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January 20, 2015

G. William Snipes, Esq.
Chairperson
Campaign Spending Commission
235 S. Beretania Street, Room 300
Honolulu HI 96813

Re: Docket No. 15-53 Nancy E. McGee vs. Calvin Say and Friends of Calvin Say

Dear Chair Snipes and Commissioners,

The following constitutes the supplemental information and argument requested by the Commission at its January 14, 2015 meeting by Ms. Nancy E. McGee. Mr. Say's use of campaign funds to pay for legal fees incurred in defending against the Petition for Writ of Quo Warranto and for defending against the Writ of Quo Warranto are personal uses of campaign funds and are not permitted by Hawai'i law. While Mr. Say refers to a "CSC decision" to support his position, the Commission has never taken a position on this matter directly or through authority of the Commission delegated to others.

Ms. McGee also again raises issues regarding the procedure Commission staff followed regarding this matter and urges the Commission to repudiate the letter of Gary Kam, Esq. to Bert Kobayashi, Esq. and Maria Wang, Esq. dated June 18, 2014.

INTRODUCTION

Much of the substantive response to the complaint revolves around the "irrespective test" which has been used to determine whether the use of campaign funds for alleged ordinary and necessary activities is connected with the duties of an office holder. For that reason, this response is focused in furtherance of and in response to that discussion.

Federal campaign spending law includes an "irrespective test" regarding the use of campaign funds for personal use. 2 U.S.C. 439a(a)(1)-(2). If the personal use of the funds would have occurred irrespective of the candidate's campaign or duties as a federal officeholder, then it is a prohibited personal use. The federal regulations have separated "personal use" type expenditures into two categories. 11 CFR 113.1(g)(1)(i) provides a non-exhaustive, non-exclusive list of expenditures that are always personal use. 11 CFR 113.1(g)(1)(ii) provides a second non-exhaustive, non-exclusive list of expenditures that, "on a case-by-case basis" by the Commission, will be determined whether they trigger the "irrespective test." Legal expenses fall under this second category.

HAWAII STATE LAW

Hawai'i law has never adopted the irrespective test. Rather, it has been substantially adopted as an administrative rule at HAR 3-160-42(b) but with some differences. The two categories in the federal regulations are absent and instead includes among the non-exclusive, non-exhaustive list of personal expenses: "Legal expenses not related to the nomination or election of a candidate; provided that personal expenses do not include legal expenses specifically related to the nomination or election of a candidate in: (A) Proceedings before the commission; or (B) Proceedings before an administrative agency or a court of law[.]" HAR 3-160-42(b)(10).

Subsection (c) then provides examples of personal uses. One that is relevant to this inquiry is Example 2: "Candidate is accused of voter fraud and incurs legal expenses during the impeachment proceedings. These are personal expenses."

Quo warranto proceedings are not related to the nomination of a candidate and are not related to the election of a candidate. Quo warranto proceedings inquire into the authority by which a possessor of the title to office claims his or her office. HRS 659-1. Hussey v. Say, 133 Haw. 452 (Haw. App., 2014) citing both Dejetley v. Kaho'ohalahala, 122 Haw. 251 (2010) and Office of Hawaiian Affairs v. Cayetano, 94 Haw. 1 (2000)

Mr. Say's defense therefore is that these legal expenses are to pay for ordinary and necessary expenses incurred in connection with the candidate's duties as a holder of office. HRS 11-381(a)(8) and HAR 3-160-44.

The House of Representatives declined Mr. Say's request for legal representation in the quo warranto action (requested through Representative Marcus Oshiro) finding that the issues in quo warranto were "a matter within the legislator's individual control" and also being "concerned about the House becoming involved in providing an individual defense." (Attached as Exhibit 1)

Accusations of usurping title to office are quite similar to accusations of voter fraud as exemplified in HAR 3-160-42(c). Voter fraud accusations that result in impeachment proceedings necessarily entail someone possessing title to office being removed from office for misconduct unconnected to his or her official duties – that defending against such misconduct is not an ordinary and necessary expense incurred in possessing office. In the same way, a quo warranto challenge entails someone possessing title to office being removed from office because he or she does not possess the constitutional requirements to legally possess that office. It is also not an ordinary or necessary expense of own's official duties – as rightly noted by the Speaker of the House.

The exact language of HAR 3-160-44(a) is that the expense must be "reasonable, usual and directly related to the office." Voter fraud and quo warranto are certainly not usual and as the Speaker of House indicated in denying the request for the House to represent Mr. Say or pay his legal bills, are not directly related to the office but within the individual control of the legislator.

FEDERAL LAW

Consider the case of former U.S. Senator Larry Craig. On June 11, 2007, Senator Craig was arrested in a men's restroom in the Minneapolis-St. Paul International Airport, where he had stopped en route to Washington D.C. He was charged with violating two Minnesota criminal statutes. He subsequently plea guilty to the misdemeanors. When the national media became aware of the conviction, Craig retained two law firms in an effort to withdraw the guilty plea and the

subsequent appeal of the denial of the withdrawal. During this time, Craig expended over $480,000 in legal fees.

Eventually, the US Senate launched an investigation into Craig's arrest, guilty plea and subsequent actions. On February 13, 2009, the Senate Ethics Committee issued a letter of admonition which stated that some portion of the Craig Committee's expenditures "may not be deemed to have been incurred in connection with our official duties, either by the [Senate Ethics] Committee or by the Federal Election Commission." An administrative complaint was subsequently lodged with the FEC regarding the expending of more than $213,000 in campaign funds to pay for legal fees and expenses incurred in connection with his attempts to undo his guilty plea.

> The FEC filed a case against Craig, his committee and the committee treasurer contending: These disbursements converted the Craig Committee's funds to personal use because they were not expenditures made in connection with Mr. Craig's campaign for federal office and were not ordinary and necessary expenses in connection with his duties as a Senator. The expenses Mr. Craig incurred in his efforts to withdraw his guilty plea would have existed irrespective of his duties as Senator.

Craig's defense was that members of the U.S. Congress must travel to and from their districts as part of their duties and that Senator Craig was engaged in that travel when he was arrested in the airport restroom. The courts rejected Craig's "in connection with" theory noting:

> It is difficult for the Court to conceive of any circumstance where expenditures to fund a criminal defense would fall under [the exception] since while, as in the case of a public corruption investigation, they might be "in connection with" the office holder's duties, they do not seem to be "ordinary and necessary."

The court held that the law defines as an expense as personal if it would exist irrespective of the officerholder's duties, not his status. Craig attempted to use the FEC's Kolbe for Cong. Advisory Op., AO 2006-35 (F.E.C. Jan. 26, 2007) for the proposition that all legal expenses related to any conduct on a trip would be covered if it was under official business. The district court rejected Craig's interpretation and noted that the FEC itself held the opposite:

> The Commission notes that the details of the preliminary inquiry by the Department of Justice are not public at this time, and it is possible that the scope of the inquiry could involve allegations not related to Representative Kolbe's duties as a Federal officeholder. Thus, the Committee may not use campaign funds to pay for Representative Kolbe's legal expenses in the preliminary inquiry regarding other allegations . . . that do not concern the candidate's campaign activities or duties as a Federal officeholder.

Usurping office is not a duty of any officeholder just as voter fraud is not a duty of an officeholder.

JUNE 18, 2014 LETTER FROM GARY K.H. KAM AND FOOTNOTE 3

Mr. Say repeatedly states that "the CSC has already determined that the same exact expenditures challenged by the complaint were proper, having been incurred in connection with Say's duties as an office-holder" and refers to a letter dated June 18, 2014 by Gary K.H. Kam, Esq.

There is no statutory basis or administrative rule for Mr. Kam to have written such a letter to Mr. Say's attorneys and there is no statutory basis or administrative rule for Mr. Say to have relied upon such a letter. HRS 11-315 provides the lawful method by which an individual may obtain an advisory opinion from the Commission. No advisory opinion was sought or obtained. Therefore,

Mr. Kam's letter is not binding upon the Commission.[1]

Mr. Say also attempts to justify the violation by pointing a finger at other commission staff in Footnote 3 of the June 6, 2014 letter to Mr. Kam. As there is no statutory or administrative rule basis for commission staff to make binding verbal interpretations on the Commission's behalf absent a rule or direction by the Commission to do so, a candidate or his committee is not entitled to rely upon what the candidate thinks the Commission staff may or may not have told them in an informal, direct conversation.

VOTER REGISTRATION LEGAL ISSUES INTERTWINED WITH QUO WARRANTO

The Commission must consider repudiating Mr. Kam's June 18, 2014 letter. Mr. Kam states: "staff has determined that … Say's expenditures of campaign funds to pay for legal services in connection with the challenge to his voter registration in House District 20 … were appropriate." This also bears upon the personal nature of expenditures for quo warranto actions and is precisely why Mr. Say has discussed both of these issues in defending against the instant complaint.

In the case of Dupree v. Hiraga, 121 Haw. 297 (2009), Dupree filed a challenge with the Maui County Clerk seeking to have Kaho'ohalahala declared an ineligible candidate for the Lana'i residency seat of the Maui County Council. The clerk construed the complaint to be a voter registration challenge because the basis for the challenge appeared to involve questioning Kaho'ohalahala's voter registration and that was the only jurisdiction the clerk had over the matters Dupree raised. The case was solely about Kaho'ohalahala's voter registration and not about his candidacy for office. The Dupree court affirmed the Board of Voter Registration that Kaho'ohalahala was not a voter within the Lana'i precinct for purposes of the 2008 election. That final determination by the Supreme Court, however, had no impact on Kaho'ohalahala as an office-holder.

Mr. Kaho'ohalahala's provisional vote for the 2008 general election was not counted but he was seated as a member of the Maui County Council. Dejetley and others filed a declaratory relief action seeking a judicial declaration that lack of residency on Lana'i constituted automatic forfeiture of office. Dejetley v. Kahoʻohalahala, 122 Hawai'i 251 (2010). The Supreme Court held that such a finding would constitute forfeiture of office but remanded the matter to the circuit court to conduct a trial on the issue of residency. The holding of Kaho'ohalahala's voter registration was not a dispositive issue in the qualification to hold office case because the voter registration challenge was a challenge to voter registration not to whether he was a resident for office-holding purposes and the trail court an eight day non-jury trial on remand. The decision in that trial is still pending.

Although not a quo warranto case, the Dejetley court noted that "Kahoʻohalahala would have to retain private counsel inasmuch as, 'in a quo warranto case, the plaintiffs would be seeking a

1 Ms. McGee also notes her troubles to the Commission that although she had filed a complaint on the form furnished by the Commission, Mr. Kam summarily dismissed her complaint on the basis of his private June 18, 2014 letter to Mr. Say's attorney. It was only when she objected to this procedure in writing on November 20, 2014 was the matter scheduled before the Commission. It appears from the circumstances in this case that there are several customs and practices related to complaints and investigations properly before the Commission that directly affect the public that are not being handled pursuant to properly promulgated administrative rules. It behooves the Commission to investigate these informal practices and decide either to end such practices or to adopt them lawfully pursuant to Chapter 91, HRS.

writ on behalf of the people and in the public interest.'" Id at 262.

In Hussey v. Say, 133 Haw. 452 (Haw. App., 2014), the Intermediate Court of Appeals rejected Mr. Say's claim (and the trial court's holding) that the quo warranto proceeding against him was a voter registration challenge. It also reaffirmed the position that challenging an improper or invalid voter registration is not a necessary or requisite pre-condition to challenging a usurper's possession of title to office.

Inasmuch as Mr. Kam's letter implies that Mr. Say defending voter registration challenges are ordinary and necessary expenses of holding office, such an implication is not consistent with recent and existing Hawaii case law regarding voter registration challenges and challenges to persons holding office. While it is true that these cases did not construe campaign spending laws, they construed the underlying substantive activities upon which Mr. Say expended campaign funds. The legal conclusions regarding these activities that are contrary to the holdings of these cases are erroneous irrespective of whether they directly mentioned campaign spending laws.

Finally, the assertion that Mr. Say expending campaign funds for the defense of his wife, who subsequently joined the Says' adults sons in registering to vote in the precinct in which they have lived as a family for decades and not continuing to register to voter in Palolo, is absurd on its face. A voter registration challenge can occur to anyone who is registered to vote and the process exists precisely to ensure that voters are registered in the proper precinct. It has nothing to do with campaigning for nomination or election and is not ordinary and necessary expenses related to the duties of office – especially in light of the holdings in Dejetley and Dupree.

CONCLUSION

There does not appear to be a factual dispute regarding the expending of the campaign funds. This dispute appears to be the legal consequences of the undisputed facts. Mr. Say has converted campaign funds for person use in defending against the quo warranto proceedings.

Actions by Commission staff also call into question whether there are customs or practices which implements, interprets, or prescribes law or policy regarding the campaign spending laws which affect the private rights of and procedures available to the public which are not presently promulgated and codified pursuant to Chapter 91, HRS.

Ms. McGee therefore urges this commission to sustain her complaint against Mr. Say and the Friends of Calvin Say. She also requests this Commission to investigate the existence of these informal customs and practices of commission staff on the basis her objection stated above.

Very truly yours,
LAW OFFICE OF LANCE D COLLINS

LANCE D COLLINS
Attorney for Complainant Nancy E. McGee

cc: Maria Y. Wang, Esq. (Attorney for Calvin Say and Friends of Calvin Say)

November 20, 2014

Nancy E. McGee
2021 Iwi Way
Honolulu HI 96816

Campaign Spending Commission
235 S. Beretania Street, Room 300
Honolulu HI 96813

Dear Mr. Kim,

While I appreciate your personal opinion of my case, I have been unable to identify any rule that allows you to summary dispose of my sworn complaint for contested case addressed to the Campaign Spending Commission on standard forms furnished by the Commission.

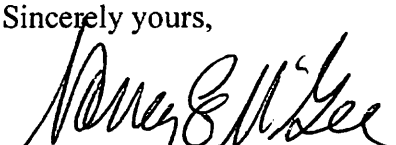
I have also been unable to find any rule that permits you or any other staff member of the Commission to issue binding opinions on behalf of the Commission without the Commission's express decision. I note that neither the agendas or minutes of Commission meetings from June until present demonstrate that the Commission made any decision regarding the legal issues or facts in my complaint and that the Commission did not delegate any authority to you in general – by rule – or in particular – by quasi-judicial decision – to make decisions or determinations on their behalf.

Neither Rule 3-161-3 nor 3-161-31 delegate any authority to the Executive Director or you to summarily resolve or dispose of matters. It also appears that your letter specifically violates Rule 3-161-38(b): "Except as provided in subsection (a), a petition shall not be dismissed except upon motion and on order of the commission or hearings officer granting the motion and upon such terms and conditions as the commission or hearings officer deems proper."

It is imperative that the Commission staff follow the rules of procedure to avoid the apperance of impropriety or worse, incompetence. Campaign spending laws are an important part of a free and democratic society and should be given the solemnity and seriousness so required.

I expect my matter to be given the attention of the Commission contemplated by their rules and that you and the Commission staff will refrain from interfering in the rule-based orderly process for the consideration of my petition/complaint.

Sincerely yours,



NANCY E. MCGEE
Petitioner/Complainant

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| FEDERAL ELECTION COMMISSION,<br><br>Plaintiff,<br><br>v.<br><br>CRAIG FOR U.S. SENATE, *et al.*,<br><br>Defendants. | ) | Civil Action No. 12-0958 (ABJ) |

**MEMORANDUM OPINION**

On June 2, 2012, the Federal Election Commission ("FEC") filed this action against Craig for U.S. Senate, its treasurer, Kaye L. O'Riordan, and former Senator Larry Craig himself. It seeks a declaration that Senator Craig and his campaign committee violated 2 U.S.C. § 439a(b), a subsection of the Federal Election Campaign Act of 1971, when they utilized campaign funds to pay legal expenses incurred in connection with Senator Craig's efforts to withdraw the guilty plea he entered after an arrest for disorderly conduct in the Minneapolis-St. Paul International Airport. The FEC contends that the use of the funds for that purpose was an unlawful conversion of campaign funds to Senator Craig's personal use, and it seeks an order assessing civil penalties and requiring him to repay approximately $200,000. What is before the Court at this juncture is defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. In other words, defendants contend that even if one assumes the truth of all of the FEC's factual allegations, the complaint must be dismissed as a matter of law.

Defendants move to dismiss the action on two grounds. They argue: (1) that the use of campaign funds to satisfy Senator Craig's legal expenses was expressly permitted under the statute and not subject to the prohibition against personal use; and (2) that defendants should be immune from agency enforcement in this instance because they relied on FEC opinions approving the use of campaign funds in substantially similar situations.

The motion to dismiss will be denied. The Court rejects defendants' assertion that the expenditures were permitted under the Act since it concludes that they cannot be characterized as ordinary and necessary expenses in connection with Senator Craig's duties as an office holder. It also finds that the campaign funds were converted to Senator Craig's personal use as that term is defined in the Act because the expenses involved would have existed irrespective of his duties as a Senator. Defendants' contention that the spending was not personal is not supported by the language of the statute or the FEC's implementing regulations and advisory opinions, and it is flatly inconsistent with the stance Senator Craig adopted before the Senate Ethics Committee. Defendants' second argument – that prior FEC opinions compel the dismissal of this action – misstates the holding of those opinions, minimizes the key distinctions between those cases and the one before the Court, and disregards clear admonitory language in the very opinion that defendants insist bears most directly on this case. Therefore, the FEC has stated a valid claim that defendants violated the Federal Election Campaign Act of 1971.

## BACKGROUND

The following facts are taken from the complaint, and defendants do not dispute them for the purposes of their motion. Defs.' Mem. in Supp. of Defs.' Mot. to Dismiss [Dkt. # 3-1] ("Defs.' Mem.") at 3 n.2. Defendant Larry Craig was a United States Senator from Idaho from January 1991 to January 2009. Compl. [Dkt. # 1] ¶ 6. Craig for U.S. Senate ("Craig Committee") was authorized to receive campaign contributions and make expenditures on the

Senator's behalf. Compl. ¶ 7. Defendant Kaye L. O'Riordan was the committee's treasurer, and she had authority to approve its expenditures. Compl. ¶ 8. The FEC is a United States government agency that has exclusive jurisdiction over the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–57. Compl. ¶ 5. The Commission is empowered to institute investigations of possible violations of the Act and to initiate civil actions in the U.S. district courts to obtain judicial enforcement of the Act. Compl. ¶ 5, citing 2 U.S.C. §§ 437g(a)(1)–(2), 437d(e), 437g(a)(6).

On June 11, 2007, Senator Craig was arrested in the Minneapolis-St. Paul International Airport, where he had stopped en route to Washington, D.C. Compl. ¶ 12. He was charged with violating two Minnesota criminal statues: (1) disturbing the peace-disorderly conduct, and (2) interference with privacy. Compl. ¶ 12. On August 8, 2007, Senator Craig pled guilty to a misdemeanor count of disorderly conduct. Compl. ¶ 12; *see also Craig v. State*, No. A07-1949, 2008 WL 5136170, at *1 (Minn. Ct. App. Dec. 9, 2008) (stating that Senator Craig pled guilty to engaging in conduct in a restroom in the Minneapolis-St. Paul International Airport, which he "knew or should have known tended to arouse alarm or resentment or [sic] others, which conduct was physical (versus verbal) in nature").

On September 1, 2007, after Senator Craig's arrest and conviction had been the subject of national media attention, he announced his intent to resign from the Senate effective September 30, 2007. Compl. ¶ 15. He also retained the Washington, D.C. firm of Sutherland, Asbill & Brennan to serve as lead counsel in an effort to withdraw the guilty plea, and the Minnesota firm of Kelly & Jacobson to serve as local counsel in the matter. Compl. ¶ 13. On September 10, 2007, Senator Craig filed a motion in Minnesota state district court to withdraw his guilty plea. Compl. ¶ 14. The court denied the motion on October 4, 2007. Compl. ¶ 14. Craig appealed the

district court's decision to the Minnesota Court of Appeals, but that appeal was denied on December 9, 2008. Compl. ¶ 14. There were no further proceedings. Compl. ¶ 14. Between July 9, 2007 and October 5, 2008, the Craig Committee disbursed a total of over $480,000 for legal fees and other expenses. Compl. ¶ 18. At least $139,952 of this amount was paid to Sutherland, Asbill & Brennan, and $77,032 was paid to Kelly & Jacobson, in connection with the efforts to withdraw the guilty plea. Compl. ¶¶ 19–20.

Eventually, the United States Senate Select Committee on Ethics ("Senate Ethics Committee") launched an investigation into Senator Craig's arrest, guilty plea, and subsequent actions. Compl. ¶ 16. During the course of this inquiry, Senator Craig advanced the position that his arrest and conviction were based upon "'purely personal conduct unrelated to the performance of official Senate duties.'" Compl. ¶ 22, quoting Letter to the Honorable Barbara Boxer from Stanley M. Brand and Andrew D. Herman, Counsel to Larry Craig (Sept. 5, 2007) ("Letter to Senate Ethics Committee"). On October 4, 2007, Senator Craig announced that he would not resign from office after all: "I will continue my effort to clear my name in the Senate Ethics Committee – something that is not possible if I am not serving in the Senate." Compl. ¶ 17.

Senator Craig served out the remainder of his term and retired in January 2009. Compl. ¶ 17. On February 13, 2008, the Senate Ethics Committee issued a "Public Letter of Admonition," which stated that some portion of the Craig Committee's expenditures "may not be deemed to have been incurred in connection with our official duties, either by the [Senate Ethics] Committee or by the Federal Election Commission." Compl. ¶ 23.

On November 10, 2008, the FEC received an administrative complaint alleging that Senator Craig had violated the Federal Election Campaign Act by spending more than $213,000

in campaign funds to pay for legal fees and expenses incurred in connection with his attempts to undo his guilty plea. Compl. ¶ 24. The agency investigated the matter and attempts to resolve the issue with defendants and their representatives were unsuccessful. On June 11, 2012, the FEC filed this suit alleging that defendants violated 2 U.S.C. § 439a(b) when they disbursed more than $200,000 in campaign funds to pay legal expenses incurred in connection with efforts to withdraw Senator Craig's guilty plea in Minnesota in 2007 and 2008. Compl. ¶¶ 25–34.[1]

The FEC contends:

> These disbursements converted the Craig Committee's funds to personal use because they were not expenditures made in connection with Mr. Craig's campaign for federal office and were not ordinary and necessary expenses incurred in connection with his duties as a Senator. The expenses Mr. Craig incurred in his efforts to with withdraw his guilty plea would have existed irrespective of his duties as Senator.

Compl. ¶ 33.

On August 2, 2012, defendants moved to dismiss this case for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Defs.' Mot. to Dismiss [Dkt. # 3] at 1. The FEC opposes the motion. Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss [Dkt. # 5] ("Pl.'s Opp."). The Court held a hearing on defendants' motion on March 11, 2013. Tr. of Mot. Hr'g [Dkt. # 9] ("Tr.").

## STANDARD OF REVIEW

"To survive a [Rule 12(b)(6)] motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In *Iqbal*, the Supreme Court reiterated the two principles underlying its decision in *Twombly*: "First, the tenet that a court must accept as true all of the

1 The FEC did conclude "that the use of Craig Committee funds to pay the Brand Law Group to respond to the Senate Ethics Committee inquiry and pay Impact Strategies, a public relations firm, to respond to press inquiries regarding Craig's arrest and misdemeanor conviction was a permissible use of campaign funds." Compl. ¶ 26.

allegations contained in a complaint is inapplicable to legal conclusions." 556 U.S. at 678. And "[s]econd, only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*. at 679.

A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. A pleading must offer more than "labels and conclusions" or a "formulaic recitation of the elements of a cause of action," *id*., quoting *Twombly*, 550 U.S. at 555, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

When considering a motion to dismiss under Rule 12(b)(6), the complaint is construed liberally in plaintiff's favor, and the Court should grant plaintiff "the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). Nevertheless, the Court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, and it is not required to accept a plaintiff's legal conclusions. *See id.*; *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In ruling upon a motion to dismiss for failure to state a claim, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002) (citations omitted).

**ANALYSIS**

The FEC filed this action alleging that defendants violated the Federal Election Campaign Act of 1971, 2 U.S.C. 439a(b), when Senator Craig used campaign funds to pay for legal expenses incurred in connection with his attempts to withdraw a guilty plea entered in

Minnesota state court. Compl. ¶ 1. Defendants have moved to dismiss the action on two grounds. First, they argue that the use of campaign funds for the legal expenses was lawful under the statutory framework because it was "permitted" under 2 U.S.C. § 439a(a)(2), and not a prohibited "personal" expenditure under 2 U.S.C. § 439a(b). Second, they contend that they should be immune from agency enforcement in this instance because they relied on FEC advisory opinions approving the use of campaign funds in substantially similar situations. Neither of these arguments is persuasive.

## I. The FEC Has Stated A Claim That Defendants Violated 2 U.S.C. § 439a

### A. Statutory Framework

Section 439a(a) permits the use of campaign funds in five specific instances, including:

> (1) for otherwise authorized expenditures in connection with the campaign for Federal office of the candidate or individual; [and]
>
> (2) for ordinary and necessary expenses incurred in connection with the duties of the individual as a holder of Federal office.

2 U.S.C. § 439a(a)(1)–(2). The statute also contains a paragraph that grants officeholders the right to use campaign funds "for any other lawful purpose unless prohibited by" section 439a(b). *Id.* § 439a(a)(6).

Section 439a(b) prohibits individuals from converting campaign funds to personal use. *Id.* § 439a(b)(1). The statute specifies that a contribution to a campaign fund "shall be considered to be converted to personal use if the contribution . . . is used to fulfill any commitment . . . or expense of a person that would exist irrespective of the candidate's election campaign or the individual's duties as a holder of Federal office." *Id.* § 439a(b)(2).

Under a plain reading of the statute, then, in order to determine whether the use of campaign funds is lawful, the Court must first decide whether the expenditure was expressly permitted under sections 439a(1)–(5). If not, but the campaign funds were used for what would

otherwise be a "lawful purpose" under section 439a(a)(6), the Court must determine whether that use was nonetheless prohibited as a "personal" expenditure under section 439a(b).[2]

Defendants maintain that the use of campaign funds for the legal expenses in connection with the attempts to withdraw Senator Craig's guilty plea was permitted under section 439a(a), and that it was not a prohibited "personal" expenditure under subsections (b)(1)–(2) of the statute as the FEC contends. Defs.' Mem. at 5–6. The complaint alleges that Senator Craig announced on September 1, 2007 that he would resign from the Senate effective September 30, 2007. Compl. ¶ 15. It further recounts Senator Craig's change of heart and his announcement of his decision to complete the remainder of his term. Compl. ¶ 17. So Senator Craig was not a candidate for re-election at the time the funds were used, and he retired in January of 2009. Compl. ¶ 17. Accordingly, defendants are not arguing that the expenses were permitted under section 439a(a)(1) because they were incurred in connection with a campaign, or that they were not "personal" because they would not have existed but for the candidate's election campaign. *See* Defs.' Mem. at 5–6.

Instead, the Court is being asked to determine whether these legal expenses can properly be characterized as "ordinary and necessary expenses incurred in connection with the Senator's duties" – that is, were they "permitted" under subsection (a)(2) of the statute? And, if they were not a "permitted" use of campaign funds under that provision but the legal expenses were "lawful" under subsection (a)(6), the Court must also decide whether the expenses were "personal": would they have existed irrespective of Senator Craig's duties as a holder of federal

2 The Court agrees with defendants' assertion that the prohibition on expenditures for "personal use" under section 439a(b) does not apply to sections 439a(a)(1)–(5) and does not act as a limit on expenditures expressly permitted under those provisions. *See* Defs.' Reply to Pl.'s Mem. in Opp. to Defs.' Mot. to Dismiss [Dkt. # 7] ("Defs.' Reply") at 17 ("Congress intended to prohibit expenditures for 'personal use' under § 439(b) only when an officeholder spends campaign funds pursuant to its authority under paragraph (a)(6) . . . .").

office? If so, the use of campaign funds for that purpose was prohibited under subsections (b)(1)–(2).[3]

B. The FEC has plausibly alleged that use of campaign funds for the legal expenses at issue was not permitted under 2 U.S.C. § 439a(a)(2)

Defendants maintain that since it was incumbent upon a Member of Congress to travel to and from his district as part of his duties, and Senator Craig was engaged in that travel when he was in the airport bathroom on June 11, 2007, the legal expenses were incurred in connection with his official duties and they would not have existed but for those duties. Defs.' Mem. at 5–6. But this argument ignores the series of critical events that took place between the moment that the travelling Senator stepped into the men's room and his payment of a $200,000 legal bill. While it may be that Senator Craig had cause to pass through the airport in connection with his duties as an office holder, and even to visit the restroom as a necessary incident to that trip, whether the *travel* was in connection with his duties is not the relevant inquiry. Whether being in the men's room was in connection with his duties is not even the relevant inquiry.

The issue is whether *the expenses were incurred* in connection with the duties of the office holder – and indeed, whether they were "ordinary and necessary" expenses incurred in connection with those duties. *See* 2 U.S.C. § 439a(a)(2). This is several steps removed from

3 Both the FEC and the defendants combine these inquiries in undifferentiated discussions in their briefs, but the statute has a clear structure that requires that they be considered separately, even if the tests involve similar factors.

whether the Senator had an official reason to be in the airport.[4] Even if a visit to one's district is assumed to fall within the scope of a Member's duties, that fact does not answer the question posed by the Act.[5]

Senator Craig was arrested for, and pled guilty to, committing a criminal violation of Minnesota state law. One does not need to be a United States Congressman – or any sort of federal official – to be charged with this offense, and the arrest did not call into question his conduct as a legislator. *See Craig v. State*, No. A07-1949, 2008 WL 5136170, at *1 n.2 (Minn. Ct. App. Dec. 9, 2008). Neither the charge nor the underlying conduct had anything to do with

4 Senator Craig has proffered documents showing that the trip was paid for with Senate funds. Ex. 1 to Defs.' Mot. to Dismiss [Dkt. # 3-2] at 3. The Congressional Record for the 110th Congress reveals that the Senate adjourned for the weekend at 10:33 p.m. on June 7, 2007 to resume on Monday, June 11 at 2:00 p.m. Cong. R. 110th Cong. (2007–2008) at S7416. It was called to order again at 2:00 p.m. on June 11. *Id.* at S7417. Senator Craig was supposed to fly from Minneapolis to Washington, D.C., and he was arrested at approximately 12:20 central daylight time, or about 40 minutes before the Senate resumed its business. Airport Police Narrative, Ex. B to Motion to Withdraw Plea at 7–8, *State v. Craig*, No. 27-CR-07-043231 (Minn. 4th Judicial Dist. Sept. 10, 2007), *available at* http://www.mncourts.gov/documents/4/Public/News/Larry_Craig_-_Copy_of_Motion_to_Withdraw_Plea_091007.pdf

5 In their memorandum, defendants cite the Senate Travel Regulations that govern the use of a government per diem during official, Congressional travel. Defs.' Mem. at 5. But counsel acknowledged during oral argument that those regulations do not bear directly on the questions here. Tr. 18:8–:11. Counsel also abandoned defendants' earlier reliance upon the Speech or Debate Clause, which is wholly inapplicable to the case at hand. *See* Defs.' Reply at 3; Tr. 34:11–35:3.

his performance of his official duties, so the legal expenses they generated were not incurred in connection with those duties.[6]

Moreover, the expenses were neither incurred at the time of the travel nor necessitated by the travel – they were incurred two months after the trip, after the Senator had second thoughts about his conviction, moved to withdraw his guilty plea, and appealed the denial of that motion. So the link is even more attenuated. Defendants have not proffered any arguments for how these expenses were "connected" to his official duties beyond the mere fact that he travels for official reasons and the underlying crime was committed while he was on travel. And they do not articulate a basis for a finding that these legal expenses were "ordinary" or "necessary."[7] So the FEC has stated a claim that the legal expenses were not ordinary and necessary expenses in

6 The Act requires more than a showing that the expenditure was "connected" to the office before it can be permitted under subsection (a)(2); it only permits the use of campaign funds for "ordinary and necessary" expenses in connection with the duties of the individual as an office holder. It is difficult for the Court to conceive of any circumstance where expenditures to fund a criminal defense would fall under subsection (a)(2) since while, as in the case of a public corruption investigation, they might be "in connection with" the office holder's duties, they do not seem to be "ordinary and necessary." But paying one's defense attorney would certainly be "lawful" under subsection (a)(6), so the expenses could be permitted under that section as long as they were not prohibited under section (b). This distinction explains why expenditures for legal fees may be authorized by the FEC in some circumstances, *see* Friends of Duke Cunningham Advisory Op., AO 2005-11, 2005 WL 2470825 (F.E.C. Sept. 26, 2005), but not others.

7 Defendants posit that "[t]o meet the 'ordinary and necessary' standard a Defendant must 'reasonably show that the expenses at issue resulted from campaign or officeholder activities.'" Defs.' Mem. at 5, citing 60 Fed. Reg. 7862, 7867 (Feb. 9, 1995). The cited portion of the Federal Register addresses the definition of the term "personal" to be included in FEC regulations and does not discuss the meaning of § 439a(a). And defendants' formulation seems to define "in connection with" and not "ordinary and necessary." In any event, they have failed to meet their own test because they have not pointed to any facts that demonstrate that the legal expenses incurred in the effort to reopen the criminal case "resulted from" an officeholder activity. Their entire motion is based on the claim that Craig's *travel* was connected to his officeholder activities, but the expenses did not "result from," or arise as a consequence of, the travel.

connection with the duties of the officeholder that would be permitted under subsection (a)(2) of the statute. [8]

C. The FEC has plausibly alleged that the use of campaign funds for the legal expenses at issue was prohibited under 2 U.S.C. § 439a(b)

Paying attorneys' fees is "a lawful purpose" that would be "permitted" under subsection (a)(6) unless prohibited under section (b). The use of campaign funds to cover the particular legal fees here is prohibited under section (b) because it falls squarely within the statutory definition of a personal use: an obligation or expense that would exist irrespective of the individual's duties as a holder of federal office. *See* 2 U.S.C. § 439a(b)(2).

To the extent that definition contains any ambiguity, the FEC has provided further guidance in its regulations:

> If campaign funds are used for a financial obligation that is caused by campaign activity or the activities of an officeholder, that use is not personal use. However, if the obligation would exist even in the absence of the candidacy or even if the officeholder were not in office, then the use of funds for that obligation generally would be personal use.

Final Rule and Explanation and Justification, Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7863–64 (Feb. 9, 1995).

It is true that the Commission has determined that there is no one-size-fits-all rule for legal expenses, and that it will assess them on a case-by-case basis. 11 C.F.R. § 113.1(g)(1)(ii)(A). But it has explained that there are certain sorts of legal expenses that will ordinarily be deemed to be personal:

> A committee or a candidate could incur other legal expenses that arise out of campaign or officeholder activities but are not related to compliance

8 This conclusion is reinforced by the Senator's own statement to the Senate Ethics Committee that his arrest and conviction was "purely personal conduct *unrelated to the performance of official Senate duties*." *See* Compl. ¶ 22, citing Letter to Senate Ethics Committee, (emphasis added).

> with the FECA or other election laws. For example, a committee could incur legal expenses in its capacity as the employer of the campaign staff, or in its capacity as a contracting party in its dealings with campaign vendors . . . . However, legal expenses will not be treated as though they are campaign or officeholder related merely because the underlying legal proceedings have some impact on the campaign or the officeholder's status. Thus, legal expenses associated with a divorce or charges of driving under the influence of alcohol will be treated as personal, rather than campaign or officeholder related.

60 Fed. Reg. 7862, 7868.

This interpretation is consistent with the statute. Subsection (b)(2) defines an expense as personal if it would exist irrespective of the officeholder's duties, not his status. *See* 2 U.S.C. § 439a(b)(2). So it does not matter if the conviction may have done more harm to the Senator's reputation than it would have in the case of some less prominent individual caught under the same circumstances, or if the decision to withdraw the guilty plea was motivated by political considerations.

Here, defendants do not advance any grounds upon which the Court could conclude that there was something about Senator Craig's duties as a Member of Congress that gave rise to this financial obligation: again, the charge did not related to his conduct as a legislator, but only actions undertaken in the privacy and anonymity of a restroom stall. *See Craig*, 2008 WL 5136170, at *1 n.2. Thus, the legal expenses here are analogous to the legal expenses for other personal transgressions such as driving while intoxicated that the Commission has determined will be treated as personal. And this was precisely the analysis that Senator Craig advanced himself when he objected to the Ethics Committee investigation on the grounds that the conduct was "purely personal" and "unrelated to the performance of official Senate duties." *See* Compl. ¶ 22, citing Letter to Senate Ethics Committee. So the complaint fairly states a claim that the campaign funds were converted to personal use in violation of section (b).

## II. Defendants Have Failed To Demonstrate That They Are Immune From Prosecution In This Matter Based On Prior FEC Advisory Opinions

As their second ground for dismissal of the action, defendants submit that they cannot be subject to sanctions under this statute because they relied on prior FEC advisory opinions that approved campaign expenditures for legal fees "in a matter indistinguishable from this one . . . and in numerous substantially similar matters." *See* Def.'s Mem. at 6–7, citing 2 U.S.C. § 437f(c)(1)(B).

Under the Federal Election Campaign Act, an individual who in good faith relies upon an FEC advisory opinion involving activity that "is indistinguishable in all its material aspects from" his or her own activity "shall not, as a result of any such act, be subject to any sanction provided by th[e] Act." 2 U.S.C. § 437f(c)(1)(B)–(c)(2). The safe harbor provision does not immunize these defendants from this suit, though, because the FEC advisory opinions defendants rely upon are entirely distinguishable from the case presented here, and defendants' motion is predicated upon a mischaracterization of their facts and the Commission's rulings.

A. This case is distinguishable from the Kolbe for Congress FEC Advisory Opinion

Defendants point to the advisory opinion issued to Kolbe For Congress on January 26, 2007, and claim that this case is "indistinguishable in all its material aspects" from that opinion. The Kolbe opinion dealt with legal expenses incurred in connection with two inquiries: one being conducted by the House Ethics Committee and another by the Department of Justice. *See* Kolbe for Cong. Advisory Op., AO 2006-35, 2007 WL 268223, at *2–3 (F.E.C. Jan. 26, 2007). With respect to the legal fees for the Ethics Committee proceedings, the FEC found that the only thing the House Ethics Committee has any authority to investigate is one's conduct as a Member, so costs incurred in responding to one of its investigations would be an ordinary and necessary

expense as a Member. *Id.* at *2.[9] As for the Justice Department investigation, the campaign advised the FEC that the preliminary inquiry concerned, in part, information known to or obtained by Kolbe regarding the interaction between current or former pages and another Congressman. *Id.* The FEC concluded that to the extent Kolbe acquired that information by virtue of his status as a federal officeholder, his legal expenses in responding to the Justice Department inquiry were incurred in connection with his duty as a House Member. *Id.*

The Advisory Opinion states that the Justice Department's preliminary inquiry also concerned "Representative Kolbe's rafting trip to the Grand Canyon in 1996." *Id.* at *3. Kolbe asserted that the trip was taken as part of his official duties on the House Appropriations Interior Subcommittee. *Id.* Based on this information, the FEC concluded that the DOJ inquiry into Kolbe's rafting trip would not exist but for his duties as a federal office holder, so the use of campaign funds to pay for legal expenses incurred in response to the inquiry into the trip was permitted under section 439a(a)(2). *Id.*

In their brief, defendants assert that the Kolbe opinion sets forth the FEC's "only" standard for differentiating official expenses from personal ones, and they purport to recite it:

> Namely, that the event generating the expenditures occurred during the individual's execution of his or her official duties as a member of Congress. *See e.g.*, FEC Advisory Opinion ("AO" 2006-35) at 3–4 (concluding that because Congressman Jim Kolbe's Grand Canyon trip constituted an "official Congressional visit . . . [his] legal expenses in responding to [DOJ] inquiry into his [conduct on the] trip . . . are ordinary and necessary expenses incurred in connection with his duty as a House member.") . . . .

9 Accordingly, legal fees that were attributable to the Senate Ethics Committee investigation of Senator Craig received similar treatment. Compl. ¶ 26.

Defs.' Mem. at 1–2 (alterations in original).[10] But the opinion doesn't say that at all. It does not articulate a test that turns upon where or when the event or conduct giving rise to the legal expenses occurred. In making that claim, defendants have altered the language of the opinion in a way that renders what is supposed to be a quotation inaccurate and misleading.

In the opinion, the FEC noted that the Kolbe committee had submitted documents showing that the trip was part of an official Congressional visit supported by the National Park Service and Grand Canyon National Park. It then held:

> Accordingly, the Commission concludes that Representative Kolbe's legal expenses in responding to the inquiry *into his trip* to the Grand Canyon are ordinary and necessary expenses incurred in connection with his duty as a House member.

Kolbe, 2007 WL 268223, at *3 (emphasis added). The FEC did not decide – as defendants told the Court – that all legal expenses related to any *conduct on the trip* would be covered simply because Kolbe embarked on the trip under an official banner. Indeed, it specifically went on to say just the opposite:

> The Commission notes that the details of the preliminary inquiry by the Department of Justice are not public at this time, and it is possible that the scope of the inquiry could involve allegations not related to Representative Kolbe's duties as a Federal officeholder. Thus, the Committee may not use campaign funds to pay for Representative Kolbe's legal expenses in the preliminary inquiry regarding other allegations . . . that do not concern the candidate's campaign activities or duties as a Federal officeholder.

10 During oral argument, defendants reiterated their position that the Kolbe opinion "just says: You show the trip is official, accordingly, it's ordinary and necessary." Tr. 10:17–:19. This claim is simply not supported by a reading of the opinion.

*Id*., citing Cunningham, 2005 WL 2470825.[11]

So the Kolbe opinion is distinguishable, and it stands for the proposition that one must analyze the nature and subject matter of the inquiry giving rise to the expenses. The FEC did not describe the test as whether the expenses can be traced in some way to official travel, but whether the particular subject of the legal inquiry that calls for the payment of legal fees "relates to" or "concerns" the Member's campaign activities or duties as a federal office holder. *See* Kolbe, 2007 WL 268223, at *2 (explaining that it "has previously concluded that legal fees and expenses incurred in legal proceedings *involving allegations concerning the candidate's campaign activities or duties as a Federal officeholder* would not exist irrespective of the candidate's campaign or duties as a Federal officeholder and therefore are not an improper personal use of campaign funds" (emphasis added)).

Putting aside the express language of the Advisory Opinion, defendants insist that when the FEC authorized the payment for legal fees for an investigation into the Grand Canyon trip, it was tacitly authorizing payment for the defense of an investigation into Kolbe's personal conduct on that trip. They argue that in its opinion, the FEC carved out any use of campaign funds to address "other allegations" that the FEC was not aware of at the time, but that: "[t]he inquiry into [Kolbe's] conduct with former pages is not an other allegation. It is the only allegation that the DOJ was investigating at the time that this opinion was issued. The only one." Tr. 29:7–:11. They further contend that since the FEC supposedly knew that Kolbe's own alleged conduct with

11 Defendants try to brush this language away by arguing that it "is not 'critical'; it is merely Commission boilerplate that serves as *dicta* to the opinion." Defs.' Reply at 9. But the fact that FEC saw fit to reiterate the point in the Kolbe opinion, and that it has included a similar statement in other opinions when campaigns were seeking advice about ongoing criminal investigations, *see id.* at 9–10, citing Cunningham, 2005 WL 2470825, at *1, underscores the importance of the caveat and reflects the FEC's intention that it be heeded by readers seeking guidance in the future.

pages was the focus of the DOJ investigation into the rafting trip, the opinion was sanctioning the use of campaign funds to defend this allegation. Tr. 11:10–12:1.

One cannot glean any of these facts from the FEC's Advisory Opinion. So to support their argument, defendants point to materials in the record underlying the Kolbe Advisory Opinion – specifically the communications between Kolbe for Congress and the FEC – that described the Justice Department inquiry. Tr. 6:19–:25; 8:20–9:1.

The Court notes at the outset that 2 U.S.C. § 437f(c)(1)(B) only grants immunity for reliance upon an advisory *opinion*, and the Kolbe opinion explicitly carves out legal expenses incurred defending "allegations not related" to official duties. So the Court should not have to probe the record behind the FEC's decision to determine whether the immunity provision applies.

But even if the Court accepts the proposition that the entire set of underlying materials are part of the opinion, Tr. 23:11–:15, those materials do not support defendants' characterization of the precedential effect of the opinion.

The record begins with the Kolbe Committee's October 27, 2006 request to the FEC, seeking an opinion on whether the Committee could use campaign funds to pay legal fees incurred in connection with a preliminary inquiry by the Department of Justice. *See* Letter from William H. Kelley, Treasurer, Kolbe for Congress to FEC (Oct. 27, 2006), *available at* http://saos.nictusa.com/aodocs/569946.pdf. The request states that the details of the inquiry were unknown, but explained that "[a]ccording to press reports, the Department of Justice has opened a preliminary inquiry in connection with current and former Members of Congress and their interactions with current and former House pages." *Id.* A number of news articles were attached to the request for the advisory opinion:

- An October 9, 2006 article from the Washington Post reports that Kolbe had been made aware of Representative Foley's inappropriate communications with a former page and that he had confronted Foley about them. *See* Supporting Documents Attached to Letter from William H. Kelley, Treasurer, Kolbe for Congress to FEC (Oct. 27, 2006), *available at* http://saos.nictusa.com/aodocs/569946.pdf.

- A clip from MSNBC reports that Kolbe had been "dragged into the controversy" surrounding Foley, and it discussed Kolbe's failure to inform House leadership of the complaint he had received from the page. That article also states that Kolbe took two male pages with him on a three-day camping trip. *Id.*

- A Wall Street Journal article reiterates the information about Kolbe's receipt of a complaint and his transmittal of that complaint to Foley's office and the House Clerk. *Id.*

- CNN.com reported that according to two unnamed federal law enforcement officials, the U.S. Attorney for Arizona had launched a preliminary inquiry into the 1996 camping trip that included Kolbe and the pages, and that "the initial assessment stems from a single allegation regarding Kolbe's behavior on the trip." *Id.*

- A New York Times article also indicates that "an allegation related to the trip was given to the U.S. attorney's office in Phoenix," but states that "[i]t was not immediately clear whether it concerned any contention of improper activity by the retiring Kolbe." *Id.*

- Finally, there is an excerpt from washingtonpost.com on October 18, 2006 that reports that the camping trip was "under review" by the Justice Department. One law enforcement official cautioned that the inquiry is "based on allegations from an unidentified source that have not been substantiated. The allegations involve Kolbe's behavior toward one of the former pages." *Id.*

After the FEC asked for more information about the DOJ inquiry – including the inquiry into the rafting trip – representatives for Kolbe for Congress submitted another newspaper article that included a statement from the U.S. Attorney's office in Phoenix confirming the existence of a "preliminary assessment" of the Kolbe trip. *See* Letter from Kolbe for Congress to FEC (Nov. 6, 2006) and Supporting Documents, *available at* http://saos.nictusa.com/aodocs/569946.pdf. The letter also set out information concerning the official nature of the trip. *Id.*

On November 17, 2006, the FEC wrote to Kolbe for Congress and expressed a need for further detail. Letter from Rosemary C. Smith, Assoc. Gen. Counsel, FEC to Katherine McCarron, counsel for Kolbe for Congress (Nov. 17, 2006), *available at* http://saos.nictusa.com/aodocs/569946.pdf. It asked: "Please either confirm that the Department of Justice's preliminary inquiry concerns a 1996 trip to the Grand Canyon involving Representative Kolbe and two former Pages (among others), or, in the alternative, describe the preliminary inquiry by the Department of Justice as it pertains to Representative Kolbe's duties as an officeholder." *Id.* The letter also asked the Kolbe team to clarify inconsistencies in the news articles about who paid for the trip and whether it was official in nature. *Id.*

The treasurer of Kolbe for Congress supplemented the record on November 27, 2006. He stated: "The specific details of the Justice Department's preliminary inquiry are largely confidential. However, it concerns, among other things, the 1996 rafting trip to the Grand Canyon . . . and information known to or obtained by Congressman Kolbe and his staff, in an official capacity, relating to the interaction between Congressman Mark Foley and current or former pages." Letter from William H. Kelley, Treasurer, Kolbe for Congress to J. Duane Pugh, Acting Asst. Gen. Counsel, FEC (Nov. 27, 2006), *available at* http://saos.nictusa.com/aodocs/569946.pdf. Notably, he added, "Congressman Kolbe is cooperating with the preliminary inquiry and has not been identified as a 'target' by the Department." *Id.* Additional material depicting the official nature of the trip – which had occurred ten years before – was provided on January 16, 2007. Letter from William H. Kelley, Treasurer, Kolbe for Congress to J. Duane Pugh, Acting Asst. Gen. Counsel, FEC (Jan. 16, 2007), *available at* http://saos.nictusa.com/aodocs/569946.pdf.

At most, then, a review of the record underlying the Kolbe Advisory Opinion reflects that as far as the FEC knew, the U.S. Attorney in Arizona had opened an initial assessment or preliminary inquiry into the rafting trip. One possible – and unconfirmed – subject of the inquiry could have been Kolbe's own interactions with a page or former page during the trip, but it also could have been Kolbe's receipt of information about another Congressman. In any event, none of that made its way into the opinion. What the FEC did know was that the matter was still confidential, that it was in its early stages, and that prosecutors had not designated Kolbe as a "target." This fact undermines defendants' assertion that the only matter the FEC understood to be under investigation in connection with the rafting trip involved personal sexual conduct by Kolbe, and that the opinion therefore sanctioned the use of campaign funds to pay for the legal expenses arising from any personal conduct occurring on an official trip. To the contrary, the FEC went out of its way to hedge its opinion given the uncertainties and confidentiality involved, and defendants' suggestion that the Advisory Opinion stands for something other than what it said is unsupported.

B. This case is distinguishable from other FEC Advisory Opinions

In their memorandum, defendants maintain that there are other opinions in addition to Kolbe that justify their position: "In sanctioning the use of official funds for legal expenses in similar matters, the Commission has likewise ignored the substance of members' underlying conduct and focused simply on whether the allegations occurred during the course of official activity." Defs.' Mem. at 9. This assertion also falls when one reviews the Advisory Opinions themselves.

In all of the cases cited by the defendants, the FEC decided whether the officeholder could use campaign funds to cover the legal expenses at issue based on an express consideration of whether the underlying allegations were related to officeholder duties. In FEC Advisory

Opinion 1997-27, Representative John Boehner incurred legal expenses arising from a civil suit he filed against Representative Jim McDermott for allegedly disclosing an intercepted telephone conference call between Boehner and other Congressmen, which "pertained specifically to the business of the House." Boehner Advisory Opinion, AO 1997-27, 1998 WL 108616, at *2 (F.E.C. Feb. 23, 1998). The FEC concluded that because the telephone conversation itself "resulted directly from the pursuit of [Boehner's] duties as a Federal officeholder . . . the legal expenses at issue would not exist irrespective of Mr. Boehner's duties as a Federal officeholder, and . . . he may use [campaign] funds . . . to pay the legal expenses incurred in evaluating and pursuing the lawsuit." *Id.*

Similarly, in FEC Advisory Opinion 2000-40, the FEC allowed McDermott to use campaign funds to defend against the Boehner suit because the conduct at issue in the suit "resulted directly from activities that [McDermott] engaged in because of [his] position at the time as Ranking Minority Member of the Ethics Committee." McDermott Advisory Opinion, AO 2000-40, 2001 WL 136013, at *3 (F.E.C. Feb 7, 2001). Specifically, the Commission explained that McDermott received and disclosed the tape recording to the media and other members of Congress because of that position. *Id.* It also added that the litigation "implicates a dispute between Members of Congress concerning the propriety of actions that were taken with respect to a matter of concern in the House of Representatives. This litigation may present matters of institutional concern for all Members of the House and may pertain to the conduct of each Member, in his or her capacity as a Member of the House." *Id.* at *5.

Finally, in Advisory Opinion 2005-11, the FEC approved Representative Randall Cunningham's use of campaign funds to pay legal fees in connection with a grand jury investigation involving "allegations that Representative Cunningham obtained benefits (*i.e.*, the

sale of his house at an above-market price and a rent-free stay on a yacht) from [a federal defense contractor] because of his . . . position on . . . the House Appropriations Defense Subcommittee." Cunningham Advisory Opinion, AO 2005-11, 2005 WL 2470825 at *3 (F.E.C. Sept. 26, 2005). The Commission concluded that these allegations would not have existed irrespective of Cunningham's officeholder duties. *Id.*

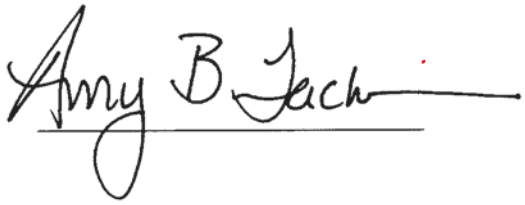
Nonetheless, defendants argue that "Senator Craig's expenses, incurred while on official travel, are more closely connected to his official duties than those incurred in the Boehner, McDermott and Cunningham matters." Defs.' Mem. at 10. But defendants can only get around these precedents by pretending that they are about something other than what they are. Specifically, defendants submit that the conduct at issue in Cunningham – "selling one's house, [and] renting a yacht" – was "wholly unrelated to Congressman Cunningham's officeholder duties." Defs.' Mem. at 9. This is not a serious attempt to grapple with the Cunningham opinion, which specifically turned upon the fact that the Member was under investigation for receiving favorable treatment in these transactions *because he sat on a Congressional committee*. And as noted above, the Boehner and McDermott opinions relied upon the fact that the activities underlying the lawsuit arose out of their performance of their official duties. That simply cannot be said of Senator Craig's action to withdraw his guilty plea.[12]

Since all the cases defendants rely on are distinguishable from the case at hand, those cases do not immunize them as a matter of law from agency enforcement in this case.

12 The Court also notes that unlike Senator Craig, neither Kolbe nor Cunningham nor Boehner nor McDermott staked out a public position in which they insisted that the conduct at issue was entirely personal and had nothing whatsoever to do with their official duties.

**CONCLUSION**

For the reasons stated above, the Court will deny defendants' motion to dismiss the action because the FEC has plausibly stated a claim that defendants violated the Federal Election Campaign Act of 1971. A separate order will issue.



AMY BERMAN JACKSON
United States District Judge

DATE: March 28, 2013

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| FEDERAL ELECTION COMMISSION, | ) | |
| Plaintiff, | ) | |
| v. | ) | Civil Action No. 12-0958 (ABJ) |
| CRAIG FOR U.S. SENATE, *et al.*, | ) | |
| Defendants. | ) | |

**MEMORANDUM OPINION**

This opinion arises out of former Senator Larry Craig's efforts to withdraw the guilty plea he entered in Minnesota state court in 2007, after he was arrested for disorderly conduct in the Minneapolis-St. Paul International Airport. On June 11, 2012, the Federal Election Commission ("FEC" or "the Commission") brought suit against defendants Craig, the Craig for U.S. Senate campaign committee ("Craig Committee"), and Kaye L. O'Riordan, the former treasurer of the Craig Committee,[1] contending that defendants converted campaign funds to personal use in violation of the Federal Election Campaign Act ("FECA" or "the Act") when they expended those funds to pay legal fees incurred in connection with Senator Craig's efforts to withdraw his plea. Defendants moved to dismiss the complaint for failure to state a claim on August 2, 2012, and the Court denied that motion on March 28, 2013. The FEC then moved for summary judgment on September 30, 2013, seeking an order disgorging from Senator Craig the $216,984 sum that the FEC contends was unlawfully converted, a $70,000 civil penalty against

1 Defendant Craig has since been substituted for Ms. O'Riordan as the treasurer for the Craig Committee, and he is now named as a defendant in this case in both his personal and official capacities. *See* May 1, 2013 Minute Order.

defendant Craig, a $70,000 civil penalty against the Craig Committee, and declaratory and injunctive relief.

The Court will grant the FEC's motion, although it will not award all of the relief the FEC seeks. The Court finds that defendants violated the FECA when they converted campaign funds to pay for legal expenses related to Senator Craig's efforts to withdraw his guilty plea, which was a personal matter that was not connected to the Senator's duties as an officeholder. Furthermore, the Court finds that the circumstances of this case merit the imposition of both a penalty and an order of disgorgement, as well as the declaratory relief the FEC seeks. But the Court finds that the amount that was unlawfully converted totals $197,535, not $216,984, and that a penalty of $45,000 against Senator Craig is appropriate in this case. The Court will therefore order Senator Craig to pay a total of $242,535 to the U.S. Department of the Treasury, which is comprised of the amount he was unjustly enriched plus the additional penalty. The Court will not order any relief against the now defunct Craig Committee, nor will it issue an injunction in this case.

## BACKGROUND

The following facts are not in dispute.[2] Defendant Larry Craig was a United States Senator from Idaho from January, 1991 to January, 2009. Compl. [Dkt. # 1] ¶ 6; Answer [Dkt. # 12] ¶ 6. Senator Craig is named in this case both in his personal capacity and in his official

2 Defendants did not file a statement of material facts in dispute that directly responded to the statement of undisputed material facts filed by the FEC, as required by the Local Rules of this Court and this Court's Scheduling Order [Dkt. # 14]. *See* LCvR 7(h)(1) ("In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."). Instead, defendants filed a non-responsive statement of their own disputed facts. *See* Defs.' Statement of Material Facts in Dispute [Dkt. # 19-1]. The FEC, however, filed an additional statement of facts that directly responds to defendants' statement, which the Court will rely on in part to set forth the facts of this case. *See* FEC's Resp. to Defs.' Statement of Alleged Material Facts in Dispute [Dkt. # 21].

capacity as treasurer of defendant Craig for U.S. Senate. *See* May 1, 2013 Minute Order. Defendant Craig for U.S. Senate is a political committee authorized to receive contributions and make expenditures on behalf of defendant Craig. Compl. ¶ 7; Answer ¶ 7. Plaintiff, the Federal Election Commission, is an agency of the United States government that is authorized to enforce the Federal Election Campaign Act. Compl. ¶ 5; Answer ¶ 5.

On June 11, 2007, Senator Craig was arrested in the Minneapolis-St. Paul International Airport and charged with two violations of Minnesota criminal law: "disturbing the peace-disorderly conduct," and interference with privacy. Compl. ¶ 12; Answer ¶ 12. On August 8, 2007, Senator Craig pled guilty to disorderly conduct, a misdemeanor. Compl. ¶ 12; Answer ¶ 12; *see also* FEC's Resp. to Defs.' Statement of Alleged Material Facts in Dispute [Dkt. # 21] ¶ 1 ("FEC Facts Resp."). But on September 10, 2007, Senator Craig filed a motion in Minnesota state district court to withdraw his guilty plea. Compl. ¶ 14; Answer ¶ 14. Senator Craig's efforts to withdraw his plea were unsuccessful, and his final appeal was denied on December 9, 2008. Compl. ¶ 14; Answer ¶ 14.

On September 1, 2007, after the arrest and conviction became the subject of national media attention, Senator Craig announced his intention to resign from the Senate effective September 30, 2007. Compl. ¶ 15; Answer ¶ 15. Meanwhile, the U.S. Senate Select Committee on Ethics ("Senate Ethics Committee") launched an inquiry into the Senator's arrest, guilty plea, and subsequent conduct. Compl. ¶ 16; Answer ¶ 16. Senator Craig then decided not to resign so that he could "continue [his] effort to clear [his] name in the Senate Ethics Committee," and he retired at the end of his term in January 2009 instead. Compl. ¶ 17; Answer ¶ 17.

On July 25, 2008, the Senate Ethics Committee authorized Senator Craig to establish a legal expense trust fund "to pay for expenses incurred in connection with" the Minnesota

litigation, although it warned Senator Craig that its "approval of the Fund and of the trust agreement [did] not indicate approval of [his] continuation of the proceedings in" Minnesota. Ex. 9 to Defs.' Opp. to Pl.'s Mot. for Summ. J. ("Defs.' Opp.") [Dkt. # 19-11] at 1. The Committee also warned that it would "consider any further use of [Senator Craig's] campaign funds for legal expenses without the Committee's approval to be conduct demonstrating [his] continuing disregard of ethics requirements." *Id.* at 2.

Between July 9, 2007 and October 5, 2008, the Craig Committee disbursed more than $480,000 of campaign funds for legal fees and other expenses. Compl. ¶ 18; Answer ¶ 18. The Craig Committee paid at least $139,952 to the law firm of Sutherland, Asbill & Brennan LLP for its legal services to Senator Craig in connection with his efforts to withdraw his guilty plea, and approximately $77,032 to the law firm of Kelly & Jacobson for similar services, for a total of $216,984. Compl. ¶¶ 19–20; Answer ¶¶ 19–20.

On February 13, 2008, the Senate Ethics Committee issued a "Public Letter of Admonition" to Senator Craig, which stated that some portion of the Craig Committee's expenditures "may not be deemed to have been incurred in connection with [Senator Craig's] official duties, either by the Committee or by the Federal Election Commission." Ex. 7 to Defs.' Opp. [Dkt. # 19-9] at 2. Then, on November 10, 2008, the FEC received an administrative complaint alleging that Senator Craig had violated the FECA by spending more than $213,000 in campaign funds to pay legal fees and expenses incurred in connection with his attempts to withdraw his guilty plea. Compl. ¶ 24; Answer ¶ 24. The FEC investigated the complaint and attempts to resolve the matter short of litigation were unsuccessful. Compl. ¶¶ 25–30; Answer ¶¶ 25–30.

The FEC filed this lawsuit on June 11, 2012, claiming that defendants violated 52 U.S.C. § 30114(b)[3] when they disbursed campaign funds to pay legal expenses related to the Senator's efforts to withdraw his guilty plea in Minnesota. Compl. ¶¶ 33–34. The FEC alleged that defendants unlawfully "converted the Craig Committee's funds to personal use" because these expenditures were not "made in connection with Mr. Craig's campaign for federal office and were not ordinary and necessary expenses incurred in connection with his duties as a Senator." *Id.* ¶ 33. Defendants moved to dismiss the complaint on August 2, 2012 for failure to state a claim. Defs.' Mot. to Dismiss [Dkt. # 3]. On March 28, 2013, the Court denied defendants' motion. *See FEC v. Craig for U.S. Senate*, 933 F. Supp. 2d 111, 113 (D.D.C. 2013). Accepting the allegations in the complaint as true, the Court found that the FEC had stated a claim that defendants violated the Act by converting campaign funds to personal use. *Id.* at 116–119. The Court further found that defendants had failed to demonstrate that they were immune from prosecution based on their alleged reliance on prior FEC Advisory Opinions because all of those opinions were distinguishable. *Id.* at 120–25.

Following the Court's ruling on the motion to dismiss, on April 11, 2013, defendants filed an answer that admitted nearly all of the factual allegations in the complaint. *See* Answer ¶¶ 12–31. Then, on September 30, 2013, the FEC moved for summary judgment. FEC's Mot. for Summ. J. [Dkt. # 16] ("FEC Mot."). The FEC sought the following relief in addition to the entry of judgment in its favor: an order disgorging from Senator Craig the $216,984 disbursed to Sutherland, Asbill & Brennan LLP and Kelly & Jacobson; a $70,000 civil penalty against Senator Craig; a $70,000 civil penalty against the Craig Committee; a declaration that defendants

3 All of pleadings in this case, as well as the Court's previous opinion, refer to the relevant portion of the FECA as 2 U.S.C. § 439a(b). As of September 1, 2014, however, that provision was recodified at 52 U.S.C. § 30114(b).

violated the Act; and a permanent injunction against all defendants prohibiting them from violating the Act in the future. *Id.* at 14. Defendants opposed the FEC's motion on November 13, 2013, arguing in part that a portion of the legal fees were lawful campaign expenditures. Defs.' Opp. [Dkt. # 19]. Plaintiff filed its reply on January 10, 2014. FEC's Reply Mem. [Dkt. # 21] ("FEC Reply"). The Court heard oral argument on plaintiff's motion on July 17, 2014. After the hearing, the Court ordered defendants to submit a supplemental pleading "itemizing and quantifying all of the legal expenses included in any of the bills submitted . . . by Kelly & Jacobson and Sutherland, Asbill, and Brennan" that defendants maintained were permissible. July 17, 2014 Minute Order. Defendants submitted their pleading on August 15, 2014, and the FEC responded on August 29, 2014. Defs.' Pleading Itemizing & Quantifying Legal Expenses [Dkt. # 24] ("Defs.' Supp. Mem."); FEC's Resp. to Defs.' Pleading [Dkt. # 25] ("FEC Resp.").

**STANDARD OF REVIEW**

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment bears the "initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (internal quotation marks omitted). To defeat summary judgment, the non-moving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). The existence of a factual dispute is insufficient to preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is "genuine" only if a reasonable fact-finder could find for the

non-moving party; a fact is only "material" if it is capable of affecting the outcome of the litigation. *Id.* at 248; *Laningham v. U.S. Navy*, 813 F.2d 1236, 1241 (D.C. Cir. 1987). In assessing a party's motion, the court must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the summary judgment motion.'" *Scott v. Harris*, 550 U.S. 372, 378 (2007) (alterations omitted), quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) (per curiam).

## ANALYSIS

The Court finds that there are no genuine issues of material fact in dispute in this case, and that defendants are liable as a matter of law for converting campaign funds to personal use in violation of section 30114(b) of the FECA. Defendants admitted all of the material facts with respect to their liability in their answer to the complaint, and the Court has already concluded that those facts amount to a violation of the federal campaign finance law. The Court has wide discretion to fashion a remedy in this case, and it will order defendant Craig to pay $242,535 to the United States Department of the Treasury. This amount is comprised of a disgorgement of $197,535, the amount of campaign funds that were unlawfully converted to personal use, plus a penalty of $45,000, which the Court finds necessary and appropriate to punish defendants' misconduct and to deter future misconduct by others. The Court will also issue the declaratory relief that the FEC seeks, but it finds that injunctive relief is not appropriate in this case.

### I. Defendants violated 52 U.S.C. § 30114(b).

In its previous opinion in this case, the Court found that, accepting the allegations in the complaint as true, the FEC had shown that defendants had violated the FECA's ban on

converting campaign funds to personal use.[4] *See Craig*, 933 F. Supp. 2d at 116–119. The Court "reject[ed] defendants' assertion that the expenditures were permitted under the Act" because it found that legal expenses incurred in withdrawing a plea to personal criminal conduct in the airport could not be characterized as "ordinary and necessary expenses in connection with Senator Craig's duties as an office holder." *Id.* at 113. Therefore, "the campaign funds were converted to Senator Craig's personal use as that term is defined in the Act." *Id.* In addition, the Court found that defendants could not find safe harbor in prior FEC opinions since they had "misstate[d] the holding of those opinions, minimize[d] the key distinctions between those cases and [their own], and disregard[ed] clear admonitory language" in the advisory opinion on which they relied most heavily. *Id.*

After the court issued its opinion denying defendants' motion to dismiss, defendants answered and admitted the critical facts. *Compare* Compl. ¶¶ 12–31 (setting forth the facts section of the complaint), *with* Answer ¶¶ 12–31 (admitting all of the factual allegations contained in the corresponding paragraphs of the complaint but maintaining Senator Craig's innocence as a matter of law). In particular, defendants admitted that "the Sutherland law firm received at least $139,952 for providing legal services to Mr. Craig in connection with his efforts to withdraw his guilty plea," and that "[t]he Kelly law firm received approximately $77,032 from the Craig Committee for providing legal services to Mr. Craig in connection with efforts to withdraw his guilty plea." Compl. ¶¶ 19–20; Answer ¶¶ 19–20. Thus, defendants have now admitted to utilizing campaign funds in a manner that the Court has already found to be a

4 Section 30114(b) prohibits individuals from converting campaign funds to personal use. 52 U.S.C. § 30114(b)(1). The statute specifies that a contribution to a campaign fund "shall be considered to be converted to personal use if the contribution . . . is used to fulfill any commitment . . . or expense of a person that would exist irrespective of the candidate's election campaign or the individual's duties as a holder of Federal office." *Id.* at § 30114(b)(2).

violation of the personal use ban of the FECA. *See Craig*, 933 F. Supp. 2d at 113; *see also* Defs.' Opp. at 2 ("Although defendants maintain that they did not violate the [FECA's] personal use ban, they recognize that the Court's order denying their motion to dismiss essentially held to the contrary."). On that basis, alone, the Court could grant summary judgment to the FEC.

Nevertheless, defendants contend that the FEC's motion should be denied because "material facts . . . remain in doubt." Defs.' Opp. at 2. First, defendants take issue with the Commission's failure, in their view, "to provide a full and accurate depiction of facts material to this matter." *Id.* at 4. Defendants submit that the FEC has not taken the following facts into account: the date on which Senator Craig retained counsel; Senator Craig's reliance on the arresting officer's assurance that he would not "call media"; Senator Craig's state of mind immediately after his arrest; and Senator Craig's dispute with the *Idaho Statesman* newspaper. *Id*. at 4–6; *see also* Defs.' Statement of Material Facts in Dispute [Dkt. # 19-1] ¶¶ 1–15. But even if all of these alleged facts are true, they do nothing to alter the Court's conclusion that defendants' expenditure of campaign funds in connection with the Minnesota matter violated the FECA's personal use ban. *See Craig*, 933 F. Supp. 2d at 118 ("Neither the charge nor the underlying conduct had anything to do with [Senator Craig's] performance of his official duties, so the legal expenses they generated were not incurred in connection with those duties."). These facts may illuminate *why* Senator Craig did what he did, but they do not change *what* he did: the Senator's arrest was personal and the attendant legal expenditures were not incurred in connection with his official duties, even if he either elected to plead guilty or to change course with his public image in mind.

Defendants also claim that there is an issue of material fact with respect to defendants' good-faith reliance on an FEC Advisory Opinion. Defs.' Opp. at 7, 9–11, citing FEC AO 2006-

35 (Kolbe), 2007 WL 419188 (Jan. 26, 2007). But the Court has already concluded that any reliance by defendants on the Kolbe opinion does not relieve them of liability because the Kolbe opinion does not actually support their claims. *Craig*, 933 F. Supp. 2d at 124 ("[D]efendants' suggestion that the [Kolbe] Advisory Opinion stands for something other than what it said is unsupported."). Although the question of defendants' good faith may still be relevant to the question of punishment and the Court's determination of the remedy it will impose, *see infra* section III.B.1, it does not alter the Court's finding that defendants violated section 30114(b).

Next, defendants argue that the Court cannot grant summary judgment for the FEC because there is a question of material fact as to the total amount of funds defendants converted to personal use. Defs.' Opp. at 12–13. The Court agrees that the FEC has failed to pinpoint the precise dollar amount that defendants unlawfully converted, but that is not a material fact that precludes summary judgment. There is no question that defendants unlawfully converted funds to personal use. Thus, there is no material fact in dispute on the question of defendants' liability. Rather, the dispute centers on the amount of that liability, which the Court will address further below.[5]

5 The Court also notes that the lack of clarity surrounding the expenditures in this case is attributable to defendants' own actions. Defendants claim, with justification, that some of their legal expenditures qualify for payment with campaign funds under two FEC Advisory Opinions. Defs.' Opp. at 12–13, citing FEC AO 2008-7 (Vitter), 2008 WL 4265321, at *4–5 (Sept. 9, 2008), *and* FEC AO 1998-1 (Hilliard), 1998 WL 108618, at *4 (Feb. 27, 1998). But these opinions also clearly place the onus on defendants to obtain "billing documentation" that "provide[s] sufficient details as to the precise legal services rendered" so that there are "adequate records to determine which amounts are lawfully payable from campaign funds." Hilliard, 1998 WL 108618, at *5; *see also* Vitter, 2008 WL 4265321, at *5 (outlining the requirement to "maintain appropriate documentation"). Defendants did not obtain this detailed documentation, or at least they have yet to provide it to the FEC or the Court, even after repeated requests that they do so. So, they have no grounds to complain about the FEC's over-inclusiveness or lack of precision, and they did little to carry their burden to establish the amount of the legal expenses that qualified for at least partial payment with campaign funds.

Finally, defendants argue that a recently-released FEC Advisory Opinion indicates that they should not be found liable in this case. Defs.' Opp. at 15, citing FEC AO 2013-11 (Miller), 2013 WL 6022101 (Oct. 31, 2013). But this opinion has no bearing on defendants' case. The Advisory Opinion concerns Joe Miller, a former candidate for U.S. Senate in Alaska. During Miller's campaign, certain media outlets sued to obtain personnel records related to his previous public employment. *Id.* at *1. The court found that Miller's "right to privacy . . . [was] outweighed by the public's significant interest in the background of a public figure that is running for U.S. Senate," and ordered the release of the records. *Id.* Miller then requested an Advisory Opinion from the FEC as to whether his campaign committee could use campaign funds to post the cash deposit required to appeal the ruling, "and/or to pay the judgment should his appeal be unsuccessful." *Id.* at *2. The FEC determined that it was lawful for Miller to use campaign funds in this manner because the underlying lawsuit and the verdict would not have arisen but for Miller's status as a candidate for office. *Id.* at *3. As the FEC explained: "[T]he Alaska media outlets' suit to obtain Miller's personnel records, as well as the court's order granting that relief, directly related to his federal campaign." *Id.*

Defendants claim that "[m]uch like Miller's decision to fight disclosure of personal material that could harm his campaign, Senator Craig's challenge to his plea stemmed from his desire to counter allegations that he believed would be damaging to his public stature as a United States Senator and his viability as a future candidate." Defs.' Opp. at 15–16. But the Miller ruling was not based on the fact that Miller had his public profile in mind; it was based on the fact that the lawsuit in which the fees were incurred was occasioned by his status as a candidate for office. As the FEC put it, "the lawsuit would not have existed irrespective of Miller's campaign," 2013 WL 6022101, at *2, and that is simply not the case for the criminal proceedings

in Minnesota. Moreover, since the Miller Advisory Opinion was not issued until October 2013, there can be no argument that defendants relied on it in good faith to justify expenditures that began in 2007.

Thus, the Court finds that defendants have not identified any material facts in dispute as to their liability. The Court therefore holds that defendants violated section 30114(b) of the FECA by converting campaign funds to the personal use of Senator Craig.

**II. Defendants converted $197,535 to personal use in violation of the FECA.**

Although the FEC has proven that defendants violated the FECA, neither the FEC nor defendants have established the precise amount of funds that defendants unlawfully converted. Defendants admitted in their answer that they paid $216,984 in campaign funds to the Sutherland and Kelly law firms for "legal services" related to the Minnesota guilty plea. *See* Answer ¶¶ 19–20; *see also* Compl. ¶¶ 19–20. But they contend that $46,464 of that amount was permissible under FEC Advisory Opinions that provide that spending on legal services related to media and ethics issues can be exempt from the personal use ban. *See* Defs.' Supp. Mem. at 1–4, 18. In response, the FEC argues that defendants have not carried their burden to establish that any portion of the $216,984 was permissibly spent, and it urges the Court to find that the full amount

was converted to personal use, or, in the alternative, to apply a flat discount rate of 10 percent, resulting in a reduction of only $10,856. FEC Resp. at 10–13.[6]

The Court finds that while defendants have established that some portion of the $216,984 in campaign funds was permissibly spent, their estimate of that lawful portion is over-inclusive. But the FEC's approach fares no better: it is under-inclusive, imprecise, and disconnected from its legal underpinnings. Therefore, the Court has undertaken its own line-by-line analysis of defendants' legal invoices, and it concludes – to the extent it is possible to derive a dollar figure – that $19,449 of the $216,984 spent was a permissible use of campaign funds under the principles set forth in the FEC's Hilliard and Vitter Advisory Opinions. *See* Appendix A (detailing the Court's calculations); *see also* Ex. 1 to FEC Resp. [Dkt. # 25-1] (the relevant invoices).

The Hilliard and Vitter opinions establish that certain legal expenses devoted to media relations or responding to ethics inquiries are partially or fully payable with campaign funds. These opinions are based upon the principle that these sorts of legal expenses would not ordinarily be incurred if the client were not a candidate or federal officeholder. *See* Vitter, 2008 WL 4265321, at *3–4; Hilliard, 1998 WL 108618, at *4. In the Hilliard opinion, the FEC stated

6 It is important to note that the FEC has already excluded significant portions of the campaign funds defendants spent in connection with the Minnesota matter from the $216,984 figure, apparently in keeping with the principles articulated in the Hilliard and Vitter Advisory Opinions. Specifically, the $216,984 the Commission seeks to recoup does not include the more than $100,000 defendants paid to Impact Strategies, a public relations firm, nor does it include the campaign funds paid to the Brand Law Group in connection with its representation of Senator Craig in the Senate Ethics Committee inquiry. *See* FEC Reply at 11 n.10 (noting the exclusion of the funds paid to Impact Strategies); Ex. 12 to FEC Reply [Dkt. # 21-1] at 5 (stating that defendants retained the Brand Law Group to respond to the Senate Ethics Committee inquiry); *see also* Hr'g Tr. at 7 (explaining that the FEC excluded all payments to Impact Strategies and the Brand Law Group). So the order of disgorgement imposed in this opinion does not include those expenditures.

that "any legal expense that relates directly and exclusively to dealing with the press . . . would qualify for 100% payment with campaign funds." 1998 WL 108618, at *4, quoting FEC Advisory Opinion 1997-12.[7] The Vitter opinion explains that "a candidate's campaign committee [may] pay legal fees incurred in preparing press releases, appearing at press conferences, meeting or talking with reporters, reviewing and monitoring media allegations, responding to media requests for comment, and conferring with the candidate or officeholder regarding media allegations." Vitter, 2008 WL 4265321, at *4 n.2. It also states that campaign funds may be used to pay legal fees and expenses incurred in responding to a Senate Ethics Committee inquiry, even when the alleged wrongdoing is "unrelated to candidacy and the duties of an officeholder." *Id.* at *3. Finally, both opinions make it clear that the party claiming that its use of campaign funds is permissible has the burden to obtain and retain records that show precisely which expenditures qualified for payment with campaign funds. *See* Hilliard, 1998 WL 108618, at *5 (stating that a campaign committee is required to obtain "billing documentation" from its attorneys that "provide[s] sufficient details as to the precise legal

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7 In full, the Hilliard Advisory Opinion provides that:

> 1) any legal expense that relates directly and exclusively to dealing with the press, such as preparing a press release, appearing at a press conference, or meeting or talking with reporters, would qualify for 100% payment with campaign funds because [the person is] a candidate or Federal officeholder;
>
> 2) any legal expense that relates directly to allegations arising from campaign or officeholder activity would qualify for 100% payment with campaign funds;
>
> 3) 50% of any legal expense not covered by 1 above that does not directly relate to allegations arising from campaign or officeholder activity can be paid for with campaign funds because [the person is] a candidate or Federal officeholder and [is] providing substantive responses to the press (beyond *pro forma* "no comment" statements).

1998 WL 108618, at *4, quoting FEC Advisory Opinion 1997-12 (alteration in original).

services rendered" so that there are "adequate records to determine which amounts [were] lawfully payable from campaign funds"); *see also* Vitter, 2008 WL 4265321, at *5 (outlining the requirement to "maintain appropriate documentation").

There is no question that the invoices that defendants submitted to the FEC and to the Court include charges for legal services related to both public relations and the Senate Ethics Committee inquiry. *See, e.g.*, Ex. 13 to Defs.' Opp. [Dkt. # 19-15] at "Craig 36" ("Research and review draft Press Release."); *id.* at "Craig 59" ("Teleconference regarding Senator ethics issues; discussion with ethics counsel."). But defendants' legal invoices utilize a "block" billing style, where multiple tasks performed are grouped together within undifferentiated blocks of time. *See, e.g.*, Ex. 1 to FEC Resp. at "Craig 34" (reflecting charges for 5.10 hours of work described as follows: "Revise motion to withdraw guilty plea and supporting affidavit. Discuss same with B. Martin and K. Verdi. Various calls with Senate staff . . . [and] with T. Kelly regarding legal issues associated with motion. Various calls with J. Smith and staff regarding publicity issues associated with motion."). Thus, defendants did not fulfill their obligation to retain "adequate records" so that the Court or the FEC can "determine which amounts [were] lawfully payable from campaign funds." Hilliard, 1998 WL 108618, at *5.[8]

Still, the Court gave defendants one more chance to make this showing. After hearing oral argument on the FEC's motion for summary judgment, the Court ordered defendants to submit a supplemental pleading "itemizing and quantifying all of the legal expenses included in any of the bills submitted . . . by Kelly & Jacobson and Sutherland, Asbill and Brennan that they

8 Moreover, although the FEC expressly asked defendants to identify campaign funds used to pay legal fees related to media inquiries, defendants declined to do so. *See* FEC Reply at 11; *see also* Ex. 13 to FEC Reply [Dkt. # 21-2] at 3 (FEC questionnaire asking defendants to "[s]tate the total amount of Craig for U.S. Senate funds that were disbursed to pay legal fees . . . to respond to media inquiries"); Ex. 14 to FEC Reply [Dkt. # 21-3] at 1 (letter from defendants' counsel stating that defendants "decline to respond directly to [the FEC's] questions").

contend were permissible under [the Hilliard and Vitter] FEC Advisory Opinions." July 17, 2014 Minute Order. The Court further instructed that "[d]efendants' submission should separately identify each entry by date and by attorney and indicate the amount of time involved and the specific dollar amount they claim constituted an appropriate use of campaign funds." *Id.* Defendants submitted a pleading on August 15, 2014, and the FEC submitted its response on August 29, 2014. *See* Defs.' Supp. Mem.; FEC Resp.

The Court finds that defendants have still failed to establish what portion of their legal bills was permissibly paid with campaign funds under the standards articulated in the Hilliard and Vitter opinions. Rather than complying with the Court's instruction to identify the specific amounts of time spent on activities that might constitute an appropriate use of campaign funds, defendants simply discounted entries containing a mix of exempt and non-exempt activities by a flat and unduly generous 50 or 25 percent. For instance, defendants applied a 50 percent discount to 7.5 hours billed by the Sutherland firm for the following:

> Attend to finalizing motion to withdraw guilty plea and affidavit. Additional research regarding same. Discuss same . . . . Various calls with Senate staff regarding legal issues associated with motion to withdraw guilty plea. Various calls with [public relations consultant Judy] Smith regarding legal and publicity issues associated with motion to withdraw guilty plea . . . .

*See* Defs.' Supp. Mem. at 7. There is no apparent factual basis for applying the 50 percent discount to this entire entry; defendants should have applied any discount only to the portion of the time that was spent on the calls with the public relations consultant concerning "legal and publicity issues." In another instance, defendants discounted by 50 percent the 9.9 hours of legal work by the Sutherland firm described in the following block entry:

> Numerous conference recalls [sic] regarding political and legal issues regarding Minneapolis incident. Confer with local counsel regarding Minneapolis proceedings. Review police report and other documents regarding Minneapolis proceedings.

*See id*. at 6. But the only portion of that entry that is even arguably media or ethics related is the first sentence about the conference calls; the remaining two sentences of the entry describe work that is purely legal.[9] Defendants' submission is replete with entries like these, and it falls far short of compliance with the Court order entered for their own benefit.[10] The Court therefore rejects defendants' contention that $46,464 of the campaign funds disbursed to the two law firms was exempt from the personal use ban.[11]

The FEC argues that in light of defendants' failure to document the expenditures that should be exempt from the personal use ban, the Court should either consider the full $216,984 to have been converted to personal use, or apply a flat discounting rate of 10 percent. FEC Resp.

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9 Defendants themselves acknowledged the mixed nature of these billing entries in their pleading by highlighting only certain sentences of the entries in yellow. *See* Defs.' Supp. Mem. at 5–17.

10 *See, e.g.*, Defs.' Supp. Mem. at 12 (applying 50 percent discount to 2.10 hours billed by Kelly & Jacobson for the following: "Attend to various public relations issues. Research procedures for filing notice of appeal. Discuss same with T. Kelly."); *id.* at 16 (applying a 25 percent discount rate to the following billing entry from Kelly & Jacobson: "Redraft and finalize oral argument; Telephone conferences with counsel for the defense; Review of cases; Preparation for oral argument with counsel for the defense; Court – Appellate Hearing; Debrief with co-counsel; Post-hearing press conference.").

11 Defendants also contend that legal fees associated with "the attorneys' consultations with staff members in Senator Craig's office, a meeting with another United States Senator, addressing a Senate Committee on Appropriations issue and addressing FEC disclosure concerns" qualified for payment with campaign funds because these activities constituted "consultations with the Senator and his advisors" under the Vitter Advisory Opinion. Defs.' Supp. Mem. at 2; *see also id*. at 5–17 (reflecting numerous deductions for "political" expenses). But the Vitter opinion exempts only those "consultations" that involved "Ethics Counsel" and "a public relations professional." *See* 2008 WL 4265321, at *3 (authorizing the use of campaign funds to "pay legal fees for Subpoena Counsel's consultations with Ethics Counsel"); *id.* at *4 (authorizing the use of campaign funds to pay "legal fees and expenses incurred by Subpoena Counsel in press relations . . . including . . . consultations with a public relations professional"). Defendants' claim that it was permissible to use campaign funds to pay for legal expenses broadly related to "political" issues is an unwarranted expansion of the principles established in the Vitter opinion for which defendants have offered no legal authority.

at 10–12. The FEC's proposed approach would result in a discount of zero or $10,856. *Id.* at 13. But although defendants' legal invoices are not sufficiently specific, and although defendants have been maddeningly cavalier in responding to both the FEC's and the Court's inquiries, the Court is bound to follow the law, and the bills are not so vague that the Court cannot do a better job than that in calculating the exempt amount.

The Court undertook its own evaluation of the invoices provided by the parties, and it determined that of the $216,984 at issue here, defendants permissibly spent approximately $19,449 in campaign funds on media or ethics related legal services. *See* Appendix A. The Court's review of the invoices from the Sutherland and Kelly law firms revealed forty-nine entries that included at least some legal work related to public relations or ethics matters. The Court found that fourteen of these entries described work that was fully payable with campaign funds and that the remaining thirty-five entries billed for a mix of tasks that were only partially exempt from the personal use ban. Given the undifferentiated nature of the data, the Court used its best judgment to estimate the amount of time spent on the exempt activities, multiplied those hours by the relevant attorneys' rates, and deducted that amount from the full $216,984 that defendants have admitted they paid to the Kelly and Sutherland firms. Through this process, the Court determined that defendants spent $19,449 on legal services related to media or ethics concerns, and that defendants converted the remaining $197,535 to personal use in violation of the FECA.[12] A chart setting forth the Court's calculations in detail is available as Appendix A to this Memorandum Opinion.

12 Any imprecision in the math is attributable to the quality of the information provided by the defendants.

## III. The Court will order Senator Craig to pay $242,535 to the U.S. Department of the Treasury and will issue a declaration that defendants violated section 30114(b).

Now that the Court has found that defendants converted $197,535 in campaign funds to personal use, it must determine the appropriate remedy for defendants' violation of the FECA. The Court's judgment in this case will be the first of its kind; it appears that no other court has been asked to determine the remedy for a violation of the particular section of the FECA involved here.

The FEC asks the Court to: (1) order Senator Craig to disgorge the full amount of funds converted to personal use; (2) levy a $70,000 civil penalty against Senator Craig; (3) levy a $70,000 civil penalty against the Craig Committee; (4) issue a declaration that defendants violated the Act; and (5) order a permanent injunction against all defendants that prohibits them from violating the Act in the future. FEC Mot. at 14. Defendants contend that the FEC's request for both a disgorgement and civil penalties is excessive and unwarranted, and that injunctive relief is not appropriate in this case.[13] Defs.' Opp. at 2, 4. In an exercise of its broad discretion to fashion a remedy for a violation of the FECA, the Court will order Senator Craig to pay $242,535 to the U.S. Treasury, which is the sum of a disgorgement of $197,535 and a penalty of $45,000. The Court will also issue the declaratory relief that the FEC requests. But the Court does not find that injunctive relief is appropriate in this case, nor will it order the Craig Committee to pay a penalty.

13 Defendants do not, however, oppose the FEC's request for declaratory relief. *See* Defs.' Opp. at 16.

*A. The Court has broad discretion to fashion a remedy under the FECA.*

The FECA provides that a court

> may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of [$7,500][14] or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act . . . .

52 U.S.C. § 30109(a)(6)(B). Despite defendants' claim that "no authority justifies [the FEC's] request for both disgorgement *and* sizable civil penalties," Defs.' Opp. at 2, the plain language of the Act accords the Court the discretion to call for disgorgement (an "other order"), a penalty, the declaration, and the injunctions that the FEC seeks.[15]

Moreover, the cases addressing violations of other provisions of FECA all suggest that the Court has broad discretion to fashion a remedy that is appropriate to the particular circumstances of this case. *See, e.g.*, *FEC v. Furgatch*, 869 F.2d 1256, 1258, 1262, 1264 (9th Cir. 1989) (imposing a penalty of $25,000 where the defendant willfully and knowingly failed to report and disclose $25,008 in independent expenditures, and suggesting that a temporary injunction would be appropriate because the defendant was likely to commit further violations); *FEC v. Ted Haley Cong. Comm.*, 852 F.2d 1111, 1115–17 (9th Cir. 1988) (deferring to the FEC's interpretation of the FECA but affirming the district court's decision not to impose approximately $85,000 in civil penalties because the defendants had acted in good faith); *FEC v. Comm. of 100 Democrats*, 844 F. Supp. 1, 7–8 (D.D.C. 1993) (holding that the defendants' willful violation of two FEC conciliation agreements warranted civil penalties, an order to repay

14 As of July 24, 2013, this amount was increased from $5,000 to $7,500 to adjust for inflation. 11 C.F.R. § 111.24(a)(1).

15 Notably, at the hearing on the FEC's motion, counsel for defendants conceded that the Court "ha[s] discretion to impose the penalty that [it] see[s] fit." Hr'g Tr. at 39.

$3,500, and an injunction against future violations); *FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795, at *6–8 (M.D. Fla. Nov. 30, 2007) (declining to award the maximum penalty or a permanent injunction for the defendant's reporting failures and then-unlawful acceptance of corporate contributions where the defendant had acted in good faith, any injury to the public was "remote and circumscribed," and there was "no indication . . . that [the defendant was] likely to violate the Act again"); *FEC v. Friends of Jane Harman*, 59 F. Supp. 2d 1046, 1057, 1059 (C.D. Cal. 1999) (declining to award a penalty, disgorgement, or injunction where the case "involve[d] a detailed analysis of complex statutes and regulations," the defendants' violations were not "substantial nor obvious," the Harman campaign no longer existed, and Representative Harman was no longer in office).

In addition, several FEC conciliation agreements provide for relief similar to the relief the FEC requests in this case; that is, some combination of penalties, disgorgement, refunds, and injunctions. *See, e.g.*, Istook Conciliation Agreement at 5–7 (Sept. 25, 2008)[16] (assessing a civil penalty of $14,600, requiring the disgorgement of excessive contributions and the refund of funds converted to personal use, and ordering defendants to "cease and desist" violations of the FECA); Kalyn Free for Congress Conciliation Agreement at 7 (Sept. 23, 2008)[17] (assessing a civil penalty of $10,000, requiring a refund by the candidate to the campaign committee, and ordering defendants to "cease and desist" violations of the FECA); Meeks for Congress Conciliation Agreement at 6–7 (Feb. 4, 2008)[18] (assessing a civil penalty of $63,000 against the campaign committee, requiring a refund and disgorgement of other funds, and ordering

16 *Available at* http://eqs.fec.gov/eqsdocsMUR/28044212385.pdf.

17 *Available at* http://eqs.fec.gov/eqsdocsMUR/28044212013.pdf.

18 *Available at* http://eqs.fec.gov/eqsdocsMUR/000EC959.pdf.

defendants to "cease and desist" violations of the FECA); Campbell for Senate Conciliation Agreement at 3–4 (Oct. 31, 2003)[19] (assessing a civil penalty of $79,000, requiring a refund of up to $104,434 in excess contributions, and ordering defendants to "cease and desist" violations of the FECA).

Thus, based on the language of the FECA, the case law, and the FEC's own conciliation agreements, the Court concludes that it has broad discretion to impose a remedy that it deems appropriate under the specific circumstances of this case.

*B. The Court will order Senator Craig to pay $242,535 to the U.S. Department of the Treasury.*

The Court will require defendant Craig to pay $242,535, which is comprised of a disgorgement of the $197,535 the Court has determined that defendants converted to personal use, plus a penalty of $45,000. The $242,535 is to be paid to the U.S. Department of the Treasury.

The Court finds that the disgorgement order is necessary to avoid the unjust enrichment of Senator Craig, and to "deprive the wrongdoer of his ill-gotten gain." *SEC v. Bilzerian*, 29 F.3d 689, 697 (D.C. Cir. 1994). Moreover, even defendants do not dispute that they should be required to repay an amount equal to the funds they converted to personal use. *See* Defs.' Opp. at 16 ("If the Court does find a violation of the personal use ban, then . . . the penalty should be no greater than the amount the Commission can establish was improperly spent *solely* on legal issues relating to the Minnesota case."). Therefore, the Court finds that a disgorgement is warranted in this case.

The Court further finds that a penalty over and above the disgorgement is also appropriate given the seriousness of the violation here. Although the D.C. Circuit has not

19 *Available at* http://eqs.fec.gov/eqsdocsMUR/000006E2.pdf.

articulated any standards to guide the Court's discretion in imposing a penalty, courts in this district and elsewhere have turned to the factors articulated by the Ninth Circuit in *Furgatch*. *See* 869 F.2d at 1258; *see also Comm. of 100 Democrats*, 844 F. Supp. at 7 (applying *Furgatch* factors); *FEC v. Am. Fed. of State, Cnty., & Mun. Employees—P.E.O.P.L.E. Qualified*, No. 88-3208 (RCL), 1991 WL 241892, at *2 (D.D.C. Oct. 31, 1991) (same); *Kalogianis*, 2007 WL 4247795, at *6 (same). The Court will do the same.

In *Furgatch*, the Ninth Circuit looked to the following factors to determine whether a civil penalty was appropriate: "(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." 869 F.2d at 1258, citing *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 993 (11th Cir. 1984). The FEC also asks the Court to consider the need to deter and punish serious violations of the FECA. *See* FEC Mem. at 18. The Court finds that all of these factors and considerations are relevant and, taking them together, that a penalty is appropriate in this case.

1. The good or bad faith of defendants.

The facts and circumstances of this case do not suggest that defendants have acted in particularly good or particularly bad faith. Defendants reiterate the claim that they relied in good faith on the FEC's Kolbe for Congress Advisory Opinion. Defs.' Opp. at 2, 23–24. Defendants also contend that they tried in good faith to comply with the requirements of FECA, noting in particular that their unlawful expenditures were authorized by counsel and disclosed to the FEC. *See* Defs.' Opp. at 2–3. And defendants argue that when the Senate Ethics Committee authorized Craig to set up a legal defense fund and trust, it "necessarily acknowledged that

Senator Craig's legal expenditures 'relate to or arise by virtue of the service of the Member.'" *Id.* at 3.[20]

Defendants' arguments are largely unavailing. First, the Court has already held that any reliance by defendants on the Kolbe decision was misplaced. *Craig*, 933 F. Supp. 2d at 113. At the motion to dismiss stage, defendants claimed their reliance on the Kolbe opinion exempted them from sanctions under the FECA. *See id.* at 120; *see also* 52 U.S.C. § 30108(c)(1)(B)–(c)(2) (stating that an individual who relies in good faith upon an FEC advisory opinion involving activity that "is indistinguishable in all its material aspects" from his or her own activity "shall not, as a result of any such act, be subject to any sanction provided by th[e] Act"). The Court observed that the Kolbe opinion was distinguishable, and, more important for these purposes, that defendants had ignored its "clear admonitory language." *Craig*, 933 F. Supp. 2d at 113. The Court also rejected defendants' argument that the record underlying the Kolbe opinion supported their claims. *Id.* at 122–24.

Now, defendants again point to the record underlying the Kolbe opinion as evidence that they relied on that opinion in good faith. Defs.' Opp. at 10–11. While it may be true that there is "[n]o bar . . . on [defendants'] use of the [Kolbe] record to establish good faith reliance" at the penalty stage of the case, Defs.' Opp. at 11, the Court has already concluded that the Kolbe record does not support defendants' arguments. *See Craig*, 933 F. Supp. 2d at 124. Furthermore, defendants' purported evidence of their longstanding reliance on the Kolbe opinion – a letter from Senator Craig's counsel to the Senate Ethics Committee in November, 2007 –

20 Defendants further contend that the issue of good faith is a question of fact that "is ordinarily a question for the jury" and that summary judgment is inappropriate at this time. Defs.' Opp. at 9, quoting *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir. 1978). But the Court has already determined as a matter of law that defendants violated section 30114(b), and the question of their good or bad faith goes only to the remedy that the Court will impose.

only indicates that defendants relied on the Kolbe opinion as authority for spending campaign funds *on representation before the Senate Ethics Committee*, which is not included in the $197,535 the Court has found defendants wrongfully converted to personal use. *See* Defs.' Opp. at 9; *see also* Ex. 6 to Defs.' Opp. [Dkt. # 19-8] at 6–9. Any reliance on the Kolbe opinion to authorize that spending is therefore irrelevant to the question of what penalty the Court should impose.

It is true, though, that defendants reported the expenditures at issue in this case to the FEC as required by law, and that the Senate Ethics Committee permitted Senator Craig to establish a legal defense fund and trust. But as with the Kolbe Advisory Opinion, defendants disregard the stern admonition contained in the Senate Ethics Committee's letter of approval: "the Committee's approval of the Fund and of the trust agreement does not indicate approval of your continuation of the proceedings in *State of Minnesota v. Larry Edwin Craig*." Ex. 9 to Defs.' Opp. at 2. The letter further states: "The Committee also reminds you that it has not approved your use of campaign funds for the payment of legal expenses in connection with this proceeding, noting in its Public Letter of Admonition that '[i]t appears that some portion of these expenses may not be deemed to have been incurred in connection with your official duties.'" *Id.* at 3. Given these express admonitions, it is difficult to understand how defendants can claim that the Senate Ethics Committee "acknowledged that Senator Craig's legal expenditures 'relate to or arise by virtue of the service of the Member.'" Defs.' Opp. at 3.

It is undisputed that defendants sought advice from counsel as to whether they could lawfully expend campaign funds in connection with Senator Craig's legal matters in Minnesota, and that counsel took the position that the expenditures were authorized. *See* Ex. 5 to FEC Mot. [Dkt. # 16-5] at 1 (letter from counsel to Senator Craig dated October 4, 2007 stating, "it is our

conclusion that you may utilize campaign funds to pay for all of your legal expenses relating to this matter"). Throughout their opposition brief, defendants repeatedly claim that their reliance on the advice of counsel indicates that they acted in good faith. *See, e.g.*, Defs.' Opp. at 2 ("Senator Craig sought the advice of counsel and made the expenditures only after receiving authorization from counsel."); *id.* at 7 ("Based on the legal advice, defendants were confident that the use of campaign funds for these expenditures was legal and customary. Indeed, they would not have made the committee expenditures had they not received authorization from counsel."); *id.* at 19 (citing reliance on advice of counsel as evidence of defendants' "good faith efforts to comply with the Act"); *id.* at 20 (same); *id.* at 23 (same).

But whether or not defendants would have made the expenditures at issue in this case without counsel's approval, defendants have been on notice since at least February 13, 2008 that their expenditures might not comport with the law. *See* Ex. 7 to Defs.' Opp. at 1–2 (public letter of admonition from Senate Ethics Committee dated Feb. 13, 2008 stating "[i]t appears that some portion of these expenses may not be deemed to have been incurred in connection with your official duties, either by the Committee or by the Federal Election Commission"). Defendants persisted in expending campaign funds on the Minnesota lawsuits for several more months, despite this warning. *See, e.g.*, Ex. 1 to FEC Mot. at "Craig 75" (legal invoice from the Kelly law firm for legal services provided between April 1, 2008 and September 15, 2008). And defendants decided to forego what would have been a significant demonstration of good faith and declined to request an advisory opinion from the FEC about their spending before disbursing the funds. FEC Mem. at 26.

In sum, the Court finds that the evidence of defendants' good or bad faith in this case points in both directions: defendants ignored clear admonitions against their use of campaign

funds and declined to seek an advisory opinion from the FEC, but they also relied on the advice of counsel and disclosed all of their spending. Thus, the Court concludes that the factor that takes defendants' "faith" into consideration was largely neutral, and it neither aggravates nor mitigates the penalty the Court will impose.

2. The injury to the public, the necessity of vindicating the FEC's authority, and the need to deter and punish violations of the FECA.

The Court finds that these factors weigh in favor of imposing a penalty in this case. First, although the injury to the public caused by defendants' misappropriation of campaign funds is difficult to discern, "there is always harm to the public when FECA is violated." *P.E.O.P.L.E. Qualified*, 1991 WL 241892, at *2. It is also reasonable to conclude that defendants' actions caused harm to the contributors to the Craig Committee, who presumably intended that their donations be used for lawful, campaign-related purposes. Moreover, a penalty here would certainly vindicate the authority of the FEC and strengthen its ability to enforce the FECA's personal use ban in the future.

In addition, the FEC argues that a penalty is necessary to deter similar violations and to punish defendants, noting that the purpose of a civil penalty is "to punish culpable individuals," not just to "restore the status quo." FEC Reply at 13, quoting *Tull v. United States*, 481 U.S. 412, 422 (1987). Defendants counter that there is no need for deterrence or additional punishment in this case because they, and especially Senator Craig, have already paid a high price for their actions. Defs.' Opp. at 20–21. But defendants' view of deterrence is too narrow: a penalty would deter not only future misconduct by these defendants, but also the misappropriation of campaign funds by others. Therefore, the Court finds that these considerations all weigh in favor of imposing a penalty in this case.

3. The defendants' ability to pay.

Despite defendants' protestations to the contrary in their opposition brief, defendants' counsel acknowledged at oral argument that Senator Craig has the ability to pay the full $216,984 disgorgement plus the $70,000 penalty that the FEC seeks. Hr'g Tr. at 48–49[21] ("It would not be our position that [Senator Craig] could not afford to pay."). Therefore, there is no question that Senator Craig can also pay the reduced total that the Court will impose. But defendant the Craig Committee has "now spent virtually all its funds," and would have no ability to pay its own penalty. *See* FEC Mem. at 17 n.12.

4. The Court's analysis.

The Court finds that all of the *Furgatch* factors are either neutral or weigh in favor of imposing a penalty. This is not a case like *Furgatch*, where the defendant plainly acted in bad faith and refused to report the unlawful expenditures, which warranted a penalty equal to the amount of the violation. *See* 869 F.2d at 1259. On the other hand, this is also not a case like *Ted Haley*, where the court assessed no penalty because the statute and regulations were unclear, the defendants acted in good faith, and the defendants quickly remedied their unintentional violations. *See* 852 F.2d at 1116–17. Some penalty, therefore, is called for.

But the Court does not agree that defendants' violation warrants the full $140,000 penalties the FEC seeks on top of an order of disgorgement. The FEC states that it requested penalties in the amount of $70,000 for defendants Craig and the Craig Committee because the sum must be sufficient to deter and punish violations of section 30114(b) without being overly punitive. *See* FEC Mem. at 18. At oral argument, counsel for the FEC noted that penalties that

21 All citations to the transcript of the hearing on the FEC's motion for summary judgment are to the unofficial transcript.

are too low are ineffective, since they "threaten[ ] to become something equivalent to interest on a loan payment for the immediate use of campaign funds." Hr'g Tr. at 16.

This argument has some force, but in the court's view, the proposed $140,000 penalty would be excessive given all of the facts and circumstances, including the amount that was diverted. The Court notes that the total penalty requested here exceeds the assessment in most of the conciliation agreements that the FEC cites in its pleadings. *See, e.g.*, Campbell for Senate Conciliation Agreement at 3–4 (Oct. 31, 2003) (assessing civil penalty of $79,000 where violation was not willful or knowing and requiring refund of up to $104,434 in excess contributions); Meeks for Congress Conciliation Agreement at 8 (Feb. 4, 2008) (assessing civil penalty of $63,000 against campaign committee and ordering refund and disgorgement of other funds). *But see* America Coming Together Conciliation Agreement at 11–12 (August 24, 2007)[22] (assessing civil penalty of $775,000 where organization had misreported and misspent "millions of dollars" in funds but had agreed to wind down its affairs). Therefore, in an exercise of the Court's discretion, and in consideration of all the factors presented in this case, the Court will order a penalty in the amount of $45,000, which is between 20 and 25 percent of the amount diverted to Senator Craig's personal use. The Court finds this civil penalty to be sufficient but not greater than necessary and it will be added to the $197,535 disgorgement for a total order of $242,535.

Furthermore, the Court will not order that any funds be disgorged to the Craig Committee,[23] nor will it impose a penalty on the Craig Committee, as the FEC requests. At oral

22 *Available at* http://eqs.fec.gov/eqsdocs/000061A1.pdf.

23 The parties agreed that any disgorged funds should be repaid to the Craig Committee. FEC Mem. at 17; Defs.' Opp. at 24 n.19. But the FEC proposed in the alternative that the funds be paid to the U.S. Department of the Treasury. FEC Mem. at 17 n.12.

argument, the FEC acknowledged that the Craig Committee is essentially defunct; Senator Craig has no plans to run for office again, and he is the Committee's only staff member. Hr'g Tr. at 14; *see also id.* at 19 (reflecting FEC counsel's statement that "the Committee at this point seems to be a shell"). So a disgorgement from Senator Craig to the Committee would essentially move the funds from one pocket to another, and then he would be solely responsible for the proper disposition of the funds. Moreover, counsel for the FEC was "not sure" whether it was possible to identify and repay any of the donors whose funds defendants converted to personal use on some sort of pro rata basis. *Id.* at 11. And, again, without the disgorgement, the Craig Committee has essentially no money. *See* FEC Mem. at 17 n.12. So if the Senator repaid the Committee and it was ordered to pay a penalty, the outcome would be the same as under the terms of the Court's order.

Under these circumstances, where the Craig Committee is little more than an alter-ego for Senator Craig himself, the Court finds that any disgorgement of funds to the Committee would be little more than an empty gesture and a logistical headache. So, the Court will simply order Senator Craig to pay both the $197,535 disgorgement and the $45,000 penalty to the U.S. Department of the Treasury.

*C. The Court will issue declaratory relief.*

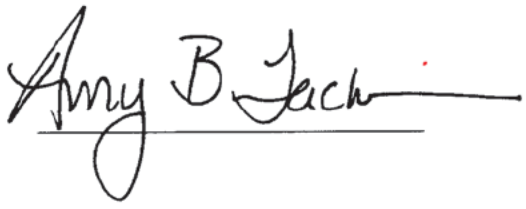
The FEC asks the Court to declare that defendants violated the FECA by converting campaign funds to personal use. Defendants do not object to this request beyond their general contention that they did not break the law. As the Court has already determined that defendants did, indeed, violate section 30114(b) by converting campaign funds to the personal use of Senator Craig, the Court will issue the declaration that the FEC seeks.

*D. The Court will not impose a permanent injunction.*

The FEC seeks a permanent injunction precluding defendants from repeating the unlawful conduct involved in this case. FEC Mem. at 30. "An injunction is appropriate 'if there is a reasonable likelihood that the wrong will be repeated.'" *P.E.O.P.L.E. Qualified*, 1991 WL 241892, at *1, quoting *SEC v. Mano Nursing Ctrs., Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972); *see also Friends of Jane Harman*, 59 F. Supp. 2d at 1059 ("Injunctive relief is appropriate only when there is a likelihood of future violations."). Senator Craig is no longer an officeholder, and the FEC has produced no evidence that defendants are likely to violate the FECA in the future. Therefore, injunctive relief is unwarranted in this case.

**CONCLUSION**

The Court finds that defendants are liable as a matter of law for violating the FECA's ban on converting campaign funds to personal use. The Court will therefore order Senator Craig to pay $242,535 to the U.S. Department of the Treasury, including a disgorgement of $197,535, the funds defendants unlawfully converted, plus a penalty of $45,000. The Court will also issue a declaration that defendants violated section 30114(b) by converting campaign funds to the personal use of Senator Craig. The Court will not, however, issue a permanent injunction in this case, nor will it order any relief against the Craig Committee. A separate order will issue.



AMY BERMAN JACKSON
United States District Judge

DATE: September 30, 2014