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April 1, 2005

Via Facsimile and Mail

John Lindback, Director
Jennifer Hertel, Compliance Specialist
Oregon Secretary of State Elections Division
141 State Capitol
Salem, OR 97310

Re: Notices of Civil Penalty — Case Nos. L8145, L8146

Dear Mr. Lindback and Ms. Hertel:

This office represents Defense of Marriage PAC (DOMC PAC) and Mr. Raphael Antico in his capacity as Treasurer of DOMC PAC. We submit the following written response and request for waiver of penalty for the campaign finance violations alleged in the above numbered cases.

The three civil penalties at issue stem from incompleteness in the two supplements to the second pre-election contribution and expenditure report from the November 2004 election. DOMC PAC and Mr. Antico do not deny that certain contributions were missed in these supplemental reports. In fact, in the case of the penalty on $9,200.00 in contributions left off the first supplement to the second pre-election report, DOMC PAC and Mr. Antico do not object to the imposition of the $4,140.00 penalty for reporting these contributions 45 days late, on December 30, 2004.

However, because there exists no mechanism for amending the supplemental reports prior to the filing of the post-election report, DOMC PAC and Mr. Antico respectfully request waiver of the additional two penalties—totaling $5,671.23 from the first supplemental report and $10,000.00 from the second supplemental report—on the grounds that it is arbitrary, capricious, and contrary to the purpose of the Oregon campaign finance statutes to impose such penalties for good faith errors that are uncorrectable under the current report amendment procedure. Simply put, while DOMC PAC and Mr. Antico take full responsibility for the 45 day delay in reporting the $9,200.00 in contributions—even though such oversight was in good faith and reported nonetheless— to impose the remainder of the civil penalties is unfair where the Elections Division does not afford the committee any opportunity to amend the supplements to the pre-election report prior to the post-election report for December 2, 2004.

*Also Admitted to Practice in Washington

I. PENALTIES AND FACTUAL SUMMARY OF ERRORS

The first penalty proposed by the Elections Division (case no. L8415) stems from $21,812.42 in contributions that were not reported in the first supplement to the second pre-election report (hereinafter "first supplement") submitted on October 25, 2004. The first supplement covered contributions received between October 18 and October 24, 2004. As detailed in the affidavit of Mr. Antico, attached, the 17 contributions missing from the October 25 first supplement were due to technical flaws in the database used by the committee. *See* Antico Affidavit, *attached.* Further, one of these contributions ($1,000.00 from Christian Life Church) was actually received on October 29, 2004, outside the time window for the first supplement, and therefore is not properly part of the first supplement. *See* Check from Christian Life Church dated October 29, 2004, *attached.* A scriveners' error in recording the date the check was received is responsible for its inclusion in this group by the Elections Division. *See* Antico Affidavit, *attached.* The remaining good faith errors were corrected in the December 2, 2004 post election report.

The second penalty proposed by the Elections Division (case no. L8415) stems from $9,200.00 in contributions that were not reported in the first supplement. The Committee and Treasurer did not discover these discrepancies until after the December 2, 2004 report had been filed. These additional contributions were included in good faith on the December 30, 2004 post-election amendment.

The third penalty proposed by the Elections Division (case no. L8416) stems from $26,611.00 in contributions that were not reported in the second supplement to the second pre-election report (hereinafter "second supplement") submitted on October 25, 2004. The second supplement covered contributions received between October 25 and October 28, 2004. This penalty imposes a 3%/day penalty on these contributions up to the maximum penalty of $10,000.00, which is being enforced against DOMC PAC and Mr. Antico. The most significant part of this penalty stems from a scriveners' error in recording the amount of a single contribution on the second supplement. A contribution of $25,000.00 was timely recorded and reported incorrectly as $2,500.00 on the second supplement. This error was corrected by DOMC PAC and Mr. Antico at the next possible opportunity in the December 2, 2004 post-election report. A second significant error was the reporting of the Coykendall contribution of October 27, 2004. The Coykendall contribution was only $100.00, but it was erroneously reported as $1,001.00 in a "correction" on the December 2, 2004 post-election report. *See* Check from Coykendalls dated October 27, 2004, *attached.* Even in the aggregate for this contributor, this contribution triggers no reporting requirement. A third error resulted from a simple transposition of numbers involving a contribution from City Bible Church wherein two numbers were simply transposed. The remaining good faith errors were corrected in the December 2, 2004 post election report.

II. REQUEST FOR WAIVER OF PENALTIES

DOMC PAC and Mr. Antico respectfully request the Elections division waive a portion of the penalties proposed, as discussed in detail below. The rationale for requesting this waiver is twofold.

First, the errors in reporting that should in fact trigger no penalty whatsoever should be waived. Specifically, the contribution from Christian Life Church on October 29, 2004 does not fall within any supplemental reporting period, and DOMC PAC and Mr. Antico should not be penalized for not reporting this contribution in the supplement reports. So too the Coykendall contribution of $100.00 is not a reportable amount, the scriveners' error in stating that amount as $1,001.00 should be ignored, and no penalty assessed on the $1,001.00 that was never received. DOMC PAC and Mr. Antico respectfully request that penalties not be assessed on these factually erroneous contribution reports.

Second, DOMC PAC and Mr. Antico request waiver on penalties that resulted from good faith mistakes made in reporting contributions on the first and second supplements, with no intent to deceive, furthermore uncorrectable by amendment under the current campaign finance reporting process, and yet corrected at the earliest possible opportunity. Specifically, no penalties should be assessed against any of the errors from the first and second supplements that were corrected in the December 2, 2004 post-election report, because there was no way under the current system in which DOMC PAC and Mr. Antico could remedy these errors before that time. The uncorrectable nature of the supplement reports makes it arbitrary and capricious for the Elections Division to impose penalties for good faith errors on those supplement reports.

For instance, the most significant error, and the largest proportion of the penalties assessed against DOMC PAC and Mr. Antico stem from a single typographical mistake in recording the $25,000.00 contribution on the second supplement. This oversight alone comprised over 80% of the contribution reporting error on the second supplement, and with the 3% penalty multiplier, resulted in $14,850.00 in penalties (reduced to the maximum $10,000.00 penalty, the entire penalty imposed). Yet there is no way, given the form requirments and the amendment process, that this simple typographical error could be addressed until the December 2, 2004 post-election report. What makes this penalty unfair in the current situation is the absolute inability to correct an error so plainly made in with no intent to deceive.

Notably, with other contribution reports required under the campaign finance reporting laws, a committee has the ability to provide notice of the need to amend a report within 10 business days, amend the report in a timely fashion, and have the amendment relate back to the original filing. *See* 2004 Campaign Finance Manual at 91. However, the Campaign Finance Manual is clear in stating that reports can ***only*** be amended pursuant to "the appropriate amendment form." *Id.* When one reviews the amendment form, one immediately notices that there is no option to use the amendment form to correct the ***first and second supplements***. *See* Amendments Form,

attached. Quite simply, unlike all other campaign finance reports required under the current system, the first and second supplements are uncorrectable once submitted. Any error in the first and second supplements imparts strict liability and necessarily significant fines on a committee and treasurer, even for good faith typographical errors.

This policy demands a degree of perfection in the first and second supplements—reports covering the hectic days immediately prior to an election—not demanded of any other report due in the course of the election cycle. The very fact that there is an amendment process for other reports makes the strict liability that flows from any error on the first and second supplements unjustifiably harsh. Where one is absolutely barred from correcting simple, good faith errors that occur in the confusing and busy final days of an election—especially where all other reports in the cycle may be corrected by amendment—and is instead punished substantially when in honesty these errors are reported at the earliest possible opportunity thereafter, the system no longer meets even elementary notions of fairness.

Both Oregon caselaw and the Fourteenth Amendment to the United States Constitution forbid arbitrary and capricious exercise of legal authority. *See Stehle v. State Dept. of Motor Vehicles*, 229 Or 543, 550, 368 P2d 386 (1962) (the judiciary provides protection "against capricious or arbitrary action by administrative officers"); *Savage v. Martin*, 161 Or 660, 673–74, 91 P2d 273 (1939) ("the Fourteenth [Amendment] as respects state action, [does] not prohibit governmental regulation of private business for the public welfare, but require[s] only that the laws shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object to be attained"); *Carnation Co. v. Department of Agriculture*, 7 Or App 223, 228–29, 488 P.2d 1385 (1971), *citing* 4 Davis, ADMINISTRATIVE LAW TREATISE 114 § 29.01 (1958). Drawing unnatural distinctions between two similar occurrences has been held to be arbitrary and capricious under Oregon law. *See Buena Dairy Associates v. Department of Agriculture*, 38 Or App 35, 48, 590 P.2d 240 (1979) ("the Department's attempt to distinguish between that transaction and the final transactions in interpreting its regulations was arbitrary and capricious: if the regulations permit one, they cannot reasonably prohibit the other. If there is any distinction, it is one without a difference.").

As discussed by the Oregon Court of Appeals, "the word 'arbitrary' is not a catchall provision. It may not be used as the vehicle for a policy decision. Rather, it applies to action which is taken without cause, unsupported by substantial evidence, or nonrational." *Paul v. Personnel Division*, 28 Or App 603, 608, 560 P.2d 293 (1977). Here the action of imposing substantial penalties for good faith errors on reports that the committee and treasurer are not permitted to correct, when at the same time affording an opportunity to correct substantively identical reports at other times, is irrational within the meaning of due process law. In sum, it is unlawful under Oregon administrative law as well as unconstitutional under federal due process to impose this form of strict liability on mistakes made in the first and second supplements.

Thus, DOMC PAC and Mr. Antico respectfully request that penalties not be assessed on errors in the first and second supplemental reports where these errors were corrected at the earliest possible opportunity—*i.e.* in the December 2, 2004 post election report. The first and third penalties (case nos. L8415 in part and L8416 in *toto*) should therefore be waived in their entirety.

I wish to highlight that the second penalty (case no. L8415 in part), for the $9,200.00 in contributions not reported until December 30, 2004 (a maximum of $1,000.00 under the current penalty matrix), is specifically ***not*** a part of this "due process" waiver request. Although the errors comprising the second penalty occurred in good faith and were reported at the earliest possible opportunity under the circumstances available with the database, DOMC PAC and Mr. Antico recognize that these errors were not corrected at the earliest ***possible*** opportunity, and thus do not trigger the same arbitrariness and due process concerns as the otherwise uncorrectable mistakes that comprise the bases for the first and third penalties. We take responsibility without exception for this item.

III. CONCLUSION

DOMC PAC and Mr. Antico respectfully request that the first and third penalties not be assessed on the grounds that to do so would violate state administrative law standards and fundamental notions of fairness. We do acknowledge that the second penalty is justified under this standard and accept the $1,000.00 maximum penalty for the errors underlying the second penalty.

We will continue to cooperate with your office. My client desires to accept responsibility for its honest mistakes and failures, but will resist those we deem overbroad, unfair, or unjust.

Very truly yours,

Kelly Clark

KC/ksr
cc: Defense of Marriage Coalition PAC

PENN W. RETTIG II
BUSINESS ACCOUNT
5180 MIRAMAR ST. PH-541-344-6315
EUGENE, OR 97405

7401

96-505/1232
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Date 10/24/04

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(1-866-486-7782)

For

McClarke American

96-7488/3232

6498

JOHN COYKENDALL
ACROCRAFT CONSTRUCTION COMPANY
16337 SE DAGMAR RD.
MILWAUKIE, OR 97267

DATE 10/27/04

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SPOKANE, WA
28-8/1251

10/24/2004

AY TO THE RDER OF The Defense of Marriage Coalition $ **1,000.00

One Thousand and 00/100********** DOLLARS

The Defense of Marriage Coalition
c/o City Bible Church
9200 NE Fremont
Portland, OR 97220

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MP

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10/24/2004

) THE
OF Defense of Marriage Coalition $ **3,500.00

ıree Thousand Five Hundred and 00/100********** DOLLARS

Defense of Marriage Coalition

Security Features Included. Details on back.

MP

AFFIDAVIT OF RAPHAEL C ANTICO
Treasurer: Defense of Marriage Coalition PAC
RE: CASE NUMBER L8145
CASE NUMBER L8146

1. I, Raphael C. Antico, swear that the following affidavit is true and correct. I make this affidavit based on my personal knowledge, and if called as a witness, I would testify as set forth herein.

2. I have been acting in the role of Treasurer for multiple PACs over the last 4 years. My record during my time as a Treasure has been impeccable.

3. During the year 2004, I prepared and authorized all of the contribution and expenditure reports for the Defense of Marriage Coalition PAC's campaign in support of Measure 36 including the first supplemental report.

4. The first supplemental was submitted October 25, 2004. In signing the report, I attested to the accuracy of the report.

5. However, between October 26, 2004 and December 2, 2004 I found our database was missing some contributions and included some inaccuracies. At that point I decided we needed to do a full internal auditing of all contributions for the period in question. In this process I found the discrepancies, however all discrepancies appeared to be at random, meaning there was no traceable, consistent error. After finding the missing/inaccurate contributions with the intent to clarify any discrepancies in our reporting, I included the previously unreported transactions in our December 2, 2004 Post Election Contribution and Expenditure Report.

6. As found in your analysis, there were four contributions that failed to be reported on the December 2nd Contribution and Expenditure Report. These contributions were in fact found after the December 2nd report was filed and were subsequently reported on time within the Amendment to the

Post Election Report.

7. I would like to provide some background as to why some of these contributions were reported inaccurately or not at all. I reported Christian Life Church's $1,000.00 contribution as being received on 10/24/2004, however the check was actually received on 10/29/2004 placing it outside the date range for both supplemental reports.

8. I reported Robert Pearson's $2,000.00 contribution accurately on the supplemental report in question, yet the $100.00 contribution received on the same day was not reported. Again, I found the missing contribution and in good faith reported it in the December 2nd Post Election Report.

9. In the case of Victorious Faith Family Church ($1,000.00), Church of the Harvest ($1,000.00), and Abbotsford Christian Assembly ($687.42) I would submit to you that these churches combine for additional contributions totaling over $5,000.00 that were reported on time and accurately.

10. With respect to the remaining contributions in question, these discrepancies exist simply because of honest clerical errors on behalf of the campaign staff and ultimately myself as the Treasurer. There are no clear explanations for these discrepancies other than to say that the mistakes were corrected in the December 2nd Post Election Report accurately.

11. The second supplemental was submitted October 29, 2004. In signing the report, I attested to the accuracy of the report.

12. However, between October 29, 2004 and December 2, 2004 I found our database was missing some contributions and included some inaccuracies. At that point I decided we needed to do a full internal auditing of all contributions for the period in question. In this process I found the discrepancies, however all discrepancies appeared to be at random, meaning there was no traceable, consistent error. After finding the missing/inaccurate contributions with the intent to clarify any

discrepancies in our reporting, I included the previously unreported transactions in our December 2, 2004 Post Election Contribution and Expenditure Report.

13. I would like to provide some background as to why some of these contributions were reported inaccurately or not at all. There was an honest typographical error in the reporting of Fieldstead and Company's $25,000.00 contribution. We reported it as $2,500.00, although I have copies of emails from the campaign data entry manager and we reported it correctly on the December 2nd C&E. This transaction alone if found to be a violation would result in the $10,000.00 penalty. I urge you to please reconsider enforcement of you proposed penalty relating to this honest and unfortunate clerical error.

14. I reported Church Upon the Rock's $1,000.00 contribution as being received on 10/27/2004, however the check was actually received on 11/1/2004 placing it outside the date range for both supplemental reports.

15. I reported Christie Coykendall's contribution as $1,001.00, however again a very unfortunate clerical error because her actual gift was only $100.00, combined with other gifts she does not even qualify to have been reported on the second supplemental.

16. In the case of City Bible Church there is an obvious simple clerical error in that two numbers in the contribution amount reported ($7594.70) were flip-flopped and should have read $7954.70. Again this was an honest error on our part, corrected in the December 2nd Report.

17. With regards to Melissa Briewick's $200.00 contribution, you noted and I concur, that in the very same second supplemental I reported the $10,000.00 contribution that was received on 10/27/2004. This is another case of a very honest clerical error.

18. With regards to Cowlitz Valley Christian Center's $150.00 contribution, you noted and I concur, that in the very same second supplemental I reported the $1,000.00 contribution that was received on 10/27/2004. The organization has given and additional $1,672.00 all of which have been reported on time and accurately. This is another case of a very honest clerical error.

19. Carmen Stoneking had two contributions left off of the second supplemental ($500.00 & $300.00) Carmen has made $7,500.00 in additional contributions that were reported on time and accurately.

20. Penn Rettig II had two contributions left off of the second supplemental ($500.00 & $100.00). Penn has made $1,715.00 in additional contributions that were reported on time and accurately.

21. With respect to the remaining contributions in question, these discrepancies exist simply because of honest clerical errors on behalf of the campaign staff and ultimately myself as the Treasurer. There are no clear explanations for these discrepancies other than to say that the mistakes were corrected in the December 2nd Post Election Report accurately.

22. I would like to stress that there are currently no processes in place for amending the two supplemental reports due shortly before the election. Throughout this entire process I have done my due diligence in reporting errors and inconsistencies in a timely manner. However with no processes in place for amending a supplemental report, it would have been impossible for me to make the needed corrections at anytime before the December 2nd Contribution and Expenditure Report. In the 2004 Campaign Finance Manual on page 91 the manual states "if the committee submits the requested information on the appropriate amendment form by the amendment deadline, the report will be considered sufficient." As you probably know, the PC2 amendment form contains no option for amending a supplemental report. Therefore, there is no "appropriate amendment form" and my only

clear recourse, as Treasurer upon discovery of an error, is to make the correction and report the correct information on the next full Contribution and Expenditure Report.

23. My intent has always been to disclose accurate and complete information to the Elections Division regarding every campaign finance report I have been involved in producing, and I believe that given the circumstances my actions were consistent with the rules of campaign finance reporting.

DATED this 15 day of April, 2005.

Raphael C. Antico

SWORN TO and Subscribed before me on the 15 day of April, 2005.

OFFICIAL SEAL
JENNELL WATKINS
NOTARY PUBLIC-OREGON
COMMISSION NO. 385938
MY COMMISSION EXPIRES OCT 18, 2008

Notary Public for the State of Oregon
My Commission Expires: Oct 18 2008