UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff(s), **CASE NUMBER: 04-80372**
HONORABLE VICTORIA A. ROBERTS

v.

D-1 CARL MARLINGA,
D-2 RALPH R. ROBERTS,
D-3 JAMES A. BARCIA

Defendant(s).
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OPINION AND ORDER REGARDING
MOTIONS TO DISMISS

I. INTRODUCTION

This matter is before the Court on Defendant Carl Marlinga's Motion to Dismiss the Indictment (Doc. #23) in its entirety, Defendant James Barcia's Motion to Dismiss Count Five of the Indictment (Doc. #30), and Defendant Barcia's Motion to Dismiss Counts Five (on different grounds) and Eight of the Indictment (Doc. #29). For the reasons stated, the Court **DENIES** all three motions.

II. BACKGROUND

Defendant Carl Marlinga ("Marlinga") is the former Macomb County Prosecuting Attorney. Defendant James Barcia ("Barcia") is currently a member of the Michigan State

Senate and a former member of the United States House of Representatives. The third Defendant is Ralph Roberts ("Roberts"), a Macomb County, Michigan realtor and owner of Ralph Roberts Realty. He joined in Marlinga's motion to dismiss Counts One, Two and Seven.

The charges stem from alleged violations of federal campaign finance laws. Marlinga and Barcia allegedly engaged in a convoluted scheme involving illegal campaign contributions. The scheme began with the case of *People v James Hulet* in Macomb County Circuit Court. In 2001, Hulet was charged with numerous felony offenses.[1] At that time, Marlinga was a candidate for election to the United States House of Representatives from Michigan's Tenth Congressional District. Marlinga's official campaign fundraising committee was called "Carl Marlinga for Congress."

From December 2001 through August 2002, Hulet, through his attorney, allegedly made a series of campaign contributions to Marlinga's fundraising committee. The contributions were all made while Hulet's case was pending, allegedly in exchange for Marlinga's assistance in his official capacity in negotiating a favorable plea for Hulet. Because 2 U.S.C. §441a of the Federal Election Campaigns Act (FECA) limits individual contributions to $2,000, Marlinga allegedly directed Hulet's attorney[2] to make contributions

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[1]Hulet was charged with criminal sexual conduct in the first degree, three counts of delivery of a controlled substance to a minor, felony firearm, possession with intent to deliver a controlled substance, possession of MDMA (ecstacy), maintaining a drug house, and contributing to the delinquency of a minor.

[2]Hulet's attorney is not named in the indictment and will be referred to simply as "Hulet's attorney."

in excess of that amount through conduits or intermediaries. Allegedly, Defendant Barcia was a conduit.

In 2002, Barcia was running for the Michigan Senate and maintained a state campaign committee called Friends of Jim Barcia. Through December 2002, Barcia was a Representative in the United States House of Representatives and he had an official federal campaign fund called "Barcia for Congress." He also sponsored a federal Political Action Committee ("PAC") called "Progressive Leadership for America." Marlinga allegedly told Hulet's attorney that if he contributed to Friends of Jim Barcia, Barcia would contribute the funds back to Carl Marlinga for Congress. Accordingly, Hulet's attorney, between June and August 2002, made a total of $4,000 in contributions to Barcia's state campaign fund. In turn, Barcia made contributions in the same amount to Marlinga's federal campaign fund, but he made them from his federal campaign fund and PAC, rather than from Friends of Jim Barcia.

During the same time, Hulet's attorney purchased two $1,000 money orders payable to Carl Marlinga for Congress. Marlinga allegedly instructed Hulet's attorney to list a third party as the purchaser in order to disguise the true contributor. Hulet's attorney also allegedly made a $10,000 contribution in December 2001, structured in the same way, via five $2,000 money orders each listing different purchasers.

Finally, a second alleged conduit or intermediary was the Michigan Democratic Party ("MDP"). Defendant Marlinga allegedly told Hulet's attorney that if he made a contribution to the MDP and delivered the check or money order to Marlinga directly, Marlinga would receive a like amount from the MDP. Therefore, in August 2002, Hulet's

attorney made another $10,000 contribution to the MDP as instructed. After receiving the funds, the MDP made an internal notation that the entire contribution was to be used for the Tenth Congressional District race to support Marlinga's run for Congress. Marlinga says that he never actually received this contribution from the MDP.

The scheme Marlinga allegedly participated in with Roberts was more straightforward. The Indictment alleges that he accepted campaign contributions from Roberts in exchange for Marlinga's assistance, in his official capacity, in persuading the Michigan Supreme Court to grant a new trial to Jeffrey Moldowan.[3] The contributions from Roberts also allegedly exceeded statutory limits. And, a conduit contribution was allegedly made by Roberts through the Southeast Michigan Business Network PAC ("Southeast PAC").

On various grounds, Marlinga and Barcia request that the Court dismiss all of the charges against them. They are:

> **Count One** charges Marlinga and Roberts with conspiracy to defraud and deprive citizens of their right to the honest services of Carl Marlinga as the Macomb County Prosecutor using the mails in violation of 18 U.S.C. §§ 1341, 1346, and 371;
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> **Count Two** charges Marlinga and Roberts with the substantive offense of defrauding and depriving citizens of their right to the honest services of Carl Marlinga as the Macomb County Prosecutor using the mails in violation of 18 U.S.C. §§ 1341 and 1346;
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> **Counts Three and Four** charge Marlinga with defrauding and depriving citizens of their right to his honest services as the Macomb County Prosecutor using wire communications in violation of 18 U.S.C. §§ 1341 and 1346;

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[3]In 1991, Jeffrey Moldowan was convicted of assault with intent to commit murder, criminal sexual conduct, and kidnapping. *People v Moldowan.*

Count Five charges Marlinga and Barcia with making a false statement to an agency of the United States, aiding, abetting, counseling, commanding, inducing and procuring in violation of 18 U.S.C. §§ 1001(a), 2(a);

Count Six charges only Marlinga, and mirrors Count Five, except it alleges that the Michigan Democratic Party served as the conduit for unlawful campaign donations;

Count Seven charges Marlinga and Roberts with procuring contributions to Carl Marlinga and Carl Marlinga for Congress which in the aggregate exceeded the $2,000 contribution limitations by concealing conduit contributions in violation of 21 U.S.C. §§ 441a(a)(1)(A), 441a(a)(8), 437g(d), and 18 U.S.C. § 2;

Count Eight charges Marlinga and Barcia with exceeding limits on contributions, procuring, commanding, and counseling in violation of 2 U.S.C. §§ 441a(a)(1)(A), 441a(a)(8), 437g(d), and 18 U.S.C. § 2;

Count Nine charges Marlinga with procuring contributions to Carl Marlinga and Carl Marlinga for Congress which in the aggregate exceeded the $2000 contribution limitations by concealing conduit contributions in violation of 441a(a)(1)(A), 441a(a)(8), 437g(d), and 18 U.S.C. § 2.

III. ANALYSIS

A. COUNTS ONE THROUGH FOUR

Defendant Marlinga moves for dismissal of Counts I through IV on two grounds. He asserts that 1) the Indictment on these Counts is defective, because it improperly adds an element to the offenses that is not included in the statutes, and 2) 18 U.S.C. §1346 is unconstitutionally vague as applied to him. There is no merit to either assertion.

i. The Indictment Adequately Alleges a *Quid Pro Quo*

Marlinga is charged with conspiracy to commit "honest services" mail fraud (Count One), and with committing "honest services" mail (Count Two) and wire fraud (Counts Three and Four). In each Count, the Indictment alleges that Marlinga was implicitly and explicitly offered, and that he "*implicitly and explicitly* agreed to accept, contributions to

Carl Marlinga for Congress, knowing that they would improperly influence and otherwise affect Defendant Marlinga in the performance of his official duties, thereby constituting an unlawful *quid pro quo*." *See* Indictment at Ct. I, ¶¶3, 4; Ct. 2, ¶2; Cts. 3 and 4, ¶2 (emphasis added).

Marlinga contends that the Government can only establish "honest services" mail and wire fraud by proving that his official actions were the result of an *"explicit"* agreement to take those actions as a *quid pro quo* for campaign contributions. An *"implicit"* agreement, says Marlinga, would not be sufficient to support the charge. Therefore, Marlinga asserts that the Government's use of the phrase "implicit and explicit" in Counts One through Four creates a defect in the Indictment by including permissible and impermissible grounds for establishing criminal liability. Consequently, Marlinga asserts that it is impossible to know whether the Grand Jury reached unanimous consent on each of the counts on permissible grounds. Therefore, Marlinga argues that the only remedy is to dismiss Counts One through Four -- simply striking the improper language would not enlighten whether the Grand Jury unanimously agreed on proper grounds.

The parties agree that the same analysis that applies to violations of the Hobbs Act, 18 U.S.C. §1951, which is not charged in this case, applies to alleged violations of the mail and wire fraud statutes. Accordingly, Defendant Marlinga relies upon *McCormick v United States,* 500 U.S. 257, 273 (1991), in which the Court held that campaign contributions will only constitute extortion under the Hobbs Act when taken under color of official right and pursuant to an explicit *quid pro quo*:

> The receipt of such contributions is also vulnerable under the Act as having been taken under color of official right, *but only if the payments are made in return for an explicit promise or undertaking* by the official to perform or not perform an official act. In such situations the official asserts that his official conduct will be controlled by the terms of the promise or undertaking.

The *McCormick* Court rationalized that, unless there is an explicit *quid pro quo*, there is the danger that those seeking elected office will run afoul of the Hobbs Act by merely doing what is inherent and necessary to run and finance a campaign:

> Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator. It is also true that campaigns must be run and financed. Money is constantly being solicited on behalf of candidates, who run on platforms and who claim support on the basis of their views and what they intend to do or have done. Whatever ethical considerations and appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right." To hold otherwise would open to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures, as they have been from the beginning of the Nation. It would require statutory language more explicit than the Hobbs Act contains to justify a contrary conclusion.

500 U.S. at 272-273. Marlinga's argument is that, however it was articulated, expressly or impliedly, an explicit agreement is required under *McCormick*. However, Marlinga argues that as worded, the Indictment suggests that an implied agreement would suffice.

As Defendant Marlinga contends, strict reading of *McCormick* would arguably preclude the Government from relying upon an "implied" *quid pro quo* agreement.

However, the Supreme Court's later ruling in *Evans v United States,* 504 U.S. 255 (1992) and the Sixth Circuit's opinion in *United States v Blandford*, 33 F.3d 685 (6th Cir. 1994), *cert. den.,* 514 U.S. 1095 (1995), suggest that the parameters of *McCormick* are not so narrow.

The Supreme Court granted *certiorari* in *Evans* to address an issue that it declined to rule upon in *McCormick* -- whether an official must affirmatively induce a bribe in order to violate the Hobbs Act. The Court adopted the position taken by a majority of circuits and held that passive acceptance of a bribe is sufficient:

> [T]he Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.

504 U.S. at 268 (footnote omitted).

After *Evans*, the *Blandford* Court analyzed an issue similar to the one raised by Marlinga. In *Blandford*, defendant appealed the trial court's instructions to the jury on the Hobbs Act violation. The defendant asserted that the trial court's instructions were in error because they did not require the jury to find that he entered into an explicit agreement. Relying upon *Evans* and *McCormick,* the *Blandford* Court rejected the defendant's assertion. In its analysis, the *Blandford* Court stated that *Evans* merely clarified "that the *quid pro quo* of *McCormick* is satisfied by something short of a formalized and thoroughly articulated contractual arrangement (*i.e.,* merely knowing the payment was made in return for official acts is enough)." 33 F.3d at 696.

Further, the *Blandford* Court noted with approval Justice Kennedy's concurrence in

Evans, in which he stated that the *quid pro quo* requirement is a necessary element for a violation of the Hobbs Act, but that it may be either express or implied from an official's words or actions:

> *The official and the payor* ***need not state the quid pro quo in express terms***, for otherwise the law's effect could be frustrated by knowing winks and nods. ***The inducement from the official is criminal if it is express or if it is implied from his words and actions***, so long as he intends it to be so and the payor so interprets it.
>
> The criminal law in the usual course concerns itself with motives and consequences, not formalities. And the trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor.

Id at 274 (emphasis added). The *Blandford* Court, therefore, reasoned that the *McCormick* Court's use of the term "explicit" in defining the *quid pro quo* requirement, "speaks not to the form of the agreement between the payor and payee, but to the degree to which the payor and payee were aware of its terms, regardless of whether those terms were articulated." *Id.* That is, "*Evans* instructed that by 'explicit' *McCormick* did not mean 'express.'" *Id*. In a footnote, the *Blandford* Court went on to say that its distinction between the terms "explicit" and "express" is further supported by the definition of those terms in Black's Law Dictionary, 579-580 (6th ed. 1990):

> **Explicit.** Not obscure or ambiguous, having no disguised meaning or reservation. Clear in understanding.
>
> **Express.** Clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. *Declared in terms; set forth in words. Directly and distinctly stated. Made known distinctly and explicitly, and not left to inference. Manifested by direct and appropriate language, as distinguished from that which is inferred from conduct.* ***The word is***

usually contrasted with "implied."

(citation omitted, emphasis added). "Implicit" is not defined in Black's Law Dictionary. But, "implied" is defined as a "word used in law in contrast to 'express'; *i.e.*, where the intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from the circumstances, the general language, or the conduct of the parties." Black's Law Dictionary at 754.

Following the *Blandford* Court's reasoning, the Government's allegation that Defendant Marlinga implicitly and explicitly entered into a *quid pro quo* agreement does not misstate the law, and sufficiently charges an offense under mail and wire fraud statutes. Per *Evans* and *Blandford,* the government may satisfy its burden by either proving that a *quid pro quo* agreement was reached between Marlinga and the various parties either by express terms or impliedly through his words or actions. Contrary to Defendant's strict interpretation, *Evans* and *Blandford* make clear that the purpose of *McCormick's* requirement that the agreement be explicit was to ensure that the Government prove that it was clearly communicated between the parties that the official unambiguously accepted or agreed to accept campaign contributions in exchange for official action (or inaction). Counts One through Four of the Indictment allege that such an agreement was reached between Marlinga and Roberts. Therefore, the Court rejects Defendant's contention that the Grand Jury may have been confused or returned an Indictment on impermissible grounds.

ii. The Mail and Wire Fraud Statutes are Constitutional as Applied to Defendant Marlinga

Defendant Marlinga argues that the "honest services" provision of 18 U.S.C. §1346 is unconstitutionally vague as applied to him. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v City of Rockford,* 408 U.S. 104, 108 (1972). Vague laws encroaching upon constitutional interests may: 1) trap the innocent by failing to provide fair warning, 2) result in arbitrary and discriminatory application, and 3) inhibit protected expressions by inducing individuals to steer far wider of the unlawful zone than they would if the boundaries were clearly marked. *Id.* A statute is not impermissibly vague as long as it gives adequate warning of the activities it proscribes and sets forth explicit standards for those who must apply them. *Broadrick v Oklahoma*, 413 U.S. 601, 609 (1973).

Marlinga argues that the allegations in Counts One through Four arise solely from actions he took while acting lawfully in two capacities -- prosecuting attorney and candidate for public office. He asserts that, as prosecutor he was obligated to make the kind of discretionary decisions made in the *Moldowan* and *Hulet* cases, and as a candidate for elected office he was obligated and entitled to engage in fundraising activities. To the extent his obligations as prosecutor and congressional candidate temporarily overlapped, Marlinga asserts that the overlap was permitted since he functioned in two capacities. Marlinga asserts that he is being prosecuted because at times he discussed the exercise of both functions at the same time and with some of the same people, some of whom he says apparently had their own agenda. In short, Marlinga asserts that he is being prosecuted for simply doing his job and exercising his right to run

for elected office, a process that necessarily allows, and in fact requires, him to solicit support from some of the same people involved in cases pending in Macomb County. Under the circumstances as he sees them, Marlinga says that he could not have been expected to know that the coincidence of conversations and actions on which the charges are based would violate the "honest services" provision.

The failing in Marlinga's argument is that it is based entirely on his version of disputed facts. Contrary to his denials, the Government clearly alleges that Marlinga was not simply performing the functions of his position when he took the actions at issue in the *Moldowan* case. Rather, he is alleged to have purposefully entered into an agreement with Roberts to provide assistance, in his official capacity as prosecutor, in exchange for campaign contributions. In support of this allegation, the Government refers to multiple telephone calls and letters between Marlinga and Roberts regarding the *Moldowan* case and the actions that he would take on Moldowan's behalf. The Indictment also alleges that Roberts, during the same time frame, promised to and did make contributions to Marlinga's campaign. Though the evidence is circumstantial, reasonable jurors could find that the totality of the Government's evidence shows that Marlinga intended to and did enter into a *quid pro quo* agreement.

It is well settled that *quid pro quo* agreements are proscribed by law. *See McCormick, supra*; *Evans, supra*; *Blandford*, *supra; United States v Frost*, 125 F.3d 346 (6th Cir. 1997), *cert. den.,* 525 U.S. 810 (1998). Consequently, there is no basis for Defendant's claim that he could not have known that his alleged actions would violate the

"honest services" provision of the mail and wire fraud statutes.

For these reasons, the charges alleged in Counts One through Four will not be dismissed.

B. COUNTS FIVE THROUGH NINE

i. The Indictment Adequately Alleges Conduit Contributions in Counts Five through Nine

2 U.S.C. §441a(a)(8) of the FECA requires that contributions made through third parties, described as "conduits" or "intermediaries," be disclosed in campaign finance reports to accurately reflect the true donor:

> For purposes of the limitations imposed by this section, all contributions made by a person either directly or indirectly, on behalf of a particular candidate, including *contributions which are in any way earmarked or otherwise directed through an intermediary or conduit* to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

(emphasis added). Counts Five through Nine of the Indictment are based on the Government's claim that disguised contributions to Defendant Marlinga were "conduit" contributions within the meaning of 2 U.S.C. §441a(a)(8). Counts Five and Eight allege that Marlinga and Barcia participated in a scheme to use Barcia's state campaign account to assist Hulet's attorney in making a contribution to Marlinga's federal campaign. Barcia allegedly agreed to act as a conduit between Marlinga and Hulet's attorney, and Marlinga and Barcia failed to report the true source of the contribution. Counts Six and Nine allege a similar scheme with Hulet's attorney making the contribution through the MDP. Count Seven alleges that Defendant Roberts funneled a contribution to Marlinga through the

Southeast PAC.

Marlinga argues that these alleged series of transactions do not qualify as “conduit” contributions under the FECA. The essence of Marlinga’s argument is that there is no direct connection between the entities from which he directly received contributions and the alleged conduit entities that received contributions from third parties. For instance, Hulet’s lawyer allegedly gave money to Barcia’s *state* campaign account, but Marlinga only received a contribution from Barcia’s *federal* campaign account. Also, because the check he received from the PAC actually bounced before eventually being paid, Marlinga argues that Roberts’ money could not have been the source of the contribution that he received from the same organization two months later. He surmises that Roberts’ funds must have been put to other purposes.

The FECA does not define the terms “conduit,” “earmark,” or intermediary. However, Marlinga points out that the Federal Election Committee (“FEC”) regulation defining “earmarked contributions” defines each of the terms:

> (b) Definitions.
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> (1) For purposes of this section, "earmarked" means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.
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> (2) For purposes of this section, "conduit or intermediary" means any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee. . . .

11 C.F.R. §110.6(b). Marlinga argues that use of the phrase “receives and forwards” in subsection (b)(2) is consistent with the dictionary definition of a “conduit” -- a means of

conveying or distributing money.[4] He contends that, to come within that definition, the alleged transactions must be akin to the physical transfer of an identifiable portion of money or, at a minimum, that there must be a direct relationship between the money received and the money expended. According to Marlinga, however, the transactions alleged in the Indictment do not fit that description because there was no direct transfer of funds from the entity receiving the contributions from Hulet and Roberts to Carl Marlinga for Congress.

Marlinga cites no authority for the proposition that the definition of a "conduit" contribution should be so narrowly construed. In fact, Defendant Marlinga's strained interpretation of the term is directly contrary to its plain meaning as it is used in §441a(a)(8), which expressly includes "all contributions" made "directly or indirectly" to a particular candidate which is "in any way" earmarked or otherwise directed through an intermediary or conduit. Moreover, neither §441a(a)(8) nor the definitions set forth in FEC regulation 11 C.F.R. §110.6 states or suggests that contributions made through third parties must be transferred by a particular means.

If Defendant Marlinga's limited interpretation were accepted, one could readily circumvent the FECA's reporting requirement by merely funneling contributions through a minimally circuitous route. Defendant cited no authority which indicates that Congress intended to allow FECA's reporting requirements to be frustrated so easily.

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[4]Marlinga cites the definition of a "conduit" from Webster's Third International Dictionary, 5 (1976), which states in relevant part that a "conduit" is: "a means of conveying or distributing money. . . ."

ii. Counts Five and Six Adequately Allege Facts in Support of All Elements of the Alleged Offense

Because of their alleged misrepresentations regarding conduit contributions, Marlinga and Barcia are charged in Count Five with making false statements in violation of 18 U.S.C. §1001(a)[5] and with aiding and abetting in violation of 18 U.S.C. §2(a).[6] Marlinga is charged with the same offenses in Count Six, based on his alleged misrepresentations regarding conduit contributions from Hulet's attorney through the MDP. Marlinga and Barcia assert that Counts Five and Six must be dismissed because the Government failed to allege the essential *mens rea* element of the statutes; namely, that they acted "knowingly and willfully."

An 18 U.S.C. §1001 offense has five elements:

> (1) the defendant made a statement; (2) the statement is false or fraudulent; (3) the statement is material; (4) *the defendant made the statement knowingly and willfully*; and (5) the statement pertained to

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[5]18 U.S.C. §1001(a) states:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title or imprisoned not more than 5 years, or both.

[6]18 U.S.C. §2(a) states:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

an activity within the jurisdiction of a federal agency.

United States v Steele, 933 F.2d 1313, 1318-1319 (6th Cir. 1991), *cert. den.,* 502 U.S. 909 (1991)(emphasis added). Defendant Barcia contends that 18 U.S.C. §2(a) also requires the government to prove that he and Marlinga acted "willfully" in aiding and abetting a violation of §1001. The Court notes that, unlike §2(b), §2(a) does not expressly state that willfulness is a necessary element,[7] and the law in this Circuit is unclear.[8] Nevertheless, the Court can presume without deciding that Barcia is correct, because the Indictment adequately alleges that Marlinga and Barcia acted "knowingly and willfully."

The Indictment meets minimal constitutional standards. The Notice Clause of the Sixth Amendment, as protected by FRCrP 7(c),[9] provides that a defendant must "be informed of the nature and cause of the accusation" against him. *U.S. Const. Amend. VI.*

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[7]§2(b) provides that:

Whoever *willfully causes* an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (emphasis added).

[8]*See U.S. v Brown* , 151 F.3d 476 (6th Cir. 1998), *cert. den.,* 525 U.S. 1026 (1998)(noting that the distinction between §§2(a) and (b) are unclear).

[9]FRCrP 7(c)(1) states in relevant part:

In General. The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged and must be signed by an attorney for the government. It need not contain a formal introduction or conclusion. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law that the defendant is alleged to have violated.

An indictment is constitutionally adequate if it meets a two-prong test: 1) it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and 2) it enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense. *Hamling v United States,* 418 U.S. 87, 117 (1974); *United States v Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001).

"To be legally sufficient, the indictment must assert facts which in law constitute an offense; and which, if proved, would establish prima facie the defendant's commission of that crime." *United States v Superior Growers Supply, Inc.,* 982 F.2d 173, 177 (6th Cir. 1992). It will usually suffice if the indictment states the offense using the words of the statute, "as long as the statute fully and unambiguously states all elements of the offense." *Landham*, 251 F.3d at 1079 (citing *Hamling*, 418 U.S. at 117). However, when the government uses the wording of the statute to generally describe the offense, the government must also include a statement of facts that will inform the defendant of the specific offense with which he is charged. *Hamling*, 418 U.S. at 117-118.

Even a cursory reading of Counts Five and Six and the supporting factual allegations, makes clear that the elements of the offense are sufficiently stated to inform Defendants Marlinga and Barcia of the specific charges against them. As Defendants point out, the Government does not anywhere state in exact terms that they acted "knowingly" and/or "willfully" in violating 18 U.S.C. §§1001(a) and 2(a). However, considering the definition of those terms, the Court finds that the wording of the allegations is adequate to satisfy the Government's burden. Under §1001, "knowingly" requires proof

that the defendant acted "with knowledge." *United States v Mekjian,* 505 F.2d 1320, 1324 (5th Cir. 1975). "[W]illful" means to act deliberately. *Id*.

The Government clearly alleges that Marlinga and Barcia's alleged false statements regarding the true source of contributions from Barcia's campaign accounts to Marlinga and, in Count Six, from the MDP to Marlinga, were made by them deliberately and with knowledge that their statements were false. For instance, Count Five alleges that Marlinga and Barcia "falsified, concealed, and covered up by any trick, scheme, and device of material fact, and made a materially false, fictitious and fraudulent statement and representation" by causing a campaign finance report to show that contributions from Hulet's attorney were actually from Barcia's campaign accounts. Indictment, Ct. Five, ¶2. Also, in the general allegations, the Indictment alleges that by structuring the Hulet and Barcia transactions as described, "Defendants Marlinga and Barcia agreed that Defendant Barcia and Friends of Jim Barcia would act as a 'conduit' or 'intermediary.'" Indictment, Gen. Allegations, ¶37.

Likewise, in Count Six, Marlinga allegedly "falsified, concealed, and covered up by any trick, scheme, and device of material fact, and made a materially false, fictitious and fraudulent statement and representation, by causing the [campaign finance] report to reflect a contribution to Carl Marlinga for Congress, when in fact James Hulet's attorney made a contribution to the Michigan Democratic Party acting as a 'conduit' on behalf of Carl Marlinga for Congress. . . ." Indictment, Ct. Six, ¶2. Additionally, in the general allegations it is alleged that Hulet presented certain contributions via money orders listing another party as the purchaser, "[a]t Defendant Marlinga's direction, in an attempt to

disguise the true contributor." Indictment, Gen. Allegations, ¶39. The Indictment further alleges that Marlinga "sought to cause the Michigan Democratic Party to act as a 'conduit' or 'intermediary,'" and that "Defendant Marlinga's goal in disguising the involvement of James Hulet's attorney in making contributions to Carl Marlinga for Congress was to conceal, on a Federal Election Commission disclosure report, that attorney's identity as a contributor of $10,000." Indictment, Gen. Allegations, ¶46. Considered in their entirety and in context, the allegations supporting Counts V and VI sufficiently allege the requisite *mens rea* against Marlinga and Barcia for their alleged violation of 18 U.S.C. §1001(a) and 2(a).

Moreover, each Count cites the statutes under which Defendants are charged, putting them on notice of the charges against them. *See* Indictment, Count Five, ¶2; Ct. Six, ¶2. In fact, the Sixth Circuit in *United States v Martinez*, 981 F.2d 867, 872 (6th Cir. 1992), *cert. den.,* 507 U.S. 1041 (1993), rejected an argument similar to the one made here, because the statute was cited in the indictment. The *Martinez* defendant argued that the indictment for two counts of aiding and abetting the sale of a controlled substance was constitutionally insufficient because neither count included the words "knowingly" or "intentionally." The Court found that the defendant was adequately informed of the elements of the charged offenses because the indictment alleged the appropriate sections of the United States Code, despite the fact that the indictment did not include the words "knowingly" or "intentionally," or expressly allege willfulness. The *Martinez* Court relied upon *United States v Johnson,* 414 F.2d 22, 26 (6th Cir. 1969), *cert. den.,* 397 U.S. 991

(1970), which held that an indictment sufficiently alleged willfulness by citing the relevant statute.

Defendant Barcia argues that the holding in *Martinez* does not reflect a general rule, but a finding limited to the facts of that case. Several opinions before and since *Martinez,* however, belie Barcia's argument. *See United States v Lentsch*, 369 F.3d 948, 953 (6th Cir. 2004)(citing *Martinez* with regard to a trespassing conviction in violation of 10 C.F.R. §860.5(b)); *United States v Hart,* 640 F.2d 856, 858 (6th Cir. 1981), *cert. den.,* 451 U.S. 992 (1981)(indictment for possession of stolen mail, in violation of 18 U.S.C. §1708, sufficient because the statute was cited, although the indictment failed to expressly allege two of three elements of the crime); *Brice v Snyder*, 82 Fed. Appx. 444, 447 (6th Cir. 2003)(unpub. op.)(citation to statute and allegation of supporting facts sufficient to notify defendant that he could be convicted under 18 U.S.C. §924(c) for carrying or using a firearm, although the indictment only charged him with possessing, not carrying, a firearm); *United States v Bright*, 48 F.3d 1220, *3 (6th Cir. 1995)(unpub. op.)(citation of statute and allegation of supporting facts sufficient to state a crime where indictment for violation of 18 U.S.C. §924(c) used the term "possess," rather than the phrase "use or carry" used in the statute). Therefore, the Court finds that the factual allegations along with the Government's citation to the relevant statutes sufficiently allege the *mens rea* element of 18 U.S.C. §§1001(a) and 2(a).

iii. Counts Six and Nine Adequately State "False Statement" and FECA Violations

Defendant Marlinga requests dismissal of Counts Six and Nine, arguing that Hulet's

attorney's contribution to the MDP is not subject to the FECA campaign contribution limits set forth in 2 U.S.C. §441a. Hulet's attorney made a $10,000 contribution to the MDP. The Indictment alleges that Marlinga directed Hulet's attorney to make the contribution through the MDP, stating that he would receive a like amount back from the MDP, thereby disguising the fact that Hulet's contribution was actually a contribution to Carl Marlinga for Congress. For these alleged acts, Marlinga is charged in Count Six with violating the "false statements" statute, because he did not report the contribution on his campaign finance report. He is charged in Count Nine with violating the campaign contribution limitations of §441a, for allegedly soliciting and accepting contributions in excess of the FECA's $2,000 maximum.

Hulet's attorney allegedly delivered the check for the $10,000 contribution directly to Marlinga, who turned it over to the MDP. The MDP then made an internal notation that the donation was to be used for the Tenth Congressional District race for which Defendant Marlinga was the Democratic nominee. However, Marlinga says this notation does not constitute "earmarking" as defined by FEC regulations. Therefore, Marlinga contends that the contribution was not subject to the limitations of §441a of the FECA.

As stated in the discussion of Count Five above, FEC regulations define "earmarked" contributions as "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or *expended on behalf of, a clearly identified candidate or a candidate's authorized committee.* 11 C.F.R. §110.6(b)(2)(emphasis added). Relying upon *Buckley v Valeo,* 424 U.S. 1 (1976), Marlinga argues that the

MDP's notation does not constitute a designation or instruction that Hulet's contribution is to be expended "*on behalf of a clearly identified candidate*."

The *Buckley* Court analyzed a provision of the FECA that has since been repealed, 18 U.S.C. § 608(e)(1). 18 U.S.C. §608(e)(1) imposed monetary limits on expenditures made on behalf of political candidates:

> No person may make any expenditure . . . *relative to* a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

(emphasis added). The appellants argued that the limitations imposed by this provision infringed upon their First Amendment rights. The Court agreed.

The *Buckley* Court reasoned that the statute's use of the indefinite phrase "relative to" was unconstitutionally vague because there was no definition clarifying what types of expenditures are "relative to" a candidate. The Court stated that such an indefinite phrase "fails to clearly mark the boundary between permissible and impermissible speech." 424 U.S. at 41. The Court rejected the lower court's finding that the vagueness deficiency was resolved by limiting the construction of the statute such that "relative to" would be read to mean "advocating the election or defeat of" a candidate. *Id* at 42. Instead, the Court held that the vagueness deficiency could only be cured by construing §608(e)(1) to apply to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id* at 44. This construction, the Court stated, would limit the application of §608(e)(1) to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your

ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id* at 44 n.52.

Apparently drawing a parallel between the definition of "earmarked" contributions as those that are expended *"on behalf of*," a clearly identified candidate or a candidate's authorized committee and the "relative to" language in §608(e)(1), Marlinga contends that the same constitutional limitations apply to the contribution limitations imposed by 2 U.S.C. §441a. That is, he asserts that §441a's campaign contribution limits are also unconstitutionally vague unless read to only apply to contributions "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." According to Marlinga, the Indictment in this case does not allege that Hulet's donation to the MDP was such a communication. Rather, he asserts that the Indictment alleges that the contribution was used or to be used in a manner that was proper under *Buckley* and outside the scope of permissible regulation.

Defendant's attempt to apply the rationale of *Buckley* to the FEC regulation fails because the phrase he bases his argument on is not analogous to the one at issue in *Buckley*. The reason that the *Buckley* Court found the phrase "relative to" unconstitutionally vague was because it was not defined in the statute and did not in any way indicate exactly what types of expenditures would fall in the category of "relative to" a candidate. The FEC regulation at issue here, however, does not suffer from the same potential for confusion. Unlike the phrase "relative to" analyzed in *Buckley*, the FEC regulation's use of the phrase "*on behalf of* a clearly identified candidate" with regard to earmarked contributions does not lend itself to multiple meanings like the phrase in

Buckley. Defendant Marlinga has not persuasively shown that this phrase is so vague that "men of common intelligence must guess at its meaning." *Broadrick v Oklahoma*, 413 U.S. 601, 607 (1973)(quotation marks omitted). As the *Broadrick* Court aptly noted, "[w]ords inevitably contain germs of uncertainty," but that uncertainty does not render a statute impermissibly vague as long as it is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest." *Id* (quotation marks omitted).

Here, the phrase "*on behalf of* a clearly identified candidate" is sufficiently clear to people of ordinary intelligence. Therefore, there is no basis for the Court to find that §441a is unconstitutionally vague, such that it can only be applied to contributions used or intended to be used for "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Buckley,* 424 U.S. at 44. *Buckley* does not apply.

iv. Count Eight Adequately Alleges a Violation of the FECA

Barcia asserts that Count Eight should be dismissed because the Indictment fails to allege an offense under the relevant sections of the FECA. He also argues that it must be dismissed because application of the FECA violates his First Amendment rights of speech and assembly, and because it is unconstitutional as applied to him.

Count Eight alleges that Marlinga and Barcia violated the FECA campaign contribution limitations when they "knowingly and willfully counseled, commanded, induced and procured contributions" over the $2,000 statutory maximum. This Count is based on

Barcia's alleged agreement to act as a conduit to facilitate Hulet's attorney's $4,000 contribution to Marlinga.

Barcia argues that Count Eight fails to allege a violation under the FECA, because Hulet's $4,000 contribution was made to Friends of Jim Barcia, a state political committee which is governed by state not federal law.[10] Barcia points out that the Indictment alleges that the funds that were given to Marlinga's federal committee were only transferred from his (Barcia's) federal committee and PAC, not from Friends of Jim Barcia. But, the Indictment does not allege that there was ever a transfer of funds between Friends of Jim Barcia and Barcia's federal campaign committee or PAC. Therefore, Barcia asserts that Count Eight only refers to an allegedly earmarked contribution to his state campaign committee, which is not governed by the FECA or otherwise a violation of federal law.

To further illustrate his point, Barcia refers to the definitions of the terms "conduit," and "earmarked" set forth in FEC regulations:

> (1) For purposes of this section, "earmarked" means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.
>
> (2) For purposes of this section, "conduit or intermediary" means any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee. . . .

11 C.F.R. §110.6(b). Though §110.6(b) does not expressly limit the definitions to contributions received for federal office, Barcia asserts that such a limitation must be read

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[10]Michigan Campaign Finance Act, M.C.L. §169.201, *et seq.*

into them. He argues, therefore, that it is clear that allegations that funds were earmarked to a state campaign account are outside the scope of the statute he allegedly violated. Moreover, he asserts that there is no allegation in the Indictment that the funds from his state campaign account were ever "forwarded" to anyone. Barcia asserts that Count Five must be dismissed for the same reasons.

Barcia acknowledges that it is alleged that he made two contributions totaling $4,000 to Marlinga from his federal committee and PAC around the same time Hulet's attorneys made the $4,000 donation to Friends of Jim Barcia. However, he argues that this so-called "cash swap" is not prohibited by the FECA. Barcia says that, although some may view the practice as bad policy and an end-run around contribution limits, the FECA "clearly" does not make it a crime.

Barcia next argues that criminalizing the contributions made here runs afoul of the Tenth Amendment's prohibition of federal interference in state elections. That is, Barcia contends that charging him with a federal offense for receiving a contribution governed by state law violates the Tenth Amendment's limitation on the authority of the federal government to regulate state elections.

Lastly, Barcia asserts that the provisions of the FECA that he allegedly violated are vague, overbroad, and unconstitutional as applied to him because they violate First Amendment protections of speech and association. Specifically, Barcia says the provisions have been applied to make it a crime for him to make a contribution to a federal campaign and at the same time receive a contribution for his state campaign from a separate donor. There is no allegation in the Indictment, Barcia argues, that the funds

donated to Friends of Jim Barcia went anywhere but to that organization, or that donations to Carl Marlinga for Congress came from anywhere but Barcia's federal campaign committee and PAC.

There is no merit to any of Barcia's claims. Barcia cites no authority for his proposed narrow construction of the terms "conduit" and "earmarked." In fact, each definition set forth in 11 C.F.R. §110.6(b) pertains to "contributions," which the FECA defines as including "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person *for the purpose of influencing any election for Federal office*." *Id* at §431(8)(a)(i)(emphasis added). It is alleged that Barcia's state campaign account was used as a means of passing campaign contributions through to Marlinga, in order to curry favor with a federal candidate and to avoid detection. It is absurd to suggest that Barcia could insulate himself from the FECA by merely ensuring that contributions are funneled through a state campaign account.

Barcia's next claim that the charges violate the Tenth Amendment fails because it is based on a patently false premise. Contrary to Barcia's claim, he is not being charged for merely receiving a contribution governed by state law. He is charged with using his state campaign account to illegally funnel federal campaign contributions to Marlinga. Consequently, the Tenth Amendment's prohibition of federal interference in state elections is not implicated.

Barcia's claim that the FECA provisions under which he is charged are vague and overbroad, in violation of the First Amendment, fails for the same reason. The basis of the charges against Barcia under the FECA are not based solely on the fact that he made a

contribution to Marlinga's federal campaign and at the same time received a contribution to his state campaign account from a separate donor (Hulet's attorney). Again, the series of transactions between Barcia, Marlinga, and Hulet's attorney allegedly were the vehicle by which they executed a deliberate scheme to make illegal campaign contributions. Because such actions are clearly proscribed by the FECA, the statute is neither vague nor overbroad as applied. The violations set forth in Counts Five through Nine are not subject to dismissal.

IV. CONCLUSION

The Court **DENIES** Defendant Carl Marlinga's Motion to Dismiss; **DENIES** Defendant James Barcia's Motion to Dismiss Count Five of Indictment, and; **DENIES** Defendant Barcia's Motion to Dismiss Counts Five and Eight of the Indictment. Since Roberts joined in the Motion to Dismiss Counts One, Two and Seven, his request is **DENIED** as well.

IT IS SO ORDERED.

/s/ Victoria A. Roberts
VICTORIA A. ROBERTS
UNITED STATES DISTRICT COURT

Dated: 2/28/05