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February 3, 2017

VIA EMAIL TO Julie.Davis@Ethics.Alabama.Gov
AND FIRST CLASS MAIL

Mr. Thomas B. Albritton
Executive Director
Alabama Ethics Commission
100 N. Union St., Suite 104
Montgomery, Alabama 36104

Re: 2016 Annual Report Filing by Bentley for Governor, Inc.

Dear Mr. Albritton:

I represent Governor Robert Bentley and Bentley for Governor, Inc. ("the Campaign"). I am writing regarding the Annual Campaign Finance Report filed by the Campaign on January 31, 2017 (copy attached hereto). Several members of the media have raised questions regarding an entry on that filing referencing the payment of legal fees incurred by Rebekah Mason in connection with work she performed, and the Campaign's paying for her work, as senior political advisor to the Governor. That entry reflects a payment of \$8,912.40 to Copeland, Franco, Screws & Gil, PA on January 3, 2016 ("the Expenditure"). Because of the media attention that has resulted, I wanted to take the affirmative step of contacting you to provide additional information and explanation.

The Expenditure is entirely consistent with the Fair Campaign Practices Act. Ala. Code § 17-5-7(a) sets forth the permissible uses of excess campaign funds, and includes "expenditures that are reasonably related to performing the duties of the office held." Ala. Code §17-5-7(a)(2). In a recent revision, the FCPA further expanded the exception to include "Legal fees and costs associated with any civil action, criminal prosecution, or investigation related to conduct reasonably related to performing the duties of the office held." Ala. Code §17-5-7(a)(7).

As Advisory Opinion No. 2016-23 ("AO 2016-23") makes clear, use of campaign funds for "personal use" is prohibited. The Commission applies a "but for" test to make that determination, and defines "personal use" as "any use of funds in a campaign account to fulfill a commitment, obligation or expense of any person that exists for reasons irrespective of the person's status as a candidate or officeholder." AO 2016-23 at 7.

In AO 2016-23, the Commission specifically identified the following as expenses deemed to be for personal use:

1. Personal and legislative living expenses as defined in the Fair Campaign Practices Act, Ala. Code § 17-5-1 et seq., which include: household supplies, personal clothing, tuition payments, mortgage, rent, or utility payments for a personal residence; admission to an entertainment event or fees for a country club or social club, unless tied to a specific campaign event or functions involving constituents;
2. Any expense that would exist irrespective of a candidate's campaign or an officeholder's official duties;
3. Household food items purchased for consumption by the candidate, officeholder, and his or her family or dependents;
4. Funeral, cremation and burial expenses;
5. Tuition payments for the candidate's or officeholder's family or dependents, or any other person;
6. Mortgage, rent and utility payments for a candidate's or officeholder's personal residence, even if a portion of the space is used for campaign or official purposes;
7. Investment expenses, unless all of the investment and its proceeds are used for campaign purposes or one of the specifically enumerated purposes in the FCPA;
8. Entertainment expenses unless tied to a specific campaign event;
9. Dues and gratuities for health clubs, recreational facilities and other nonpolitical organizations unless tied to a specific campaign event;
10. Salary payments to the candidate's family, unless the family member is providing a bona fide service to the campaign and the payments reflect the fair market value of those services and are properly documented by the campaign;
11. Signs or markers designating roadways, etc., or a portion thereof in honor of the officeholder or candidate or a member of their family.

Id. at 3. In its Advisory Opinion, the Commission also listed certain expenses presumed to not be for personal use, including, as provided in Ala. Code §17-5-7(a)(7), “legal fees and costs associated with any civil action, criminal prosecution, or investigation related to conduct reasonably related to performing the duties of the office held.” *Id.* at 4.

Where, as here, there do not appear to be Ethics Commission or Attorney General Advisory Opinions or other rulings which speak to a particular issue under the FCPA, it is appropriate to look to interpretations of similarly worded provisions of the Federal Election Campaign Act, 52 U.S.C. §30101, *et seq.* See Attorney General Advisory Opinion 2000-165 (analogizing to FECA provision in interpreting whether excess campaign funds may be used to pay legal fees by incumbent office holder).

The federal analog to Ala. Code §17-5-7(a)(2) is contained at 52 U.S.C. §30114 and provides that federal principal campaign committee funds may be used “for ordinary and necessary expenses incurred in connection with duties of the individual as a holder of Federal office.” In interpreting this provision, the Federal Election Commission has issued a number of interpretations through advisory opinions explaining when an officeholder may or may not use campaign funds for legal expenses. In at least two of those FEC advisory opinions, the Commission has addressed payments for legal expenses of persons other than the candidate. Both have found such payments appropriate. Because of their significance to the issue at hand, both are quoted at length below.

The first is FEC Advisory Opinion No. 2011-07, an opinion to the campaign committee of Congressman Chuck Fleischmann on May 26, 2011 regarding the legal expenses of a former campaign consultant who later became the Congressman's Chief of Staff. In its ruling, the FEC stated:

The Commission has long recognized that if a candidate “can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use.” Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds. 60 FR 7862, 7867 (Feb. 9, 1995). Legal fees and expenses, however, “will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder's status.” *Id.* at 7868. Thus, the Commission has concluded that the use of campaign funds for legal fees and expenses does not constitute personal use when the legal proceedings involve allegations directly relating to the candidate's campaign or duties as a Federal officeholder. *See, e.g.* . . . Advisory Opinions 2009-20 (Visclosky), 2009-10 (Visclosky), 2008-07 (Vitter), 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger). On the other hand, “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.” Explanation and Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds, 60 FR 7862, 7867 (Feb. 9, 1995).

Here, the Committee seeks to use campaign funds to pay the legal expenses of a person who was working as a campaign consultant for the candidate, namely Mr. Saltsman. In Advisory Opinion 2009-20 (Visclosky), the Commission approved the use of campaign funds for the legal fees of persons other than the candidate. In that instance, Representative Visclosky's current and former congressional staff members had received, or expected to receive, grand jury subpoenas to produce documents related to a Federal investigation of Representative Visclosky for alleged improper receipt of campaign contributions and obtaining earmarked

appropriations for clients of a lobby group. The Commission concluded the staffers' expenses "would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder."

The facts presented in the request differ in one important element from those presented in Advisory Opinion 2009-20 (Visclosky). Although the Commission approved the use of campaign funds for the legal fees of persons other than Representative Visclosky, it was Representative Visclosky's activity that was the subject of the investigation. Here, the basis of the lawsuit is the alleged activity of Mr. Saltzman, not Representative Fleischmann. Nonetheless, it appears that the legal fees and expenses involve allegations directly relating to campaign activities engaged in by Mr. Saltzman.

The civil lawsuit arises from the alleged conduct of Mr. Saltzman in his role as a campaign consultant for Representative Fleischmann's campaign. The complaint alleges that Mr. Saltzman acted as the campaign's message and media consultant and participated in the creation of campaign ads directed at Ms. Smith. In that capacity, Mr. Saltzman allegedly acquired and publicized plaintiffs employment agreement, including in the form of a campaign ad, which provides the basis of the lawsuit. Moreover, according to the complaint, Mr. Fleischmann allegedly used the materials Mr. Saltzman obtained as the basis for many of the attacks that Mr. Fleischmann made himself as a candidate against Ms. Smith. In *fact*, the complaint attributes Mr. Fleischmann's primary victory over Ms. Smith "in large part" to Mr. Saltzman's actions. As a result, the lawsuit against Mr. Saltzman would not exist irrespective of Representative Fleischmann's campaign.

Accordingly, the Commission concludes that, to the extent that the legal proceedings derive from allegations directly relating to campaign activity, the Committee may use campaign funds to pay legal fees described in this request.

FEC Advisory Opinion No. 2011-07 at 3-4.

A second relevant opinion, FEC Advisory Opinion No. 2009-20, was issued to Representative Pete Visclosky on August 28, 2009. It centered on payments of legal expenses for current and former Congressional staffers arising out of an investigation of various allegations relating to certain campaign contributions. The Advisory Opinion validated the payment of legal fees and expenses incurred by current and former staff members, based on the following rationale:

The Commission has long recognized that if a candidate "can reasonably show that the expenses at issue resulted from campaign or officeholder activities, the Commission will not consider the use to be personal use." Explanation and

Justification for Final Rules on Expenditures; Reports by Political Committees; Personal Use of Campaign Funds. 60 FR 7862, 67 (Feb. 9, 1995). Legal fees and expenses, however, “will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder's status.” *Id.* at 7868. The Commission has concluded that the use of campaign funds for legal fees and expenses does not constitute personal use when the legal proceedings involve allegations directly relating to the candidate's campaign or duties as a federal officeholder. *See, e.g.*, Advisory Opinions 2009-10 (Visclosky), 2008-01 (Vittner), 2006-35 (Kolbe), 2005-11 (Cunningham), and 2003-17 (Treffinger).

As discussed above, the advisory opinion request and accompanying media reports indicate that the Federal government is investigating campaign contributions allegedly made by PMA Group and its clients to Representative Visclosky. Additionally, the reports discuss appropriations earmarks purportedly obtained by Representative Visclosky for various PMA Group clients. The Commission has previously concluded that the allegations concern Representative Visclosky's campaign and duties as a Federal officeholder because Representative Visclosky allegedly received the contributions in question as part of his campaign, and his alleged actions regarding the congressional appropriations process are directly related to his duties as a Federal officeholder. Advisory Opinion 2009-10 (Visclosky).

Current and former staff members in Representative Visclosky's House office are involved in the Federal investigation because of their current and former employment relationships with Representative Visclosky in his capacity as a U.S. Congressman and a candidate. Therefore, based on the representations made in the advisory opinion request and accompanying news articles, the Commission concludes that current and former office staff members' legal fees and expenses associated with the Federal investigation would not exist irrespective of Representative Visclosky's campaign or duties as a Federal officeholder. Accordingly, the Committee may use campaign funds to pay legal fees and expenses incurred by Representative Visclosky's current and former congressional staff in connection with the Federal investigation into the alleged provision of illegal campaign contributions by the PMA Group and its clients to the Committee, and Representative Visclosky's allegedly improper earmarking of appropriations for clients of PMA, and any other legal proceedings that involve the same allegations.

The Commission notes, however, that because many of the details of the Federal investigation are not public at this time, it is possible that portions of the investigation could involve allegations not related to Representative Visclosky's



Mr. Thomas B. Albritton

February 3, 2017

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campaign or his duties as a Federal officeholder. "The use of campaign funds to pay for . . . representation in legal proceedings regarding any allegations that are not related to [the Congressman's] campaign activity or duties as a Federal officeholder would constitute an impermissible personal use." Advisory Opinions 2009-10 (Visclosky) and 2005-11 (Cunningham).

FEC Advisory Opinion No. 2009-20 at 4-5.

Based on the FPCA and these FEC Advisory Opinions, we believe that the Expenditure was entirely appropriate and consistent with applicable law. In the event the Commission reaches a contrary conclusion, we are prepared to reverse the payment and have the funds returned to the Campaign. We stand ready to provide any additional information you may desire.

Very truly yours,

A handwritten signature in black ink, appearing to read "William C. Athanas", with a stylized, looping flourish.

William C. Athanas

WCA:

Enclosure

cc: Hugh Evans, Esq. (via email to Julie.Davis@Ethics.Alabama.Gov and first class mail, w/ encl.)



Fair Campaign Practices Act
State of Alabama
Candidate & Elected Official
Campaign Finance Report
SUMMARY FORM 1A

THIS AREA FOR OFFICIAL USE ONLY

This document was filed electronically on 01/31/2017
 at 04:59PM with the Elections Division, Office of the
 Alabama Secretary of State.

Please Print in Ink or Type.

Full Name of Candidate ROBERT BENTLEY			Political Party / Ballot REPUBLICAN		Calendar Year covered by this report 2016
Office Sought (include district or circuit number, if applicable) GOVERNOR					
Address 11 RIDGELAND					
City TUSCALOOSA	State AL	ZIP Code 35406	Telephone Number (334) 242-7100		

☐ Amended Annual Report

☐ Termination Report

SECTION I - Summary of activity from last filed report through December 31 of reporting year					
1	Beginning balance (ending balance from previous filing)		1		\$396,905.90
Cash Contributions					
2a	Itemized cash contributions (total from Form 2)	2a		\$0.00	
2b	Non-itemized cash contributions	2b		\$0.00	
2d	Total cash contributions (add lines 2a, 2b, and 2c)	2d		\$0.00	
In Kind Contributions					
3a	Itemized in-kind contributions (total from Form 3)	3a		\$0.00	
3b	Non-itemized in-kind contributions	3b		\$0.00	
3c	Total in-kind contributions (add lines 3a and 3b)	3c		\$0.00	
Receipts from Other Sources					
4a	Total itemized receipts from other sources (total from Form 4)	4a		\$11,641.36	
4b	Total non-itemized receipts from other sources	4b		\$0.00	
4c	Total receipts from other sources (add lines 4a and 4b)	4c		\$11,641.36	
Expenditures					
5a	Itemized expenditures (total from Form 5)	5a		\$382,568.24	
5b	Non-itemized expenditures	5b		\$0.00	
5c	Total expenditures (add lines 5a and 5b)	5c		\$382,568.24	
6	Ending balance (add lines 1, 2c, & 4c, then subtract line 5c)	6		\$25,979.02	
SECTION II - Summary of activity for entire reporting year - January 1st through December 31st					
7	Beginning balance (as of January 1 of reporting year)	7		\$346,905.90	
8	Total cash contributions this year	8		\$0.00	
9	Total in-kind contributions this year	9		\$0.00	
10	Total receipts from other sources for year	10		\$61,641.36	
11	Total expenditures for year	11		\$382,568.24	
12	Ending balance (add lines 7, 8, & 10, then subtract line 11)	12		\$25,979.02	
13	Total campaign debt (total debt owed as of December 31)	13		\$50,000.00	

As required by the Alabama Fair Campaign Practices Act, I hereby swear or affirm to the best of my knowledge and belief that the attached report(s) and the information contained herein are true and correct and that this information is a full and complete statement of all contributions, expenditures, and other required information during the applicable period of time.

Sworn to and subscribed before me this _____ day of _____ of the year _____.
 My commission expires the _____ day of _____ of the year _____.

Signature of Notary Public

Print Notary's Name

Electronically signed **ROBERT BENTLEY,**
 by **CANDIDATE** **01/31/2017**

Signature of Candidate or Elected Official Date

FORM REVISED 12.9.2012

ALABAMA FAIR CAMPAIGN PRACTICES ACT - CAMPAIGN FINANCE REPORT FOR CANDIDATE/ELECTED OFFICIAL



FORM 4: Receipts from Other Sources loans, interest, and other sources of income

NAME OF CANDIDATE OR ELECTED OFFICIAL:

ROBERT BENTLEY

When total contributions from a single source exceed \$100.00, the FCRA requires all contributions from that source to be itemized
DO NOT LIST cash or in-kind contributions on this form. Use Forms 2 and 3 for those listings.

SOURCE OF RECEIPT (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	FORM OF RECEIPT			COMPLETE THIS BLOCK IF RECEIPT IS A LOAN GUARANTORS (FCRA REQUIRES FULL NAME AND COMPLETE ADDRESS OF INDIVIDUAL(S) ENDORSING OR GUARANTEEING A LOAN)	RECEIPT SOURCE (CHECK ONE)					DATE RECEIVED	AMOUNT OF RECEIPT
		Form Interest	Form Loan	Form Other		Lending Institution	Source PAC	Source Individual	Source Business	Source Other		
REPUBLICAN GOVERNOR'S ASSOCIATION	1747 PENNSYLVANIA AVE NW #250 WASHINGTON, DC 20006			X						X	03/22/2016	\$11641.36
FORM REVISED ON 11.22.2012	TOTAL RECEIPTS											\$11641.36

**FORM 5: Expenditures by candidate or elected official**

NAME OF CANDIDATE OR ELECTED OFFICIAL:

ROBERT BENTLEY

When total expenditures to a single recipient exceed \$100.00, the FCPA requires all expenditures to that recipient be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)									DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/Poling	Charitable Contributions	Food	Fundraising	Loan Repayment	Lodging	Transportation		
COPELAND, FRANCO, SCREWS & GIL PA	444 S. PERRY STRET MONTGOMERY, AL 36104	X									01/03/2016	\$8912.40
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403			X							01/03/2016	\$8000.00
RCM COMMUNICATIONS, INC..	P.O. BOX 2536 TUSCALOOSA, AL 35403								X		01/03/2016	\$1344.00
POLICY INTELLIGENCE, LLC	P. O. BOX 1931 MONTGOMERY, AL 36102			X							01/13/2016	\$1000.00
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									01/28/2016	\$16063.65
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403			X							02/04/2016	\$8000.00
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403								X		02/04/2016	\$1456.00
REBEKAH MASON	P. O. BOX 2356 TUSCALOOSA, AL 35406	X									02/05/2016	\$395.00
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403			X							03/03/2016	\$8000.00
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403								X		03/03/2016	\$1268.06
RYALS, DONALDSON & AGRICOLA, PC	60 COMMERCE STREET, SUITE 1400 MONTGOMERY, AL 36104	X									03/14/2016	\$1260.00
ALABAMA REPUBLICAN PARTY	3505 LORNA RD. BIRMINGHAM, AL 35216	X									03/22/2016	\$2500.00
ALABAMA STATE GENERAL FUND	P.O. BOX1511 MONTGOMERY, AL 36102	X									03/24/2016	\$11641.35
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									04/07/2016	\$42623.00
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403			X							04/12/2016	\$8000.00
RCM COMMUNICATIONS, INC.	P.O. BOX 2536 TUSCALOOSA, AL 35403								X		04/12/2016	\$1344.00
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									05/09/2016	\$55874.94
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									06/07/2016	\$56737.00
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									07/14/2016	\$21138.00
POLICY INTELLIGENCE, LLC	P. O. BOX 1931 MONTGOMERY, AL 36102			X							07/26/2016	\$2000.00
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									08/03/2016	\$33148.00
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									09/08/2016	\$22071.58
MELTON, ESPY & WILLIAMS, PC	P. O. DRAWER 5130 MONTGOMERY, AL 36103	X									10/07/2016	\$12382.00

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)									DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/Feeing	Charitable Contributions	Food	Fundraising	Loan Repayment	Lodging	Transportation		
WALLER, LANSDEN, DORTCH & DAVIS, LLP	1901 6TH AVE. NORTH SUITE 1400 BIRMINGHAM, AL 35203	X									11/14/2016	\$50000.00
US POSTMASTER	CAHABA HEIGHTS STATION BIRMINGHAM, AL 35243	X									11/29/2016	\$2726.00
KWIK KOPYSHOP	4148 CARMICHAEL RD MONTGOMERY, AL 36106	X									12/15/2016	\$4683.26
FORM REVISED 9.2.2011	TOTAL EXPENDITURES										\$382568.24	