

Comments in Response to the City and County of San Francisco Ethics Commission Request for Public Comments on Potential Changes to and the Effectiveness of the Public Financing Program

I. Introduction

On July 20, 2018, the City and County of San Francisco Ethics Commission received an informational presentation regarding the current status of the City's public financing program and potential changes to increase the effectiveness of the program.¹ The Commission has also requested public comment regarding, among other things, approaches taken in other jurisdictions that could strengthen the program.²

At its June 15, 2018 meeting and in announcing public listening sessions, the Commission determined that a substantive review of the City's public campaign financing program was its "top policy priority."³ We appreciate the Commission's focus on the importance of protecting the integrity of the election process as a core mission. While we support the use of public financing programs as a measure to reduce the corruption and the appearance of corruption that accompany excessive spending, we are filing these comments to urge the Commission to consider enacting additional limitations on contributions that will prevent big money interests and foreign actors from frustrating the purpose of public financing by swamping the election with a flood of independent expenditures.

The public trust in the integrity of election processes is essential in a democratic society. The exponential increases in spending on federal, state, and local elections in recent years is often traced back to the Supreme Court's decision in *Citizens United*. *Citizens United* did unleash a new source of funding for political spending, but it was actually a lower court decision that misinterpreted a stray remark (known to lawyers as "dicta") from *Citizens United* that created the impetus for the growth of independent expenditure committees, also known as super PACs.⁴ The Supreme Court was not presented with an opportunity to review that decision,

¹ City and County of San Francisco Ethics Commission, Notice of Regular Meeting, July 20, 2018 at 2:00 PM, and Agenda (July 20, 2018) available at <https://sfethics.org/ethics/2018/07/agenda-july-20-2018.html>.

² City and County of San Francisco Ethics Commission, "Announcement of Interested Persons Meeting to Discuss Public Financing Program and Draft Regulations Concerning Opinions and Advice," (July 2018) available at <https://sfethics.org/ethics/2018/07/announcement-of-interested-persons-meetings-to-discuss-public-financing-program-and-draft-regulations-concerning-opinions-and-advice.html>.

³ *Supra* note 1.

⁴ Albert Alschuler, Laurence Tribe, Norman Eisen, Richard Painter, "Why Limits on Contributions to Super PACS Should Survive *Citizens United*," forthcoming 86 *Fordham L. Rev.* 2299, *14-15 (2018), <https://ir.lawnet.fordham.edu/flr/vol86/iss5/2/>.

SpeechNow v. FEC, or other lower court decisions on this issue, but the underpinnings of *SpeechNow* are vulnerable to legal challenges in the Supreme Court that could lead to the end of super PACs.⁵

Another clear and present danger to the integrity of elections in the U.S. is the prospect of foreign interference whether through illegal injection of foreign money or through espionage. Both federal and state law prohibit foreign nationals or foreign governments from contributing to candidates or spending to influence elections, but recent events have demonstrated a need to police other avenues to prevent foreign money from influencing elections. The complementary measures that we describe in the comments would address both of these issues, and do so in a way that is constitutionally sound and could pave the way for overturning the flawed lower court decision that led to the rise of super PACs. Much of the work in developing these proposals draws upon work done in preparation for a similar ordinance recently passed by the City Council of St. Petersburg, Florida.⁶

II. Empirical Data on the Sources and Effects of Outside Spending in San Francisco

Recent levels of outside spending in City elections have raised serious concerns among San Francisco residents regarding the potential for corruption and the appearance of corruption.⁷ The Campaign Finance Reform Ordinance that established the City's program for public financing sought, as one of its primary goals, to protect the integrity of elections by limiting spending in City elections as evidenced by the inclusion of the voluntary individual expenditure ceiling in the program. In fact, the staff presentation on July 20, 2018, noted that limiting independent expenditures should be seen as one of the goals of the public financing

⁵ We appreciate San Francisco's history with respect to enacting limitations on contributions to independent expenditure committees and the legal challenges that have arisen. We are prepared to provide the Commission with legal analysis regarding how to navigate these complexities. That analysis is best provided in the context of the specific provisions of any proposals that the Commission ultimately decides to consider with respect to these kinds of limitations.

⁶ See <http://freespeechforpeople.org/st-petersburg-campaign>. For examples of the types of supportive analyses that could be provided in the process of considering this provision, see the letters provided to the St. Petersburg City Council from Prof. Laurence Tribe, Federal Election Commissioner Ellen Weintraub, Prof. Charles Fried, Prof. John Coates, Prof. Albert Alschuler, Prof. Joseph Morrissey, and Stephen Weissman, Ph.D. Additional San Francisco-oriented written and oral testimony would be provided as part of the San Francisco process.

⁷ Joe Fitzgerald Rodriguez, "Outside Spending exceeds \$1 Million to elect London Breed as SF Mayor," San Francisco Examiner (June 3, 2018) available at <http://www.sfexaminer.com/outside-spending-exceeds-1-million-elect-london-breed-sf-mayor/>; Nitasha Tiku, "How Tech Shaped San Francisco's Unresolved Mayor's Race," Wired (June 11, 2018) available at <https://www.wired.com/story/how-tech-shaped-san-franciscos-unresolved-mayors-race/>; Melia Robinson, "It's Election Day in California: Meet the 9 Tech Millionaires and Billionaires Who Are Quietly Steering San Francisco city politics," Business Insider (June 5, 2018) available at <https://www.businessinsider.com/tech-founders-investors-san-francisco-politics-2018-5>.

program given the increase in outside spending in recent years.⁸ In outlining the goals of the public financing program, staff also looked to the purposes set forth in Section 1.100 of the Campaign Finance Reform Ordinance.⁹

We agree that it is critical to consider those purposes in examining the effectiveness of the public financing program, and based on recent data, it is clear that achieving those purposes also requires considering complementary measures to prevent outside spending groups from circumventing the program and undermining its objectives.¹⁰ It is imperative to understand the increasing role that independent expenditures have played in recent elections to see how they have impacted the effectiveness of the public financing program.

A. The Rise of Super PAC Spending and Foreign Influence in San Francisco City Elections.

In 2014, super PACs had not quite arrived in San Francisco city elections. The 2014 election involved five contested seats for the Board of Supervisors, as well as several ballot measures. The 2014 election set a record of spending *overall* (principally due to the \$9.2 million spent by the beverage industry on Measure E), but massive outside spending had not yet arrived in Supervisors elections. The San Francisco Ethics Commission's campaign dashboard for the 2014 election reported a total of \$179k in outside spending in candidate elections.¹¹ The #1 outside spender in 2014

⁸ Staff Presentation, "Overview of San Francisco's Public Financing Program," 3 (July 20, 2018).

⁹ *Id.* at 4.

¹⁰ These comments are not intended to endorse or oppose any local candidates; rather, the commenters seek to report publicly available information about trends in expenditures in recent local elections to inform the Commission's policy considerations.

¹¹ City and County of San Francisco Ethics Commission, Third Party Spending Regarding San Francisco Candidates Dashboard, November 4, 2014 Election available at <https://sfethics.org/ethics/2013/12/third-party-spending-regarding-san-francisco-candidates-november-4-2014.html>. See also Kristen Wolslegel & Jeffrey Thorsby, *Spending to Influence: Campaign Finance and Lobbying in San Francisco in 2014*, Mar. 3, 2015, <https://sfethics.org/ethics/2015/03/spending-to-influence-campaign-finance-and-lobbying-in-san-francisco-in-2014.html>. According to the Wolslegel & Thorsby report (which, besides elections for city office, also covers ballot measure races and state Assembly races), there were 69 active political action committees (general purpose committees) in the 2014 election cycle. The top four in terms of contributions received were:

1. Committee for a Brighter San Francisco Future (\$256k)
2. UA Local 38 COPE Fund (\$272k)
3. San Francisco Alliance for Jobs and Sustainable Growth (\$170k)
4. San Francisco Police Officers Association Issue PAC (\$153k)

The four largest contributors to PACs in 2014 were:

1. PG&E Corporation: \$173k total, including \$67k to Committee on Jobs Government Reform Fund, and \$60k to Committee for a Brighter San Francisco Future

candidate races was “Yes on F,” which spent just under \$31k identified as “neutral” in Malia Cohen’s race; the United Educators of San Francisco Candidate PAC spent \$29,361 each in support of two other candidates; and all other candidate-related independent spending was relatively small.

That began to change in 2015. The 2015 election involved the Mayor, one Supervisor seat, and 11 measures, including one hotly contested measure to restrict short-term rentals (Proposition F). An analysis by the San Francisco Public Press found that the 2015 election was the most expensive on record.¹² More than a quarter of the total spending in 2015 came from Airbnb, which put \$9 million into defeating Proposition F. But Airbnb’s future plans in city politics extended beyond ballot measures and into candidate elections:

Valued at more than \$25 billion, the company appears willing to spend millions to influence San Francisco politics. It is building and funding a major political operation centered on a state-level entity it calls the “Committee to Expand the Middle Class.” From January to June, the committee donated nearly half a million dollars to business-friendly candidates for the local Democratic Party. Out of 10 candidacies, only two won. In June it also backed three winning non-housing-related ballot propositions favored by elected officials who had opposed the tighter rental regulations.¹³

This was part of a broader political flexing by Airbnb. In October 2016, Airbnb responded to the New York Legislature’s growing interest in regulating the homestay industry by arming a super PAC with \$10 million to influence New York’s legislative races.¹⁴

Airbnb’s creation, the Committee to Expand the Middle Class (state committee ID #1381999), received \$2.05 million in 2015-16 from just 12 contributors: \$900k from Airbnb Inc., \$450k from SF for Everyone/No on Proposition F (#1378051) (itself mostly Airbnb-funded), \$300k from the tech investor Paul Graham of Y Combinator, and several \$50k+ contributions from investors at the venture capital firms Sequoia

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2. San Francisco Association of Realtors: \$98k total, including \$60k to San Francisco Alliance for Jobs and Sustainable Growth, and \$25k to Committee for a Brighter San Francisco Future
 3. UNITE HERE Local 2: \$90k total, including \$83k to UNITE HERE Local 2 PAC
 4. Committee on Jobs Government Reform Fund: \$77k, including \$55k to San Francisco Alliance for Jobs and Sustainable Growth, and \$20k to Committee for a Brighter San Francisco Future

¹² Angela Woodall & Michael Stoll, *In Bid for Dominance, Mayor’s Allies Flood S.F. Politics With Corporate Cash*, Aug. 17, 2016, <http://sfpublicpress.org/news/costofvotes/2016-08/in-bid-for-dominance-mayors-allies-flood-sf-politics-with-corporate-cash>.

¹³ *Id.*

¹⁴ Kenneth Lovett, *Airbnb to spend \$10 on Super PAC to fund pre-Election day ads*, N.Y. Daily New, Oct. 11, 2016, <http://nydn.us/2EF5Lgi>.

Capital and Y Combinator. In 2016, this committee contributed \$420k to “Progress San Francisco” (#1381519), which also receives major funding directly from Paul Graham (\$250k), Salesforce CEO Marc Benioff (\$200k), Facebook (\$150k), Salesforce (\$125k), Samuel Altman of Y Combinator (\$100k), Evan Williams of Medium (\$100k), and various other tech investors and tech corporations. The 2016 election broke the 2014 election’s record for amount spent. With six Supervisor races, independent expenditures exceeded \$1.8 million.¹⁵ In 2016, Progress San Francisco gave over \$600k to “Protect SF,” a committee (since terminated) supporting Safai for supervisor, and about \$684k to the Robert F. Kennedy Democratic Club to support Philhour and Safai.¹⁶

According to data produced by the San Francisco Ethics Commission,¹⁷ in the District 1 race, the outside spending supporting Philhour totaled about \$700k: \$505k from the Robert F. Kennedy Democratic Club (since renamed United Democrat Club, after the Kennedy family objected), \$124k from San Franciscans for a City that Works, and just over \$30k each from two other PACs. In District 11, outside spending supporting Safai totaled \$780k: \$635k from Protect SF, \$122k from San Franciscans for a City that Works, and smaller amounts from the Robert F. Kennedy Democratic Club and another PAC. Outside spending in other races was considerably less: San Franciscans for a City that Works spent \$115k in support of Arce in District 9, San Francisco Parent PAC spent \$58k in District 1, and various labor and tenants’ organizations spent \$50k or less in various races.

The top contributors for these three major 2016 super PAC spenders were:

1. RFK/United Democrat Club (#1383372): Unclear based on state data, but appears to be mostly Progress San Francisco—at least \$684k. Given that the RFK Democrat Club spent \$505k in District 1 and \$21k in District 11¹⁸
2. San Franciscans for a City that Works (#1384192): \$270k from Progress San Francisco; \$60k from San Franciscans Against Wasteful Spending/No on Propositions D, H, L & M (ID #1388893); \$30k from Sheet Metal Workers Local Union 104 PAC; \$25k from Northern California Carpenters Regional Council.

¹⁵ Michael Barba & Joshua Sabatini, *Tech support: Third-party spending reaches historic high in SF supervisor races*, San Francisco Examiner, Nov. 3, 2016, <http://www.sfexaminer.com/?p=157257>; Joshua Sabatini & Michael Barba, *Google bus issue reappears as ‘dark money’ from tech floods into supervisor races*, San Francisco Examiner, Oct. 14, 2016, <http://www.sfexaminer.com/?p=155499>.

¹⁶ <https://goo.gl/QkMykk>. It also spent heavily on ballot measures. See Julian Mark, *Big Soda, Tech, and Developers Spending Millions This Election*, Mission Local, Nov. 1, 2016, <https://missionlocal.org/2016/11/campaign-finance-story/>.

¹⁷ <https://sfethics.org/ethics/2016/06/campaign-finance-dashboards-june-7-2016-and-november-8-2016-elections.html>.

¹⁸ See also Heather Knight, *The SF Democratic club that must not be named*, Feb. 21, 2017, <http://www.sfchronicle.com/news/article/The-SF-Democratic-club-that-must-not-be-named-10946108.php>.

3. Protect SF (#1390689): Unclear from state data, perhaps due to terminated status, but Progress San Francisco gave \$601,500 to Protect SF in the last few weeks before the election.

Of the labor and tenants' organizations that made independent expenditures in 2016 supervisors' races, the largest amounts were spent by:

1. San Francisco Tenants and Families for Affordable Housing (ID# 1378915), ~\$173k total: This political committee, which also spends money on ballot measures, receives large contributions from labor union PACs. In 2016, it received at least \$173k from SEIU Local 1021 Candidate PAC (ID# 1296948) and \$155k from SEIU Local 1021 Issues PAC (ID# 1296947) (the latter of which might be specific to ballot measures).¹⁹
2. Dignity CA SEIU Local 2015 (ID# 1357256), ~\$113k total: This political committee receives large contributions from labor union PACs. In 2016, it received a \$200k contribution from SEIU Local 2015 State PAC (ID# 1374983) and a \$887,374 contribution from the federal SEIU Committee on Political Education (COPE, federal PAC ID #C00004036); in 2017, it received a \$1.153M contribution from SEIU COPE.
3. SEIU Local 1021 Candidate PAC (ID #1296948), ~\$68k total direct independent spending plus contributions to San Francisco Tenants and Families for Affordable Housing as noted above.

Thus, the largest *contributors* to these labor and tenants' independent spenders were SEIU Local 1021 Candidate PAC, SEIU Local 2015 State PAC, and SEIU COPE. However, as explained below, these contributors were themselves aggregating contributions almost entirely below \$200:

- SEIU Local 1021 Candidate PAC (ID# 1296948): The vast majority of its receipts come from unitemized (<\$100) contributions. Of the \$1.59M it received in 2015-16, \$1.46M (92%) came from unitemized contributions, and the rest (\$64k) from SEIU Local 1021 (the union itself).
- SEIU Local 2015 State PAC (ID# 1374983): 100% of its \$1.327M in contributions are unitemized.
- SEIU COPE (federal ID #C00004036): According to federal data, in 2016 this PAC received \$50M, but virtually all from unitemized (<\$200) contributions. Only 74 contributions exceeded \$200; only three exceeded \$1,000; only one (\$6,000) exceeded \$5,000.

¹⁹ Form 460 for San Francisco Tenants and Families for Affordable Housing, sponsored by community and labor organizations (filed January 31, 2017) available at <http://public.netfile.com/Pub2/RequestPDF.aspx?id=163075137>.

Although the totals have not yet been finalized regarding the June 2018 mayoral race, existing reporting indicates that outside spending has yet again reached a new high and that many of the same large donors were active.²⁰

B. Analysis

The current individual contribution limit in San Francisco is \$500. Right now, however, wealthy funders can circumvent that limit by contributing not \$500, \$5,000, or even \$50,000, but \$250,000 or more to super PACs that spend in those very same elections. As recently as 2014, very large outside spending (and, consequently, very large contributions to outside spending groups, such as super PACs) in races for city elective office was rare. Starting in 2015 and 2016, however, the picture now appears as follows:

Wealthy donors, including both corporations (e.g., Airbnb, Facebook) and individual funders (e.g., Graham, Benioff, Williams, Altman), give both to the Committee to Expand the Middle Class, which makes very large contributions (nearly all of its money) to Progress San Francisco, and also directly to Progress San Francisco. Progress San Francisco then gives to groups, such as the RFK/United Democrat Club, Protect SF, and San Franciscans for a City that Works, that spend the money on independent expenditures.

The “pass-through” nature of this funding mechanism is worth noting. Consider, for example, Paul Graham’s \$300k contribution to the Committee to Expand the Middle Class. That entity did not spend his \$300k on independent expenditures. Rather, it gave \$420k to Progress San Francisco (where it merged with an additional \$250k from Paul Graham). Nor did Progress San Francisco spend the money on independent expenditures. Rather, Progress San Francisco gave \$684k to the RFK/United Democrat Club, \$270k to San Franciscans for a City that Works, and \$601k to Protect SF—the entities that actually spent money in city elections.

While large contributions from business and labor interests have long been part of San Francisco political life, these new groups are not aggregating two-, three-, or even four-figure contributions. They are receiving, passing along, and spending *six*-figure contributions. The potential for corruption, including quid pro quo corruption, is at a scale beyond anything previously known in city campaign funding.

Labor and tenants’ affiliated super PACs operate somewhat differently. The vast majority of the money spent by these entities ultimately traces back to small donors. Small donors provide 100% of the funds to SEIU Local 2015 State PAC, very

²⁰ See *supra* note 7; City and County of San Francisco Ethics Commission, Campaign Finance Dashboards – June 5, 2018 and November 6, 2018, Third Party Expenditures During Late Reporting Period, available at <https://sfethics.org/ethics/2018/03/campaign-finance-dashboards-june-5-2018-and-november-6-2018-elections.html>.

nearly 100% of the funds to federal SEIU COPE, and 92% of the funds to SEIU Local 1021 Candidate PAC. These funds are then passed along to entities such as San Francisco Tenants and Families for Affordable Housing and Dignity CA SEIU Local 2015, which engage in independent spending. Thus, while this also involves a “pass-through” entity, the funds are ultimately mostly small-donor-derived.

III. Proposed Complementary Limitations to Increase Effectiveness of Public Financing Program

While public financing is an important tool, the data above show that recent third party (outside) spending in local elections threatens to undermine the effectiveness of public financing by overwhelming it. Taking the June 2018 mayoral election as an example, although all three major candidates received large amounts of public financing (\$975,000 each for London Breed and Mark Leno and \$707,759 for Jane Kim), late third party expenditures for one candidate alone, exceeded the total public financing provided for any one candidate, reaching a total of \$1.3 million.²¹ Third party expenditures also continued to exhibit the “pass-through” nature described above that was seen in 2015 and 2016. For example, Progress San Francisco again played a major behind-the-scenes role making large contributions to PACs that supported candidate Breed, and other tech magnates supported candidate Kim.²² With that context in mind, it is crucial to consider additional campaign financing measures to rein in outside spending and prevent it from dampening or erasing the impacts of the public financing program.

We recommend at least two additions to the existing campaign finance reform ordinance to address this danger, and achieve the purposes set forth in Section 1.100.

A. Limits on contributions to independent expenditure political committees

A contribution limit of \$5,000 from any donor (corporation, individual, or committee) to independent expenditure committees, with an exception for a donor that is itself a committee that accepts contributions that are limited to \$5,000, would help protect against quid pro quo corruption or its appearance. This is the same limit that applied to contributions to federal independent expenditure PACs until the *SpeechNow.org v. FEC* decision. Furthermore, based on an analysis of recent campaign finance data, it would impede only a relatively small percentage of contributors.

²¹ City and County of San Francisco Ethics Commission, Campaign Finance Dashboards – June 5, 2018 and November 6, 2018, Third Party Expenditures During Late Reporting Period, available at <https://sfethics.org/ethics/2018/03/campaign-finance-dashboards-june-5-2018-and-november-6-2018-elections.html>.

²² See *supra* note 7.

The exception for a donor that is itself a committee that accepts contributions that are limited to \$5,000 reflects the “pass-through” nature of much funding in San Francisco city elections. There is a relevant difference between a single individual writing a check for \$100,000 versus a political committee that accepts multiple \$5000 contributions and aggregates them into a \$100k contribution. The exception would prohibit the former, but allow the latter.

Lower or higher contribution limits could be considered. However, there could be disadvantages. A higher limit (e.g., \$30,000) might not be politically palatable to voters; even though it actually sets a limit where none currently exists (and therefore reduces the limit from infinity to \$30k), it could be painted as unnecessarily *allowing* large donations. Conversely, a lower limit (e.g., \$1,000) might attract more opposition from “medium” donors and, perhaps, be more legally vulnerable.

B. Limits on contributions from foreign-influenced corporations

The proposed ordinance also addresses political spending by a “foreign-influenced corporation”—a corporation owned 5% by a single foreign national investor, or 20% by multiple foreign national investors.

Direct corporate political spending seems to be rare in San Francisco elections. Rather, corporations (foreign-influenced or otherwise) generally contribute to political committees, which then spend the money—or, more often, contribute it to another committee, which perhaps in turn contributes it to yet another, before finally reaching the committee that spends the money on independent expenditures.

By far, the most prominent corporation active in San Francisco city elections that may meet the definition of “foreign-influenced corporation” is Airbnb. Airbnb is a privately held company, so ownership data is not complete, but it is partly owned by Moscow-based (and Kremlin-linked) DST Global.²³

²³ See Jon Swaine & Luke Harding, *Russia funded Facebook and Twitter investments through Kushner investor*, The Guardian, Nov. 5, 2017, <https://www.theguardian.com/news/2017/nov/05/russia-funded-facebook-twitter-investments-kushner-investor>; Dan Primack, *Yuri Milner adds \$1.7 billion to his VC war chest*, FORTUNE, Aug. 3, 2015, <http://fortune.com/2015/08/03/yuri-milner-adds-1-7-billion-to-his-vc-warchest/> (DST Global is Moscow based); Scott Austin, *Airbnb: From Y Combinator to \$112M Funding in Three Years*, The Wall Street Journal, July 25, 2011, <http://blogs.wsj.com/venturecapital/2011/07/25/airbnb-from-y-combinatorto-112m-funding-in-three-years/>. Reportedly, \$40 million of the \$112 million that Airbnb raised in its 2011 funding round came from DST Global. See Alexia Tsotsis, *Airbnb Bags \$112 Million In Series B From Andreessen, DST And General Catalyst*, TechCrunch, July 24, 2011, <http://tcrn.ch/2EF61F2>. However, the calculation of DST Global’s ownership stake may be based on a valuation of \$1 billion or more; if so, DST Global’s \$40 million could represent 4%, not the 5% needed to qualify as a “foreign-influenced corporation.”

As noted above, Airbnb’s money, like that of other donors, flows through multiple intermediate entities before being spent in San Francisco elections: Airbnb → Committee to Expand the Middle Class → Progress San Francisco → entities that make independent expenditures. Other foreign-influenced corporations, whether small or large, likely follow a similar pattern.²⁴ Consequently, the proposed ordinance reflects this likely route for how money from foreign-influenced corporations may enter the political system.

IV. Conclusion

Thank you for the opportunity to submit comments as you assess the landscape surrounding campaign finance in the City and County of San Francisco. We would welcome the opportunity to present the proposals in more detail. The City of St. Petersburg, Florida enacted similar provisions at the end of 2017 with the support of Free Speech For People. We have developed a full legal analysis addressing any constitutional concerns, and we would be happy to work with the Commission to answer any questions and develop draft language to support the Commission’s core concerns and mission.

Respectfully submitted,

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²⁴ For example, in the case of the Mexican businessman convicted in federal court for illegal foreign political spending in the 2012 San Diego municipal election, \$120,000 was funneled from “South Beach Acquisitions Inc.” to independent expenditure committees. See <http://voiceofsandiego.org/wp-content/uploads/2014/08/Azano-SS-Indictment.pdf>, ¶ 31.