

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	4:17-cr-116 (2)
	§	(Hon. Lee H. Rosenthal)
STEPHEN STOCKMAN	§	

**DEFENDANT STOCKMAN'S MOTION TO DISMISS COUNTS 1 THROUGH 8  
(MAIL AND WIRE FRAUD)  
FOR FAILURE TO ALLEGE A CRIME AND FOR MULTIPLICITY**

COMES NOW STEPHEN STOCKMAN, DEFENDANT, through counsel Sean Buckley, and pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, files this his Motion to Dismiss Counts 1 Through 8 (Mail and Wire Fraud) for Failure to Allege a Crime and for Multiplicity, for cause showing the Honorable Court as follows:

- 1. The Indictment fails to comply with the requirements of F.R.Crim.P Rule 7(c)(1) by failing to allege with specificity facts establishing the elements of fraud in raising funds for nonprofit organizations.**

In all criminal cases, F.R.Crim.P. Rule 7(c)(1) requires that an indictment set forth "a plain, concise, and definite written statement of the essential facts constituting the offense charged." The Supreme Court has established that an indictment must fairly inform the defendant of the charges against which he must defend. *See Hamling v. United States*, 418 U.S. 87, 117 (1974). For mail and wire fraud, an indictment must contain a reasonably detailed description to provide the defendant with notice of the nature of the offense. *Id.* at 117-18. "Where guilt depends so crucially upon ... *a specific identification of fact* ... cases

have uniformly held that an indictment must do more than simply repeat the language of the criminal statute." *United States v. Yefsky*, 994 F.2d 885, 893 (1st Cir. 1993). Counts 1-8 of the Indictment fail these tests.

Additionally, Counts 1-8 fail to meet minimum First Amendment standards governing charitable solicitations — the type of fraud alleged here.<sup>1</sup> In *Illinois ex rel. Madigan v. Telemarketing Associates*, 538 U.S. 600 (2003), the Supreme Court emphatically affirmed that:

[t]he First Amendment protects the right to engage in charitable solicitation[s].... ("charitable appeals for funds ... involve a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment").... [*Id.* at 611-12 (citations omitted) (emphasis added).]

Having been so established, the Court acknowledged that the right left only a "corridor open for fraud actions...." *Id.* at 617. That corridor, in turn, is a very narrow one. As the Court explained:

[I]n a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a fundraiser to fraud liability. As

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<sup>1</sup> See generally *Village of Schaumburg v. Citizens for a Better Environment, et al.*, 444 U.S. 620, 627 (1980) ("regulation 'must be done "with narrow specificity"' when First Amendment interests are affected); *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 967 (1984) ("[W]hether the statute regulates before- or after-the- fact makes little difference in this case. Whether the charity is prevented from engaging in *First Amendment* activity by the lack of a solicitation permit or by the knowledge that its fundraising activity is illegal if it cannot satisfy the percentage limitation, the chill on the protected activity is the same."); *Riley v. National Federation of the Blind*, 487 U.S. 781, 794 (1988) ("And, of course, in every such case the fundraiser must bear the costs of litigation . . . . This scheme must necessarily chill speech in direct contravention of the First Amendment's dictates."). These three cases are collectively known as the "*Village of Schaumburg* trilogy." See also *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.").

restated in Illinois case law, to prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false [and] made the representation with the intent to mislead ... and succeeded in doing so. Heightening the complainant's burden, these showings must be made by clear and convincing evidence. [*Id.* at 620.]

Thus, the Court warned that "[s]imply labeling an action one for 'fraud' ... will not carry the day." *Id.* at 617. Further, the *Telemarketing Associates* Court indicated that the issue of fraud was not just a matter of proof at trial, but also a matter of sufficiency of the indictment. *See id.* at 617-18. To that end, the Court examined carefully whether the State's Attorney General had alleged in her complaint sufficient facts to meet the Court's high First Amendment barrier. While the Illinois Attorney General's complaint containing detailed allegations was found sufficient to withstand a motion to dismiss in *Telemarketing Associates*, the U.S. Attorney's mail and wire fraud Counts 1-8<sup>2</sup> here do not meet the "[e]xacting proof requirements ... provid[ing] sufficient breathing room for protected speech."<sup>3</sup> *Telemarketing Associates* at 620.

**2. The Indictment alleges Mail and Wire Fraud in connection with solicitations made by Stockman on behalf of charitable organizations.**

Counts 1-8 charge that Defendant Stockman "knowingly devised and intended to devise a scheme to defraud and to obtain money by materially false and fraudulent

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<sup>2</sup> Compare the lack of specificity in Counts 1-8 to that in *United States v. Lyons*, 472 F.3d 1055, 1065 (9<sup>th</sup> Cir. 2007), which held that the indictment correctly charged specific misrepresentations in fundraising for nonprofit organizations.

<sup>3</sup> The U.S. Supreme Court has expressed grave concern that "the expense of" defending oneself in court can lead to individuals being "deterred from voicing their criticism . . . even though [the statements are] believed to be true and even though [they are] in fact true." *See New York Times v. Sullivan*, 376 U.S. 254, 279 (1964). The same reason would apply here, and a defendant should not be put to the expense of defending himself unless the indictment makes clear the fraud alleged.

pretenses, representations, and promises" in violation of 18 U.S.C. §§ 1341 and 1343. First Superseding Indictment ("Indictment") at 10. The Indictment alleges that the purpose of the scheme was "to enrich themselves and to fund their political activities ... based on false pretenses." *Id.* Thus, the initial allegation in each of the first eight counts is that Defendant Stockman committed willful fraud in the solicitation of contributions to two nonprofit organizations:

- **Life Without Limits**, exempt from federal income taxation under Internal Revenue Code ("IRC") § 501(c)(3), *see* Indictment at ¶ 12 (described) and ¶¶ 28-35, 38-39 (discussed); and
- **Center for the American Future** ("CAF"), exempt from federal income taxation under IRC § 501(c)(4), *see* Indictment at ¶ 13 (described) and ¶¶ 41-49 (discussed).

The Indictment discusses Stockman's fundraising for yet another nonprofit organization:

- **The Ross Center**, exempt from federal income taxation under IRC § 501(c)(3), *see* Indictment at ¶ 11 (described) and ¶¶ 23-26, 28-29, 31 (discussed).

However, the Counts relate only to Life Without Limits and Center for the American Future, as none of the charges in the Indictment relate to The Ross Center. (A motion to strike references to The Ross Center as surplusage is being filed.)

**3. The Indictment makes only generalized charges with respect to the fraud alleged.**

The Indictment contains the following allegations of fraudulent representation in soliciting contributions to Life Without Limits and Center for the American Future:

¶ 16 — "materially false and fraudulent pretenses, representations, and promises."

¶ 17 — "fraudulently soliciting ... hundreds of thousands of dollars ... based on false pretenses."

¶ 18 — "false representations ... that their donations would be used for charitable and educational purposes, or for lawful independent political activity."

¶ 22 — "false statements and representations to the FEC, the charitable donors, and the public."

¶ 28 — "materially false representations."

¶ 29 — "materially false representations."

¶ 31 — "material misrepresentations."

¶ 32 — "for the purported purpose of funding the 'Freedom House,' a townhouse in Washington, D.C., that would serve as a meeting place, dormitory, and training facility for young people. STOCKMAN and Dodd presented Person B with an 18-page document titled ... 'Congressional Freedom Foundation' [which] was 'launching a three-pronged strategy to promote the ideas of liberty,' by establishing the 'Freedom House,' the 'Congressional Freedom Caucus,' and the 'Congressional Freedom Foundation Field Training Program.'"

¶ 34 — "Despite representing to Person B that Person B's charitable donation would be used to fund the Freedom House..." (Note this paragraph does not allege Stockman engaged in misrepresenting, only representing. *See also* ¶ 46.)

¶ 39 — "material misrepresentations."

¶ 41 — "purportedly to finance an 'independent expenditure' by Center for the American Future...." (Note, for the reasons set out in Stockman's motion to dismiss Count 12 filed on October 24, 2017, the CAF newspaper was neither an independent expenditure, nor a coordinated expenditure. Note that neither Stockman nor Posey called the CAF newspaper an "Independent Expenditure" but rather referred to it as "information.")

¶ 51 — "materially false and fraudulent pretenses, representations, and promises."

¶ 52 — "materially false and fraudulent pretenses, representations, and promises."

¶ 53 — "materially false and fraudulent pretenses, representations, and promises."

As can be readily seen from this compendium of accusations, the Indictment is almost wholly devoid of specific factual allegations of fraudulent misrepresentations. There are only three exceptions:

First, there is an allegation in ¶ 18 providing a generalized overview of a representation that donations would be used for charitable and educational purposes or for lawful independent political activity. However, this general statement is characterized as a misrepresentation only because of the Government's theory that the funds later were misspent — it does not in the least inform the Defendant of any specific false pretenses, false representations, or false promises.

Second, ¶ 32 discusses a written proposal given to Person B which the Indictment misleadingly describes as a physical building called "Freedom House" — as if that were the only project in the proposal. Insofar as this proposal sought funds for a wide range of programs and categories of expenses, it is highly misleading and prejudicial to describe this project narrowly as being for a building called "Freedom House." In fact, this claim is belied by the proposal's budget as seen by the Grand Jury, showing that the Freedom House project (\$1,299,000) was only about half of the entire (\$2,464,000) proposal. Accordingly, alleging that the \$350,000 contribution from Person B was not used to buy a building called the Freedom House in no way demonstrates that any portion of the contribution was misspent, to say nothing of the existence of an intent to deceive at the time of the solicitation. In fact, the same information shown to the Grand Jury demonstrates that \$350,000 constituted only 27 percent of the purchase price of the proposed Freedom House

building, demonstrating that the donor knew he was contributing toward a broader project that would including fundraising and administrative and other expenses.

Third, ¶ 41 alleges that the funds raised to mail the Center for the American Future newspaper was purportedly for an independent expenditure. The Indictment falsely characterizes the soliciting of funds to mail a newspaper. (Defendant Stockman has already filed a motion to dismiss Count 12 relating to the CAF newspaper because it contained no express advocacy and therefore was not an FEC- regulated expenditure, independent or coordinated.)

There is no legal requirement that every penny of money solicited be used for the programs for which they are solicited.<sup>4</sup> It is common knowledge, especially among sophisticated businessmen like Persons A and B, that organizations have overhead, including personal salaries, and that any donation usually will be deposited into the general treasury fund of an organization to be used for all lawful purposes. *See, e.g., Riley* at 804 (Scalia, J., concurring) (“[D]onors are assuredly aware that a portion of their donations may go to solicitation costs and other administrative expenses....”). For charitable solicitation fraud, a more specific statement of the allegedly false material statements is required to create a sufficient indictment.

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<sup>4</sup> Sophisticated individual or foundation donors, the type involved here, understand that they have the option to make what are known as “restricted” grants or contributions to nonprofit organizations. During the years in question in the Indictment, grants were of three types: “unrestricted,” “temporarily restricted,” or “permanently restricted.” Effective December 15, 2017, the Financial Accounting Standards Board changed these to two categories: “with donor-imposed restrictions” and “without donor-imposed restrictions.” Such grants must be recorded in the organization’s books and records and then expended only consistent with the restrictions imposed. None of the grants or contributions in the Indictment involve any type of restriction. *See PPC’s 990 Desk Book*, Thompson Reuters, 25<sup>th</sup> ed. (Jan. 2017) at 7-18.

In the absence of specific allegations of misrepresentations involving charitable solicitations as required by the First Amendment, Defendant Stockman should not be put to the burden of defending himself at a trial. To avoid compromising "a variety of speech interests — communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes — that are within the protection of the First Amendment" (*Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980)), the Indictment should be dismissed due to these deficiencies, and as further discussed *infra*.

**4. Counts 1 through 8 are insufficiently alleged in the Indictment.**

**A. Count One**

Count One alleges fraud with respect to soliciting a \$350,000 contribution for Life Without Limits from Foundation B. Paragraphs 32- 39 support Count One, but fail to allege mail fraud.

The first element of mail fraud requires a scheme to defraud, which requires that the government show: (i) that the defendant knowingly devise a scheme to defraud; (ii) false material pretenses; and (iii) specific intent to defraud. *See United States v. Imo*, 739 F.3d 226, 236 (5th Cir. 2014). Although Paragraph 32 alleges defendants met with Person B and sought a contribution for Life Without Limits, the Indictment fails to allege that they did not intend, at the time of the solicitation, to use the contribution to further the purposes of the Congressional Freedom Foundation proposal, which, as the Indictment states, was "to promote the ideas of liberty." ¶ 32. Other than implications about how some of the

funds were used later, the Indictment fails to allege specific facts supporting intent to defraud.

In fact, the proposal for the Freedom House portion of the Congressional Freedom Foundation was for a building (prospectively a townhouse in Washington, D.C.) (*see* ¶ 32) that would require substantially more money than Person B's \$350,000 donation, and Person B was clearly aware of this fact based on the proposal. The purpose of the contribution was to enable Life Without Limits to begin its program activities as well as a fundraising campaign to solicit donations that would ultimately enable it to make Freedom House a reality. Thus, the Indictment does not allege sufficient facts to support its allegation that defendants intended to or did in fact defraud Person B. Indeed, the Congressional Freedom Foundation proposal to Person B specifically advised that not all of the funds to be raised would be used to purchase a physical Freedom House building, but would also be used for additional fundraising, staff salary, and other purposes relating to the mission of the planned Congressional Freedom Foundation. The fact that the check was made out to Life Without Limits, not the name on the Congressional Freedom Foundation proposal, further demonstrates that Person B knew that he was donating to a nonprofit organization, not just to a building.

From the Indictment, it appears that the Government's only possible allegation of intent to deceive is that such intent must be assumed because the funds were not spent on a physical Freedom House building, even though some of the expenditures occurred over a year after the contribution. *See* ¶ 44. The Indictment points out that Life Without Limits is an IRC § 501(c)(3) organization, and claims that money from it was used to "finance

[Stockman's] congressional campaign." ¶ 30. However, there are no facts alleged that funds from this nonprofit were transferred to his campaign. Moreover, this allegation is undermined by the fact that 501(c)(3) organizations are expressly prohibited from being involved in campaigns for elected office, and if they are, are subject to revocation of their exemption by the IRS. Instead, upon information and belief, Life Without Limits still retains its tax-exempt status and continues to be listed in the IRS's Exempt Organizations Select Check as of this date.<sup>5</sup>

**B. Count Two**

Count Two suffers from the same failures as Count One. Count Two relates to a \$15,000 check from Foundation A1 to Life Without Limits. The check was dated April 9, 2012, that is alleged to have been mailed on April 11, 2012. Unlike Count One, the allegations with respect to Count Two claim that defendants "made materially false representations to Person A that his donations would be used for legitimate charitable or educational purposes." ¶ 28. But like Count One, there is no specific allegation that defendants intended to do anything specific other than use the donations from Person A for charitable purposes. The Indictment attempts to make much of the fact that Stockman was running for Congress at the same time that he was soliciting donations for a charitable organization. However, at present, there is no law prohibiting such multitasking, and certainly does not establish a scheme to defraud.

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<sup>5</sup> <https://www.irs.gov/charities-non-profits/exempt-organizations-select-check>

**C. Counts Three and Four**

Counts Three and Four both relate to a \$450,571.65 check to the U.S. Postal Service for postage to pay for the mailing of educational newspapers by the Center for the American Future. The primary material falsehood that the Indictment alleges and relies upon for Count Three is that the payment for the postage was an independent expenditure, but the Indictment alleges that the payment was in fact a coordinated communication (which would by law be a prohibited corporate and excessive contribution). ¶¶ 40-50.

Defendant Stockman has already filed a motion to dismiss Count 12 because the CAF newspaper did not constitute express advocacy under binding Fifth Circuit precedent, and thus was neither an independent expenditure nor a coordinated expenditure regulated by federal law. Moreover, for purposes of the materiality of the representations, the specific legal definition of the newspapers is irrelevant. The Indictment indicates that the newspapers were mailed with the postage provided by Person B, thus undermining the allegation of fraud: Person B achieved what he donated toward — the mailing of the newspapers.<sup>6</sup> Beyond that, there is no allegation to demonstrate a specific intent to defraud. The donor's payment to the Postal Service constituted an in-kind contribution to Center for the American Future, and apparently was reported as such on the CAF IRS Form 990 for 2014.

Counts Three and Four are based on a letter sent from a direct-mail company to Person B, allegedly at the direction of Defendant Stockman, to request payment of postage

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<sup>6</sup> As CAF is an organization exempt from federal income taxation under IRC section 501(c)(4), the contribution to it was not deductible for Person B's personal income taxes.

for mailing of the Center for the American Future newspaper. However, the Indictment also states:

STOCKMAN and POSEY informed the company head that there would not be any additional mailings, and they instructed the company head to refund the unspent portion of Person B's donation to Center for the American Future. [Indictment ¶ 48.]

The Government may hope this paragraph would be interpreted to mean that Stockman ordered that the mailing of the CAF newspaper be halted prematurely, so all postage funds would not be used, so that unused funds could be recaptured by Center for the American Future to be spent elsewhere. However, that is neither what is alleged, nor, upon information and belief, what happened. Indeed, neither of the two facts alleged, even if true, support a charge of any wrongdoing on the part of Stockman. First, a statement that there "would not be any additional mailings" would have been certainly correct, as the CAF Newspaper was the only mailing being made. Second, the statement that Stockman instructed "the company head to refund the unspent portion of funds" that was not expended in mailing the CAF newspaper would not have been unlawful, and the Indictment articulates no legal basis for concluding otherwise.

**D. Count Five**

In addition to containing the same flaws of the factual allegations explained above with respect to Count Two, which covers the same donation, Count Five alleges the emailing on March 28, 2012, of the IRS's tax exemption letter with respect to Life Without Limits, which was and remains to this day an IRC § 501(c)(3) public charity. Count Two alleges the sending of a \$15,000 check on April 9, 2012, presumably in response to the

exemption letter. As explained with respect to Count Two, the IRS letter provided the information Person A needed to confirm the tax-exempt status of the organization to which he was donating. Person A received the proper tax treatment for this donation, as the indictment shows. *See* ¶ 31 ("Foundation A filed a Form 990-PF, 'Return of Private Foundation,' reflecting \$100,000 in charitable donations to Life Without Limits in calendar year 2012."). There is no offense charged here. Count Five should be dismissed.

**E. Count Six**

Count Six references an "Email from STOCKMAN to Dodd with subject line 'stan'" dated May 13, 2012. ¶ 53. No other allegation mentions this email or its contents or how it relates at all to the alleged scheme. It fails to provide any nexus to this case at all, and fails to apprise Stockman of the allegation. No offense is charged here. Count Six should be dismissed.

**F. Count Seven**

Count Seven alleges wire fraud with respect to a \$100,000 wire transfer from Foundation A to Life Without Limits on July 2, 2012. Paragraphs 27-31 allege a scheme to defraud and to obtain money by false pretenses from Person A. It alleges secret diversion of "a significant portion" of the donations to finance the congressional campaign. The Indictment does not explain any part of this scheme. It is obvious within the Indictment and publicly known that Defendant Stockman worked as a professional fundraiser (for Life Without Limits, among other nonprofit organizations) for which he was paid. There is no allegation that his fees were unreasonable. When a person is paid for services rendered, that becomes his personal money. Stockman was running for Congress in 2012, and federal

law authorizes him to use his personal money to fund his campaign in any amount. This does not constitute secret diversion, and the Indictment fails to explain how Stockman's actions were unlawful. In any event, all attempts to answer the Indictment's fraud allegations require speculation as to what the Indictment alleges in the first place.

Furthermore, the Indictment claims that "Foundation A filed a Form 990-PF, 'Return of Private Foundation,' reflecting \$100,000 in charitable donations to Life Without Limits in calendar year 2012." ¶ 31. There is no claim that Defendant Stockman improperly took the funds from Life Without Limits. There has been no IRS action with respect to Life Without Limits to assess penalties for private benefit, excessive compensation, or improper activity with respect to federal elections. Count Seven is devoid of allegations of any clear wrongdoing sufficient to apprise the defendant of the crime for which he is charged.

#### **G. Count Eight**

Count Eight purports to charge wire fraud for an "[e]mail [on May 13, 2014] from POSEY to Person B's accountant attaching letter concerning \$350,000." ¶ 53. Paragraph 38 alleges that the email was "part of the scheme and to conceal the misappropriation of Person B's \$350,000 charitable donation" from over one year earlier (January 24, 2013).

Count Eight relates to the same \$350,000 contribution forming the basis for Count One, and suffers the same defects set out above in that there are insufficient facts to support the charges of fraud. Furthermore, the Posey email was sent on May 13, 2014 — just a few days before the deadline for Foundation B to file the information return for tax year 2013. Thus, the email bore a direct nexus only to providing Foundation B with an appropriate receipt for Foundation B's donation, and did nothing to conceal any disposition of funds

that neither Person B nor Foundation B had ever questioned to begin with. In fact, the email was not even sent to Person B, but to "Person B's accountant," clearly for tax purposes. Furthermore, ¶ 39 states that "Foundation B filed a Form 990- PF, 'Return of Private Foundation,' with the IRS reflecting \$350,000 in charitable donations to Life Without Limits for calendar year 2013." There is no allegation that the donation was disallowed by the IRS. Count Eight should be dismissed.

**5. The death of purported "Victim A" in 2017 requires dismissal of Counts 2 and 5 through 7 which relate to actions occurring in 2012.**

With respect to Defendant Stockman, the Indictment grounds Counts 2 and 5 through 7 on charitable solicitations made to Person A. The Indictment completely omits the important fact that, upon information and belief, Person A died on February 13, 2017. Moreover, upon information and belief, the FBI Agent who testified before the Grand Jury never advised the Grand Jury that Person A had died — neither during his testimony on February 28, 2017, nor his testimony on March 28, 2017. Additionally, Person A died six weeks before the First Superseding Indictment was issued on March 28, 2017.

All of the counts involving Person A occurred over five years ago — between December 2011 and July 2012. *See* Indictment at ¶¶ 27-31.

- Count 5 is based on an email sent on March 28, 2012 (in the indictment issued exactly five years after this email had been sent).
- Count 2 is based on a check sent by private carrier on April 11, 2012.
- Count 6 is based on an email sent on May 13, 2012.
- Count 7 is based on a wire transfer made on July 2, 2012.

- Upon information and belief, the FBI has claimed to the Grand Jury it began its investigation in late 2013 after news articles were published about Dodd's and Posey's contributions in the names of their parents. Thus, not only did the Government wait several years to seek issuance of an indictment of this supposed scheme to defraud, as to one count, but also it waited until the last possible day to do so within the five-year statute of limitations. Person A was the primary person who could have testified to the ongoing relationship he had with Stockman, and what "promises," if any, were made at the time of the solicitations. By all accounts, Person A was a highly intelligent and successful businessman who was involved in a variety of philanthropic activities. However, this primary source of exculpatory evidence is now unavailable, and the delay of the government in bringing the Indictment has resulted in extreme prejudice to Defendant which requires dismissal of the four counts related to Person A. It is impossible for Defendant Stockman to know the government's reason for having sat on these charges while a man that they knew to be in his late 80s died, but the effect of that decision has resulted in prejudice to Defendant because the Government's case rested primarily on the testimony of a deceased witness, and now rests on Defendant Dodd, who has accepted a plea bargain in exchange for testifying against Congressman Stockman.

**6. Counts 1 and 8 are Multiplicitous and violate the Double Jeopardy Clause of the Fifth Amendment.**

An indictment is multiplicitous if it charges a single offense in multiple counts, thus raising the potential for multiple punishment for the same offense in violation of the Fifth Amendment's Double Jeopardy clause. *United States v. Reagan*, 596 F.3d 251, 253 (5<sup>th</sup> Cir. 2010), *United States v. Brechtel*, 997 F.2d 1108, 1112 (5<sup>th</sup> Cir. 1993). To determine whether separate offenses have been committed, the court must look to the "allowable unit of prosecution." *Reagan* at 253; *United States v. Reedy*, 304 F.3d 358, 365 (5<sup>th</sup> Cir. 2002). When the charged statute involves an overarching scheme or artifice to defraud, the "allowable unit of prosecution" is the execution of the scheme, not the individual steps in furtherance of that scheme. *See United States v. Lemons*, 941 F.2d 309, 317-18 (5<sup>th</sup> Cir.

1991)("although the acts charged in count 1-8 were in furtherance of the scheme, there was but one execution of the scheme"); *Brechtel* at 1112.

Count 1 and Count 8 both relate to a single charitable donation given in response to one solicitation. Count 1 alleges mail fraud based on the mailing of the \$350,000 check around January 24, 2013. Count 8 alleges wire fraud relating to the same \$350,000 check, but is based on an email from defendant Posey to Person B's accountant over a year later, May 13, 2014.

The solicitation of the \$350,000 and the email reflect the same transaction, stemming from one allegedly fraudulent charitable solicitation, and involved the same "victim." Indeed, the indictment states that Posey's 2014 email was "part of the scheme and to conceal the misappropriation of Person B's \$350,000 charitable donation" (§ 38, emphasis added), although the obvious purpose of that email was for acknowledging the receipt of the \$350,000 for the tax purposes of Person B's charitable foundation. This directly implicates the Double Jeopardy clause of the Fifth Amendment, which states that no person can "be subject for the same offence to be twice put in jeopardy of life or limb," and violates the Double Jeopardy test set forth in *Blockburger v. United States*, 284 U.S. 299 (1932) as well as other criteria for impermissible multiplicity. The operative action is the "fraudulent solicitation" that was alleged to have occurred on January 24, 2013, and that action is common between both Count 1 and Count 8.

The Supreme Court has held that "[t]he Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169

(1977). Since Count 1 and Count 8 relate to the same transaction, they are multiplicitous and at least one of them should be dismissed for this reason alone.

**7. Counts 3 and 4 are Multiplicitous and violate the Double Jeopardy Clause of the Fifth Amendment.**

Similarly, Counts 3 and 4 charge violations of § 1341 based on the same nonprofit solicitation and donation. Count 3 involves a letter sent from a direct mail company to Person B asking for payment of postage on the newspaper mail, and Count 4 is Person B mailing his check for \$450,571.65 payable to US Postmaster. Since both Count 3 and Count 4 relate to a single transaction, they are multiplicitous and at least one of them should be dismissed for this reason alone.

**8. Counts 2 and 5 are Multiplicitous and violate the Double Jeopardy Clause of the Fifth Amendment.**

Similarly again, Counts 2 and 5 charge separate violations of §1341 that relate to the same completed transaction. Count 5 is an email of Life Without Limits' IRS exemption letter on March 28, 2012, and Count 2 is the apparent sending of a \$15,000 check on April 11, 2012. Since both Count 2 and Count 5 relate to the same transaction, they are multiplicitous and at least one of them should be dismissed for this reason alone.

**9. Conclusion and request for relief.**

Based on the foregoing, Defendant Stephen Stockman respectfully moves the Honorable Court to DISMISS Counts 1 through 8. Furthermore, Stockman respectfully requests a hearing on this Motion.

Respectfully submitted,

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### **CERTIFICATE OF CONFERENCE**

I certify that on October 26, 2017 I discussed this Motion with Mr. Ryan Ellersick, counsel for the United States, and the Government is OPPOSED.

/s/ Sean Buckley  
Sean Buckley

### **CERTIFICATE OF SERVICE**

I certify that on October 26, 2017 I provided a copy of this Motion to counsel for the United States, and all parties, via the ECF system.

/s/ Sean Buckley  
Sean Buckley

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	4:17-cr-116 (2)
	§	(Hon. Lee H. Rosenthal)
STEPHEN STOCKMAN	§	

**ORDER ON DEFENDANT STOCKMAN'S  
MOTION TO DISMISS COUNTS 1 THROUGH 8**

ON THIS DATE THE COURT came to consider Defendant Stephen Stockman's Motion to Dismiss Counts 1 through 8 of the Indictment. Upon consideration, the Motion is:

\_\_\_\_\_ GRANTED.

\_\_\_\_\_ DENIED.

SIGNED ON THIS THE \_\_\_\_\_ DAY OF \_\_\_\_\_, 201\_\_\_\_\_.

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE