

**STATE OF CONNECTICUT  
STATE ELECTIONS ENFORCEMENT COMMISSION**

In the Matter of a Complaint by Anthony Santino

File No. 2013-042

**SETTLEMENT AGREEMENT**

This Agreement, by and between Thomas C. Foley, of the Town of Greenwich, County of Fairfield, State of Connecticut; the Delaware corporation Voters for Good Government, Inc.; and the authorized representative of the State Elections Enforcement Commission is entered into in accordance with Section 9-7b-54 of the Regulations of Connecticut State Agencies and Section 4-177 (c) of the General Statutes of Connecticut. The parties to this Agreement have differing interpretations of Connecticut statutes and the Constitutional constraints upon such statutes, but have consented to this Agreement in order to jointly settle this contested matter. In accordance herewith, the parties agree that:

**Factual Stipulations**

1. In or about February 2013 Respondent Thomas C. Foley contacted Dave Sackett of The Tarrance Group, Inc. ("TTG"), a national Republican strategic research and polling firm located in Virginia, and requested that TTG conduct a poll.
2. Starting in February 2013 through to the beginning of March 2013, Mr. Sackett designed and developed a public opinion research poll with input from Mr. Foley and Justin Clark, a strategic consultant to Voters for Good Government ("VGG") and also Mr. Foley's campaign manager during his 2010 campaign for governor.
3. The poll was conducted by TTG of 500 registered "likely" voters in Connecticut from March 18-20, 2013. The poll asked sixteen substantive questions, in addition to other baseline questions about the voters themselves.
  - a. The substantive portion of the poll started in Questions 1 through 4 by asking general questions about the voter's views on the state of Connecticut, the voter's view of how Governor Malloy is handling the job of governor, whether the voter would vote Republican or Democrat in 2014, as well as the voter's "key issues."
  - b. Question 5 specifically asked about the voter's choice as between Tom Foley and Dannel Malloy in a 2014 race for governor.

- c. Questions 6 through 8 and 10 through 12 compared the “favorable” rating (and name recognition) of: Tom Foley, Dannel Malloy, Christopher Shays, John McKinney, Larry Cafero and Mark Boughton.
  - d. Question 9 asked whether the voter believes that the Governor has done well enough to deserve re-election or if the voter believes that it is time for a new person.
  - e. Questions 13 and 14 asked those voters with a “favorable” or “unfavorable” impression of Tom Foley, respectively, to expand on the reason for that choice (from a list of prewritten choices).
  - f. Question 15 stated that “some believe that there was voter fraud that occurred which changed the results of the 2010 election for [g]overnor” and asked whether the voter believes that such voter fraud occurred and did change the result.
  - g. Question 16, the final substantive question, asked the voter if such voter would be more or less likely to vote for Tom Foley based on the voter’s views about “what happened with the controversy regarding voter fraud in the 2010 election for [g]overnor.”
4. After reviewing the results of the poll, Mr. Sackett drafted, as he and his team normally do, a memorandum from Mr. Sackett entitled “Key Findings Memorandum.”
  5. With modest input from Mr. Foley and Mr. Clark, a final “Key Findings Memorandum” was produced by Mr. Sackett.
  6. The “Key Findings Memorandum,” dated April 8, 2013, contains six so-called “Key Findings,” divided up into two categories: “Direction of State” and “Views of Key Political Figures.”
    - a. The first three “key findings” state that a majority of voters surveyed overall think that Connecticut is “off on the wrong track,” including 77% of Republican voters, 59% of unaffiliated voters and 40% of Democratic voters.
    - b. The fourth “key finding” explains that Governor Malloy is “very vulnerable to a credible challenge” in 2014 and presents certain data as authority for this assertion.
    - c. The fifth “key finding” indicates that “Tom Foley has retained nearly his entire name ID from his 2010 candidacy, and remains very well-known with solid image ratings among Connecticut voters.”
    - d. The final “key finding” indicates that the “other potential Republican candidates” have far lower “favorable” and “soft name ID” ratings compared to Tom Foley.
    - e. The “potential” candidates included in the final “key finding” include Mr. Foley (46%), Mark Boughton (7%), Larry Cafero (6%), and John McKinney (19%).
    - f. The final “key finding” also includes a statement that Mr. McKinney’s relative popularity was “heavily” concentrated in the Fourth Congressional District, “a district his father, the late Stewart McKinney, represented in the 1970’s and 80’s.”

7. After the input of Mr. Foley and Mr. Clark was incorporated into the “Key Findings Memorandum,” the memorandum was provided to various Connecticut media outlets on or about April 8, 2013.
8. On or about March 19, 2013, Mr. Sackett, who also did work for Mr. Foley’s 2010 run for governor, issued an invoice for \$15,504 to Mr. Foley, billed to “Foley for Governor,” Mr. Foley’s terminated 2010 candidate committee, and directed to Mr. Foley’s residential address.
9. On or about March 31, 2013, Respondent Voters for Good Government, Inc. (“VGG”) drafted a check to TTG, signed by Mr. Foley in his capacity as VGG’s Treasurer, in the amount of \$15,504; the check was posted on or about April 12, 2013.
10. VGG is a Delaware non-stock corporation, incorporated in approximately 2012 and is a tax-exempt organization under Section 527 of the U.S. Internal Revenue Code (26 U.S.C. § 527).
11. VGG is an “entity,” as that term is defined for campaign finance purposes in General Statutes § 9-601 (19) (Rev. to June 18, 2013).<sup>1</sup>
12. VGG is an entity that was created to engage in independent political activity, and as such was not required at its formation to and does not have a separate political committee registered under Title 9 of the Connecticut General Statutes, as that term is defined in General Statutes § 9-601 (3) (Rev. to June 18, 2013).
13. On or about September 10, 2013, Respondent Foley filed an Exploratory Committee Registration (SEEC Form 4) with the State Elections Enforcement Commission forming a November 2014 exploratory committee for statewide office only.
14. Mr. Foley has filed no other prior registration or campaign finance disclosure statement with SEEC in relation to primaries and/or elections in 2014.

**Relevant Statutes**

15. General Statutes § 9-601 (11) (Rev. to June 18, 2013) defines the term “candidate” under Chapters 155 and 157 and reads, in pertinent part:

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<sup>1</sup> General Statutes § 9-601 (19) provides that “‘Entity’ means the following, whether organized in this or any other state: An organization, corporation, cooperative association, limited partnership, professional association, limited liability company, and limited liability partnership”

“Candidate” means an individual who seeks nomination for election or election to public office whether or not such individual is elected, and for the purposes of this chapter and chapter 157, an individual shall be deemed to seek nomination for election or election if such individual has (A) been endorsed by a party or become eligible for a position on the ballot at an election or primary, or (B) solicited or received contributions, made expenditures or given such individual’s consent to any other person to solicit or receive contributions or make expenditures with the intent to bring about such individual’s nomination for election or election to any such office. . . .

16. “Expenditure” is defined in General Statutes § 9-601b (Rev. to June 18, 2013), as follows, in pertinent part:

(a) As used in this chapter and chapter 157, the term “expenditure” means:

(1) Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made for the purpose of influencing the nomination for election, or election, of any person or for the purpose of aiding or promoting the success or defeat of any referendum question or on behalf of any political party; . . . .

17. “Contribution” is defined in General Statutes § 9-601a (Rev. to June 18, 2013), as follows, in pertinent part:

(a) As used in this chapter and chapter 157, the term “contribution” means:

(1) Any gift, subscription, loan, advance, payment or deposit of money or anything of value, made for the purpose of influencing the nomination for election, or election, of any person or for the purpose of aiding or promoting the success or defeat of any referendum question or on behalf of any political party;

(2) A written contract, promise or agreement to make a contribution for any such purpose;

(3) The payment by any person, other than a candidate or campaign treasurer, of compensation for the personal services of any other person

which are rendered without charge to a committee or candidate for any such purpose;

(4) An expenditure that is not an independent expenditure; . . . .  
(Emphasis added.)

18. "Independent Expenditure" is defined in General Statutes § 9-601c (Rev. to June 18, 2013), as follows, in pertinent part:

(a) As used in this chapter and chapter 157, the term "independent expenditure" means an expenditure, as defined in section 9-601b, that is made without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee. . . .

19. General Statutes § 9-604 reads, in pertinent part:

(a) Each candidate for a particular public office or the position of town committee member shall form a single candidate committee for which he shall designate a campaign treasurer and a depository institution situated in this state as the depository for the committee's funds and shall file a committee statement containing such designations, not later than ten days after becoming a candidate, with the proper authority as required by section 9-603. . . .

(b) The formation of a candidate committee by a candidate and the filing of statements pursuant to section 9-608 shall not be required if the candidate files a certification with the proper authority required by section 9-603, not later than ten days after becoming a candidate, and any of the following conditions exist for the campaign: . . . (2) the candidate finances the candidate's campaign entirely from personal funds and does not solicit or receive contributions, provided if said candidate personally makes an expenditure or expenditures in excess of one thousand dollars to, or for the benefit of, said candidate's campaign for nomination at a primary or election to an office or position, said candidate shall file statements according to the same schedule and in the same manner as is required of a campaign treasurer of a candidate committee under section 9-608; (3) the candidate does not receive or expend funds in excess of one thousand dollars; . . .

20. General Statutes § 9-608 (Rev. to June 18, 2013) reads, in pertinent part:

(a) (1) Each treasurer of a committee, other than a state central committee, shall file a statement, sworn under penalty of false statement with the proper authority in accordance with the provisions of section 9-603, (A) on the tenth calendar day in the months of January, April, July and October, provided, if such tenth calendar day is a Saturday, Sunday or legal holiday, the statement shall be filed on the next business day . . .

21. General Statutes § 9-623 (Rev. to June 18, 2013) reads, in pertinent part:

...

(b) (1) If any campaign treasurer fails to file any statement required by section 9-608, or if any candidate fails to file either (A) a statement for the formation of a candidate committee as required by section 9-604, or (B) a certification pursuant to section 9-603 that the candidate is exempt from forming a candidate committee as required by section 9-604, within the time required, the campaign treasurer or candidate, as the case may be, shall pay a late filing fee of one hundred dollars.

...

(4) The penalty for any violation of section 9-603, 9-604 or 9-608 shall be a fine of not less than two hundred dollars or more than two thousand dollars or imprisonment for not more than one year, or both. (Emphasis added.)

22. General Statutes § 9-602 (Rev. to June 18, 2013) reads, in pertinent part:

(a) Except with respect to an individual acting alone, or with respect to a group of two or more individuals acting together that receives funds or makes or incurs expenditures not exceeding one thousand dollars in the aggregate, no contributions may be made, solicited or received and no expenditures may be made, directly or indirectly, in aid of or in opposition to the candidacy for nomination or election of any individual or any party or referendum question, unless (1) the candidate or chairman of the committee has filed a designation of a campaign treasurer and a depository institution situated in this state as the depository for the committee's funds, . . . .

23. General Statutes § 9-622 reads, in pertinent part:

The following persons shall be guilty of illegal practices and shall be punished in accordance with the provisions of section 9-623:

...

(10) Any person who solicits, makes or receives a contribution that is otherwise prohibited by any provision of this chapter; . . .

### Commission Conclusions

#### *Mr. Foley Incurred an Expenditure and Was a Candidate*

24. Considering the aforesaid, the Commission believes that the evidence is sufficient to show that Respondent Foley incurred an “expenditure” for the commissioning of the poll and the “Key Findings” memorandum. The poll and the “Key Findings” memorandum issued to the press were clearly things of value (\$15,504), and the facts and circumstances described above show that cost was incurred by Mr. Foley “for the purpose of influencing the nomination for election, or election” of Mr. Foley insofar as the poll and the memorandum were promotional of a 2014 Foley candidacy.
25. Even shown in its most neutral light, one of the purposes of the poll was to assess Mr. Foley’s viability as a candidate; thus it was made for the purpose of influencing Mr. Foley’s nomination for election.
26. General Statutes § 9-601b does not contemplate a per se exception for polling by a potential candidate simply because the activity might be of an exploratory nature. If it is made for the purpose of influencing the nomination for election (even if the person to be influenced may only be the potential candidate her/himself), the cost is an “expenditure” under § 9-601b.
27. Moreover, the Commission believes the “Key Findings” memorandum is also an expenditure. Mr. Foley, both individually and through his vendor, TTG, edited out the data that was unfavorable to him and published only that data which promoted his potential candidacy and opposed the potential candidacies of both his likely Republican primary opponents, as well as Governor Malloy, the likely Democratic nominee in the general election.
28. Where an individual has incurred an expenditure and has not yet registered as a candidate, s/he must at the very least, register as a candidate and, if the financial activity is above \$1,000, designate a funding source (either the candidate her/himself or a committee) and

begin to disclose such financial activity on the filing schedule enumerated in General Statutes § 9-608.

29. As such, the Commission believes that Mr. Foley became a “candidate,” as that term is defined in General Statutes § 9-601 (11) in February 2013 when Mr. Foley incurred the expense for the poll and the memorandum released to the public.
30. Where, as here, the Commission believes that Mr. Foley incurred a \$15,504 expenditure and he received a contribution from VGG in the same amount, he was required to register as a candidate pursuant to General Statutes § 9-604 and designate a committee as his funding vehicle.
31. Mr. Foley was also required to file periodic campaign finance disclosure statements under General Statutes §§ 9-604 & 9-608 on April 10, 2013 and July 10, 2013.
32. As discussed above, Mr. Foley made no such disclosures within the time restrictions enumerated in the aforementioned statutes.
33. Additionally, the Commission believes VGG paying for the poll constitutes a contribution, which, pursuant to General Statutes § 9-602, was not permitted to make contributions unless and until it formed a political committee. See General Statutes § 9-622 (10).

*Voters for Good Government, Inc. Made a Contribution*

34. The Commission further believes that VGG’s direct payment to TTG in reimbursement for the expenditure authorized by Mr. Foley, was a contribution to Mr. Foley as a candidate.
35. VGG, through its treasurer, Mr. Foley, issued a check to TTG for the amount that Mr. Foley owed. The Commission believes this was the same as giving a check directly to Mr. Foley (or if he was in a committee, giving it to the committee treasurer). That is, reimbursements for expenses incurred are the functional equivalent of direct cash contributions to a candidate and/or committee.
36. Here, VGG, by Mr. Foley’s own act and initiative, reimbursed Mr. Foley via a check drawing funds in the same amount as that due by Mr. Foley to TGG for the expenditure promoting Mr. Foley discussed above.
37. As such, the Commission believes that the evidence is sufficient to show that the VGG payment was coordinated, was of value, and was made for the purpose of influencing the nomination for election of Mr. Foley and therefore constituted a “contribution” under General Statutes § 9-601a (a).

38. As discussed above, Voters for Good Government, Inc., was an “entity” under General Statutes § 9-601 (19).
39. While an entity is permitted to make independent expenditures directly out of its treasury in Connecticut, it may not make a contribution until it has formed a political committee, opened a bank account for the committee and raised funds directly into such political committee account. See General Statutes § 9-602.
40. Without first forming a political committee and disclosing its activity, VGG spent funds directly out of its treasury to make what the Commission believes was a contribution in the form of a reimbursement to Mr. Foley for the poll and the “Key Findings” memorandum that was released to the media.

#### **The Respondents’ Good Faith Legal Defense, In Brief**

41. The Respondents do not dispute the Factual Stipulations above.
42. The Respondents believed in good faith and believe now that the TGG poll is not an expenditure under the Connecticut Statutes. The Respondents believe the Commission’s assertion that it is an expenditure is both overreaching and unconstitutional as it conflicts with First Amendment protected political speech affirmed multiple times by the United States Supreme Court. In *Buckley v. Valeo*, 424 U.S. 1 (1976) and *Federal Election Commission v. Massachusetts Citizens for Life Inc.*, 479 U.S. 238 (1986) and the Connecticut Supreme Court’s decision in *State v. Proto*, 203 Conn. 682 (1987), *inter alia*, the courts said that to avoid invalidation under the First Amendment, the statutory phrase “for the purpose of influencing the . . . election, of any person” in General Statutes § 9-601b(a) can only apply to “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ or ‘reject.’” *Buckley*, 424 U.S. at 44 n.52.
43. The Respondents believed in good faith and believe now that the cost of the poll was a legitimate expense of VGG fulfilling its mission of supporting ideas and candidates to provide better balance in Connecticut state government. VGG had a pattern of conducting polls in 2012, well previous to the TTG poll, which assessed public policy issues and the prospects for unseating incumbents in certain state Senate districts. Neither those polls in 2012 nor the TTG poll in question was done on behalf of any campaign or potential campaign for Mr. Foley, all were paid for with checks signed by Mr. Foley, and none of them was an expenditure under Connecticut law.

44. Mr. Foley was a private citizen and acting consistent with his role as Treasurer of VGG when he engaged TTG to undertake a poll for VGG. A private citizen acting on behalf of, or collaborating with, an organization such as VGG regarding a legitimate public opinion research poll is not electoral activity within the Commission's jurisdiction, does not trigger candidacy, and is not an expenditure supporting a campaign that at the time did not exist.
45. The Respondents believe that Mr. Foley's role as Treasurer of VGG and signer of the check as VGG's sole signatory on its bank account, both of which were established long before any of the events related to this settlement occurred, do not in any way alter the legitimate purpose of VGG conducting the poll for its own purposes or suggest that the poll was done on behalf of a campaign for Mr. Foley.
46. Respondent Foley believed in good faith and believes now that nothing he has said or done required him to register a committee until he did so on September 10 of this year.
47. Whether the poll was done for VGG or on behalf of Mr. Foley only matters if the poll is deemed an expenditure. As a private citizen, which Mr. Foley believes he was at the time the poll was conducted, conducting a poll that is not an expenditure is entirely proper and outside of the jurisdiction of the Commission.
48. The Commission has not shown that its aggressive interpretation of what constitutes an expenditure is warranted by the statute and somehow escapes the contrary ruling of the United States Supreme Court on an identical matter. Under the Commission's interpretation of an expenditure, the cost of the gasoline required for a first time visit to a party town committee for someone thinking about running for office would be an expenditure and would require him or her to register as a candidate – something surely not intended by the legislature and an obvious absurdity. This absurdity is the reason the Supreme Court of the United States determined that the bright line and the clear language of express advocacy is the appropriate threshold for determining what constitutes an expenditure.

#### **The Commission's Response, In Brief**

49. The Commission agrees that neither the poll nor the memorandum contained such explicit so-called "magic words" of advocacy of election or defeat and that under the Respondents' interpretation, the Commission might not have jurisdiction over the facts of this case.
50. However, expenditures made by a candidate and those made in coordination with a candidate are not entitled to such a narrow definition of "expenditure." *State v. Proto*, 203 Conn. 682, 701-02 ("[N]ot all expenditures are entitled to heightened constitutional protection."). Thus, where, as here, the Commission is addressing whether an individual made an expenditure in furtherance of his own nomination, the Commission does not apply

the narrowing construction of express advocacy. To the extent that the phrase “made for the purpose of influencing the nomination for election” needs further elucidation, the United States Supreme Court has held that words such as “‘promote,’ ‘oppose,’ ‘attack,’ and ‘support’ ‘provide[d] explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.’” *McConnell v. Fed. Election Com'n*, 540 U.S. 93, 170 n. 64 (2003). See also *Vermont Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 389 (D. Vt. 2012) (reading “for the purpose of . . . influencing an election . . . or affecting the outcome of an election” as simply, “supporting or opposing one or more candidates”).

#### **Agreement of the Parties**

51. The parties concur that the instant Agreement does not constitute an admission of liability by the Respondents, but rather the settlement of a contested matter.
52. In exchange for settlement of the matter, Respondent Voters for Good Government, Inc. agrees to remit \$15,504 to the Commission in the form of a check issued to either “Treasurer, State of Connecticut” or “Citizens’ Election Fund.”
53. In exchange for settlement of the matter, Respondent Foley agrees to do the following:
  - a. Remit \$600 to the Commission;
  - b. Reimburse VGG \$15,504 from his personal funds;
  - c. Within 30 days of the Commission’s adoption of this Agreement, have his exploratory committee file an SEEC Form 30 showing: 1) an expense for the TTG poll in the amount of \$15,504 incurred on the date that Mr. Foley first contacted Mr. Sackett about conducting the poll; 2) that the expense of the poll was paid for by the candidate; and 3) a reference to this settlement agreement for both of these entries in the Form 30;
  - d. Have his exploratory committee file an amendment to the October 10, 2013 report reflecting the activity referenced above; and
  - e. If Mr. Foley transitions his exploratory committee into a candidate committee for statewide office, the candidate committee will report a single receipt of personal funds from Mr. Foley in the amount of \$15,504 and a paid-in-full deficit of the same amount.
54. Respondents admit all stipulated jurisdictional facts and agree that this Agreement and Order shall have the same force and effect as a final decision and Order entered after a full hearing and shall become final when adopted by the Commission. Respondents shall receive a copy hereof as provided in Section 9-7b-56 of the Regulations of Connecticut State Agencies.

55. The Respondents waive:

- a. Any further procedural steps;
- b. The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law, separately stated; and
- c. All rights to seek judicial review or otherwise to challenge or contest the validity of the Order entered into pursuant to this Agreement.

56. It is understood and agreed that this Agreement will be submitted to the Commission for consideration at its next meeting and, if the Commission does not accept it, it is withdrawn and may not be used as an admission by the Respondents in any subsequent hearing, if the same becomes necessary.

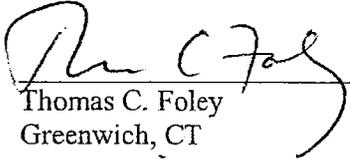
57. Upon the Respondents' compliance with the Order hereinafter stated, the Commission agrees this Agreement settles all matters between the Commission and the Respondents occurring prior to and including the date of this Agreement.

### ORDER

IT IS ORDERED THAT that Respondent Foley will comply with the terms enumerated in ¶53 of this Agreement.

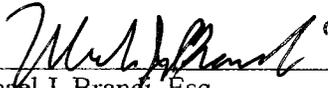
IT IS ORDERED THAT that Respondent Voters for Good Government, Inc. will remit \$15,504 to the Commission in the form of a check issued to either "Treasurer, State of Connecticut" or "Citizens' Election Fund."

**The Respondent:**

  
Thomas C. Foley  
Greenwich, CT

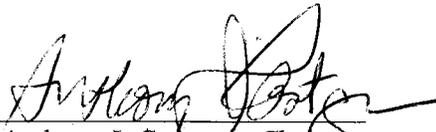
Dated: 10/15/13

**For the State of Connecticut:**

BY:   
Michael J. Brandi, Esq.  
Executive Director & General Counsel and  
Authorized Representative of the  
State Elections Enforcement Commission  
20 Trinity St., Suite 101  
Hartford, CT

Dated: 10/16/13

Adopted this 16<sup>th</sup> day of October of 20 13 at Hartford, Connecticut.

  
Anthony J. Castagno, Chair  
By Order of the Commission

The Respondent

*[Handwritten Signature]*  
**Michael J. Brennan**  
 Managing Director and Authorized  
 Representative of Values for Local  
 Communities, Inc.

For the State of Connecticut

*[Handwritten Signature]*  
**Michael J. Brennan, Esq.**  
 Executive Director & General Counsel and  
 Authorized Representative of the  
 State Election Enforcement Commission  
 20 Trinity St., Suite 100  
 Hartford, CT

Date: 10/16/13

Date: 10/16/13

Signed this 16<sup>th</sup> day of October of 2013 at Hartford, Connecticut

*[Handwritten Signature]*  
**Andrew J. Gatzert**  
 Secretary, Commission  
 on Ethics of the State