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June 21, 2022

CONFIDENTIAL

To: Jeremy Farris, Executive Director

Re: *Gessing v. Hochman-Vigil*, Case No. 2022-005: investigation findings and probable cause determination

Director Farris:

I am writing concerning *Gessing v. Hochman-Vigil*, a Complaint alleging that Respondent Dayan Hochman-Vigil violated the Governmental Conduct Act, NMSA 1978, §§ 10-16G-1 to -18 (1967, as amended 2021) (“GCA”) and the Gift Act, NMSA 1978, §§ 10-16B-1 to -5 (2007, as amended 2019).¹

As detailed below, I conclude that the complaint is not supported by probable cause. I request that you appoint a hearing officer and instruct the hearing officer to enter an order dismissing the complaint.²

BACKGROUND

Below I provide an overview of the parties to the complaint, a summary of the complaint, and a summary of my investigation of the complaint.

¹ The complaint alleges violations of the Lobbyist Regulation Act, NMSA 1978, §§ 2-11-1 to -10 (1977, as amended 2021), and the Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to -36 (1979, as amended 2021). The Secretary of State certified voluntary compliance with the Lobbyist Regulation Act on April 4, 2022 (#8), and voluntary compliance with the Campaign Reporting Act on April 19, 2022 (#10). As such, these claims will be dismissed. *See* NMSA 1978, § 2-11-8.2(B); NMSA 1978, § 1-19-34.4(C).

Further, as noted in the Notice of Complaint Filed, at 2 n.1 (Mar. 11, 2022) (#3), the complaint also alleges violations of other law outside the Commission’s jurisdiction, such as Rules of the House of Representatives and Section 57-22-6 of the Charitable Solicitations Act, NMSA 1978, §§ 57-22-1 to -11 (1983, as amended 1999). *See* § 10-16G-9(A). Because these claims are outside the Commission’s jurisdiction, they have been dismissed. *See* 1.8.3.10(F) NMAC; Order (Apr. 1, 2022) (#6).

² *See* 1.8.3.13(B) NMAC

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I. Parties

A. Complainant

Complainant is Paul Gessing.

B. Respondent

Respondent Dayan Hochman-Vigil the Representative for New Mexico House District 15.³

II. The complaint

The complaint alleges that Respondent violated the GCA, the Campaign Reporting Act, and the Gift Act. The complaint sets out the alleged violations in separate “sections,” each of which sets out a violation of one or more provisions in the above-referenced acts. I summarize each “section” of the complaint below.

In Section 1, the complaint alleges that Respondent’s decision to hire and pay Jill Meyers for consulting services using campaign funds violated Sections 3, 4, 4.2, and 9 of the GCA because Ms. Meyers’s services were “not reasonably related to serve [sic] constituents” and Ms. Meyers “fails to disclose contracts with Virgin Galactic, a foreign for-profit corporation that influenced legislation, introduced by the candidate with effect on Facilities Lease with Spaceport America[.]”⁴

In Section 2, the complaint alleges that Respondent’s decision to hire and pay Ms. Meyers for consulting services using campaign funds violated Sections 3, 4, and 4.2 of the GCA because Ms. Meyers is the president of Women in Aviation Land of Enchantment Chapter (WIA), which receives contributions from Virgin Galactic, a foreign business entity and employs some members of WIA.⁵

In Section 3, the complaint alleges Respondent violated Sections 3 & 4.2 of the GCA by paying Jill Meyers for consulting services using campaign funds because Ms. Meyers is not a registered lobbyist.⁶

In Section 4, the complaint alleges Respondent violated Sections 3 & 4.2 of the GCA by paying Jill Meyers for consulting services using campaign funds because Ms. Meyers is also a

³ See Compl. at 17.

⁴ See Compl. at 5.

⁵ See Compl. at 7-8.

⁶ See Compl. at 8-11.

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contributor, consultant, fundraiser, and employee of Respondent's campaign committee.⁷

In Section 5, the complaint alleges Respondent violated Section 3 of the GCA by paying Jill Meyers for consulting services using campaign funds because Ms. Meyers is a client of the Rodey law firm, which also employs the treasurer of Respondent's campaign committee, who is also related to Respondent by marriage.⁸

In Section 6, the complaint alleges Respondent violated Section 4.2 of the GCA by paying Jill Meyers for consulting services using campaign funds because Ms. Meyers hired Respondent "in a professional capacity."⁹

In Section 7, the complaint alleges Respondent violated Sections 3 & 4 of the GCA by paying Jill Meyers for consulting services using campaign funds because Ms. Meyers "does express advocacy for an employer of [Respondent], Sceye Inc."¹⁰

In Section 8, the complaint alleges Respondent violated Section 3 of the GCA by paying Jill Meyers for consulting services using campaign funds because Ms. Meyers acts as an intermediary, and, at the invitation of Virgin Galactic, travels with Respondent to Spaceport America, "an agency that influenced legislation introduced by the candidate, with effect on Facilities Lease [sic] between Virgin Galactic, LLC, and the [New Mexico] Spaceport Authority."¹¹

Finally, in Section 9, the complaint alleges Respondent violated Section 4.1 of the GCA and the Gift Act by paying Jill Meyers for consulting services using campaign funds because (i) Meyers accepted a Unity 22 boarding pass ticket and transportation from Virgin Galactic to view spaceflights from Spaceport America; and (ii) Respondent traveled to Spaceport America to view spaceflights by Virgin Galactic, a "restricted donor" as defined in the Gift Act.¹²

III. Procedural history

The complaint alleges violations of the Rules of the House of Representatives, the Charitable Solicitations Act, the Campaign Reporting Act, and the Lobbyist Regulation Act. The

⁷ See Compl. at 11. The complaint alleges Respondent violated the Campaign Reporting Act, but the Secretary of State's finding that Respondent is in voluntary compliance with the Campaign Reporting Act requires dismissal of that claim.

⁸ See Compl. at 12.

⁹ See Compl. at 13-14.

¹⁰ See Compl. at 14-16.

¹¹ See Compl. at 17.

¹² See Compl. at 18.

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claimed violations of the Rules of the House of Representatives and the Charitable Solicitations Act were dismissed for want of subject matter jurisdiction on April, 1, 2022.¹³ The claimed violations of the Campaign Reporting Act and Lobbyist Regulation Act were referred to the Secretary of State on March 14, 2022 pursuant to both NMSA 1978, Sections 2-11-8.2(B) (2021) and 1-19-34.4(C) (2021) and the joint powers agreements between the Commission and the Secretary of State.¹⁴ The Secretary of State certified that Respondent was in compliance with the Lobbyist Regulation Act and Campaign Reporting Act, and therefore the claims alleging violations of those Acts are subject to dismissal.¹⁵ Thus, the only remaining claims alleged in the complaint are the alleged violations of the GCA and the Gift Act.

IV. Summary of my investigation

To investigate whether the complaint is supported by probable cause, I:

1. Reviewed the complaint and materials cited therein;
2. Asked Respondent Dayan Hochman-Vigil to provide written answers to interrogatories under oath;
3. Reviewed correspondence between Respondent and the Secretary of State's office, including her response and the attached statement from Rodey, Dickason, Sloan, Akin & Robb, P.A. concerning its prior representation of Spaceport Authority; and
4. Researched the value of attendance of the events at Spaceport America that Respondent is alleged to have attended.

Based on my investigation, I believe the complaint's allegations are not supported by

¹³ See Order (Apr. 4, 2022) (#6).

¹⁴ See Letter referring Campaign Reporting Act and Lobbyist Regulation Act claims to Secretary of State (March 14, 2022) (#5); see also Substitute Joint Powers Agreement for Shared Jurisdiction Under the Campaign Reporting Act between the New Mexico State Ethics Commission and the New Mexico Secretary of State, at § II(A) (Aug. 17, 2021), available at https://www.sec.state.nm.us/wp-content/uploads/2021/08/2021-08-16_Amendment_No._1_to_JPA_for_CRA_MTO_JDF_DFA-signed.pdf (last accessed June 14, 2022); Substitute Joint Powers Agreement for Shared Jurisdiction Under the Lobbyist Regulation Act between the New Mexico State Ethics Commission and the New Mexico Secretary of State, at § II(A) (Aug. 17, 2021), available at https://www.sec.state.nm.us/wp-content/uploads/2021/08/2021-08-16_Amendment_No._1_to_JPA_for_LRA_MTO_JDF_DFA-signed.pdf (last accessed June 14, 2022).

¹⁵ See Correspondence from the Secretary of State (Apr. 4, 2022) (#7); Correspondence from the Secretary of State (Apr. 19, 2022) (#9); see also NMSA 1978, § 1-19-34.4(C) (1993, as amended 2021) ("If the secretary of state certifies voluntarily compliance, the state ethics commission shall dismiss the complaint or that part of the complaint alleging a violation of the Campaign Reporting Act"); § 2-11-8.2(B) (1977, as amended 2021) (" . . . If the secretary of state certifies voluntary compliance, the state ethics commission shall dismiss the complaint or that part of the complaint alleging a violation of the Lobbyist Regulation Act");

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probable cause.

LEGAL STANDARD

After the Executive Director determines the Commission has jurisdiction over a complaint, the General Counsel is required to investigate the complaint to determine whether it is supported by probable cause (in which case the complaint must be resolved by a hearing officer at a public hearing), or whether it is not (in which case the complaint is subject to mandatory dismissal).¹⁶ In determining whether a complaint is supported by probable cause, the State Ethics Commission Act requires the general counsel to determine whether there is evidence that could form the basis for a finding of liability by a hearing officer or the Commission; however, to make that determination, the Act does not require the general counsel to exhaustively review all possible sources of evidence.¹⁷

A complaint may be supported by probable cause when there is evidence (not necessarily conclusive) of a violation.¹⁸ A complaint also may be supported by probable cause when the undisputed facts establish a violation of the law. As the Court of Appeals put it in the context of claims for malicious abuse of process, “[t]he question of probable cause is a question of law and fact. Whether the circumstances alleged to show probable cause are true, and exist, is a matter of fact; but supposing them to be, whether they amount to probable cause, is a question of law.”¹⁹

DISCUSSION

The complaint alleges that Respondent Hochman-Vigil has violated the GCA and the Gift Act. As explained below, I conclude that the allegations are not supported by probable cause.

I. GCA

The complaint alleges Respondent violated Sections 3, 4, 4.1, 4.2, and 9 of the GCA. I address each section (and the claimed violations thereof) in turn.

¹⁶ See § 10-16G-10(D)–(E).

¹⁷ See § 10-16G-10(E).

¹⁸ See *State v. Cordova*, 1989-NMSC-083, ¶ 15, 109 N.M. 211, 784 P.2d 30 (interpreting the term “probable cause” in the criminal procedure context to require that “(1) only a probability of [a violation] need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; [and] (3) common sense should control”) (quoting *State v. Snedeker*, 99 N.M. 286, 290, 657 P.2d 613, 617 (1982)); *State v. Vest*, 2011-NMCA-037, ¶ 7, 149 N.M. 548 (“The degree of proof necessary to establish probable cause for the issuance of a search warrant is more than a suspicion or possibility but less than a certainty of proof.”).

¹⁹ *Yucca Ford, Inc. v. Scarsella*, 1973-NMCA-042, ¶ 4, 85 N.M. 89 (quoting *Leyser v. Field*, 1890- NMSC-001, ¶ 3, 5 N.M. 356).

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A. GCA Section 3

The complaint alleges Respondent violated Section 3 of the GCA by hiring and paying Jill Meyers as a consultant using campaign funds because Ms. Meyers:

- Failed to disclose contracts with Virgin Galactic, a foreign for-profit corporation that influenced legislation introduced by Respondent (Compl. Section 1);
- Is the president of Women in Aviation Land of Enchantment Chapter, a nonprofit corporation that receives contributions from Virgin Galactic (Compl. Section 2);
- Is not a registered lobbyist (Compl. Section 3);
- Is a client of the Rodey law firm, which also employs the treasurer of Respondent's campaign committee, who is also related to Respondent by marriage (Compl. Section 5);
- "[D]oes express advocacy for an employer of [Respondent], Sceye Inc." (Compl. Section 7); and
- Acts as an intermediary, and, at the invitation of Virgin Galactic, travels with Respondent to Spaceport America, "an agency that influenced legislation introduced by the candidate, with effect on Facilities Lease [sic] between Virgin Galactic, LLC, and the [New Mexico] Spaceport Authority" (Compl. Section 8).

GCA Section 3 provides:

A. A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

C. Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

D. No legislator or public officer or employee may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be

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sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.²⁰

1. GCA Subsection 3(A)

To allege a violation of Subsection 10-16-3(A), a complaint must allege that Respondent used “the powers and resources of public office . . . to obtain personal benefits or pursue private interests.” § 10-16-3(A); *see also State v. Gutierrez et al.*, 2020-NMCA-045, ¶ 33, *cert. granted*, S-1-SC-38367 (Sep. 8, 2020) (“[Subsection 10-16-3(A)] (1) mandates the use of the powers and resources of a legislator’s, public officer’s, or public employee’s public office only for the benefit of the people of New Mexico, and (2) prohibits legislators, public officers, and public employees from exploiting their powers and resources for private gain.”).

The complaint alleges that it was improper for Respondent to use campaign funds to hire and pay Ms. Meyers to provide consulting work, but does not allege that this decision amounted to a use of the powers and resources of Respondent’s public office. Rather, the complaint alleges Respondent (in her capacity as a candidate) used funds raised to support her campaign for elected office to hire a consultant who had conflicted relationships with Virgin Galactic, Sceye, Inc., and the Rodey law firm. As such, the complaint fails to allege that the transactions above involve a use (or a promised use) of the powers and resources of Respondent’s office, a prerequisite to a claimed violation of GCA Subsection 10-16-3(A).

2. GCA Subsections 3(B) & 3(C)

The Commission has previously taken the position that Subsections 10-16-3(B) & (C) as “combine” to “impose a duty on legislators, public officers, and public employees to disclose real or potential conflicts of interests. Subsection (B) details the duty’s scope of application (i.e., to whom the duty applies), and subsection (C) provides the duty’s specific content (i.e., what the duty requires).”²¹ Under this view, a violation of Subsection 10-16-3(C) occurs when a public official or employee either (i) fails to disclose a real or potential conflict of interest or (ii) has abused his office.

To the extent the complaint alleges Respondent failed to disclose a real or potential conflict of interest, I find that the allegation is not supported by probable cause: the allegations detailed above all turn on Respondent’s decision to hire Jill Meyers as a consultant using campaign funds, and that Ms. Meyers was the subject of competing or conflicting interests as a result of her relationships with Virgin Galactic and the Rodey law firm. But the complaint does not allege or cite evidence tending to show that Respondent’s hiring of Ms. Meyers as a consultant using campaign funds gave rise to a personal interest (whether financial or otherwise)

²⁰ *See* NMSA 1978, § 10-16-3 (2011).

²¹ Br. of State Ethics Comm’n as Amicus Curiae 3-4, *State v. Gutierrez*, No. S-1-SC-38367 (consolidated) (Nov. 10, 2020).

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that conflicted with her official responsibilities.

To the extent the complaint alleges that Respondent abused her office in violation of Subsection 10-16-3(C) of the GCA, I find the allegation is not supported by probable cause. To “abuse” one’s office means to put an office “to . . . a wrong or improper use.”²² “Abuse of public office” is elsewhere defined as “A public servant’s tortious or criminal use of governmental position for private gain.”²³ Considering these definitions, I take “abuse of office in public service” in Subsection 10-16-3(C) to mean doing something or refusing to do something in clear violation of the law and with some corrupt purpose.²⁴ But the only alleged legal duty on the part of Respondent set forth in the sections of the complaint above is an alleged duty to make expenditures of campaign funds “reasonably related to serve constituents[.]”²⁵ The Complaint appears to allege that Respondent converted campaign funds to personal use by using contributions received to pay Ms. Meyers for consulting work, which Ms. Meyers in turn paid to the Rodey law firm for legal work, which finally the Rodey law firm paid to Respondent’s husband.²⁶ To the extent this duty is cognizable in some statute, it is the Campaign Reporting Act’s requirement that candidates only expend contributions received for a permitted purpose, including “expenditures of the campaign[.]”²⁷ But the Secretary of State’s finding in this case that Respondent is in compliance with the Campaign Reporting Act is dispositive of any claimed abuse of office predicated on Respondent’s violation of the Campaign Reporting Act.

Because the complaint fails to allege facts or cite evidence tending to show that Respondent either failed to disclose a real or potential conflict of interest or abused her office in violation of GCA Subsections 3(B) & (C), the portion of the complaint alleging a violation of these provisions is not supported by probable cause.

²² *Abuse*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/abuse> (last accessed June 14, 2022).

²³ *Abuse of Public Office*, Black’s Law Dictionary (11th ed. 2019).

²⁴ *Cf.* N.Y. Penal Code. § 195.00 (defining “official misconduct” as “an act relating to [a public servant’s] office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized,” or a knowing failure to “perform[] a duty which is imposed upon [the public servant] by law or is clearly inherent in the nature of his office”). This interpretation avoids the problems of vagueness and indeterminacy that would come from defining “abuse of office” to include any exercise of power for an improper purpose, and is also in harmony with the overall structure of Section 3 of the Governmental Conduct Act: Subsection 10-16-3(A) proscribes any use of official power or resources in service of a private interest, even if the use of power or resources would otherwise be permitted. Subsection 10-16-3(C) prohibits public officers and employees from corruptly acting or refusing to act in violation of a clear legal duty relating to their office or public employment, regardless of whether such acts or omissions are motivated by a personal interest.

²⁵ *See* Compl. at 5, 7, 8, 11, 12, 13, 15, 17, 18.

²⁶ *See* Compl. at 12.

²⁷ NMSA 1978, § 1-19-29.1(A) (2009).

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3. GCA Subsection 3(D)

The elements of a Subsection 10-16-3(D) violation are a public officer or employee's (i) request, receipt, or offer of (ii) any money, thing of value or promise thereof that is (iii) conditioned upon or given in exchange for promised performance of an official act. But the complaint does not allege that Respondent requested or received any money, thing of value or promise thereof conditioned on the promised performance of an official act. The complaint's only reference to Respondent's official acts is her introduction and sponsorship of House Bill 68 in the 2021 Regular Session.²⁸ But the complaint lacks any further allegation that Respondent requested or received something of value in exchange for her introduction or sponsorship of House Bill 68. As a result, any claimed violation of Subsection 10-16-3(D) fails.

B. GCA Section 4

GCA Section 4 provides:

A. It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

B. A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.²⁹

The complaint alleges Respondent violated GCA Section 4 by hiring and paying Ms. Meyers for consulting services using campaign funds because (i) Ms. Meyers is the president of Women in Aviation Land of Enchantment Chapter, which receives contributions from Virgin Galactic, a

²⁸ See Compl. at 5 (Section 1). House Bill 68 broadened the definition of spaceflight companies in the Spaceflight Informed Consent Act, NMSA 1978, §§ 41-14-1 to -4 (2010, as amended through 2021), and removed the provision for automatic repeal, allowing the statute to continue indefinitely. A main purpose of the Act is to limit liability to a space flight entity. See NMSA 1978, § 41-14-3 (2013).

²⁹ NMSA 1978, § 10-16-4 (2011).

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foreign business entity and employs some members of WIA (Section 2); and (ii) Ms. Meyers “does express advocacy for an employer of [Respondent], Sceye Inc.” (Section 7).³⁰

As noted above with respect to GCA Subsection 3(A), the Complaint alleges that Respondent improperly used campaign funds to hire Jill Meyers to serve as a consultant, but this allegation does not implicate the powers and resources of Respondent’s legislative office. That conclusion also requires dismissal of any claimed violation of GCA Section 4, as the Complaint fails to allege that Respondent’s hiring of Ms. Meyers was an official act. But in addition, the GCA defines “public officer or employee” to exclude legislators.³¹ Accordingly, even if the complaint alleged that Respondent took some official action (for example, introduced House Bill 68) for the purpose of directly enhancing a financial interest, the allegation would not support a finding that Respondent violated Section 4 of the GCA, because Respondent is not subject to its prohibitions.

C. GCA Section 4.1

Section 9 of the complaint alleges that Respondent violated Section 4.1 of the GCA by paying Jill Meyers for consulting services using campaign funds because Jill Meyers accepted a Unity 22 boarding pass ticket and transportation from Virgin Galactic to view spaceflights from Spaceport America; and Respondent traveled to Spaceport America to view spaceflights by Virgin Galactic.

Section 4.1 of the GCA provides:

No legislator, public officer or employee may request or receive an honorarium for a speech or service rendered that relates to the performance of public duties. For the purposes of this section, “honorarium” means payment of money, or any other thing of value in excess of one hundred dollars (\$100), but does not include reasonable reimbursement for meals, lodging or actual travel expenses incurred in making the speech or rendering the service, or payment or compensation for services rendered in the normal course of a private business pursuit.³²

As an initial matter, the fact that Jill Meyers received an honorarium (whether it be consulting fees from Respondent’s campaign committee, or the value of a visit to Spaceport America to view spaceflights), does not bear on whether Respondent violated GCA Section 4.1. Accordingly, the mere fact that Ms. Meyers received money or some other thing of value does

³⁰ See Compl. at 14-16.

³¹ See NMSA 1978, § 10-16-2(I) (2011).

³² NMSA 1978, § 10-16-4.1 (1993).

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not establish probable cause that Respondent violated the GCA.

To the extent the complaint makes any allegation that Respondent violated GCA Section 4.1, the sole allegation is that Respondent also traveled to Spaceport America to view spaceflights.³³ Respondent has admitted as much, stating in sworn interrogatory answers that she visited Spaceport America once for a tour with other members of the Legislative Finance Committee, and again to view a manned spaceflight.³⁴ While the complaint's allegation that Respondent visited Spaceport America to view a manned spaceflight (and Respondent's admission of that allegation) establishes that Respondent received some thing of value (*viz.*, the value of an invitation to tour Spaceport America and view a manned spaceflight), there is no evidence that this was in return for some "speech or service rendered[.]"³⁵ Any value realized by Respondent for visiting Spaceport America and being invited to view a manned spaceflight is more properly understood as a gift from Virgin Galactic to Respondent.³⁶

D. GCA Section 4.2

Section 4.2 of the GCA provides: "[a] public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency."³⁷

The complaint alleges Respondent violated GCA Section 4.2 by hiring and paying Jill Meyers using campaign funds because (i) Ms. Meyers's services were "not reasonably related to serve [sic] constituents" and Ms. Meyers "fails to disclose contracts with Virgin Galactic, a foreign for-profit corporation that influenced legislation, introduced by the candidate with effect on Facilities Lease with Spaceport America" (Section 1);³⁸ (ii) Ms. Meyers is the president of Women in Aviation Land of Enchantment Chapter, which receives contributions from Virgin Galactic, a foreign business entity and employs some members of WIA (Section 2);³⁹ (iii) Ms. Meyers is not a registered lobbyist (Section 3); (iv) Ms. Meyers is also a contributor, consultant, fundraiser, and employee of Respondent's campaign committee (Section 4);⁴⁰ and (v) Ms.

³³ See Compl. at 18.

³⁴ See Respondent's Answer to Interrogatory 1 (Ex. 1).

³⁵ See § 10-16-4.1.

³⁶ Whether Respondent violated the Gift Act by accepting an invitation to tour Spaceport America and view a manned spaceflight is addressed in Section II, *infra*.

³⁷ NMSA 1978, § 10-16-4.2 (2011).

³⁸ See Compl. at 5.

³⁹ See Compl. at 7-8.

⁴⁰ See Compl. at 8-11.

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Meyers hired Respondent “in a professional capacity” (Section 6).⁴¹

As noted above, the GCA excludes legislators from the definition of “public officer or employee.” Because GCA Section 4.2 does not apply to legislators such as Respondent, there is no basis to find that any of these allegations establish probable cause that Respondent violated GCA Section 4.2.

E. GCA Subsection 9(B)

The complaint alleges Respondent violated Subsection B of Section 9 of the GCA because Ms. Meyers “fails to disclose contracts with Virgin Galactic, a foreign for-profit corporation that influenced legislation, introduced by the candidate with effect on Facilities Lease with Spaceport America[.]”⁴² GCA Subsection 9(B) provides:

B. A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.⁴³

The complaint does not allege that Respondent appeared for, represented, or assisted another person before the Spaceport Authority or another state agency—it alleges only that Ms. Meyers has contracts with Virgin Galactic, and that the legislation introduced by Respondent had an effect on a facilities lease between Virgin Galactic and Spaceport America. Absent some allegation that Respondent appeared for, represented, or assisted a person in a matter before the Spaceport Authority (or another state agency) and that the appearance, representation or assistance was paid, there is no basis to find that Respondent violated Subsection B of GCA Section 10-16-9.

II. Gift Act

The Gift Act, NMSA 1978, Sections 10-16-1 to -5 (2007, as amended through 2019) prohibits a legislator from “knowingly accept[ing] from a restricted donor . . . a gift of a market value greater than two hundred fifty dollars (\$250).”⁴⁴ A “restricted donor” is defined as anyone

⁴¹ See Compl. at 13-14.

⁴² See Compl. at 5 (Section 1).

⁴³ NMSA 1978, § 10-16-9(B) (2007).

⁴⁴ NMSA 1978, § 10-16B-3(A) (2007).

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who:

- (1) is or is seeking to be a party to any one or any combination of sales, purchases, leases or contracts to, from or with the agency in which the donee holds office or is employed;
- (2) will personally be, or is the agent of a person who will be, directly and substantially affected financially by the performance or nonperformance of the donee's official duty in a way that is greater than the effect on the public generally or on a substantial class of persons to which the person belongs as a member of a profession, occupation, industry or region;
- (3) is personally, or is the agent of a person who is, the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee's official duties or employment within the regulatory agency; or
- (4) is a lobbyist or a client of a lobbyist with respect to matters within the donee's jurisdiction[.]⁴⁵

Section 9 of the complaint alleges Virgin Galactic is a "restricted donor" as defined by the Gift Act and that Respondent's acceptance of an invitation to view spaceflights at Spaceport America is a violation.⁴⁶

In written testimony, Respondent explains that she attended two events at Spaceport America:

On May 18, 2021, I attended a tour of Spaceport America as a member of the Legislative Finance Committee (LFC). The LFC agenda included the tour. I paid for my own transportation and lodging to attend the LFC meeting. My understanding is that the Spaceport and its tenants provided meals to the LFC. Like other LFC meetings I have attended, I received per diem and mileage reimbursement from the LFC as an attendee in my capacity as a legislator for the LFC meeting.

On May 22, 2021, I attended the manned flight of White Knight II at the Spaceport with the Governor and Secretary Alicia Keys. I was invited by Jason Lazich (Director of Infrastructure and Ground Services) and Sirisha Bandla (Vice President of Government Affairs) of Virgin Galactic. I paid for my own

⁴⁵ NMSA 1978, § 10-16B-2(D) (2007).

⁴⁶ See Compl. at 18).

Gessing v. Hochman-Vigil, 2022-005: Findings

June 21, 2022

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transportation and lodging. I was not reimbursed for these expenses. While at the event, which I understood to be by invitation only, I ate a sandwich and drank a latte provided by Virgin Galactic to invitees. I estimate the cost of the food and drink to be less than twenty dollars.⁴⁷

I find there is no probable cause to support a finding that Respondent's attendance at these two events violates the Gift Act for two reasons.

First, my own investigation tends to show that an invitation to view a Virgin Galactic manned spaceflight does not have a market value of more than \$250. It costs a member of the public around \$50 to tour Spaceport America.⁴⁸ The asking price for a VIP "Feel the Heat" ticket to a recent SpaceX crewed rocket launch at the Kennedy Space Center was exactly \$250.⁴⁹ The adult price of admission to another launch at Cape Canaveral was \$106.⁵⁰ Since tickets to other launches, including VIP tickets, are not priced over \$250, the fair market value of an invitation to view a Virgin Galactic at launch at Spaceport America likely does not exceed \$250.

Second, no evidence or assertions as to its value are contained in the complaint, and Complainant did not provide any supplemental information when asked. On June 16, 2022, I invited Complainant to identify or explain how a visit to Spaceport America to view a Virgin Galactic spaceflight has a market value of greater than \$250. In response, Complainant did not provide any evidence tending to establish this fact. Instead, Complainant requested that I review "financial statements with the US SECURITIES AND EXCHANGE COMMISSION," "reports of lobbying activities to the US CONGRESS (US CONG), SENATE and HOUSE OF REPRESENTATIVES," and contact employees of Virgin Galactic.⁵¹ This answer is non-responsive: I did not ask Complainant to identify evidence that could possibly bear on this point; I asked Complainant to "provide evidence showing or explanation as to how [Respondent's] "travel to Spaceport America to view spaceflights by [Virgin Galactic]" has a market value of greater than \$250."⁵² Complainant's failure to identify any evidence tending to show that the value of an invitation to view a Virgin Galactic spaceflight exceeds \$250 provides a basis to

⁴⁷ See Respondent's Answer to Interrogatory 1 (Ex. 1).

⁴⁸ See Email from C. Rosemond to W. Boyd (June 15, 2022) (Ex. 2); *see also* Visit Las Cruces, New Mexico, <https://www.lascrucesvb.org/explore/spaceport-america/> (last accessed June 21, 2022).

⁴⁹ See Kennedy Space Center, Rocket Launch: NET September 15, 2021 8:02 PM EDT | SpaceX Falcon 9 Inspiration4, <https://www.kennedyspacecenter.com/launches-and-events/events-calendar/2021/september/rocket-launch-spacex-inspiration-4> (last accessed June 21, 2022).

⁵⁰ Kennedy Space Center, <https://www.kennedyspacecenter.com/info/tickets#launchviewing> (last accessed June 21, 2022).

⁵¹ See Email from P. Gessing to W. Boyd (June 17, 2022) (Ex. 3).

⁵² See Email from W. Boyd to P. Gessing (June 16, 2022) (Ex. 3).

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draw an inference against Complainant and in favor of Respondent on this point.⁵³

Third, a probable cause finding against Respondent would not only require evidence showing that the fair market value of the invitation to view a Virgin Galactic spaceflight exceeds \$250, but also evidence showing that Respondent *knew* its value at the time she accepted the invitation.⁵⁴ As Respondent explained in her answers to my written interrogatories, she or the State of New Mexico paid for her travel and other expenses associated with her attendance at the event, save the meals she ate while at the Spaceport, which she estimates were worth between \$10 and \$20.⁵⁵ To the extent she received a gift from a restricted donor, it was the value of attendance at an invitation-only event.⁵⁶ But as noted above, it is more likely than not that the value of attendance, including the meals she was offered, did not exceed \$250. And in the absence of evidence that attendance at similar events is worth more than \$250 to a member of the public (the only real way of estimating the fair market value of attending an invitation-only event), there is no basis to find that Respondent *knowingly* accepted a gift with a greater-than-\$250 fair market value.⁵⁷

CONCLUSION

For the reasons set out above, I conclude the complaint is not supported by probable cause. I respectfully request that you transmit my conclusions to a hearing officer with instructions to dismiss the complaint.

Walker Boyd

⁵³ See 1.8.3.11(C) NMAC (“If a party refuses to respond to the general counsel’s request for information or discovery requests, to attend a deposition, or to answer questions at a deposition noticed under this subsection, unless the party’s refusal is based on an assertion of privilege made in good faith, the general counsel, when deciding whether a complaint is supported by probable cause, may draw an adverse inference against the party refusing to testify.”).

⁵⁴ See NMSA 1978, § 10-16B-3(A) (prohibiting a public official from “*knowingly* accept[ing] from a restricted donor . . . a gift of a market value greater than two hundred fifty dollars (\$250)”) (emphasis added).

⁵⁵ See Respondent’s Answer to Interrogatory 1 (Ex. 1).

⁵⁶ *Id.*

⁵⁷ See NMSA 1978, § 10-16B-3(A) (2007).

THE WARD LAW FIRM
P.O. Box 7940
Albuquerque, NM 87194
505-944-9454
vincent@wardlawnm.com

May 18, 2022

By Electronic Mail

New Mexico State Ethics Commission
Attn: Walker Boyd, General Counsel
800 Bradbury Drive SE, Suite 215
Albuquerque, New Mexico
87106
Ph: (505) 554-7196
Email: walker.boyd@state.nm.us

Re: *Gessing v. Hochman-Vigil*, 2022-05: Answer to First Set of Interrogatories

Dear Mr. Boyd,

Respondent Dayan Hochman-Vigil submits the following answers to the Commission's interrogatories.

Interrogatory No. 1: Did you attend an event at or otherwise visit Spaceport America in 2021 or 2022? If so, please:

- (i) Identify each event or visit;
- (ii) Identify who invited you to attend the event or to visit;
- (iii) If you did not personally satisfy any expense you incurred in relation to the event or visit (e.g., admission, food, travel, lodging), identify expense incurred, including the amount of the expense, and who paid the expense.

Answer:

On May 18, 2021, I attended a tour of Spaceport America as a member of the Legislative Finance Committee (LFC). The LFC agenda included the tour. I paid for my own transportation and lodging to attend the LFC meeting. My understanding is that the Spaceport and its tenants provided meals to the LFC. Like other LFC meetings I have attended, I received per diem and mileage reimbursement from the LFC as an attendee in my capacity as a legislator for the LFC meeting.



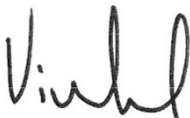
On May 22, 2021, I attended the manned flight of White Knight II at the Spaceport with the Governor and Secretary Alicia Keys. I was invited by Jason Lazich (Director of Infrastructure and Ground Services) and Sirisha Bandla (Vice President of Government Affairs) of Virgin Galactic. I paid for my own transportation and lodging. I was not reimbursed for these expenses. While at the event, which I understood to be by invitation only, I ate a sandwich and drank a latte provided by Virgin Galactic to invitees. I estimate the cost of the food and drink to be less than twenty dollars.

Interrogatory No. 2: Please identify any person you consulted in answering these interrogatories.

Answer:

I consulted my counsel, Vincent Ward.

Respectfully submitted,



VINCENT J. WARD

VERIFICATION

I, Dayan Hochman-Vigil, declare under penalty of perjury under the laws of the State of New Mexico that my Answers to the State Ethics Commission's Interrogatories above are true and correct.

05 / 18 / 2022

Executed on: _____

By:  _____

Boyd, Walker, NMSEC

From: Curtis Rosemond <cr@finalfrontiertour.com>
Sent: Wednesday, June 15, 2022 2:07 PM
To: Boyd, Walker, NMSEC
Subject: [EXTERNAL] Re: price quote for spaceport tour

CAUTION: This email originated outside of our organization. Exercise caution prior to clicking on links or opening attachments.

Good afternoon.

Thank you for your interest in Spaceport America.

Tours are \$49.99 per adult and \$29.99 plus tax for children 12 years old and under.

Please let us know if you have any additional questions.

Kindest regards,

Curtis "CR" Rosemond
President

"The Official Tour Operator and Merchandiser for Spaceport America"



Las Cruces, New Mexico 88011
Phone 575-267-8888
www.spaceportamericatour.com

----- On Wed, 15 Jun 2022 12:02:22 -0600 **Boyd, Walker, NMSEC** <Walker.Boyd@state.nm.us> wrote -----

Good afternoon,

Would you please provide a price quote for a tour of Spaceport America?

Please don't hesitate to call if you have any questions about my request.

Regards,

Walker Boyd



Boyd, Walker, NMSEC

From: Paul Gessing <pgessing@riograndefoundation.org>
Sent: Friday, June 17, 2022 3:38 PM
To: Boyd, Walker, NMSEC
Subject: [EXTERNAL] Re: Gessing v. Hochman-Vigil, 2022-05

CAUTION: This email originated outside of our organization. Exercise caution prior to clicking on links or opening attachments.

Dear Mr. Boyd,

As part of an investigation, the general counsel may administer oaths, interview witnesses and examine books, records, documents and other evidence reasonably related to the complaint [NM Stat § 10-16G-10 (2019)]; and, the general counsel knows per diem and mileage rates [NM Stat § 10-8-4 (2006)].

Virgin Galactic (NYSE: SPCE) files financial statements with the US SECURITIES AND EXCHANGE COMMISSION including cost of sales, and files reports of lobbying activities to the US CONGRESS (US CONG), SENATE and HOUSE OF REPRESENTATIVES.

Virgin Galactic has exclusive rights under the Letter Agreement with Spaceport Authority to view spaceflights from Spaceport America.

Please contact Sirisha Bandla, Vice President of Government Affairs, and Jason Lazich, Virgin Galactic; Jill R. Meyers, Meyers AeroConsulting; NM Department of Taxation and Revenue; and, Alicia Keyes, Chairwoman NM Spaceport Authority, for evidence reasonably related to determination of market value of gifts from Virgin Galactic, including tickets to view spaceflights. Photos of VIRGIN GALACTIC BOARDING PASS and VIP GUESTS are attached (see EVIDENCE WITH EXHIBIT V, and EXHIBIT W).

Please contact FINAL FRONTIER TOURS to determine price of tickets for the public tour of Spaceport America, at URL: <https://www.spaceportamerica.com/visit/>

Please contact me prior to June 24, 2022, if you require additional information.

Sincerely,

Paul J. Gessing
505-264-6090

On Thu, Jun 16, 2022 at 8:49 AM Boyd, Walker, NMSEC <Walker.Boyd@state.nm.us> wrote:

Good morning Mr. Gessing:

Under the Gift Act, a public official may not knowingly accept a gift from a restricted donor “of a market value greater than two hundred fifty dollars (\$250).” NMSA 1978, § 10-16B-3(A) (2007). In your complaint against Day Hochman-Vigil, you assert that Ms. Hochman-Vigil “did travel to Spaceport America to view spaceflights by [Virgin Galactic]” in violation of the Gift Act. See Complaint at 18. Would you please provide evidence showing or explanation as to how Ms. Hochman-Vigil’s “travel to Spaceport America to view spaceflights by [Virgin Galactic]” has a market value of greater than \$250?



I request that you respond to this inquiry on or before June 24, 2022.

Kind regards,

Walker Boyd

General Counsel

State Ethics Commission

800 Bradbury Drive Southeast, Suite 215

Albuquerque, NM 87106

walker.boyd@state.nm.us

mobile: (505) 554-7196

website: <https://sec.state.nm.us>

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Any views or opinions expressed in this email may be solely those of the author and are not necessarily those of the State Ethics Commission.

--

Paul J. Gessing
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