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VIA HAND-DELIVERY

Special Investigative Committee
Utah House of Representatives
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RE: *Softwise, Inc. and Tosh, Inc.*

Members of the House Special Investigative Committee:

The purpose of this letter is to address some of the concerns raised and presented to the Special Investigative Committee of the Utah House of Representatives ("Special Committee") during the two-day public hearing on December 19 and 20, 2013. At the conclusion of the proceedings on the first day, a letter was submitted to Chairman Dunnigan requesting an opportunity to address the Special Committee (Exhibit A). The Chair had stated that no public comment would be received and we thought that some input was appropriate. The morning of December 20th we received a letter from Chairman Dunnigan denying our request (Exhibit B).

Only one side of the story was presented by attorneys and investigators from the New York based law firm of Akin Gump. They readily admitted having only partially conducted a limited investigation of former Attorney General John Swallow (Mr. Swallow). While the purpose of the hearing was the investigation of allegations of misconduct against Mr. Swallow, special investigative counsel ("Akin Gump") directed much of their presentation towards maligning the consumer lending industry and our Utah-based clients, Softwise, Inc. and Tosh, Inc. Akin Gump presented to the Special Committee a one-sided and self-serving account that unfairly mischaracterized the companies' relationship with Mr. Swallow and inaccurately suggested that Softwise and Tosh deliberately obfuscated the legislative investigation without cause.

This letter provides an in-depth look at several issues over which we seek to provide greater clarity, including: contributions made by the lending industry in supporting Mr. Swallow's campaign; the support for Mr. Swallow in the 2012 Utah Attorney General election; and our efforts to aid the state and federal investigations into Mr. Swallow's conduct.

I. Contributions by the lending industry to support John Swallow's campaign.

Akin Gump spent much time in the hearing talking about the contributions made by lending businesses to the PACs and advocacy organizations supporting Mr. Swallow's campaign. In fact, the support to Mr. Swallow was characterized as some type of scheme between these various businesses and Mr. Swallow's campaign, which is completely false. No actions by any of these contributors were contrary to law.

It is important to point out Mr. Swallow's background in the consumer lending industry to properly understand why some in the industry contributed to his campaign. Mr. Swallow previously worked as a political consultant and attorney in the industry for approximately five years before he accepted an appointment to serve in the Utah Attorney General's Office. During his time in the industry Mr. Swallow worked on legislative issues in various states, attended trade association conferences and made a number of friends and contacts within the lending industry, across the United States. When Mr. Swallow decided to run for Attorney General he aggressively solicited support from the industry in which he had previously worked. Those in the lending industry who wanted to donate were asked by Mr. Swallow's campaign to write checks payable to the "Proper Role of Government Education Association" ("PRGEA"). Companies we contacted stated they were willing to contribute to the entity to which they wrote contribution checks because it is very common to make political donations to a PAC or other organization supporting a political candidate. Contributions to PACs and advocacy groups are legal, common, and an acceptable practice at both the state and federal level. It is worth noting that Steven Ross, Akin Gump attorney and co-counsel in the House Investigation, whose team made many disparaging remarks regarding the lenders' contributions to PACs, is himself a prolific donor to political candidates and PACs. In the past five election cycles he has personally contributed over $212,000 to various candidates and their PACs.[1]

Lenders who made contributions to PRGEA viewed their donations to that organization as being no different than contributions made to other political candidates or organizations. These were legal contributions made in accordance with state and federal law. Akin Gump readily admitted to the Special Committee that no Utah laws were broken in this process.[2] The contributors wrote checks under the assumption that PRGEA was a legally established entity. If there were attempts to conceal the names of those contributing on Mr. Swallow's behalf, it was not done by those making the contributions.

The Special Counsel, reporting to the bipartisan Special Committee also recognized that the practice of federal contributions flowing to state candidates is a common practice in both major political parties.

> "[T]his may be a fairly routine kind of arrangement that either the Democrat [sic] or the Republican party might engage in."[3]

II. Support for Mr. Swallow.

Those who listened to the presentation by Counsel for the Special Committee were led to believe the consumer lending industry was primarily responsible for the election of Mr. Swallow. The reality is that support for Mr. Swallow's election was widespread. Some 65% of voters selected Mr. Swallow as their Attorney General in 2012. Mr. Swallow was also endorsed and/or supported by the vast majority of high-ranking political figures in Utah. Mr. Swallow raised money from many different individuals, businesses and industries. Akin Gump failed to report the other individuals and businesses outside the

[1] See Campaignmoney.com website.
[2] *Transcript for December 20,* Page 191 lines 16-20 ("Under Utah law, it is entirely appropriate for individuals and for businesses to contribute financial support to assist the campaigns of candidates who support the positions and values of the contributors.").
[3] *Transcript for December 20,* Page 218 lines 22-24.

consumer lending industry that donated to Mr. Swallow's campaign, including those who contributed to PRGEA.

Those that supported Mr. Swallow from the consumer lending industry in Utah supported him because they felt he was the best candidate for the job. It was not a "pay-to-play" scenario as has been suggested by Akin Gump. The Attorney General's Office does not, nor has ever, regulated the consumer lending industry in Utah; instead that responsibility belongs to the Utah Department of Financial Institutions.

Akin Gump also highlighted the contributions that Richard Rawle's company made to PRGEA supporting Mr. Swallow's Attorney General Campaign. Mr. Rawle's company made a generous contribution to support Mr. Swallow's campaign because Mr. Rawle was supporting a good friend. Rawle and other family members made generous and public contributions to Mr. Swallow's Congressional races in 2002 and 2004. For five years, Mr. Swallow was retained as a political consultant and attorney by Richard Rawle's company. During this time, Richard Rawle developed a personal relationship with Mr. Swallow, based in part on their shared political viewpoints. This friendship was well established long before Mr. Swallow's entry into the Attorney General's Office.

Richard Rawle and his family members had nothing to gain by donating to Mr. Swallow's congressional and attorney general races. In each of these campaigns, Mr. Swallow asked Richard Rawle for strong support and Richard Rawle responded accordingly and helped. Those who knew Richard Rawle knew that he was an extremely generous person, and his contributions to Mr. Swallow's campaigns were consistent with his character.

Kip Cashmore ("Mr. Cashmore"), the President of the Utah Consumer Lenders Association, whose name was mentioned a number of times in the Special Committee hearings and is portrayed as one of the leaders of the supposed pay-to-play issue, was not interviewed by the Special Committee investigators. According to Mr. Cashmore, no attempt to reach him was made until December 18, 2013, the day before the Special Committee hearings. When our firm asked Mr. Cashmore about his knowledge of the lenders who made contributions to PRGEA, he stated he had never heard of many of these companies until their names were disclosed in the hearing. This underscores the fact that, there was no scheme or collusion on the part of the consumer lending industry. Many of the contributors did not even know each other, let alone how much others were contributing. It appears Mr. Swallow and his campaign independently went to various lenders within the industry to solicit donations. Friends he had cultivated in prior years came forth and supported his campaign. All donations were within the bounds of the law.

III. Efforts to participate in the investigations of Mr. Swallow.

Both personally and professionally, we attempted to participate as fully as possible in state and federal investigations into Mr. Swallow's conduct. During the presentation to the Special Committee at the December Hearing, however, Akin Gump misconstrued our client's involvement with the Special Committee's investigation in an effort to justify their unreasonable strategic posture. Despite Akin Gump's mischaracterization, our participation in investigations of Mr. Swallow is a matter of public record. Indeed, by providing witnesses and documents, our clients helped facilitate the report issued by the Lieutenant Governor's Office—a report that eventually led to Mr. Swallow's resignation.

When allegations of misconduct against Mr. Swallow first surfaced in January 2013, we made available witnesses and documents to the FBI to aid in their investigation of the claims made by Jeremy Johnson. Johnson later admitted these claims were false during the course of a February 1, 2013 interview with the Deseret News. [4]

When a separate investigation was launched by the Lieutenant Governor's Office, we received requests to produce documents as they related to Mr. Swallow. As a standard practice, we requested and received a protective order from the Lieutenant Governor's Special Counsel to protect non-public information that was shared with them. After entering into a protective order my client produced the requested documents, precisely because they wanted to assist in the state's investigation of Mr. Swallow. At the same time we agreed to facilitate the interviews of employees who provided a wealth of information to assist the Lieutenant Governor's Office in its investigation.

Finally, our interest in assisting with the investigation of Mr. Swallow extended well beyond the FBI and Lieutenant Governor's Office. In October 2013 we facilitated a meeting between two employees of my client and investigators employed by the Special Committee. During this meeting, our client's employees responded to questions in the hopes of facilitating your investigation. Akin Gump only briefly discussed this participation during the December Hearing, perhaps because the only exception to our participation in your investigation into Mr. Swallow arose after Akin Gump unreasonably refused to provide adequate protection to private and non-public business information, as discussed below.

On October 4, 2013, the Special Committee issued a legislative subpoena to Softwise, Inc. ("Softwise Subpoena"). The Softwise Subpoena requested production of a broad range of documents and communications, the majority of which were entirely unrelated to the Swallow investigation. Even more problematic, full compliance with the plain language of the Softwise Subpoena would have required the production of trade secrets and personal information entirely unrelated to Mr. Swallow. If this information were leaked to the press or our competitors—a likely result under GRAMA—we believed that it would irreparably harm our client's business interests.

At the request of our clients we contacted Akin Gump to negotiate a protective order similar in nature to the one entered into with the Lieutenant Governor's Office. Without much discussion, Akin Gump rejected our proposed protective order. Instead, Akin Gump proposed an informal agreement, under which investigators would review all of the otherwise confidential documents and select only the relevant documents. We carefully considered this option. However, based on relevant case law we concluded that Akin Gump's "quick peek" proposal would likely waive any privilege or confidentiality for the non-relevant documents. *See, e.g., State v. Anderson*, 972 P.2d 86, 90 (Utah Ct. App. 1998); *In re Quest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1181-84 (10th Cir. 2006).

We believe that any attorney, faithfully advising clients on the risks associated with the disclosure of trade secrets or personal documents, would have rejected Akin Gump's proposal. The case law surrounding GRAMA, attorney-client privilege, and the protection of trade secrets requires a business to reasonably protect non-public information or permanently lose the right to invoke legal protections in

[4] http://www.deseretnews.com/article/865572067/Bribery-or-lobbying-Jeremy-Johnson-says-theres-no-difference.html?pg=all

suits against competitors. Because of these legitimate and real concerns, we informed Akin Gump that we could not produce the documents without adequate protection. Akin Gump then rejected our request.

Ultimately, because of Akin Gump's unreasonable position, we were forced to seek a protective order through the judicial process, a remedy adopted by the Utah State Legislature. (Utah Code Ann. Section 36-14-5(3). However, we re-affirmed our intent to participate in the investigation.

In one conversation I had with Steven Reich, with Akin Gump, he admitted that his people were only interested in about 10% of the requested documents in the subpoena. After pointing out to him that implicit in that remark was an admission that the subpoena was overboard, he still would not agree to a protective order being signed to facilitate the turnover of the documents.

We believe that the motions filed with the Third District Court set out our legitimate concerns about the privacy, business, and constitutional interests placed in jeopardy by Akin Gump's approach to this investigation. These motions explain how disclosure of the documents would have made our companies vulnerable to competitors and jeopardized non-public information. The motions re-iterate our intent to aid the investigation of Mr. Swallow (we asked that the subpoenas be quashed, or in the alternative, have the court issue a protective order to produce the documents), but they also raise concerns about an individual's right to participate in political activity without the chilling effect of being forced to disclose information that was simply not relevant to Mr. Swallow's alleged misconduct. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

For months, we made every effort to assist in the House Investigation of Mr. Swallow. Unfortunately, Akin Gump placed us in an untenable position. We did not want to seek judicial protection. At the same time, however, there is no doubt in our minds that this entire dispute—thousands of dollars and hundreds of hours on both sides—could have been avoided if Akin Gump had reasonably negotiated and agreed to an adequate protective order. Akin Gump's effort during the December hearings to direct much of the blame for the high cost of their investigation and fees towards our company and our counsel was misleading and totally inaccurate.

Conclusion

In light of the cooperation and good faith exercised by my client in this and other investigations into allegations of misconduct by Mr. Swallow, we are disappointed with the unwarranted allegations leveled by Akin Gump in their attempt to explain the nature of the relationship Mr. Swallow had with my client and other members of the consumer lending industry. The industry acted in accordance with state and federal laws when it provided contributions to a former colleague who sought their support.

It is also important to remind members of the Special Committee that the consumer lending industry has been heavily regulated by the State of Utah since the initial legislation was passed to oversee these businesses in 1998. Over the past 15 years, the Utah Legislature has passed some 13 amendments to the code to provide for the appropriate balance of legislative oversight and open market competitiveness. The Legislature's oversight efforts have culminated in a marketplace where in 2013 only nine complaints were filed for the entire cash advance industry in Utah, with the Utah Department of Financial Institutions, the industry's primary regulator. This is a remarkable figure when one considers the hundreds of thousands of transactions completed each year throughout the state. Under current law,

Utahns receive a number of important safeguards as they apply for and receive small dollar loans. An unwarranted desire to overregulate the industry in light of accusations made by Akin Gump's investigation would have a detrimental effect on the soundness of the consumer lending markets within the State, potentially driving consumers who need loans to off-shore and unregulated Internet lenders.

In closing, Chairman Dunnigan recently stated in a news article that it would be wrong to make major campaign/election changes aimed at the actions of just one man. Rather, wise moderating actions should be taken if lawmakers believe they would be good policy for all in the future.[5] Now, some in the Legislature are considering statutory action against the consumer lending industry because of the actions of this same one man. With the worthy goal of enacting good policy for all, the consumer lending industry encourages all lawmakers to take the same measured approach when addressing issues related to its industry.

Very truly yours,

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[5] http://192.254.208.77/index.php/features/today-at-utah-policy/1642-legislation-coming-in-aftermath-of-swallow-abuses