FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Interim Audit Report– Canseco for Congress
(LRA 878)

I. INTRODUCTION

The Office of the General Counsel reviewed the proposed Interim Audit Report ("IAR") on Canseco for Congress ("Committee").[1] Our comments address issues pertaining to Finding 1 (Receipt of Apparent Prohibited Contributions) and Finding 2 (Receipt of Contributions that Exceed Limits). We concur with any findings not discussed in this memorandum. If you have any questions, please contact Danita Lee, the attorney assigned to this audit.

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[1] We recommend that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the proposed IAR. 11 C.F.R. §§ 2.4(a) and (b)(6).

II. RECEIPT OF APPARENT PROHIBITED CONTRIBUTIONS (Finding 1)

The proposed IAR examines two transactions totaling $100,000. The immediate source of the funds appears to be Inmuebles Caza, S.A., de C.V., ("Caza"), a foreign national corporation registered in Mexico. The funds were deposited in the Committee's bank account in two installments. One deposit totaling $14,000 was made by an electronic funds transfer from a Caza account to the Committee's account on January 29, 2010. A second deposit totaling $86,000 was made using a cashier's check remitted by Caza and deposited in the Committee's bank account on April 13, 2010. The proposed IAR concludes that the transactions appear to be contributions from a foreign national prohibited by 2 U.S.C. § 441e.

The Committee appears to assert that the funds were intended to represent either loans to the Candidate from, or at least secured by, the Candidate's own capital account in Canseco Investments, Ltd. ("Canseco, Ltd."), or the proceeds of personal loans to the Candidate from his sister using funds drawn on her capital account in Canseco, Ltd. Canseco, Ltd. is apparently a family-owned limited partnership. It is registered in Texas, and the Committee asserts that Canseco, Ltd. owns 100% of Caza.

Based on the limited state of the documentation available at this point, we concur with the proposed IAR finding that the transactions appear to be prohibited foreign national contributions. However, while we understand the auditors have asked the Committee for information to show that the funds were not from Caza, there remain a number of unanswered questions pertaining to the Committee's claim that the funds at issue were the Candidate's personal funds. The answers to these questions might, or might not, change our analysis at a later stage of the audit. Our analysis, based on currently available facts, is set forth below.

A. Sums Totaling $100,000 Deposited in Committee's Account

Two deposits to the Committee's account are at issue. The $14,000 deposit was made to the Committee's account on January 29, 2010, but the Committee did not disclose this receipt on its disclosure reports. The Audit Division has information indicating that the transfer was made from a bank account ending in [redacted] which the Audit Division believes is a Caza account. The Committee provided a September 13, 2011 letter to the Committee from Jorge Canseco, who is the candidate's brother and the president of Caza. This letter explained that the $14,000 was part of a larger loan of $30,000 that was made from Caza "to the person of [the candidate]" on January 28, 2010. According to the letter, "at the request of the borrower, the [$14,000 was] distributed by electronic funds transfer" to the Committee's bank account.

The $86,000 deposit was made to the Committee's account on April 13, 2010. The Committee submitted three types of contemporaneous documentation pertaining to this deposit. First, documentation from the Committee shows that a cashier's check for $86,000 was remitted by Caza and made payable to the Candidate on April 12, 2010. The documentation also indicates that the Candidate endorsed the $86,000 cashier's check and deposited it in a Committee account named "Canseco for Congress" using a deposit slip dated April 12, 2010.

Second, the Committee submitted a chain of emails dated April 9, 2010. The first email was from Jorge Canseco to the Candidate. The email states that Caza had, at that time, funds totaling $685,000; that one-eighth of that amount totaled $89,000; and that $58,000 minus $30,000 "already loaned" was available to the Candidate.[2] The second email was from the Candidate to seven individuals. The email says that "My request is based on my 1/8 interest in the sums of money that CAZA has. My request is for a loan not a distribution."[3] The third email is to the Candidate from Ceci Keck and was copied to the other individuals to whom the prior email was sent.[4] The third email states that "I always said that if Quico [the Candidate, presumably] took just his percentage of whatever is there it would be fine with me."

Third, the Committee submitted a promissory note for $58,000 dated April 12, 2010 that was executed by the Candidate in favor of his sister, Patricia Bruce, as the lender. The promissory note sets forth the terms of the Candidate's promise to repay Ms. Bruce. The Committee asserts that the $86,000 comprised $28,000 as attributable in some sense to the Candidate's "capital," based on the email he received from Jorge Canseco on April 9, 2011, and $58,000 as a personal loan received by the Candidate from his sister that was in turn derived from her "capital in the partnership."

The Committee has actually characterized the funds at issue here in slightly varying manners. First, in an August 29, 2011 email to the Audit Division, a Committee consultant assisting with the audit described $28,000 of the $86,000 as "a loan from the Congressman's capital." Second, in a September 15, 2011 email to the Audit Division, the Committee, through its counsel, described the $14,000 and the $28,000 as "loans that the Congressman received from Canseco Investments" that were "secured by Congressman Canseco's 1/8 ownership interest in Canseco Investments," and described the $28,000 as a "loan from his capital." It also described the $58,000 as "a personal loan made by Congressman Canseco's sister," the funds for which "came from her capital in the partnership." However, the funds transfer record of the January deposit, the cashier's check associated with the April deposit and the contemporaneous email chain from April 2010 all indicate that the direct source of the funds was Caza, not Canseco, Ltd. Other than asserting that Canseco, Ltd. owns 100% of the shares of Caza, the Committee has not directly addressed this point.

B. There Is A Lack of Documentation That Any Of These Funds Are the Candidate's Personal Funds

A candidate for Federal office may make unlimited expenditures from personal funds. 11 C.F.R. § 110.10. Personal funds of a candidate consist of assets, income, or jointly owned spousal assets. 11 C.F.R. § 100.33. Assets are amounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or

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[2] The difference between $89,000 and $58,000 was apparently related to a tax liability of Caza.

[3] In context, the email from the Candidate appears to refer to earlier communications that have not been provided to the Audit Division. The email begins, "All, I am sorry for the trouble I have been to all. My request is based on . . . "

[4] We do not have information establishing the precise relationship between Ceci Keck and the Candidate, Canseco, Ltd., or Caza.

control over and with respect to which the candidate had legal and rightful title or an equitable interest. 11 C.F.R. § 100.33(a). Personal funds may also be income received during the current election cycle of the candidate and includes, among other things, income from the candidate's stocks or other investments including interest, dividends, or proceeds from the sale or liquidation of such stocks or investments. 11 C.F.R. § 100.33(b)(2).

The April 9, 2010 emails make clear that the Candidate believed that he had a financial interest in "the sums of money that CAZA has." However, taking the Committee's assertions as true, the Candidate may not have had a legal right of access to or control over Caza's assets. What the Candidate apparently owned was a limited partnership interest in Canseco, Ltd., which in turn apparently owned 100% of the shares of Caza. Generally, the assets of a corporation belong to the corporation, not to its shareholders personally.[5] Tex. Bus. Org. § 21.051 (Vernon 2010). In addition, the assets of a limited partnership are generally the property of the partnership, not the personal property of limited partners. Tex. Bus. Org. § 152.101 (Vernon 2010). The Commission has on several occasions determined that even where a candidate personally owned 100% of the stock of a corporation, the corporation's assets did not constitute the personal funds of the candidate, and that transfers of these funds from the corporation to the candidate's committee, caused by the candidate in his capacity as a corporate officer, were prohibited contributions in violation of 2 U.S.C. § 441b(a) -- including transactions structured as loans from the business to the candidate. *See, e.g., FEC v. Kalogianis,et al.*, No. 8:06-cv-68-T-23EAJ (M.D.Fla. Nov. 20, 2007); MUR 3951 (E.C. Harrison Properties); MUR 3191 (Friends of Bill Zeliff). Thus, without more, we are unable to conclude that there is documentation establishing that: 1) all or a portion of Caza's funds were the Candidate's personal funds in which he had either legal and rightful title or an equitable interest *and* a legal right of access to or control over, consistent with 11 C.F.R. § 100.33(a), or 2) Caza's funds were paid to the Candidate in the form of income as interest, dividends, or proceeds from sale or liquidation of the Candidate's stock or investments, consistent with 11 C.F.R. § 100.33(b). Nor is there any indication that, despite the contemporaneous references to "the sums of money that CAZA has," the actual source of funds was Canseco, Ltd., or any source other than Caza. There is also, for instance, no copy of any entries from the accounts of Canseco, Ltd. showing that the Candidate's capital account was debited or that any shares of Caza held by Canseco, Ltd. were liquidated and the proceeds provided to the Candidate.

Moreover, even if it could be established that $58,000 of the $100,000 at issue constituted the personal funds of the Candidate's sister, our analysis might then lead us to conclude that the Committee received an excessive contribution from the Candidate's sister, rather than a foreign national contribution from Caza. Although the promissory note indicated that the debt was structured as a personal debt owed by the Candidate to his sister, the funds were deposited directly to the Committee's account after being endorsed by the Candidate. Any candidate who receives a loan for use in connection with his or her campaign is deemed, by operation of law, to do so as an agent of the authorized committee. 2 U.S.C. § 432(e)(2). Accordingly, even if the Commission

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[5] Although we are relying on general principles of corporate law under United States' jurisprudence, we believe that this issue is governed by Mexican corporate law. We have committed resources to research, access, and translate the Mexican corporate law that would govern this issue. We, however, do not have a final resolution. If appropriate, we will update this memorandum once we have additional information.

accepted that the transaction was a loan from the Candidate's sister, the Candidate would have received the loan as the Committee's agent. The funds were deposited in the Committee's account, and apparently the Committee used the funds in connection with the election. The funds, therefore, could not be considered the Candidate's personal funds.

We recommend that the proposed IAR be modified to give the Committee an opportunity to show that all or a portion of the $100,000 deposited in the Committee's account was composed of the Candidate's personal funds consistent with 11 C.F.R. § 100.33. This could take the form of legal arguments demonstrating that under Mexican or other applicable law the Candidate had legal or equitable title to, and a legal right of access to or control over, the portion of Caza's funds provided to him; evidence, including accounting and/or bank records, demonstrating that the true source of the funds was the Candidate's capital account in Canseco, Ltd. *and* that under applicable law and the partnership agreement the Candidate's capital account met the definition of an "asset" in 11 C.F.R. § 100.33(a); evidence demonstrating that what was actually paid to the Candidate was interest, dividends, a profit-sharing distribution, or proceeds from the sale or liquidation of the *Candidate's* assets; or other information demonstrating that the funds at issue were the Candidate's personal funds.

III. RECEIPT OF CONTRIBUTIONS THAT EXCEED LIMITS (Finding 2)

The proposed IAR examines three financial transactions and concludes that the transactions were excessive contributions from three individuals. The first transaction involved $22,000 that was electronically transferred from the Candidate's personal bank account on December 10, 2009. The second transaction involved $8,000 that was electronically transferred from the Candidate's personal bank account on December 18, 2009. The Committee did not disclose either transaction. It advised the auditors that the two transfers were loans from the Candidate's personal funds. The third transaction involved $150,000 that was deposited in the Committee's bank account on April 27, 2010. The Committee disclosed the transaction as a loan from the Candidate. The proposed IAR concludes that none of the funds for the three transactions were the Candidate's personal funds. Rather, the proposed IAR concludes that the funds were derived from loans made to the Candidate from three individuals.[6] The source of funds for the respective $22,000 and $8,000 transfers to the Committee's bank account were funds that were electronically deposited in the Candidate's personal bank account by two individuals, and the source of funds for the $150,000 was a check written to the Candidate from an individual. The Committee also submitted a copy of a promissory note signed by the Candidate promising to repay the latter loan.

As noted, when a candidate receives a loan for use in connection with his or her campaign, the candidate is deemed to have received the loan as an agent of the authorized committee. 2 U.S.C. § 432(e)(2). Thus, the loans were received by the Committee, not the Candidate personally, and were not the Candidate's personal funds. Moreover, because all loans to committees are contributions except those made by financial institutions in the ordinary course of their business,

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[6] The auditors indicate that none of the individuals are related to the Candidate.

2 U.S.C. §§ 431(8)(A)(i) and (B)(vii), these loans were contributions received from the lenders, and exceeded the limits set forth at 2 U.S.C. §441a(a)(1)(A).

The auditors apply a LIFO accounting analysis to trace the source of funds and conclude that the deposits in the Candidate's personal bank account were excessive contributions from the three individuals. The Audit Division explained to this Office that it applied a LIFO accounting methodology to trace the funds because the Committee maintained a negative balance in its bank account at the beginning of the month that the transfers and deposits were made and that the bank account was underfunded throughout the month. The auditors explained that since the Candidate's account was underfunded and was charged numerous non-sufficient fund fees and that because other funds deposited in the account were spent almost immediately, the account had a zero or negative balance at various times throughout the month. The auditors concluded, using LIFO, that the only funds available to make the transfers from the Candidate's account to the Committee were the funds received from the three individuals.

After discussion with our Office, the Audit Division conducted an alternative analysis using FIFO, and determined that the choice of accounting method resulted in minimal differences to the amounts of excessive contributions received by the Committee. If this is so, however, the FIFO method might yield a result in which at least some portion of the transfers from the Candidate's personal account to the Committee (although perhaps a very small one) may have been derived from the Candidate's personal funds and not from the loans in question. We, therefore, recommend that the Audit Division revise the proposed IAR to more clearly explain the flow of funds through the Candidate's personal account and the reason it chose LIFO, rather than FIFO, methodology to trace the funds.

The proposed IAR also calculates the amount in excess of the contribution limits by using limits totaling $7,200 for each of the three individuals who transferred funds to the Candidate. Thus, the proposed IAR concludes that the contributions from the three individuals exceed the limits by an aggregate amount of $144,050. The Audit Division explained to this Office that it applied a contribution limit totaling $7,200 because Texas had a runoff election during the election cycle. The auditors, therefore, determined that the individuals had available three contribution limits of $2,400 for each election which totaled $7,200. However, the Act does not impose a $7,200 election cycle limit on contributions. In 2010, it imposed a $2,400 limit for each election. 2 U.S.C. § 441a(a)(1). Moreover, contributions not specifically designated in writing for a particular election are considered designated for the next election for that Federal office after the contribution is made. 11 C.F.R. § 110.1(b)(2)(ii). Because the parties attempted to structure the transactions at issue as personal loans to the Candidate, there were obviously no designations in writing for a particular election. The respective contribution limit for each of the three transactions was, therefore, $2,400 and the contributions were made with respect to the next election (primary, runoff, or general) after they were made. The excessive contribution, thus, should be calculated based on this amount. We recommend that the auditors revise the proposed IAR and apply a single $2,400 contribution limit to each of the three contributions to determine the contribution amount in excess of the limitation.