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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 4851

DATE COMPLAINT FILED: November 2, 1998

DATE OF NOTIFICATION: November 12, 1998

DATE ACTIVATED: March 5, 2001

STATUTE OF LIMITATIONS: October 15, 2003¹

SOURCE: COMPLAINT GENERATED

COMPLAINANT: Mark Brewer, Chair
Michigan Democratic State Central Committee

RESPONDENTS: Michigan Republican State Committee and William H. Gnodtke, Treasurer
Touma for Congress and Richard M. Gabrys, as Treasurer
Leslie Ann Touma

RELEVANT STATUTES/REGULATIONS: 2 U.S.C. § 431
2 U.S.C. § 434(b)(4)(H)(iii)
11 C.F.R. § 100.7
11 C.F.R. § 100.8
11 C.F.R. § 100.16
11 C.F.R. § 104.4(a)

INTERNAL REPORTS CHECKED: Audit Documents
Disclosure Reports

FEDERAL AGENCIES CHECKED: None

¹ For the reporting violations described in this Report, the limitations period most likely began running, at the earliest, on October 15, 1998, when the first erroneous report was filed. Thus, the five-year limitations period for the reporting violations will expire no sooner than October 15, 2003. For the other potential violations in this matter, excessive contributions/coordinated party expenditures, the limitations period most likely began to run when the direct mail at issue was distributed to voters, which occurred sometime in late October 1998, shortly before the November 3, 1998 general election.

I. INTRODUCTION

This matter was generated by a complaint filed by Mark Brewer, Chair of the Michigan Democratic State Central Committee ("Complainant"). The Complainant alleges that the Michigan Republican State Committee ("MRSC") paid for two direct mail pieces, which contained express advocacy and were coordinated with Touma for Congress ("Campaign") and Leslie Ann Touma ("Candidate"). The Complainant further contends that expenditures for the mailers violated the limits on contributions and/or coordinated party expenditures and that the mailers misleadingly assert that they were independent expenditures.

This MUR was held in abeyance pending the outcome of a Commission audit of the MRSC for the 1998 election cycle. That audit resulted in a referral to this Office, which focused primarily on substantial and repeated allocation violations that were considerably more straightforward in that they required no investigation and involved considerably more money than the expenditure/contribution violations at issue in this MUR. Consequently, this Office moved forward on the allocation violations and decided to process this MUR separately.

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6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Law**

8 Pursuant to the Federal Election Campaign Act of 1971, as amended ("Act"), an
9 expenditure is "any purchase, payment, distribution, loan, advance, deposit, or gift of money or
10 anything of value, made for the purpose of influencing any election for Federal office."

11 2 U.S.C. § 431(9)(A). A contribution is "any gift, subscription, loan, advance or deposit of
12 money or anything of value made for the purpose of influencing any election for Federal office."

13 2 U.S.C. § 431(8)(A).

14 Expenditures made in cooperation, consultation or concert, with or at the request or
15 suggestion of, a candidate, his authorized political committee, or their agents, shall be considered
16 to be a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i). An "independent
17 expenditure" is an expenditure by a person expressly advocating the election or defeat of a
18 clearly identified candidate which is made without cooperation or consultation with any
19 candidate, or any authorized committee or agent of such candidate, and which is not made in
20 concert with, or at the request or suggestion of, any candidate, or any authorized committee or
21 agent of such candidate. 2 U.S.C. § 431(17). Political committees must report their independent
22 expenditures. 2 U.S.C. § 434(b)(4)(H)(iii).

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1 **Payment by a state committee of a political party for campaign materials (such as pins,**
2 **bumper stickers, brochures, posters, newsletters, and yard signs) used by such committee in**
3 **connection with volunteer activities on behalf of any nominee of such party is not an expenditure**
4 **or a contribution if: (1) the preparation and/or distribution of such materials is conducted on**
5 **behalf of the party's nominees for the general election; (2) the materials are distributed by**
6 **volunteers, not through public advertising such as direct mail; (3) the party committee does not**
7 **use materials purchased by the national party committee or money transferred from the national**
8 **party committee specifically to purchase materials; (4) the party committee does not use funds**
9 **designated for a particular candidate; and (5) a payment from a candidate to help pay for the**
10 **materials does not exceed his or her share of the expenses. 11 C.F.R. §§ 100.7(b)(15),**
11 **100.8(b)(16). "Direct mail" means any mailing(s) by a commercial vendor or any mailing(s)**
12 **made from commercial lists. *Id.***

13 **B. The Allegations in the Complaint**

14 **The complaint alleges that the MSRC, the Campaign, and the Candidate violated the Act**
15 **when the MRSC paid for two direct mail pieces shortly before the 1998 general election. The**
16 **first piece ("Mailer 1") is captioned: "Sander Levin's liberal policies will really get under your**
17 **skin." It includes a photograph of Sander Levin, the Candidate's opponent, sets forth**
18 **Mr. Levin's position on a variety of issues, and concludes with the statement: "On November 3rd,**
19 **let's not miss our opportunity to replace Sander Levin." The second piece ("Mailer 2") is**
20 **captioned "Leslie Touma. Send Michigan's Best." It sets forth the Candidate's agenda, quotes**
21 **the Candidate, and contains the statement "Leslie Touma. Send Michigan's Best" superimposed**

over the backdrop of the U.S. Capitol. Both mailers include the following disclaimer, "Paid for by Michigan Republican State Committee . . . Not authorized by any candidate committee."³

The complaint alleges that the costs for these mailers are either coordinated party expenditures or contributions to the Campaign because they: (1) refer to clearly identified candidates; (2) convey electioneering messages; and (3) were coordinated with the Campaign.

Thus, the Complaint contends that the MRSC, by paying for these mailers, exceeded the contribution or coordinated party expenditure limitations of the Act. The complaint also alleges that the disclaimer "misleadingly states that they are independent expenditures when they are not."

C. Joint Response

The MRSC and the Campaign submitted a joint response ("Joint Response") to the allegations in this MUR.⁴ According to the Joint Response, the costs for Mailer 1 qualify as independent expenditures because "such expenditures were made by the MRSC without cooperation or consultation with Ms. Touma, or any authorized committee or agent of Ms. Touma."⁵ The MRSC and the Campaign contend that the costs for both mailers qualify as "volunteer mass mailing activity." Since the costs for the mailers qualify as either independent expenditures (Mailer 1) or volunteer activity (Mailer 1 and Mailer 2), the MRSC and the Campaign contend that these expenditures are not contributions and are not coordinated party expenditures. Thus, the MRSC and the Campaign insist that paying for these mailers did not cause the MRSC to exceed applicable contribution or coordinated party expenditure limits.

³ The return address on Mailer 1 is the MRSC and the return address on Mailer 2 is the Campaign.

⁴ The Candidate was notified of the complaint, but did not respond.

⁵ Although the MRSC claims that Mailer 1 qualifies as an independent expenditure, this does not necessarily constitute an admission that the MRSC failed to report independent expenditures. This is because if, as the party claims, Mailer 1 also qualifies for the volunteer exception, the expenditures were properly reported as "Other Federal Operating Expenditures." See also Note 7 and accompanying text.

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D. Audit Findings

The Audit Division found that the MRSC spent \$7,590 in production costs associated with 69,000 pieces of Mailer 1 and \$7,590 for production costs associated with 69,000 pieces of Mailer 2. Attachment 1. Given that the mailers are pre-printed with the U.S. Postal Service bulk mail stamp, they apparently were distributed by the U.S. Postal Service at the non-profit, bulk mail rate. The MRSC did not itemize the postage costs so this Office is unable to establish the exact amount spent for postage. However, postage for 138,000 pieces of similar mail at the current non-profit, bulk mail rate, would be \$22,770. Using the actual production costs for both mailings (\$15,180) plus the approximate postage costs (\$22,770), the MRSC apparently spent about \$37,950 on these mailers. The Audit Division found that the MRSC reported its expenditures for the mailers as "Other Federal Operating Expenditures" on financial reports filed with the Commission. Finally, the Audit Division also concluded that the MRSC had used its full coordinated expenditure limitation under 2 U.S.C § 441a(d) and had contributed the maximum \$5,000 direct contribution to the Campaign.⁶

E. Analysis

We conclude, and the Joint Response does not dispute, that both mailers expressly advocate for the election or defeat of clearly identified candidates. Mailer 1 expressly advocates for Mr. Levin's defeat. It refers to him by name, contains his photograph and includes an explicit directive to engage in electoral action: "On November 3rd, let's not miss our opportunity to replace Sander Levin." Mailer 2 expressly advocates for the Candidate's election. It includes the statement: "Leslie Touma. Send Michigan's Best" superimposed over the U.S. Capitol. It also

⁶ The applicable coordinated party expenditure limit under 2 U.S.C. § 441a(d) was \$32,550.

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1 includes a photograph of the Candidate and quotes her saying: "If you agree with my ideas, I
2 hope you'll join my campaign."

3 Since the mailers are express advocacy, if they resulted from coordination between the
4 MRSC and the Campaign or the Candidate, the expenditures for the mailers are in-kind, direct
5 contributions and/or coordinated party expenditures. And since, as discussed above, the MRSC
6 has otherwise used its full direct contribution and coordinated party expenditures limits, if these
7 expenditures were coordinated, the MRSC violated the Act by making excessive direct
8 contributions and/or excessive coordinated party expenditures.

9 Although the Complainant asserts that the expenditures were coordinated, the MRSC
10 denies that unlawful coordination occurred.⁷ Moreover, there are insufficient specific facts to
11 support a reason to believe finding on a coordination theory. Absent such facts, the expenditures
12 for the mailers do not qualify as either contributions or coordinated party expenditures.⁸

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⁷ In the Joint Response, the MRSC and the Campaign contend that the expenditures for Mailer 1 "were made by the MRSC without cooperation or consultation" with the Candidate and her authorized committees. For Mailer 2, however, the Joint Response does not expressly deny that there was coordination. Instead, the Joint Response states that, as a "volunteer mass mailing" activity, expenditures for Mailer 2 could be coordinated with the Candidate without it counting as a contribution or a coordinated party expenditure. In light of the express denial that coordination took place for Mailer 1, the failure to deny coordination for Mailer 2 indicates that there may have been coordination with the Candidate and/or the Campaign with regard to Mailer 2.

⁸ Since the MRSC paid for the mailers with federal funds, there is no allocation issue in this matter.

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In light of the foregoing, this Office recommends that the Commission:

find no

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reason to believe, on the basis of the complaint in this matter, that the Campaign or the
Candidate violated the Act.


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IV. RECOMMENDATIONS

- 1.
- 2.
3. Find no reason to believe, on the basis of the complaint filed in MUR 4851, that Touma for Congress and Richard M. Gabrys, as Treasurer, and Leslie Ann Touma, violated the Act, and close the file as to these respondents.
- 4.
- 5.
6. Approve the appropriate letters.

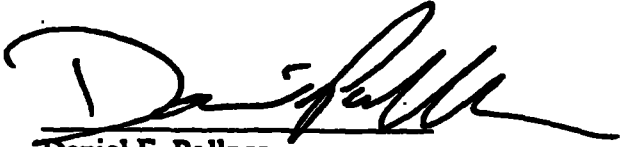
Date: 3/4/03


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