FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 11 2011

Robert K. Kelner, Esq.
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

RE: MUR 6417
Jim Huffman for Senate and Lisa Lisker,
in her official capacity as treasurer
James Huffman
Leslie Spencer

Dear Mr. Kelner:

On November 4, 2010, the Federal Election Commission (the "Commission") notified your clients, Jim Huffman for Senate and Lisa Lisker, in her official capacity as treasurer, James Huffman and Leslie Spencer, of a complaint alleging that your clients violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and provided your clients with a copy of the complaint.

After reviewing the allegations contained in the complaint, and your clients' response, the Commission on August 2, 2011, found reason to believe that Jim Huffman for Senate and Lisa Lisker, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) and 2 U.S.C. § 434(b)(3)(E), provisions of the Act, and 11 C.F.R. § 104.3(d)(4), a regulation promulgated pursuant to the Act. The Commission also found reason to believe that James Huffman violated 2 U.S.C. § 441a(f) and reason to believe that Leslie Spencer violated 2 U.S.C. § 441a(a). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,

Cynthia L. Bauerly
Chair

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Jim Huffman for Senate and Lisa Lisker, in her official capacity as treasurer
James Huffman
Leslie Spencer

MUR: 6417

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by the Democratic Party of Oregon. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that Jim Huffman for Senate and Lisa Lisker, in her official capacity as treasurer ("Committee"), reported the receipt of six loans totaling $1.35 million from Oregon's 2010 Republican Senate candidate James Huffman's personal funds that were not from his personal funds. The allegation is based on Huffman's personal disclosure statement filed with the U.S. Senate ("PDS") that described the value of his assets as between $565,003 and $1,115,000, the bulk of which were in a retirement fund. According to the complaint, "[i]t is simply implausible that Mr. Huffman had enough 'personal funds' to loan $1.35 million" to the Committee, and "[c]onsequently, some or all of the $1.35 million in cash loans likely emanated from a source other than Mr. Huffman's 'personal funds,'" resulting in the likelihood that the Committee accepted, and the source of the funds made, an excessive contribution. The complaint requests that the Commission investigate the violations, including whether they were knowing and willful. The joint response of the Committee, James Huffman, and his wife, Leslie Spencer, concedes that several of the loans should have been attributed to Spencer rather than Huffman, and states that the Committee is amending its disclosure reports to show the loans as having been made by Spencer.

As discussed in more detail below, it appears that none of the loans came from Huffman's "personal funds." Bank of the West was the source of one of the loans, in the amount of $50,000, and Leslie Spencer, Huffman's spouse, was the source of the other five loans, totaling $1.3 million. Since Spencer contributed $4,800 to her husband's campaign on the same day that she made her second loan to the Committee, she made excessive contributions of $1.3 million to the Committee, which Huffman and the Committee accepted. Accordingly, there is reason to believe that Leslie Spencer violated 2 U.S.C. § 441a(a), and the Committee and James Huffman violated 2 U.S.C. § 441a(f). Since the Committee misreported all six loans and failed to file a Schedule C-1 disclosing that Bank of the West was the source of one loan, there is reason to believe that the Committee violated 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4).

II. FACTUAL SUMMARY

The complaint alleges that between February 25, 2010 and October 13, 2010, the Committee disclosed that Huffman made six loans totaling $1.35 million from his "personal funds," but Huffman reported on his PDS, attached to the complaint, that his personal assets consisted of a checking account valued between $15,001 and $50,000, stock valued between $50,001 and $100,000, and a retirement fund valued between $500,000 and $1,000,000. The complaint notes that Huffman's PDS also discloses that his wife, Leslie Spencer, is the beneficiary of two trusts valued at $6,478,878, in which Huffman has no ownership interest.[1] Maintaining that it is "implausible" that Huffman had enough personal funds to make some or all of the loans, the complaint alleges some or all of the $1.35

[1] According to the PDS, the trusts are managed by Fiduciary Trust Company International ("FTCI"), and consist of the Leslie M. Spencer Trust, of which Spencer is the income beneficiary, and a Spencer 2005 Family Trust, in which Spencer has an undivided one-third interest.

million in loans originated from another source, likely resulting in the Committee accepting—and the actual source of the loans making—an excessive contribution.

A joint response was submitted on behalf of all the respondents and attached sworn declarations from Huffman, Spencer, and the Committee's treasurer. According to the response, Huffman and Spencer believed that Huffman could loan the Committee up to the amount of his share of jointly owned property, regardless of the source of the funds. They estimated that amount, which included Spencer's trust funds, to be approximately $2.3 million.[2] For five of the loans, however, instead of using Huffman's individual or joint assets to make the loans, the couple used Spencer's FTCI trust account, which was solely in her name, to make $1.3 million of the loans because it was the most convenient and accessible source, and because there was a secure transfer history between their joint account at Bank of the West and FTCI. According to the response, "[t]he decisions that were made with respect to the source of the loans were based solely on convenience and flexibility."

The Response describes the transmittal of the $1.3 million in funds originating from Spencer's FTCI trust account to the Committee for the five loans, and attaches supporting documentation. FTCI wired the funds from Spencer's trust account in the amounts of $50,000, $150,000 and $200,000 to Huffman's and Spencer's joint account at Bank of the West on March 15, 2010, April 8, 2010, and July 1, 2010, that were used to fund three loans of the same amounts disclosed by the Committee as from Huffman's personal funds on March 30, 2010, March 31, 2010, and June 30, 2010, respectively. To fund a fourth

[2] The Response admits in retrospect that the estimate was too high because the estimated real market value of their joint homes was significantly less than what they were later appraised for, and the estimate included a property in Spencer's name alone. The Response states that the appropriate estimate would have been closer to $1,798,328.

loan of $500,000 on September 14, 2010, also disclosed as from Huffman's personal funds, Spencer wired $500,000 from her FTCI line of credit to the joint bank account on September 13, 2010, and Huffman then wired those funds to the Committee's account at Wachovia Bank the next day. Finally, to fund a fifth loan disclosed as from the candidate's personal funds on October 13, 2010, Spencer wired $400,000 from her FTCI line of credit directly to the Committee's account at Wachovia Bank to "facilitate the timing of a planned Committee advertisement."

A sixth loan disclosed as from Huffman's personal funds did not originate from Spencer's FTCI account. On February 25, 2010, Huffman and Spencer transferred $50,000 from a pre-existing home equity line of credit account at Bank of the West, secured by their jointly owned Oregon home, to their joint account at the same bank. The same day, a check for $50,000 from the joint account made payable to Jim Huffman for Senate was deposited into the campaign account.

II. LEGAL ANALYSIS

A. Excessive Contribution

The Act provides that no person shall make contributions to any candidate and his or her authorized political committee with respect to any election for federal office which, in the aggregate, exceed $2,400. 2 U.S.C. § 441a(a)(1)(A). No candidate or candidate committees shall knowingly accept any contribution or make any expenditure in violation of section 441a. 2 U.S.C. § 441a(f). The term "contribution" includes any "gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i).

The United States Supreme Court has upheld the constitutionality of the Act's contribution limits as applied to members of a candidate's family. In *Buckley v. Valeo*, 424 U.S. 1, 51 n.57 (1976) (*"Buckley"*), the Court noted that the legislative history of the Act indicated that "[i]t is the intent of the conferees that members of the immediate family of any candidate shall be subject to the contribution limitations established by this legislation.. .. The immediate family member would be permitted merely to make contributions to the candidate in amounts not greater than $1,000 for each election involved, "citing to S. Conf. Rep. No. 93-1237, p. 58 (1974), U.S. Code Cong. & Admin. News 1974, p. 5627. According to *Buckley*, "[a]lthough the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." 424 U.S. 1, 53 n.59. In several cases, the Commission has conciliated with respondents where family members made excessive contributions to the candidate's campaign. *See e.g.*, MUR 5438 (Condon); MUR 5334 (O'Grady); MUR 5429 (Weiner); and MUR 5138 (Ferguson). *But see* MUR 5321 (Robert) and MUR 5724 (Feldkamp).

Federal candidates may make unlimited contributions from their "personal funds" to their campaigns. 11 C.F.R. § 110.10. "Personal funds" include (a) amounts derived from assets that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had legal and rightful title or an equitable interest, (b) income received during the current election cycle, of the candidate, including salary and other earned income from bona fide employment; income from the candidate's stocks or other investments; bequests

to the candidate; income from trusts established before the beginning of the election cycle; income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary; gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and (c) amounts derived from a portion of the assets that are owned jointly by the candidate and the candidate's spouse. 11 C.F.R. § 100.33.

Huffman and Spencer do not claim that the $1.3 million in loans to the Committee that were funded from Spencer's FTCI accounts fell into any of the above categories such that they can be deemed Huffman's "personal funds." The Response states that, since their marriage, Huffman and Spencer have not considered the FTCI funds "any differently than money in their joint account," and have transferred funds from it to the joint account for "family purposes," including home renovations, car purchases, and family travel, as well as to pay federal and state taxes from their joint returns and to deposit joint tax refunds. The Response admits, however, the couple understood that "only Ms. Spencer had access to the FTCI account and [they] did not consider these funds when estimating Mr. Huffman's net worth." Thus, the couple's use of the funds in the FTCI account as the source of the loans was not based on any belief that they were, in reality, anything other than Spencer's solely owned funds to which Huffman had no independent access. Nor do they contend now, with an understanding of the applicable laws, that using the FTCI funds was legally permissible. To the contrary, the Committee disclosed that Spencer made five of the loans on its Post-General Report, and it amended prior 2010 disclosure reports to show that Spencer made the five loans. Huffman has contributed $1.3 million in personal funds to the Committee in order for the Committee to fully refund Spencer, including from

Huffman's interest in the value of the couple's two homes, stock sales, and funds from his TIAA-CREF account. The Committee's 2011 April Quarterly Report shows disbursements of $1 million to Spencer, and its 2011 July Quarterly Report shows disbursements of $300,000 to Spencer.

B. Reporting

The Act provides that each report shall identify the person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and the date and amount or value of such loan. 2 U.S.C. § 434(b)(3)(E). When a candidate obtains a loan derived from a home equity line of credit for use in connection with the candidate's campaign, the candidate's principal campaign committee shall disclose on Schedule C-1 to the report covering the period when the loan was obtained, the date, amount, and interest rate of the loan, the name and address of the lending institution, and the types and value of collateral or other sources of repayment that secure the loan, advance, or line of credit, if any. 11 C.F.R. § 104.3(d)(4).

The Committee incorrectly reported on its 2010 April Quarterly Report, 2010 Pre-Primary Report, 2010 July Quarterly Report, 2010 October Quarterly Report and 2010 Pre-General Report that the six loans were from Huffman's personal funds. The Bank of the West was the source of the first loan, which was in the amount of $50,000. For this loan, the Committee should have filed a Schedule C-1 with the 2010 April Quarterly Report, since the loan was based on a home equity line of credit. With respect to the other five loans totaling $1.3 million, the Committee should have disclosed them as from Spencer on the appropriate 2010 disclosure reports.

The Committee has amended its 2010 April, July, and October Quarterly Reports, and the 2010 Pre-General Report to reflect on Schedule A and Schedule C that Spencer made contributions to the Committee in the form of loans. The Committee also amended its 2010 Pre-Primary Report to reflect on Schedule C that Spencer made the loans, and filed a Schedule C-1 with the amended 2010 April Quarterly Report along with a revised Schedule C to reflect that Bank of the West was the source of the first loan.

Based on the above, there is reason to believe that Leslie Spencer violated 2 U.S.C. §441(a) by making an excessive contribution, and James Huffman, and Jim Huffman for Senate and Lisa Lisker, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting an excessive contribution. There is also reason to believe that Jim Huffman for Senate and Lisa Lisker, in her official capacity as treasurer, violated 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(d)(4) for failing to properly report $1.35 million in loans.

C. Knowing and Willful

The complaint requests that the Commission investigate the alleged violations, including whether they were knowing and willful. To establish a knowing and willful violation, there must be knowledge that one is violating the law. *See FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986). A knowing and willful violation may be established "by proof that the defendant acted deliberately and with knowledge that the representation was false." *U.S. v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). A knowing and willful violation may be inferred "from the defendants' elaborate scheme for disguising" their actions. *See id. at* 214-15.

It appears that Huffman and Spencer understood how to calculate the limits on the amount of loans Huffman could make to the Committee from his personal and joint assets, but they did not understand that the loans had to be funded from those assets as well. While they consulted Lisker, who confirmed their understanding of how to calculate the limits on the amount of loans Huffman could make, they did not discuss with her the required source of the loans. There is no contrary information suggesting that the Respondents intentionally made, accepted, or failed to properly report the loans. The Respondents did not attempt to "disguise" the source of the loans as they are easily traced to their sources, and Huffman's PDS indicated that he did not have the personal or joint assets to make all the loans in issue. Accordingly, we do not find that the Respondents' violations were knowing and willful.