FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Lauren Battey, Esq.
Michael Bayes, Esq.
Jason Torchinsky, Esq.
Holtzman Vogel Josefiak PLLC
45 North Hill Drive, Suite 100
Warrenton, VA 20186

DEC 22 2015

RE: MUR 6771
Sue Lowden for US Senate and
Chris Marston in his official
capacity as treasurer

Dear Ms. Battey and Messrs. Bayes and Torchinsky:

On January 14, 2014, the Federal Election Commission ("Commission") notified your above-named clients of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On December 17, 2015, the Commission decided, on the basis of the information in the complaint, and information provided by your clients, to dismiss the allegation that Sue Lowden for US Senate and Chris Marston in his official capacity as treasurer violated 52 U.S.C. § 30104(b)(8). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which more fully explains the Commission's finding is enclosed.

If you have any questions, please contact Roy Q. Luckett, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

ENCLOSURE

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Sue Lowden for US Senate and Chris Marston in his official capacity as treasurer

MUR: 6771

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission alleging that Sue Lowden for US Senate ("Committee"), the authorized campaign committee for 2010 U.S. Senate candidate Sue Lowden, violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations by failing to report an approximately $78,000 debt owed to Vitale & Associates, LLC ("Vitale"), a Colorado-based polling and public-affairs company. Compl. at 1 (Jan. 9, 2014). For the reasons explained below, the Commission exercises its prosecutorial discretion and dismisses the matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

II. FACTUAL BACKGROUND

During the 2010 election, the Committee used Vitale as a vendor. The Committee's 2010 April Quarterly Report disclosed payments to Vitale for "Survey Research" on February 10, 2010, and March 23, 2010, in the amounts of $20,982.59 and $21,330.94, respectively.[1] The Committee's next two filed reports, the 2010 July and October Quarterly Reports, disclosed a separate debt to Vitale in the amount of $77,796.88, also for "Survey Research."[2] When the Committee filed its 2010 Year End Report, it disclosed no debt to Vitale and no payments to Vitale. Thereafter, none of the Committee's filings in 2011, 2012, and 2013 disclosed any debt

[1] *See* http://docquery.fec.gov/pdf/180/10020293180/10020293180.pdf at 330 and 344.

[2] *See* http://docquery.fec.gov/pdf/441/10020544441/10020544441.pdf at 204, and http://docquery.fec.gov/pdf/035/10020963035/10020963035.pdf at 40.

owed to Vitale. On April 14, 2011 and May 3, 2012, respectively, the Committee amended its 2010 October and July Quarterly Reports to delete the debt to Vitale that it had disclosed on its original reports.

Vitale filed a lawsuit against Lowden regarding the debt in the U.S. District Court for the District of Nevada for breach of contract, alleging a failure to pay, on August 8, 2012.[3] On January 14, 2014, the Committee amended its 2010 July Quarterly Report and all subsequent reports to include a $77,796.88 debt with Vitale with the notation, "disputed debt—currently in litigation in NV Federal Court." The lawsuit was terminated on July 30, 2015, after the district court entered summary judgment in Lowden's favor.[4]

The administrative Complaint in this matter was filed on January 9, 2014. It alleges that the Committee violated Commission regulations by omitting the Vitale debt from its disclosure reports, beginning with its Amended 2010 July and October Quarterly Reports and continuing with all subsequent reports. Compl. at 1-2.

The Committee argues that it has not violated the Act or Commission regulations and requests that the Commission dismiss the matter. The Committee asserts that it did not enter into either an express or implied contract for the performance of the polling services that Vitale claims were provided. Resp. at 1-2. The Committee explains that given its belief that no contract or agreement ever existed, it believed the alleged debt was not reportable to the Commission as a "disputed debt" under 11 C.F.R. § 116.10. *Id.* Further, the Committee

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[3] *See Vitale & Assocs., LLC v. Lowden*, No. 2:12-cv-01400-JCM-VCF at ¶¶ 5-9 (D. Nev. Aug. 8, 2012) (Complaint) ("In connection with her primary campaign, Defendant, either directly or through an agent, entered into a contract for services with Plaintiff[;] [t]he amount owing to the Plaintiff by the Defendant is the sum of $77,796.88.").

[4] *See id.* (D. Nev. July 30, 2015) (Order Granting Summary Judgment and Denying Motion for Attorney Fees and Costs).

explains that on January 14, 2014, it amended the 2010 July Quarterly Report and all subsequent reports to reflect the $77,796.88 Vitale invoice as a "disputed debt -- currently in litigation in NV Federal Court," and that it did so "out of an abundance of caution," given that the lawsuit "elevated the issue to a 'bona fide disagreement' that could fall within 11 C.F.R. § 116 *et seq.*" *Id.* at 2-3. The Committee asserts that it amended its disclosure reports before it received notification of the Complaint in this matter; the notification letter was mailed to the Committee on January 14, 2014, the same day the Committee amended its reports.

The Committee's Response also notes that its most recent filing at the time of the Response — the 2014 April Quarterly Report — reflects a cash-on-hand balance of $0. *Id.* at 3. The Committee's 2015 October Quarterly Report, its most recent report, also discloses $0 cash on hand.[5] The Committee has been working with the Commission's Reports Analysis Division ("RAD") to terminate.

III. LEGAL ANALYSIS

The Act and Commission regulations require political committees to continuously report the amount and nature of their outstanding debts until those debts are extinguished. 52 U.S.C. § 30104(b)(8); 11 C.F.R. §§ 104.3(d), 104.11(a). Further, where there is a "disputed debt," the political committee must report that disputed debt if the creditor has provided "something of value" to the political committee. 11 C.F.R. § 116.10(a). A "disputed debt" is "an actual or potential debt or obligation owed by a political committee, including an obligation arising from a written contract, promise or agreement to make an expenditure, where there is a bona fide disagreement between the creditor and the political committee as to the existence or amount of

[5] http://docquery.fec.gov/pdf/110/201510230200311110/201510230200311110.pdf.

1 the obligation owed by the political committee." *Id.* § 116.1(d). Until the dispute is resolved,
2 the political committee must disclose any amounts paid to the creditor, any amount the political
3 committee admits it owes, and the amount the creditor claims is owed. *Id.* § 116.10(a).

4 Here, even though the fact of Vitalc's lawsuit established the existence of a "bona fide
5 disagreement" over (and thus triggered a reporting obligation with respect to) the nearly $78,000
6 at issue, the Commission concludes that this matter does not merit further use of Commission
7 resources. The Committee disclosed the alleged debt at the time it was incurred and amended all
8 of its disclosure reports to reflect the disputed debt before receiving the administrative
9 Complaint. Furthermore, the Committee, having no cash-on-hand, is essentially defunct and
10 intends to terminate. Under the circumstances, the Commission exercises its prosecutorial
11 discretion and dismisses the allegations. *Heckler*, 470 U.S. at 831.

NON-CONFORMING