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January 14, 2016

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA FACSIMILE: (202) 219-3923

Re: MUR 6985: Response to Complaint from Zeldin for Congress, et al.

Dear Mr. Jordan:

We are writing this letter on behalf of Congressman Lee Zeldin, Zeldin for Congress ("ZFC"), and Nancy Marks, in her official capacity as Treasurer of ZFC, and Zeldin for Senate, Congressman Zeldin's New York State Senate campaign (the "State Committee") (collectively, the "Respondents"), in response to the Complaint filed in the above-referenced matter by Robin Long, a Democrat operative with ties to Congressman Zeldin's political opponents. The Complaint was clearly filed for publicity and political gain, as it is based solely on speculation and innuendo, and is centered around a gross misapplication of federal law. The asserted facts on their face do not support a reason to believe finding in this matter, and the Complaint should be dismissed.

The Federal Election Commission (the "Commission") may find "reason to believe" only if a Complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act (the "Act"). See 11 C.F.R. § 111.4(a), (d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true. See MUR 4960, Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons (Dec. 21, 2001). Moreover, the Commission will dismiss a complaint when the allegations are refuted with sufficiently compelling evidence. See *id.*

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The Complaint contains numerous unsubstantiated and specious claims against Respondents. Specifically, the Complaint suggests that the State Committee engaged in impermissible coordinated communications with ZFC, by virtue of the State Committee's payments for a handful of non-political advertisements in local civic organization journals. The Complaint also falsely alleges that the State Committee made illegal transfers to ZFC in the form of reciprocal contributions. These accusations are unsupported by the law or facts. Each spurious allegation is addressed in turn below.

The State Campaign's Journal Advertisements Do Not Constitute "Coordinated Communications" Because They Fail To Meet the Payment Prong Under 11 CFR 109.21(a)(1).

The Complaint contends that the State Committee's payments for several journal advertisements made within 90 days before then-State Senator Zeldin's June 24th, 2014 congressional primary election, and the November 4th, 2014 general election, were "coordinated communications" under 11 CFR § 109.21 because they identified Mr. Zeldin. This allegation is baseless and is negated by the Commission's own precedent.

As an initial matter, it is important to provide some background. The State Committee's payments for the advertisements cited on page 2 of the Complaint are related to small ads placed in booklets and journals printed by various civic, religious, and charitable organizations in Mr. Zeldin's Third Senate District in Long Island, New York. These journals are often handed out at events sponsored by the organizations, which typically honor individuals or groups for their achievements in the community. As is common practice for state legislators in New York, the State Committee would often donate money to sponsor half or full page ads, in which Mr. Zeldin, solely in his capacity as a State Senator, would thank a group for its meaningful work in the community or congratulate a group on a particular milestone or anniversary. Importantly, none of the journal ads purchased by the State Committee contained any electoral advocacy whatsoever, either on the state or federal level, and consequently they did not in any way promote or support Mr. Zeldin's candidacy for federal office, or any other individual's state or federal candidacy. Attached are several examples of the types of journal ads that the State Committee sponsored.

The principal logic applied by Ms. Long is that the journal ads purchased by the State Committee constituted coordinated communications, and therefore resulted in prohibited in-kind contributions to ZFC, merely because Mr. Zeldin's name appeared on the ads and they were distributed 90 days before his federal primary and general elections. In doing so, the Complaint recklessly concludes that the first prong of the coordinated communications test at 11 CFR § 109.21(a)(1), the payment prong, is automatically fulfilled because the ads were paid for by the State Committee. Such a conclusion runs counter to Commission precedent. To the contrary, the journal ads would not constitute coordinated communications because these communications do not meet the payment prong at 11 CFR § 109.21(a)(1). In fact, under this first prong of the "coordinated communication" definition, a communication is only subject to the regulations if it

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"is paid for in whole or in part, by a person other than that candidate, authorized committee, or political party committee." 11 CFR § 109.21(a)(1) (emphasis added).

In Advisory Opinion 2009-26 (Coulson), the Commission addressed a similar situation, in which a state officeholder, Elizabeth Coulson, was concurrently serving as an Illinois State Representative and as a candidate for the U.S. House in Illinois' 10th Congressional District. Ms. Coulson asked the Commission whether she could pay for and distribute a postcard, which bore her name and image, for a senior citizen fair using funds from her state campaign committee's account. Like the Zeldin State Committee's journal ads, the postcard did not contain any electoral advocacy. In answering Ms. Coulson's question, the Commission applied its rationale from Advisory Opinion 2007-01 (McCaskill). In that advisory opinion, the Commission concluded that "the payment prong was not met if Senator McCaskill's former State campaign committee paid for solicitations for the purpose of retiring debts remaining from her previous candidacies for State offices, because 'the candidate and her agents are paying for these communications.'" The Commission therefore concluded that State Representative Coulson "may use her State Office Account or State Campaign Committee to pay for the postcard without such payment being treated as an in-kind contribution to, or an expenditure by, Representative Coulson's Federal campaign, because Representative Coulson and her agents are paying for these communications." See Adv. Op. 2009-26 (Coulson), at 7-8; see also MUR 6207 (DeSaulnier), Factual and Legal Analysis (Aug. 6, 2010), at 7.

Applying the Commission's legal rationale and conclusions in Advisory Opinions 2009-26 and 2007-01, the State Committee's journal ads would not satisfy the payment prong of the coordinated communications test because the "candidate and [his] agents are paying for these communications." *Id.* at 8. The coordinated communications analysis espoused in the Complaint is therefore legally deficient on its face, and entirely irrelevant, because the advertisements in question fail to meet the first prong of the test.

Even If The State Committee's Journal Ads Constituted Coordinated Communications, Which They Do Not, They Are Specifically Allowed Under 52 U.S.C. § 30125(f)(2) and 11 CFR § 300.72.

The Commission need not reach this issue because the journal ads do not satisfy the payment prong of the coordinated communications test at 11 CFR § 109.21(a)(1). However, it is important to note that state officials are specifically allowed to expend state campaign funds in connection with nonfederal, state purposes if the communications purchased refer only to the state official. That is precisely the case here.

Federal law recognizes that a sitting state legislator does not lose his or her ability to operate a state committee for legitimate state political and official purposes upon forming a committee for federal office. The Act makes it clear that the provisions cited by Ms. Long in the Complaint do not apply to the State Committee's journal ads:

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if the communication involved is in connection with an election for such State or local office and refers only to such individual or to any other candidate for the State or local office held or sought by such individual, or both.

52 U.S.C. § 30125(f)(2).

The Commission's regulations further clarify that the provisions cited in the Complaint do not apply:

if the public communication is in connection with an election for State or local office, and refers to one or more candidates for State or local office or to a State or local officeholder but does not promote, support, attack, or oppose any candidate for Federal office.

11 CFR § 300.72.

Congress created this exception in 2002, with the passage of the McCain-Feingold law, to allow state officeholders to continue to do their official state duties and use their state campaign committees for nonfederal purposes even if they were concurrently running for federal office. *See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 Fed. Reg. 49110 (Jul. 29, 2002).

As discussed above, the State Committee's journal ads do not support, attack, or oppose Mr. Zeldin, or any candidate for that matter. The ads simply reference Mr. Zeldin's name and his title as State Senator. The Commission has previously determined that "the mere identification of an individual who is a Federal candidate is not of itself tantamount to promoting, supporting, attacking, or opposing that candidate." Advisory Opinion 2007-34 (Jackson Jr.); *see also* Advisory Opinions 2007-21 (Holt), 2006-10 (Echostar), and 2003-25 (Weinzapfel). The journal ads in this case were purchased by the State Committee in accordance with state law, and allowed then-State Senator Zeldin to thank various groups for their meaningful work in the community or congratulate individuals or groups on achieving particular milestones or anniversaries. Such constituent communications are common practice, and specifically permitted under the foregoing provisions of the Act and the Commission's regulations.

The State Committee Has Not Made Any Illegal Transfers To Zeldin for Congress.

The Complaint's claims regarding "illegal transfers" and "reciprocal contributions" amount to nothing more than a partisan fishing expedition based on pure speculation. The State Committee has not made any transfers to ZFC, let alone illegal transfers. The Complaint argues that the State Committee made such "illegal transfers...using a network of political party committees as an intermediary." Although Ms. Long does not reference any specific statutory or regulatory citations, she is inferring that the State Committee made earmarked contributions to.

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ZFC through various intermediaries pursuant to 52 U.S.C. § 30116(a)(8) and 11 CFR § 110.6(b)(1), which under that theory would have resulted in illegal transfers from the State Committee to ZFC, in violation of 11 CFR § 110.3(d). Such contentions are both factually and legally flawed.

As purported evidence for these assertions, the Complaint cites a series of contributions, amounts, and dates that have no connection whatsoever. One needs to look no further than the first couple examples cited by Ms. Ross to realize the pure absurdity of these allegations. She claims that a \$500 contribution made by the State Committee to the Committee to Elect a Republican Majority ("CERM") in October of 2013, and CERM's \$1,000 contribution to ZFC six months later in March of 2014, is evidence that the State Committee made an illegal transfer through CERM. Next, she argues that a \$100 contribution made by the State Committee in December of 2013 to the Smithtown Women's Republican Club ("SWRC"), and SWRC's \$500 contribution to ZFC in July of 2014, seven months later, is proof that the State Committee made an illegal transfer through SWRC. All of the examples cited by Ms. Long are beyond tenuous, and do nothing to substantiate her claims.

A contribution is earmarked when there is "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part or a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 CFR § 110.6(b). In the past, the Commission has determined that contributions were earmarked where there was a clear documentary evidence demonstrating a designation or instruction by the donor. See MURs 4831/5274 (Nixon) (finding contributions were earmarked where checks contained express designations on memo lines); see also, MUR 5732 (Matt Brown for U.S. Senate), MUR 5520 (Republican Party of Louisiana/Tauzin), MUR 5445 (Davis), MUR 4643 (Democratic Party of New Mexico) (rejecting earmarking allegations where there was no evidence of a clear designation, instruction, or encumbrance by the donor), and MUR 5125 (Perry) (finding no earmarking because the complaint contained only bare allegations of earmarking, but showed no designation, instruction or encumbrance). The Commission has rejected earmarking claims even where the timing of the contributions at issue appeared to be a significant factor, but the contributions lacked a clear designation or instruction. See MUR 5445 (Davis) and MUR 4643 (Democratic Party of New Mexico).

In this case, the Complaint provides no support that the State Committee made the "designations, instructions and encumbrances" required for a violation of 52 U.S.C. § 30116(a)(8) and 11 CFR § 110.6(b)(1), when making its contributions to the various local party committees. The State Committee's contribution checks to the local parties did not contain any designations or instructions, and were not accompanied by any sort of documentation indicating how the contributions should be used. Moreover, the State Committee did not make any other express or implied, or written or oral instructions or designations to the local party committees when making its contributions. Ms. Long's argument therefore rests solely on the timing of the contributions, which as mentioned above, were not even remotely temporal. And even if they were, this line of reasoning, based exclusively on the timing of contributions, has been explicitly

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rejected by the Commission in the numerous enforcement matters referenced above. See MUR 5445 (Davis) and MUR 4643 (Democratic Party of New Mexico).

Conclusion

In presenting politically-motivated and factually and legally unsubstantiated arguments, Ms. Long has failed to demonstrate that the Respondents have violated any provision of the Act or the Commission's regulations. Instead, Ms. Long has invoked an administrative process in an attempt to score cheap political points in the lead up to the 2016 election. The Complaint is based on malicious speculation and frivolous legal theories. We therefore respectfully request that the Commission recognize the legal and factual insufficiency of the Complaint on its face and immediately dismiss it.

Thank you for your prompt consideration of this matter, and please do not hesitate to contact me directly at (202) 572-8663 with any questions.

Respectfully submitted,



Charles R. Spies
James E. Tyrrell III
Counsel to Zeldin for Congress

Enc.

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Senator Lee M. Zeldin



Congratulations to the

James V. Kavanaugh Columbiettes

and

Honorees

**Rose Marie Oliveri, Barabara Kruk, Bill
Guiducci, and Lynda Zachon**

~ Senator Lee Zeldin

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Senator Lee M. Zeldin

**“Best wishes to the Holbrook
Chamber of Commerce on their
60th Anniversary Dinner Gala!”~**

Senator Lee Zeldin

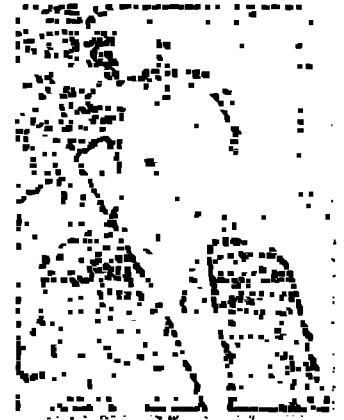


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Senator Lee M. Zeldin

“Best wishes to The Mental Health Association of New York State for a successful Spring Reception and Silent Auction! ~
 Senator Lee Zeldin



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**Senator
Lee M. Zeldin**

**"Congratulations
to Patrick Boyle &
all of the
Honorees"
~ Senator Zeldin**

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Senator Lee M. Zeldin

**"Congratulations to A Taste of Our
Towns 2014 Peter Bulfin Award
winners Anna & Tom Cilmi!"**

~ Senator Lee Zeldin



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