FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 23 2016

Honorable Mike Lee
United States Senate
316 Hart Senate Office Building
Washington, DC 20510

RE: MUR 7025
Senator Mike Lee

Dear Senator Lee:

On July 3, 2014, the Federal Election Commission notified you of a complaint alleging that you had violated certain sections of the Federal Election Campaign Act of 1971, as amended. On March 15, 2016, the Commission found, on the basis of the information in the complaint, and information provided by respondents, that there is no reason to believe that you violated the Act. Accordingly, the Commission closed the 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 explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Claudio J. Pavia, the attorney assigned to this matter at (202) 694-1597.

Sincerely,

Peter Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**
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4 Respondents: Mike Lee MUR 7025
5 Friends of Mike Lee and Mike McCauley
6 in his official capacity as treasurer
7 J.P. Morgan Chase & Company
8 Ronald McMillan
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11 **I. INTRODUCTION**

12 This matter was generated by a complaint filed with the Federal Election Commission by
13 Maryann Martindale and the Alliance for a Better Utah, alleging several violations of the Federal
14 Election Campaign Act of 1971, as amended (the "Act") resulting from the 2011 short sale of
15 Sen. Mike Lee's house. The Complaint alleges that J.P. Morgan Chase & Company ("JPMC")
16 made a prohibited national bank contribution to Lee when it approved the short sale and waived
17 the balance that Lee still owed on the mortgages.[1] The Complaint also alleges that Ronald
18 McMillan made potentially excessive contributions to Lee when he purchased Lee's house and
19 then rented another house to Lee by arranging those transactions at prices other than fair market
20 value. Finally, the Complaint alleges that Friends of Mike Lee (the "Committee"), the principal
21 campaign committee for Mike Lee's 2010 Senate campaign, failed to disclose the contributions,
22 and that Lee converted the contributions to personal use.

[1] Technically, Lee financed the purchase of his house through two simultaneously-executed deeds of trust. A deed of trust is virtually identical to a mortgage, and Lee's loans shall be referred to here by the more common term, "mortgage." Restatement (Third) of Property (Mortgages) Intro. (1997).

II. FACTUAL BACKGROUND

In 2007, Lee purchased a house in Alpine, Utah, in the midst of what the media later described as the height of a housing boom.[2] JPMC provided Lee, then an attorney in private practice, with two mortgages that had a combined value of $1,440,000.[3]

In 2010, Lee was elected Senator from Utah, and, during that election cycle, Ronald McMillan and his wife, Bonnie McMillan, made contributions to the Committee.[4] Upon his election, Lee reportedly faced several financial challenges in addition to his lower Senate salary.[5] The real estate market reportedly "tanked," his former law firm filed for bankruptcy while owing him a "large sum," and the short sale of a neighboring property lowered the already-depressed home values in his neighborhood.[6] As a result, Lee apparently could not afford the mortgage payments for his house but could not sell the property at a suitable price either. JPMC approved a June 2011 short sale of Lee's house to McMillan and waived the deficiency balance, that is, the remaining amount that Lee owed on the mortgage after the sale.[7] In return, Lee forfeited a

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[2] Attached to the Complaint are two *Salt Lake Tribune* news articles that describe the circumstances of the short sale. Compl., Exs. C at 1, D at 1. The news articles indicate that Lee purchased the house in 2008. However, according to publicly-filed documents, it appears that Lee purchased the house in August 2007. *See* Warranty Deed (Aug. 17, 2007).

[3] JPMC provided Lee with a deed of trust to secure a debt of $1,100,000 and a closed-end deed of trust to secure a debt of $340,000. *See* Deed of Trust at 2 (Aug. 21, 2007); Closed-End Deed of Trust at 1 (Aug. 21, 2007). The news articles attached to the Complaint indicate that Lee purchased the house for $1,100,000, but this apparently confuses the value of one of his mortgages with the same price. *See* Compl., Exs. C at 1, D at 1.

[4] Ronald and Bonnie McMillan each contributed $2,400 to the Committee on February 26, 2010. Friends of Mike Lee, Amended 2010 Apr. Quarterly Rpt. at 18 (June 24, 2010).

[5] Lee reportedly stated that he purchased the house while earning a salary of several hundred thousand dollars a year, but expected that he might have to sell if elected to the Senate since the lower salary would make it difficult to pay the mortgage. Compl., Ex. D at 1.

[6] Compl., Exs. C at 2, D at 1.

[7] Compl., Ex. D at 1. The Complaint alleges that the short sale took place in May 2012, but the available information indicates that it occurred in June 2011. *Compare* Compl. at 2 *with* Compl., Ex. D at 1; Warranty Deed (Jun. 14, 2011) (signed by Michael S. Lee); Warranty Deed (Jun. 14, 2011) (signed by Sharon B. Lee).

"significant" down payment.[8] McMillan funded his purchase with two mortgages that had a combined value of $720,100.[9] A news article claims that JPMC waived a deficiency balance of approximately $400,000.[10] Shortly after the sale, McMillan rented another house to Lee in the same area.[11]

The Complaint alleges that JPMC made an unreported campaign contribution to Lee by waiving the deficiency balance.[12] According to the Complaint, other JPMC mortgage borrowers, in contrast to the favorable disposition Lee received, "faced foreclosure and ongoing personal liability."[13] The Complaint further alleges that McMillan made an unreported campaign contribution to the Committee because McMillan and Lee "may have" agreed to a short sale and rental prices other than at fair market value.[14] As evidence for this claim, the Complaint asserts that the short sale and rental — each involving Lee and McMillan — appear "prearranged" and therefore must not have been negotiated at arm's length.[15] Finally, the Complaint alleges that Lee converted the contributions from JPMC and McMillan to personal use.[16]

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8 Compl., Ex. D at 1.

9 Compl., Exs. C at 1, D at 1.

10 Compl., Ex. D at 1.

11 Compl., Ex. C at 1.

12 Compl. at 3.

13 *Id.*

14 *Id.* at 2.

15 *Id.*

16 *Id.*

The Committee's Response denies the allegations and states that the short sale and rental have "absolutely nothing to do with the Committee."[17] The Committee asserts that it did not receive contributions or make disbursements involving Lee's residences.[18]

JPMC's Response denies the allegations and explains that in March 2011 — several months before the short sale — it instituted a general policy of forgiving short sale deficiency balances.[19]

JPMC argues that because the waiver of Lee's deficiency balance was consistent with this policy, it follows that JPMC did not waive Lee's debt to influence an election.[23] JPMC could not confirm or deny any details of its transactions with Lee because under the Financial Right to Privacy Act (12 U.S.C. § 3401 *et. seq.*), it "cannot release information contained in the financial records of any customer to a government authority unless

[17] Committee Resp. at 1.

[18] *Id.*

[19] JPMC Resp. at 1.

[23] *Id.* at 2.

pursuant to the customer's authorization, administrative or judicial subpoena, summons, search warrant, or formal written request for the particular information or financial records."[24]

McMillan's Response denies the allegations and argues that the Complaint is speculative.[25] McMillan attached a sworn declaration to his response.[26] He states that the transactions "had nothing to do with [Lee's] position as a United States Senator," and "nothing to do with any of his campaigns."[27] McMillan asserts that he liked the property and believed that purchasing it would be a smart financial decision.[28] Moreover, he explains that his agent conducted negotiations for the short sale and that JPMC approved the terms of sale as part of a "lengthy process."[29] Although McMillan acknowledges that he has known Lee and his family since moving into the neighborhood, he and Lee are members of the same church, and he apparently was aware that Lee owned the house, McMillan states that he does not recall discussing the sale with Lee while the transaction was pending.[30] McMillan represents that his first conversation with Lee about the purchase occurred at their church after the short sale was completed.[31] McMillan explains that he offered to rent his old house to Lee — who expressed a desire to remain in the same neighborhood for school and church reasons — while McMillan waited for market conditions to improve.[32] McMillan states that his agent identified market

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24 *Id.* at 2-3.

25 McMillan Resp. at 6

26 *Id.*, Ex. 1 ("McMillan Declaration").

27 McMillan Decl. ¶ 11.

28 *Id.* ¶ 4.

29 *Id.* ¶ 5.

30 *Id.* ¶¶ 2-3; 5.

31 *Id.* ¶ 7.

rental rates and that McMillan negotiated a rate with Lee based on those figures.[33] Although McMillan does not provide the specific rental rate that Lee paid for the house, he explains that the rate covered the mortgage payments and anticipated expenses.[34]

III. ANALYSIS

The Act defines a contribution as "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."[35] The Commission's regulations provide that a third party's payment of a candidate's personal expense shall be a contribution "unless the payment would have been made irrespective of the candidacy."[36] The Commission has explained in prior matters that because candidates continue to engage in personal transactions during their candidacy that are beyond the campaign finance matters regulated by the Act, a finding of reason to believe that a candidate's personal transaction resulted in a contribution to his or her campaign requires specific information demonstrating a nexus between the transactions and the campaign.[37] Further, the

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[32] *Id.* ¶¶ 8-9.

[33] *Id.* ¶ 10.

[34] *Id.*

[35] 52 U.S.C. § 30101(8).

[36] 11 C.F.R. § 113.1(g)(6); *see* Explanation and Justification, Third Party Payments of Personal Use Expenses, 60 Fed. Reg. 7862, 7871 (Feb. 9, 1995) ("If a third party pays for the candidate's personal expenses, but would not ordinarily have done so if that candidate were not running for office, the third party is effectively making the payment for the purpose of assisting that candidacy.").

[37] *See, e.g.*, MUR 6035 (Northern Trust Co.) (home mortgage); MUR 5141 (Moran for Congress) (loan from a friend to help pay for legal expenses related to a domestic relations matter); MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee) (cost of a candidate's move to a new house); MUR 4944 (PNC Mortgage Corp.) (home mortgage); *see also* Statement of Reasons at 2, n.2, Commr's McDonald, Mason, Sandstrom, Smith, & Thomas, MUR 4944 ("SOR") (recognizing "there are a number of issues arising from a candidate's personal situation . . . that may become campaign issues, but the Commission will not necessarily therefore deem expenses arising from such controversies to be campaign expenses").

1 Commission has advised that "[t]he basis for this determination is the context of the transaction's
2 surrounding factual circumstances."[38]

3 A candidate who receives a contribution "for use in connection with" his or her campaign
4 is considered "as having received the contribution . . . as an agent of the authorized committee or
5 committees of such candidate."[39] A candidate's authorized committee must disclose the
6 identification of each person whose contribution or contributions have an aggregate amount or
7 value in excess of $200 within an election cycle.[40] No person shall convert a contribution or
8 donation to personal use.[41] The Act also provides that no person shall make an excessive
9 contribution to any candidate and his or her authorized political committee, and candidates and
10 their committees shall not knowingly accept such contributions.[42] In addition, the Act prohibits
11 national banks and corporations organized by authority of any law of Congress from making
12 contributions to candidates, and prohibits candidates and their committees from knowingly
13 accepting or receiving such contributions.[43]

14 **A. JPMC's Waiver of the Deficiency Balance on Lee's Home Mortgage was Not**
15 **a Contribution.**

16 The Complaint argues that the amount JPMC forgave on Lee's mortgage should be
17 treated as a contribution and is subject to the Act's prohibitions and limitations. However, the
18 available information suggests that the short sale was a consequence of Lee's personal financial

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38 *See* SOR at 3, Commr's Mason, Sandstrom, McDonald, Smith, Thomas, & Wold, MUR 5141.

39 52 U.S.C. § 30102(e)(2).

40 *Id.* § 30104(b).

41 *Id.* § 30114(b).

42 *Id.* § 30116(a), (f).

43 *Id.* § 30118(a).

1 situation with no apparent connection to the Committee or Lee's campaign for Senate.[44] The
2 Committee denied that the short sale involved the campaign in any way, and it occurred shortly
3 after the 2010 election and over five years before the 2016 election.[45]

4 Furthermore, the available information in the record suggests that JPMC waived Lee's
5 deficiency balance irrespective of his candidacy. The Commission has considered several
6 factors when addressing the status of third party payments: (1) whether the payment freed up the
7 candidate's funds for campaign purposes; (2) whether the payment granted the candidate more
8 time to spend on the campaign instead of pursuing usual employment; and (3) whether the
9 payment would not have been made but for the individual's candidacy.[46] There is no
10 information tending to suggest that the waiver freed up Lee's funds for campaign purposes.
11 Moreover, the waiver did not enable Lee to spend more time on his campaign as his employment
12 situation remained unaffected by the short sale.

13 The remaining question is whether JPMC would have waived the deficiency balance but
14 for Lee's candidacy. It does not appear that a short sale was unusual at the time,[47] and JPMC
15 states that it had a general policy of waiving the deficiency balances on JPMC-owned mortgage

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[44] *See* Factual & Legal Analysis at 5-6 n.2, MUR 6035 (citing SOR at 5, Commr's McDonald, Mason, Sandstrom, Smith, & Thomas, MUR 4944 ("Treating such loans for a candidate's home purchase or other personal living expenses as not 'in connection with the campaign' and as made 'irrespective of the candidacy' is well founded in our view.")).

[45] *See* SOR at 3-4; MUR 5141 (interpreting an approximately 17-month difference between the date of a loan and the next election as a factor supporting a finding of no reason to believe).

[46] *Id.* at 4 (explaining the factors that the Commission has considered in prior matters involving third party payments for a candidate's personal expense and applying a three-part test to find that a personal loan to a candidate from a friend was made irrespective of his candidacy).

[47] There is information in the record suggesting that short sales were "increasingly becoming the preferred option for banks" during this time period, given that "scrutiny over foreclosure practices were a nightmare for the banks." Compl., Ex. D at 1. This opinion comes from Daren Blomquist, vice president of RealtyTrac, "which looks at housing trends." *Id.* In addition, another house in Lee's neighborhood reportedly sold through a short sale around the same time. *Id.*

loans that it approved for a short sale.[48] Moreover, as mentioned above, the short sale was not close in time to an upcoming election and there is no obvious connection between the short sale and Lee's candidacy. The available information supporting the allegation is thus limited to the Complaint's bare assertion that Lee received the benefits of a short sale and release from personal liability whereas other JPMC borrowers faced the hardships of a foreclosure and ongoing personal liability.[49] There are no available facts in the record indicating that Lee received a benefit that would not have otherwise been available to similarly-situated individuals or that JPMC's waiver was not made in the ordinary course of business.[50] Without more, a reason to believe finding would be based solely on speculation.

In sum, the available information does not indicate a nexus between the short sale and Lee's campaign. Therefore, the Commission finds no reason to believe that J.P. Morgan Chase & Company made a prohibited contribution in violation of 52 U.S.C. § 30118(a), finds no reason to believe that Mike Lee and Friends of Mike Lee and Mike McCauley in his official capacity as treasurer knowingly received or accepted a prohibited contribution in violation of 52 U.S.C. § 30118(a), finds no reason to believe that Friends of Mike Lee and Mike McCauley in his official capacity as treasurer failed to disclose a contribution in violation of 52 U.S.C. § 30104(b), and finds no reason to believe that Mike Lee converted contributions from J.P. Morgan Chase & Company to personal use in violation of 52 U.S.C. § 30114(b).

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[48] JPMC Resp. at 1.

[49] Compl. at 3.

[50] This conclusion is consistent with analogous provisions of the Act and the Commission's regulations. There is an exemption from the definition of a contribution for bank loans made in accordance with applicable law and in the ordinary course of business. *See* 52 U.S.C. § 30101(8)(A)(vii); 11 C.F.R. § 100.82(a).

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B. McMillan's Purchase of Lee's House and Rental of Another House to Lee Were Not Contributions.

The Complaint alleges that McMillan's purchase of Lee's house and his rental of another house to Lee both resulted in potentially excessive contributions that the Committee failed to disclose. The allegations are premised on the Complaint's unsupported assertion that the transactions appeared prearranged and, consequently, that they "may have" been arranged at prices other than fair market value.[51] As a threshold matter, it does not appear that McMillan provided Lee with anything of value in connection with these transactions — a necessary element of a contribution.

First, as to the short sale, it does not appear that McMillan provided Lee with a benefit by creating a market that otherwise did not exist so that Lee could avoid the inconvenience and bad publicity associated with a foreclosure, or so that Lee could benefit from JPMC's policy of waiving the deficiency balances on short sales. There is information that other homeowners resolved their mortgages through short sales around this time, including one of Lee's neighbors.[52] McMillan's sworn statement asserts that he purchased the house because he "liked the property, and considered the opportunity to buy it at a good price through a short sale to be a smart financial move."[53] Furthermore, there is no available information to support an inference that McMillan purchased the house for more than its fair market value. In any event, such information would not necessarily alter a contribution analysis since McMillan purchased the house through a short sale and JPMC had a policy of waiving the deficiency balance. In other

[51] Compl. at 2. The Commission has made clear that a "complainant's unwarranted legal conclusions from asserted facts, will not be accepted as true." SOR at 2, MUR 5141.

[52] Compl., Ex. D at 1 (describing the recent trend of banks approving short sales rather than foreclosures).

[53] McMillan Decl. ¶ 4.

1 words, an inflated sales price would have benefited JPMC, not Lee. Accordingly, the available
2 information does not indicate that Lee received anything of value from McMillan in connection
3 with the short sale.

4 Second, as to the rental, there is no available information to support an inference that
5 McMillan charged Lee rent that was below the fair market value. A news article attached to the
6 Complaint provides a website's estimate that Lee's rent should be around $2,200 a month, but
7 the Complaint does not allege, and the available information does not indicate, what Lee actually
8 pays to McMillan.[54] Moreover, McMillan's sworn statement asserts that "I had my real estate
9 agent pull comparable rates and we negotiated the monthly payment based on those figures," and
10 that the amount was "enough to cover the monthly mortgage payment and provide additional to
11 [*sic*] save for future repairs and renovations."[55] There is no information to the contrary.
12 Accordingly, the available information does not indicate that Lee received anything of value
13 from McMillan in connection with the rental.

14 Even if McMillan did provide Lee with something of value in connection with the short
15 sale and rental — and, again, there is no indication that he did — those transactions appear to
16 have been personal, rather than campaign-related. The only apparent suggestion in the
17 Complaint of a connection with Lee's candidacy relates to the fact that McMillan and his wife
18 were contributors to Lee during the 2010 election cycle. However, as stated above, the
19 transactions involved Lee's personal residences, the Committee denied that the transactions
20 involved the campaign or campaign funds, Lee has not subsequently transferred any of his

[54] Compl., Ex. C at 1.

[55] McMillan Decl. ¶ 10.

personal funds to the Committee, and the transactions occurred after the 2010 election and over five years before the 2016 election.

Furthermore, the available information suggests that McMillan made the transactions irrespective of Lee's candidacy. First, they did not free up any funds for Lee to use in his campaign. Second, they did not enable Lee to spend more time on his campaign. And, finally, there is no indication that McMillan would not have engaged in those transactions but for Lee's candidacy. McMillan's sworn statement asserts that they "had nothing to do with [Lee's] position as a United States Senator, nothing to do with any of his campaigns, and I would have entered into these transactions even if he were neither a candidate nor a sitting United States Senator."[56] Moreover, McMillan states that he considered the purchase of Lee's house at a lowered price to be a "smart financial move," and the rental of his old house to Lee to be prudent since he did not think he could receive "top value" by selling in the prevailing market conditions.[57] The available facts do not question those assessments.

In summary, there is no evidence that McMillan provided Lee with anything of value, or of a nexus between the transactions at issue and Lee's campaign for Senate. Therefore, the Commission finds no reason to believe that Ronald McMillan made an excessive contribution in violation of 52 U.S.C. § 30116(a), finds no reason to believe that Mike Lee or Friends of Mike Lee and Mike McCauley in his official capacity as treasurer knowingly accepted excessive contributions in violation of 52 U.S.C. § 30116(f), finds no reason to believe that Friends of Mike Lee and Mike McCauley in his official capacity as treasurer failed to disclose contributions to the Commission in violation of 52 U.S.C. § 30104(b), and finds no reason to believe that Mike

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[56] *Id.* ¶ 11.

[57] *Id.* ¶¶ 4, 9.

Lee converted contributions from Ronald McMillan to personal use in violation of 52 U.S.C. § 30114(b), and closes the file in this matter.

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