LAW OFFICES
TRISTER, ROSS, SCHADLER & GOLD, PLLC
1666 CONNECTICUT AVENUE, N.W., FIFTH FLOOR
WASHINGTON, D.C. 20009
PHONE: (202) 328-1666
FAX: (202) 204-5946
www.tristerross.com

MICHAEL B. TRISTER
GAIL E. ROSS
B. HOLLY SCHADLER
LAURENCE E. GOLD
ALLEN H. MATTISON†
†ALSO ADMITTED IN MARYLAND

KAREN A. POST
Senior Counsel

NEIL C. WEARE
JOSEPH W. STEINBERG‡
‡ONLY ADMITTED IN MINNESOTA

DAVID M. WACHTEL*
Of Counsel
*ALSO ADMITTED IN CALIFORNIA AND MARYLAND

Montana Office
LAURA L. HOEHN*
Of Counsel
*ALSO ADMITTED IN CALIFORNIA

By email and first-class mail

August 3, 2016

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 7101
LIUNA Building America

Dear Mr. Jordan:

I am writing on behalf of respondent LIUNA Building America ("LBA") in response to the complaint ("Complaint") filed in this matter against other named respondents. The Commission should not have added LBA as a respondent in this matter, and it should find no reason to believe that LBA violated the Federal Election Campaign Act ("the Act").

The Complaint makes three factual allegations about LBA: first, that LBA contributed $250,000 to named respondent Defending Main Street SuperPAC, Inc.; second, that LBA is a "super PAC"; and third, that LBA is "primarily funded" by contributions exceeding $5,000 per year by two particular contributors. Complaint ¶ 70 and n.7. LBA admits that it made the contribution alleged; that LBA is registered with the Commission as an independent-expenditure-only committee in accordance with the Commission's policy for doing so; and that LBA has reported its own contributors on its Forms 3X filed with the Commission in accordance with the Act.

However, as the Complaint explicitly acknowledges, all of the conduct it alleges as unlawful – namely, contributions to the named respondent political committees that exceeded $5,000 per year – complies with applicable judicial and Commission authority, including the Commission's own advisory opinions acquiescing to *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*). The theory of the Complaint is that *Speechnow.org* was wrongly decided, so the Commission should reconsider and revoke its acquiescence to it and find in this matter that all of the named respondents have violated the Act. See Complaint ¶ 8. Even so, in light of the actual prevailing legal authority, the complainants "do not ask the FEC to seek civil penalties

or other sanctions for past conduct, but rather only declaratory and/or injunctive relief against future acceptance of excessive contributions." *Id.*, ¶ 7.

The D.C. Circuit's holding in *Speechnow.org* has now been adopted by every circuit court of appeals that has addressed it, and only a few have yet to consider it. That holding is plainly the law unless and until the Supreme Court holds otherwise, and there is no reason for the Commission to reconsider its compliance with *Speechnow.org* and its progeny in processing this Complaint. Accordingly, the Commission should find no reason to believe that LBA violated the Act and should dismiss this matter as to LBA.

Moreover, the Commission should dismiss this matter as to LBA for a second independently sufficient reason: it was unwarranted, unfair and even abusive for the Office of General Counsel (OGC) to add LBA as a respondent. The Complaint names no fewer than 10 independent-expenditure-only committees as respondents, evidently as a hedge against the risk of mootness in the event some of them were to terminate during complainants' hoped-for eventual litigation over the Commission's dismissal. The complainants admit that they identify LBA and other particular contributors to the named respondents only as illustrative sources of "select very large contributions" to those respondents among the many more contributors that exceeded $5,000 per year, which the Complaint alleges is the maximum permissible contribution. See *id.* ¶ 44 (footnote omitted). And the complainants here make clear who they wish to be treated as respondents and the limited and solely injunctive relief that they seek against them – relief that, if granted, would in fact suffice to prevent LBA itself and any other entity from contributing more than $5,000 per year to any of them. There is, then, no justification whatsoever for OGC to expand the roll of respondents and burden LBA with the obligation of having to retain legal counsel and make this submission. We wonder if OGC has similarly notified the many others named in the Complaint as having made over-$5,000 contributions to the named respondents, or the other even more numerous over-$5,000 contributors who are disclosed in the named respondents' Forms 3X on file with the Commission. But even if LBA were the only such added respondent, perhaps due to its status too as an independent-expenditure-only committee, OGC acted improvidently in so acting.

Finally, we suggest that OGC's gratuitous action here points up the need for the Commission to revisit or clarify its policy about adding respondents to those that are actually named as such in a complaint. The applicable regulation provides that a complainant "should clearly identify *as a respondent* each person or entity who is alleged to have committed a violation." 11 C.F.R. § 111.4(d)(1) (emphasis added). And, the Commission has described OGC's prerogative to add "only those parties that were either specifically identified by the complaint to have violated the FECA or were shown to have a clear nexus to the alleged violation in a complaint." FEC, Notice of Public Hearing and Request for Public Comments, "Agency Procedures," 73 Fed. Reg. 74495, 74498 (December 8, 2008). But the Commission appears to have declined since its 2009 agency-procedures hearing to explain further when it is appropriate for OGC to add respondents that a complainant chooses not to identify as such, and this important procedural issue is not even mentioned in the Commission's otherwise helpful 2012 publication, "Guidebook for Complainants and Respondents on the FEC Enforcement Process."

Accordingly, for reasons of prosecutorial discretion as well as the Complaint's failure to allege that LBA violated the Act, the Commission should dismiss this matter as to LBA.

Respectfully submitted,

Laurence E. Gold

Counsel for Respondent
LIUNA Building America