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April 6, 2018

VIA EMAIL TO CELA@fec.gov

**CONFIDENTIAL COMMUNICATION**

Federal Election Commission  
Office of Complaints Examination and  
Legal Administration  
Attn: Kathryn Ross, Paralegal  
999 E Street, N.W.  
Washington, DC 20463

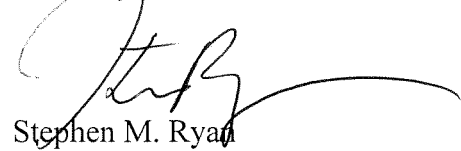
**Re: MURs 7313 and 7319**

To the Office of Complaints Examination and Legal Administration:

On behalf of our client, Respondent Michael Cohen, please see the enclosed response to the supplemental and amended complaints in the above-captioned matters under review.

Please feel free to contact me at 202-756-8333 or [sryan@mwe.com](mailto:sryan@mwe.com) if you have any questions regarding this response.

Sincerely,



Stephen M. Ryan  
Counsel for Respondent Michael Cohen

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

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 ) Re: MUR 7313  
 ) MUR 7319  
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**RESPONSE OF MICHAEL D. COHEN**

Respondent Michael D. Cohen respectfully submits the following response to the Complaint and Supplemental/Amended Complaints (“Complaints”) filed in the above-referenced matters under review. The Complaints are based on speculation and are not supported by the facts or the law, as the payment facilitated by Mr. Cohen to Ms. Stephanie Clifford is not subject to the Federal Election Campaign Act (“FECA”). Contrary to the allegations in the Complaints, the payment was private, was not political in nature, was not made for the purpose of influencing the election, and would have been made irrespective of Mr. Trump’s candidacy. Accordingly, the Commission should not exert valuable government resources investigating these allegations of a private transaction not subject to the FECA.

**I. FACTUAL BACKGROUND**

In a private transaction in October 2016, Mr. Cohen used his own personal funds to facilitate a payment of \$130,000 to Ms. Clifford. At that time, Ms. Clifford had been offered payments by third parties to make public allegations of a completely personal nature that—even if untrue—could have harmed Mr. Trump, his family, and his business. Mr. Cohen, who has served as personal counsel to Mr. Trump for eleven years, facilitated this payment on behalf of his client. The payment was *not* made in connection with Mr. Trump’s campaign. Mr. Cohen has never been an agent or employee of the Trump campaign. The payment was not made for the purpose of influencing the election, and Mr. Cohen would have facilitated the payment irrespective of Mr. Trump’s candidacy.

**II. ARGUMENT**

The allegations in the Complaints are not supported by the FECA or Commission precedent.

**A. The payment was not made “for the purpose of influencing a candidate’s election to federal office,” and thus, was not a contribution subject to the FECA.**

The FECA defines a “contribution” to include “(i) 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; (ii) or the payment by any person of compensation for the personal

services of another person which are rendered to a political committee without charge for any purpose.” 52 U.S.C. § 30101(8)(A). Accordingly, to constitute a contribution under the FECA, the payment must be made for “*the purpose* of influencing a candidate’s election to federal office.” *Id.* (emphasis added).

Here, the payment was not made for the purpose of influencing Mr. Trump’s election to federal office. Rather, it was made by Mr. Cohen to settle a personal issue with Ms. Clifford concerning her allegations that—if published—could have harmed Mr. Trump, his family, and his business. As the Commission has recognized, “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.” *See* Statement of Reasons at 2, n.2, Comm’rs McDonald, Mason, Sandstrom, Smith, & Thomas, MUR 4944 (In re Hillary Rodham Clinton). Mr. Trump’s candidacy may have impacted Ms. Clifford’s actions in October 2016 regarding her personal decade-old allegations about Mr. Trump, but that does not mean that the settlement agreement with Ms. Clifford and corresponding payment was a campaign contribution or expenditure made for “*the purpose* of influencing a candidate’s election to federal office.” 52 U.S.C. § 30101(8)(A) (emphasis added).

**B. Commission precedent establishes that third-party payments for personal expenses are considered contributions subject to the FECA *only if* they were made but for the candidacy for federal office.**

The Commission has previously stated 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.” Factual & Legal Analysis at 6, MUR 7025 (Friends of Mike Lee) (March 23, 2016) (“MUR 7025”). FEC regulations provide that a third-party payment for a candidate’s personal expenses is not considered to be a contribution to a candidate or campaign committee if “the payment would have been made irrespective of the candidacy.” 11 C.F.R. § 113.1(g)(6).<sup>1</sup> The Commission has summarized the third-party payment provision as follows: “would the third party pay the expense if the candidate was not running for Federal office? If the answer is yes, then the payment does not constitute a contribution.” Advisory Opinion 2008-17 at 4 (KITPAC).

In evaluating a complaint alleging that a congressman violated the FECA as a result of his receipt of a \$25,000 loan from a friend, who was also a lobbyist, that the member used to pay for legal fees in a domestic relations matter, the Commission stated that the “threshold determination under [the FECA is] whether this loan was for use in connection with the campaign.” Statement of Reasons of Comm’rs Mason, Sandstrom, McDonald, Smith, Thomas & Wold at 3, MUR 5141 (Moran for Congress) (“MUR 5141”). In MUR 5141, the Commission analyzed three factors

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<sup>1</sup> The “irrespective” test contained in the third-party payment provision at 11 C.F.R. § 113.1(g)(6) differs slightly from the “irrespective” test contained in the general personal-use prohibition at § 113.1(g), which defines “personal use” as “any use of funds in a campaign account of a present or former candidate to fulfill a commitment, obligation or expense of any person that would exist irrespective of the candidate’s campaign or duties as a Federal officeholder.” 11 C.F.R. § 113.1(g); *see also* Advisory Opinion 2008-17 at 4 (KITPAC).

involving third-party payments to determine whether a candidate's receipt of payments for personal expenses should be considered contributions under the FECA:

- (1) whether receipt of funds for personal expenses would free-up other funds of the candidate for campaign purposes;
- (2) whether the candidate would have more time to spend on the campaign instead of pursuing his or her usual employment; and
- (3) whether the funds would not have been donated but for the candidacy.

*Id.* at 4. Regarding the first two factors, the Commission found that the \$25,000 loan to the congressman did not free up the candidate's funds or time for campaign purposes. The Commission reasoned that the loan was made by the congressman's friend of 25 years, was made well before the next election, the check was endorsed directly to the congressman's divorce attorney, and the campaign committee was well-funded. *Id.* at 3. The Commission stated that the "analysis of whether the loan would have been made but for the candidacy parallels the basis for the determination above that the loan was not for use in connection with the campaign[.]" and added that "although Section 113.1(g)(6) of the Commission's regulations treats some third party payments as contributions, it provides that payments made irrespective of the candidacy are not to be so treated." *Id.* at 4.

In MUR 7025, the FEC analyzed the same three factors above to find no reason to believe that the respondents violated the FECA as a result of the short sale of a senator's home. *See* F&LA at 8, MUR 7025. The Commission reasoned that there did not appear to be a nexus between the short sale and the senator's campaign as the transactions associated with the short sale involved the senator's personal residences, did not involve the campaign or campaign funds, the senator did not transfer the personal funds to the campaign, and the transactions did not occur in the midst of the campaign. *Id.* at 11-12.

This Commission precedent indicates that, contrary to the allegations in the Complaints, there must be a nexus between third-party payments for personal expenses and the campaign. As demonstrated below, no such nexus existed between the payment to Ms. Clifford and Mr. Trump's campaign.

**C. The private transaction at issue in the Complaints was not for use in connection with the campaign, and it meets the Commission's criteria to find that it was not a contribution subject to the FECA.**

The FEC's evaluation criteria involve the threshold question in evaluating the third-party payment—whether it was "for use in connection with the campaign"—and the following three factors: (1) would the funds free up other funds of Mr. Trump's for campaign purposes; (2) would Mr. Trump have more time to spend on the campaign instead of pursuing his usual employment; and (3) would the payment have been made but for Mr. Trump's candidacy. An evaluation of these criteria clearly indicate that the payment should not be considered a contribution.

As an initial matter, the payment was in no way for use in connection with the campaign. This transaction involved private parties and allegations that did not relate to Mr. Trump's campaign. Ms. Clifford's decision to raise personal allegations in the weeks leading up to the election did not transform the private matter—or Mr. Cohen's response to the private matter—into campaign activity merely because there could have been some impact on the campaign. As the Commission has explained, "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." Statement of Reasons at 2, n.2, MUR 4944 (Clinton). The Commission's analysis of the types of proceedings in which campaign funds may be used to pay for legal expenses is also illustrative: "[legal expenses] will not be treated as though they are campaign or officeholder related merely because the underlying proceedings have some impact on the campaign or the officeholder's status." *See* Explanation and Justification, Contribution and Expenditure Limitations and Prohibitions: Personal Use of Campaign Funds, 60 Fed. Reg. 7862, 7868 (Feb. 9, 1995).

The payment at issue here meets all three Commission criteria to find it was not a contribution subject to the FECA. At the time of the payment, Mr. Trump was a billionaire businessman, his campaign committee was well-funded, and the \$130,000 amount paid to Ms. Clifford by Mr. Cohen would not have freed up Mr. Trump's funds or time to earn money for use on campaign activities. The payment was never used by the campaign committee or for campaign activities. Mr. Cohen was never an agent of the campaign committee or of Mr. Trump as a candidate. Rather, he served as the personal attorney for Mr. Trump for approximately eleven years before the payment was made, and he participated in settlement discussions with Ms. Clifford's lawyer on behalf of his client. The settlement payout to Ms. Clifford was made in the best interests of Mr. Trump, his family, and his business.

A connection between the payment and Mr. Trump's campaign must exist to trigger the FECA's contribution limits and reporting requirements. Such a connection does not exist in this matter. Mr. Cohen facilitated the payment for reasons unrelated to Mr. Trump's candidacy: to avoid negative publicity and attention—for Mr. Trump, his family, and his business—regarding completely personal allegations from years before Mr. Trump declared his candidacy. Mr. Cohen would have facilitated the payment regardless of whether Mr. Trump was a candidate. Accordingly, the FECA's contribution limitations, prohibitions, and reporting requirements raised in the Complaints should not apply to the payment.

### **III. CONCLUSION**

For the reasons stated above, Respondent respectfully requests that the Commission find no reason to believe that a violation has occurred, dismiss the Complaints, and close these matters.