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KORY LANGHOFER
Managing Attorney

October 4, 2019

Federal Election Commission
Office of the General Counsel
Attn: Delbert K. Rigsby
1050 First Street, NE
Washington, D.C. 20463
drigsby@fec.gov

Re: MUR 7327 and MUR 7337

Dear Mr. Rigsby:

I write on behalf of Respondents Debbie Lesko, Debbie Lesko for Congress (the "Federal Committee"), Re-Elect Debbie Lesko for Senate (the "State Committee"), and Ashley Ragan in her official capacity as treasurer of Debbie Lesko for Congress (collectively, the "Lesko Respondents") for the purpose of (1) providing an initial response to the Commission's request for the production of documents, (2) furnishing corroboration that the transfer underlying the complaints in these proceedings consisted solely of federally permissible funds, and (3) requesting authorization of pre-probable cause conciliation, pursuant to 11 C.F.R. § 111.18(d).

I. Initial Response to Discovery Requests

To date, the Lesko Respondents have located one document[1] that is responsive to the Commission's requests and not protected from disclosure by the attorney-client privilege or the attorney work product doctrine.

Please be advised that the Lesko Respondents object to the Commission's requests to the extent they seek documents or information that are protected from disclosure by the attorney-client privilege or the attorney work product doctrine. Further, in providing this response and the enclosed production, the Lesko Respondents fully reserve any and all objections, defenses or privileges that may be validly interposed in connection with the Commission's document requests or any other investigatory method or process that the Commission may utilize in these proceedings.

II. Origins of the Funds Comprising the Transfer

The Commission's Factual & Legal Analysis ("FLA") relied in part on the fact that "The Respondents have not disclosed an itemization of the funds comprising the $50,000 from the State Committee to" Conservative Leadership for Arizona ("CLA"), an independent expenditure-only committee. FLA at 9 n.37. To this end, the Lesko Respondents have enclosed with this letter a spreadsheet documenting the Lesko Respondents' use of a "last in, first out" procedure—which the Commission has recognized as a "reasonable accounting method," *see* Adv. Op. 2007-26 (Schock)—to identify the portion of the State Committee's cash-on-hand that constituted federally permissible funds, *i.e.*, monies that originated from individuals in amounts of $2,700 or

[1] The document is enclosed and bears the Bates number LESKO0001.

649 North Fourth Avenue, First Floor
Phoenix, Arizona 85003
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less or from federal multicandidate committees in amounts of $5,000 or less. As verified in a sworn declaration, the State Committee's transfer to CLA consisted solely and exclusively of these federally-compliant funds. *See* Ragan Decl. ¶ 6. The Lesko Respondents believe that this corroboration of the origins and nature of the funds comprising the transfer warrants a reconsideration of the FLA's findings. *See* MUR 6985 (Zeldin for Senate), Second General Counsel's Report (recommending dismissal after federal candidate respondent provided during post-RTB investigation documentary evidence establishing his use of a reasonable accounting method to ensure that monies disbursed by his state committee consisted only of federally permissible funds).

Further, the Lesko Respondents respectfully submit that the FLA is afflicted with at least four substantial legal errors and material oversights. First, relying on MURs 6563/6733 (Schock), the FLA asserts that "the fact that the underlying funds satisfied the source prohibitions and amount limitations did not avoid the violation." FLA at 8. As an initial matter, the infractions found in those proceedings resulted from a congressman's impermissible *solicitation* of a $25,000 contribution to an independent expenditure-only committee—a separate and distinct regulatory stricture that is not implicated here. Second, to the extent any plausible analogy to MURs 6563/6733 can be forged at all, Congresswoman Lesko is similarly situated to then-Representative Eric Cantor, whose leadership PAC made the $25,000 contribution at issue. Notably, the Commission declined to find reason to believe that Representative Cantor had violated any provision of the FECA because although the aggregate total of his leadership PAC's contribution far exceeded the $5,000 limit that governs federal candidates' solicitations of contributions to independent expenditure committees, the underlying funds comprising the transfer complied with federal source and amount limits. Indeed, more generally, the Commission has repeatedly informed the regulated community that the operative query in this and similar contexts is whether the constitutive funds transferred by a federal candidate (or entities under her control) qualify as "hard" dollars; the cumulative total transferred is immaterial for purposes of the Federal Election Campaign Act, as amended ("FECA"). *See* Adv. Op. 2007-26 (Schock) (concluding that federal candidate's state committee "may donate *any amount* of Federally permissible funds remaining in its account," provided that the recipient could lawfully accept such funds [emphasis added]); Adv. Op. 2006-38 (Casey); Adv. Op. 2005-05 (LaHood).

Second, the FLA attempts to distinguish Adv. Op. 2007-26 by arguing that it "addressed a federal candidate's state committee contributing funds to other *state* committees," FLA at 8, adding that the funds transferred to CLA were not subject to the FECA's "reporting requirements." But as a controlling bloc of the Commission has previously held in connection with the substantively identical proscription in 52 U.S.C. § 30125(f), "[t]he requirement that a state or local candidate officeholder pay . . . with money subject to FECA limits, prohibitions, and *reporting* requirements does *not* establish a reporting requirement that would not otherwise exist. In other words, if, for example, FECA does not otherwise require a state or local candidate or officeholder to report, then the candidate or officeholder need not do anything to comply with the 'reporting requirement' language of" the FECA. MUR 5604 (In re William D. Mason, *et al.*) Statement of Reasons of Commissioners Toner, Mason and von Spakovsky at 5-6 (internal citations omitted; emphasis in original). Although the Commission suggested in a subsequent enforcement matter (released after the filing of the complaint in these proceedings) that the "reporting requirements" element may constitute an independent criterion, it added that "[t]he Commission, though, has never found a [soft money] violation based solely on the fact that the funds a committee used to pay for a . . . communication were not subject to the Act's reporting requirements." MUR 7123 (Jay Inslee for Washington), Factual & Legal Analysis at 5 (dismissing complaint).

Third, the FLA's finding that the Lesko Respondents "financed" CLA is predicated primarily on Advisory Opinion 2006-04 (Tancredo), in which the Commission advised a federal candidate that he would be deemed

to have "financed" a ballot measure committee if he knowingly provided 50% of the organization's overall funding. By contrast, the Lesko Respondents possessed no information concerning CLA's origins, purposes, budget, or operations; they did not know—and had no means of knowing—what percentage of CLA's aggregate revenues the State Committee's contribution would ultimately represent or CLA's intended lifespan. Indeed, the transferred funds actually had been designated for Arizona Grassroots Action PAC, and ended up in the control of CLA only as result of a miscommunication. *See* Lesko Decl. ¶¶ 6-9; Murray Decl. ¶¶ 5-6, 8-10, 13; Ragan Decl. ¶ 10.[2] The notion that a federal candidate can accidentally "finance" a committee by happenstance solely as a consequence of extrinsic factors and *post hoc* developments outside her control collides with the Commission's precedents, the animating purposes of the FECA, and basic common sense. *See* MUR 6753 (People for Pearce), First General Counsel's Report at 6-7 (recommending dismissal of allegation that federal candidate "financed" non-connected political committee, in part because the candidate and recipient PAC "were unaware that their funds would constitute a significant portion of [the PAC's] receipts and have submitted [a] sworn affidavit . . . in support of that claim"); Policy Statement of Commissioner Lee E. Goodman, Feb. 16, 2018 ("An arms-length contribution—even a large contribution—from a candidate's campaign committee or leadership PAC to an independent expenditure committee may be a form of financial support, but it does not constitute the kind of financial control over non-federal funds which is the focus of the statute.").

Fourth, the FLA conspicuously declines to engage the foundational question of how the State Committee's transfer to CLA plausibly implicates the sole governmental interest that can constitutionally sustain the FECA's restrictions—*i.e.*, the prevention of corruption or the appearance or corruption. *See McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1450 (2014). As set forth in the Lesko Respondents' response to the complaints, no underlying contribution comprising the transfer exceeded the FECA's amount limits or transgressed its source limitations. Further, even if underlying contributions to the State Committee were to be aggregated with contributions by the same donors to the Federal Committee during the 2018 election cycle, the State Committee still had sufficient federally compliant cash on hand to finance its transfer to CLA. In other words, no "soft money" changed hands, and no individual's aggregate contributions to either the State Committee or CLA exceeded $2,700. Because the transferred funds consisted of donations made in accordance with federal source and amount limits, they were intrinsically devoid of any actual or apparent corrupting potential. There accordingly is no constitutionally sound rationale for penalizing the Lesko Respondents under these circumstances.

III. Request for Pre-Probable Cause Conciliation

The Lesko Respondents by this letter respectfully request that the Commission authorize pre-probable cause conciliation, pursuant to 11 C.F.R. § 111.18(d). It is undisputed that on or around January 18, 2018, the State Committee disbursed the sum of $50,000 to CLA. As detailed in their response to the complaints in these consolidated proceedings and as summarized above, the Lesko Respondents take the position that the transfer was permissible because (1) the contributed sum consisted exclusively of funds that complied with the limitations, prohibitions, and reporting requirements of the FECA, and (2) the Lesko Respondents did not establish, finance, maintain or control CLA.

[2] Notably, the FLA does not (and could not plausibly) find that a $50,000 transfer from the State Committee to Arizona Grassroots Action PAC would have caused the State Committee to "finance" the latter, which had received more than $1.5 million in contributions during the relevant reporting period.

Significantly, the FLA appears to be undergirded by a conclusion that, even if the Lesko Respondents could prove the veracity of the facts and circumstances set forth in their response and the supporting sworn declarations, the Commission still would find that the transfer resulted in the State Committee's "financing" of CLA, in violation of 52 U.S.C. § 30125(e)(1)(A). For the reasons discussed above and in their response to the complaints, the Lesko Respondents maintain that no violation occurred. Because it appears that the Commission may believe that any controverted factual questions are ultimately immaterial to the disposition of this matter, however, the Lesko Respondents believe that pre-probable cause conciliation could facilitate an efficient resolution of these proceedings, while sparing both them and the Commission from the burdens and expenses of discovery.

Thank you for your attention to this matter and for your consideration of this request. Please do not hesitate to contact me should you have any questions or require additional information.

Respectfully,

/s/ Kory Langhofer
Kory Langhofer