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September 13, 2018

Via Hand Delivery

Jeff S. Jordan
Assistant General Counsel
Federal Election Commission, Complaints
Examination & Legal Administration
1050 First Street, NE
Washington, D.C. 20463

Re: Barry Michaels v. Nexstar Media Group, Inc.
MUR 7484

OFFICE OF
GENERAL COUNSEL
2018 SEP 13 PM 2:12

Dear Counsel:

This office represents Nexstar Broadcasting, Inc. dba KLAS TV 8 ("Nexstar" or "KLAS TV 8"). Please accept this letter as Nexstar's response to Barry Michaels' Federal Election Campaign Act (the "Act") Complaint (the "FEC Complaint"), MUR 7484.

As outlined below, Mr. Michaels' contention that Nexstar's criteria for the upcoming United States Senate candidate debate in Las Vegas, and his principal concern about the requirement for proof of a relatively-nominal \$50,000 in fundraising, is without merit.

For your information, Mr. Michaels has filed litigation in the U.S. District Court for the District of Nevada, case 2:18-CV-01620-JAD-GWF, and there is a hearing scheduled for this coming Friday, September 14, 2018, concerning his request for a preliminary injunction. As the enclosed Declaration of Lisa Howfield ("Howfield Declaration", attached hereto as Exhibit 1) filed in the litigation reflects, Nexstar is a privately-owned company that owns and operates KLAS TV 8 in Nevada, as well as another 133 stations in 99 additional markets around the country. Howfield Declaration at ¶2. In 2014, Nexstar determined to begin hosting more debates by its stations around the country and adopted formal debate participation criteria to govern participation in those debates. Howfield Declaration at ¶3. In order to accomplish this goal, Nexstar developed a set of objective criteria to determine which candidates it would invite to the debate. Howfield Declaration at ¶4. These criteria include requirements that the candidate be eligible for the election, be polling at a sufficiently high number, and have engaged in meaningful fundraising within the state – all with the goal of inviting only serious candidates for the position. Howfield Declaration at ¶5.

Jeff S. Jordan
 September 13, 2018
 Page 2

Those criteria also include a set of objective indices of a functioning campaign, and a putative candidate must establish that he or she satisfies five of them to be qualified to participate in the debate. Howfield Declaration at ¶6. Among these indicators are planned in-district appearances or invitations to appear and/or speak at public gatherings and press coverage identifying the candidate as a candidate in the current election by at least eight unique news reports in media (e.g. newspapers, TV, cable news, radio, or online news websites that are recognized by local and/or national media). Howfield Declaration at ¶7. Candidates who fail to satisfy five of those criteria must demonstrate a minimum level of polling recognition. Howfield Declaration at ¶8. Finally, federal candidates for federal office must also establish, through filings at the Federal Elections Commission, a minimum level of fundraising in the state. Howfield Declaration at ¶9. These criteria apply equally to all candidates, regardless of party affiliation or viewpoint. Howfield Declaration at ¶10.

As part of KLAS TV 8's bona fide news coverage of the 2018 midterm elections, on or about June 15, 2018, Nexstar decided to hold a televised debate among the leading candidates for Nevada's 2018 U.S. Senate election. Howfield Declaration at ¶11. KLAS TV 8, on July 27, 2018, mailed to all candidates who had registered with the Nevada Secretary of State to run in the U.S. Senate race, a letter announcing plans for the debate and providing KLAS TV 8's objective criteria for debate participation. Howfield Declaration at ¶12. On July 30, 2018, Mr. Michaels called KLAS TV 8 and complained that the \$50,000 fundraising provision would disqualify him. Howfield Declaration at ¶13. KLAS TV 8 informed Michaels that he had to satisfy all of the criteria listed, including the fundraising provision and the polling requirement, in conjunction with the express terms of the criteria. Howfield Declaration at ¶13. Mr. Michaels responded by email on Wednesday, August 1, 2018, arguing that, if he qualified under the first three sections of the debate criteria, he was (on the face of the policy) not required to satisfy the fundraising criteria. Howfield Declaration at ¶15. KLAS TV 8 responded on August 3, 2018, reiterating that Mr. Michaels did not satisfy the requisite criteria and would not be invited to participate in the debate. Howfield Declaration at ¶16.

Mr. Michaels' Complaint to the FEC focuses exclusively on his contention that Nexstar's inclusion of a minimum fundraising threshold as part of its debate criteria is (despite all evidence to the contrary) a targeted criterion designed to preclude the participation of otherwise deserving candidates not belonging to one of the two main political parties. This is facially and demonstrably false.

Case law nationwide is clear on this point - a broadcaster is within its sound journalistic discretion to preclude a candidate from a televised debate if its selection is viewpoint-neutral. "A broadcaster could, under the First Amendment, exclude an independent candidate with little popular support in the reasonable, viewpoint-neutral exercise of its journalistic discretion." *Ark. Educ. Tv Comm'n v. Forbes*, 523 U.S. 666, 682-83 (1998) (emphasis added). "To be consistent with the First Amendment, the exclusion of a

Jeff S. Jordan
 September 13, 2018
 Page 3

speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.” *Id.* at 681.

Nexstar’s debate participation criteria are completely consistent with the criteria that other broadcasters have used. Nexstar’s criteria do not consider candidate platforms, party affiliations, a candidate’s stance on any specific issue, or any other subjective factors related to any given candidate’s viewpoint. Howfield Declaration at ¶10. Nexstar developed and implemented the criteria following a carefully considered use of its journalistic discretion, consistent with the debate’s status as a nonpublic forum. Looking to the face of the requirements themselves, there is nothing related to a candidate’s viewpoint. Howfield Declaration at ¶10.

Nexstar’s debate participation criteria are objective requirements expressly designed to limit KLAS TV 8’s debate to serious candidates. Even outside of Nevada, circuit and district courts nationwide have repeatedly found that debate participation criteria that include things like on fundraising thresholds, polling numbers, and other indicators of the seriousness of a candidate’s campaign – are objective within the meaning of the FEC’s regulations. For example, in *Forbes*, the Supreme Court validated the use of polling numbers and the prospective candidate’s apparent lack of financial support, evidenced by his failure to report campaign finances to the Secretary of State’s office or to the Federal Election Commission, finding that these factors reflect an “objective lack of support” and not subjective, viewpoint-based criteria. *Forbes*, 523 U.S. at 682-83. “There is no substance to *Forbes*’ suggestion that he was excluded because his views were unpopular or out of the mainstream. His own objective lack of support, not his platform, was the criterion.” *Id.* Similarly, in *Piccolo v. New York City Campaign Fin. Bd.*, the court found that a requirement that a candidate have raised funding – in excess of the \$50,000 including in KLAS TV 8’s criteria in this case – was an objective, reasonable selection criterion. *Piccolo v. New York City Campaign Fin. Bd.*, 05 Civ. 7040 (GBD)(MHD), 2007 U.S. Dist. LEXIS 99233 (S.D.N.Y. 2007). “[A]ll participants, prior to the . . . second debate, statutorily limited to ‘leading contenders,’ must have raised or spent at least \$250,000.00 and polled at ten percent or higher in the selected polls.” *Id.* at *68-70. Finally, in *Marcus v. Iowa Pub. TV*, the Court also found that the use of fundraising benchmarks as part of the candidate selection process for a televised debate was objective and reasonable. *See Marcus v. Iowa Pub. TV*, 97 F.3d 1137 (8th Cir. 1996).

KLAS TV 8’s criteria for the Senate candidate debate are objective, reasonable, and directly related to a viewpoint-neutral evaluation of the seriousness of each candidate. While Michaels objects to the \$50,000 fundraising criterion, his protests ring hollow. If he is truly serious in trying to reach the 311,388 Nevada voters not registered either Republican or Democrat, even a layperson’s analysis would wonder why he has done no fundraising within the state. It tests the limits of logic to believe that Mr. Michaels, who would not have qualified for the debates under multiple criteria set out by Nexstar, is a serious candidate for the U.S. Senate in Nevada. Nexstar’s use of a minimum fundraising amount as one part of its

Jeff S. Jordan
September 13, 2018
Page 4

candidate-screening process is designed to ensure that Nexstar affords only serious candidates a platform at the debate. The debate criteria facially do not consider party affiliation. Moreover, when Nexstar applied these general criteria to Michaels' desire to participate in the debate, they did not consider his party affiliation (or lack thereof).

There is simply no basis for Mr. Michaels' Complaint and it should be found meritless and either dismiss the matter or find that there is no cause to find that that any violation occurred. We would be pleased to answer any questions the FEC may have.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Charles D. Tobin".

Charles D. Tobin

CDT/jas

cc: Enforcement Division of the Office of the General Counsel

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2 Justin A. Shiroff
Nevada Bar No. 12869
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7 *Attorneys for Defendant Nexstar*
8 *Media Group, Inc. dba KLAS TV 8*

9 UNITED STATES DISTRICT COURT

10 DISTRICT OF NEVADA

11 BARRY MICHAELS, an individual,

2:18-CV-01620-JAD-GWF

12 Plaintiff

13 vs.

14 NEXSTAR MEDIA GROUP, INC. dba
15 KLAS TV 8; SARKES TARZIAN, INC. dba
16 KTNV TV; DOES 1-10,

17 Defendants.

DECLARATION OF LISA
HOWFIELD IN SUPPORT OF
OPPOSITION TO PLAINTIFF'S
EMERGENCY MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF [ECF NO. 3]

18 I, Lisa Howfield, a citizen of Clark County, State of Nevada, over 18-years of
19 age, being duly sworn, declare as follows:

20 1. I am Vice President and General Manager with Defendant Nexstar
21 Media Group, Inc. dba KLAS TV 8 ("KLAS TV 8"). I submit this declaration in
22 connection with Defendant's Opposition to Plaintiff's Emergency Motion for
23 Preliminary Injunctive Relief (ECF No. 3). The facts stated in this declaration are
24 based on either my personal knowledge or review of KLAS TV 8's regularly-
25 maintained business records unless stated otherwise. I could and would testify
26 competently to facts below if called upon to do so.
27
28

1 2. Nexstar is a privately-owned company that owns and operates KLAS TV
2 8 in Nevada, as well as another 133 stations in 99 additional markets around the
3 country.

4 3. In 2014, Nexstar determined to begin hosting more debates by its
5 stations around the country and adopted formal debate participation criteria to
6 govern participation in those debates.

7 4. In order to accomplish this goal, Nexstar developed a set of objective
8 criteria to determine which candidates it would invite to the debate.

9 5. These criteria include requirements that the candidate be eligible for
10 the election, be polling at a sufficiently high number, and have engaged in
11 meaningful fundraising within the state – all with the goal of inviting only serious
12 candidates for the position.

13 6. Those criteria also include a set of objective indices of a functioning
14 campaign, and a putative candidate must establish that he or she satisfy five of them
15 qualified to participate in the debate.

16 7. Among these indices are: planned, in-district appearances or invitations
17 to appear and/or speak at public gatherings; and press coverage identifying the
18 candidate as a candidate in the current election by at least eight unique news reports
19 in media (e.g. newspapers, TV, cable news, radio, or online news websites that are
20 recognized by local and/or national media). A true and correct copy of the entire list of
21 criteria for the debate candidates is attached here as Exhibit 1-A.

22 8. Candidates who fail to satisfy five of those criteria must demonstrate a
23 minimum level of polling recognition. Exhibit 1-A at part 4.

24 9. Finally, federal candidates must also establish, through filings at the
25 Federal Elections Commission, a minimum level of fundraising in the state. Exhibit
26 1-A at part 5.

27 10. These criteria apply equally to all candidates, regardless of party
28 affiliation or viewpoint.

1 11. As part of KLAS TV 8's bona fide news coverage of the 2018 midterm
2 elections, on or about June 15, 2018, Nexstar decided to hold a televised debate
3 among the leading candidates for Nevada's 2018 U.S. Senate election.

4 12. KLAS TV 8 on July 27, 2018, mailed to all candidates who had
5 registered with the Nevada Secretary of State to run in the United States Senate
6 election a letter announcing plans for the debate and providing KLAS TV 8's
7 objective criteria for debate participation.

8 13. On July 30, 2018, Plaintiff called KLAS TV 8 and complained that the
9 \$50,000 fundraising provision would disqualify him.

10 14. KLAS TV 8 informed Plaintiff that he had to satisfy all of the criteria
11 listed, including the fundraising provision and the polling requirement, in
12 conjunction with the express terms of the criteria.

13 15. Plaintiff responded by email on Wednesday, August 1, 2018, arguing
14 that, if he qualified under the first three sections of the debate criteria, he was (on
15 the face of the policy) not required to satisfy the fundraising criteria. A true and
16 correct copy of the email correspondence between Plaintiff and me is attached here as
17 Exhibit 1-B

18 16. KLAS TV 8 responded on August 3, 2018, reiterating that Plaintiff did
19 not satisfy the requisite criteria and would not be invited to participate in the debate.

20 17. KLAS TV 8's review of Plaintiff's candidacy indicated that he failed to
21 meet the debate criteria in multiple ways.

22 18. Under the third criteria, Plaintiff did not seem to have any planned in-
23 district appearances or invitations to appear and/or speak at public gatherings, had
24 no indication of any donations (despite having a treasurer), and the press coverage of
25 his campaign is almost entirely self-driven.

26 19. Under the fourth criteria, Plaintiff is not polling at a sufficiently high
27 number to qualify on that basis. Additionally, Plaintiff's past electoral experiences
28 related to primary campaigns for Congressional District 3, a district-restricted

1 election, which is clearly not "the same office or a comparable office" to a state-wide
2 general election for a U.S. Senate seat.

3 20. Under the fifth criteria, Plaintiff has not filed any documentation with
4 the Federal Election Commission detailing contributions to his campaign, let alone
5 sufficient proof that he reached the minimum total of \$50,000.

6 21. Plaintiff is not eligible to participate in the KLAS TV 8 debate for
7 multiple reasons.

8 22. KLAS TV 8 relief on its journalistic judgment in determining who to
9 include or exclude from the debate.

10 I declare under penalty of perjury that the foregoing is true and correct.

11 Dated: September 5, 2018.

12
13 By: Lisa Howfield
14 Lisa Howfield
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EXHIBIT 1-A

EXHIBIT 1-A

Proposed Nexstar debate policy

Nexstar Broadcasting Inc. is committed to hosting fair and open debates among qualified candidates as part of the Company's mission to inform the public and assist voters in making important electoral decisions. To determine who is a qualified candidate, the Company has adopted the following objective and non-discriminatory criteria to govern which candidates are eligible to participate in Company-sponsored debates. In order to be eligible to participate, a candidate must comply with *all* sections of this policy.

1. A candidate must be legally qualified and (x) listed on the ballot for the office the candidate is seeking or (y) be a write-in candidate who meets all of the legal qualifications required by the federal, state or municipal government for the office being sought and has filed the appropriate papers for write-in status.
2. A candidate must have publicly announced his or her candidacy in a public forum. For the purposes of this section, "public forum" includes an announcement of candidacy on the Internet.
3. A candidate must be actively campaigning for election in the jurisdiction he or she is seeking to represent for the office he or she is seeking. To meet the definition of an active campaign, a candidate must have all of the following:
 - a. A campaign headquarters with a paid and/or volunteer staff that is open to the public during business hours. For the purposes of this subsection, a campaign headquarters may not be a private residence, but may be a business address used primarily for non-campaign purposes; and
 - b. A campaign phone line; and
 - c. A publicized, dedicated candidate-specific website or web page; and
 - d. Planned in-district appearances or invitations to appear and/or speak at public gatherings; and
 - e. Monetary contributions and a campaign treasurer; and
 - f. Campaign literature; and
 - g. Press coverage identifying the candidate as a candidate in the current election by at least eight unique news reports in media (e.g. newspapers, TV, cable news, radio, or online news websites that are recognized by local and/or national media).
4. If a candidate meets at least five but not all of the requirements in Section 3 above (and meets the requirements in Section 5 below) and can show either:
 - a. He or she has received a minimum of 5 percent for a primary election, or 10 percent for a general election, support in an established, professionally conducted nonpartisan poll without taking the survey's margin of error into account, or
 - b. The percentage of votes cast for the candidate in a previous election within the four years immediately preceding the current election exceeds a minimum of 20 percent of votes for the same office or a comparable office,the candidate is eligible to participate in the debate.
5. In addition to the requirements of Sections 1-4 inclusive, a candidate for a state or federal office must have reported, on official forms filed with the appropriate election authority,

accepting at least \$50,000 in monetary, as opposed to in-kind, campaign contributions, at least 25 percent of which must be raised from in-state constituents. For local offices, a candidate must have reported, on official forms filed with the appropriate election authority, having accepted at least \$15,000 in campaign contributions.

6. Nexstar Broadcasting Inc. and its affiliates, employees, agents and servants shall not guarantee to any candidate or candidate's campaign, verbally or in writing, that the candidate will be included in a debate until the requirements of this policy, and each of them, have been satisfied to the satisfaction of Nexstar Broadcasting Inc. and its affiliates.

EXHIBIT 1-B

EXHIBIT 1-B

Lisa Howfield

From: Lisa Howfield
Sent: Tuesday, August 7, 2018 4:38 PM
To: 'Nevada Only'
Subject: RE: Up coming Senate debate

Good afternoon Mr. Michaels,

We will not be altering our policy.

Lisa Howfield
Vice President and General Manager
KLAS 8 News Now - The Valley's News Leader
3228 Channel 8 Drive
Las Vegas, NV. 89109
Office
Cell
702-596-9538 Fax
Lhowfield@lasvegasnow.com
www.lasvegasnow.com

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From: Nevada Only <nevadaonly@yahoo.com>
Sent: Friday, August 3, 2018 9:55 AM
To: Lisa Howfield <LHowfield@lasvegasnow.com>
Subject: Re: Up coming Senate debate

Dear Lisa,

Thank you for your response, however neither of your references site any case law.

The FCC equal opportunity section seems to leave a little wiggle room in their interpretation and may not apply, although it appears it has not "yet" been adjudicated. but discrimination surely does apply. Your policy diminishes my ability to be heard and most of all the public's right to free and fair elections.

It appears your company arbitrarily added a \$50,000 donation clause for one reason, to eliminate all but the major party candidates knowing they had already raised more than that amount.

Below is the FCC federal statute defining a qualified candidate.

Section 73.1940 [47 CFR §73.1940] Legally qualified candidates for public office.

(a) A legally qualified candidate for public office is any person who:

- (1) Has publicly announced his or her intention to run for nomination or office;
- (2) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and
- (3) Has met the qualifications set forth in either paragraph (b), (c), (d), or (e) of this section.

(b) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (a) of this section, that person:

- (1) Has qualified for a place on the ballot; or
- (2) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

As far as raising the required funds from now until September 6th goes, there would be no way to verify them since FEC filings for that period are not due until October 15th., and you're requiring them to be filed on official forms.

I believe I am the only other candidate (out of 4) for the U.S. Senate that meet all of your other requirements. Therefore, I am hereby requesting your station allow me to participate in your upcoming debate.

On the other hand, if your current company policy is left to stand, I will not hesitate to litigate this matter in federal court and ask for declaratory and injunctive relief.

Thank you,

Barry

Barry Michaels MPA, DC
Jumpstart Corporate Services, LLC.
9708 Gilespe Street
Suite 104
Las Vegas, NV 89183

On Aug 2, 2018, at 3:14 PM, Lisa Howfield <LHowfield@lasvegasnow.com> wrote:

Mr. Michaels,

Thank you for your response. The governing federal statute can be found here:

<https://www.law.cornell.edu/cfr/text/11/110.13>

and you can find the NYC mayoral debate criteria referenced in my prior email here:

https://www.nyccfb.info/pdf/2017_Debate_Program_Criteria.pdf.

Lisa Howfield
Vice President and General Manager
KLAS 8 News Now - The Valley's News Leader
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From: Nevada Only <nevadaonly@yahoo.com>

Sent: Thursday, August 2, 2018 10:53 AM

To: Lisa Howfield <LHowfield@lasvegasnow.com>
Subject: Re: Up coming Senate debate

Lisa, would you please forward me any recent case law that supports your company's position. Thanks
Barry

Sent from my iPhone

On Aug 2, 2018, at 9:34 AM, Lisa Howfield <LHowfield@lasvegasnow.com> wrote:

Mr. Michaels,

Thank you for letting me know you have filed a complaint with the FCC. The FCC does not have a policy or rules that establish any particular debate criteria for broadcast stations to follow or meet. In addition, federal law permits (and requires) the staging organization to use pre-established objective criteria to determine whether to include a candidate in the debate. The only limitation under federal law is that the staging organization may not use nomination by a particular party as the sole criterion and nowhere in our policy does party affiliation or lack of party affiliation factor into our criteria for inclusion. Accordingly, the fact that you are running as an independent is not a factor we have considered as relates to your participation.

To the extent the FCC seeks to confirm our policy and criteria are neutral and applied equally to all candidates, we will be happy to provide them with a copy of our established criteria for participation. We will further provide them with information that supports the fact that these criteria have been applied equally to all candidates for participation in our debate for the U.S. Senate seat open in Nevada.

Further, as the preliminary paragraph of our Debate Policy states, to be eligible to participate, a candidate "must comply with *all* sections of this policy." This includes Sections 1, 2, 3, and 5, with Section 4 relevant only if a candidate does not meet all of the criteria set forth in Section 3. Nowhere in the policy does it state that only the criteria in Section 3. We have had the policy reviewed by our own counsel and are confident that if presented to a court for interpretation, a court will conclude all means all and not just the requirements set forth in Section 3. As to the monetary thresholds, our policy is not the only policy which has established monetary minimums for participation (for example, New York City establishes monetary funding and expenditure criteria for participation in mayoral debates), and so long as the minimums are applied equally to all candidates, they are neutral criteria.

We do not set arbitrary early cut-off dates for determination of whether a candidate meets our criteria. Should you meet the criteria between the date hereof and the date scheduled for the debate, please let us know so that we can verify the information and include you in the debate.

Lisa Howfield
Vice President and General Manager
KLAS 8 News Now - The Valley's News Leader

3228 Channel 8 Drive

Las Vegas, NV. 89109

Office

Cell

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From: Nevada Only <nevadaonly@yahoo.com>

Sent: Tuesday, July 31, 2018 3:58 PM

To: Lisa Howfield <LHowfield@lasvegasnow.com>

Cc: Michael Zapin <michaelezapin@gmail.com>

Subject: Up coming Senate debate

Dear Lisa,

I am qualified as a candidate and will be on the November ballot for the U.S. Senate. I believe your station, KLAS-TV Channel 8 is discriminating against me by deliberately requiring above and beyond that which is legally required as a qualified candidate.

Two independent lawyers have already confirmed that if the criteria met in paragraph three is fully satisfied, then the requirements of paragraph 5 do not come into play. I strongly urge you to go back and give that language a second look. What you have told me verbally contradicts the clear written language of your policy.

I have not raised \$50,000 nor do I feel I need to. My website www.BarryForUSSenate.com is beyond that of Dean Heller's or Jacky Rosen's, and my social media presence is as good, if not better, than either of theirs.

The fact that I'm running as an Independent should have no bearing on whether or not I'm allowed to

participate in your debate. For this reason, I filed a complaint against your company with the Federal Communication Commission (FCC) this morning.

I have already relied on the language to my detriment, as plans for the debate was an integral part of my over all campaign strategy. I will not hesitate to pursue all legal remedies based on your written policy, including damages for fraudulent representation and possibly injunctive relief to stop the debate from taking place, in the event I am excluded from participation, for purported paragraph 5 criteria

Please advise and be guided accordingly.

Thank you,

Barry

Barry Michaels MPA, DC
Barry For U.S. Senate 2018
Jumpstart Corporate Services, LLC.
9708 Gilespe Street
Suite 104
Las Vegas, NV 89183

OFFICE OF
GENERAL COUNSEL
2018 SEP 13 PM 2:12