FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6101
Heller for Congress and Elisabeth Ballinger in her official capacity as Treasurer	)	
	)	
	)	

STATEMENT OF REASONS
Commissioner Ellen L. Weintraub

This matter involves allegations that November Inc. (d/b/a November Inc., Autumn Productions, and NI Operations) and Foundations, Inc. (n/k/a IN Compliance Inc.) ("Foundations") made prohibited corporate contributions to Heller for Congress and Elisabeth Ballinger in her official capacity as Treasurer ("the Committee"), by extending over $250,000 in credit to the Committee, which did not pay its debts over a two year period of time. On April 21, 2009, the Commission voted 5-0 to find reason to believe that Heller for Congress violated 2 U.S.C. §§ 441a(f) and/or 441b(a) by accepting excessive or prohibited contributions, and that November Inc. and Foundations Inc. made prohibited corporate contributions in violation of 2 U.S.C. § 441b(a) as the result of these extensions of credit.

After completion of the Office of General Counsel's investigation, the Commission voted to take no further action as to the respondents and closed the file.[1] Although I agreed that the Commission should take no further action as to the vendors, November, Inc. and Foundations, Inc., I voted against taking no further action as to the Committee, for the reasons set forth below.

The Federal Election Campaign Act of 1971, as amended ("the Act") provides that no person shall make a contribution to a candidate or authorized committee in excess of $2,300 (for the 2008 election cycle), and prohibits a corporation from making a contribution. 2 U.S.C. §§ 441a(a)(1), 441b(a). In addition, the Act prohibits committees from knowingly accepting excessive or prohibited contributions. 2 U.S.C. § 441a(f). Commission regulations provide that the extension of a credit to a candidate's authorized political committee by a commercial vendor is a contribution unless the credit is extended in the ordinary course of business, and the terms are substantially similar to extensions of credit to nonpolitical debtors of similar risk and size of obligation. *See* 11 C.F.R. § 116.3.

[1] On July 14, 2010, Commissioners Bauerly, Hunter, McGahn, Petersen, and I voted to take no further action as to November Inc. and Foundations, Inc. Commissioners Bauerly, Hunter, McGahn, and Petersen voted in favor of a motion to take no further action as to the Committee; I voted against this motion. Commissioner Walther was recused from the matter and did not vote.

In this case, the committee accrued substantial debts to these vendors at the end of the 2006 election cycle and made only token payments throughout the 2008 cycle. With respect to one vendor, November Inc., the committee owed over $264,000 at the end of 2006. By the end of 2008, two years and an entire election cycle later, it still owed over $245,000. At the end of 2009, the committee continued to owe almost $210,000. In 2010, over a year after the complaint was filed, the Committee finally began to make serious efforts to pay down the debt. As of its most recent report, however, it still owes over $90,000, four years after the debt began to accrue. None of the cases offered in support of the recommendation to take no further action involved debts accrued for so long and remaining unpaid by a committee with resources at the time of the case closing.

In its investigation, the Office of General Counsel ("OGC") found that it is not unusual in the political consulting business for consultants to continue to provide services to committees which fail to pay because turning a political client over to a collection agency or initiating legal proceedings to collect an unpaid debt can hurt a company's ability to secure new business. According to the vendors, the political consultants understand that they may not receive full payment for their services because the fundraising of political campaigns can be unpredictable and campaigns generally do not work on a budget. Ironically, the fact that the vendors made repeated efforts to collect the debt here is cited as evidence that there was no violation because it is argued that this shows the vendors acted in the ordinary course of business. But this line of reasoning leads to the absurd result that a committee can ignore repeated requests for payment with impunity – the demands themselves appear to inoculate the committee for nonpayment.

Although I agree that the vendors could not have been expected to act other than as they did, I do not believe that the investigative record supports absolving the Committee of liability for failing to pay its debts. While devoting considerable time and space to explaining why the vendors did not violate the Act, the General Counsel's Report #2 ("Report") fails to include a comparable discussion as to the Committee's liability despite the fact that the Commission found reason to believe that the Committee knowingly accepted an excessive or prohibited contribution, in violation of 2 U.S.C. § 441a(f). In its limited discussion regarding the Committee, the Report acknowledges that "the Committee's explanation that it favors spending its resources on Heller's 2010 re-election over retiring the debt from past elections – presumably with November Inc.'s acquiescence – appears to be in tension with the regulations' requirements . . . ." Report at 19. I would go further. In my view, for a committee that has the funds to pay its debts to choose instead to extract an interest-free loan from a vendor in order to fund its campaign activities is not just in tension with the law and regulations, it violates them.

According to OGC's investigation, the Committee reported having sufficient funds to pay its debts in 2007 (with over $664,000 in cash on hand by year end), in 2008 (when it accumulated over $1 million in cash on hand before the primary), and in 2009 (when it ended the year with almost $492,000). Yet the Committee chose not to pay off its debt to November Inc. because the Committee wished to stockpile its resources for the candidate's 2008 and 2010 re-election efforts. This is not surprising. Given the choice, a committee would probably always choose to fund present campaign activities rather than use its funds to pay its past debts. It is understandable that a vendor might have to make accommodations for unsuccessful committees

that end their races with more debts than cash on hand. But this was a committee with ample resources. Under these circumstances, I believe that the Committee has accepted a prohibited contribution as it was commercially unreasonable for the Committee to obtain an extension of credit simply because it wanted to use its funds for a purpose it perceived to be more desirable.

The fact that the Commission takes no action as to the vendors should not preclude the Commission from pursuing the Committee. In MUR 5396 (Bauer for President), the Commission reached this exact result when the Commission entered into a conciliation agreement with the Committee but took no further action as to the vendors. Moreover, in other contexts involving prohibited contributions, the Commission has found that the person making the prohibited contribution may have violated the Act but has declined to pursue the committee accepting the contribution. *See, e.g.*, MUR 5390 (Federal Home Loan Mortgage Corp.) (conciliation agreement with corporation but no finding as to recipient committees); MUR 5504 (Karoly) (same). In sum, liability as to the contributor and the recipient need not be the same, depending on the facts and circumstances of the case.

Based on the foregoing, I believe that the Commission should have further pursued the matter against the Heller for Congress Committee.

8/30/10
Date

Ellen L. Weintraub
Commissioner