FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 13, 2000

SENSITIVE

Frederic D. Woocher, Esq.
Strumwasser & Woocher
100 Wilshire Blvd., Suite 1900
Santa Monica, CA 90401

RE: MUR 4742
Vargas for Congress '96 and Deanna Liebergot, as treasurer; Juan Vargas; The Primacy Group/Larry Remer, Owner

Dear Mr. Woocher:

Based on a complaint filed with the Federal Election Commission ("the Commission") on May 7, 1998, and information supplied by your clients, the Commission, on April 27, 1999, found that there was reason to believe Vargas for Congress '96 and Deanna Liebergot, as treasurer; Juan Vargas; and The Primacy Group and its owner, Larry Remer; each violated 2 U.S.C. § 441a. At that time, the Commission instituted an investigation of this matter. Subsequently, on November 30, 1999, the Commission found reason to believe that Vargas for Congress '96 and Deanna Liebergot, as treasurer, had also violated 2 U.S.C. § 434(b).

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Tony Buckley, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Lawrence M. Noble
General Counsel

Enclosure
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Juan Vargas	)	
Vargas for Congress '96 and	)	
Deanna Liebergot as treasurer	)	MUR 4742
The Primacy Group and Larry Remer, Owner	)	

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was generated by a complaint filed by Derrick Roach, treasurer for the David Gomez for San Diego City Council Campaign Committee, against Mr. Gomez' opponent in the 1998 San Diego City Council race, City Council member Juan Vargas. Mr. Vargas was an unsuccessful candidate in the Democratic primary for the United States House of Representatives in 1996. The complaint dealt, *inter alia*, with the relationship between Mr. Vargas' authorized committee for the 1996 Federal race, Vargas for Congress '96 (with its treasurer, Deanna Liebergot, collectively, "the Committee"), and its primary vendor, the unincorporated political consultant firm The Primacy Group, solely owned by Larry Remer (collectively, "Primacy").

On April 27, 1999, the Federal Election Commission ("the Commission") found reason to believe that Mr. Vargas, the Committee and Primacy violated 2 U.S.C. § 441a in connection with a consulting contract between the Committee and Primacy and a $24,506.07 debt to Primacy incurred by Mr. Vargas and the Committee pursuant to that contract during the 1996 congressional campaign, which remained unpaid from March 1996 until August 1999. The bases for the reason to believe findings were the determinations that Primacy had extended credit outside of the ordinary course of business through the consulting contract which deferred the payment of most of Primacy's retainer until the end of the campaign and had not pursued

collection of the debt in a commercially reasonable manner, resulting in excessive contributions given by Primacy and accepted by Mr. Vargas and the Committee. On November 30, 1999, the Commission found further reason to believe that the Committee violated 2 U.S.C. § 434(b) by misreporting the debt in Commission filings.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("the Act") states that no person shall make a contribution to a candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceeds $1,000. 2 U.S.C. § 441a(a)(1)(A). The Act further prohibits any candidate or political committee from knowingly accepting any contribution which exceeds the limits at section 441a(a)(1)(a). *See* 2 U.S.C. § 441a(f). The term "contribution" includes 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. 2 U.S.C. § 431(8)(A)(i).

The extension of credit by any person to a candidate's authorized political committee is also a contribution, unless the credit is extended in the ordinary course of business. 11 C.F.R. § 100.7(a)(4). The terms of any credit extended must be substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. 11 C.F.R. § 116.3(a). In determining whether credit was extended by an unincorporated vendor in the ordinary course of business, the Commission will examine the vendor's established procedures and past practice in approving credit, the usual and normal practice in the vendor's industry, and whether the vendor received prompt payments in the past from the candidate or the candidate's authorized committee. *See* 11 C.F.R. § 116.3(c). In addition, a commercial vendor

must pursue collection of a debt in a commercially reasonable manner; otherwise, a contribution will result. 11 C.F.R. § 100.7(a)(4).

A written contract, including a media contract, promise, or agreement to make an expenditure, is considered an expenditure as of the date the contract, promise or obligation is made. 11 C.F.R. § 100.8(a)(2). Agreements to make expenditures over $500, including those memorialized in writing, must be reported as of the date that the debt or obligation is incurred. 11 C.F.R. § 104.11(b). This is true of all campaign debts and obligations, which must be reported in a committee's periodic disclosure filings. 2 U.S.C. § 434(b)(8). All outstanding obligations are to be reported on FEC Form 3 Schedule D, with specific references to: the amounts owed; the outstanding balance as of the beginning of the reporting period; the amounts incurred during that reporting period; payments made during that reporting period; and the outstanding balance at the close of the reporting period.

B. Facts

On September 29, 1995, the Committee and Primacy entered into a contract negotiated and signed by Mr. Vargas and Mr. Remer by which Primacy was to provide services to the Committee for the 1996 primary and general elections for the seat for the U.S. House of Representatives for California's 50th Congressional District. The contract called for a monthly retainer of $4,000 for the six-month period before the March, 1996 primary, and for the Committee to reimburse all expenses incurred by Primacy associated with the campaign.[1]

[1] The contract also provided for a $25,000 "win bonus" should Mr. Vargas win the Democratic primary, and an additional $25,000 "win bonus" should Mr. Vargas win the November, 1996 general election. The retainer covered Respondents' charges for consulting services, the services of a treasurer, and the use of a portion of Respondents' offices for the campaign.

However, of the $4,000 per month retainer, the Committee was only required to pay Primacy $1,000 a month in cash in each of the six months before the March, 1996 primary. The balance of the monthly retainer -- $18,000, or $3,000 per month -- was termed "deferred compensation," the payment of which was divided into two sections. One-third of the deferred compensation -- $6,000, or $1,000 per month -- was to come due at the primary. However, this amount was only required to be paid at that point "if in the opinion of both [the Committee] and [Primacy] the campaign can afford to make said disbursement without significantly harming the campaign effort." Otherwise, the contract did not require the Committee to pay the $6,000 until 180 days after the primary. Finally, under the contract the remaining two-thirds of the deferred compensation balance -- $12,000, or $2,000 per month -- was to be paid within 180 days of the primary.

With Mr. Vargas' loss in the primary election, the $6,000 which had previously been deferred came immediately due. Because the Committee did not have much cash on hand after the primary, it was unable to pay the deferred compensation, and the $18,000 ($6,000 due at the completion of the primary election plus the $12,000 deferred until 180 days after the primary election) became part of the debt reported by the Committee as owed to Primacy. The total debt, $24,506.07, also included certain unreimbursed expenses incurred by Primacy. The first time that the Committee reported any debt owed to Primacy in connection with the facts stated above was in its 1996 April Quarterly Report, filed with the Commission on April 19, 1996. Primacy made scant effort to collect the debt owed to it for a period of a little over three years – from March 1996 until August 1999 – and then only seriously pursued it after learning that the Commission was investigating this matter.

C. Analysis

Under the terms of the contract in issue, the Committee received consulting services, a treasurer, and the use of a portion of Primacy's offices for $1,000 per month, with $18,000 deferred until six months after the primary. Primacy apparently also deferred payment of approximately $6,500 of its expenses, although the contract provided that Primacy should be reimbursed for such expenses upon presentation of an itemized accounting. Primacy has not shown that it, or anyone else in the industry, gave such favorable terms to political committees in the ordinary course of business, nor that the terms of credit extended in this case are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. This is not surprising, since it would be difficult to stay in business under such circumstances.

The extension of credit permitted by the contract between the Committee and Primacy was not negotiated at arms-length and was not in the ordinary course of business. Counsel acknowledges that Mr. Remer and his wife "are supporters (and friends) of Councilmember Vargas; they agree with his politics and very much admire his efforts in public office."[2] Indeed, in an August 20, 1999 letter from counsel, the elevation of Primacy's personal considerations over business considerations in arriving at the fee arrangement is all but stated: "consultants may even allow their own personal and political views to influence the fees they are prepared to charge a given candidate, being willing to work at a greater financial sacrifice for a candidate

[2] Mr. Remer's daughter served as a summer intern in Mr. Vargas' city council office in 1997. *See* Diane Bell, SAN DIEGO UNION TRIBUNE, Aug. 12, 1997, at B1.

whom they genuinely admire and whose views they strongly support." While such subjectivity is not in itself illegal, it does result in an excessive contribution when, as here, the terms of the fee arrangement are so generous to a candidate or a political committee that they fall outside the ordinary course of business. Mr. Vargas and the Committee impermissibly accepted the excessive contribution by knowingly entering into the contract and paying according to its terms.

Likewise, the same lack of arms-length dealings characterizes Primacy's failure to pursue collection of the debt in a commercially reasonable manner. According to Primacy, immediately after the campaign, the Committee made a "very serious attempt to raise funds", but that this attempt "met with very little success." *Affidavit of Larry Remer dated June 24, 1999.* Primacy states that it had discussed the debt with Mr. Vargas on several occasions, and had agreed to carry the debt forward "until the 'timing' improved and Councilman Vargas' fundraising viability increased." *Id.* Primacy states that this course of action was "a business decision consistent with [Primacy's] past practices with other candidates who ended campaigns with a debt and consistent with the realities of the political consulting business." *Id.*

Primacy has identified seven clients to whom it extended credit since October 1995 due to their failure to timely pay off all campaign debts, including the Committee.

Contrasting this to the three years Primacy allowed the Committee

to pay back its debt, Primacy cannot demonstrate that the extended moratorium on debt collection from the Committee was consistent with its past practices, or those of the industry. While the failure to pursue a debt in a commercially reasonable manner from an admired friend may be understandable, it resulted here in an excessive contribution under the Act. By accepting the postponement of payment, Mr. Vargas and the Committee knowingly accepted the excessive contribution.

Primacy points to the fact that the contracts signed between Mr. Remer and the candidates with whom he deals hold the candidate personally liable for the debts incurred by the committees. That type of provision would only be meaningful if it was enforced, and in this case it was not. Primacy never made any attempt to hold Mr. Vargas personally responsible for the debt. Indeed, in November 1998, during the period when the Committee still owed Primacy the entire debt, Mr. Remer and his wife each made $1,000 contributions to the Vargas Committee. Counsel states that the money contributed by Mr. and Mrs. Remer was used to pay off other debts owed by the Committee - those owed to Vargas himself. Thus, the Commission is confronted with the curious circumstance of a businessman making a contribution to a Committee which owes him money, so that the Committee can pay back debts owed to the candidate, a friend of the businessman. Meanwhile, the debts owed to the businessman and his company remain unpaid.

Regarding the reporting of debt by the Vargas Committee, the Committee continuously should have reported the payment obligation to Primacy as a debt from the time that the contract was signed in October 1995, and any unreimbursed Primacy expenses as they became due, and reported the $1,000 cash payment to Primacy every month as a payment on the debt. However, the Committee's reports during the course of the campaign showed only the monthly payments to Primacy, but did not reflect the debts still owed. Only when the campaign was over did the

Committee first report the debt, depriving voters of timely information concerning the financial strength of the committee.

Therefore, there is probable cause to believe that Juan Vargas, Vargas for Congress '96 and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 441a(f) and that The Primacy Group and Larry Remer, Owner, violated 2 U.S.C. § 441a. There is also probable cause to believe that Vargas for Congress '96 and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 434 (b).

III. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that The Primacy Group and Larry Remer, Owner, violated 2 U.S.C. § 441a.

2. Find probable cause to believe that Juan Vargas, Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 441a(f).

3. Find probable cause to believe that Vargas for Congress '96, and Deanna Liebergot, as treasurer, violated 2 U.S.C. § 434(b).

7/13/00
Date

Lawrence M. Noble
General Counsel

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: July 13, 2000

SUBJECT: MUR 4742-General Counsel's Brief

The attached is submitted as an Agenda document for the Commission Meeting of _____

Open Session _____ Closed Session _____

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