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Secretary of the Commission
Federal Election Commission
999 "E" Street
Washington, DC 20463

Re: MUR ~~472~~ 4742
Vargas for Congress '96 and Deanna Liebergot, as Treasurer; Juan Vargas; The Primacy Group/Larry Remer, Owner

Dear Commissioners:

This letter brief is submitted on behalf of Vargas for Congress '96 and Deanna Liebergot, as Treasurer; Juan Vargas; and The Primacy Group/Larry Remer, Owner (collectively, "Respondents") in opposition to the General Counsel's Brief in support of its recommendation for a finding of probable cause in the above-entitled matter.

Introduction

The General Counsel's recommendations are utterly without factual or legal basis. The underlying allegation in this case is that Respondent Larry Remer and his political consulting firm, The Primacy Group, made an illegal campaign contribution because the candidate and campaign committee he worked for, Respondents Juan Vargas and Vargas for Congress '96, were unable to raise enough money to pay off the debt the Committee owed (and fully reported owing) to The Primacy Group. For their part, Respondents Vargas and Vargas for Congress '96 are charged with having "knowingly" accepted an illegal contribution by "accepting the postponement of payment" to The Primacy Group — that is, for the "crime" of not having been able to raise enough money to pay off The Primacy Group's debt any earlier. And for good measure, the General Counsel's office has belatedly thrown in the

allegation that Respondent Vargas for Congress '96 and its Treasurer, Deanna Liebergot, violated the Act by not reporting the debt to The Primacy Group until the payment was due and the debt had actually accrued.

These charges are absurd. The General Counsel's office is apparently unaware of the expression — and the fact — that you "cannot draw blood from a turnip." The General Counsel's office is also apparently completely unaware of how campaigns are conducted in the real world, and of the very real constraints that exist for losing candidates in attempting to raise funds and for their creditors in trying to secure payment of outstanding campaign debts. The General Counsel's brief is replete with claims about "the ordinary course of business" and "a commercially reasonable manner" that have no basis in reality, much less in the record of this particular case. One is forced to wonder where the General Counsel's information comes from, because it bears no resemblance to the world in which Respondents live.

Respondents have repeatedly requested that the General Counsel's office provide them with any precedents from the Commission or the courts in which candidates or vendors have been found to have violated the Act when the campaign committee was unable to raise enough funds to pay off a campaign-incurred debt. To date, Respondents have received nothing from the General Counsel's office, and no such cases are cited in the General Counsel's brief. Respondents submit that this is because this is an entirely *unprecedented* case, which serves no purpose under the Federal Election Campaign Act other than to further penalize a candidate and his campaign consultant — who have at all times attempted to comply with the law — for the candidate's misfortune of having lost the election and having thereby incurred campaign debts that proved more difficult to pay off than had been anticipated.

In sum, this is an enforcement action that should never have gotten this far, but should certainly end at this point without further action by the Commission.

Background

The General Counsel's "Statement of the Case" leaves out some salient facts and mischaracterizes several others, so this brief supplemental summary of the background of this action is necessary to provide the full record of relevant events leading up to the request for a finding of probable cause.

This matter, as the General Counsel notes, was generated by a complaint filed as a publicity stunt two and one-half years ago, in May 1998, by Derrick Roach, the treasurer of the candidate who was at the time opposing Respondent Vargas in an election for the San Diego City Council (a race that Respondent Vargas subsequently won). What the General Counsel fails to point out, however, is that the principal allegation in the complaint was that The Primacy Group and Mr. Vargas had engaged in "possible money laundering activity by illegally diverting money from a city council campaign to repay debts from [Vargas'] failed congressional campaign." Mr. Roach's theory was apparently that The Primacy Group had been "overcharging" Mr. Vargas for its consulting services during the 1998 City Council campaign in order to pay for the outstanding debt that Respondent Vargas' federal committee (Vargas for Congress '96) owed Primacy for work done in connection with Mr. Vargas' unsuccessful Congressional campaign in 1996.

Respondents cooperated fully with the General Counsel's investigation of these charges, providing several sets of Responses to Interrogatories, Responses to Subpoenas to Produce Documents, and sworn affidavits from Councilman Vargas and Mr. Remer. As the General Counsel's office ultimately agreed — albeit not until some 18 months later — Mr. Roach's charges were utterly baseless: The financial arrangements between The Primacy Group and Mr. Vargas' city council campaign committee were perfectly proper and commercially reasonable; there was absolutely no evidence to support the allegation that The Primacy Group was being overpaid for its services in connection with that campaign. Moreover, as a logical matter, the charges were

spurious: The City of San Diego's campaign finance laws are *more restrictive* than those of the federal Act, so it defied credulity to assert that Councilman Vargas would have somehow schemed to raise money under the City law *from fewer lawful sources* and in *contributions restricted to $250 per person* in order to pay off the federal committee's campaign debt, rather than simply to raise money at $1,000 per contribution from a wider range of permissible donors under the federal law.

The matter should have ended at that point. Instead, however, the General Counsel's office — apparently not willing to admit its mistake in having initially found reason to believe that Respondents may have violated the Act by paying down the federal committee's debt through overpayments to Primacy — continued to pursue what it originally acknowledged was only an "alternative theory" for finding a possible violation of the Act: that Primacy may have made an excessive contribution to the federal committee by failing to make a commercially reasonable attempt to collect the debt owed to it, and that Respondent Vargas and his committee likewise violated the Act by having "knowingly" accepted this supposedly excessive contribution. Furthermore, more than 18 months after opening its investigation and more than 3 and one-half years from the date the Committee's reports were filed, the General Counsel suddenly added the charge that Respondents Vargas for Congress '96 and Treasurer Liebergot also violated 2 U.S.C. § 434(b) by allegedly not properly reporting the debt to Primacy at the time it had first accrued.

The General Counsel's discussion of the facts relating to the debt owed to The Primacy Group is both sparse and misleading. Notably lacking from the General Counsel's recitation is any indication of the financial condition of the Vargas for Congress '96 Committee (hereafter, the "Committee") and the relationship between The Primacy Group's debt and the Committee's overall finances. From September 1995 through the end of March 1996, the Committee had raised and spent almost $250,000 in the primary election. Unfortunately, by the time all the bills came in for the campaign, the Committee found itself approximately $90,000 in

debt. Following the election in early March 1996, Mr. Vargas continued to attempt to raise funds to pay off the accumulated debt, raising over $60,000 in the remainder of March and almost $40,000 from April through December 1996. When it was apparent that he would be left with a substantial campaign deficit, Mr. Vargas took out a commercial loan for $15,000 and even dipped into his own threadbare pockets to loan his campaign another $10,000 in order to pay off the most pressing debts. But the money just wasn't there, and by the end of 1996, the Committee had outstanding campaign debts of over $65,000, including the approximately $10,000 that was owed to Mr. Vargas himself.

The Primacy Group was owed $24,506.07, which consisted of the $18,000 in "deferred compensation" that had matured on the day after the primary election (but which was not due under the terms of Primacy's contract with the Committee until another 180 days thereafter), as well as some $6,506.07 in expenses that had been incurred by Primacy on the Committee's behalf. (Contrary to the erroneous statement on page 5 of the General Counsel's brief, Primacy did not defer payment of any these expenses in violation of the terms of its contract with the Committee; these charges were not incurred until March and were invoiced to the Committee as soon as the bills from the sub-vendors were received by Primacy.[1]) Another $41,000 was owed to more than a dozen other individuals and entities, in various amounts ranging from $500 to $10,000.

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[1]It is disturbing how many factual errors are contained in the General Counsel's brief. In addition to mischaracterizing the nature of these expenses in an apparent attempt to imply that Primacy had been providing the Committee with some sort of special "deal" not called for in the contract, the General Counsel's brief erroneously states that Primacy's contract called for a $25,000 "win bonus" should Mr. Vargas win the Democratic primary, and an additional $25,000 "win bonus" should Mr. Vargas win in November. In fact, the contract called for a *total* "win bonus" of only $25,000 — $12,500 if Mr. Vargas were to win the primary, and another $12,500 if he won the general election.

As Mr. Vargas explained in his sworn statement dated June 24, 1999, he made a very serious attempt to raise funds to pay off his campaign debt after the election, but the effort met with increasingly diminishing success. Letters were written and phone calls were made, but it simply proved impossible to raise any further funds in the atmosphere of the Presidential election and other federal campaigns, and in the midst of a still-weak local economy. Almost every major supporter of Mr. Vargas had already contributed the maximum amount allowed under federal law, and despite these intensive efforts, hardly any funds were raised in the latter part of 1996.

Mr. Vargas and Mr. Remer discussed the Committee's campaign debt on several occasions. Agreeing that there was simply no reasonable way for Mr. Vargas to raise any federal funds anytime soon, Mr. Remer agreed to carry the debt forward until the timing improved and Mr. Vargas was in a better position to raise funds. Mr. Vargas had to run for re-election to the City Council in early 1998, but if he could win that election and re-establish himself in a leadership position in the community, he could hope to once again be in a position to raise funds for his failed Congressional campaign from several years earlier. Accordingly, Mr. Remer never made any attempt to compromise or write off the debt owed him by the Committee, hopeful that Mr. Vargas would someday be in a position to repay the debt in full.

That day did not arrive until the middle of 1999, when Mr. Vargas — having been re-elected to the City Council the year before and having now had enough time to increase his visibility, his political fortunes and his potential donor base — was finally in a position to resume fundraising activities once again. The General Counsel's brief states that Primacy "only seriously pursued" collection of the debt owed by the Committee "after learning that the Commission was investigating this matter." This is only partly true. *Primacy* had always pursued collection of the debt, but — as discussed in greater detail below — its options were extremely limited. Primacy's fortunes in obtaining payment of the debt were directly tied to Mr.

Vargas' and the Committee's fundraising abilities, and there was no realistic fundraising potential until 1999 at the earliest. At about that time, Mr. Remer and Mr. Vargas were contacted by the General Counsel's office, which raised questions about the delay in debt repayment. As part of the pre-probable cause conciliation process, Respondents offered to demonstrate their good faith in addressing the General Counsel's stated concerns by having the Committee hire a special fundraiser and accelerate its efforts to raise additional funds to pay off the debt owed to Primacy. As a result of an extraordinary effort, this objective was accomplished by the end of 1999, but instead of earning the appreciation of the General Counsel's office and the dismissal of the now-mooted charges, the Committee's good-faith efforts apparently are being cited against Respondents as if they constituted some sort of "admission" of wrongdoing.

I. There is No Probable Cause to Believe that The Primacy Group and Larry Remer Violated 2 U.S.C. § 441a and Made an Excessive Contribution By Extending Credit to the Committee and Failing To Pursue Collection of the Debt in a Commercially Reasonable Manner.

The charge that an excessive contribution was made by The Primacy Group in violation of 2 U.S.C. § 441a is based upon the General Counsel's allegation that the "deferred compensation" terms of Primacy's contract and Primacy's failure to pursue collection of the debt were not "commercially reasonable" and "in the ordinary course of business." It would be nice if the General Counsel had presented any evidence in support of these charges. In truth, however, all the evidence is to the contrary.

The General Counsel baldly asserts, without any underlying support, that the extension of credit resulting from the "deferred compensation" arrangement in the contract between The Primacy Group and Mr. Vargas' Committee "was not negotiated at

arms-length and was not in the ordinary course of business."[2] These are false and outrageous charges. The contract constituted a completely arms-length transaction, and it is fully consistent with the terms contained in many other political consulting agreements. There is absolutely no basis for the General

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[2]The General Counsel takes two expressions of Mr. Remer's support for Mr. Vargas completely out of context. Mr. Remer's acknowledgment that he and his wife "are supporters (and friends) of Councilmember Vargas" was made in response to the General Counsel's inquiry as to why Mr. Remer and his wife had each contributed $1,000 to Mr. Vargas' congressional campaign in November 1998 — more than three years after entering into this consulting contract. Likewise, Mr. Remer's daughter served as an intern in Mr. Vargas' city council office in 1997, almost two years after these contractual arrangements were finalized. Of course, there is no basis in any event to suggest that contracting parties must be enemies in order to be capable of entering into an "arms-length" agreement.

Even more egregious is the General Counsel's taking a statement completely out of context from Respondents' counsel's letter of August 20, 1999, to suggest that the elevation of Primacy's personal considerations over business considerations in arriving at the fee arrangement with Mr. Vargas' committee was "all but stated." The quoted sentence was not referring to Mr. Remer's relationship with Mr. Vargas at all, much less to the manner in which the fee arrangement was reached in the present case, but to the various factors that might, "as a general matter," enter into the negotiations between political consultants and potential clients over the fees that a consultant might charge in any given election. The reference to the consultants' personal and political views of the candidate followed at the end of a long list of other factors that might affect the financial arrangements, including the client's ability to pay, the likelihood of his or her success, and relatedly, the prospects for developing an ongoing business relationship in future campaigns.

Counsel's accusation that the contract was not negotiated at arms-length; just because two parties may know and respect each other does not mean that a contract between them is not an "arms-length" transaction. What an amazing rule that would be!

In this particular instance, the "deferred compensation" arrangement had potential benefits to both parties: As Respondents explained to the General Counsel in previous correspondence (apparently to utterly no avail), for the Committee, deferring the bulk of Primacy's compensation until later in the campaign would allow it to build up an initial "critical mass" of start-up funds until the fundraising had improved and would enable it to direct its limited initial resources where they would do the most good, as well as to those "hard" costs of the campaign, such as the Postal Service, broadcast media, and mail houses, that operate on a strictly cash-and-carry basis.

A consultant like The Primacy Group can also enjoy substantial benefits from the deferral of some or most of its compensation. To begin with, there can be tax benefits from deferring a portion of the payment until later in time, spreading the payments out over two different tax years or simply until later in the same year. More importantly, however, the financial success of the consultant is tied to the political success of the candidate. Here, for instance, Primacy stood to earn substantially more money if Mr. Vargas were successful in winning the primary election; in addition to the "win bonuses" called for in the contract, there would be all the additional earnings from the general election campaign, not to mention future campaigns on behalf of the successful candidate. The more money that was spent early in the campaign communicating with the voters — rather than being returned to the consultant's own pocket — the better the candidate's chance of winning. From Primacy's perspective, then — and especially with a client like Mr. Vargas who could be assured of ultimately paying off any debts that were incurred — it made complete economic sense for Mr. Remer to agree to defer a significant portion of his consulting fees.

Moreover, deferred compensation arrangements — whether formally memorialized, as here, in the terms of a written contract or occurring as a practical matter due the exigencies of the campaign — are commonplace both in Primacy's experience and in the political consulting business generally. In response to the General Counsel's inquiry on this subject, Mr. Remer responded that it was a rare campaign in which he and other political consultants are *not* called upon as a practical matter to "defer" their compensation at some point in the campaign.[3] In Primacy's case, this typically takes the form of the firm's billing the campaign for its monthly retainer while knowing full well (either implicitly from prior experience or by express verbal arrangement with the candidate) that the bill will not be paid (and is not required to be paid) until some 30, 60, or 90 days later, after the fundraising has caught up with the cash demands of the campaign. Primacy thus informed the General Counsel's office that it was its standard practice to defer payment of its monthly consulting services retainer until the latter part of a campaign, or until sufficient funds could be raised to pay those fees. (Nor, for that matter, as Primacy pointed out, are the monthly retainers really "earned" on a constant monthly basis; the consultant will almost always have to put more time and effort into the campaign in the closing months, thus justifying a larger payment at the end of the campaign than at the beginning, notwithstanding the use of a single, flat monthly "fee" as a means of averaging out the budgeting of these expenses.)

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[3]Mr. Remer explained to the General Counsel that it was his recollection that the reason he expressly included a deferred compensation provision in the written contract with Mr. Vargas for this election campaign was that he wanted to reassure Mr. Vargas that he did not have to worry about using whatever money he was able to raise early in the campaign to pay his political consultants, but that this money could instead be used for efforts to raise Mr. Vargas' profile and, in turn, assist both with fundraising and in the political campaign.

As to the industry practice, submitted with this response are the sworn declarations of two other prominent political consultants from the San Diego area, each of whom confirms that the type of "deferred compensation" agreement contained in the contract between Primacy and the Committee is in fact quite commonplace. For example, Mr. Shepard, a member of the Board of Directors of the American Association of Political Consultants, states:

> "In my professional experience, I have witnessed and been party to a number of agreements between candidates and consultants that involved a graduated retainer schedule in which the initial monthly retainer was increased during the course of the campaign. Such arrangements are based on the recognition that some campaigns have limited resources during their early stages and greater resources as the election date approaches."

Similarly, Mr. Glaser explains:

> "For the record, the use of deferred compensation, bonuses, and time payments are frequently used in many, if not most, campaigns. . . . Starting a campaign is very similar to starting a small business. Cash flow is not smooth or predictable. A relationship develops between a candidate and the consultant to put the campaign first. It is not in the best interest of the client to bankrupt the campaign for the sake of conformity to the letter of the contract. It is not in the best interests of the consultant either.
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> * * *
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> "I wish to state for the record that the deferred compensation agreement between Mr. Vargas, Mr. Remer and The Primacy Group is wholly within the norm for the political consulting industry."

In sum, far from being "difficult to stay in business" under the type of deferred compensation agreement contained in the contract between The Primacy Group and the Committee, as the General Counsel asserts, it would be difficult for a consultant like Mr. Remer to stay in business if he were *not* willing, in a circumstance such as this, to be flexible in his payment terms. As Mr. Glaser aptly puts it, "The campaign is grown to be successful, and as with a small business you get paid when it can be done without damaging the campaign." Mr. Remer made a calculated business judgment when he entered into his "deferred compensation" agreement with the Committee. That agreement is certainly well within the bounds of "the ordinary course of business," and it is not for the General Counsel's office or this Commission to second-guess the reasonableness of that arrangement.

The Primacy Group's pursuit of the debt owed it by the Committee was likewise commercially reasonable. Again, the General Counsel's analysis of this issue demonstrates a startling disconnect from the real world of politics, both as to the realities of the fundraising process and as to the limited options facing an impecunious political committee's creditors. As both Mr. Vargas and Mr. Remer have testified without any contradiction from the General Counsel, Mr. Vargas attempted to raise funds to pay off his campaign debts throughout 1996 without success; they then agreed that it made more sense to hold off on further fundraising efforts and to instead focus on building up Mr. Vargas' profile and status in the community so that he could ultimately succeed in raising the necessary funds. The soundness of this judgment was confirmed by the fact that Mr. Vargas did indeed succeed in restoring himself to a position of prominence that allowed him to pay off his campaign debt in full to Mr. Remer. How does that possibly become a "commercially unreasonable" manner of dealing with the debt? Rather than have to compromise or write off some of the debt in order to be paid sooner, The Primacy Group has been paid in full!

Nor is there any evidence to support the General Counsel's unjustified accusation that a "lack of arms-length dealings" characterizes Primacy's failure to pursue collection of the debt in a commercially reasonable manner. As noted above, more than a dozen other individuals and companies were owed money by the Committee during this same time period, and none of them took any different approach toward pursuing collection of their debts. Were each of their relationships with the Committee characterized by a "lack of arms-length dealings"? And exactly what does the General Counsel think that Primacy was supposed to do in order to pursue collection of the debt? Its brief appears to suggest that Primacy should have sued Mr. Vargas and sought to make him personally liable for the debt. That, of course, would not only have been one way to make sure that Primacy never saw a penny of the debt it was owed by the Committee, but it would have guaranteed that Primacy never worked for Mr. Vargas again, and maybe never worked in the industry again, either.[4]

The reality is that a consultant has few "commercially reasonable" alternatives other than to wait and attempt to assist the candidate and committee to raise funds to pay off the campaign debt. Mr. Remer testified in his sworn declaration that he had adopted a conscious strategy of postponing collection of

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[4]Respondents' counsel can attest from personal experience that attempting to sue a candidate to recover substantial debts owed by the candidate's committee is indeed a bad strategy for recovering any money. Our firm once represented a fundraiser who insisted on suing a candidate and committee who owed her approximately $70,000 for work that she had done. After more than a year of litigation and many thousands of dollars spent on discovery and other proceedings, the candidate simply declared bankruptcy on the eve of trial, wiping the slate clean of all of his debts and assuring that the consultant would recover nothing from the lawsuit. The case ultimately settled for pennies on the dollar, far less than the candidate had offered to pay if the fundraiser would have agreed to wait until he could try to raise additional funds through his committee.

the debt owed to Primacy by Mr. Vargas' political committee as a reasonable and legitimate "business" decision, choosing to maintain a professional relationship with Mr. Vargas and to assist in his re-election campaign in order to keep him in office and to retain his fundraising prowess, and (equally important) to keep good relationships with other current and potential political clients who would surely look askance at a consultant who would jump to sue his clients rather than give them time to pay off their debts.

Mr. Remer further provided the General Counsel's office with the names of seven other clients whom he had similarly given time to pay off their campaign debts. The General Counsel's office now seeks to dismiss the relevance of these other instances, arguing that they were either smaller debts or were paid off more quickly. But the more important point is that these instances demonstrate a consistent strategy and practice on Primacy's part of providing the candidate with sufficient time to pay off the outstanding debt, refuting the General Counsel's allegation that the Vargas Committee's debt collection was somehow handled in a commercially unreasonable manner and inconsistently with Primacy's past practices.[5]

Once again, Primacy's patience in pursuing collection of the debt from the Vargas Committee is perfectly in keeping with the industry practice. As consultant Glaser confirms:

"I personally have had several slow paying clients.

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[5]Although it is true that the dollar amount of debt incurred in most of these other campaigns was smaller than that owed to Primacy by the Vargas Committee, the debts were quite comparable in relationship to the total amount of money raised and spent in these campaigns. Moreover, while it is true that Mr. Baker was able to pay off his sizable debt to Primacy more quickly than Mr. Vargas, that is in large part due to the fact that Mr. Baker *won* his special election and did not have any competing demands on his fundraising efforts in the subsequent months.

> Some elected, some unsuccessful. It is only through the close relationship does the consultant have the chance to get paid at all. Why is this? Because a consultant cannot sue his clients to collect a debt. Oh sure, you CAN sue. But then you will have a great deal of trouble gaining the trust and confidence of your next client.
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> "No, your only option is to work with your client, and take payments over time. I have had to accept this reality more often than I would like to admit. Interestingly, with patience, I have always been paid. Candidates <u>want</u> to pay their debt. It just takes longer to raise money if you are not the front runner, or worse, if you lose."

The General Counsel's office may not have had access to Mr. Glaser (although they surely could have found another political consultant to talk to before making these accusations), but they presumably do have ready access to the campaign finance reports filed by other federal candidates. Even the most cursory perusal of those reports establishes that neither the amount of the debt incurred by the Vargas Committee nor the delay in repayment are at all beyond the bounds of reasonableness. Respondents attempted to undertake a quick search of the campaign reports on-line at the Commission's website for some of the other contested congressional campaigns in California for this same time period and found numerous committees with outstanding debts, many for far longer than the Vargas Committee's debt to Primacy.

For example, as of the end of 1999, the Dave Baker for Congress Committee continues to report an outstanding debt of $173,302.64, which includes debts to various consultants and vendors for thousands of dollars, including $32,070.32 still owed to Stu Mollrich Communications, Inc., $12,500 to Market Opinion Research, and $9,319.24 to AA-1 Litho Printing Co. Although the on-line reports do not go back that far, all of these debts have apparently been outstanding *since 1988*, when Mr. Baker made his

run for Congress, and absolutely no effort has been made to pay them off or to collect upon them since at least 1996, when the first on-line report appears.

Similarly, in the same year that Mr. Vargas unsuccessfully ran for the House, Michela Alioto was defeated in her attempt to win election in the First Congressional District in Northern California. Ms. Alioto (who is independently wealthy) incurred a campaign debt of over $500,000, most of which consisted of loans of personal funds that she had made to the Committee. Yet also included in that debt is $10,471.29 that she has owed to her campaign lawyers at the firm of Remcho, Johansen & Purcell since at least the end of 1996. This debt has been reported in Ms. Alioto's campaign reports continuously since the mid-year report of 1997 through the mid-year 2000 report, with apparently no effort having been made on the part of Remcho, Johansen & Purcell to pursue collection.

Other examples abound: Benjamin Brink ran for Congress in 1996 in the 14th Congressional District in California, incurred a debt of more than $250,000, including unpaid bills of $14,579.41 and $11,044.28 to his campaign consultant and printing house, and then simply stopped filing his FEC disclosure reports; John V. Flores ran unsuccessfully for the 31st Congressional District seat in California in 1996 and incurred a debt of $15,000 to his political consultants, and has never paid the debt off; and Richard Sybert was defeated in that same 1996 election for the 24th Congressional District in California and still reports owing his campaign consultants at McNally Temple Associates Inc. $2,000 for that election, despite the fact that Mr. Sybert was able to loan his campaign committee almost $700,000 in his personal funds and presumably could afford to pay McNally Temple the money he owes them at almost any time.

The same pattern holds true at the local level in San Diego. Michael McSweeney ran for the state Assembly in 1996 and was defeated in the primary election. He incurred campaign debts of over $30,000, including $7,500 owed to his principal campaign

consultants, Russo, March + Raper. That debt remains outstanding in full today, along with a similar debt of $1,500 McSweeney's committee owes to Competitive Edge Research for polling and survey research.

Of course, the grand-daddies of campaign spenders are the Presidential campaigns. The Dole-Kemp '96 General Committee, for example, has consistently reported owing over $920,000 in debts accrued during the 1996 campaign, with apparently no effort made to pay off these debts in recent years. But that debt pales in comparison to the *over $2.6 million debt* that is still reported by Friends of John Glenn from his failed *1984* Presidential bid! Among the monies owed by the Glenn committee is an outstanding balance of almost $160,000 to the law firm of Covington & Burling in Washington, D.C.

Why hasn't Covington & Burling taken any action to collect that debt from John Glenn? They certainly know what their legal remedies are, and they are quite capable of protecting their interests in court. And John Glenn can certainly raise the money or afford to pay the debt from his own personal funds. (Senator Glenn, after all, raised millions of dollars for his re-election bids following his Presidential run.) Well, the simple truth is that often discretion is indeed the better part of valor. As Mr. Shepard and Mr. Glaser confirm, a creditor's options in attempting to collect a debt from a losing campaign are very limited — both legally and practically.

In sum, the handling of the campaign debt incurred by the Vargas Committee was both commercially reasonable and fully consistent with the industry practice. There is absolutely no basis for finding probable cause to believe that The Primacy Group and Mr. Remer violated the Federal Election Campaign Act either in the way they collected that debt or the arrangements under which they incurred it in the first place.

II. There is No Probable Cause to Believe that Juan Vargas and Vargas for Congress '96 Violated 2 U.S.C. § 441a(f) By

"Knowingly" Accepting an Excessive Contribution from The Primacy Group

The allegation that Mr. Vargas and Vargas for Congress '96 violated 2 U.S.C. § 441a(f) as a result of their handling of the debt to Primacy is even more ludicrous than the charges against Primacy discussed above. It is bad enough to allege that The Primacy Group had somehow made an "excessive" contribution under these circumstances, but to contend that Vargas and the Committee "*knowingly*" violated the law by "accepting the postponement of payment" is absurd and offensive.

Mr. Vargas negotiated for The Primacy Group's services under an arrangement that was similar to that found throughout the political consulting industry. It was an arrangement that he thought would best serve his interests in winning the election. When the election was over and Mr. Vargas lost, he never once attempted to avoid his obligation to make good on the debt he owed to Primacy or to his other campaign workers and creditors. He continued to attempt to raise funds throughout the remainder of the year. He dipped into his pockets to lend his Committee the money needed to pay off his most pressing debts. And he continuously re-affirmed his commitment to pay off the remainder of his debt and worked on a strategy with Mr. Remer that they mutually believed would best allow him to do so. That strategy has proved successful and the debt to Primacy was paid off in full well before the General Counsel's office filed its brief in support of a finding of probable cause.

There is absolutely no basis for impugning Mr. Vargas with the allegation that his actions violated the Act, and there is especially no basis for accusing him of "knowingly" violating the Act, as 2 U.S.C. § 441a(f) requires. The days of debtor's prisons and the "crime of poverty" are supposed to be over in this country. To penalize Mr. Vargas for his inability to raise sufficient funds to pay off his campaign debts any sooner would be a gross injustice and is unsupported by the law. There is thus no basis for the Commission to find probable cause to

believe that Mr. Vargas and Vargas for Congress '96 and Deanna Liebergot, as Treasurer, violated the Act.

III. There is No Probable Cause to Believe that Vargas for Congress '96 and Deanna Liebergot Violated 2 U.S.C. § 434(b) By Not Properly Reporting the Deferred Compensation Obligation to The Primacy Group

As a last-minute add-on, the General Counsel's office has thrown in an allegation that Vargas for Congress '96 and Deanna Liebergot violated 2 U.S.C. § 434(b) by not timely reporting the debt when it was first incurred. According to the General Counsel's office, "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 cash payment to Primacy every month as a payment on the debt."

The General Counsel has apparently misinterpreted both the terms of the contract between Primacy and the applicable law. Under the contract, Primacy was entitled to receive a total of $24,000 for work done in connection with the Primary Election, "payable according to the following schedule:

- $1000 per month paid monthly to the consultant until the Primary Election in March of 1996;
- $1,000 per month (a total of $6000) to be disbursed to the consultant on March 1, 1996 if -- in the opinion of BOTH the client and the consultant -- the campaign can afford to make said disbursement without significantly harming the campaign effort. Otherwise, said $6000 will become 'deferred' income and will be paid to the consultant after the Primary Election (within 180 days or 6 months)
- $2000 per month for the period until the March 1996 primary election to be held as 'deferred

compensation' and to be paid within 180 days (6 months) of the Primary Election"

Thus, under the terms of the contract, aside from the $1,000 payments that Primacy would be receiving monthly beginning in October 1995 (and which were properly reported monthly, as they became due), the first date upon which Primacy was entitled to receive any other money from the Committee was March 1, 1996. At that point, the Committee was obliged to pay Primacy an additional $6,000 — unless the parties agreed, as they did, that the campaign could not afford to make such payment without significantly harming the campaign effort. At that point, then, the $6,000 was to be considered "deferred compensation," due to be paid to Primacy 180 days thereafter, along with the remaining $12,000 payment.

The Committee and its Treasurer, Deanna Liebergot, quite reasonably and properly believed that under this arrangement, no "debt" had accrued from the Committee to Primacy until March 1996, when The Primacy Group sent the Committee an invoice for $15,000 in consulting fees for the months of October through February. (The full $4,000 consulting fee for the month of March was included in a separate invoice from Primacy to the Committee, dated March 7, 1996, which invoice also included $276.64 in miscellaneous expenses incurred by Primacy during the prior month. For the Commission's convenience, copies of the pertinent invoices are included with this letter brief.)[6] Primacy was not entitled to receive any of these payments any earlier than March 1996, and the Committee was not obliged to pay Primacy any additional money prior to that date. Under any reasonable interpretation of when a "debt" accrues and becomes due, then,

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[6]Those invoices refute any innuendo in the General Counsel's brief that Primacy may not have invoiced the Committee for all unreimbursed Primacy expenses as they became due, or that the Committee may not have promptly reported those expenses as soon as it received the invoices. Any suggestion to the contrary in the General Counsel's brief is simply erroneous.

March 1, 1996, was the earliest such date that the additional $18,000 was owed by the Committee to Primacy.[7]

The General Counsel's office cites to 11 C.F.R. § 104.11(b) for the proposition that an agreement to make an expenditure over $500 must be reported as of the date that the debt is incurred. But that very same section continues, "*except* that any obligation incurred for rent, salary or other regularly reoccurring administrative expense *shall not be reported as a debt before the payment due date.*" (Emphasis added.) The Committee and its Treasurer were thus fully justified under this regulation in treating the payments due to Primacy as "regularly reoccurring" expenses and first reporting them as a debt only upon the earliest possible payment due date in March 1996, not back in October 1995.

Lastly, even if the Commission were to believe that as a technical matter the Primacy debt should have been reported in a different manner by the Committee, there is no reason to issue a probable cause finding with respect to this issue. There was no intent to deceive anyone and, contrary to the General Counsel's allegation, the voters were not deprived of any meaningful information regarding the financial strength of the Committee. Primacy's role and involvement with the campaign was reported in connection with the monthly $1,000 payments and additional expense reimbursements that it was receiving throughout the reporting periods, and the Committee's finances were not materially affected by the additional $18,000 (out of over $200,000 in expenditures) that the General Counsel's office

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[7]In fact, a reasonable argument exists that the "debt" did not actually become due until 180 days thereafter under the terms of the contract. By the date of the Primary Election, however, the amount that would subsequently be due at least became fixed (all of the Primary Election consulting having been completed), and it was therefore reasonable for the Committee to select that date as the appropriate date for marking the accrual of a debt certain.

contends should have been reported earlier. At worst, the Committee's reports should be amended to reflect the Commission's views of the proper method of reporting this ambiguous transaction; certainly, no enforcement action or finding of violation is warranted for such a minor and technical alleged infraction.

Conclusion

It would have been much simpler and far less expensive if Respondents had capitulated to the General Counsel's demand that they admit to violations of the Act and pay a nominal fine as a result thereof. But sometimes one must stand up for one's principles. Neither Mr. Vargas and his Committee and Treasurer, nor The Primacy Group and Mr. Remer, did anything wrong or improper here, and they are simply unwilling to admit to a violation that they did not commit, especially not a "knowing" violation of the law.

Respondents respectfully request that the Commission do the right thing here, too. The Commission should reject the General Counsel's request for a finding of probable cause and instead direct the General Counsel to close the file on this matter forthwith.

Sincerely,

Fredric D. Woocher

cc: Office of the General Counsel

Enclosures

AFFIDAVIT OF THOMAS C. SHEPARD

My name is Thomas C. Shepard. I am president of Campaign Strategies, Inc., a full-service political consulting firm headquartered in San Diego, California. My firm has represented over 100 candidates and ballot measures throughout the state of California, from local school board and city council races up to and including statewide ballot measures. I have been employed as a political consultant for 19 years. I serve as a member of the Board of Directors of the American Association of Political Consultants.

I am personally acquainted with Larry Remer and his firm, The Primacy Group, Inc. In the past, I have worked with Mr. Remer on a number of campaigns and have, at other times, represented clients who opposed Mr. Remer's clients. I am also familiar with San Diego City Council Member Juan Vargas.

I understand the FEC is examining certain of the financial arrangements between Mr. Remer, The Primacy Group, Inc., and Council Member Vargas, dating to Mr. Vargas' unsuccessful campaign for the Democrat nomination in California's 50th Congressional District in March 1996. I submit to the FEC the following professional experience regarding such arrangements.

First, I understand the FEC is examining the "deferred compensation" clause in the contract between Mr. Vargas, Mr. Remer and The Primacy Group, Inc. In my professional experience, I have witnessed and been party to a number of agreements between candidates and consultants that involved a graduated retainer schedule in which the initial monthly retainer was increased during the course of the campaign. Such arrangements are based on the recognition that some campaigns have limited resources during their early stages and greater resources as the election date approaches.

Second, I understand the FEC is examining the debt Mr. Vargas owed to Mr. Remer and the Primacy Group, Inc. at the conclusion of the campaign. I have had several clients over the past two decades who refused or were unable to pay outstanding retainer fees at the conclusion of a campaign. In my professional experience, consultants have limited leverage in collecting such fees from losing candidates. In the past, I have resorted to litigation as a last resort, only under the most intractable circumstances.

Sworn under penalty of perjury on September 12, 2000 at San Diego, California.

Thomas C. Shepard

Affidavit of Bobby G. Glaser:

My name is Bobby G. Glaser, and if called to testify I could testify from my own personal knowledge the following facts:

I have been a professional political consultant for 15 years. My firm, The La Jolla Group, has represented clients for state and local office. Additionally my firm has worked on behalf of issue campaigns, signature collection for initiatives, recalls and referendums, as well as lobbying on behalf individual and corporate clients.

I am personally very well acquainted with Larry Remer and his firm, The Primacy Group Inc. I have both worked with Mr. Remer on various campaigns and I have represented clients in opposition to Mr. Remer's clients. Mr. Remer and I have been friends and colleagues for more than 15 years.

I am also familiar with San Diego Assemblyman-elect Juan Vargas, who is a long time client of Mr. Remer's and The Primacy Group Inc.

I understand that the FEC is examining certain of the financial arrangements between Mr. Remer, The Primacy Group Inc. and Assemblyman-elect Vargas, dating to Mr. Vargas's unsuccessful race for the Democratic nomination for the 50th Congressional District in March of 1996.

I understand that "deferred compensation" has come into question, and the collection practices of the industry as a whole. For the record, the use of deferred compensation, bonuses, and time payments are frequently used in many, if not most, campaigns. I know from personal experience how difficult debt collection is in the political industry.

Starting a campaign is very similar to starting a small business. Cash flow is not smooth or predictable. A relationship develops between a candidate and the consultant to put the campaign first. It is not in the best interest of the client to bankrupt the campaign for the sake of conformity to the letter of the contract. It is not in the best interests of the consultant either.

The campaign is grown to be successful, and as with a small business you get paid when it can be done without damaging the campaign. Some consultants will stop work if not paid. This many times will insure they never get paid. Most will wait until the next opportunity.

I personally have had several slow paying clients. Some elected, some unsuccessful. It is only through the close relationship does the consultant have the chance to get paid at all. Why is this? Because a consultant cannot sue his clients to collect a debt. Oh, sure, you CAN sue. But then you will have a great deal of trouble gaining the trust and confidence of your next client.

No, your only option is to work with your client, and take payments over time. I have had to accept this reality more often than I would like to admit. Interestingly, with patience, I have always been paid. Candidates want to pay their debt. It just takes longer to raise money if you are not the front runner, or worse, if you lose.

This is not unique to the political industry. All small businesses have to work with their clients to get paid. It goes without out saying that NOBODY gets paid on time, every time. The fact of the matter is that businesses by definition must work with their clients in order for both the client, and the business owner, to be successful.

I wish to state for the record that the deferred compensation agreement between Mr. Vargas, Mr. Remer and The Primacy Group Inc. is wholly within the norm for the political consulting industry. Since the amount due was paid, it validates the collection process. To arbitrarily assign sinister meanings to the payments, then investigate the innuendoes is a waste of time and money. The facts show a different story. A lawful process of debt due, payments made and debt paid. I am confident that bank presidents, holding non-performing mortgages, would tell you they do not intend to make a donation to the debtor. Further they will tell you that working with the debtor to "make good" on the debt, is the only course of action.

Sworn under penalty of perjury on 9/12/00 at San Diego, California.

Bobby G. Glaser
Owner
The La Jolla Group
8304 Clairemont Mesa Blvd.
Suite 213
San Diego, CA 92111-1315
(858) 496-8896

21.04.403.1908

THE PRIMACY GROUP
3609 FOURTH AVENUE
SAN DIEGO, CA 92103

(619) 295-6923

Invoice

DATE	INVOICE #
3/7/1996	1282

BILL TO
Vargas for Congress '96 3609 Fourth Avenue San Diego, CA 92103

DESCRIPTION	AMOUNT
CONSULTING - OCT	3,000.00
CONSULTING - NOV	3,000.00
CONSULTING - DEC	3,000.00
CONSULTING - JAN	3,000.00
CONSULTING - FEB	3,000.00
Total	$15,000.00

Invoice

THE PRIMACY GROUP
3609 FOURTH AVENUE
SAN DIEGO, CA 92103

(619) 295-6923

DATE	INVOICE #
3/7/1996	1288

BILL TO
Vargas for Congress '96 3609 Fourth Avenue San Diego, CA 92103

DESCRIPTION	AMOUNT
CONSULTING -- MARCH 1996	4,000.00
TELEPHONE CHARGES	22.19
POSTAGE	138.89
LUNCH W/JUAN & LARRY COHEN 2/9/96	22.05
LUNCH W/ALAN BERSIN 2/15/96	22.80
LUNCH W/JOE O'BRIEN 2/19/96	18.87
LUNCH W/JUAN, RALPH, ET AL 2/28/96	28.72
LUNCH W/JUAN 2/29/96	23.12
Total	$4,276.64

THE PRIMACY GROUP
3609 FOURTH AVENUE
SAN DIEGO, CA 92103

(619) 295-6923

Invoice

DATE	INVOICE #
3/28/1996	1299

BILL TO

Vargas for Congress '96
3609 Fourth Avenue
San Diego, CA 92103

DESCRIPTION	AMOUNT
FEDERAL EXPRESS CHARGES $15 x 7	105.00
VIDEO PRODUCTION - LIGHTNING CORP	5,275.98
OFFICE SUPPLIES	70.00
VOTER LIST	150.00
LUNCH W/RALPH - 3/19/96	22.74
LUNCH W/RALPH - 3/6/96	27.20
LUNCH W/RALPH 3/21/96	26.51
TELEPHONE CHARGES	52.00
Total	$5,729.43