

## BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Bauer for President 2000, Inc. )  
 and Francis P. Cannon, as treasurer )  
 Campaign for Working Families PAC )  
 and Amy R. Myers, as treasurer )  
 Lukens Cook Company )  
 America Direct, Inc. )  
 Moore Response Marketing Services )  
 RST Marketing Associates, Inc. )

**SENSITIVE**

MUR 5396

2004 OCT 20 P 4: 14

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FEDERAL ELECTION  
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## GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

Accept the attached conciliation agreements and close the file with respect to respondents

Bauer for President 2000, Inc. ("the Committee") and Francis P. Cannon, as treasurer, and

Campaign for Working Families PAC ("CWF") and Amy R. Myers, as treasurer. Take no

further action and close the file with respect to respondents America Direct, Inc. ("America

Direct"), Moore Response Marketing Services ("Moore"), and RST Marketing Associates, Inc.

("RST"). Close the file with respect to respondent Lukens Cook Company ("Lukens").<sup>1</sup>

II. BACKGROUND

MUR 5396 arose from an audit referral (AR #02-08). The referral alleged that CWF

made, and the Committee accepted, excessive in-kind contributions resulting from an exchange

of their respective mailing lists or portions of mailing lists of unequal value, resulting in CWF's

<sup>1</sup> The Commission previously found no reason to believe that respondent Lukens made a prohibited contribution to the Committee, however the file was not closed at that time. Therefore, this report will not address Lukens, other than to recommend that the Commission close the file with respect to this respondent.

1 violation of 2 U.S.C. § 441a(2)(A) and the Committee's violation of 2 U.S.C. § 441a(f).<sup>2</sup> The  
2 referral also alleged that vendors America Direct, Moore and RST granted, and the Committee  
3 accepted, prohibited contributions by means of inappropriate extensions of credit for goods and  
4 services provided to the Committee, resulting in both the vendors' and the Committee's violation  
5 of 2 U.S.C. § 441b(a). On November 18, 2003, the Commission found reason to believe with  
6 respect to the violations set forth above and authorized conciliation

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8 Each respondent was notified of the Commission's  
9 findings and this Office entered into the appropriate conciliation discussions with the  
10 respondents.

11 **III. DISCUSSION**

12 **A. The Mailing Lists**

13 In early 1999, CWF and the Committee entered into an oral agreement to exchange donor  
14 mailing lists.<sup>3</sup> See Attachment 4, p. 2. According to that agreement, the Committee received a  
15 complete copy of CWF's donor and non-donor files for use during the presidential campaign. At  
16 the end of the presidential campaign, CWF was to receive a complete copy of the Committee's  
17 donor and non-donor files. The CWF names were to remain the property of CWF, the  
18 Committee names were to remain the property of the Committee, and each entity was to pay for  
19 its use of names from the other's mailing list. Through this exchange of lists, the Committee

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<sup>2</sup> All of the facts in this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Federal Election Campaign Act of 1971, as amended ("the Act"), herein are as it read prior to the effective date of BCRA and all citations to the Commission's regulations herein are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

<sup>3</sup> Although there does not appear to be any written agreement, the elements of the oral agreement were later delineated in a memorandum. See Attachment 4, pp. 6-7.

1 accessed a significantly larger number of names from CWF's mailing list than CWF accessed  
2 from the Committee's mailing list. Based on the number of names accessed and the usual rental  
3 prices for names on the respective lists, the Commission found reason to believe that CWF made,  
4 and the Committee accepted, excessive in-kind contributions through the exchange of mailing  
5 lists of unequal value, and authorized conciliation. CWF and the Committee were made aware of  
6 the Commission's findings.

7 The Committee used portions of the CWF mailing list multiple times, aggregating  
8 957,338 names from CWF's mailing list through February 2000. CWF rents its mailing list for  
9 \$115 per 1000 names, making the value of the names accessed by the Committee \$110,094  
10  $(957,338/1,000 \times \$115)$ . CWF similarly used portions of the Committee's mailing list multiple  
11 times, aggregating 205,642 names from the Committee's mailing list through July 2004. The  
12 Committee rents its mailing list for \$130 per 1000 names, making the value of 205,642  
13 Committee names \$26,733.20  $(205,642/1,000 \times \$130)$ . Based on the number of names accessed  
14 and the rental rates, the difference in value of the names would be \$83,360.80, with CWF's list  
15 being significantly more valuable than the Committee's list. Because CWF previously  
16 contributed \$4,000 to the Committee, any value difference greater than \$1,000 would be an  
17 excessive in-kind contribution. 2 U.S.C. § 441a(a)(2)(A).

18 Although initially claiming that the exchange was of equal value, CWF and the  
19 Committee now admit that their exchange of mailing lists was not an exchange of equal value.  
20 However, CWF and the Committee also assert three compelling issues in their defense that has  
21 led this Office to recommend the Commission approve a lower civil penalty than originally  
22 authorized for conciliation.

23 First, the Committee used CWF's mailing list from February 5, 1999 through February

28, 2000, and CWF began using the Committee's list in June 2000. Respondents argue that the statute of limitations began to run on the date of first use on February 5, 1999, and therefore the statute of limitations ran as of February 2004.<sup>4</sup> This Office has taken the position that respondents' use constituted a continuing action and, therefore, the statute of limitations did not begin to run until the date of last use in May 2003.<sup>5</sup> The differences in opinion as to the statute of limitations would likely continue to be an issue in any further enforcement of this matter. Our research has uncovered no Commission precedent on this point, and it is unclear how a reviewing court would rule on this issue.

Even if the matter is deemed to be within the statute of limitations, respondents have two respectable, if not incontrovertible, arguments. Respondents argue that, as outlined in the Factual and Legal Analyses attached to the First General Counsel's Report, a number of different ways exist to calculate valuation of mailing lists. Indeed, one method referenced by respondents would significantly decrease the difference in value between CWF's and the Committee's mailing lists. CWF further argues that the method chosen by the Commission's auditors was inappropriate for the "sophisticated" transaction brokered between CWF and the Committee. *See* Attachment 4, p. 2. While standing by the valuation method chosen by the auditors, ultimately respondents' argument, that no absolute consensus exists regarding the proper method of valuing mailing lists, rings true.

Finally, respondents argue that the Commission should take into consideration the length

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<sup>4</sup> Negotiations commenced in February 2004, shortly after we received the reason to believe findings and conciliation approval.

<sup>5</sup> Another possible theory is that each use of the mailing lists was a separate and distinct event and, therefore, each use has its own corresponding start date for the statute of limitations. Under this theory, the statute of limitations has run for only some of the Committee's uses of the mailing lists.

1 of time the Committee and CWF would use each other's mailing lists. The Committee could use  
2 CWF's more valuable names only for a short period of time (the length of the presidential  
3 campaign), but CWF would continue to use the Committee's less valuable names in perpetuity.  
4 See Attachment 3, p. 2; Attachment 4, pp. 3 and 10. Respondents claim that this infinite use  
5 decreases the difference in value between the lists in the long run. While respondents do not cite  
6 any precedent in support of this theory, common sense dictates some logic to the argument. In  
7 response, this Office has taken the position that the Committee names would continually  
8 decrease in value over time (*i.e.*, because people die or move), ultimately rendering the  
9 Committee names useless to CWF. However, we recognize that, in some instances, the  
10 difference in length of time could impact valuation and have taken it into consideration when  
11 making our recommendations.

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15 **B. The Vendors**

16 The Committee used three vendors to provide it with direct mail services. All three  
17 vendors properly invoiced the Committee for its services, but the Committee did not fully pay the  
18 vendors and/or did not pay the vendors in a timely manner. This is considered an extension of  
19 credit to the Committee. The vendors' extensions of credit would be considered in-kind  
20 contributions to the Committee unless such extensions were given in the ordinary course of  
21 business and on terms substantially similar to extensions of credit to non-political debtors of  
22 similar risk and size of obligation. 11 C.F.R. §§ 116.3 and 116.4. Here, after being notified of  
23 the Commission's reason to believe findings, the vendors responded and provided evidence that

1 each acted in a commercially reasonable manner with respect to the Committee. *See*  
2 Attachments 5 through 7.

3 Moore confirmed that it performed work for the Committee and that the Committee was  
4 delinquent in its payments to Moore. *See* Attachment 5. Moore confirmed that it had a number  
5 of clients it considered "slow payers," and included the Committee in that category. Moore  
6 stated that its policy in the current economy was to be more flexible with slow paying accounts  
7 where the account holder demonstrated a commitment to satisfying the debt. *See* Attachment 5,  
8 pp. 23-24. Moore stated that it implemented this policy because it was not cost effective to send  
9 all late receivables to a third-party collection agency. Moore also provided evidence that,  
10 beginning in August 2000, it began contacting the Committee for payment on late bills. In  
11 November 2001, when the Committee stopped returning Moore's phone calls, Moore turned over  
12 the Committee's account to a collection agency that also made repeated attempts to obtain  
13 payment from the Committee through July 2003. *See* Attachment 5, pp. 1-2. Indeed, throughout  
14 this latter period, the Committee provided some payments to Moore, but still maintained an  
15 outstanding balance due. Moore did not provide evidence that it treated non-political debtors  
16 similar to the manner in which it treated the Committee. However, Moore has offered credible  
17 evidence that it acted in a commercially reasonable manner and had given similar extensions of  
18 credit to other clients.

19 America Direct confirmed that another company, The Lukens Company ("Lukens"), hired  
20 it to perform work for the Committee and that the Committee was delinquent in its payments to  
21 America Direct. *See* Attachment 6. America Direct provided evidence that it often does not  
22 receive timely payments from political and non-political clients, and that many delinquent clients  
23 pay in increments. *See* Attachment 6, pp. 3, 7-33. America Direct provided evidence that, as

1 long as the delinquent client (either political or non-political) continued to service portions of its  
2 debt, America Direct would not send out additional invoices or payment requests but might  
3 contact the client by telephone. Specifically relating to the Committee's account, America Direct  
4 usually directed inquiries regarding the Committee's bills to Lukens and stated that it had  
5 contacted Lukens to follow up on outstanding Committee invoices. *See* Attachment 6, p. 3. On  
6 a few occasions, America Direct did speak with the Committee directly regarding its outstanding  
7 balance. America Direct provided proof that the Committee still maintained an outstanding  
8 balance, but continued to make partial payments. America Direct has offered credible evidence  
9 that it acted in a commercially reasonable manner and had provided the extension of credit on  
10 terms and conditions similar to those given to comparable non-political clients.

11 RST confirmed that America Direct hired RST to perform work for the Committee and  
12 that the Committee was delinquent in its payments to RST. *See* Attachment 7. RST provided  
13 evidence that many other clients, both political and non-political, paid RST incrementally over  
14 time instead of when invoices were due. *See* Attachment 7, pp. 3-6. RST stated that it would  
15 usually communicate with such clients by phone and would not send out additional payment  
16 requests. RST stated that it communicated with America Direct about the Committee's account  
17 and demonstrated that the Committee continued to make partial payments on its outstanding  
18 balance. *See* Attachment 7, pp. 3, 7. RST did not provide any proof of those communications or  
19 other proof of actions taken by RST to collect on the Committee's delinquent account. However,  
20 if one construes RST's evidence in conjunction with the evidence provided by the other  
21 respondent vendors regarding the normal course of business in this industry, RST has offered  
22 credible evidence that it acted in a commercially reasonable manner and had given similar  
23 extensions of credit to other comparable non-political clients.

1           The vendors' responses that they acted in a commercially reasonable manner are  
2 plausible, but are not indisputable, and this Office could request additional detailed information  
3 from the vendors regarding specific actions taken by the vendors to attempt to collect on the  
4 Committee's delinquent accounts. However, considering the evidence already provided by the  
5 vendors indicating their general practices and demonstrating specific actions taken with respect  
6 to the Committee; the age of this case; and the Commission's limited resources, this Office  
7 recommends taking no further action as to Moore, America Direct and RST.

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15 **IV. CONCLUSION**  
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Accordingly, for the reasons outlined above, this Office recommends the Commission accept the attached conciliation agreements as to CWF and the Committee; take no further action as to Moore, America Direct, and RST; close the files as to all respondents; and approve the appropriate letters.

**V. RECOMMENDATIONS**

1. Accept the attached conciliation agreement with Bauer for President 2000, Inc. and Francis P. Cannon, as treasurer;
2. Accept the attached conciliation agreement with Campaign for Working Families PAC and Amy R. Myers, as treasurer;
3. Take no further action with respect to America Direct, Inc.;
4. Take no further action with respect to Moore Response Marketing Services;
5. Take no further action with respect to RST Marketing Associates, Inc.;
6. Close the file with respect to Bauer for President 2000, Inc. and Francis P. Cannon, as treasurer; Campaign for Working families PAC and Amy R. Myers, as treasurer; Lukens Cook Company; America Direct, Inc.; Moore Response Marketing Services; and RST Marketing Associates, Inc.; and

7. Approve the appropriate letters.

Lawrence H. Norton  
General Counsel

10/20/04  
Date

BY:

Rhonda J. Vosdingh  
Rhonda J. Vosdingh  
Associate General Counsel  
for Enforcement

Sidney Roke  
Sidney Roke  
Assistant General Counsel

Kimberly Hart  
Kimberly Hart  
Attorney

by  
SK.

Other staff assigned: Alexandra Doumas

Attachments:

1. Conciliation Agreement with respect to Bauer for President 2000, Inc. and Francis P. Cannon, as treasurer
2. Conciliation Agreement with respect to Campaign for Working Families PAC and Amy R. Myers, as treasurer and copy of a check for \$15,000 in payment of the civil penalty
3. Response of Bauer for President 2000, Inc. and Francis P. Cannon, as treasurer to Commission's finding of RTB
4. Response of Campaign for Working Families PAC and Amy R. Myers, as treasurer to Commission's finding of RTB
5. Response of America Direct, Inc. to Commission's finding of RTB
6. Response of Moore Response Marketing Services to Commission's finding of RTB
7. Response of RST Marketing Associates, Inc. to Commission's finding of RTB