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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

	MUR: 6023
	DATE COMPLAINT FILED: June 9, 2008
	DATE OF NOTIFICATION: June 16, 2008
	LAST RESPONSE RECEIVED: July 31, 2008
	DATE ACTIVATED: September 2, 2008
	EXPIRATION OF SOL: September 7, 2012/ April 1, 2013
COMPLAINANT:	David Donnelly, Director of Campaign Money Watch
RESPONDENTS:	John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer Rick Davis The Loeffler Group, LLP Susan Nelson 3eDC, LLC
RELEVANT STATUTES AND REGULATIONS:	2 U.S.C. § 431(8) 2 U.S.C. § 434(b) 2 U.S.C. § 441a 2 U.S.C. § 441b 11 C.F.R. § 100.5 11 C.F.R. § 100.7(a)(4) 11 C.F.R. § 110.1 11 C.F.R. § 113.1(g)(6)(iii) 11 C.F.R. § 114.2(b) 11 C.F.R. § 116.1 11 C.F.R. § 116.3 11 C.F.R. § 116.4 11 C.F.R. § 116.10
INTERNAL REPORTS CHECKED:	Disclosure Reports
FEDERAL AGENCIES CHECKED:	U.S. Senate, Office of Public Records

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I. INTRODUCTION

This matter is based upon a complaint alleging that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, ("McCain Committee") may have received an excessive in-kind contribution from a lobbying firm and a prohibited corporate contribution from an Internet consulting firm.[1] The complaint alleges that The Loeffler Group, LLP ("LG") made payments to Susan Nelson, a former lobbyist who left LG to become the McCain Committee's Finance Director, which amounted to undisclosed excessive in-kind contributions to the McCain campaign. The complaint also alleges that 3eDC, LLC ("3eDC"), an Internet consulting company partly owned by Rick Davis, McCain's campaign manager, made a prohibited corporate contribution to the McCain campaign when it reduced the campaign's debt to 3eDC by over $100,000.

Based upon the available information, including written responses from the respondents denying the allegations, there is no information to indicate that the respondents may have committed the violations alleged in the complaint. Accordingly, we recommend that the Commission find no reason to believe that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, Rick Davis, The Loeffler Group, LLP, Susan Nelson, and 3eDC, LLC violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in connection with the allegations in this matter and close the file.[2]

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[1] The complaint was based on information from a press report discussing lobbyist ties to the McCain campaign. Complaint at 1; Michael Isikoff, *McCain vs. Lobbyists*, NEWSWEEK, May 26, 2008, at 6.

[2] Along with its response to the complaint, the Loeffler Group, LLP submitted Motions to Sever, Dismiss, and to Submit the Response Under Seal ("Motions"). This Office circulated a Memorandum to the Commission, dated December 10, 2008, indicating that there was no basis for the Commission to consider the Motions. On April 15, 2009, the Commission approved the recommendations in the Memorandum denying LG's motions and approved a revised notification letter to counsel.

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II. THE LOEFFLER GROUP, LLP

A. Factual Background

Susan Nelson worked as a lobbyist for LG from August 2005 through July 2007, when she left to work full time as the Finance Director for the McCain campaign. LG Response to Complaint ("LG Response") at 1, 3 and Aff. at ¶ 6; McCain Committee Response to Complaint ("McCain Response") at 1; Tory Newmyer & Kate Ackley, *K Street Files*, ROLL CALL, July 13, 2005. After she left LG, she continued to receive monthly payments from the firm in the amount of $15,000 until April 2008. Isikoff, *supra* note 1, at 6. The complaint claims that the payments for alleged part-time consulting services "dwarfed [Nelson's] approximately $6,300 monthly salary" for full-time work with the McCain committee. Complaint at 3. As such, the complaint questions whether LG actually made excessive in-kind contributions to the McCain campaign by paying such a large salary to Nelson for part-time work and whether Nelson, in fact, did any work for LG during this period.

LG responds that from August through December 2007, LG's payments to Susan Nelson consisted of severance payments that were part of a severance agreement entered into with Nelson when she left the firm. LG Response at 5. LG explains that these payments were commercially reasonable, as well as consistent with and pursuant to LG's pre-existing severance policy and practices. *Id.* at 5, 11-12, and Aff. at ¶ 6. According to LG, the severance payments were less than her previous full-time salary and "on terms in the ordinary course of [LG's] business" from August through December 2007. *Id.* at 5 and Aff. at ¶ 6. However, LG's response does not verify the amount of the monthly payments to Nelson or Nelson's previous full-time salary. LG Chairman, Tom Loeffler, attests that during this time period, Nelson

provided advisory services directly to him and that he and Nelson may have had over 100 conversations regarding firm matters during that time. LG Response at 5 and 8, and Aff. at ¶ 7.

After the severance period ended in December 2007, LG entered into a consulting arrangement with Nelson for part-time work for which payments began in January 2008 in the same amount as the severance payments. LG Response at 6 and Aff. at ¶ 10. According to LG, the firm wanted to continue to consult with Nelson on various firm matters during this time, and because the work would be similar to the work she performed during the severance period, the parties agreed to payments in the same amount. *Id.* at 6.

The McCain campaign states in its response that it was aware of both LG's 2007 severance package and the 2008 consulting agreement with Nelson, and that it had no objection to Nelson working with LG on an "occasional basis provided that it did not interfere with any of her work for the Campaign." McCain Response at 1-2. The McCain Committee explains that it operated under the understanding that the payments were commercially reasonable and pursuant to LG's policies. *Id.* at 1. The campaign instructed LG that any salary payments that Nelson received from the firm pursuant to the 2008 consulting agreement "would have to be the usual and normal rate paid for such work in order to comply with federal election law and regulations," and the campaign reviewed the consulting agreement between Nelson and LG to ensure that it addressed these concerns. *Id.* at 2. None of the respondents, however, have provided a copy of this agreement to the Commission, and Nelson also did not file a response to the complaint, even though she was notified of it.

The arrangement between Nelson and LG ended in May 2008 when the McCain campaign instituted a conflict of interest policy applicable to lobbyists that prohibited campaign employees from being registered lobbyists. *Id.* at 2 and Exhibit A. As a result of the McCain

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Committee's new policy, Nelson left LG to work exclusively for the campaign, and LG de-listed her as a lobbyist in its 2007 Year End Reports filed pursuant to the Lobbying Disclosure Act of 1995. *Id.* at 4; *see* Loeffler Group's 2007 Year End Lobbying Reports, dated Feb. 14, 2008, *available at* http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm.

B. Legal Analysis

The Act prohibits contributions to a candidate or an authorized committee in excess of $2,300 in connection with federal elections. 2 U.S.C. § 441a. 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). LG is a limited liability partnership, and, as such, its contributions are permissible, subject to a $2,300 contribution limit. 11 C.F.R. § 110.1 (b)(1) and (e). A contribution by a partnership is attributed to the partnership and to each partner "[i]n direct proportion to his or her share of the partnership profits" or according to the partners' profit-sharing agreement as long as "[o]nly the profits of the partners to whom the contribution is attributed are reduced (or losses increased)" and "[t]hese partners' profits are reduced (or losses increased) in proportion to the contribution attributed to each of them." *Id.* There are five partners listed on the firm's website, and four donated the maximum $2,300 to McCain's primary election campaign.[3]

In the context of employment-related compensation, Commission regulations provide that payments from a third party to a candidate shall be considered a contribution unless the "compensation results from *bona fide* employment that is genuinely independent of the candidacy," " is exclusively in consideration of services provided by the employee as part of this

[3] Commission records indicate that LG partners Michael P. Daniels, Robert H. Finney, Tom Loeffler, and Hans C. Rickhoff each contributed $2,300 to the McCain Committee for the primary election.

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employment," and "the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same time period." *See* 11 C.F.R. § 113.1(g)(6)(iii). While this regulation applies to payments made to a candidate, the provision nevertheless aids in the analysis of the payments made to Susan Nelson as it sets forth standards by which to analyze compensation by third parties to highly-placed campaign employees to determine whether the compensation results in a contribution to the campaign.

The Commission has, in past enforcement matters, determined that compensation did not result in a contribution where the information available was consistent with the respondents' contentions that the arrangements were for *bona fide* services performed, independent of the candidacy, and did not exceed the compensation paid to similarly qualified persons. At the reason to believe stage, the Commission has examined the complaint and responses, alongside any publicly available information, in making this determination. For example, in MUR 5260 (Talent for Senate), the Commission found no reason to believe that violations occurred as result of payments from a law firm and university to a candidate, where the information provided by Respondents indicated that the payments were for *bona fide* employment, the candidate's high public profile played a role in determining the amount of his compensation, there was no indication to suggest that the compensation was for anything other than *bona fide* services, and the evidence showed that compensation paid to Talent was comparable to compensation paid to similarly qualified persons for the same work over the same period of time. MUR 5260, First General Counsel's Report, dated Dec. 19, 2002, at 16-23. In that matter, the Commission noted that there was "an absence of any evidence tending to show that Arent Fox and Talent entered into their arrangement with the intent to subsidize Talent's Senate campaign or exploratory efforts." *Id.* at 23.

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Other matters have required investigations into the criteria set forth in 11 C.F.R. § 113.1. In MUR 5014 (Jeff Flake for Congress), the Commission investigated whether payments made to a federal candidate by a non-profit organization were prohibited or excessive contributions under the Act. At the reason to believe stage, the available information raised questions about the amount of work the candidate performed, whether the amount of compensation paid to the candidate was commensurate with his work and whether it was comparable with what would be paid to another similarly qualified person, why the timing of the consulting agreement was to last only for the duration of the campaign, and whether the organization would have had sufficient funds to pay the candidate without the substantial donation that was made by the candidate's campaign co-finance chairman at that time the candidate was hired. *See* First General Counsel's Report dated April 2, 2001. After the investigation, the Commission determined there was insufficient evidence in that matter to support the alleged violations. Instead, the evidence suggested that there was a *bona fide* consulting agreement between the parties, the salary payments were made to the candidate only for services he rendered, and the amount of the candidate's compensation was commensurate with the amount paid to similarly qualified persons performing the same work. MUR 5014, General Counsel's Report # 2, dated October 3, 2003, at 5-18.

Similarly, in MUR 5571 (Tanonaka for Congress), the Commission authorized an investigation when information available at the reason to believe stage suggested that the candidate's receipt of a lump sum payment from Koa Companies was contrary to the terms of the consulting agreement and was paid at a time when his campaign committee's financial position was poor; the candidate concealed his business relationship with Koa until after state and federal agencies initiated investigations into his campaign activities; and the candidate engaged in a

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pattern of hiding the sources of funds used to make his personal loans to his campaign, suggesting knowing and willful violations of the Act. *See* Factual and Legal Analysis for Dalton Tanonaka and Tanonaka for Congress. However, the Commission found, after an investigation, that there was a consulting agreement between Tanonaka and the Koa Companies for *bona fide* consulting services, the agreement was independent of Tanonaka's candidacy, and that compensation Tanonaka received was in consideration for services he performed for the company and commensurate with the amount of money that would be paid to any similarly qualified person for the same work over the same period of time. *See* MUR 5571, General Counsel's Report # 2, dated September 20, 2007; *c.f.*, MUR 5638 (Bill Abbott For Preserving American Jobs) (Commission found reason to believe and entered into conciliation agreement with union where Respondents admitted that payments to the candidate were not for *bona fide* employment, genuinely independent of the candidacy, in consideration for services provided, or equivalent to what would be paid to similarly situated employees).

The complaint questions whether LG's payments to Nelson were for *bona fide* employment or were intended solely to supplement her smaller salary with the McCain campaign. If the latter is true, then the McCain Committee would have received an excessive in-kind contribution from LG. 2 U.S.C. § 441a. The complaint also raises a legitimate concern over whether Nelson could have simultaneously worked as the Finance Director for a presidential campaign and provided consulting services to another employer. However, the responses from LG and the McCain Committee rebut these allegations, and we have found no information in the public record to contradict their assertions that Nelson did perform work for LG during the time period in question. LG's response verifies that the payments to Nelson were for work she performed for the firm. In a sworn affidavit, LG Chairman Tom Loeffler explains

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that payments made to Nelson from August through December 2007 were part of a severance package, and from January through April 2008, the payments were compensation for her *bona fide* consulting services. *Supra* at pp. 3-4. LG, however, does not provide any examples of projects on which Nelson consulted during this time. The McCain Committee also indicates that it reviewed LG's consulting agreement with Nelson, and it relied on "express statements" by LG that both the severance and consulting agreements with Nelson were "consistent with and pursuant to [LG's] pre-existing severance policy and practices . . . in the usual and ordinary course of LG's business and at commercially reasonable terms." McCain Response at 2. Although we do not have an affidavit from Nelson, there is no information to suggest that LG's payments to Nelson were not for actual services she performed for the firm.

The complaint also draws attention to the size of the monthly payments LG made to Nelson ($15,000) compared with Nelson's monthly salary with the McCain campaign ($6,300). This fact alone does not suggest that LG's payments were not for *bona fide* consulting services or in an amount greater than what would be paid to a similarly qualified individual for the same type of work. In fact, it is not unusual for compensation in the private sector to be substantially greater than payments made to campaign staff members. In the context of advisory opinion requests, the Commission has permitted compensation plans that are tied to factors other than billable hours, such as seniority, the ability to attract clients, and other skills. For instance, in Advisory Opinion 2004-08 (American Sugar Cane League), the Commission found there was no prohibited contribution where a corporation's severance package to a candidate was tied to past employment services, based on objective considerations, and comparable to those packages offered to similarly qualified employees. *See also* Advisory Opinion 2006-13 (Spivack) (compensation paid to candidate did not constitute a contribution as long as it was in accordance

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with the firm's established compensation plan); Advisory Opinion 2004-17 (Klein) (compensation for consulting services actually rendered was not a contribution if it satisfied criteria in 11 C.F.R. § 113.1(g)); Advisory Opinion 1979-74 (Emerson) (compensation for services that is comparable to amount paid to other similarly qualified persons for the same work over the same period would not be a contribution). However, the Commission has been clear over the years that where compensation is tied to billable hours, a contribution results when the candidate's compensation is not reduced to reflect the actual hours worked. *See, e.g.*, Advisory Opinion 2000-1 (Taveras); Advisory Opinion 1980-115 (O'Donnell); Advisory Opinion 1978-06 (Garr).

While LG does not describe the salaries that other similarly qualified persons would have received for the same work, 11 C.F.R. § 113.1(g)(6)(iii)(C), in his affidavit, Tom Loeffler does explain how he determined Nelson's salary payments for this time period. He explains that Nelson's compensation was not tied to billable hours, but rather "on the basis of [Loeffler's] 30 years experience as an employer with knowledge of the marketplace and the true value of a person's professional services," and included factors such as seniority and status within the firm, Nelson's ability to attract and retain clients, her skills, and her "value to [LG] as an around-the-clock advisor." LG Response at 3 and Aff. at ¶ 3. LG also states that its severance agreement was made in accordance with the firm's past practices, in the firm's "ordinary course of business on terms substantially similar to those offered other employees in recognition of bona fide work," and did not exceed an amount given to others in similar situations. *Id.* at 12 and Aff. at ¶ 6. I

Although LG indicates that Nelson's monthly payments during this time period were less than her monthly salary when she worked full time for the firm, LG does not specify the amount

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of those monthly payments or Nelson's previous salary. We were also unable to locate information about Nelson's salary through publicly available sources. Although the Lobbying Disclosure Act of 1995 requires lobbying firms to register their lobbyists and report the firm's income and expenditures, the firm is not required to report individual lobbyists' salaries. According to news reports, however, lobbyists' salaries for well-connected staff can start as high as $300,000 a year. *See* Jeffrey H. Birnbaum, *The Road to Riches is Called K Street*, WASH. POST, June 22, 2005, at A01. Previously, Nelson had been a Principal at the firm, and had many years of professional fundraising and government affairs consulting experience at the firm and previously with other organizations. LG Response at 3 and Aff. at ¶ 1. As further justification for her salary payments, Loeffler also explains that he relied heavily on Nelson during the time period in question because three other "key personnel" had recently left the firm. *Id.* at 5.

There is no information available to demonstrate that LG's payments to Nelson from August 2007 through April 2008 were inappropriate. LG contends that the payments were tied to Nelson's consulting services actually rendered to the firm, that it had a past business practice of offering severance packages to departing employees, that it followed such practice in offering Nelson a severance package, that Nelson's payments were tied to factors other than billable hours, and that they were less than her prior full-time salary. 11 C.F.R. § 113.1(g)(6)(iii). The complaint fails to provide any specific information that would contradict these assertions.

Even though LG's and the McCain Committee's responses appear to rebut the speculative allegations in the complaint, some questions remain regarding how much work Nelson actually performed for the firm. Although LG's response makes general statements that Nelson's compensation did not exceed the amount that would have been given to others in a similar situation, the response fails to provide any specific examples in support. LG's response

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would have been more factually complete and compelling had it provided a list of matters or projects on which Nelson consulted during this time. In similar cases, the Commission has weighed the information in the complaint and responses when determining whether to proceed with an investigation. In MUR 5736 (Friends for Mike McGavick), for instance, the Commission found that while the responses to the complaint were not factually complete, the complaint, which alleged that the candidate's employer altered the terms of his employment agreement that in turn resulted in lucrative benefits for the candidate, failed to provide sufficient facts to warrant an investigation. *See* MUR 5736, First General Counsel's Report dated Nov. 22, 2006. In that matter, the Respondents explained that the candidate's employment agreement was converted to a severance package in the ordinary course of business and included payments for services McGavick was to provide during the company's transition to a new CEO. *Id.* at 3-5. Moreover, there was no information available to indicate that McGavick did not perform *bona fide* work for the corporation during the transition or that he was paid more than other departing executives. *Id.* at 10; *see also*, MUR 5701(Bob Filner for Congress), First General Counsel's Report, dated July 10, 2006, at 5 (finding allegations and available information did not warrant an investigation where the respondent provided "sufficient and specific facts to rebut the complainant's allegations" that a business run by the candidate's spouse was a "sham"). In the *Filner* matter, there was also no information presented to contradict the Respondents' contentions that *bona fide* services were provided to the campaign committee and that the company was paid fair market value for the work. *Id.*

Similarly, while the responses from LG and the McCain Committee in this matter do not provide substantial details regarding the arrangements with Nelson, the allegations in the complaint lack sufficient facts to contradict the Respondents' assertions and to warrant an

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investigation. *See* Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee), issued December 21, 2000 (stating that "[u]nwarranted legal conclusions from asserted facts . . . or mere speculation . . . will not be accepted as true," and "[s]uch speculative charges, especially when accompanied by direct refutation, do not form an adequate basis to find reason to believe that a violation of FECA has occurred"). Accordingly, we recommend that the Commission find no reason to believe that the McCain Committee, Susan Nelson, and the Loeffler Group, LLP, violated the Act in connection with the allegations relating to payments that LG made to Nelson.

III. 3EDC, LLC

A. Factual Background

The McCain campaign hired 3eDC, a company partly owned by McCain campaign manager Rick Davis, to develop and maintain the campaign's website. 3eDC Response to Complaint ("3eDC Response") at 1. 3eDC provided those services, which included website development, e-mail list building, social networking tools, and database management from January through May 2007. *Id.* at 2-4. The complaint alleges that 3eDC reduced its bill for Web services provided to the McCain campaign by $107,475 at a time when the campaign was struggling financially and attempting to cut costs, resulting in a prohibited corporate contribution under 2 U.S.C. § 441b and 11 C.F.R. § 100.55. The complaint refers to public statements by the McCain campaign that there were billing errors and that the bill was renegotiated. However, the complaint questions how "a campaign manager can renegotiate a contract with a firm that he partly owns without at least the appearance that he has used his influence with both parties to reduce the debt." Complaint at 6.

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A number of press articles report that Rick Davis arranged for the campaign's initial service contract with the vendor, 3eDC, and that the contract with 3eDC "initially brought objections from top [McCain] advisers," with some individuals accusing Davis of "self-dealing." Michael Cooper, *Savior or Machiavelli - McCain's Top Aide Carries On*, N.Y. TIMES, Oct. 23, 2007, at A26; Matthew Mosk, *Top McCain Adviser has Found Success Mixing Money, Politics*, WASHINGTON POST, June 26, 2008, at A01. However, the McCain Committee, 3eDC, and Davis claim that Davis was not involved in negotiating the initial contract or in any other discussions concerning 3eDC. *See, e.g.*, 3eDC Response at 2 and Attachment 1. In his one-page response, Davis explains that he was "only a passive investor in 3eDC," and not involved in the day-to-day operations. Davis Response to Complaint ("Davis Response") at 1. Davis and the McCain Committee also state that Davis recused himself from any involvement with 3eDC while working for the McCain campaign. Davis Response at 1; McCain Response at 1 and Attachment A, ¶ 4. There is conflicting publicly available information on whether Davis disclosed his financial interest in 3eDC to McCain early in the campaign. Cooper, *supra* at A26; Edward T. Pound, *Troublesome Resumes*, U.S. NEWS & WORLD REPORT, May 28, 2007, at 50.

The McCain Committee's and 3eDC's responses explain that the parties had a legitimate dispute regarding the amount the campaign owed to 3eDC. 3eDC and the McCain campaign entered into a contract for services on January 26, 2007. 3eDC Response at 2-3 and Attachment 2 (Services and Licenses Agreement). The contract details 3eDC's fee structure for its services to the McCain Committee, including base fees, hourly rates for additional work, and administrative fees. 3eDC Response at 2-3 and Attachment 2, at 24. In May 2007, 3eDC decided to invoke the contract's termination clause because the campaign had failed to pay two outstanding invoices when they were due, which 3eDC considered to be a material breach of the

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agreement. 3eDC at 3 and Attachment 2, ¶ 9.2. Initially, 3eDC sent a letter, dated May 11, 2007, to the McCain Committee requesting that it pay $164,138.21, the total owed on those invoices, in order to cure the material breach. *Id.* at Attachment 3. The parties discussed the matter and decided to terminate the service agreement. *Id.* at 3. They entered into a Termination Agreement and Release ("Termination Agreement"), dated May 18, 2007, that required payment of the overdue invoices totaling $164,138.21, required 3eDC to deliver a Final Statement of unpaid services to the campaign by May 25, 2007, included a provision providing for accrual of 1% interest per month for amounts that were past due, and required the campaign to make full payment, plus interest, within 60 days of receipt of the Final Statement. 3eDC Response at 3 and Attachment 4. The Termination Agreement estimated that the remaining invoices to be included in the Final Statement totaled approximately $725,000. *Id.* at Attachment 4, ¶ 1(b). The McCain campaign paid $164,138.21 upon execution of the agreement on May 18, 2007.

According to the McCain Committee, 3eDC never delivered a "Final Statement" to the campaign, but instead "revised and confirmed the existing pending invoices." *See* McCain Response at Attachment B, page 4. Nevertheless, before the sixty-day deadline, the McCain Committee sent a letter dated July 16, 2007, invoking an "audit" provision from the Services and License Agreement that allowed the campaign to conduct a review and analysis of the vendor's records supporting the fees and expenses invoiced by 3eDC. 3eDC Response at 4, Attachment 2, ¶ 3.6 and Attachment 3; McCain Response at 1 and Attachment 6 (Letter to 3eDC). The McCain Committee explains that it also began its review in response to news reports alleging that Rick Davis personally benefitted from the committee's contract with 3eDC. McCain Response at 1 and Attachment A, ¶¶ 2-3.

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Upon completing its review, the McCain Committee submitted a seven-page summary to 3eDC, dated September 10, 2007, that proposed adjustments for fees that it believed were in error or where it believed there was insufficient documentation to support the expenses, and proposed to pay a total of $585,001.83 to settle the debt. 3eDC Response at Attachment 6. The McCain Committee's letter provides a detailed account of the disputed invoice amounts. *Id.* The McCain Committee has also provided to the Commission a copy of its internal written summary of its 3eDC account. McCain Committee at Attachment B. Specifically, the Committee proposed a reduction in 3eDC's hosting charges by $22,022.42; in Internet advertising by $42,341.34; and website content and development by $63,119.24. *Id.* During the course of its review, the campaign also identified adjustments in 3eDC's favor, which it credited to 3eDC. *Id.* at 1-2. In total, the McCain Committee proposed a reduction of approximately $127,483.

According to Chief Executive Officer Scott Wilkinson, while 3eDC did not agree with all of the adjustments, it believed that the proposal was commercially reasonable and accepted the committee's proposal, subject to some additional terms. 3eDC at 4 and Attachments 1, 7; McCain Response at Attachment C. Those terms included required interest payments of 6% a year, monthly installments, a payment schedule, late fees of 1% per month, an acceleration clause if the campaign ceased operating before December 1, 2008, and required that the McCain Committee not seek reimbursement for the cost of its audit. 3eDC Response at 5 and Attachment 7. 3eDC believed that accepting the campaign's proposal, along with the additional terms, was commercially reasonable and the best course of action to "resolve the matter in order to get paid." *Id.* at 4. 3eDC explained that it balanced the costs of potential litigation, which would also result in more time passing without receiving payments from the campaign,

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compared with the "relatively small amount involved." *Id.* at 5. Based on those considerations, settling the matter at the reduced amount proposed made the most "financial sense." *Id.* Ultimately in September 2007, both parties agreed to these terms, which required 15 monthly payments that would end on December 25, 2008. 3eDC Response at Attachment 7; McCain Response at 2. According to the McCain Committee, all required monthly payments were made to 3eDC pursuant to the parties' negotiated resolution, and the full amount was paid several months early. McCain Response at Attachment A, ¶ 8.

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B. Legal Analysis

The Act prohibits corporations from making contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). As a limited liability company, 3eDC may be subject to the prohibition against corporate contributions, depending on whether it elects to be treated as a partnership or corporation by the Internal Revenue Service. 11 C.F.R. § 110.1(g). If treated as a partnership, it is possible that 3eDC made an excessive in-kind contribution to the McCain Committee in violation of 2 U.S.C. § 441a when it reduced the committee's debt as that reduction was well in excess of the maximum contribution of $2,300 per partner as allowed by law. 11 C.F.R. § 110.1(e). If 3eDC elected tax treatment as a corporation, it may have made a corporate contribution in violation of 2 U.S.C. § 441b(a) if its agreement with the McCain Committee was not commercially reasonable. Information regarding 3eDC's tax election is not publicly available. Therefore, it is unclear whether 3eDC is subject to the prohibition against corporate contributions or the contribution limits applicable to partnerships. 11 C.F.R. § 110.1(g). Nonetheless, it is not necessary to investigate 3eDC's tax status because we conclude that the agreement was commercially reasonable, and thus, there is no reason to believe there is a violation of either section 441a or 441b, as explained below.

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The allegations in the complaint raise the question whether 3eDC's reduction of its bill of services to the McCain Committee by $127,483 was commercially reasonable. Commission regulations provide that a commercial vendor may forgive or settle a debt for less than the full amount owed or may resolve a disputed debt, if it has treated the debt in a commercially reasonable manner and complied with the regulatory requirements in 11 C.F.R. §§ 116.4 and 116.10. "Commercial vendor" is defined as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those services." 11 C.F.R. § 116.1(c). For unincorporated vendors, such as 3eDC, the amount forgiven is not considered a contribution if the commercial vendor has treated the debt in a commercially reasonable manner and satisfied the relevant requirements of 11 C.F.R. § 116.7 or 116.8. *Id.* at § 116.4(a). A vendor can demonstrate that it has treated a debt in a commercially reasonable manner by showing that: (1) the original extension of credit was proper pursuant to 11 C.F.R. § 116.3; (2) the committee has undertaken all reasonable efforts to satisfy the outstanding debt, such as engaging in additional fundraising, reducing overhead and administrative costs, or liquidating assets; and (3) that the vendor has pursued its remedies as vigorously as it would pursue its remedies against a similarly situated non-political debtor, *i.e.*, that it has made oral and written requests for payment, withheld delivery of goods or services until overdue debts are satisfied, imposed additional charges for late payment, referred the debt to a collection service, or litigated for payment on the debt. 11 C.F.R. § 116.4(d).

Ongoing committees may resolve disputed debts, but the parties must nevertheless treat a disputed debt in a "commercially reasonable manner" in accordance with 11 C.F.R. § 116.4(a) and (d). A disputed debt, defined as an actual or potential debt or obligation where there is a *bona fide* disagreement between the creditor and the political committee as to the existence of

the debt or the amount owed, is not subject to the debt settlement requirements and procedures set forth in 11 C.F.R. §§ 116.7 and 116.8. *See* 11 C.F.R. §§ 116.1(d) and 116.7(c)(2).

Commission regulations also state that a commercial vendor may extend credit to a candidate or political committee, provided that the extension of credit is in the ordinary course of the vendor's business practices and that the terms of the credit are substantially similar to extensions of credit to non-political entities, and they further provide that an extension of credit includes agreements between a vendor and political committee providing additional time to pay an amount due or the failure of the committee to make full payment by the previously agreed upon due date. 11 C.F.R. §§ 116.1(e) and 116.3(a).

Here, the complaint questions the circumstances surrounding the negotiation of the debt the McCain Committee owed to 3eDC. Both 3eDC and the McCain Committee assert that they had a *bona fide* dispute regarding the amount that the campaign owed and add that the reduction that was ultimately negotiated was commercially reasonable. As discussed below, there is no information to contradict the Respondents' contentions.

First, there is no information to indicate that the original service contract between 3eDC and the campaign, or that their negotiations concerning the amount owed by the campaign, was not proper pursuant 11 C.F.R. § 116.3(c). *See* 11 C.F.R. § 116.4(d)(1). The complaint provides no information to demonstrate that 3eDC deviated from its established procedures and past practices in any of its arrangements with the campaign. *Id.* at § 116.3(c)(1). While 3eDC has not provided specific information to demonstrate that its actions in re-negotiating the fees with the Committee followed the company's established procedures, whether the transaction "conformed to the usual and normal practice in the commercial vendor's trade or industry," or if it was on the same terms as those provided to non-political clients, as required by 11 C.F.R.

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§ 116.3(c)(1)-(3), the Respondents have provided the Commission with substantial documentation to show that they negotiated a reasonable resolution of a commercial dispute. As part of their responses to the complaint, they both provided thorough documentation regarding the initial service contract, correspondence with each other concerning termination of the contract and negotiation of the debt, and included sworn affidavits from representatives describing the circumstances behind the negotiations. In addition, the McCain Committee provided lengthy documentation containing the results of its line item review of its account with 3eDC. *See* McCain Response at Attachment B (providing fifteen-page redacted internal memorandum to Commission); *see also* 3eDC Response at Attachment 6 (providing Committee's seven-page summary sent to 3eDC). Further, the documentation demonstrates that the Respondents each followed procedures established in those agreements in order to terminate the contract, review invoices, and resolve disputed amounts due. *Supra* at 14-17.

Second, the McCain Committee's efforts to satisfy the outstanding debt were reasonable. *See* 11 C.F.R. § 116.4(d)(2). As part of its efforts to resolve the outstanding debt, the McCain Committee invoked the "Audit" provision from the Services and License Agreement, before the sixty-day deadline for payment of the final invoices totaling approximately $725,000, and completed a review of 3eDC's records pertaining to the Committee's account that led to the eventual reduction of the 3eDC's bill to the Committee. Although section 116.4(d)(2) lists other efforts that can indicate reasonableness, such as engaging in further fundraising efforts, the regulation states that the examples set forth therein are not an exhaustive list. In this matter, the Committee's prompt and thorough review of 3eDC's records suggests that the McCain Committee took reasonable steps to ascertain the correct amount due to the vendor and then paid

the amount ahead of schedule. The Committee's actions in accepting the additional terms proposed by 3eDC to settle the debt also support this conclusion.

Although section 116.4(d)(2) requires that a committee undertake all reasonable efforts to satisfy the outstanding debt, the McCain Committee did not admit that anything more than $585,001.83 was due on the contract, and it paid that amount. 3eDC may not have initially agreed with that figure, but it accepted the results of the McCain Committee's audit. Thus, the requirement that the McCain Committee use "all" reasonable efforts is satisfied in this case.

Finally, the information available supports a finding that 3eDC pursued its remedies as vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances. 11 C.F.R. § 116.4(d)(3). In response to the McCain Committee's failure to pay two invoices, 3eDC sought to terminate the service contract and sent a written request for payment. *Id.* at § 116.4(d)(3)(i). In addition, upon receipt of the McCain Committee's written summary proposing adjustments to 3eDC's fees, 3eDC proposed additional terms including interest payments, a payment schedule and late fees. *Id.* at § 116.4(d)(3)(iii). While 3eDC chose not to pursue litigation or refer the McCain Committee's debt to a debt collection service as suggested in the non-exhaustive list found in the Commission's regulations, 3eDC explained that the cost of litigation was one of its considerations in deciding to settle the matter for the amount proposed by the campaign. 11 C.F.R. § 116.4(d)(3)(iv) and (v). 3eDC's business decision to settle the Committee's debt for the bulk of the amount owed, plus interest payments and late fees, rather than spend additional funds in hopes of obtaining an amount closer to $725,000, does not appear unreasonable.

Thus, the Respondents' documentation lends support to their contentions that the reduction of the McCain Committee's bill was done in a commercially reasonable manner. As

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discussed above, the documentation also accounts for the time that passed between the termination of the service contract and the campaign's payment of the amount owed to 3eDC. In past cases in which the Commission determined that in-kind contributions resulted, the cases involved long delays in payment that did not appear commercially reasonable. *See* MUR 5396 (Bauer for President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and 441b violations resulting from extensions of credit from three different vendors totaling over $700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the Commission found reason to believe that the committee and two of its vendors violated section 441b by accepting or making illegal corporate extensions of credit totaling over $900,000 that were unresolved for four months or longer, but took no further action because the debts had been paid in full and some debt collection activity had occurred).

In this matter, the Respondents negotiated a termination agreement within 7 days of 3eDC's notification of the campaign's material breach of the contract. The Committee's audit of 3eDC's records then lasted almost two months, from July to September 2007. However, upon completion of the audit, the campaign sent a detailed summary to 3eDC proposing adjustments in the invoices, and within a few days, the parties negotiated a final agreement for payment of the remaining amount due to 3eDC, that included a payment schedule, interest payments and late fees. *Supra* at 14-17. The campaign immediately started the required payments in October 2007 and paid the debt off early.

Because the dispute over the amount owed was resolved over the course of two months, between the deadlines for the 2007 July and October Quarterly Reports, the McCain Committee was not required to report the debt owed to 3eDC as a "disputed debt." 11 C.F.R. § 116.10. It appears that the McCain Committee properly reported its debt owed to 3eDC in its reports filed

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with the Commission, by reporting the amount of the debt it ultimately agreed on with 3eDC. 2 U.S.C. § 434(b)(8).

Accordingly, we recommend that the Commission find no reason to believe that the McCain Committee violated 2 U.S.C. §§ 434(b), 441a or 441b, and that 3eDC, LLC, and Rick Davis violated 2 U.S.C. §§ 441a or 441b in connection with the allegations in this matter.

IV. RECOMMENDATIONS

1. Find no reason to believe that John McCain 2008, Inc. and Joseph Schmuckler, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a or 441b.

2. Find no reason to believe that The Loeffler Group, LLP violated 2 U.S.C. § 441a.

3. Find no reason to believe that Susan Nelson violated the Federal Election Campaign Act of 1971, as amended, in connection with the allegations in this matter.

4. Find no reason to believe that Rick Davis and 3eDC, LLC violated 2 U.S.C. §§ 441a or 441b.

5. Approve the attached Factual and Legal Analyses.

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6. Approve the appropriate letters.

7. Close the file.

Thomasenia P. Duncan
General Counsel

5/5/09
Date

BY:
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Associate General Counsel for Enforcement

Stephen Gura
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