BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Heller for Congress and Elisabeth Ballinger, in her official capacity as Treasurer)
)
November Inc. (d/b/a November Inc., Autumn Productions, and NI Operations))
)
Foundations, Inc. (n/k/a IN Compliance Inc.))

MUR 6101

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

Take no further action as to: (1) Heller for Congress and Elisabeth Ballinger, in her official capacity as Treasurer; (2) November Inc. (d/b/a November Inc., Autumn Productions, and NI Operations); and (3) Foundations, Inc. (n/k/a IN Compliance Inc.).

II. BACKGROUND

This matter involves allegations that November Inc. (d/b/a November Inc., Autumn Productions, and NI Operations) ("November Inc.") and Foundations, Inc. (n/k/a IN Compliance Inc.) ("Foundations") made prohibited corporate contributions to Heller for Congress and Elisabeth Ballinger, in her official capacity as Treasurer ("the Committee"), by extending over $250,000 in credit to the Committee, debts that remained unpaid by the Committee for more than two years. At issue is whether these two vendors extended credit to the Committee in the ordinary course of business, on terms similar to those offered to nonpolitical clients, and whether they acted in a commercially reasonable manner in attempting to collect the debt. Applying its regulations at 11 C.F.R. §§ 100.55, 116.1, and 116.3, the Commission found reason to believe that Heller for Congress and Elisabeth Ballinger, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f) and/or 441b(a) by receiving excessive or prohibited corporate contributions, and that November Inc. and Foundations made prohibited corporate contributions in violation of 2 U.S.C. § 441b(a) as the result of these extensions of credit. In addition, because we did not know at the time that Autumn Productions and NI Operations were business names of November Inc., the Commission found reason to believe that Autumn Productions made excessive or prohibited corporate contributions, in violation of 2 U.S.C. §§ 441a(f) or 441b, and took no action as to NI Operations.

The investigation revealed that both vendors extended credit to other clients on similar terms and made attempts to collect the debt owed by the Committee. Although both vendors continued to extend credit to the Committee despite its history of non-payment, these subsequent extensions of credit were significantly smaller than the original extension of credit or were made based on explicit promises of repayment. Because there is insufficient evidence, on balance, to establish that these vendors did not act in the ordinary course of business, we recommend that the Commission take no further action and close the file in this matter.

III. RESULTS OF THE INVESTIGATION

The Commission authorized an investigation to determine whether November Inc. and Foundations extended credit to the Committee in the ordinary course of business, with substantially similar terms to nonpolitical clients of similar risk and obligation, and whether these vendors acted in a commercially reasonable manner in attempting to collect the debt. *See* 11 C.F.R. §§ 100.55 (defining when an extension of credit is a contribution), 116.1(e) (defining an extension of credit), 116.3 (discussing extensions of credit by incorporated vendors), and 116.4(d)(3) (discussing debt collection methods). The information provided by the Respondents during the course of the investigation, including their responses to written and interview questions, on balance, suggests that the Respondents did not violate the Act.

A. November Inc.

November Inc., which also operates under the business names Autumn Productions and NI Operations, is a Nevada-based commercial vendor specializing in fundraising, government affairs, and media, campaign, and project management. In this case, November Inc. acted as a "one-stop shop" to the authorized committee of Dean Heller, providing everything except media and mail services.[1]

The Committee first reported disbursements to November Inc. on July 1, 2005.[2] Between that date and July 31, 2006, the Committee reported making $43,871.98 in disbursements to November Inc. Following more than one year of timely payment, beginning in August 2006, November Inc. extended more than $250,000 in credit to the Committee.

- The Committee first reported a significant debt ($132,906.50) to November Inc. in its 2006 October Quarterly Report,[3] which it filed after the 2006 Primary Election.

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[1] *See* Report of Investigation of Mike Slanker, Principal, November Inc., at 1 ("Slanker ROI"). Slanker stated that November Inc. arranged for the Committee to use Weeks and Co. for media services and Majority Strategies (Next Wave Communications) for mail services.

[2] *See* 2005 October Quarterly Report.

[3] The Committee reported a smaller debt of $600 to NI Operations for rent in its 2006 July Quarterly Report, but it accrued the vast majority of the debt owed to November Inc. during the reporting periods for its 2006 October Quarterly, Pre-General, and Post-General Reports.

- The Committee then reported debt owed to November Inc. in its 2006 Pre-General and 2006 Post-General Reports, which raised the total debt to $264,462.65.

Although November Inc. and its affiliated businesses extended the bulk of this credit in the approximately three months between August and November 2006, the Committee has carried much of this debt since then and has made only periodic payments toward it. The Committee pays approximately $3,500.00 per month to November Inc.,[4] and, according to its 2009 Year End Report, the Committee currently owes November Inc. $209,506.60, $35,900 less than what it reported owing in its 2008 Year-End Report. *See* Attachment A. The Committee asserts, however, that it made debt payments of $109,173.65 in the first three months of 2010, including at least $75,956.60 to November Inc., which will be reflected in its 2010 April Quarterly. *See* November Inc. Response via Email, dated Mar. 31, 2010.

Despite this outstanding debt, November Inc. provided services totaling $8,672.17 during the 2008 and 2010 cycles, for which the Committee was invoiced and appears to have paid on time.[5] In its 2009 Year End Report, the Committee reported $491,535.46 cash on hand.

1. November Inc. Extended Credit to the Committee in the Ordinary Course of Its Business

An extension of credit does not result in a contribution where a vendor extends credit in the ordinary course of business. *See* 11 C.F.R. §§ 100.55, 116.3(b). In

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[4] *See* Slanker ROI at 2.

[5] Following its 2006 Post-General Report, the Committee reported disbursements to November Inc. totaling $8,672.17 for new services during the 2008 and 2010 cycles in four reports. *See* 2008 July Quarterly ($3,120 in total disbursements for new services); 2008 October Quarterly ($528.95 in total disbursements for new services); 2009 October Quarterly ($3,286.22 in total disbursements for new services); 2009 Year-End ($1,737 in total disbursements for new services). *See also* November Inc. Response to Follow-Up Questions at Ex. A (including invoices for 2007 through 2009).

determining whether a vendor extended credit in the ordinary course of business, the Commission will consider: (1) whether the vendor followed its established procedures and its past practice in approving the extension of credit; (2) whether the vendor received prompt payment in full if it previously extended credit to the same candidate or committee; and (3) whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry. *See* 11 C.F.R. § 116.3(c). These factors need not be accorded equal weight, and one factor is not necessarily dispositive. *See Explanation and Justification, Debts Owed by Candidates and Political Committees*, 55 Fed. Reg. 26,378, 26,381 (Jun. 27, 1990) ("*E&J*"). In prior MURs, the Commission has taken no further action in matters where there is credible information that the vendor followed its own practices in extending credit and where, even though the record lacked complete information on industry standards for extension of credit, there was no information suggesting that the vendor failed to follow industry standards. *See*, *e.g.*, MUR 5396 (Bauer for President 2000, Inc.), General Counsel's Report #2, at 6-8 (Commission took no further action as to vendors where they produced information that they had similarly extended credit to other clients, received delinquent or partial payments from both political and non-political clients, or orally attempted to collect balances due from the committee); MURs 5069 and 5132 (Comite Acevedo Vila Comisionado 2000, Inc.), General Counsel's Report #2, at 4-9 (Commission took no further action where vendor presented evidence showing, *inter alia*, that its established practice was to rely on invoices for services rendered in lieu of written agreements memorializing terms of credit extended to customers).

Here, although November Inc. continued to extend credit and provide services despite the Committee's non-payment of debt, the evidence nonetheless demonstrates that November Inc. followed its established practices in invoicing and extending credit to the Committee, and extended the vast majority of this credit over a relatively short period of time and after approximately a year of timely payment by the Committee. As a result, the original extension of credit to the Committee likely was in the ordinary course of business.

a. November Inc. Followed its Established Procedures and Past Practice in Approving the Extension of Credit to the Committee

November Inc. appears to have followed its established procedures and past practices in invoicing and extending credit to the Committee. *See* 11 C.F.R. § 116.3(c)(1). November Inc. represents that its agreement for services with the Committee is similar to its agreements with its nonpolitical clients. Although November Inc. could not find an original signed agreement for services with the Committee, Mike Slanker, a November Inc. principal, stated that the agreement required the Committee to pay a retainer to November Inc., with fees to be paid as necessary.[6] An unsigned version of the agreement corroborates these terms, requiring that the Committee pay a $1,500 per month retainer during the primary election, an 8% fundraising commission on money raised for the primary, a $5,000 retainer during the general election, and a monthly 5% commission on general election funds, plus reasonable out-of-pocket expenses as necessary.[7] These terms, including payment on a specified compensation schedule and a

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[6] *See* Slanker ROI at 1.

[7] *See* November Inc. Agreement with Heller for Congress for Fundraising Services (Jan. 15, 2006).

30-day termination notice, are similar to those in a consulting agreement produced between November Inc. and a nonpolitical client.

November Inc. also represents that it used the same invoicing policy for the Committee as for its other political and nonpolitical clients, which is to render the services to the client first, and then invoice the client and request payment within 30 days.[9] November Inc. submitted information showing that it had 33 clients between April 1, 2006 and April 30, 2009, and the company invoiced all its clients in the same way that it invoiced the Committee.[10] Further, November Inc. asserts that the payment terms in this case were the same as those that it has always instituted.[11]

Moreover, the original extension of credit followed more than a year of prompt payment by the Committee between July 2005 and late summer 2006.[12] November Inc. first extended substantial credit to the Committee in or around August 2006. It is unclear whether November Inc. and the Committee memorialized the original extension of credit in writing, or whether November Inc. invoiced the Committee as it previously had and the Committee merely failed to pay its bill. Slanker stated that he was in constant contact with the Committee around the time of the first extension of credit, but he could not recall anything specific about discussions of prepayment with the Committee.[13] The

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[9] *See* November Inc. Response to the Factual and Legal Analysis at 6 and Ex. B.

[10] *See id.* at 3.

[11] *See id.* at 6-7.

[12] *See* 2006 Pre-Primary Report; *see also* Slanker ROI at 1; November Inc. Response to Follow-Up Questions at Ex. A (majority of November Inc. invoices between April 1, 2006, and August 15, 2006, were marked "paid"),

[13] *See* Slanker ROI at 1.

invoices do not carry forward a balance due from month to month, and neither party could produce a credit agreement or information concerning contemporaneous discussions about the Committee's unpaid bills. Both parties, however, were aware of the amounts owed by the Committee, as the Committee timely reported the debts, and Slanker noted, "The end stuff [services provided toward the 2006 general election] was what was so expensive and also what the Committee didn't have the money to pay."[14]

Despite the lack of extensive documentation, nothing in the record suggests that November Inc. failed to follow its established procedures and past practice in approving the extension of credit to the Committee. November Inc.'s original service agreement and method of invoicing the Committee did not provide unusual or highly favorable terms to the Committee. *Cf.* MUR 5635 (CLPAC), Conciliation Agreement (Commission found probable cause where, *inter alia*, vendors entered into "no risk" fundraising contracts). Moreover, while the total amount of credit November Inc. extended to the Committee during the 2006 cycle comprised more than half of the total debt owed by all clients, *see infra* p.14, November Inc. extended it over a relatively short period after more than a year of prompt payment by the Committee. *See* MURs 5069 and 5132 (Comite Acevedo Vila Comisionado 2000, Inc.), General Counsel's Report #2, at 8 (Commission took no further action where, *inter alia*, committee's timely payment of vendor's invoices for three months before vendor extended substantial credit suggested that the transaction was in the ordinary course of business). The information thus suggests that the original extension of credit did not deviate from November Inc.'s established practices.

[14] *See id.*

b. November Inc. Did Not Receive Prompt Payment in Full and Continued to Extend Credit to the Committee, but Nonetheless Appears to have Acted in the Ordinary Course of Business

November Inc. began extending substantial amounts of credit to the Committee in August 2006 and did not receive payment according to the invoiced terms, but nonetheless continued to provide services through the 2006 cycle. While the Commission generally has looked unfavorably upon continued extensions of credit while a committee owes an outstanding debt, *see* 11 C.F.R. § 116.3(c)(2), this factor alone has not been dispositive. *Compare* MUR 5396 (Bauer for President 2000), Conciliation Agreement (Commission determined that committee received prohibited contributions as the result of continued extensions of credit that were not in the ordinary course of business where the debts remained outstanding for months or years and the vendors failed to provide written evidence of collection efforts or information about collection policies and practice, advance payment policies, or billing cycles for nonpolitical debtors, but took no further action as to the vendors), *with* MURs 5069 and 5132 (Comite Acevedo Vila Comisionado 2000, Inc.), General Counsel's Report #2 (Commission took no further action where vendor continued to provide services even though committee did not pay according to invoiced terms, paid for media time in advance and assumed risk of committee's nonpayment, and extended credit in excess of $650,000, more than half of which remained outstanding a year later, without a written agreement, because vendor asserted that such actions were based on a mutual understanding that all amounts invoiced would be paid, and presented evidence that the transactions were consistent with industry practice and were nonetheless in the ordinary course of business).

November Inc., however, extended this amount of credit over a relatively short time period, three months, after approximately a year of timely payment by the Committee. *See supra* p. 8. November Inc. also continued receiving monthly retainers and some monthly payments from the Committee.[15] Moreover, the parties demonstrated that November Inc. previously continued to extend credit to both political and nonpolitical clients despite not being paid for past services,[16] and that other vendors continued to extend credit to the Committee despite not being paid.[17]

While the continued extensions of credit alone may be evidence that November Inc. extended credit outside the ordinary course of business, the Commission's regulations state that the Commission will consider all the factors listed in Section 116.3(c), and the *E&J* explains that one factor is not necessarily dispositive. On balance, considered with the evidence demonstrating that November Inc. followed its regular business practices, this fact does not establish that November Inc. acted outside the ordinary course of business.

c. November Inc.'s Extension of Credit to the Committee Conforms to the Usual and Normal Practice in November Inc.'s Industry

The available evidence does not demonstrate that November Inc.'s extension of credit failed to conform to the usual and normal practice in its industry. *See* 11 C.F.R. § 116.3(c)(3). November Inc. argues that its continued extension of credit to the Committee is based on common industry practice: it is the nature of political consulting

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15 *See* Slanker ROI at 1.

16 *See* November Inc. Response via Email at 1-2, ¶¶ 2.b., 2.f., and 2.h; *see also* Slanker ROI at 2.

17 *See, e.g.*, Committee 2006 Pre-General Report through 2007 April Quarterly Report (Weeks & Company initially owed $10,000 but eventually owed as much as $47,000); *see also* Committee Response via Email (Weeks and Co. continued extending credit to the Committee during the 2008 and 2010 election cycles, despite not being paid for an outstanding debt from the 2006 cycle).

to provide services to clients with existing debt, since consultants are never sure how much a campaign can actually raise, and turning down these clients would harm them in generating new business.[18] According to Slanker, because political campaigns depend on fundraising and do not generally work from a budget, companies working with campaigns know that if they are paid for their services, it may be towards the end of the campaign, and these companies take this in stride and understand that they sometimes "get stiffed."[19] Similarly, according to November Inc., late payment or non-payment of debt is common in the political consulting industry,[20] because turning a political client over to a collection agency or initiating legal proceedings to collect an unpaid debt can severely stymie a company's ability to secure future business.[21] Rather than resort to

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[18] *See* Slanker ROI at 1-2; *see also Hearing on Proposed Regulations Concerning Debts Owed by Candidates and Political Committees (11 C.F.R. Part 116)* at 123, ln. 5-16 (Feb. 15, 1989) (statement of Robert F. Bauer, General Counsel, Democratic Senatorial and Congressional Campaign Committees) (vendors continue to do business with committees that fail to pay for past services because "in some cases, they are not terribly astute vendors; what John Stengall Johnson called the triumph of hope over experience, they think this time they will be paid, or alternatively, they believe that having shown some understanding of the candidate in '84 and believing that he or she had the good-faith intention to repay the debts, they are prepared to do business with them again in '86...."), and 146, ln. 3-5 ("There are businesses that are happy everytime [sic] someone walks in the store and wants to buy something from them.").

[19] *See* Slanker ROI at 1-2.

[20] *See id.* at 2; Joel Siegel, *Millions Racked Up in Campaign Debt: Candidates May Have Lost Race to White House but Still Must Make Good, Vendors Say*, ABC NEWS, *at* http://abcnews.go.com/Politics/Vote2008/story?id=5021310&page=1 (June 8, 2008) ("For losing candidates, campaign debts can linger for years, enduring symbols of failures they would rather forget....some [vendors] end up receiving just pennies on the dollar, if they get paid at all."); Kenneth P. Vogel, *Cash-Strapped Clinton Fails to Pay Bills*, POLITICO, *at* http://www.politico.com/news/stories/-0308/9259.html (March 30, 2008) ("Just like with other businesses, it's common for campaigns to carry unpaid bills from month to month..."); Edward Luce & Stephanie Kirchgaessner, *Well of Donors Dries Up for Clinton*, FINANCIAL TIMES, *at* http://www.ft.com/cms/s/0/015fcc08-1df1-11dd-983a-000077b07658.html?nclick_check=1 (May 9, 2008) ("Other kinds of debt, including money owed to campaign 'vendors', such as polling groups, charter plane companies or staff salaries, can be delayed indefinitely...").

[21] *See* November Inc. Response to the Factual and Legal Analysis at 5.

these measures, consulting companies generally continue to work with candidate committees because it is possible that a candidate can raise enough to pay the company.[22]

Finally, November Inc. asserts that three aspects of the extension of credit at issue demonstrate that the transaction conformed to industry standards.

- The debt owed by the Committee was a much smaller fraction of the company's 2006 sales than it appeared at the time of the RTB finding. November Inc.'s 2006 sales were $1,436,725.70, and its sales for the entire 2006 election cycle totaled $2,432,092.51.[23] Based on these numbers, the $264,462.65 in credit extended to the Committee represented approximately 18.4% of November Inc.'s 2006 annual sales and approximately 10.9% of its sales for the 2006 election cycle, not the approximate 108% of annual sales estimated based on the information available at the reason-to-believe stage. *See* MUR 6101, First General Counsel's Report, at 7-8 (estimating November Inc.'s annual sales at $100,000 based on public sources).

- Second, other clients owed significant debts to November Inc.[24] At the end of 2006, November Inc. was owed a combined $446,323.83.[25] Of this amount, $142,807.80 was owed by two nonpolitical clients, and $303,516.03 was owed by four political clients.[26] Of the amount owed by political clients, November Inc. owed $264,462.65, and the other three political clients owed $39,053.38.[27]

- Third, the Committee reported debt to ten different commercial vendors and political consultants.[28] While November Inc. concedes that the Committee owes a substantially greater amount to it than to other vendors, it explains that this was because November Inc. provided general political consulting and fundraising services, the most expensive services in a campaign.[29] As a result, these debts are

[22] *See id.*

[23] *See id.* at 3. November Inc.'s sales for 2007 and 2008 were significantly smaller ($143,127.09 and $140,086.29, respectively) because the company was essentially dormant during the 2008 cycle.

[24] *See* November Inc. Response Via Email, dated March 31, 2010, at 1-2 (clarifying November Inc. Response to the Factual and Legal Analysis at 3).

[25] *See id.*

[26] *Id.*

[27] *Id.*

[28] *See id.* at 4; Committee Response to the Factual and Legal Analysis at 3. Although both responses state that the Committee reported debt to twelve vendors, they treat November Inc., Autumn Productions, and NI Operations as separate vendors.

[29] *See* November Inc. Response to the Factual and Legal Analysis at 7.

> less easily extinguished than smaller debts from other services.[30] Moreover, according to the Committee, none of these vendors and consultants have charged interest or instituted legal action, despite remaining adamant about being paid.[31]

Taken together, these facts suggest that November Inc.'s extension of credit to the Committee was a *bona fide* business decision. Although our investigation focused on the instant transactions and did not survey other Nevada-based political consulting firms,[32] nothing in the record suggests that November Inc. deviated from industry norms in its dealings with the Committee.

Moreover, none of the Commission's past enforcement matters provides a sufficient basis to go forward on these facts. In fact, the Commission has declined to pursue arguably more egregious transactions. In MUR 4742 (Juan Vargas for Congress), for example, five Commissioners took no further action as to allegations that the committee had received an excessive contribution from a sole proprietorship headed by a supporter of and contributor to the candidate, where the parties entered into a consulting contract that deferred a portion of the vendor's retainer until the end of the campaign, the vendor had never before extended the type of terms offered to the committee, and part of the deferred compensation was to be paid only "if in the opinion of both [the committee] and [the vendor] the campaign can afford to make said disbursement without significantly harming the campaign effort." Approximately $24,000 remained unpaid by the committee for three years, and debts owed to the vendor

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30 *See id.*

31 *See* Committee Response to the Factual and Legal Analysis at 3.

32 *See, e.g.*, MUR 5396 (Bauer for President), General Counsel's Report #2 (Commission took no further action as to vendors based primarily on affidavits and invoices submitted by vendors); MUR 4989 (Dole/Kemp '96) (Commission found no reason to believe based on documentation and information provided by vendor in response to audit referral regarding vendors' credit policies and extensions of credit to other customers that showed extension of credit was in the ordinary course of business).

by other clients were significantly less. The vendor took virtually no actions to collect the debt because it made a business judgment, in consultation with the campaign, that the committee was likely to be able to pay off the debt at some point in the future. The vendor asserted that these actions were not unprecedented in the industry, were motivated by its desire to maintain friendly and professional relations with the candidate, and taking legal action would inhibit future business. The Commission rejected the recommendations to find probable cause, opining, "There is some evidence that the activity at issue here may have been in the ordinary course of business and consistent with standard industry practice, and the resulting legal question presented a close call. At most, the respondents' activity constituted a technical violation." MUR 4742 (Juan Vargas), Statement of Reasons of Vice-Chairman McDonald and Commissioners Mason, Sandstrom, Smith, and Thomas (Nov. 8, 2000); *see also* MUR 4742 (Juan Vargas), Supplemental Statement of Reasons of Vice-Chairman McDonald and Commissioners Mason, Sandstrom, Smith, and Thomas (Mar. 27, 2001) (applying same analysis in response to new information demonstrating vendor was an incorporated sole proprietorship).

2. November Inc. Extended Credit to the Committee with Substantially Similar Terms to Its Other Clients

An extension of credit also must be on terms that are substantially similar to extensions of credit to nonpolitical debtors of similar risk and size of obligation. *See* 11 C.F.R. § 100.55. As discussed above, November Inc. provided information that the extension of credit was similar to its nonpolitical clients:

- As noted *supra* p. 8, November Inc. invoiced all of its clients the same way and used the same payment terms.[33]

- November Inc. extended credit to other clients, albeit in lesser amounts. In addition to the $264,462.65 owed by the Committee, November Inc.'s other clients owed a combined $404,044.43 in December 2006.[34] Of this amount, $142,807.80 was owed by two nonpolitical clients and $261,236.63 was owed by four political clients.[35]

- Since 2004, November Inc. has had six political and four nonpolitical clients that were more than 90 days past due on their payments.[36] While most of these clients had debts that remained outstanding between three and nine months, one nonpolitical client still owes November Inc. $127,807.80 for credit that was extended in 2005, and one political client still owes November Inc. $11,000 for credit that was extended in 2006.[37]

- November Inc. has never stopped providing services to a client for non-payment.[38]

- November Inc. does not charge interest to any of its clients for outstanding debt.[39]

- November Inc. has never initiated legal proceedings against any of the companies that have been 90 days or more in arrears, nor turned over the companies to a collection agency.[40]

Based on these facts, it appears that November Inc. extended credit to the Committee on substantially similar terms to its other clients.

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[33] *See* November Inc. Response to the Factual and Legal Analysis at 7 and Ex. B.

[34] *See id.* at 3.

[35] *See* November Inc. Response via Email at 1.

[36] *See* November Inc. Response to the Factual and Legal Analysis at 3-4.

[37] *See* November Inc. Response via Email at 1-2.

[38] *See* Slanker ROI at 2.

[39] *See id.* at 2.

[40] *See* November Inc. Response to the Factual and Legal Analysis at 8-9.

3. November Inc. Made a Commercially Reasonable Attempt to Collect the Debt

An extension of credit made in the ordinary course of business can ripen into a prohibited contribution if the vendor fails to make a commercially reasonable attempt to collect the debt. *See* 11 C.F.R. § 100.55. Attempts to collect a debt are commercially reasonable if the vendor has pursued its remedies as vigorously as it would against a nonpolitical debtor in similar circumstances, including making oral and written requests for payment, withholding additional services until debts are satisfied, imposing penalties for late payment, referring debts to a collection agency, and/or instituting litigation. *See* 11 C.F.R. §§ 100.55, 116.4(d)(3). In the past, the Commission has found that vendors made sufficiently reasonable attempts to collect a debt when they produced evidence of oral and written requests for payment. *See* MUR 5180 (Dear for Congress) and *FEC v. Dear for Congress*, 03-CV-2897 (E.D.N.Y. filed Jun. 5, 2003), Memo to the Commission, at 4 (May 27, 2004) (Commission took no further action in enforcement matter where vendor asserted that it had invoiced the committee and made undocumented oral attempts to collect the debt and presented evidence that its general policy was not to sue advertising debtors based on business considerations); MUR 5069 and 5132 (Comite Acevedo Vila Comisionado 2000, Inc.), General Counsel's Report #2 (Commission took no further action where vendors produced evidence of oral and written requests for payment, along with an eventual threat of litigation after the enforcement complaint was filed, for an initial debt of $650,000 that remained outstanding for more than three years). *But cf.* MUR 5396 (Bauer for President 2000), Conciliation Agreement and General Counsel Report #2, at 6-8 (Commission accepted conciliation agreement with committee concluding that vendors did not act in a commercially reasonable manner where they did not produce evidence of their collection policies and practice or written evidence of previous collection efforts, but the Commission took no further action as to the vendors based on invoices and affidavits).

The available evidence is insufficient to conclude that November Inc. failed to make a commercially reasonable attempt to collect the debt from the Committee. While we have no information concerning November Inc.'s discussions about its initial extension of credit or its efforts to obtain payment from the Committee in the months following the 2006 general election, November Inc. produced a series of emails from August 2007 to March 2009 that show that the company asked for payment from the Committee numerous times.[41] The co-owners of November Inc. also communicated their desire to collect the debt about once a month between December 2007 and December 2008, and the issue of debt repayment was raised by November Inc. in almost every in-person and telephone conversation with the Committee.[42] On the other hand, November Inc. took none of the other debt collection methods in section 116.4(d)(3); in fact, it represents that it has never withheld services until debts are satisfied, imposed penalties for late payment, referred debts to a collection agency, or instituted collection litigation against any client. *See supra* pp. 11-12, 15-16.

On balance, the evidence is insufficient to establish that November Inc.'s attempts to collect the debt owed by the Committee were commercially unreasonable. Moreover, the Committee explained that it is making efforts to pay off the remaining debt it owes to November Inc., and provided a plausible explanation for its failure to do so to date.

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[41] *See* November Inc. Response to the Factual and Legal Analysis, Exs. C-F, H.

[42] *See* Affidavit of Mac Abrams, Campaign Manager, Heller for Congress, at 2, ¶ 5.

According to Mac Abrams, the campaign manager for the Committee during the 2008 election cycle, the Committee set aside a "rainy day fund" during the 2008 cycle to pay off outstanding debts.[43] During the 2008 race, however, Heller's opponent's poll numbers began to rise, and, according to Abrams, the Committee was forced to use the rainy day funds to run television advertisements to fend off its opponent.[44] Consequently, the Committee maintains it was left with little cash-on-hand at the end of the 2008 cycle, and was thus unable to significantly pay down its obligations.[45] *See* Attachment A; *see also* MUR 4742 (Juan Vargas for Congress), *supra* pp. 13-14.

In addition, the Committee placed a higher priority on paying debts owed to other vendors because November Inc. was effectively dormant during part of the 2008 election cycle, when its co-owners were working for the National Republican Senatorial Committee ("NRSC").[46] The Committee explained that it prioritized paying vendors that were still providing services to the Committee and was aware that it would have to prioritize its debt to November Inc. once the company's owners returned from their time with the NRSC.[47] Consistent with this explanation, following the 2008 election, the Committee agreed to begin paying off its debt to November Inc. in monthly installments

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[43] *See* Affidavit of Mac Abrams at 1, ¶¶ 2-3. Mac Abrams was the only employee from the Committee who had permission to authorize bill payment during the 2008 election cycle, but since 2009 Abrams has instructed Elisabeth Ballinger, the Committee's treasurer, to make bill payments. *See* Committee Response to Follow-Up Questions at 1, ¶ 3.

[44] *See id.* at ¶¶ 7-9.

[45] *See id.* at ¶ 10. The Committee offered the same explanation for not paying the debts owed to Foundations in 2008, stating that it used its funds to pay for campaign expenses, rather than paying down its debts. *See* Committee Response to Follow-Up Questions at 2-3, ¶ 5.

[46] *See* Committee Response to Follow-Up Questions at 2, ¶ 3. During this time, the company had some clients that paid timely, while others did not. *See* Slanker ROI at 2.

[47] *See* Committee Response to Follow-Up Questions at 1-2, ¶ 3. In addition to the debt owed to November Inc., the Committee reported owing $8,133.81 to two vendors in its 2009 Year End Report.

of $3,500.[48] In addition, in the first three months of 2010, the Committee asserts that it made debt payments of $109,173.65, including at least $75,956.60 to November Inc., which will be reflected in its 2010 April Quarterly Report.[49] Although the Committee reported having $491,535.46 cash on hand in its 2009 Year End Report, it asserts that it has not used these funds to pay off its debt to November Inc. because Representative Heller likely will need $1.6 million or more for his 2010 re-election efforts, and the campaign must balance the necessity of paying its debts with the financial requirements of the re-election campaign.[50] While the Committee's explanation that it favors spending its resources on Heller's 2010 re-election over retiring the debt from past elections – presumably with November Inc.'s acquiescence – appears to be in tension with the regulations' requirements, its recent payment of approximately $76,000 to November Inc. and its regular monthly payments against the remaining balance owed are indications that November Inc.'s attempts to collect the debt from the Committee have been commercially reasonable.

On balance, the record suggests that the extension of credit at issue was the product of a *bona fide* business relationship between November Inc. and the Committee, and provides an insufficient basis to further pursue the allegations in this matter. Accordingly, we recommend that the Commission take no further action as to November Inc. and the Committee in connection with these transactions.

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[48] *See* November Inc. Response to Follow-Up Questions at 2, ¶ 4; *see also* Slanker ROI at 2

[49] *See* November Inc. Response via Email, dated Mar. 31, 2010, at 1.

[50] *See id.*

B. Foundations

Foundations (n/k/a IN Compliance Inc.) is a commercial vendor that performs treasury services for political campaigns.[51] The Committee first reported disbursements to Foundations on August 1, 2005. Between that date and July 31, 2006, the Committee reported disbursements of $34,737.43 to Foundations. After approximately one year of prompt payment, beginning in August 2006, Foundations extended $29,131,61 in credit to the Committee, $19,500 of which remained outstanding until March 11, 2009.

- The Committee first reported a debt to Foundations of $13,048.27 on its 2006 October Quarterly Report.
- The debt grew to $29,131.61 on the Committee's 2006 Post-General Report.
- The Committee apparently began paying its debt after the election, reducing it to $19,500 on its 2007 October Quarterly report.
- This amount stayed constant until the Committee reported paying off its debt to Foundations on March 11, 2009.

See Attachment A. Foundations continued to provide services to the Committee through the 2008 election cycle, for which it received timely payment.

1. Foundations Extended Credit to the Committee in the Ordinary Course of Its Business

a. Foundations Followed its Established Procedures and Past Practice in Approving the Extension of Credit to the Committee

Foundations appears to have followed its established procedures and past practice in approving the extension of credit to the Committee. *See* 11 C.F.R. § 116.3(c)(1). Foundations had a contract with the Committee for the 2006 and 2008 election cycles[52]

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[51] *See* Chrissie Hastie Report of Investigation ("Hastie ROI") at 1.

[52] *See* Hastie ROI at 1.

whereby Foundations would invoice the Committee on the first of the month for the previous month's services and any expenses incurred, and payment was due 30 days from invoicing.[53] Foundations' billing procedures for all of its customers from April 1, 2006 through April 30, 2009 were the same as those for the Committee.[54]

In the 2006 election cycle, the Committee paid its invoices within 30 days until the last part of the cycle.[55] Chrissie Hastie, the owner and President of Foundations, stated that she provided treasury services to the Committee with the expectation that she would be paid and that, at the close of the 2006 election cycle, the campaign manager said that the 2006 debt would be paid as funds became available through debt retirement fundraising.[56] Foundations also extended similar amounts of credit to other political clients.[57]

Based on these facts, there is no evidence demonstrating that Foundations departed from its past practice and established procedures in extending credit to the Committee.

b. Foundations Did Not Receive Prompt Payment in Full and Continued to Extend Credit to the Committee, but Nonetheless Appears to have Acted in the Ordinary Course of Business

Foundations continued to extend credit to the Committee despite not being paid for the original debt. As discussed above, Foundations first extended credit to the Committee in or around August 2006, after approximately one year of timely payments.

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[53] *See* Foundations Response to the Commission's Follow-Up Questions at 1, ¶ 2, and Ex. B; Hastie ROI at 1.

[54] *See* Foundations Response to the Commission's Follow-Up Questions at 1, ¶ 4.

[55] *See* Hastie ROI at 1.

[56] *See* Hastie ROI at 1; Foundations Response to the Factual and Legal Analysis at 1.

[57] *See* Foundations Response to the Factual and Legal Analysis at 2, n.4.

While we have little information about any discussions that took place about the Committee's nonpayment between August and November 2006, Foundations continued to invoice the Committee during this period and discussed debt retirement fundraising with Committee staff.[58] Unlike November Inc., however, Foundations and its successor company, IN Compliance Inc., continued providing services to the Committee on a regular basis after the initial extensions of credit. Between the incurrence of the debt in August 2006 and the debt's extinguishment in March 2009, the Committee reported disbursements for new services in 13 out of the 15 reports it filed.

Foundations asserts that it continued to provide services to the Committee during the 2008 cycle because Committee representatives said that the Committee would continue soliciting contributions to pay down its 2006 debt, as well as pay Foundations for new services rendered.[59] Committee representatives also told Hastie that the debt would be paid in full at the completion of its 2008 contract (which lasted until January 31, 2009), and Foundations provided email correspondence demonstrating that it attempted to collect the total bill after this date.[60] Further, Foundations has in the past continued to provide new services to other political organizations, despite not being paid for past services.[61]

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[58] *See* Foundations Response to the Commission's Follow-Up Questions at Ex. B; Foundations Response to the Factual and Legal Analysis at 1.

[59] *See* Hastie ROI at 1. The Committee reported paying Foundations for all new services rendered after October 2007, when its debt was reduced to $19,500.

[60] *See* Foundations Response to Factual and Legal Analysis at 3; Foundations Response to Factual and Legal Analysis, Ex. 3. The Committee made periodic, if small, payments to reduce its debt in response to these efforts. *See* Foundations Response to Factual and Legal Analysis at 2, n.1.

[61] *See* Foundations Response to Factual and Legal Analysis at 2, n.4.

While the continued extensions of credit may be evidence that Foundations acted outside the ordinary course of business, this one factor is not necessarily dispositive. *See supra* pp. 9-10. Given that Foundations initially extended credit to an existing client with an established payment history, then continued extending credit over a relatively short time period in response to assurances of repayment, this information, on balance, does not demonstrate that Foundations acted outside the ordinary course of business.

c. Foundations' Extension of Credit to the Committee Conforms to the Usual and Normal Practice in Foundations' Industry

The available evidence is insufficient to demonstrate that Foundations' extension of credit failed to conform to the usual and normal practice in its industry. *See* 11 C.F.R. § 116.3(c)(3); *see also supra* pp. 10-14. Foundations asserts that companies that provide treasury services to federal political campaigns understand that, because the campaigns are dependent on fundraising for revenue, the companies will often have to wait some time for payment.[62]

Foundations also asserts that it has carried debts for other political committees in the same amount as the Committee's debt, usually because of "lackluster" campaign fundraising.[63] For example, the Nevada Republican State Central Committee owed more than $16,000 for three to four months, and the Oregon Republican Party owed $15,300 for almost one year.[64] While the Committee's debt was outstanding far longer than these

[62] *See* Hastie ROI at 1.

[63] *See id.*

[64] *See* Foundations Response to Factual and Legal Analysis at 2, n.4.

other clients, Foundations represents that it received explicit assurances from the Committee that it would raise funds to retire the 2006 cycle debt.

2. *Foundations Extended Credit to the Committee With Similar Terms to Its Other Clients*

The extension of credit to the Committee by Foundations appears to have been similar to Foundations' other clients. *See* 11 C.F.R. § 100.55. Although Foundations provides treasury services only to political campaigns and does not have nonpolitical clients, its billing procedures for all of its customers from April 1, 2006 through April 30, 2009, were the same as those for the Committee.[65] Likewise, as noted above, Foundations carried debt from two other clients which were similar in size to the debt carried for the Committee.[66]

Further, Foundations represents that it has never cut off services to a client for nonpayment or asked for pre-payment, because this would inhibit the ability to obtain new clients.[67] Additionally, Foundations states that it does not customarily charge interest on outstanding debts, but does keep internal records for accounts receivables to track and follow-up on outstanding debts.[68]

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[65] *See* Foundations Response to the Commission's Follow-Up Questions at 1, ¶ 4.

[66] *See id.*; Foundations Response to Factual and Legal Analysis at 2, n.4; Hastie ROI at 2. Foundations stated that two clients owed it money from April 1, 2006 through April 30, 2009. Foundations extended $16,287.80 in credit to the Nevada Republican State Central Committee, which remained outstanding for 3-4 months, and extended $15,300 in credit to the Oregon Republican Party, which remained outstanding for almost one year. *See* Foundations Response to Factual and Legal Analysis at 2, n.4.

[67] *Id.* at 2.

[68] *See* Foundations Response to Factual and Legal Analysis at 2..

3. Foundations Made a Commercially Reasonable Attempt to Collect the Debt

Finally, Foundations made oral and written attempts to collect the outstanding debt.[69] *See* 11 C.F.R. §§ 100.55, 116.4(d)(3). Christie Hastie communicated Foundations' desire to collect the debt several times per month in early 2007.[70] In late 2007, the Committee told Hastie that it would cease debt repayment until it had assessed Dean Heller's 2008 congressional race, and Hastie inquired about the debt less frequently, but following the 2008 race, Hastie began inquiring about the debt at least once per month.[71] The Committee paid off its debt to Foundations on March 11, 2009, after the instant complaint was filed.

Taken together, there is insufficient evidence nothing in the record to demonstrate that Foundations' extension of credit to the Committee was not the product of a *bona fide* business relationship. Moreover, in past matters, the Commission has taken no further action where a Committee pays an outstanding debt in full. See, *e.g.*, MUR 4742 (Juan Vargas), *supra* pp. 14-15 (viewing full payment of debt as a factor mitigating against further action). As a result, we recommend that the Commission take no further action as to Foundations and the Committee in connection with these transactions.

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[69] *See* Foundations Response to Factual and Legal Analysis at 2; *see also* Foundations Response to Factual and Legal Analysis, Ex. 1.

[70] *See* Committee Response to Commission's Follow-Up Questions at 2-3, ¶ 5.

[71] *Id.*

III. RECOMMENDATIONS

1. Take no further action as to Heller for Congress and Elisabeth Ballinger, in her official capacity as Treasurer; November Inc. (d/b/a November Inc., Autumn Productions, and NI Operations); and Foundations, Inc. (n/k/a IN Compliance Inc.).

2. Approve the appropriate letters.

3. Close the file.

Thomasenia P. Duncan
General Counsel

4/15/10
Date

BY: Stephen Gura
Deputy Associate General Counsel for Enforcement

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