FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

In the Matter of	)	
	)	MUR 7006
Heaney for Congress, *et al.*	)	
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

In response to a Complaint, the Commission's Office of General Counsel ("OGC") recommended that the Commission find reason to believe the Respondents made and accepted excessive and prohibited contributions under the soft money prohibitions and coordinated communication provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations. We voted against OGC's recommendations. This Statement provides the reasons for our votes.

According to information in the Complaint and responses, three companies allegedly owned or controlled by Andrew Heaney — Heaney Energy Corp., Submarine Rock, LLC, and Little Deep, LLC (collectively, the "Companies")[1] — made contributions totaling $20,000 to an independent-expenditure-only political committee, New York Jobs Council (the "Super PAC"), in June 2015.[2] Approximately two months later, in August 2015, Heaney announced his candidacy for New York's 19th Congressional District.[3] Five months after that, in January 2016, the Super PAC reportedly made its first independent expenditure; it was in opposition to John Faso, Heaney's opponent in the primary election.[4]

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[1] MUR 7006 (Heaney for Congress, *et al.*), Complaint ("Compl.") at 3-4, n.1 (citing to public documents referring to Heaney variously as "owner," "founder," and "chief executive officer" of the Companies); *see also* MUR 7006 (Heaney for Congress, *et al.*), Response of Heaney Energy Corp., Little Deep, LLC, and Submarine Rock, LLC ("Companies' Resp.") at 1 (stating that Heaney was chief executive officer of Heaney Energy and "served in a similar capacity" for Little Deep and Submarine Rock). *But see* Compl. at Exhibits B and E (identifying Heaney as "owner" of Little Deep, LLC and Heaney Energy).

[2] New York Jobs Council, FEC Form 3X, 2015 Mid-Year Report, July 31, 2015, *available at* https://docquery fec.gov/pdf/176/201507319000526176/201507319000526176.pdf.

[3] Andrew Heaney, FEC Form 2, Statement of Organization, August 5, 2015, *available at* https://docquery fec.gov/pdf/434/201508059000801434/201508059000801434.pdf.

[4] The Companies made their contributions on June 17 and 23, 2015, and the Super PAC reported making its first independent expenditure on January 29, 2016. *See* New York Jobs Council 24/48 Hour Report of Independent Expenditures (Feb. 4, 2016); *see also* MUR 7006 (Heaney for Congress, *et al.*), First General Counsel's Report ("FGCR") at 5.

Soft Money Prohibitions

Even though corporations and LLCs generally may make unlimited contributions to independent-expenditure-only political committees,[5] OGC concluded that the Companies' contributions to the Super PAC violated the Act's soft money prohibitions. This conclusion followed a number of preliminary determinations and inferences that were based loosely on information in the record.

First, OGC inferred from Heaney's purported relationship with the Companies and the Super PAC's later opposition to Faso that Heaney "consented to" the Companies' June 2015 contributions to the Super PAC "for the purpose of supporting his candidacy."[6] Based on this inference, OGC concluded that Heaney became a candidate in June 2015, when the Companies' contributions to the Super PAC exceeded the $5000 statutory threshold for candidacy.[7]

Second, OGC inferred from the timing and amount of the Companies' contributions that Heaney "financed" the Super PAC.[8] The Act prohibits any entity "established, financed, maintained, or controlled" by a candidate or acting on a candidate's behalf from making or accepting contributions from prohibited sources or in excess of amount limitations in connection with a federal election.[9] Having decided that Heaney became a candidate when the Companies contributed to the Super PAC, and that Heaney as a candidate thereby "financed" the Super

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5 *Citizens United v. FEC*, 558 U.S. 310 (2010).

6 FGCR at 7; *see also* Compl. at 3 (alleging that Heaney, "as the [Companies'] apparent principal owner," "presumably" had decided to run for Congress and "almost certainly" directed Companies' contributions). OGC appears to have relied, in part, not on information in the record but on information *not* in the record. FGCR at 7 ("Notably, Heaney, his Committee, and the Heaney Companies do not deny that Heaney made or directed the contributions to" the Super PAC.). OGC drew an adverse inference from the Super PAC's "firewall memo," which stated that the Super PAC would support Heaney's candidacy and referred to his campaign committee and was dated four days before Heaney filed a Statement of Candidacy. FGCR at 7 n.26, 10 n.38. This inference overlooks the fact that an individual has 15 days after becoming a candidate to file a Statement of Candidacy. *See* 11 C.F.R. § 101.1(a).

7 *See* 52 U.S.C. § 30101(2)(B); 11 C.F.R. §100.3(a). OGC also concluded that Heaney and his principal campaign committee, Heaney for Congress, violated the registration and reporting provisions of the Act by filing an untimely Statement of Candidacy and Statement of Organization, respectively.

8 Even assuming, *arguendo*, that the Companies' contributions triggered Heaney's candidacy, the Respondents denied "financing" the Super PAC. They relied on Advisory Opinion 2006-04 (Tancredo), in which the Commission stated that a contribution by a congressional committee of 25% of a state ballot committee's total receipts would violate 52 U.S.C. § 30125 in light of the overall relationship between the campaign and the ballot committee. *Id*. at 4-5; *see also* 11 C.F.R. § 300.2(c) ("[T]he factors described in paragraphs (c)(2)(i) through (x) of this section *must* be examined in the context of the overall relationship between [a political committee] and the entity to determine whether the presence of any factor or factors is evidence that the [political committee] directly or indirectly established, finances, maintains, or controls the entity.") (emphasis added).

9 52 U.S.C. § 30125(e)(1)(A).

PAC, OGC concluded that Heaney, the Companies, and the Super PAC violated the Act's soft money prohibitions by making and receiving those contributions.

In other words, OGC concluded that the Companies' contributions to the Super PAC violated the Act because of events that occurred weeks and even months after the contributions were made. Specifically, under this theory, because Heaney owned or held leadership positions at the Companies and *eventually* became a candidate,[10] and because the Super PAC paid for ads against Heaney's opponent *seven months* after receiving the Companies' contributions, the contributions were illegal from the start.

If the Commission were to adopt this approach, companies would need to refrain from exercising their constitutional rights to contribute to Super PACs in the event that their owners or officers might later decide to run for office and be supported (or at least, as here, not opposed) by the same Super PACs. This approach relies on legal logic that would be vulnerable to court challenge. Accordingly, we decline to adopt it here.

Coordinated Communications

The Complaint was filed before the Super PAC reported making any public communications opposing Faso or supporting Heaney. Nonetheless, the Complaint predicted that the Super PAC would make such communications and that they would be prohibited and excessive in-kind contributions to Heaney's principal campaign committee, Heaney for Congress, under the common vendor provision of the Commission's coordinated communication rule.[11] The Respondents objected to the speculative nature of the claims and provided a copy of a firewall policy adopted by Crimson Public Affairs, Heaney for Congress's vendor, to prevent the sharing of information between it and In the Field Consulting, the Super PAC's vendor (collectively, the "Vendors"), and the Vendors' owners.[12]

OGC concluded that the Super PAC and Heaney for Congress "may have coordinated through common vendors."[13] We found this conclusion to be problematic for several reasons.

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[10] *See* FGCR at 6-8.

[11] Compl. at 12 (predicting that Super PAC "likely" would make express advocacy communications opposing Heaney's opponent that "likely" would be prohibited in-kind contributions to Heaney's campaign under the "common vendor" provision of the Commission's coordinated communications regulations because services provided to Super PAC by In the Field Consulting "likely" would be related to public communications and were "presumably" informed by services provided to Heaney's campaign by Rob Cole and Jake Menges, partners in consulting firm Crimson Public Affairs).

[12] In addition to co-owning Crimson Public Affairs, Rob Cole was executive director of the Super PAC and owned In the Field Consulting, which provided services to the Super PAC.

[13] FGCR at 12. By the time OGC made its recommendations to the Commission, the Super PAC had reported making several independent expenditures opposing Faso or supporting Heaney.

- First, the record indicates that Heaney for Congress and the Super PAC did not share a common vendor. Instead, OGC deemed two commercial vendors — each of which provided services to either the Super PAC or to Heaney for Congress, but neither of which provided services to both committees — to be a "common vendor" based on their partially overlapping ownership.[14]

- Second, the record does not indicate that the Super PAC's vendor, In the Field Consulting, or the vendor's owner, officers, or employees, provided any services to Heaney for Congress, much less the services specified in the Commission's common vendor regulation.[15] Thus, under the plain language of the regulation, there was no reason to believe that the common vendor provision was met.

- Third, even if we were to assume for the sake of argument that the Vendors should be treated as a single vendor, their firewall policy dated back to August 2015. The policy's stated purpose was "to ensure that Rob Cole[16] [providing services to the Super PAC through In the Field Consulting] and any employees, contractors or vendors of [In the Field Consulting] are not privy to any activity or information and communications between [Heaney for Congress] or [Crimson Public Affairs] on behalf of [Heaney for Congress]."[17]

- Fourth, the record did not contain any "specific information" indicating that, despite the firewall policy, information about Heaney's campaign plans, projects, activities, or needs was conveyed to the Super PAC, or that if such information were conveyed, it was material to the Super PAC's express advocacy communications.[18]

Under these circumstances, we could not conclude that there was reason to believe that the Super PAC's express advocacy communications were in-kind contributions to Heaney for Congress under the common vendor provision of the Commission's coordinated communication regulations.

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14 FGCR at 15-18.

15 *See* 11 C.F.R. § 109.21(d)(4).

16 FGCR at 13.

17 *See* MUR 7006 (Heaney for Congress, *et al.*), Response to Complaint from New York Jobs Council and Robert Cole, Ex. A at 5.

18 11 C.F.R. § 109.21(h).

Conclusion

For these reasons, we voted against finding reason to believe the Respondents violated the Act and Commission regulations.

Matthew S. Petersen
Vice Chairman

8/30/2019
Date

Caroline C. Hunter by CSC

8/30/2019
Date

Caroline C. Hunter
Commissioner