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SENSITIVE

Thomasenia P Duncan, Esq
General Counsel
Federal Election Commission
999 E Street, N W
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2008 MAR 31 P 4: 51

Re: MUR 5976

Dear Ms Duncan

Please find enclosed a response to the February 25, 2008 complaint filed by the Democratic National Committee This Response is filed jointly on behalf of Senator John McCain and John McCain 2008, Inc (Joseph Schmuckler, Treasurer)

I am honored to be joined on this Response Brief by Charles Fried, Beneficial Professor of Law at Harvard Law School and a former Solicitor General of the United States, and Thomas Merrill, the Charles Keller Beekman Professor of Law at Columbia University and a former Deputy Solicitor General of the United States Both Professor Fried and Professor Merrill are participating in this representation in their individual capacities and not on behalf of their Law Schools or Universities Additionally, an Opinion of Counsel is appended hereto from Professor Jonathan Macey, Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law at Yale University Professor Macey offers his expert Opinion on this Matter's banking and securities law issues in his personal capacity and not on behalf of Yale Law School

Should you have any questions concerning this Response, please feel free to contact either me or Todd Steggerda, Chief Counsel to John McCain 2008

Sincerely,


Trevor Potter
General Counsel
John McCain 2008



Paid for by John McCain 2008
PO Box 16118 | Arlington, VA 22215

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**RESPONSE OF JOHN MCCAIN AND JOHN MCCAIN 2008, JOSEPH SCHMUCKLER
AS TREASURER, TO COMPLAINT IN MATTER UNDER REVIEW 5976**

INTRODUCTION

There can be no speech without the expenditure of resources. The United States Supreme Court recognized this fundamental truth in Buckley v. Valeo, ruling that just as the First Amendment does not allow limitations on the content or quantity of speech, it does not countenance limitations on expenditures by the speaker in aid of that speaker's speech. Buckley v. Valeo, 424 U.S. 1 (1976). This is a foundational First Amendment truth and it applies most urgently to political speech—the Amendment's core. Through all the vagaries and varieties of pronouncements on campaign finance issues since Buckley, the Court—though often invited to do so—has never retreated from this position. See, e.g., Randall v. Sorrell, 548 U.S. 230 (2006). The public financing regime does not contradict this established premise because it is entirely voluntary. Now comes the Democratic National Committee (the "DNC") and seeks to entrap Senator John McCain and John McCain 2008, Inc. (collectively, "Respondents" or "McCain Campaign") into spending limits through a series of baseless and vague arguments without any legitimate constitutional foundations. Yet, even if such a misguided approach to constitutional rights were appropriate, it would fail on its own terms.

The principal hook by which the DNC hopes to catch the Campaign is the perfectly reasonable provision in the campaign finance laws that require a candidate who receives public funds from the U.S. Department of the Treasury (the "Treasury Department") to stay within specified expenditure limits. But in this case, neither the Campaign, nor any Campaign creditor, has ever accepted a single penny from the Treasury Department. Nor has the Campaign ever pledged federal matching-funds certifications as security for private financing, which further undermines the DNC's baseless suggestion that the expenditure limits remain in force. To the contrary, the Campaign entered into an agreement with a private lender that purposely avoided pledging matching-funds certifications as security. Although that agreement included a conditional and unfulfilled covenant that the Campaign would, on the happening of certain events—events that never occurred—later seek public matching funds and pledge those funds as collateral if it were found to be eligible for them, a private contract that does not in fact cause or result in a pledge of matching-funds certifications as security has no statutory or regulatory implications and, more importantly, cannot force the Campaign to forsake its First Amendment rights.

The DNC's other arguments are similarly without merit. Though the Campaign, like every political actor, has a constitutional right to stay clear of the public financing system, the DNC wrongly claims that having once contemplated receiving funds and having sought to establish its eligibility for them, the Campaign is now trapped within that system and the associated spending limits—even though it has not accepted any funds from the Treasury Department. The DNC's theories on the effect of the Federal Election Commission's lack of quorum are equally flawed. Indeed, it is simply wrong as a matter of law to suggest, as the DNC argues here, that the Campaign must now languish in the public finance system and be subject to the expenditure limits thereof on the quantity of political speech because there is at present no Federal Election Commission quorum (and, because of a political impasse, may not soon have a

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quorum) rendering the Commission unable to issue its ministerial recognition of the Campaign's decision not to accept public funds.

Any claim that there is a limit on a candidate's expenditures must be evaluated in light of the serious First Amendment concerns this would present. In the brief that follows, the Respondents demonstrate how the DNC's arguments, even without consideration of the constitutional difficulties presented, fail on their own terms under principles of campaign-finance, administrative, banking, and contract law.

STATEMENT OF FACTS

United States Senator John McCain is a candidate for the office of President of the United States. His principal campaign committee is John McCain 2008, Inc (Joseph R. Schmuckler, Treasurer). On August 13, 2007, Senator McCain filed with the Federal Election Commission (the "Commission") a Candidate and Committee Agreement and Certification Letter and a Threshold Submission¹ (collectively, "Matching-Funds Application") to establish eligibility for the Presidential Primary Matching Payments Account Act's ("Matching Fund Act" or "Act") public funding program (the "Program") Pub L No 93-443 (1974), 11 CFR § 9033.1 (2007). Senator McCain asked the Commission to determine his eligibility for the Program in order to preserve the option of accepting public funds. As was widely reported at the time, the Campaign never committed to accept public funds for the primary election. To the contrary, the Campaign publicly announced from the onset of establishing program eligibility that it was merely preserving the option to accept federal funding if it later decided to do so.²

In subsequent months, the Campaign submitted additional matchable contributions for Commission review and certification. By late December 2007, it became clear that the US Senate would neither confirm the President's Commission nominees, nor allow him to make recess appointments over the year-end holidays. As a result, the Commission knew it would be left without a quorum and unable to take official actions concerning Matching Fund Act payments. Accordingly, the Commission on December 19, 2007, while still in possession of a quorum, issued to the Treasury Department a certification of the Campaign's eligibility to "receive payment from the Presidential Primary Matching Payment Account"³. Notably, the

¹ McCain Candidate and Committee Agreement and Certification Letter and Threshold Submission (Aug 13, 2007) (attached hereto as Exhibit 1)

² See, e.g., *The Day in Politics*, Star-Ledger (New Jersey), Aug 29, 2007 (Communications Director Jill Hazelbaker stated that "[w]e have not made a final decision, but we are doing what's necessary should we decide to opt into the matching fund system"), Brian C. Mooney, *Obama Fund-Raising Blazes 3d-Quarter Trail*, GOP's Thompson Also Makes Strides, Boston Globe, Oct 2, 2007 ("spokeswoman Jill Hazelbaker said no decision has been made about formally opting into the public funding system"), *FOX News Sunday* (Fox News Channel television broadcast Oct 21, 2007) (WALLACE "Are you going to accept federal matching funds?" MCCAIN "We haven't made that decision yet, and it's not a decision we need to make immediately. We can continue to consider all options"), *American Morning* (CNN television broadcast Oct 23, 2007) ("KIRAN CHETRY "All right. So that at this point, you are not going to be taking federal matching funds?" MCCAIN "We haven't made a decision. We'll make a decision. Stay tuned.")

³ Federal Election Commission, Notice of Certification (Dec 19, 2007) (attached hereto as Exhibit 2)

Treasury Department had previously announced that the Matching Funds Account balance was not likely to be sufficient to make any payments to eligible candidates until March 2008 ⁴

On February 6, 2008, after having won the New Hampshire, South Carolina, and Florida Republican primaries, and having substantially prevailed in the "Super Tuesday" primaries, Senator McCain notified the Commission that he was withdrawing his Matching-Funds Application from the primary public funding system and would not accept any public funds for the primary election period ⁵ In so doing, Senator McCain accurately represented that the Campaign had neither accepted any funds from the Treasury Department, nor pledged any matching-funds certifications as security for a bank loan By letter dated February 7, 2008, the Campaign informed the Treasury Department that it had withdrawn the Matching-Funds Application from the Program and would not accept public funds for the primary election ⁶

On February 19, 2008, Commission Chairman David Mason sent a letter to Senator McCain indicating that the Commission would consider Senator McCain's February 6 withdrawal notice "at such time as it has a quorum" ⁷ Chairman Mason also asked for information concerning a line of credit that the Campaign had obtained months earlier, and had accurately disclosed through appropriate filings In his February 19 letter, Chairman Mason invited Senator McCain to "expand on [Senator McCain's] rationale" for concluding that neither he nor the Campaign had pledged matching-funds certifications as security for private financing ⁸ Chairman Mason's request was apparently prompted by press reports concerning the Campaign's line of credit from Fidelity Bank & Trust

The private financing at issue in Chairman Mason's letter was a \$3 million line of credit negotiated in November 2007 with Fidelity & Trust Bank of Bethesda, Maryland (the "Bank") This line of credit was negotiated and executed in the normal course of the Bank's business ⁹ on November 14, 2007 pursuant to three principal documents a Business Loan Agreement (the "Loan Agreement"), a Commercial Security Agreement (the "Security Agreement"), and a Promissory Note (the "Note") (collectively, the "Loan Documents") ¹⁰ Under the Loan Documents, the Bank required certain collateral and other assurances that funds loaned to the Campaign would be repaid On December 17, 2007, the Campaign and the Bank executed a Loan Modification Agreement pursuant to which the line of credit was increased from \$3 million to \$4 million ¹¹ On March 20, 2008, the Campaign repaid to the Bank all funds borrowed pursuant to the Loan

⁴ Press Release, Federal Election Commission, *FEC Approves Matching Funds for 2008 Candidates* (Dec 20, 2007), available at www.fec.gov/press/press2007/20071207cert.shtml

⁵ Letter from John McCain, U S Senator, to Federal Election Commission (Feb 6, 2008) (attached hereto as Exhibit 3)

⁶ Letter from Trevor Potter, General Counsel, John McCain 2008, Inc , to U S Treasury (Feb 7, 2008) (attached hereto as Exhibit 4)

⁷ Letter from David Mason, Chairman, Federal Election Commission, to John McCain, U S Senator (Feb 19, 2008) (Attached hereto as Exhibit 5)

⁸ *Id.*

⁹ Barry Watkins Aff ¶ 3 (attached hereto as Exhibit 6)

¹⁰ Loan Documents (Nov 14, 2007) (attached hereto as Exhibit 7)

¹¹ Loan Modification Agreement (Dec 17, 2007) (attached hereto as Exhibit 8) [hereinafter *Loan Modification Agreement*]

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The Loan Documents and the Loan Modification Agreement embodied the Bank's and the Campaign's (collectively, the "Parties") express agreement and intent that the Campaign was not pledging matching-funds certifications as security for the line of credit. The Security Agreement (in original and modified form)—the document through which security interests in the loan transaction were intended to be, and were in fact, created—expressly excluded from the description of "collateral" any and all certifications of matching funds. Specifically, the original Security Agreement excluded "any certifications of matching fund eligibility, including related rights, currently possessed by [the Campaign] or obtained before January 1, 2008" as collateral for the line of credit.¹² Likewise, the modified Security Agreement stated "any certifications of matching fund eligibility, including related rights, now held by [the Campaign] are not themselves being pledged as security for the Indebtedness and are not themselves collateral for the Indebtedness or subject to this Security Agreement"¹³ The Parties' intent was likewise embodied in the Loan Agreement (in original and modified form), which also specifically excluded matching-funds certifications from the description of "collateral." According to the original Loan Agreement, "It is expressly understood and agreed that 'Collateral' specifically excluded any certifications of matching fund eligibility currently possessed by Borrower or obtained before January 1, 2008"¹⁴ Similarly, the modified Loan Agreement stated as follows

It is expressly understood and agreed that "Collateral" specifically excludes any certification of matching fund eligibility now held by Borrower and/or John McCain and any right, title and interest of Borrower and/or John McCain to receive payments thereunder.¹⁵

The Loan Modification Agreement further clarified that these certifications were not pledged as collateral, plainly excluding as such "any right, title and interest of [the Campaign] and/or John McCain to receive payments" under the matching-funds certifications.¹⁶

Three other provisions of the Loan Documents addressed the matching-funds certifications, but none of them created a security interest in them. First, the Parties agreed that the Campaign could grant a security interest in the new matching-funds certifications for the line of credit in the future, but only if certain conditions first occurred and a separate agreement was executed. Specifically, if Senator McCain had withdrawn from the Program before December 31, 2007 and failed to win or place within at least 10 percentage points of the winner in the New Hampshire primary (or the next primary or caucus, pursuant to the modified Loan Agreement), then the Loan Agreement required the Campaign to reenter the Program and then grant to the Bank a security interest in its new matching funds.¹⁷ However, these conditions precedent never occurred. Second, the Campaign promised that it would not transfer, grant a security in, or otherwise encumber the public matching-funds certifications to or for the benefit of any other

¹² Security Agreement, at 1 (Nov 14, 2007) [hereinafter Security Agreement]

¹³ Security Agreement, at 1 (Nov 14, 2007) (as modified on Dec 17, 2007) (emphasis added) [hereinafter Security Agreement (as modified)]

¹⁴ Loan Agreement, at 5 (Nov 14, 2007) [hereinafter Loan Agreement]

¹⁵ Loan Agreement, at 5 (Nov 14, 2007) (as modified on Dec 17, 2007) (emphasis added) [hereinafter Loan Agreement (as modified)]

¹⁶ *Id.* at 5

¹⁷ *Id.* at 2

person or entity¹⁸ Third, the Loan Agreement required that the Campaign not, without the Bank's prior consent, exceed the Program's spending limits, irrespective of whether the Campaign was subject to the Program as of any applicable date of determination¹⁹ Neither the Bank nor the Campaign intended to create a security interest in any matching-funds certifications pursuant to these provisions²⁰

On February 25, 2008, the Campaign's General Counsel responded to Chairman Mason's February 19 letter, with, among other things, a letter from the Bank's counsel, confirming that the certifications had not been pledged as collateral for the Campaign's line of credit The Bank's counsel stated

[The bank does not now have, nor did it ever receive from the Committee, a security interest in any certification for matching funds Any finding or determination to the contrary would be wholly inconsistent with the language of the loan documents, the intent and understanding of the parties and basic principles of banking, security, and uniform commercial code law²¹

The DNC filed the present complaint with the Commission on February 28, 2008

ARGUMENT

I. THE MATCHING-FUNDS PROGRAM'S SPENDING LIMITS DO NOT APPLY TO THE MCCAIN CAMPAIGN

A. Senator McCain has a Constitutional Right to Withdraw From the Primary Matching-Funds Program

The U S Supreme Court in Buckley v Valeo recognized a candidate's constitutional right to spend unlimited funds on election activities, holding that the "First Amendment requires the invalidation of ceilings on overall campaign expenditures" Buckley v Valeo, 424 U S 1, 58 (1976) The Buckley Court was faced with two sets of spending limits One set was automatically imposed on all presidential candidates and the other was accepted voluntarily by candidates in conjunction with public funding Federal Election Campaign Act Amendments of 1974, Pub L 93-443 § 404(a) (Oct 15, 1974) The Court overturned the generally applicable spending limits because they restricted candidates' First Amendment rights The Program's spending limits were upheld, but only because they were voluntary²² It is for this reason that the Matching Fund Act and its implementing regulations do not impose any restrictions on a

¹⁸ Id. at 3

¹⁹ Id. at 4

²⁰ Richard Davis Aff ¶ 6 (attached hereto as Exhibit 9), Watkins Aff ¶ 8

²¹ Letter from Trevor Potter, General Counsel, John McCain 2008, Inc , to David Mason, FEC Chairman (Feb 25, 2008) quoting Letter from Matthew S Bergman and Scott E Thomas, Attorneys, Dickstein Shapiro LLP, to Trevor Potter, General Counsel, John McCain 2008, Inc (Feb 25, 2008) (emphasis added) (attached hereto as Exhibit 10)

²² Buckley directly compared a candidate's decision to participate in the public funding system to a candidate's choice to "voluntarily limit the size of contributions he chooses to accept"—a determination made solely by the candidate Id. at 57 n 65

candidate's ability to voluntarily withdraw from the Program. The Commission itself has expressly recognized that the Program must remain voluntary to be constitutional. As the Commission emphasized in its Gephardt Advisory Opinion ("Gephardt" or "Gephardt Opinion"), it is the voluntary nature of the Program that is so fundamental.

The Supreme Court held that the voluntary nature of all of the public funding programs permits the related expenditure limits, while simultaneously striking down expenditure limits that were not voluntarily accepted as part of a public funding program. Fed Election Comm'n Adv Op 2003-35 at 3 (Gephardt), available at <http://saos.nictusa.com/aodocs/2003-35.pdf> (emphasis added) [hereinafter Gephardt].

Unless the Program affords presidential candidates a voluntary decision to participate—and, more fundamentally, not to participate—its spending limits are indistinguishable from those invalidated by Buckley and its structure is unconstitutional. Common Cause v. Schmitt, 512 F Supp 489, 495 (D.C. 1980) ("Candidates, the constitutional rationale goes, are permitted to forgo their own right to private contributions and unlimited expenditures in exchange for (exclusive) financing from the public coffers. This is a voluntary decision made by the candidate, presumably, because the candidate believes that his or her political communication is enhanced by public funding, even given the restrictions.") Accordingly, Senator McCain has a constitutional right not to participate in the Program, and may therefore decide to accept or reject public funds after individually weighing each action's consequences. Republican Nat'l Comm. v. Fed. Election Comm'n, 487 F Supp 280, 286 (1980) (in upholding the Presidential Election Campaign Fund portion of the presidential public funding program the Court said, "the candidate has a legitimate choice whether to accept public funding and forego private contributions") (summarily aff'd 445 U.S. 955 (1980)). See generally, Rosenstiel v. Rodriguez, 101 F.3d 1544, 1549 (8th Cir. 1996), Vote Choice v. DiStefano, 4 F.3d 26 (1st Cir. 1993).

B. The McCain Campaign Never Accepted Matching Funds, Which is the Constitutional and Regulatory Trigger for Application of Program Spending Limits

The McCain Campaign never received or accepted matching funds. Nor does the DNC allege that it did. Under the statutory and regulatory confines of the Program's legal framework and the principles of Buckley v. Valeo embodied therein, this undisputed fact means that the Campaign is not bound by the Program's spending limits. It is a necessary corollary of Buckley that a candidate voluntarily binds himself to spending limits only through the receipt of associated matching funds. "Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." Buckley, 424 U.S. at 57 (emphasis added). Thus, the import of Buckley is that (a) a candidate's decision to participate in the Program must be voluntary, and (b) a candidate surrenders his constitutional right to unlimited spending only if he receives public

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funds See Buckley, 424 U S at 95 (“[A]cceptance of public financing entails voluntary acceptance of an expenditure ceiling”) ²³

Consistent with Buckley, the Commission’s regulations make clear that spending limits do not apply to a candidate unless that candidate has actually received public funds under the Program

The expenditure limitations of 11 CFR 9035.1 shall not apply to a candidate who does not receive matching funds at any time during the matching payment period 11 CFR § 9035.1(d) (2007) (emphasis added)

Accordingly, under section 9035.1(d) of the regulations and in step with the principles underlying Buckley, spending limits are not applicable to the Campaign because it never accepted public funds under the Program

C. Commission Practice Has Been to Recognize that Candidates May Withdraw Prior to the Receipt of Federal Funds

In the past, the Commission has faithfully administered the Program in compliance with Buckley by recognizing the Program’s voluntary nature. Neither its action nor inaction has ever impeded the withdrawal of any candidate’s matching-funds application. In fact, it has limited its involvement to simply recognizing candidates’ withdrawals and notifying the Treasury Department of candidates’ consequent ineligibility. In the only available interpretation by the Commission of its role in the withdrawal process, the Commission in its Gephardt Opinion said it would simply “withdraw a certification of a candidate’s eligibility to receive Matching Payment Act funds prior to the payment date upon receipt of a written request by the candidate” under normal circumstances. Gephardt at 4 (emphasis added). Gephardt’s “holding”, then, prescribes at most a purely ministerial role for the Commission in recognizing an eligible candidate’s ultimate refusal to participate in the Program. Indeed, Congressman Gephardt was told the Commission would process his withdrawal in one business day—just long enough to “deliver a certification withdrawal to the Secretary of Treasury prior to his issuance of payments”. Id. Consistent with Buckley, past Program participants have established matching-funds eligibility and elected subsequently to refuse public funds. Gephardt at 3 (“The Commission’s previous resolution of similar issues is consistent with permitting rescissions prior to the payment of any Matching Payment funds”). Then-presidential candidate Howard Dean was declared eligible to participate in the Program in June 2003, but declined public funds on

²³ Statutory provisions and legislative history also speak of the receipt of public funds as the moment when a candidate’s voluntary commitment to the Program’s spending limits becomes binding. See Republican Nat’l Comm., 487 F Supp at 285 (“Here the conditions imposed by Congress upon receipt of public campaign financing do not infringe upon the First Amendment rights of candidates”) (emphasis added) (summarily aff’d, 445 U S 955 (1980)). See also H R Rep No 94-1057, at 54 (1976) (Conf Rep), reprinted in 1976 U S C C A N 946, 969 (“The remaining provisions of this section transfer into the Act those provisions of 18 U S C 608 which imposed expenditure limitations on presidential candidates, conditioning their application, in accordance with the Supreme Court’s decision in Buckley v. Valeo, upon the acceptance of public financing.”)

November 12, 2003.²⁴ Similarly, Republican Elizabeth Dole withdrew her matching-funds application on December 17, 1999 after qualifying earlier that year.²⁵ Commission precedent has thus established a ministerial role for the Commission that carefully preserves candidates' autonomy as outlined in Buckley.

Nothing should fundamentally alter the Commission's normal practice here. Moreover, its current lack of quorum is not cause to depart from Commission precedent or from Buckley's mandate of a voluntary program. Senator McCain's right to not participate in the Program is equal to that of past candidates. He contemplated participating in the Program, and qualified through the eligibility process in order to be able to do so, but eventually exercised his right to voluntarily withdraw his Matching-Funds Application. His February 6, 2008 withdrawal letter was therefore effective, at the latest, "upon receipt" by the Commission unless Senator McCain had actually received public funds under the Program any time prior to his withdrawal, which he had not. Had a Commission quorum existed on February 6, 2008, doubtless the Commission's exercise of its ministerial role would have closely mirrored the Commission's two-day processing of Elizabeth Dole's withdrawal: the Treasury Department would have been informed forthwith that Senator McCain was no longer entitled to receive federal matching funds due to his withdrawal from the Program.²⁶

D The McCain Campaign Did Not Grant a Security Interest in Matching-Funds Certifications

The DNC argues, without basis, that Senator McCain "pledged matching funds as collateral for a loan to his campaign," and has therefore surrendered his constitutional right to voluntarily withdraw from the Program. In so arguing, the DNC incorrectly relies on language in the Gephardt Opinion that discusses pledging matching-funds certifications as "security for private financing."

The DNC Complaint attempts to make much of the fact that the Gephardt Opinion states, as a factual condition precedent, that Congressman Gephardt had not pledged the certifications his campaign had received from the Commission as collateral for a private loan. Complainant DNC completely misconstrues the reasons this was relevant to the Commission, and suggests that the Commission created a new standard that would restrict withdrawal of an eligibility application for the matching funds system. Even apart from its constitutional shortcomings,²⁷ the

²⁴ Letter from Howard Dean, presidential candidate, to Ellen Weintraub, FEC Chair (Nov. 12, 2003) (hereinafter Dean Letter) (attached hereto as Exhibit 11)

²⁵ Letter from Elizabeth Dole, U.S. Senator to Scott Thomas, FEC Chairman (Dec. 17, 1999) (hereinafter Dole Letter) (attached hereto as Exhibit 12)

²⁶ Elizabeth Dole's letter was received by the Commission on December 20, 1999. The Commission notified Treasury of her withdrawal on December 22, 1999. See Dole Letter, Fed. Election Comm'n. The Record 6 (Feb. 2000), available at <http://www.fec.gov/pdfs/record/2000/feb00.pdf>

²⁷ The statement in Gephardt regarding the pledge of certifications as collateral in no way represents a constitutionally permissible barrier to voluntary withdrawal from the program. The quid pro quo theory embodied in the Act and the Buckley and the Republican Nat'l Comm. decisions forbids such limitation. Provided public monies have not been released, the government has provided no "quid" that can be used to extract a regulatory "quo." The only relevant event for purposes of triggering the restrictions on expenditures and other legal limitations is the acceptance of public funds. Private agreements that take place in anticipation of such a release have no

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DNC's interpretation is contrary to both the language and likely purpose of this phrase in the Gephardt Opinion (and ignoring the fact that the Commission can only lawfully establish a new regulatory standard through a notice and a comment rulemaking, not through an Advisory Opinion)²⁸

The more likely reason the Commission noted a bank's lack of security interest in Congressman Gephardt's certifications was that its regulations prescribe certain procedures to pledge matching-funds certifications as security Under 11 C F R § 100 82, a loan secured by primary matching-funds certifications satisfies the Commission's loan security requirements when

(iv) The Loan agreement requires the deposit of the public financing payments, contributions, and interest income pledged as collateral into the separate depository account for the purpose of retiring the debt according to the repayment requirements of the loan agreement, and

(v) In the case of public financing payments, the borrower authorizes the Secretary of the Treasury to directly deposit the payments into the depository account for the purpose of retiring the debt 11 C F R § 100 82(e)(2)(iv)-(v) (2007)

These procedures appear to protect the Secretary of the Treasury when public financing payments have been pledged as a security interest By requiring that public financing payments be placed in a separate depository account when such payments collateralize a loan, the regulations assure that the Treasury Department does not face uncertainty about who is entitled to receive the payments It is logical, then, that the Commission recognized these practical implications when it authored the Gephardt Opinion²⁹ Nevertheless, the language has no applicability to the current Complaint in any event because (as explained in detail below) both the Bank and the McCain Campaign agree there was no such security interest

The Loan Documents, reflecting the Parties' clear intent, did not create any security interest in any matching-funds certifications Under Maryland law, which the Parties agreed would govern the loan transaction and which is based on the Uniform Commercial Code, a security interest is "an interest in personal property or fixtures that secures the payment or performance of an obligation " U C C § 1-201(b)(35) (2008) Moreover, "[the creditor] cannot

bearing on the relationship between the government and the candidate, which is the sole basis for identifying a *quid pro quo*

²⁸ See 2 U S C § 437f(b) (2008) ("Any rule of law which is not stated in this Act or in chapter 95 or 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title ")

²⁹ Alternatively, the statement could merely be a recapitulation of the facts, in dicta, that had been presented to the Commission for purposes of rendering the advisory opinion The Gephardt committee had stated that "the Commission's certification will not be pledged as security for any loan during the Committee's reconsideration of its participation in the Matching Payment Act's public funding program " Gephardt at 2 Advisory opinions are generally couched in terms of the facts presented by the party seeking the opinion But the recitation of those facts does not mean that they become legal requirements binding on subsequent parties

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have an enforceable security interest where there is no security agreement signed by the debtor " Tilghman Hardware v Larrimore, 628 A 2d 215, 219 (Md 1993) A security agreement must not only evidence the Parties' intent to create a security interest in an item of property that is clearly defined, the agreement must also include the debtor's specific grant of a security interest to the secured party Id at 399-401 Indeed, the "granting words" are the quid pro quo of the security agreement—"necessary to indicate the intention of the parties to create a security interest, and in the absence of such words, it seems rather clear that the parties did not intend to create a security interest " Id

The Loan Documents included a Security Agreement, and its operable provision expressly excluded from the grant any and all interest in public matching funds, as follows

GRANT OF SECURITY INTEREST For valuable consideration, Grantor grants to Lender a security interest in the Collateral to secure the Indebtedness and agrees that the Lender shall have the rights stated in this agreement with respect to the Collateral in addition to all other rights that Lender may have by law

COLLATERAL DESCRIPTION The word "Collateral" as used in this Agreement means inventory, equipment, accounts [and other property] Grantor and Lender agree that any certifications of matching funds eligibility, including related rights, now held by [the Campaign] are not themselves being pledged as security for the Indebtedness and are not themselves collateral for the Indebtedness or subject to this Security Agreement ³⁰

The Parties' intent was also plainly embodied in the Loan Agreement, which likewise excluded matching-funds certifications from the description of "Collateral" "It is expressly understood and agreed that 'Collateral' specifically excludes any certifications of matching fund eligibility now held by Borrower and/or John McCain and any right, title and interest of Borrower and/or John McCain to receive payments thereunder"³¹ Here, the Parties unambiguously expressed their intent to exclude matching-funds certifications from the Security Agreement's operative grant, so the Loan Documents are properly not subject to any alternative interpretation See Canaras v Lift Truck Services, Inc., 322 A 2d 866, 873 (Md 1974) ("Where a contract is plain and unambiguous there is no room for construction and it must be presumed that the parties meant what they expressed") The fact that the Parties did not, and did not intend to create any security interest in any matching-funds certifications is confirmed by Jonathan Macey, Sam Harris Professor of Corporate Law, Corporate Finance, and Securities Law at the Yale Law School and an independent expert in banking law who, upon examining the

³⁰ Security Agreement (as modified), at 1 (emphasis added) Even prior to modification, the definition of "Collateral" in the Security Agreement specifically excluded, in substantially similar form, matching fund certifications Security Agreement, at 1

³¹ Loan Agreement (as modified), at 5 (emphasis added) Even prior to modification, the definition of "Collateral" in the Loan Agreement specifically excluded, in substantially similar form, matching fund certifications Loan Agreement, at 5

loan transaction and all of its underlying documents, concluded that the Loan was "at no time secured by matching funds certificates"³²

The DNC's suggestion that the Campaign "made a current pledge and encumbrance of future rights to receive funds" through the Loan Document language that describes the excluded certificates as those "now held"³³ is misguided in law and in fact. Among other fundamental shortcomings, it is simply not possible, as a matter of commercial law, to create a valid security interest by implication. See *Haft v Haft*, 671 A 2d 413, 417 (Del. Ch. 1995) ("[I]t is elementary that the intention necessary to form a contract is not found in the private subjective mental state of either of the parties.") As explained more fully in the attached expert opinion letter of Professor Macey, the DNC's argument that the Loan Documents' silence as to future entitlements somehow implies that future certifications are included as collateral is "logically flawed and at odds with the Uniform Commercial Code"³⁴

Moreover, the Bank's attorneys at Dickstein Shapiro LLP stated unequivocally that the Bank never received a security interest in matching-funds certifications, before or after the date of the Loan Documents

[T]he bank does not now have, nor did it ever receive from the Committee, a security interest in any certification for matching funds. Any finding or determination to the contrary would be wholly inconsistent with the language of the loan documents, the intent and understanding of the parties and basic principles of banking, security, and uniform commercial code law.³⁵

Instead, the Bank and the Campaign understood that "[a]ny certifications of matching funds eligibility, including related rights, now held" included any certification the Campaign held or was to receive based on all submissions for funds during the Campaign's period of eligibility in the Program. (Hence the inclusion of the words "related rights.") As the President of the Bank states in his attached affidavit,

At the time when each of the Loan Documents was executed and delivered by the Campaign, the Bank intended to expressly exclude any present and future right of the Campaign to Matching Funds as collateral for the Loan, notwithstanding any date reference pertaining to when certifications for Matching Funds might come into being. The reason why the Loan Documents stated that the exclusion (from collateral for the Loan) applied to Matching Funds entitlements 'now held' (as opposed to 'now held or hereafter acquired') was because the Bank's attorneys advised the Bank to

³² Expert Opinion, Professor Jonathan Macey I (March 14, 2008) (hereinafter Macey Opinion) (attached hereto as Exhibit 13)

³³ FEC Complaint, Democratic National Committee 5 (Feb. 25, 2008) (hereinafter DNC Complaint)

³⁴ Macey Opinion 5

³⁵ Letter from Matthew S. Bergman and Scott E. Thomas, Attorneys, Dickstein Shapiro LLP, to Trevor Potter, General Counsel, John McCain 2008, Inc. (Feb. 25, 2008) (emphasis added) (attached hereto as Exhibit 10)

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do so, in order to avoid any inconsistency within the Loan Documents that could arguably arise pursuant to the 'Additional Requirement' section of the Loan Documents³⁶

Thus, the Parties intended to exclude from collateral any present and future right of the Campaign to matching-funds certifications, regardless of when those certifications came into existence³⁷

Similarly, the DNC misconstrues language in the "Additional Requirements" section of the Loan Agreement as allegedly creating a "present encumbrance, however conditional, of the Campaign's future interest in any entitlement to matching funds"³⁸ The Campaign did agree to reapply to the Program and separately grant to the Bank a security interest in any future matching-funds certifications it might obtain but only in the event that the Campaign withdrew from the Program in 2007 and then lost the New Hampshire primary election by more than ten points (and made a similar promise in the December 17 Loan Modification Agreement), but that conditional promise did not create a security interest. At most, the language contractually bound the Campaign to do something in the future, should the conditions precedent occur (which they did not). While failure to perform this obligation could possibly create an action against the Campaign for breach of contract, this does not transform the promise into a security interest. Professor Macey confirms this conclusion, stating that

[The DNC's] interpretation of the text confuses an agreement to potentially grant a security interest in the future with the actual granting of a security interest. On the contrary, by discussing the agreement to possibly grant [the Bank] a security interest in the future, the text instead reaffirms that the Campaign had not already granted [the Bank] a security interest in this part or any other part of the agreement.³⁹

This same analysis applies to the contractual provisions that prevent the Campaign from exceeding the Program's spending limits or prevent it from granting a security interest in the matching funds certifications to anyone else. These are contractual obligations which give additional protection to the Bank, but cannot give rise to a security interest, as they do not contain the requisite granting language. Moreover, they do not, as the DNC Complaint erroneously asserts, lead to the conclusion that an implied security interest has arisen.

The Loan Documents' language is clear and explicit on this score. Even if it were not, the law is clear that "if the language under consideration is ambiguous or uncertain the court must then determine the intention of the parties." *Canaras*, 322 A 2d. at 874. Notably, as the affidavits of officers from both the Campaign and the Bank make plain, the Parties' intent was to secure the subject loan with every asset of the Campaign except matching-funds certifications.⁴⁰ This is hardly surprising, given that both the Campaign and the Bank relied upon experienced

³⁶ *Watkins Aff* ¶ 7

³⁷ *Id.*, *Davis Aff* ¶ 6

³⁸ DNC Complaint 5

³⁹ Macey Opinion 3

⁴⁰ *Davis Aff* ¶ 4, *Watkins Aff* ¶ 5

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election law counsel advising as to the prudence—under the most conservative interpretation of existing guidance, including the Gephardt Opinion—of excluding the matching-funds certifications from the loan collateral in order to preclude even a potential argument that the Campaign had somehow foreclosed its right to voluntarily withdraw from the Program ⁴¹

E. The McCain Campaign Is Not Bound, Under a Contract Law Theory, To Accept Matching Funds (and Comply with Associated Spending Limits) Merely By Establishing Program Eligibility or By Submitting the Candidate Agreement Letter

The McCain Campaign did not commit itself to accept public funds and comply with the Program's spending limits simply by establishing eligibility for the Program. Yet, the DNC wrongly equates the Matching-Funds Application and the establishment of Program eligibility with the actual acceptance of public funds, as if those events were constitutionally equivalent under Buckley.⁴² Its argument, then, is that establishing eligibility itself is sufficient to forever bind a candidate to the Program and to its spending limits. Buckley forbids this result. As discussed, the Program must be voluntary. And the Program is not voluntary if a candidate must irrevocably tie himself to spending limits merely to ask the Commission if he is qualified to receive public funds. By submitting the Matching-Funds Application, the Campaign agreed only to abide by spending limits and other Program conditions if it accepted public funds during the 2008 primary election. 11 C.F.R. § 9035.1(d) (2007) ("The expenditure limitations of 11 CFR 9035.1 shall not apply to a candidate who does not receive matching funds at any time during the matching payment period") (emphasis added), see also 26 U.S.C. § 9033(b) (2008) (providing no statutory barrier to withdrawal of eligibility). The Campaign cannot be deemed to have effectively accepted public funds, and therefore be subject to spending limits by only taking steps to establish eligibility to participate in the Program.

Seeking credibility for its supposition that the McCain Campaign is bound by virtue of its initial submissions and candidate letter, the DNC relies exclusively—and erroneously—on Gephardt's "binding contract" language, which Gephardt used to discuss the Program's eligibility process. Gephardt was quite obviously invoking contractual terms only by way of analogy.⁴³ For example, when Congressman Gephardt asked whether he could defer payment of Program funds, the Commission replied by saying that the Commission and the Treasury

⁴¹ Because the McCain Campaign made no pledge of a security interest in the matching-funds certifications, the DNC's allegation that the McCain Campaign violated FEC reporting requirements by inaccurately stating on the Schedule C-1 that the collateral for the loan does not include "certification for federal matching funds" or "public financing" is without merit.

⁴² This is also an argument at odds with the fact that its own Chair, Howard Dean, established eligibility and then withdrew from the Program and its spending limits in the 2004 cycle.

⁴³ Immediately after suggesting that the law of contracts provides the proper lens for viewing the issue, the Commission proceeded to analyze the question whether withdrawal is permitted in light of the voluntary nature of the program and the *quid pro quo* analysis emphasized in Buckley and Republican Nat'l Comm. This analysis yielded the correct conclusion that withdrawal is permitted any time before the funds are released. Indeed, given that withdrawal is permitted any time before funds are released, it is mystifying what the Commission meant by referring to the application for funds as creating a "binding contract." As stated, though, the Gephardt Commission viewed the contract-based analysis as nothing more than a useful analogy. Gephardt at 3 ("The Committee wishes to reconsider its decision to participate in the Matching Payment Act public funding program and inquires, in effect, whether the Commission would consent to a rescission of this contract") (emphasis added).

Department "lack[ed] discretion to delay certification of eligible payments or payments of certified amounts" because of statutory requirements Gephardt at 6 ("Thus, the Commission and the Secretary of the Treasury lack discretion to delay certification of eligible payments or payments of certified amounts. Consequently, requests for such delays cannot be granted.") It correctly made no mention of contractual obligations to Congressman Gephardt or to other presidential candidates. The Commission only referenced statutes and regulations because it is bound by statutes and regulations—not contracts—in administering the Program. Simply put, if the Commission is not actually bound by a contract in administering the Program, candidates cannot be forced to participate in the Program on the theory that the Commission has not yet "rescinded" a metaphorical contractual obligation.

The Commission in Gephardt could not have intended the contractual analogy to be taken literally because under applicable administrative law concepts, an award of matching funds is not performance of a binding contract. In administrative law terms, an award of matching funds is a "license", and the process of determining whether a candidate qualifies for such an award is "licensing." See 5 U.S.C. §§ 551(8), (9) (2008) (Administrative Procedure Act definitions of "license" and "licensing"). Licensing, in turn, is a type of adjudication. See 5 U.S.C. § 551(7) (2008). The license here is a conditional one—it comes with regulatory restrictions attached. Candidates know this, and hence they know that when they accept public matching funds they become subject to restrictions on expenditures and other limitations. But none of this transforms the mere submission of an application, and the Commission's processing of the application, into a binding contract. If this were properly viewed as a binding contract, such that a rescission must be requested and approved by the other party to the contract, then presumably other fundamental contractual rights and remedies would be available, including the right to bring a breach of contract suit against a party unilaterally rescinding a contract. Surely the Commission could not, in this case, seek an order of specific performance requiring a candidate to accept matching funds, nor could it sue for damages to recover its administrative costs if Senator McCain had pulled out of a race before receiving public funds. Establishing matching-funds eligibility is a public administrative process, not a contractual one.

The same would be true with typical licensing at other federal agencies, such as the Federal Communications Commission's (the "FCC") licensing of broadcast rights. In that instance, a company applies for a broadcast license with the FCC, and the FCC checks over the application to ensure it is in proper form. If the company later decides to withdraw its application, administrative law principles would not dictate that there had been a binding contract created between the company and the FCC. To the contrary, if the applicant decided to withdraw the application before it is ruled upon, that would be the end of the matter. Government agencies process applications for licenses all the time, and applicants change their mind about whether they want licenses all the time. But neither agencies nor courts analyze this process in terms of the law of contracts, and the Commission should not conduct the regulatory analysis through such prism here.⁴⁴

⁴⁴ Even if this process is analyzed as a contract, where a party has rendered itself (or is otherwise) unable to fulfill a condition of the contract, it thereby releases the other party of the requirement that the condition be met. See, e.g., Parsons v. Bristol Dev. Co., 402 P.2d 839, 868 (Cal. 1965) ("Each party to a contract has a duty to do what the contract presupposes he will do to accomplish its purpose. Thus, '[a] party who prevents fulfillment of a condition of his own obligation cannot rely on such a condition to defeat his own liability.'"") As such, because

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F. The McCain Campaign Is Not Bound to Accept Matching Funds (and Comply with Associated Spending Limits) on Account of Using Program Eligibility for Access to State Primary Ballot or for Other Purposes

The DNC argues that the McCain Campaign received “a material, financial benefit from the certification of eligibility for matching funds through the ability to avail itself of the automatic right of access to the ballot, in some states,”⁴³ and implies that this “benefit” somehow requires the McCain Campaign to accept matching funds and adhere to spending limitations. This argument is simply unfounded. Buckley specifically establishes that a candidate is subject to spending limitations only when he has accepted public matching funds. Neither Buckley nor any other existing authority supports the DNC’s theory that the McCain Campaign is bound to participate in the Program because it obtained what the DNC incorrectly and vaguely designates as some form of “material financial benefit,” through the McCain Campaign’s use of Program eligibility to obtain access to the primary ballots in select states. To be clear, measures used in some states that allow Program-eligible candidates to qualify for presidential-primary ballots are meant to provide states with a convenient method to measure a candidate’s electoral strength. See, e.g., 15 Del Code Ann § 3183 (2008) (directing each political party’s chairperson to submit a list of candidates “who have become eligible by the close of business on the preceding day to receive payments from the Presidential Primary Matching Payment Account of the Internal Revenue Code”). In essence, states view the matching-funds eligibility application at the federal level (which includes a demonstrated level of financial support across a broad range of states) as a sufficient proxy for electoral strength to qualify such candidates for the primary ballot in that state. Notably, in no state utilizing this process does a candidate encumber—or even submit—the actual certifications authorizing him to receive matching funds. Rather, the showing is merely one of eligibility, which for the reasons we explained above, do not bind a candidate to the Program, nor subject him to its associated spending limits.

II. OFFICIAL COMMISSION ACTION IS NEITHER REQUIRED NOR APPROPRIATE TO EFFECTUATE THE MCCAIN CAMPAIGN’S PROPER WITHDRAWAL FROM THE PROGRAM

As articulated above, the McCain Campaign has a right—and properly exercised that right—to voluntarily withdraw its Matching-Funds Application because it had never received any public funds from the Treasury Department. To the extent the Gephardt Opinion is read to suggest that advance FEC approval is required before a candidate can voluntarily withdraw from participation in the Program, as the DNC suggests, such reading is flawed for several reasons. Most fundamentally, such a requirement would represent an unconstitutional prior restraint on the exercise of protected free speech rights, given a candidate’s First Amendment right to conduct a campaign without spending limits. See generally, Buckley, 424 US 1. No proposition of First Amendment law is more clearly established than that the exercise of protected speech rights cannot be made conditional either on the discretionary approval of an administrative agency, or on an approval process that has no effective time limit. See FW/PBS,

the FEC is unable to fulfill a condition (release the Campaign from the Program) of the contract, it must release the Campaign.

⁴³ DNC Complaint 6

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Inc v City of Dallas, 493 U S 215 (1990) (holding that “a prior restraint that fails to place time limits on the time within which the decisionmaker must issue the license is impermissible”)

Moreover, even if the Gephardt Opinion is construed as requiring the Commission's approval of withdrawal, and insofar as the Commission is unable to perform what in any event must be no more than the ministerial (bookkeeping) function of ruling on such requests promptly (because it lacks a quorum or otherwise), this violates the candidate's procedural due process rights. The ability to conduct one's campaign without spending limits is a significant liberty interest. See Bd of Regents v Roth, 408 U S 564, 572 (1972) (protected liberty includes not just freedom from bodily restraint but other rights grounded in the Constitution). A candidate cannot be deprived of such an interest without a timely hearing and decision. See Logan v Zimmerman Brush Co., 455 U S 422 (1982) (procedural scheme that allows protected entitlement to be extinguished through administrative delay violates due process). If the administrative scheme, as structured or as administered, fails to provide a timely decision, it effectively extinguishes the liberty interest in question, and does so in a manner that violates both procedural and—because of the core First Amendment interests implicated—substantive due process.

Interpreting the Gephardt Opinion as establishing a Commission approval requirement in this regard also defies basic tenets of administrative law. The Act clearly distinguishes between rules and regulations, on the one hand, and advisory opinions on the other, and in fact prohibits the establishment of a regulation through an advisory opinion. See 2 U S C §§ 437f, 438 (2008). The Gephardt Opinion therefore cannot be invoked as the basis for any requirement not set forth in the Act or in any regulation. The statute provides “Any rule of law which is not stated in this Act or in chapter 95 or 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.” Id. at § 437f(b). Consequently, insofar as the Gephardt Opinion is construed as either requiring advance Commission approval to withdraw (or, for that matter, as precluding withdrawal when matching funds have been pledged as collateral, or as treating applications for matching funds as binding contracts), the requirements are invalid because they were not adopted through an official rulemaking procedure.

For all of these reasons, an affirmative vote of the Commission (at such time as it has a quorum) is not required to effectuate the McCain Campaign's withdrawal from the Program. Any interpretation of the Gephardt Opinion that might support such a requirement should be disclaimed to avoid the serious constitutional and statutory issues that such a reading of the Act would present. Indeed, there is ample evidence that the Gephardt Opinion did not envision any requirement of an affirmative vote of the Commission before permitting future withdrawals. The final sentence of the Commission's analysis states that “the Commission cautions that it must receive any such written request no later than December 30, 2003, to provide the Commission with one business day to deliver a certification withdrawal to the Secretary of Treasury prior to his issuance of payments on the first business day of the Presidential election year.” Gephardt at 4. The clear implication is that the action of processing a request to withdraw is purely ministerial, and the Commission has no discretion to deny a written request to withdraw before funds are disbursed. This, of course, is entirely consistent with the voluntary nature of the Program and the quid pro quo structure it represents. A candidate cannot be forced to apply for

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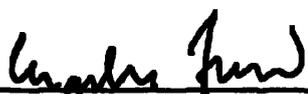
matching funds, and certainly does not need to obtain the Commission's approval before applying for funds. Similarly, a candidate cannot be forced to abide by spending limits before public matching funds are received—nor can he be forced to obtain the Commission's approval before withdrawing an application for matching funds.

CONCLUSION

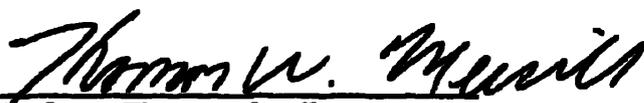
Senator McCain properly exercised his right to not participate in the Program. He fully retained this right because he never accepted public funds, and is therefore not subject to the Program's spending limits in light of his recent withdrawal. Buckley, the Primary Matching Payment Account Act's terms and legislative history, Commission regulations, and past Program withdrawals all establish that to the extent the Commission takes any action on Senator McCain's withdrawal notice, such action must be ministerial in nature only, and given the discussion on the merits described herein, would merely validate the proper withdrawal notice filed with the Commission on February 6, 2008.

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Respectfully Submitted,



Professor Charles Fried



Professor Thomas Merrill



Trevor Potter
Todd Steggerda
Counsel
John McCain 2008, Inc

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August 13, 2007

The Honorable Robert D. Lenhard, Chairman
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

Dear Chairman Lenhard:

As a candidate seeking to become eligible to receive Presidential primary matching funds, I certify and agree to the following provisions as prescribed in 11 CFR §9033.1 and 11 CFR §9033.2:

- I In accordance with 11 CFR §9033.2(b)(1) and 11 CFR §9033.2(b)(3), I certify that I am seeking the nomination of the Republican Party for election to the Office of President in more than one State. I and/or my authorized committee(s) have received matchable contributions, which in the aggregate exceed \$5,000 from residents of each of at least twenty States, which with respect to any one person do not exceed \$250.00.
- II Pursuant to 11 CFR §9033.2(b)(2), I and/or my authorized committee(s) have not incurred and will not incur qualified campaign expenses in excess of the expenditure limitations prescribed by 26 U.S.C. §9035 and 11 CFR §9035.
- III In accordance with 11 CFR §9033.1(b)(1), I acknowledge that I have the burden of proving that disbursements made by me, and any of my authorized committee(s) or agents are qualified campaign expenses as defined at 11 CFR §9032.9.
- IV Pursuant to 11 CFR §9033.1(b)(2), I and my authorized committee(s) will comply with the documentation requirements set forth in 11 CFR §9033.11.
- V Upon the request of the Commission, I and my authorized committee(s) will supply an explanation of the connection between any disbursement made by me or my authorized committee(s) and the campaign as prescribed by 11 CFR §9033.1(b)(3).
- VI In accordance with 11 CFR §9033.1(b)(4), I and my authorized committee(s) agree to keep and furnish to the Commission all documentation for matching fund submissions, any books, records (including bank records for all accounts) and

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supporting documentation and other information that the Commission may request

- VII As provided at 11 CFR §9033 1(b)(5), I and my authorized committee(s) agree to keep and furnish to the Commission all documentation relating to disbursements and receipts including any books, records (including bank records for all accounts), all documentation required by this section (including those required to be maintained under 11 CFR §9033 11), and other information that the Commission may request. If I or my authorized committee(s) maintains or uses computerized information containing any of the categories of data listed in 11 CFR §9033.12(a), the committee will provide computerized magnetic media, such as magnetic tapes or magnetic diskettes, containing the computerized information at the times specified in 11 CFR §9038 1(b)(1) that meet the requirements of 11 CFR §9033.12(b). Upon request, documentation explaining the computer system's software capabilities shall be provided and such personnel as are necessary to explain the operation of the computer system's software and the computerized information prepared or maintained by the committee(s) shall be made available.
- VIII As prescribed at 11 CFR §9033 1(b)(6), I and my authorized committee(s) will obtain and furnish to the Commission upon request all documentation relating to funds received and disbursements made on my behalf by other political committees and organizations associated with me.
- IX In accordance with 26 U.S.C. §9038 and 11 CFR §9033 1(b)(7), I and my authorized committee(s) shall permit an audit and an examination pursuant to 11 CFR §9038 of all receipts and disbursements, including those made by me, all authorized committee(s) and any agent or person authorized to make expenditures on my behalf or on behalf of my authorized committee(s). I and my authorized committee(s) shall also provide any material required in connection with an audit, investigation, or examination conducted pursuant to 11 CFR §9039. I and my authorized committee(s) shall facilitate the audit by making available in one central location, office space, records and such personnel as are necessary to conduct the audit and examination, and shall pay any amounts required to be repaid under 11 CFR §9038 and 11 CFR §9039.
- X Pursuant to 11 CFR §9033 1(b)(8), the person listed below is entitled to receive matching fund payments on my behalf, which will be deposited into the listed depository, which I have designated as the campaign depository. Any change in the information required by this paragraph shall not be effective until submitted to the Commission in a letter signed by me or the Treasurer of my authorized principal campaign committee.

Name of Person Joseph Schmuckler, Treasurer, John McCain 2008

Mailing Address P O Box 16118, Arlington, Virginia 22215

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**Designated
Depository**

BB&T

Address

**1909 K Street, NW
Washington, DC 20006**

- XI Pursuant to 11 CFR §9033.1(b)(9), 11 CFR §9033.1(b)(10), and 11 CFR §9033 1(b)(11), I and my authorized committee(s) will: (A) prepare matching fund submissions in accordance with the Federal Election Commission's Guideline for Presentation in Good Order, including the provision of any magnetic media pertaining to the matching fund submissions and which conforms to the requirements specified at 11 CFR §9033 12, (B) comply with the applicable requirements of 2 U S C §431 ~~et seq~~ 26 U S C §9031 ~~et seq~~ and the Commission's regulations at 11 CFR Parts 100-300, and 9031-9039, (C) pay any civil penalties included in a consultation agreement or otherwise imposed under 2 U S C §437g against myself, any of my authorized committee(s) or any agent thereof**
- XII Pursuant to 11 CFR §9033 1(b)(12), any television commercial prepared or distributed by me or my authorized committee(s) will be prepared in a manner which ensures that the commercial contains or is accompanied by closed captioning of the oral content of the commercial to be broadcast in line 21 of the vertical blanking interval, or is capable of being viewed by deaf and hearing impaired individuals via any comparable successor technology to line 21 of the vertical blanking interval**

Signed


Candidate Signature*

* 11 CFR §9033 2(a)(1) requires the Candidate and Committee Agreements and Certifications to be signed by the Candidate

cc **The Honorable David M. Mason
Vice Chairman
Federal Election Commission**

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February 6, 2008

VIA HAND DELIVERY

The Honorable David Mason, Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

The Honorable Ellen Weintraub, Vice Chair
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE John McCain 2008, Inc

Dear Commissioners

This letter is to advise you that I, on behalf of myself and John McCain 2008, Inc , my principal campaign committee, am withdrawing from participation in the federal primary-election funding program established by the Presidential Primary Matching Payment Account Act. No funds have been paid to date by the Department of the Treasury, and the certification of funds has not been pledged as security for private financing.

I will make no further requests for matching-fund payment certifications and will not accept any matching-fund payments, including the initial amount and other amounts certified by the Commission in connection with my campaign's previous submissions. My campaign has not submitted to the Department of Treasury any bank account information and will also inform them directly of our withdrawal from the matching funds system.

Should you have any questions or desire any additional information, please contact my counsel, Trevor Potter, at 703-418-2008.

Sincerely,


John McCain
US Senator-AZ

cc The Honorable Henry Paulson, Secretary, Dept of the Treasury
The Honorable Judith Tillman, Commissioner, Dept of the Treasury Financial Management Service

—★—
Paid for by John McCain 2008
PO Box 16118 | Arlington, VA 22215

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February 7, 2008

VIA HAND DELIVERY

Commissioner Judith R. Tillman
Financial Management Service
United States Treasury Department
401 14th Street, SW
Washington, DC 20227

RE John McCain 2008, Inc

Dear Commissioner Tillman

This letter is to advise you that Senator John McCain and John McCain 2008, Inc have withdrawn from participation in the federal primary-election funding program established by the Presidential Primary Matching Payment Account Act. A copy of Senator McCain's letter of withdrawal to the Federal Election Commission is enclosed.

Senator McCain and John McCain 2008, Inc will make no requests for matching payments and will not accept matching-fund payments, including the initial amount and other amounts certified by the Federal Election Commission in connection with previous submissions. John McCain 2008, Inc has not submitted any bank account information to the Department of Treasury.

Should you have any questions or desire any additional information, please contact me at 703-418-2008.

Sincerely,


Trevor Potter
General Counsel
John McCain 2008, Inc

cc The Honorable Henry Paulson, Secretary, Department of the Treasury
The Honorable David Mason, Chairman, Federal Election Commission
The Honorable Ellen Weintraub, Vice Chair, Federal Election Commission

★
Paid for by John McCain 2008
PO Box 16118 | Arlington, VA 22215

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FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

February 19, 2008

BY FACSIMILE AND FIRST CLASS MAIL

Senator John McCam
John McCam 2008, Inc
Post Office Box 16118
Arlington, Virginia 22215

Re John McCam 2008, Inc (LRA 731)

Dear Senator McCam

This is in response to your letter dated February 6, 2008, received by the Commission late February 8, advising that you are withdrawing from the Presidential Primary Matching Payment Program

As you may be aware, in Advisory Opinion 2003-35 (Gephardt), the Commission balanced the voluntary nature of participating in the Matching Payment Program with the contractual obligations a candidate commits to once he seeks and receives Commission certification of eligibility to receive payments under the Matching Payment Program. The Commission made clear that a candidate enters into a binding contract with the Commission when he executes the Candidate Agreements and Certifications. AO 2003-35. The Commission stated that it would withdraw a candidate's certification upon written request, thus agreeing to rescind the contract, so long as the candidate 1) had not received Matching Payment Program funds, and 2) had not pledged the certification of Matching Payment Program funds "as security for private financing." *Id.*

Accordingly, we consider your letter as a request that the Commission withdraw its previous certifications. Just as 2 U.S.C. § 437c(c) required an affirmative vote of four Commissioners to make these certifications, it requires an affirmative vote of four Commissioners to withdraw them. Therefore, the Commission will consider your request at such time as it has a quorum.

We note that in your letter, you state that neither you nor your committee has pledged the certification of Matching Payment funds as security for private financing. In preparation for Commission consideration of your request upon establishment of a quorum, we invite you to expand on the rationale for that conclusion, including but not limited to addressing the following

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Senator John McCam
February 19, 2008
Page 2

provisions of the loan agreement executed between John McCam 2008, Inc , and Fidelity and Trust Bank of Bethesda, Maryland on November 14, 2007, as modified on December 17, 2007

The paragraph entitled "Additional Requirements" set forth in the Affirmative Covenants section of the November 14 agreement (page 2), as well as the December 17 modification to that paragraph (page 2 of the modification)

The references to matching funds in the paragraph entitled "Collateral Description" set forth in the November 14 "Commercial Security Agreement" (page 1 of that agreement) (The paragraph contains no reference to certifications of matching fund eligibility or related rights obtained after January 1, 2008, thus apparently bringing any such certifications that might occur within the paragraph's more general description of the collateral for the line of credit)

The December 17 modification to the paragraph just mentioned (page 3 of the modification), which removed the reference to certifications and related rights "currently possessed by grantor or obtained before January 1, 2008" and replaced it with a reference to certifications or rights "now held by Grantor[]"

We would appreciate receiving any response you choose to make by not later than March 7, 2008 If you have any questions, please contact Lawrence L. Calvert, Associate General Counsel, or Lorenzo Holloway, Assistant General Counsel, at (202) 694-1650

Sincerely,



David M. Mason
Chairman

cc The Honorable Judith Tillman, Commissioner,
Financial Management Service, Department of the Treasury

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not Matching Funds or any of the Campaign's right, title or interest with respect thereto. The Loan Documents expressly excluded Matching Funds from "Collateral" for the Loan pursuant to the operative grant clauses contained therein and did not create a security interest in any Matching Funds, past, present or future.

- 6 Although the Loan Documents contained provisions contemplating the possibility that the Bank might, in the future, be granted a security interest in future certifications of Matching Funds, these provisions were operative if, and only if, several circumstances described in the Loan Documents were to occur (which never did) ¹
- 7 At the time when each of the Loan Documents was executed and delivered by the Campaign, the Bank intended to expressly exclude any present and future right of the Campaign to Matching Funds as collateral for the Loan, notwithstanding any date reference pertaining to when certifications for Matching Funds might come into being. The reason why the Loan Documents stated that the exclusion (from collateral for the Loan) applied to Matching Funds entitlements "now held" (as opposed to "now held or hereafter acquired") was because the Bank's attorneys advised the Bank to do so, in order to avoid any inconsistency within the Loan Documents that could arguably arise pursuant to the "Additional Requirement" section of the Loan Documents (as described in paragraph 6 above). Such an inconsistency could arise if the Campaign later granted to the Bank a security interest in certifications for Matching Funds that came into effect as a result of a withdrawal of John McCain from the Program, the consequent nullification of the August 2007 qualification and its related certifications, a subsequent re-entry of John McCain into the Program, and the issuance of new certifications arising from that later qualified status. However, the "now held" language was not

¹ If Senator McCain withdrew from the Program and thereafter failed to win or place within at least 10 percentage points of the winner of the New Hampshire primary (or the next primary or caucus), the Loan Documents required the Campaign to seek to reenter the Program and, if the Federal Election Commission voted to find the Campaign qualified and then certified contributions to the Campaign for Matching Funds, to grant to the Bank a security interest in the new Matching Funds certifications.

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intended to create a security interest in any Matching Funds certificates received at any point during the period of eligibility resulting from the August 2007 qualification and prior to withdrawal from the Program

8 In order to permit the Bank to obtain a pledge of Matching Funds as collateral for the Loan in the future if circumstances warranted it (as described in paragraph 6 above), and in order to preserve the Campaign's right to Matching Funds entitlements, certain provisions were included within the Loan Documents that (i) required the Campaign to remain within the spending limits imposed by the Program (irrespective of whether the Campaign opted to remain in the Program or withdraw from the Program and opt in at a later date)², and (ii) prohibited the Campaign from assigning, pledging, leasing, granting a security interest in, or encumbering any of the Campaign's right, title or interest in and to Matching Funds. The Bank determined that the foregoing provisions, among others, were necessary and appropriate in the absence of having a security interest in and to Matching Funds

9 Further, affiant sayeth not

[Signature]
Affiant

Sworn to and subscribed before me this 28 day of March, 2008

JENIFFER A MEJIA
NOTARY PUBLIC
PRINCE GEORGE'S COUNTY
MARYLAND
MY COMMISSION EXPIRES SEPT 9, 2009 (NOTARY SEAL)

Jeniffer A Mejia
Notary Public

My Commission Expires Sept 9, 2009

² If the Campaign were to withdraw from the Program, a consequent nullification of all of its related rights would occur. However, it was the bank's understanding that, by way of an application for re-entry into the Program, the Campaign would have the right to new Matching Funds certifications, but only if the Campaign stayed within the spending limits of the Program at all times.

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as a consequence of any tax, penalties, excise taxes, charges, deposits or financial returns of a borrower made or submitted on the
Collateral. The provisions of this section of the Agreement, including the obligation to indemnify and defend, shall survive the payment of the
indebtedness and the termination, expiration or termination of this Agreement and shall not be affected by Lender's acquisition of any interest in any of
the Collateral, whether by foreclosure or otherwise.

Liability and Waiver. In litigation, claims, investigations, administrative proceedings or similar actions (including those for unpaid taxes) against
Borrower or its subsidiaries, and in other legal proceedings which may lawfully adversely affect Borrower's financial condition or prospects,
other than litigation, claims, or other actions, if any, that have been disclosed to and acknowledged by Lender in writing.

Taxes. To the best of Borrower's knowledge, all of Borrower's tax returns and reports that are or were required to be filed, have been filed, and all
taxes, assessments and other governmental charges have been paid in full, except those presently being or to be collected by Borrower in good faith
in the ordinary course of business and for which adequate reserves have been provided.

Loan Priority. Unless otherwise expressly disclosed by Lender in writing, Borrower has not entered into or granted any Security Agreements, or
provided the filing or perfection of any Security Interests or of creating any of the Collateral directly or indirectly involving assignment of Borrower's
Lease and Note, that would be prior or that may in any way be superior to Lender's Security Interests and rights in and to such Collateral.

Binding Effect. This Agreement, the Note, all Security Agreements (if any), and all Related Documents are binding upon the signers thereof, as well
as upon their successors, representatives and assigns, and are legally enforceable in accordance with their respective terms.

ASSIGNMENT OF COVENANTS. Borrower covenants and agrees with Lender that, so long as this Agreement remains in effect, Borrower will
indemnify and hold Lender harmless from and against (1) all potential adverse changes to Borrower's financial condition, and (2) all
existing and all potential litigation, claims, investigations, administrative proceedings or similar actions affecting Borrower or any Guarantor which
could materially affect the financial condition of Borrower or the financial condition of any Guarantor.

Financial Records. Borrower shall keep and preserve its accounts with GAAP, applied on a consistent basis, and permit Lender to examine and audit
Borrower's books and records at all reasonable times.

Financial Statements. Furnish Lender with such financial statements and other related information at such frequencies and in such detail as Lender
may reasonably request.

Additional Information. Furnish such additional information and statements, as Lender may request from time to time.

Insurance. Maintain fire and other fire insurance, public liability insurance, and such other insurance as Lender may require with respect to
Borrower's properties and operations, in form, amount, coverage and with insuring companies acceptable to Lender. Borrower shall name Lender
and its affiliates as additional insureds in such policies and coverages. Borrower shall maintain such insurance in form satisfactory to Lender. Lender shall have the right to
cancel any policy that is not cancelled or discontinued without a 30 day prior written notice to Lender. Such insurance policy also shall include an
assignment of proceeds and coverage in favor of Lender and not be limited in any way by any act, ordinance or policy of Borrower or any other
party. In connection with all policies covering assets in which Lender holds or is offered a security interest for the Loan, Borrower will provide
Lender with such lender's loss payable or other endorsements as Lender may require.

Insurance Reports. Furnish to Lender upon request of Lender, reports on such existing insurance policy showing such information as Lender may
reasonably request including without limitation the following: (1) the name of the insurer, (2) the date issued, (3) the amount of the policy, (4) the
premium amount, (5) the time covered properly falling on the basis of which insurance has been obtained, and the amount of outstanding loans
secured, and (6) the expiration date of the policy. In addition, upon request of Lender (Borrower will name other than attorney). Borrower will name no
individuals (except attorneys) to Lender otherwise as applicable to the actual cash value or replacement cost of any Collateral. The cost of such
reports shall be paid by Borrower.

Other Agreements. Comply with all terms and conditions of all other agreements, whether now or hereafter existing between Borrower and any
other party and notify Lender immediately in writing of any default in connection with any other such agreements.

Loan Proceeds. Use of Loan proceeds solely for Borrower's business operations, unless specifically directed to the contrary by Lender in
writing.

Taxes, Charges and Liens. Pay and discharge when due all of its liabilities and obligations, including without limitation all assessments
from governmental charges, taxes and fees of every kind and nature, imposed upon Borrower or its properties, leases, or profits, prior to the
date on which payment would be due, and all local orders that, if unpaid, might become a lien or charge upon any of Borrower's properties
tangible or intangible.

Performance. Perform and comply in a timely manner, with all terms, conditions and provisions set forth in this Agreement, in the Related
Documents and in all other instruments and agreements between Borrower and Lender. Borrower shall notify Lender immediately in writing of any
default in connection with any agreement.

Qualifications. Maintain executive and management personnel with substantially the same qualifications and experience as the present executive
and management personnel, provide written notice to Lender of any change in executive and management personnel resident in business office
in a reasonable and prudent manner.

Environmental Studies. Promptly conduct and complete, at Borrower's expense all such investigations studies, samplings and testings as may
be requested by Lender or any governmental authority relative to any substances or materials or by product of any substances derived to lands or a
substance substances under applicable federal, state, or local law, rule, regulation, order or statute or in siting any property or any facility
owned, leased or used by Borrower.

Compliance with Governmental Requirements. Comply with all laws, ordinances, and regulations, now or hereafter in effect, of all governmental
authorities applicable to the conduct of Borrower's business and operations, and to the use or occupancy of the Collateral, including without
limitation, the Americans With Disabilities Act. Borrower may contact in good faith any such law, ordinance, or regulation and without
undue cost or expense, including appropriate records, so long as Borrower has notified Lender in writing prior to doing so and so long
as in Lender's sole opinion, Lender's interests in the Collateral are not prejudiced. Lender may require Borrower to post adequate security or a
surety bond satisfactory to Lender, to protect Lender's interest.

Inspection. Permit employees or agents of Lender at any reasonable time to inspect any and all Collateral for the Loan or Loans and Borrower's
other properties and to examine and take possession of such Borrower's books, records, and receipts and to make copies and transcripts of Borrower's books,
accounts, and records. If Borrower now or at any time hereafter publishes any records (including without limitation computer generated records
and computer software programs for the production of such records) in the possession of a third party, Borrower, upon request of Lender, shall
notify such party to permit Lender free access to such records at all reasonable times and to provide Lender with copies of any records it may
request, all at Borrower's expense.

Environmental Compliance and Reports. Borrower shall comply in all respects with any and all Environmental Laws, not cause or permit to
occur, as a result of its operations or activities or activities on Borrower's part or on the part of any third party, on property owned or under
control by Borrower, any environmental liability whose damage may result in the environment unless such environmental liability is prevented to
and in compliance with the conditions of a permit issued by the appropriate federal, state or local governmental authorities, and that filed to Lender
promptly and in any event within thirty (30) days after receipt thereof a copy of any notice, agreement, law, statute, ordinance, order or other
correspondence from any governmental agency or municipality concerning any environmental or substantial action or condition on Borrower's part
in connection with any environmental liability whether or not there is damage to the environment under other federal statutes.

Additional Agreements. Make covenants and deliver to Lender such promissory notes, mortgages, deeds of trust, security agreements,
assignments, financing statements, instruments, documents and other agreements as Lender or its assignee may reasonably request to address
and secure the Loan and to protect its Security Interests.

Additional Requirements. Borrower and Lender agree that if Borrower withdraws from the public meeting fund program by the end of December
2007, the John McCain State does not wish the New Hampshire primary or place at least within 90 consecutive days of the election of the New
Hampshire Primary. Borrower will ensure John McCain is permitted to receive political contributions and disbursements, within thirty (30) days of the New
Hampshire Primary (1) promptly for public meeting funds, (2) paid to Lender, as a condition precedent for the Loan, a 30 day period, provided security
interest in and to all of Borrower's debt, file and interest in and to the public meeting fund program, and (3) execute and deliver to Lender such
documents, instruments and agreements as Lender may require with respect to the foregoing.

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Financial Reports. Provide Lender with the following:

Quarterly Federal Reserve Committee reports of Assets and Liabilities to be provided no later than fifteen (15) days after the Federal Reserve Committee filing date.

All financial reports required to be provided under this Agreement shall be prepared in accordance with GAAP, applicable Federal Reserve law and regulations applied on a consistent basis and certified by borrower as being true and correct.

Financially Wholly. Borrower has effected to the the Job Identified as outlined in the Government Security Agreement and the certificate Job Identification to give consideration in an amount sufficient to make the outstanding principal balance of the Loan, together with all interest and unpaid interest and all other fees, charges and expenses with respect thereto, for so long as Lender shall request.

Maintenance of Deposit Accounts with Lender. Maintain, at all times, its primary operating account(s) including all primary depository accounts (also and domestic) depository accounts and withdrawal accounts, with Lender.

Check, Certificate, Bonds, etc. Deposit or cause to be deposited into one or more of the depository accounts established by Lender on Borrower's behalf, all checks, drafts, cash and other instruments received by Borrower, including, without limitation, contribution payments, within one (1) Business Day of Borrower's receipt thereof. Funding such deposit, Borrower will not withhold any such items of payment with any of its other funds or property, but will hold them separate and apart.

RECOVERY OF ADDITIONAL COSTS. If the imposition of or any change in any law, rule, regulation or guideline, or the interpretation or application of any law, rule or regulation or governmental authority governing any report or filing and having the force of law shall impose, modify or alter applicable any laws (Federal, State or local laws) or Executive Orders issued by Lender, reserve requirements, special regulatory requirements or other conditions which result: (a) increase the cost to Lender for collecting or establishing the credit facilities in which this Agreement relates; (b) reduce the amount payable to Lender under this Agreement or the related documents; or (c) reduce the rate of return on Lender's capital or a consequence of Lender's obligations with respect to the credit facilities in which this Agreement relates, then Borrower agrees to pay Lender such additional amounts as will compensate Lender therefor, within the 60 days after Lender's written demand for such payment, which demand shall be accompanied by an explanation of such imposition or change and a calculation in reasonable detail of the additional amounts payable by Borrower which explanation and calculation shall be available in the absence of actual cost.

LENDER'S REPRESENTATIONS. If any action or proceeding is commenced that would materially affect Lender's interest in the Collateral or if Borrower fails to comply with any provision of this Agreement or any related documents, including but not limited to Borrower's failure to discharge or pay when due any amounts Borrower is required to discharge or pay under this Agreement or any related documents, Lender on Borrower's behalf may but shall not be obligated to take any action that Lender deems appropriate, including but not limited to discharging or paying all loans, taxes, security interests, mortgages and other claims, at any time before or based on any Collateral and paying all costs for notices, maintaining and providing any Collateral. All such expenditures incurred or paid by Lender for such purposes will have first priority at the date thereof under the Note from the date incurred or paid by Lender in the date of repayment by Borrower. All such expenses will be deemed a part of the indebtedness owed, at Lender's option, will (a) be payable on demand, or (b) be added to the balance of the Note and be repaid on demand and be payable with any installment payments to become due during the (c) the term of any applicable insurance policy, or (d) the remaining term of the Note.

NEGATIVE COVENANTS. Borrower covenants and agrees with Lender that while this Agreement is in effect, Borrower shall not, without the prior written consent of Lender:

Indebtedness and Liens. (1) incur by trade debt issued in the normal course of business and indebtedness to Lender unsecured by this Agreement, credit line or security instruments for borrowed money, including capital leases; (2) except with respect to Permitted Liens, sell, transfer, mortgage, pledge, lease, grant a security interest in, or otherwise dispose of any or all of Borrower's assets, including, without limitation, any of Borrower's debt, the 100% of the net worth of the public utility holding local program or any holding local government instrument, whether now existing or hereinafter arising; or (3) sell or otherwise dispose of any of Borrower's assets except to Lender.

Continuity of Operations. (1) Keep in any business activity substantially different from those in which Borrower is presently engaged; (2) cause operations, facilities, assets, inventory, supplies or equipment with any other party, change its name, structure or transfer or sell substantial part of the ordinary course of business; or (3) pay any dividends on Borrower's stock (other than dividends payable in the stock) provided however that recommending the transaction, but only to pay to any or no form of Federal tax assessed and in connection or would result from the payment of dividends if Borrower is a "corporation" or "partner" (as defined in the Internal Revenue Code of 1986, as amended). Borrower may pay such dividends on its stock to its shareholders from time to time in amounts necessary to enable the shareholders to pay income taxes and make scheduled interest and payments to satisfy their liabilities under Federal and state law which arise solely from their direct or constructive ownership of a share of the Corporation or Partnership because of their ownership of shares of Borrower's stock, or purchase or exercise any of Borrower's outstanding shares or other or owned Borrower's capital interests.

Lease, Acquisition and Guarantees. (1) Lease, borrow or otherwise acquire or create to any other person, enterprise or entity; (2) purchase, create or acquire any interest in any other enterprise or entity; or (3) incur any obligation as surety or guarantor other than in the ordinary course of business.

Agreements. Borrower will not enter into any agreement containing any provision which would be violated or breached by the performance of Borrower's obligations under this Agreement or its constituent instruments.

Limitation on Advances. Create neither or permit the outstanding principal balance of the Loan to exceed One Million Five Hundred Thousand and No/100 Dollars (\$1,500,000.00) at any time prior to the date on which Borrower shall have fully performed and satisfied its obligations set forth herein before under its existing "Post Office Deposits".

CREATION OF ADVANTAGE. If Lender has made any commitment to make any Loan to Borrower, whether under this Agreement or under any other agreement, Lender shall have no obligation to make Loan Advances or to advance Loan payments if: (1) Borrower or any Guarantor is in default under the terms of this Agreement or any of the related documents or any other agreement that Borrower or any Guarantor has with Lender; (2) Borrower or any Guarantor has become insolvent or has been liquidated; (3) a petition in bankruptcy or similar proceedings, or in connection therewith, (4) there occurs a material adverse change in Borrower's financial condition, in the financial condition of any Guarantor, or in the value of any Collateral securing any Loan; or (5) any Government action, order or statute operates to null, modify or revoke such Guarantor's guaranty of the Loan or any other loan with Lender; or (6) Lender in good faith deems itself insecure, even though no event of default shall have occurred.

SETOFF OR SETOFF. To the extent permitted by applicable law, Lender reserves a right of setoff in all Borrower's accounts with Lender (whether checking, savings, or some other account). This includes all accounts Borrower holds jointly with someone else and all accounts Borrower may open in the future. However, this does not include any IRA or 401(k) accounts or any trust accounts for which setoff would be prohibited by law. Borrower authorizes Lender, to the extent permitted by applicable law, to charge or offset all sums owing on the indebtedness against any and all such accounts, and, at Lender's option, to substantially freeze all such accounts to allow Lender to protect Lender's charge and setoff rights provided in the paragraph.

DEFAULT. Each of the following shall constitute an event of Default under this Agreement.

Payment Default. Borrower fails to make any payment when due under the Loan.

Other Defaults. Borrower fails to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the related documents or to comply with or to perform any term, obligation, covenant or condition contained in any other agreement between Lender and Borrower.

Default in Power of Third Parties. Borrower or any Guarantor defaults under any law, regulation of credit, security agreement, purchase or sales agreement, or any other agreement in favor of any other creditor or person that may materially affect any of Borrower's or any Guarantor's property or Borrower's or any Guarantor's ability to repay the Loans or perform their respective obligations under this Agreement or any of the related documents.

False Statements. Any material representation or statement made or furnished to Lender by Borrower or on Borrower's behalf under this Agreement or the related documents is false or misleading in any material respect, either now or at the time made or furnished or becomes false or misleading at any time thereafter.

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Insolvency. The declaration or insolvency of Borrower's business, or a trustee or receiver appointed for Borrower or for all or a substantial portion of the assets of Borrower, or Borrower makes a general assignment for the benefit of Borrower's creditors, or Borrower files for bankruptcy, or an insolvency proceeding is filed against Borrower and such insolvency proceeding is not stayed for sixty (60) days.

Defective Collateralization. This Agreement or any of the Related Documents ceases to be in full force and effect (including failure of any collateral document to create a valid and perfected security interest or lien) at any time and for any reason.

Creditor or Perfected Proceedings. Commencement of foreclosure or judicial proceedings, whether by judicial proceeding and/or possession or any other method, by any creditor of Borrower or by any governmental agency (which may include creditors of the Loan). This includes a foreclosure of any of Borrower's interests, including special interests, with Lender, otherwise, the effect of which shall not apply if there is a good faith dispute by Borrower as to the validity or enforceability of the claim(s) in the hands of the creditor or judicial proceeding and if Borrower files judicial action of the creditor or judicial proceeding and deposits with Lender monies or a surety bond for the creditor or judicial proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate reserve or bond for the dispute.

Events Affecting Guaranty. Any of the preceding events ceases with respect to any Guarantor of any of the Indebtedness or any Guarantor also or becomes inoperative, or ceases or changes the validity of, or being waived, any Guaranty of the Indebtedness. In the event of a check, Lender, in its sole discretion, shall not be required to present the Guarantor's certificate to secure immediately the obligations existing under the guaranty in a manner satisfactory to Lender, and, in doing so, shall not be bound by the certificate.

Change in Ownership. Any change in ownership of twenty-five percent (25%) or more of the common stock of Borrower.

Advance Change. A material adverse change occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of the Loan is impaired.

Insolvency. Lender is good faith believes that:

EFFECT OF AN EVENT OF DEFAULT. If any Event of Default shall occur, except where otherwise provided in this Agreement or the Related Documents, all covenants and obligations of Lender under this Agreement or the Related Documents, or any other agreement immediately will terminate (including any obligation to make further Loan Advances or Disbursements), and, at Lender's option, all sums owing in connection with the Loan, including principal, interest, and all other fees, costs and charges, if any, will become immediately due and payable, at which point of time all of Borrower's assets shall be in the care of an Escrow Agent of the Lender as described in the "Escrow Agent" section of this Agreement. Lender shall have all of the rights and remedies provided in the Related Documents or available at law in equity or otherwise. Lender may be satisfied by applicable law, all of Lender's rights and remedies shall be cumulative and may be exercised separately or successively. Lender is not required to pursue any remedy and may elect to pursue any other remedy, and an election to pursue one remedy or to take action to enforce an obligation of Borrower or of any Guarantor shall not affect Lender's right to declare a default and to exercise its rights and remedies.

COMPLIANCE WITH THE FEDERAL RESERVE BOARD'S RESERVED FUNDS PROGRAM. Borrower agrees and covenants with Lender that while this Agreement is in effect, Borrower shall not exceed covered or debar spending limits set forth in the Federal Reserve Board's Program, if applicable.

FOOT CLOSING DOCUMENTS. Within sixty (60) days from the date of this Agreement, Borrower hereby agrees to deliver to Lender, the Assignment of the Loan Income Policy (the "Assignment") and a copy of the Payment Life Insurance Policy (the "Policy"), on the life of John McCole. In no event shall less than \$50,000.00. Borrower understands and agrees that failure to deliver the Policy and the Assignment within the period specified will constitute an Event of Default.

STATUS OF CURRENTLY FILED CERTIFICATIONS OF BAYNE'S FINES. Borrower and Lender agree that any certification of standing filed against Bayne currently provided by Borrower or obtained before January 1, 2000 and the right of John McCole 2000. See and John McCole to resolve payment under these certifications are not enforceable under the Commercial Security Agreement for this Loan.

INCIDENTAL PROVISIONS. The following miscellaneous provisions are a part of this Agreement:

Assignment. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.

Assignment of Fees, Expenses. Borrower agrees that Lender shall be an attorney to help enforce this Agreement. Borrower will pay, subject to any applicable law, Lender's attorney's fees and costs of enforcement of this Agreement, including the cost of any court proceedings, whether or not there is a lawsuit and including without limitation additional legal expenses for bankruptcy proceedings.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Consent to Jurisdiction. Borrower irrevocably submits to the jurisdiction of any state or federal court sitting in the State of Maryland over any suit, action, or proceeding arising out of or relating to this Agreement. Borrower irrevocably waives, to the fullest extent permitted by law, any objection that Borrower may ever have to the venue of any such suit, action, or proceeding brought in any such court and any claim that any such suit, action, or proceeding brought in any such court has been brought in an inconvenient forum. Final judgment in any such suit, action, or proceeding brought in any such court shall be conclusive and binding upon Borrower and may be enforced in any court in which Borrower is subject to jurisdiction by a writ upon such judgment provided that service of process is obtained upon Borrower as provided in this Agreement or as otherwise permitted by applicable law.

Consent to Loan Participation. Borrower agrees and covenants to Lender's sale or transfer, whether now or later, of one or more participations interests in this Loan to one or more purchasers, whether related or unrelated to Lender. Lender may provide, without any limitation whatsoever to any one or more purchasers or potential purchasers, any information or knowledge Lender may have about Borrower or about any other party relating to the Loan, and Borrower hereby waives any claim in policy, Borrower may have with respect to such matters. Borrower additionally waives any and all claims of sale of participation interests, as well as all portions of any proceedings of such participation interests. Borrower also agrees that the purchase of any such participation interests will be conditioned on the timely payment of such interests in the Loan and will have all the rights granted under the participation agreement or agreements governing the sale of such participation interests. Borrower further waives all rights of claim or contribution that it may have now or later against Lender or against any purchaser of such a participation interest and irrevocably agrees that after Lender or such purchaser may enforce Borrower's obligations under the Loan irrespective of the claims or insolvency of any holder of any interest in the Loan. Borrower further agrees that the purchase of any such participation interests may entitle its interest irrespective of any potential claims or defenses that Borrower may have against Lender.

Governing Law. This Agreement will be governed by federal law applicable to Lender and, to the extent not preempted by federal law, the laws of the State of Maryland without regard to its conflicts of law provisions. This Agreement has been accepted by Lender in the State of Maryland.

Choice of Venue. If there is a lawsuit, Borrower agrees upon Lender's request to submit to the jurisdiction of the courts of Montgomery County State of Maryland.

JURY WAIVER. LENDER AND BORROWER EACH HEREBY WAIVES THAT, BY JURY IN ANY ACTION OR PROCEEDING TO WHICH LENDER OR BORROWER MAY BE FINED, ADDED OUT OF OR IN ANY WAY PARTICIPATE TO THIS AGREEMENT. IT IS AGREED THAT THIS WAIVER CONSTITUTES A WAIVER OF TRIAL BY JURY OF ALL CLAIMS AGAINST ALL PARTIES TO SUCH ACTIONS OR PROCEEDINGS. THE WAIVER IS IRREVOCABLE, VOLUNTARY AND VOLUNTARILY MADE BY LENDER AND BORROWER, AND LENDER AND BORROWER HAVE HEREBY AGREED THAT NO REPRESENTATIONS OF FACT OR OPINION HAVE BEEN MADE BY ANY PERSON, TO INDUCE THE WAIVER OF TRIAL BY JURY OR TO IN ANY WAY INDUCE OR SELLIFY THE WAIVER. BORROWER FURTHER REPRESENTS THAT BORROWER HAS BEEN REPRESENTED IN THE MAKING OF THIS AGREEMENT AND IN THE MAKING OF THE WAIVER BY INDEPENDENT LEGAL COUNSEL, SELECTED BY BORROWER'S OWN FREE WILL, AND THAT BORROWER HAS HAD THE OPPORTUNITY TO INSURE THE WAIVER WITH COUNSEL.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right of any other right. A demand by Lender of a portion of this Agreement shall not constitute or operate as a waiver of Lender's right otherwise to demand and recover with due provision for any other portion of this Agreement. No payment by Lender, nor any course of dealing between Lender and Borrower, or between Lender and any Guarantor, shall constitute a waiver of any of Lender's rights or of any of Borrower's or any Guarantor's obligations as to any

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these documents. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute a binding consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notice. Any notice required to be given under this Agreement shall be given in writing, and shall be effective when actually delivered, if hand delivered, unless actually received by the addressee business otherwise required by law, when deposited with a nationally recognized overnight carrier, or if neither when deposited to the United States mail, or first class, registered or registered mail postage prepaid, directed to the addressee shown under the heading of this Agreement. Any party may change its address for notices under this Agreement by giving immediate written notice to the other parties, describing their full purpose of the change in its change the party's address. For notice purposes, Borrower agrees to keep Lender informed of all forms of Borrower's actual address. Unless otherwise provided or required by law, if there is more than one Borrower, any notice given by Lender to any Borrower is deemed to be notice given to all Borrowers.

Severability. If a court of competent jurisdiction finds any provision of this Agreement to be illegal, invalid, or unenforceable as to any provisions, that finding shall not render the remaining provisions illegal, invalid, or unenforceable as to any other provisions. If possible, the offending provision shall be modified so that it becomes legal, valid and enforceable. If the offending provision cannot be so modified, it shall be considered deleted from this Agreement. Unless otherwise required by law, the legality, validity, or enforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Substitution and Assignment of Borrowers. To the extent the consent of any provision of this Agreement requires it appropriately, including without limitation any representations, warranties or covenants, by "Borrower" as used in this Agreement shall include all of Borrower's subsidiaries and affiliates. Notwithstanding the foregoing, however, no provision of this Agreement shall be construed to require Lender to make any loan or other financial accommodation to any of Borrower's subsidiaries or affiliates.

Successors and Assigns. All covenants and representations by or on behalf of Borrower contained in this Agreement or any Related Documents shall bind Borrower's successors and assigns and shall pass to the benefit of Lender and its successors and assigns. Borrower shall not, however, have the right to assign Borrower's rights under this Agreement or any Related Documents, without the prior written consent of Lender.

Survival of Representations and Warranties. Borrower understands and agrees that in entering into this Agreement, Lender is relying on all representations, warranties, and covenants made by Borrower in this Agreement or in any certificate or other instrument delivered by Borrower to Lender under this Agreement or the Related Documents. Borrower further agrees that regardless of any investigation made by Lender, all such representations, warranties and covenants will survive the termination of this Agreement and delivery to Lender of the Related Documents, shall be enforceable in equity, shall be deemed made and relied by Lender at the time with Lender's knowledge to make, and shall remain in full force and effect until such time as Borrower's indebtedness shall be paid in full, or until this Agreement shall be terminated in the manner provided above, whichever is the last to occur.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement, unless specifically stated to the contrary, or references to other documents shall mean amounts in total money of the United States of America. Words and terms used in the singular shall include the plural and the plural shall include the singular, or the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code. Accounting words and terms not otherwise defined in this Agreement shall have the meanings assigned to them in accordance with generally accepted accounting principles or its effect on the date of this Agreement.

Advance. The word "Advance" means a disbursement of Loan funds made or to be made to Borrower or on Borrower's behalf on a line of credit or multiple advance basis under the terms and conditions of this Agreement.

Agreement. The word "Agreement" means this Business Loan Agreement, or this Business Loan Agreement may be amended or modified from time to time together with all exhibits and schedules attached to this Business Loan Agreement from time to time.

Borrower. The word "Borrower" means John McCain 2008, Inc. and includes all co-signers and co-obligors signing the Note and all their successors and assigns.

Collateral. The word "Collateral" means all property and assets granted as collateral security for a Loan, whether real or personal property, whether granted directly or indirectly, whether granted once or in the future, and whether granted to the Bank of a specially insured, non-pledged, collateral savings bank of trust, insurance, pledge, any pledge, credit, mortgage, secured credit institution, credit fund, bank, any optional fund, conditional sale, trust receipt, bill of sale, and all other similar interests, items or arrangements intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise. It is expressly understood and agreed that "Collateral" specifically excludes any modifications of existing real property security possessed by Borrower or obtained before January 1, 2008.

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (49 U.S.C. Section 1074), also known as CERCLA, the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-569 (SARA) the Hazardous Materials Transportation Act, 49 U.S.C. Section 1601 et seq. The Resource Conservation and Recovery Act (40 U.S.C. Section 5001 et seq.) or other applicable state or federal laws rules or regulations adopted pursuant thereto.

Event of Default. The words "Event of Default" mean any of the events of default set forth in this Agreement in the default section of this Agreement.

GAAP. The word "GAAP" means generally accepted accounting principles.

Grantor. The word "Grantor" means each and all of the persons or entities granting a Security Interest in any Collateral for the Loan, and their personal representatives, successors and assigns.

Guarantor. The word "Guarantor" means any guarantor, surety or accommodation party of any or all of the Loan.

Guaranty. The word "Guaranty" means the guaranty from Guarantor to Lender, including without limitation a guaranty of all or part of the Note.

Hardware Substances. The words "Hardware Substances" mean materials that, because of their quality, composition or physical, chemical or electronic characteristics, may cause or pose a potential or actual hazard to human health or the environment when improperly used, treated, stored, disposed of, processed, manufactured, transported or otherwise handled. The words "Hardware Substances" are used in their very broadest sense and include without limitation any and all hazardous or toxic substances, articles or parts as defined by or listed under the Environmental Laws. The term "Hardware Substances" also includes, without limitation, pesticides and pesticides by-products or any similar hazard and substance.

Indebtedness. The word "Indebtedness" means the indebtedness evidenced by the Note or Related Documents, including all principal and interest together with all other indebtedness and costs and expenses for which Borrower is responsible under this Agreement or under any of the Related Documents.

Lender. The word "Lender" means Fidelity & Trust Bank, its successors and assigns.

Loan. The word "Loan" means any and all loans and financial accommodations from Lender to Borrower whether now or hereafter existing and hereby advanced, including without limitation those loans and financial accommodations described herein or described on any exhibit or schedule attached to this Agreement from time to time.

Note. The word "Note" means the Note executed by John McCain 2008, Inc. in the principal amount of \$1,000,000.00 dated November 14, 2007 together with all modifications of and renewals, replacements and substitutions for the note or notes mentioned.

Pledged Loan. The words "Pledged Loan" mean (1) item and security interests creating indebtedness used by Borrower to Lender; (2) item or items, accessories or other things other and not due or being delivered in good faith; (3) item or instruments, documents, certificates, or papers or other the item relating to the ordinary course of business and creating obligations which are not yet due; (4) purchase money item or purchase money security interests such as in any property acquired of item by Borrower in the ordinary course of business to secure indebtedness outstanding on the date of this Agreement or provided to be secured under the purview of this Agreement; (5) "Indebtedness and Loans"; (6) item and security interests which, as of the date of this Agreement, have been assigned to and approved by the Lender in writing; and (7) those item and security interests which in the aggregate constitute an investment and independent security interest.

with respect to the net value of borrower assets. It is expressly understood and agreed that any lien, claim or encumbrance on all or any portion of borrower's right, title or interest in and to the public utility plant property or any existing real estate owned hereunder, whether now existing or hereafter arising, shall not constitute a "Permitted Lien"

Permitted Encumbrance. The words "Permitted Encumbrance" mean all property taxes, credit agreements, lease agreements, construction agreements, purchase, security agreements, mortgages, deeds of trust, security deeds, railroad mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, created or deemed to exist by law.

Security Agreement. The words "Security Agreement" mean and include without limitation any agreement, purchase, agreement, assignment, understanding or other agreement, whether created by law, contract, or otherwise, voluntary, involuntary, operating, expiring, or creating a Security Interest.

Security Interest. The words "Security Interest" mean, without limitation, any and all types of collateral security, present and future, whether by the form of a lien, charge, construction mortgage, deed of trust, security deed, assignment, pledge, crop mortgage, chattel mortgage, railroad chattel mortgage, chattel deed, hypothecation, equipment lease, conditional sale, lease finance, lien or the retention of title, lease or sub-lease intended as a security device, or any other security or lien interest whatsoever whether created by law, contract, or otherwise.

BORROWER HEREBY AGREES TO READ ALL THE PROVISIONS OF THE BORROWING LOAN AGREEMENT AND BORROWER AGREES TO ITS TERMS. THIS BORROWING LOAN AGREEMENT IS DATED NOVEMBER 14, 2007.

THIS AGREEMENT IS GIVEN UNDER SEAL, AND IT IS INTENDED THAT THIS AGREEMENT IS AND SHALL CONSTITUTE AND HAVE THE EFFECT OF A SEALED INSTRUMENT ACCORDING TO LAW.

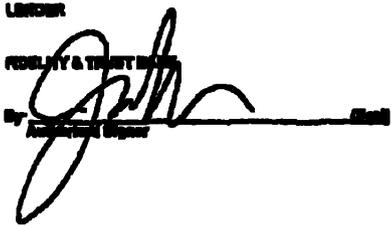
BORROWER

JOHN MOORE JR., INC.


By _____ Seal

LENDER

FIDELITY & TRUST CO.


By _____ Seal

WITNESSED BY THE SIGNATURES OF THE PARTIES TO THIS INSTRUMENT ON THE DATE AND AT THE PLACE ABOVE SAID.

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the Coliseum, and no agreement shall have been made under which any deduction or discounts may be obtained concerning the Coliseum except those obtained in Leader's writing.

Location of the Coliseum. Except in the ordinary course of Greater's business, Greater agrees to keep the Coliseum (or to the extent the Coliseum consists of more than one property) and all contents of personal belongings, by means convenient to the Coliseum, at Greater's address shown above or at such other location as may be acceptable to Leader. Upon Leader's request, Greater will deliver to Leader in some coliseum in Leader's address or at such other location as may be acceptable to Leader, including without limitation the following: (1) all and personal Greater items or belongings; (2) all and property Greater is leasing or holding; (3) all change including Greater items, tools, means of transit, and (4) all other property which Coliseum is or may be located.

Removal of the Coliseum. Except in the ordinary course of Greater's business, including the sales of inventory, Greater shall not remove the Coliseum from its existing location without Leader's prior written consent. To the extent that the Coliseum consists of contents, or other third property, Greater shall not take or permit any action which would require application for continuation of title for the contents outside the State of Delaware, without Leader's prior written consent. Greater shall, whenever requested, advise Leader of the exact location of the Coliseum.

Transactions Involving Coliseum. Except for inventory sold or consigned collected in the ordinary course of Greater's business, or an otherwise provided for in this Agreement, Greater shall not sell, offer to sell, or otherwise transfer or dispose of the Coliseum. While Greater is not in default under this Agreement, Greater may sell inventory, but only in the ordinary course of its business and only to buyers who qualify as a buyer in the ordinary course of business. A sale in the ordinary course of Greater's business does not include a transfer in partial or total satisfaction of a debt or any debt due. Greater shall not provide, authorize, guarantee or otherwise permit the Coliseum to be subject to any lien, security interest, mortgages, or claims, other than the security interest provided for in this Agreement, except the prior written consent of Leader. This includes security interests even if later in date to the security interest created under this Agreement. Unless waived by Leader, all proceeds from any disposition of the Coliseum for whatever reason shall be held in trust for Leader and shall not be commingled with any other funds, proceeds, interest, this agreement shall not constitute consent by Leader to any sale or other disposition. Upon receipt, Greater shall immediately deliver any such proceeds to Leader.

Title. Greater represents and warrants to Leader that Greater holds good and marketable title to the Coliseum, free and clear of all liens and encumbrances except for the lien of this Agreement, no financing statement covering any of the Coliseum is on file in any public office other than those which relate to the security interest provided by this Agreement or to which Leader has specifically consented. Greater shall defend Leader's rights in the Coliseum against the claims and demands of all other persons.

Repairs and Maintenance. Greater agrees to keep and maintain, and to cause others to keep and maintain, the Coliseum in good order, repair and condition at all times while this Agreement remains in effect. Greater further agrees to pay within ten (10) days for work done on, or repairs rendered or materials furnished in connection with the Coliseum so that no lien or encumbrance may ever attach to or be filed against the Coliseum.

Inspection of Coliseum. Leader and Leader's designated representatives and agents shall have the right of all reasonable times to examine and inspect the Coliseum whenever located.

Taxes, Assessments and Liens. Greater will pay when due all taxes, assessments and fees upon the Coliseum, in use or operation, upon this Agreement, upon any preliminary title or notice concerning the Coliseum, or upon any of the other Federal Government. Greater may withhold any such payment or any debt in cash or any form if Greater is in good faith conducting an appropriate proceeding to contest the obligation to pay and to have the Coliseum in and possession in Leader's sole custody. If the Coliseum is subject to a lien which is not discharged within fifteen (15) days, Greater shall deposit with Leader such a certified check or other security satisfactory to Leader in an amount adequate to provide for the discharge of the lien plus any interest, costs, reasonable attorney's fees or other charges that could accrue as a result of enforcement of such of the Coliseum. In any contest Greater shall defend Leader and Leader and shall satisfy any final adverse judgment before Greater shall operate the Coliseum. Greater shall cause Leader to be notified of any such lien or other claim within ten (10) days of the date of the lien or claim. Greater further agrees to furnish Leader with copies of all such liens, assessments and payments and to provide to Leader a copy of all such liens and a timely manner. Greater may withhold any such payment or any debt in cash or any form if Greater is in good faith conducting an appropriate proceeding to contest the obligation to pay and to have the Coliseum in and possession in Leader's sole custody.

Compliance with Governmental Jurisdictions. Greater shall comply promptly with all laws, ordinances, rules and regulations of all governmental authorities, now or hereafter in effect, applicable to the ownership, production, disposition, or use of the Coliseum, including all laws or regulations relating to the public safety of highly-volatile fuel or relating to the production of materials for the production of an explosive product or otherwise. Greater may suspend in good faith any such law, ordinance or regulation and without compliance during any proceeding, including appropriate appeals, so long as Leader's interest in the Coliseum, in Leader's opinion, is not jeopardized.

Insurance Subrogation. Greater represents and warrants that the Coliseum never has been, and never will be so long as this Agreement remains in force on the Coliseum used in violation of any Environmental Law or for the generation, transportation, storage, treatment, disposal, release or discharge of any Hazardous Substance. The representations and warranties contained herein are based on Greater's due diligence in investigating the Coliseum for Hazardous Substances. Greater hereby (1) releases and waives any future claims against Leader for indemnity or contribution in the event Greater becomes liable for cleanup or other costs under any Environmental Law, and (2) agrees to indemnify, defend, and hold harmless Leader against any and all claims and losses resulting from a breach of this provision of this Agreement. This obligation is intended and defined to survive the payment of the indemnification and the termination of this Agreement.

Indemnification of Greater's Insurers. Greater shall procure and maintain all such insurances, including without limitation fire, theft and liability coverage together with such other insurances on Leader's property with respect to the Coliseum, in form, amounts, coverages and limits reasonably acceptable to Leader and covered by a contract or contracts reasonably acceptable to Leader. Greater shall provide to Leader all documents and information that Leader may need to know the terms or conditions of insurance in force with respect to the Coliseum, including obligations that coverage will not be cancelled or discontinued without at least ten (10) days' prior written notice to Leader and not including any disclaimer of the insurer's liability for claims in any such a contract. Such insurance policy also shall include an endorsement providing that coverage in favor of Leader will not be reduced in any way by any act, omission or default of Greater or any other person. In connection with all policies covering amounts in which Leader holds or is claimed a security interest, Greater will provide Leader with such data as possible or other correspondence as Leader may require. If Greater at any time fails to obtain or maintain any insurance as required under this Agreement, Leader may that shall not be obligated to obtain such insurance as Leader deems appropriate, including if Leader so desires "single interest insurances" which will cover only Leader's interest in the Coliseum.

Application of Insurance Proceeds. Greater shall promptly notify Leader of any loss or damage to the Coliseum, whether or not such casualty or loss is covered by insurance. Leader may make partial or total payment of any loss or damage to the Coliseum, whether or not such casualty or loss is covered by insurance on the Coliseum, including without limitation proceeds thereon, shall be held by Leader as part of the Coliseum. If Leader consents to repair or replacement of the damaged or destroyed Coliseum, Leader shall, upon satisfactory proof of completion, pay or reimburse Greater from the proceeds for the reasonable cost of repair or replacement. If Leader does not consent to repair or replacement of the Coliseum, Leader shall retain a Coliseum amount of the proceeds to pay all of the indebtedness, and shall pay the balance to Greater. Any proceeds which have not been disbursed within the 60 months after their receipt and which Greater has not consented to the repair or replacement of the Coliseum shall be used to pay for the indebtedness.

Insurance Reserves. Leader may require Greater to maintain with Leader reserves for payment of insurance premiums which reserves shall be created by monthly payments from Greater of a sum estimated by Leader to be sufficient to produce, at least fifteen (15) days before the premium due date, amounts at least equal to the insurance premiums to be paid. If fifteen (15) days before premium is due, the reserve funds are insufficient, Greater shall upon demand pay any deficiency to Leader. The reserve funds shall be held by Leader as a general deposit and shall constitute a non-interest bearing account which Leader may utilize for payment of the insurance premiums required to be paid by Greater as they become due. Leader does not hold the reserve funds in trust for Greater, and Leader is not the agent of Greater for payment of the insurance premiums required to be paid by Greater. The responsibility for the payment of premiums shall remain Greater's sole responsibility.

Insurance Reports. Greater upon request of Leader, shall furnish to Leader reports on each existing policy of insurance showing such information as Leader may reasonably request including the following: (1) the name of the insurer; (2) the date issued; (3) the amount of the policy; (4) the policy interest; (5) the then current value on the basis of which insurance has been obtained and the manner of determining that value; and (6) the expiration date of the policy. In addition, Greater shall upon request by Leader (however not more often than monthly) have an independent appraisal satisfactory to Leader conducted, at applicable the cost value or replacement cost of the Coliseum.

Financing Statements. Greater authorizes Leader to file a UCC financing statement, or alternatively a copy of this Agreement to perfect Leader's security interest. At Leader's request, Greater additionally agrees to sign all other documents that are necessary to perfect, protect, and enforce Leader's security interest in the Property. Greater will pay all filing fees, the transfer taxes, and other fees and costs incurred unless prohibited by law.

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entire sales, receipts, debts, money orders, documents of title, instruments and items pertaining to payment, shipment, or storage of any Colliery to include collection. Lender may notify assignee and obligors on any Colliery to make payments directly to Lender.

Obtain Delivery. If Lender chooses to sell any or all of the Colliery, Lender may obtain a judgment against Grantor for any delivery remaining on the Colliery due to Lender after application of all amounts received from the proceeds of the rights provided in this Agreement. Grantor shall be liable for a delivery once if the transaction described in this subsection is a sale of equipment or chattel paper.

Other Rights and Remedies. Lender shall have all the rights and remedies of a secured creditor under the provisions of the Uniform Commercial Code, as may be amended from time to time. In addition, Lender shall have and may exercise any or all other rights and remedies it may have available at law, in equity, or otherwise.

Waiver of Remedies. Except as may be prohibited by applicable law, all of Lender's rights and remedies, whether addressed by this Agreement, the Federal Government, or by any other statute, shall be waived and may be exercised directly or unconsciously. Waiver by Lender in person or through any agent shall not constitute payment of any other amount, and no waiver by Lender shall constitute or be taken as an obligation of Grantor under this Agreement, and Grantor's failure to perform, shall not affect Lender's right to exercise a default and continue to exercise its remedies.

INCORPORATION PROVISIONS. The following amendments provisions are a part of this Agreement:

Assignment. This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be changed or amended.

Attorney Fees, Expenses. Grantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's reasonable attorney's fees up to \$10,000 of the principal balance due on the Colliery and Lender's legal expenses, incurred in connection with the enforcement of this Agreement. Lender may file or sue against Grantor to help enforce this Agreement, and Grantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's reasonable attorney's fees up to \$10,000 of the principal balance due on the Colliery and legal expenses whether or not there is a lawsuit, including reasonable attorney's fees up to \$10,000 of the principal balance due on the Colliery and legal expenses for preliminary proceedings (including efforts to locate or locate any amounts due or information, records, and any completed and judgment collection notices). Lender may also recover from Grantor all court attorney's fees, reasonable disbursements and other collection costs (including without limitation, fees and charges of collection agencies) actually incurred by Lender.

Caption Headings. Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of this Agreement.

Governing Law. With respect to procedural matters related to the perfection and enforcement of Lender's rights against the Colliery, this Agreement will be governed by federal law applicable to Lender and to the extent not precluded by federal law, the laws of the State of Delaware. In all other respects, this Agreement will be governed by federal law applicable to Lender and, to the extent not precluded by federal law, the laws of the State of Maryland without regard to its conflict of law provisions. However, if there ever is a question about whether any provision of this Agreement is valid or enforceable, that provision shall be governed by whatever state or federal law would find the provision to be valid and enforceable. The laws mentioned here are intended by the State and this Agreement have been applied, vetted, considered, approved and made and all necessary laws documents have been accepted by Lender in the State of Maryland.

Choice of Venue. If there is a lawsuit, Grantor agrees upon Lender's request to submit to the jurisdiction of the courts of Montgomery County, State of Maryland.

No Waiver by Lender. Lender shall not be deemed to have waived any rights under this Agreement unless such waiver is given in writing and signed by Lender. No delay or omission on the part of Lender in exercising any right shall operate as a waiver of such right or any other right. A waiver by Lender of a provision of this Agreement shall not constitute or be taken as a waiver of Lender's right otherwise to demand that provision and that provision or any other provision of this Agreement. No prior waiver by Lender, nor any course of dealing between Lender and Grantor, shall constitute a waiver of any of Lender's rights or of any of Grantor's obligations or to any other provisions. Whenever the consent of Lender is required under this Agreement, the granting of such consent by Lender in any instance shall not constitute a continuing consent to subsequent instances where such consent is required and in all cases such consent may be granted or withheld in the sole discretion of Lender.

Notice. Any notice required to be given under this Agreement shall be given in writing and shall be effective when actually delivered, when actually received by addressee, or when deposited by mail, when deposited with a nationally recognized overnight courier, or, if mailed, when deposited in the United States post, as first class, certified or registered mail postage prepaid, delivered to the addressee shown on the heading of this Agreement. Any party may change its address for notices under this Agreement by giving written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Grantor agrees to keep Lender informed of all times of Grantor's current address. Unless otherwise provided or required by law, if there is more than one Grantor, any notice given by Lender to any Grantor is deemed to be notice given to all Grantors.

Power of Attorney. Grantor hereby appoints Lender or Grantor's reasonable attorney-in-fact for the purpose of executing any documents necessary to perfect, amend, or to enforce the security interest granted in this Agreement or to demand identification of things of other interest. Lender may at any time, and without further authorization from Grantor, file a notice, photographs or other reproduction of any financing statement or of this Agreement for use as a financing statement. Grantor will reimburse Lender for all expenses for the perfection and the maintenance of the perfection of Lender's security interest in the Colliery.

Severability. If a part of this Agreement is held to be illegal, invalid, or unenforceable as to any circumstances, that holding shall not make the remaining provisions illegal, invalid, or unenforceable as to any other circumstances. If possible, the offending provision shall be amended so as to be a business legal, valid and enforceable. If the offending provision cannot be so amended, it shall be considered deleted from this Agreement. Unless otherwise provided by law, the illegality, invalidity, or unenforceability of any provision of this Agreement shall not affect the legality, validity or enforceability of any other provision of this Agreement.

Successors and Assigns. Subject to any limitation stated in this Agreement as to Grantor's interest, this Agreement shall be binding upon and inure to the benefit of the parties, their successors and assigns. If ownership of the Colliery becomes vested in a person other than Grantor, Lender, without notice to Grantor, may deal with Grantor's successors with reference to this Agreement and the Colliery by way of assignment or collection without releasing Grantor from the obligations of this Agreement or liability under the Colliery.

Survival of Representations and Warranties. All representations, warranties, and agreements made by Grantor in this Agreement shall survive the execution and delivery of this Agreement, shall be continuing in nature, and shall remain in full force and effect until such time as Grantor's obligations shall be paid in full.

Time is of the Essence. Time is of the essence in the performance of this Agreement.

Waiver of Jury. All parties to this Agreement hereby waive the right in any way held by any action, proceeding, or counterclaim brought by any party against any other party.

DEFINITIONS. The following capitalized words and terms shall have the following meanings when used in this Agreement. Unless specifically stated to the contrary, all references to dollar amounts shall mean amounts in United States of America. Words and terms used in the singular shall include the plural, and the plural shall include the singular, or the context may require. Words and terms not otherwise defined in this Agreement shall have the meanings attributed to such terms in the Uniform Commercial Code.

Agreement. The word "Agreement" means this Commercial Security Agreement, as this Commercial Security Agreement may be amended or modified from time to time together with all exhibits and schedules attached to this Commercial Security Agreement from time to time.

Borrower. The word "Borrower" means John McCain 2008, Inc.

Colliery. The word "Colliery" means all of Grantor's right, title and interest in and to all of the Colliery as described in the Colliery Description section of this Agreement.

Default. The word "Default" means the Default set forth in this Agreement in the section titled "Default".

Environmental Laws. The words "Environmental Laws" mean any and all state, federal and local statutes, regulations and ordinances relating to the protection of human health or the environment, including without limitation the Comprehensive Environmental Response, Compensation, and Liability

PROMISSORY NOTE

Principal Loan Date Maturity Loan No Coll/Cnt Account Officer Initials
\$3,000,000.00 11-14-2007 02-14-2008 1001000 000 000 JN

Reference in the notes above are for Lender's use only and do not limit the applicability of this document to any particular loan or loan.

Any line above containing **** has been omitted due to text length limitations

Borrower John Metchie 2006, Inc P O Box 90170 Arlington, VA 22210 Lender: Fidelity & Trust Bank 4001 Grand Ave. Bethesda, MD 20814-4000

Principal Amount: \$3,000,000.00 Initial Rate: 3.500% Date of Note: November 14, 2007

INTEREST TO PAY John Metchie 2006, Inc ("Borrower") promises to pay to Fidelity & Trust Bank ("Lender"), or order, in lawful currency of the United States of America, the principal amount of Three Million & 000/100 Dollars (\$3,000,000.00) or an amount in any US coin denomination, together with interest on the unpaid outstanding principal balance of each advance, interest shall be calculated from the date of each advance until repayment of each advance.

PAYMENT Borrower will pay this loan in one payment of all outstanding principal plus all accrued unpaid interest on May 14, 2008. In addition, Borrower will pay regular monthly payments of all accrued unpaid interest due on each payment date, beginning December 14, 2007, with all subsequent interest payments to be due on the same day of each month after that. Interest otherwise accrued or required by applicable law, payments will be applied first to any accrued unpaid interest then to principal, then to any late charges and then to any unpaid collection costs. The annual interest rate on this Note is computed as a 3.500% (three and 5/100ths) rate that is, by applying the rate of the present interest rate over a year of 360 days, multiplied by the outstanding principal balance, multiplied by the actual number of days the principal advance is outstanding. Borrower will pay Lender at Lender's address shown above or at each other place as Lender may designate in writing.

VARIABLE INTEREST RATE The interest rate on this Note is subject to change from time to time based on changes in an independent index which is the Prime Rate, defined as the rate then in force provided by The Wall Street Journal, New York, New York, as the "U.S. Prime Rate", presently published under the authority of "Money Market" and defined therein as the base rate on deposits being offered by all listed banks in the United States of America, as the same may fluctuate from time to time. The Prime Rate for any given day will be determined using the Wall Street Journal "U.S. Prime Rate" reported as of such day, notwithstanding that the Prime Rate for any given day is published as a later date and in the event more than one "U.S. Prime Rate" shall be reported, the Prime Rate for purposes hereof shall be the highest such published "U.S. Prime Rate" (the "Index"). The Index is not necessarily the lowest rate charged by Lender at its time. If the Index becomes unavailable during the term of this Note, Lender may designate a substitute index after notifying Borrower. Lender will tell Borrower the current index rate upon Borrower's request. The interest rate change will not occur more often than each day. The rate of interest payable hereunder shall be adjusted as and when any adjustment in the Prime Rate occurs. It is understood and agreed by the Borrower that the adjustment of the Prime Rate is intended merely as an index for setting interest rates of the Lender. Borrower understands that Lender may make loans based on other rates as well. The Index currently is 7.000% per annum. The interest rate to be applied to the unpaid principal balance during this Note will be at a rate of 1.000 percentage point over the Index, resulting in an initial rate of 8.000% per annum. NOTICE: Lender's determination of the interest rate on this Note is more than the maximum rate allowed by applicable law.

PREPAYMENT Borrower agrees that all fees and other charges shall be applied as of the date of the loan and will not be subject to prepayment conditions (including forbearance or an amount of default, except as otherwise provided by law. Default for this purpose shall mean any failure to comply with or to perform any obligation under this Note or any other agreement between Lender and Borrower. Any prepayment of principal or of interest in advance of the scheduled date of payment of principal or interest shall be applied to the principal balance due. Borrower agrees not to use Lender payments applied "hold in trust", "held in escrow", or other language. If Borrower makes such a payment, Lender may accept it without being any of Lender's debts under this Note, and Borrower will remain obligated to pay any further amount owed to Lender. All written communications concerning disputed amounts, including any check or other payment instrument, that Borrower has the payment certificate "returned in full" or the amount owed or that is marked with other conditions or limitations or an ink substitution of a disputed amount must be mailed or delivered to: Fidelity & Trust Bank, 4001 Grand Ave Bethesda, MD 20814-4000

LATE CHARGE If a payment is 30 days or more late, Borrower will be charged 0.500% of the unpaid portion of the regularly scheduled payment.

INTEREST OPTION: UPON DEFAULT Upon default, including failure to pay upon final maturity, the interest rate on this Note shall be increased by adding a 5.000 percentage point margin ("Default Rate Margin"). The Default Rate Margin shall also apply to each succeeding interest rate change that would have applied had there been no default. However, in no event will the interest rate exceed the maximum interest rate limitations under applicable law.

DEFAULT: Bank of the following shall constitute an event of default ("Event of Default") under this Note:

- Payment Default: Borrower fails to make any payment when due under this Note
Other Defaults: Borrower fails to comply with or to perform any other loan, obligation agreement or condition contained in this Note or in any of the related documents or to comply with or to perform any loan, obligation agreement or condition contained in any other agreement between Lender and Borrower
Default in Favor of Third Parties: Borrower or any Guarantor defaults under any loan, extension of credit, security agreement, purchase or sales agreement, or any other agreement, in favor of any other creditor or person that may constitute a lien on any of Borrower's property or Guarantor's ability to repay this Note or perform Borrower's obligations under this Note or any of the related documents
False Statements: Any warranty, representation or statement made or provided to Lender by Borrower or on Borrower's behalf under this Note or the related documents is false or misleading in any material respect, other than or at the time made or furnished or becomes false or misleading of any law or contract
Insolvency: The dissolution or liquidation of Borrower's business as a going business, or a trustee or receiver is appointed for Borrower or for all or a substantial portion of the assets of Borrower, or Borrower makes a general assignment for the benefit of Borrower's creditors, or Borrower files for bankruptcy, or an insolvency bankruptcy petition is filed against Borrower and such insolvency petition remains undischarged for sixty (60) days
Creditor or Protective Proceedings: Commencement of bankruptcy or insolvency proceedings, whether by judicial proceeding, self help, agreement or any other method, by any creditor of Borrower or by any governmental agency against any collateral securing the loan. This includes a grant of a lien on any of Borrower's assets, including deposit accounts, with Lender. However, the Effect of Default shall not apply if there is a good faith dispute by Borrower as to the validity or appropriateness of the claim which is the basis of the creditor or protective proceeding and if Borrower gives Lender notice of the creditor or insolvency proceeding and deposits with Lender monies or a security bond for the amount or portion proceeding, in an amount determined by Lender, in its sole discretion, as being an adequate source of bond for the dispute
Waiver Affecting Guarantors: Any of the preceding events occur with respect to any guarantor, spouse, or representative party of any of the individuals or any spouse, creditor, child, or representative party of any of the individuals, or creditor or guarantor of the validity of or liability under, any security of the obligations contemplated by this Note. In the event of a death, Lender, at its option, may, but does not be required to, permit the guarantor's estate to continue accordingly the obligations existing under this Note to a trustee subsidiary to Lender, and, in doing so, may stay any Event of Default
Change in Ownership: Any change in ownership of twenty-five percent (25%) or more of the common stock of Borrower
Advance Charge: A material advance charge occurs in Borrower's financial condition, or Lender believes the prospect of payment or performance of this Note is impaired.
Insolvency: Lender in good faith believes itself insolvent

LENDER'S REMEDY Upon default, Lender may declare the entire unpaid principal balance under this Note and all accrued unpaid interest, together with all other applicable fees, costs and charges, if any, immediately due and payable and then Borrower will pay that amount.

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THIS NOTE IS GUARANTY UNDER NEW YORK LAW AND IT IS INTENDED THAT THIS NOTE IS AND SHALL CONSTITUTE AND HAVE THE EFFECT OF A
SIGNED INSTRUMENT ACCORDING TO LAW.

WARRANTY

JOHN MOORE, JR., BY

JOHN MOORE, JR., PRESIDENT

WARRANTY TO BE OBSERVED BY THE GUARANTOR AND BY THE GUARANTOR'S SUCCESSORS

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LOAN MODIFICATION AGREEMENT

THIS LOAN MODIFICATION AGREEMENT (this "Modification") is made this 17th day of December, 2007, by and between (i) **FIDELITY & TRUST BANK**, a Maryland banking corporation having an office at 4831 Cordell Avenue, Bethesda, Maryland 20814 ("Lender"); and (ii) **JOHN MCCAIN 2008, INC.**, a Delaware corporation having an address of P.O. Box 16118, Arlington, Virginia 22215 ("Borrower"). All capitalized terms used but not defined herein shall have the meaning attributed to such terms in the hereinafter referenced Loan Agreement

WITNESSETH THAT:

WHEREAS, pursuant to the terms and conditions of a certain Business Loan Agreement dated November 14, 2007 (as the same may be modified or amended from time to time, the "Loan Agreement"), by and between Borrower and Lender, Borrower obtained a loan and certain other financial accommodations (collectively, the "Loan") from Lender in the original principal amount of Three Million and No/100 Dollars (\$3,000,000 00), and

WHEREAS, the Loan is (i) evidenced by a certain Promissory Note dated November 14, 2007 (together with any and all extensions, renewals, modifications, amendments, replacements and substitutions thereof or therefor, the "Note"), made by Borrower and payable to the order of Lender in the original principal amount of Three Million and No/100 Dollars (\$3,000,000 00), and (ii) secured by, among other things, a certain Commercial Security Agreement dated November 14, 2007 (as the same may be modified or amended from time to time, the "Security Agreement"), encumbering substantially all of the assets of Borrower, and

WHEREAS, Borrower has requested that the principal amount of the Loan be increased from Three Million and No/100 Dollars (\$3,000,000.00) to Four Million and No/100 Dollars (\$4,000,000.00), and Lender has agreed to increase the principal amount of the Loan pursuant to Borrower's request, subject to the terms and provisions of this Modification which shall itself evidence the increase to the principal amount of the Loan and Note, and certain other modifications to the Note, the Loan Agreement, the Security Agreement and the other Loan Documents, as hereinafter provided

NOW THEREFORE, for Ten Dollars (\$10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. The foregoing recitals are hereby incorporated herein by this reference and made a part hereof, with the same force and effect as if fully set forth herein

2. Subject to the terms of this Modification, the principal amount of the Loan is hereby increased from Three Million and No/100 Dollars (\$3,000,000.00) to Four Million and No/100 Dollars (\$4,000,000 00), and all references to a loan amount of "\$3,000,000.00" or "Three Million and 00/100 Dollars" set forth in the Note, the Loan Agreement, the Security Agreement or any other Loan Document are hereby substituted and replaced with "\$4,000,000.00" and "Four Million and 00/100 Dollars", as applicable.

3. The additional One Million and No/100 Dollars (\$1,000,000.00) of Loan proceeds being made available to Borrower pursuant to this Modification shall be (i) disbursed in accordance with the provisions of the Loan Agreement applicable to advances and disbursements of Loan proceeds generally, and (ii) except as otherwise expressly provided in this Modification below, secured by comparable liens and security interests on all collateral heretofore securing the Loan.

4. Without limiting anything set forth in this Modification to the contrary, certain provisions of the Loan Agreement are hereby modified as follows:

(a) The paragraph entitled "Additional Requirement" set forth in the Affirmative Covenants section of the Loan Agreement is hereby deleted in its entirety and the following substituted in lieu thereof

"Additional Requirement. Borrower and Lender agree that if Borrower withdraws from the public matching funds program, but John McCain then does not win the next primary or caucus in which he is active (which can be any primary or caucus held the same day) or does not place at least within 10 percentage points of the winner of that primary or caucus, Borrower will cause John McCain to remain an active political candidate and Borrower will, within thirty (30) days of said primary or caucus (i) reapply for public matching funds, (ii) grant to Lender, as additional collateral for the Loan, a first priority perfected security interest in and to all of Borrower's right, title and interest in and to the public matching funds program, and (iii) execute and deliver to Lender such documents, instruments and agreements as Lender may require with respect to the foregoing. Borrower and Lender agree that Borrower will provide oral or written notice to Lender at least 24 hours before notice of withdrawal from the public matching funds program is provided by Borrower or John McCain to the Federal Election Commission."

(b) The paragraph entitled "COMPLIANCE WITH THE FEDERAL ELECTION COMMISSION'S MATCHING FUNDS PROGRAM" set forth in the Loan Agreement is hereby deleted in its entirety and the following substituted in lieu thereof:

"COMPLIANCE WITH THE FEDERAL ELECTION COMMISSION'S MATCHING FUNDS PROGRAM. Borrower agrees and covenants with Lender that while this Agreement is in effect, Borrower shall not, without Lender's prior written consent, exceed overall or state spending limits imposed under the Federal Matching Funds Program, irrespective of whether Borrower is subject to such program as of any applicable date of determination "

(c) The paragraph entitled "STATUS OF CURRENTLY HELD CERTIFICATIONS OF MATCHING FUNDS" set forth in the Loan Agreement is hereby deleted in its entirety and the following substituted in lieu thereof:

"STATUS OF CURRENTLY HELD CERTIFICATIONS OF MATCHING FUNDS. Borrower and Lender agree that any certifications of matching funds eligibility now held by Borrower, and the right of Borrower and/or John McCain to receive payment under such certifications, are not (and shall not be) collateral for the Loan "

(d) The definition of "Collateral" set forth in the "Definitions" section of the Loan Agreement is hereby deleted in its entirety and the following substituted in lieu thereof:

"Collateral. The word "Collateral" means all property and assets granted as collateral security for the Loan, whether real or personal property, whether granted directly or indirectly, whether granted now or in the future, and whether granted in the form of a security interest, mortgage, collateral mortgage, deed of

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trust, assignment, pledge, crop pledge, chattel mortgage, collateral chattel mortgage, chattel trust, factor's lien, equipment trust, conditional sale, trust receipt, lien, charge, lien or title retention contract, lease or consignment intended as a security device, or any other security or lien interest whatsoever, whether created by law, contract, or otherwise. It is expressly understood and agreed that, "Collateral" specifically excludes any certification of matching funds eligibility now held by Borrower and/or John McCain, and any right, title and interest of Borrower and/or John McCain to receive payments thereunder."

(e) The definition of "Notes" set forth in the "Definitions" section of the Loan Agreement is hereby deleted in its entirety and the following substituted in lieu thereof:

"Note The word "Notes" means the Promissory Note dated the date hereof, executed by Borrower and payable to the order of Lender in the original principal amount of \$3,000,000, as increased to a face amount of \$4,000,000.00 pursuant to that certain Modification Agreement dated December 7, 2007, by and between Borrower and Lender, together with all other amendments, modifications, extensions, renewals, replacements, restatements and substitutions thereof or therefor."

(f) The paragraph entitled "Collateral Description" set forth in the Security Agreement is hereby deleted in its entirety and the following substituted in lieu thereof:

"COLLATERAL DESCRIPTION. The word "Collateral" as used in this Agreement means the following described property, whether now owned or hereafter acquired, whether now existing or hereafter arising, and wherever located, in which Grantor is giving to Lender a security interest for the payment of the indebtedness and performance of all other obligations under the Note and this Agreement:

All inventory, equipment, accounts (including but not limited to all health-care-insurance receivables), chattel paper, instruments (including but not limited to all promissory notes), letter-of-credit rights, letters of credit, documents, deposit accounts, investment property, money, other rights to payment and performance, and general intangibles (including but not limited to all software and all payment intangibles); all oil, gas and other minerals before extraction; all oil, gas, other minerals and accounts constituting as-extracted collateral, all fixtures; all timber to be cut, all attachments, accessories, accessories, fittings, increases, tools, parts, repairs, supplies, and commingled goods relating to the foregoing property, and all additions, replacements of and substitutions for all or any part of the foregoing property; all insurance refunds relating to the foregoing property; all good will relating to the foregoing property; all records and data and embedded software relating to the foregoing property, and all equipment, inventory and software to utilize, create, maintain and process any such records and data on electronic media, and all supporting obligations relating to the foregoing property; all whether now existing or hereafter arising, whether now owned or hereafter acquired or whether now or hereafter subject to any rights in the foregoing property; and all products and proceeds (including but not limited to all insurance payments) of or relating to the foregoing property. Grantor and Lender agree that any certifications of matching funds eligibility, including related rights, now held by Grantor are not themselves being pledged as security for the indebtedness and

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are not themselves collateral for the indebtedness or subject to this Security Agreement. Grantor agrees not to sell, transfer, convey, pledge, hypothecate or otherwise transfer to any person or entity any of its present or future right, title and interest in and to the public matching funds program or any certifications of matching funds eligibility, including related rights, issued with respect thereto without the prior written consent of Lender."

5 As a condition precedent to the effectiveness of this Modification, (i) the face amount of the Policy on the life of John McCain shall be increased from \$3,000,000.00 to \$4,000,000.00, (ii) evidence of such increase shall be provided by Borrower to Lender in form and substance acceptable to Lender in all respects, and (iii) the Assignment shall be deemed modified accordingly

6 Borrower hereby represents and warrants that (a) as of December 17, 2007, the outstanding principal balance of the Loan was \$2,257,697.30, and all accrued and unpaid interest thereon has been paid when due, (b) there are no set-offs or defenses against, and no defaults or Events of Default under, the Note, the Loan Agreement, the Security Agreement or any other Loan Document, (c) there exists no act, event or condition which, with notice or the passage of time, or both, would constitute a default or Event of Default under the Note, the Loan Agreement, the Security Agreement or any other Loan Document, (d) the representations and warranties of Borrower set forth in the Note, the Loan Agreement, the Security Agreement and all of the other Loan Documents are hereby renewed and redated as of the date of this Modification and are true, correct and complete in all respects as of such date, and (e) the execution, delivery and performance by Borrower of this Modification (i) is within its corporate powers, (ii) has been duly authorized by all necessary corporate action, and (iii) does not require the consent or approval of any person or entity which has not already been obtained

7. As a condition precedent to the effectiveness of this Modification, Borrower shall pay all of Lender's costs and expenses associated with this Modification and the transactions contemplated hereby, including, without limitation, Lender's legal fees and expenses

8 The execution and delivery of this Modification and any act, proceeding or payment (past, present or future) related to the Note, the other Loan Documents or this Modification and all past or present acts or omissions taken or foregone or payments made or to be made by any party hereto or thereto in relation to such documents, shall not, did not and will not in any way constitute a release of any claims that Lender may have against Borrower or any other obligor with respect to any default or event of default under the Note and/or the other Loan Documents, and Lender specifically reserves all claims of any kind that Lender may now or hereafter have against Borrower and/or any other obligor, including without limitation, Lender's claims for payment in full of the amounts due under the Note, the Loan Agreement, the Security Agreement, and the other Loan Documents, and indemnity, contribution and set-off, and any and all such rights, interests, defenses, offsets and causes of action are hereby expressly reserved and preserved

9. Borrower and its representatives, successors and assigns, hereby jointly and severally, knowingly and voluntarily RELEASE, DISCHARGE, and FOREVER WAIVE and RELINQUISH any and all claims, demands, obligations, liabilities, defenses, affirmative defenses, setoffs, counterclaims, actions, and causes of action of whatsoever kind or nature, whether known or unknown, which each of them has, may have, or might have or may assert now or in the future against Lender directly or indirectly, arising out of, based upon, or in any manner connected with any transaction, event, circumstance, action, failure to act, or occurrence of any sort or type, in each case related to, arising from or in connection with the Loan, whether known or unknown, and which occurred, existed, was taken, permitted, or begun prior to the date of this Modification. Borrower hereby acknowledges and agrees that the execution of this Modification by Lender shall not constitute an acknowledgment of or an

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admission by Lender of the existence of any such claims or of liability for any matter or precedent upon which any liability may be asserted.

10 In the event of a conflict between the provisions of this Modification and the provisions of the Note, the Loan Agreement, the Security Agreement and/or the other Loan Documents, the provisions of this Modification shall govern and control to the extent of such conflict

11 This Modification shall evidence the modifications to the Note, the Loan Agreement, the Security Agreement and the other Loan Documents described herein above.

12 Except as hereby expressly modified, the Note, the Loan Agreement, the Security Agreement and the other Loan Documents shall be and remain unchanged and in full force and effect, and the same is hereby expressly approved, ratified and confirmed.

13 This Modification shall be governed by the laws of the State of Maryland and shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns

14 This Modification may be executed in any number of counterparts, each of which shall be deemed an original and all of which together shall be deemed one and the same instrument. Each party agrees to be bound by its facsimile signature

[remainder of page intentionally left blank -- signature page follows]

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IN WITNESS WHEREOF, the undersigned have executed this Modification on the day and year first above written

WITNESS

Carla Study
Name

Borrower:
JOHN MCCAIN 2008, INC.
[Signature]
By: RICHARD DAVIS
Name: PRESIDENT
Title:

Lender:
FIDELITY & TRUST BANK, a Maryland banking corporation
[Signature]
By: JOHN RICHARDSON
Name: SENIOR VP
Title:

State of Virginia)
County of Arlington) ss

This Modification was executed before me on this 18 day of December, 2007, by Richard Davis, as the PRESIDENT of John McCain 2008, Inc, a Delaware corporation, and being reasonably well known to me (or satisfactorily proven) to be the person who executed the foregoing document, being authorized to do so, acknowledged the same to be the act and deed of said corporation.

[Signature]
(Signature of notarial officer)

[SEAL]
My commission expires. DECEMBER 31, 2011

ERICA L. CARSON
Notary Public
Commonwealth of Virginia
7147968
My Commission Expires Dec 31, 2011

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**AFFIDAVIT OF RICHARD DAVIS IN SUPPORT OF
REPLY TO THE COMPLAINT OF JOHN MCCAIN 2008, INC. AND JOHN MCCAIN**

Richard Davis, being first duly sworn upon oath, deposes and states the following

1 I am President of John McCain 2008, Inc , (the "Campaign"), and function as the
Manager of the McCain Campaign

2 I have personal knowledge of the facts and circumstances relating to the line of
credit (the "Loan") between John McCain 2008, Inc and Fidelity & Trust Bank of Bethesda,
Maryland (the "Bank") The Loan was negotiated at arm's length, and the Bank informed us it
was in the ordinary course of the Bank's business

3 In August 2007, Senator McCain filed an application with the Commission to
determine his eligibility for the federal matching-funds program for the primary election
("Program") Senator McCain and the McCain Campaign stated at the time that the purpose of
qualifying for the Program was for the Campaign to preserve the option of participating in the
primary matching funds system, but that no decision had been made whether the Campaign
would actually accept public funds from the U S Treasury

4 From the onset of negotiations with the Bank to obtain a line of credit, the
Campaign expressly stated that it was seeking a loan that would not be secured by any federal
matching-funds certifications, whether past or future All negotiations with the Bank concerning
the Loan were based on this express statement The Bank concluded that the Loan would be
adequately securitized, and the Bank would have adequate assurance of repayment, without their
obtaining a security interest in matching-funds certifications

5 On November 14, 2007, the Bank and the Campaign executed three principal
documents to memorialize the Loan a Business Loan Agreement (the "Loan Agreement"), a

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Commercial Security Agreement (the "Security Agreement"), and a Promissory Note (the "Note") (collectively the "Loan Documents") Under the Loan Documents, the Bank extended a \$3 million line of credit to the Campaign On December 17, 2007, the Bank and the Campaign executed a Loan Modification Agreement that increased this line of credit to \$4 million At the time the November 14, 2007 documents were signed, it was our expectation that we would make a decision on withdrawal from the Program on or before December 31, 2007 (and thus prior to the expected January 2 payments by the U S Treasury to Program participants, since receipt and acceptance of such funds from the Treasury would have obligated the Campaign to remain in the Program and subject itself to spending limitations) When the December 17 Loan Modification Agreement was signed, it had become clear that the U S Treasury would not be making payments in January, and likely not until March, which meant as a practical matter that the Campaign would not have to make a decision prior to December 31, 2007 on whether to withdraw from the system The documents were accordingly modified to reflect this change

6 When the Campaign negotiated and executed the Loan Documents and Loan Modification Agreement, it expressly intended throughout the process (and understood the Bank's intent to be identical) that no security interest of any sort in the Campaign's matching funds entitlement would be provided to the Bank Therefore, the Campaign intended to expressly exclude from definition of "collateral" any and all the matching-funds certifications obtained from the FEC at any time as a result of Senator McCain's August 2007 qualification for eligibility to participate in the matching funds program For this reason, the Loan Documents and the Loan Modification Agreement were drafted to create no security interest in any matching-fund certifications, past, present or future The Campaign explicitly understood from legal counsel and the Bank that the Campaign's December 1, 2007 and January 1, 2008

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matching-funds submissions and any other submissions and certifications stemming from the August 2007 qualification were all excluded from the definition of "collateral" as "certifications now held, and related rights" (and through other provisions contained in the Loan Documents reflecting the parties' intent)

7 The only circumstances under which the Bank, in the future, could have been granted by the Campaign a security interest in any matching funds never occurred. If Senator McCain withdrew from the Program and subsequently failed to win, or place within at least 10 percentage points of the winner in the New Hampshire primary (or the next primary or caucus, under the Modified Loan Agreement), and the Senator thereafter re-applied to the Program, was declared eligible by a fully-constituted Commission, and made new matching funds submissions which resulted in new certifications from the FEC. Since these circumstances did not occur, the Campaign at no time took any of the further steps that would have been required to provide to the Bank in the future a security interest in the matching fund certifications.

8 In March 2008, the Campaign repaid the Loan in its entirety.

I declare under penalty of perjury that the foregoing is true and correct.

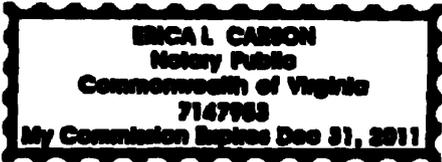


Richard Davis
President
John McCain 2008, Inc

County of Arlington
Commonwealth of Virginia
The foregoing instrument was subscribed and sworn
before me this 28 day of MARCH, 2008 by


Notary Public

Notary registration number 7147953
My Commission Expires 31 DECEMBER 2011





February 25, 2008

VIA HAND DELIVERY

Chairman David Mason
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE John McCain 2008, Inc

Chairman Mason

This responds to your February 19, 2008 letter concerning Senator John McCain's February 6, 2008 withdrawal from the federal primary-election matching funds program established by the Presidential Primary Matching Payment Account Act ("the Program")

The Federal Election Commission recognized in Advisory Opinion 2003-35 (*Gephardt* for President) that the Supreme Court's *Buckley* opinion found the Program to be constitutional because the Program is voluntary. As a result, candidates have a constitutional right to withdraw from the Program. The Commission in *Gephardt* expressed its view that this constitutional right to withdraw was conditioned on the candidate not receiving Program funds from the U S Treasury and not pledging Program certifications received from the FEC as security for private financing. The campaign has received no funds from the U S Treasury, and has notified the Treasury that it will not accept any such funds. Consistent with the reports to the FEC noted in your letter, the campaign did not use its federal matching fund certifications as security for the campaign's bank loan, as discussed further below.

Two previous presidential candidates were certified by the FEC as qualified to participate in the Program and withdrew prior to receiving federal funds. Democratic National Committee Chair Howard Dean (a presidential candidate during the 2003-2004 election cycle) qualified for the Program in June of 2003, but withdrew on November 12, 2003. Similarly, Republican candidate Elizabeth Dole withdrew from the Program on December 17, 1999 after qualifying earlier that year.

In your letter, you stated your belief that "Just as 2 USC Section 437c(c) required an affirmative vote of four Commissioners to make these certifications, it requires an affirmative vote of four Commissioners to withdraw them." We respectfully disagree with this conclusion for the following reasons. First, 2 USC 437c(c) contains no such requirement as a condition for withdrawal. This was recognized by an FEC spokesperson who accurately told the Associated Press that although "[t]he statute says a vote of four commissioners is required to certify someone as eligible, [t]here is nothing in the statute that talks about withdrawing from the



Paid for by John McCain 2008
PO Box 16118 | Arlington, VA 22215

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program " Second, the FEC's regulations are similarly silent on the subject Third, your letter cites Advisory Opinion 2003-35, issued to former Congressman Gephardt, which outlined procedures the Commission chose to follow in that instance The procedure included an affirmative vote by the Commission accepting Congressman Gephardt's withdrawal from the Program (a similar procedure was followed in the Dole and Dean withdrawals) However, this Advisory Opinion does not establish a legal *requirement* that the Commission must approve all withdrawals from the Program As you are aware, the statute *prohibits* the Commission from establishing regulatory requirements through an Advisory Opinion 2 USC 437f(b) The Commission has not taken the numerous additional steps through a formal rulemaking procedure with notice and comment that would be necessary to incorporate the *Gephardt* Advisory Opinion procedures into its regulations and make them binding on the Commission and on candidates participating in the Program

This is particularly important in light of the extraordinary circumstances in which we and the Commission find ourselves at this time Senator McCain submitted his withdrawal letter on February 6th of this year, and as your February 19th letter notes, the FEC does not currently have the minimum number of Commissioners necessary to constitute a quorum and conduct business We believe this necessarily means that the Commission cannot determine at this time whether a vote is required to recognize and accept Senator McCain's withdrawal (as you conclude) or whether his withdrawal occurred automatically upon his February 6th notification (as we believe is the case) Accordingly, we understand the current status to be that once a quorum exists, the Senator's withdrawal letter will be presented to the Commission for its decision on whether any further action is required Even if the Commission concludes that a vote is necessary, we are confident that the Commission will find that its role is "ministerial" in function, and that the Program's voluntary nature requires it to recognize that Senator McCain's withdrawal from the Program was effective as of February 6th

The legal effect of Senator McCain's withdrawal—whether it is found to occur automatically via his letter of February 6th or is later ratified by vote of the new Commissioners—will be the same Senator McCain will not be subject to the Program's spending limitations after February 6, 2008 We understand that you believe this is a matter that can only be decided by the full Commission when a quorum is present, and we are confident that the full Commission will concur with us if it considers the question Both as a candidate and as a Member of Congress, Senator McCain is hopeful that the Senate will move expeditiously to confirm new Commissioners so that the FEC may conduct all of its important business, including a review of these issues.

Your letter also requests that we provide additional information to the FEC concerning the rationale for concluding that the campaign's bank line of credit was not secured with federal matching fund certifications John McCain 2008 has already placed the loan documents on the public record at the FEC, as required by law Today, the bank, through its attorneys, unequivocally stated that the matching fund certifications held by the campaign were never collateral for the line of credit I am attaching a copy of the letter I received It concludes

Accordingly, the bank does not now have, nor did it ever receive from the Committee, a security interest in any certification for matching funds Any finding or determination to

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the contrary would be wholly inconsistent with the language of the loan documents, the intent and understanding of the parties and basic principles of banking, security and uniform commercial code law

News services report today that the Democratic National Committee ("DNC") has filed a complaint with the Commission concerning this loan, citing these very documents. Accordingly, we expect to respond as provided in 2 USC 437g to the DNC's complaint with whatever additional information may be necessary to explain any further grounds for the conclusion that no Program certifications received by Senator McCain and John McCain 2008 constituted security for private financing

I trust this information, and any that we may provide in response to the DNC complaint, will answer any questions which you, or the Commission when a quorum exists, may have concerning these issues

Sincerely Yours,



**Trevor Potter
Counsel
John McCain 2008**

cc The Honorable Judith Tillman, Commissioner, Dept of the Treasury Financial Management Service

Encl Letter from Counsel for Fidelity & Trust Bank, dated February 25, 2008

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DICKSTEINSHAPIRO LLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420 2201 | dicksteinshapiro.com

February 25, 2008

Mr. Trevor Potter
John McCain 2008, Inc
PO Box 16118
Arlington, VA 22215

Re Fidelity & Trust Bank Loan

Dear Trevor,

We understand that a number of questions have been raised regarding the loan made by Fidelity & Trust Bank to John McCain 2008, Inc (the "Committee") In that regard, we offer the following perspective at the bank's request

As outside counsel for the bank, we worked closely with the bank and the Committee since the inception of the lending relationship At the outset, and with guidance provided by FEC Advisory Opinion 2003-35, we were mindful of two potentially competing concerns (i) the bank having adequate assurance of loan repayment, and (ii) the Committee retaining flexibility to withdraw from the matching funds program (which we understand might not be possible if certifications for matching funds were pledged as collateral)

After the bank determined that adequate assurances of loan repayment existed without obtaining a pledge of any certification for matching funds, the loan terms were carefully drafted to exclude from the bank's collateral any matching funds certification (so as to assure that the Committee retained the flexibility to withdraw from the program in accordance with the principles of Advisory Opinion 2003-35) The fact that there was no pledge of any certification for matching funds is further evidenced by the fact that covenants were included within the loan documents that expressly required the Committee to pledge, in the future, and if (and only if) certain specified events occurred after the Committee were to withdraw from the program (such as the Committee's re-entry into the program), future certifications of matching funds as collateral for the loan It is our understanding that, to date, none of those events have occurred. Accordingly, the bank does not now have, nor did it ever receive from the Committee, a security interest in any certification for matching funds Any finding or determination to the contrary would be wholly inconsistent with the language of the loan documents, the intent and understanding of the parties and basic principles of banking, security and uniform commercial code law

Sincerely,



Matthew S Bergman, Partner
(202) 420-4722
bergmann@dicksteinshapiro.com



Scott E Thomas, Of Counsel
(202) 420-2601
thomass@dicksteinshapiro.com

28044213019



PO Box 1228
Burlington, VT 05402
802-891-3200
www.deanforamerica.com

November 12, 2003

The Honorable Ellen Weintraub
Chair
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Chair Weintraub

This letter is to advise you that, as determined in accordance with my public statements, I no longer wish to participate in the Matching Payment system administered by the Commission. By this letter, I hereby withdraw the candidate agreement filed with the Commission pursuant to 11 C.F.R. §9033.1 and 2.

I will be making no requests for matching payments and will not accept the receipt of any such payments, including the initial amount certified by the Commission in connection with my campaign's threshold submission. My campaign has not submitted to the Department of Treasury any bank account information.

Should you have any questions or desire any additional information, please contact my counsel, Eric Kleinfeld, at 202-293-1177.

Sincerely,

Howard Dean, M.D.

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Paid for by Dean for America. Contributions to Dean for America are not deductible for federal income tax purposes.

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**ELIZABETH DOLE FOR PRESIDENT
EXPLORATORY COMMITTEE
1925 N. Lynn Street, Suite 400
Arlington, VA 22209**

December 17, 1999

VIA HAND DELIVERY

The Honorable Scott Thomas
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D C 20463

Re Elizabeth Dole for President Exploratory Committee

Dear Chairman Thomas:

I am withdrawing my request for public matching funds on behalf of the Elizabeth Dole for President Exploratory Committee ("Committee"). This withdrawal is conditioned on the understanding that the Committee will not be subject to an audit under the Presidential Primary Matching Payment Account Act contained in Title 26 of the U S Code. This will allow the Committee to wind down its activities in an expeditious fashion.

Sincerely,


Elizabeth Dole

28044213021

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N.W.
WASHINGTON, D.C. 20005-2111

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December 17 1999

VIA FACSIMILE & FEDERAL EXPRESS

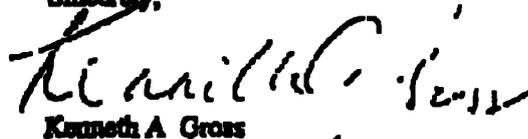
The Honorable Scott Thomas
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Elizabeth Dole for President Exploratory Committee

Dear Chairman Thomas,

As counsel for the Elizabeth Dole for President Exploratory Committee ("Committee"), we are withdrawing the Committee's request for public matching funds. This withdrawal is conditioned on the understanding that the Committee will not be subject to an audit under Title 26 of the Presidential Primary Matching Payment Account. This will allow the Committee to wind down its activities in an expeditious fashion.

Sincerely,



Kenneth A. Gross

cc Ray Liu

28044213022



Yale Law School

March 14, 2008

Thomasena P Duncan, Esq
General Counsel
Federal Election Commission
999 E Street, N W
Washington, DC 20463

Re MUR 5976

Dear Ms Duncan

In this letter I present my views regarding the Complaint filed with the Federal Election Commission by the Democratic National Committee ("DNC") alleging that Presidential candidate Senator John McCain (R-Ariz) and his Presidential campaign committee, John McCain 2008, Inc (the "campaign") pledged certifications of matching funds he received or was entitled to receive from the Federal Election Commission as security for private financing. The DNC argues that such a pledge of security interests in the FEC certifications was made by the campaign, and that this pledge prevents Senator McCain and the campaign from withdrawing from the Presidential Primary Funding system and obligates the Senator and the campaign to abide by the aggregate spending limits for participants in that system.

I have examined certain loans that the campaign obtained in November and December 2007, and in January 2008, from Fidelity & Trust Bank ("Fidelity" or "the Bank") in order to determine whether, from a banking and commercial law perspective, these loans were secured by matching funds certificates.¹ I have determined that the loans at issue were at no time secured by matching funds certificates. As a professor and scholar in the field of banking law,² I believe that I am competent to render an expert opinion in this matter.

In the United States the law of security interests is governed by Article 9 of the Uniform Commercial Code (UCC). A security interest grants the holder thereof a right to

¹ I have been asked to provide my independent, objective view of this issue as an expert in banking law. I am not involved in the McCain '08 campaign in any way. I am a registered Democrat resident in the state of Connecticut.

² Please see attached resume listing my publications and qualifications.

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take remedial action with respect to the property that is subject to the security interest upon the occurrence of certain events – the classic example being the non-payment of a loan. A security interest generally is created with a security agreement, which is a contract governed by UCC Article 9 and state law governing contracts.³ Under the UCC, a security interest is a right in property of the debtor that has been used to secure payment of an obligation such as a loan. A security interest is created by a security agreement, under which the debtor grants a security interest in certain of the debtor's property is granted for the purpose of serving as collateral for a loan or other obligation. A security interest is a contractual right. A security interest comes into being if, and only if, a borrower enters into a contract that allows the lender, or secured party, to take collateral the borrower owns in the event that the borrower cannot pay back the loan. It is elemental that a security interest cannot be created unless there is an agreement that such a security agreement be created.⁴ This, in turn, requires an understanding (that is, a *meeting of the minds*) between the lender and the borrower that a security interest be created.

Thus, the issue of whether a security interest in property (such as the certifications of matching funds at issue here) exists depends on whether there was an understanding between the bank and the campaign. There are, in turn, two key factors that are relevant to a determination of whether there was an understanding that matching fund certificates were pledged as security for the McCain 2008 loans in November and December 2007. These factors are (1) whether John McCain 2008, Inc. intended to use matching fund certificates as collateral for a loan, and (2) whether the Bank reasonably believed that matching fund certificates were actually being pledged as collateral. My analysis reveals that the McCain campaign clearly did not intend to use matching fund certificates as collateral for a loan. It also is very plain that the Bank did not believe – and could not reasonably have believed – that any matching fund certificates were being pledged as collateral. Thus, this is a clear and unambiguous case.

The text of the applicable loan agreements clearly states that John McCain 2008, Inc. did not grant a security interest in the matching funds to Fidelity. See Business Loan Agreement between John McCain 2008, Inc. and Fidelity & Trust Bank (Nov 14, 2007) and Modification Agreement between John McCain 2008, Inc. and Fidelity & Trust Bank (Dec 17, 2007). Specifically, the “Affirmative Covenants,” “Additional Requirements” provision of the Loan Agreement states that “if the Borrower [the Campaign] withdraws from the public matching fund program by the end of December 2007, but

³ The UCC has been adopted, with some modifications, by every state, as well as the District of Columbia, Guam and the U.S. Virgin Islands.

⁴ All of the rules regarding the creation of a security interest depend on an agreement (called a “security agreement”) being reached between the lender and the borrower. Specifically, UCC Article 9 sets forth three requirements that must be satisfied in order for a security interest to be enforceable against the debtor and third parties. Each of these requirements clearly envisions that the borrower and lender have reached an agreement that a security agreement be created. These requirements are (1) that value be provided in exchange for the collateral, (2) that the debtor must have rights in the collateral, and (3) that either the debtor must have “authenticated” a security agreement with a description of the collateral or the creditor must be in possession of the collateral. When each of these three formalities are met, the security interest “attaches” to the collateral and becomes enforceable.

John McCain then does not win the New Hampshire primary or place at least within 10 percentage points of the winner of the New Hampshire primary, Borrower will cause John McCain to remain an active political candidate and Borrower *will*, within thirty (30) day of the New Hampshire Primary (i) reapply for public funds, (ii) grant to Lender, as additional collateral for the Loan, a first priority perfected security interest in and to all of Borrower's right, title and interest in and to the public matching fund program " Loan Agreement at 2 (emphasis added) This text indicates that while the Campaign did contemplate a potential *future* grant of a security interest in the certifications of matching funds, no such grant ever was made, either in the documents or elsewhere

The conclusion that no matching funds were pledged as security for private financing is inevitable if one looks fairly at the documents and the business and economic contest in which the loans were made Fidelity, a bank with experience in the business of making loans to candidates for public office, was aware that if Senator McCain performed well in the New Hampshire primary, additional capital would flow into the Campaign which, in turn would reduce the risk of default on the loan On the other hand, if Senator McCain did poorly in the New Hampshire primary, Fidelity understood that the McCain Campaign might not be able to raise funds as easily and that the risk of default on the loan would be higher In order to protect itself in case of a poor McCain showing Fidelity might want to further secure the loan by having Senator McCain reapply for matching funds and grant Fidelity a security interest in such funds But there was no security interest here because the future applications that would have to be granted in separate agreements in the future

Under the Loan Agreement, no security interest was created because no security interest could have been created in non-existent, future certifications of matching funds More precisely, it was clear at all times that no security interest would be created unless the McCain Campaign (1) withdrew from the federal matching funds program, (2) started losing primaries by large margins, (3) applied for federal matching funds certifications, and (4) received such certifications Not one of these four conditions precedent was fulfilled, and therefore no security interest ever was created

The Democratic National Committee, in its Complaint Against Senator John McCain and John McCain 2008, Inc (Feb 25, 2008), tries to falsely paint this provision as creating "a *present* encumbrance of the Campaign's *future* interest in and entitlement to matching funds, as part of the security for the line of credit," however, this interpretation of the text confuses an agreement to potentially grant a security interest in the future with the actual granting of a security interest On the contrary, by discussing the agreement to possibly grant Fidelity a security interest in the future, the text instead reaffirms that the Campaign had not already granted Fidelity a security interest in this part or any other part of the agreement

Moreover, in conformity with the "Affirmative Covenants," "Additional Requirements" portion of the Loan Agreement, other provisions of the loan agreements require the Campaign to maintain eligibility for the matching funds program so that in the future the Campaign would be able to apply for and assign rights to certificates of

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matching funds if need be Under the "Negative Covenants" section in the loan Agreement, the Campaign agreed with Fidelity that "while this Agreement is in effect, Borrower shall not, without the prior written consent of Lender grant a security interest in, or encumber any of Borrower's assets, including, without limitation, any of Borrower's right, title or interest in and to the public matching fund programs of any matching fund settlement " Loan Agreement at 3 If the Campaign had granted a security interest in the matching funds to Fidelity, as the DNC erroneously asserts, there would obviously be no purpose for this clause restricting the Campaign from assigning the rights to the matching funds in the future The DNC's complaint erroneously cites this negative covenant to not pledge rights in future matching fund entitlements in support of their interpretation that the bank assumed it had a perfected security interest in the matching funds entitlement In fact, the clear interpretation of the language is instead that Fidelity understood that no parties had been assigned rights to the future matching funds entitlement and Fidelity wanted to ensure that rights to those entitlements would be available for assignment to themselves as security in the future, should they require it The Campaign was not encumbering the funds, but agreed not to encumber the funds in the event they may need to pledge them to Fidelity as a security interest in the future They did not See Modification Agreement and subsequent discussion infra

Additionally, as with the "Negative Covenants" section discussed above, the "Compliance with the Federal Election Commission's Matching Funds Program" section in the Loan Agreement states that "Borrower agrees and covenants with Lender that while this Agreement is in effect, Borrower shall not exceed overall or state spending limits set forth in the Federal Matching Funds Program ," so to ensure the Campaign remains eligible for the program to protect the Campaign's ability to reapply for funds and assign rights in the future if need be Loan Agreement at page 4 Although the DNC complaint asserts the only reason for inclusion of this provision on compliance with the FEC program is so the bank can treat rights in future certificates of matching funds as collateral, in fact, the language used in the agreement simply describes the Bank's effort to protect its ability to obtain a security interest in the matching funds in the future In particular, the Modification Agreement added to this section that the Campaign must abide by the spending limits of the Matching Funds Program "irrespective of whether Borrower is subject to such program as of any applicable date of determination " Modification Agreement at page 2 Thus, the Bank clearly contemplated that the Campaign might not be subject to the Program at some future date, i e that the Campaign may have withdrawn from the program, so the Bank certainly cannot have believed it was obtaining a security interest in the entitlements that were contingent upon the Campaign's continuation in the Matching Funds Program

The "Collateral Description" in the Security Agreement provides further evidence that the Bank never possessed a security interest in the Matching Funds Simply put, this section does not identify any rights or interests to matching funds as collateral In fact, the section explicitly states that all current entitlements arising from the program are not collateral The section remains silent as to whether potential future entitlements to the matching program's funds count as collateral Commercial Security Agreement between John McCam 2008, Inc and Fidelity & Trust Bank at 1 The DNC argues that this silence

as to future entitlements implies that rights to these entitlements are included as collateral. However, this argument is both logically flawed and at odds with the Uniform Commercial Code (UCC). The DNC is relying on the Expressio Unius canon of textual interpretation for the idea that the acceptance of one thing is the exclusion of another. Specifically, the DNC argues that the explicit exclusion of current rights to matching funds implies the inclusion of future rights to matching funds. Unfortunately, the Expressio Unius canon is not helpful in this situation as it can just as easily be used in support of the opposite argument. The fact that the "Collateral Description" section includes such a long, detailed list of collateral would suggest that any type of collateral not expressly listed in the section (i.e. future rights to matching funds) is excluded from the section. While the Expressio Unius does not contribute to the analysis, the UCC provides definitive guidance. Section 9-203(3)(a) of the UCC states that in order for a security interest to attach to collateral the security agreement must "provide[] a description of the collateral." Further, the description of collateral must "reasonably identify" the collateral and must not be "supergeneric." UCC § 9-108. Thus, given the UCC description requirement, the "Collateral Description" section's failure to list future rights to matching funds as collateral indicates that these rights were not intended to be collateral.

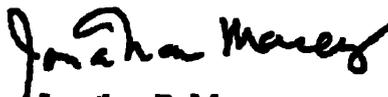
As still further evidence that no security interest had been created, the negative covenant at the end of the "Collateral Description" section of the Security Agreement forbids the Campaign from assigning rights to their entitlements to matching funds without the bank's consent. Under UCC § 9-322, the first party with a secured interest in the collateral to file a financing statement gets first-priority. If Fidelity already had a security interest in the future rights to matching funds then there would be no need for Fidelity to create a negative covenant of this sort. Rather, Fidelity could simply perfect and thus guarantee its spot as a first-priority secured creditor. Any subsequent assignments made by the McCain Campaign would be subservient to Fidelity's interest. Thus, the fact that such a negative covenant exists suggests that Fidelity did not perceive itself to have a security interest in the Campaign's rights to future entitlements under the matching program. Rather, they wanted to make sure no other creditors had an opportunity to gain a security interest in these funds before Fidelity did.

Finally, the DNC Complaint claims that the Modification Agreement altered the language of the exemption in the "Collateral Description" Section to indicate that the Collateral will include future amounts of matching funds paid. DNC Complaint at page 5. However, there is nothing in the "Collateral Description" in the Modification Agreement to suggest that the Collateral will necessarily include future amounts of matching funds. Instead, the modification clearly states, "Grantor and Lender agree that any certifications of matching funds eligibility, including related rights, now held by Grantor are not themselves being pledged as security for the Indebtedness and are not themselves collateral." Modification Agreement at 3-4. While the Campaign was holding open the possibility to pledge a security interest in the funds to Fidelity in the future, it is clear that it was not presently granting such an interest.

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My research into the applicable documentation concludes that at no time did the John McCain 2008 Campaign secure its loans from Fidelity with matching fund certificates

Sincerely,

A handwritten signature in black ink that reads "Jonathan R. Macey". The signature is written in a cursive, flowing style.

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Resume

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"Third Party Legal Opinions Evaluations and Analysis" (Prentice Hall Law and Business, 1992),

"Insider Trading Economics, Politics, and Policy" (The AEI Press, 1991),

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Tuesday, April 5, 2005**

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September 1, 1997**

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"The '80s Villain, Vindicated" The Wall Street Journal, July 18, 1995,

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"Mutual Banks Take Your Money and Run" The Wall Street Journal, Wednesday, December 29, 1993,

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"Not All Pro Bono Work Helps the Poor" The Wall Street Journal, Wednesday, December 30, 1992,

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Remarks at Symposium on the First Amendment and Federal Securities Regulation, 20 Connecticut Law Review (assorted pages) 1988,

Remarks at Colloquium on the ALI Corporate Governance Project, 71 Cornell Law Review (assorted pages) (1986),

"A Conduct Oriented Approach to the Glass-Steagall Act" 91 Yale Law Journal 102 (1981) (published as a student)

**Current
Activities**

Chair, Association of American Law Schools Section on Legal Scholarship

**Executive Committee, Association of American Law Schools Section on
Corporate Law,**

Member, American Law Institute,

Academic Advisory Board Committee, the Banking Law Anthology.

Academic Advisory Board, The Social Philosophy and Policy Center.

Board of Editors, Journal of Banking and Finance

Board of Editors, Journal of Banking Law

Board of Editors, Journal of Financial Crime.

Board of Editors, Corporate Practice Commentator.

Employment History

**Sam Harris Professor of Corporate Law, Securities Law and Corporate Finance,
Yale University, 2004 – present**

J DuPratt White Professor of Law, Cornell Law School, 1991-2004,

Visiting Professor of Law, Yale University, 2003-2004,

**Member, Board of Directors, Telxon Corporation, 1998- 1999 (appointed as
dissident director in settlement of proxy contest dispute), Director nominee
Rexene Corporation, 1999, Circon Corporation, 1998, Arvin Meritor, Inc 2004)**

Visiting Professor, Faculty of Law, Stockholm School of Economics, fall, 1993,

**Research Fellow, International Centre for Economic Research, Turin Italy, winter,
1993, spring, 1994,**

Professor of Law (with tenure), University of Chicago, 1990-1991,

Professor of Law, (with tenure), Cornell University, 1987-1990,

Visiting Professor of Law, The University of Chicago, fall quarter, 1989-1990,

Visiting Professor, University of Tokyo Faculty of Law, summer, 1989,

Visiting Associate Professor of Law, University of Virginia, 1986-1987,

Assistant to Associate Professor of Law, Emory University, 1983-1986,

**Law Clerk to the Honorable Henry J Friendly, United States Court of Appeals,
Second Circuit, 1982-1983 term of court,**

**Consultant, Municipal Finance Department, Lloyd Bush & Associates, New
York, NY (consultant representing municipalities and investment banks before
credit rating agencies (1978-1979)),**

Municipal Bond Trader, Bankers Trust Company, New York, NY (1977-1978)

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