



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 6570
Berman for Congress and Bruce Corwin)
in his official capacity as treasurer)
Committee to Elect an Effective Valley)
Congressman and Beverly Grossman)
Palmer in her official capacity as treasurer)
Howard Berman)
Voter Guide Slate Cards)
Jerry Seedborg)
Seedborg Campaigns, Inc.)

**STATEMENT OF REASONS
OF COMMISSIONER STEVEN T. WALTHER**

In Matter Under Review (MUR) 6570, the Commission deadlocked in a vote of 3-3 on the Office of General Counsel's (OGC) recommendation to dismiss allegations that the above-captioned respondents violated 2 U.S.C. § 441a by making or accepting excessive contributions resulting from common vendor coordination.¹ I voted against OGC's recommendation to dismiss the matter because I believe a limited investigation was warranted in these circumstances. Following the split vote, the Commission voted 6-0 to close the file.² I write to explain my votes.

¹ OGC recommended dismissing the matter as an exercise of the Commission prosecutorial discretion, *see Heckler v. Chaney*, 470 U.S. 821 (1985), concluding that the Commission lacked a "sufficient basis to find that a violation occurred," given the "conclusory nature of the Complaint — made without personal knowledge or reference to supporting evidence — and the lack of information available from any other source that would support a reasonable inference that the activities here may have been coordinated within the meaning of the regulations." *See* First General Counsel's Report in MUR 6570, dated October 22, 2012.

² *See* Commission Certification in MUR 6570 dated November 29, 2012.

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I. Background

Former Congressman Howard L. Berman, who represented California's 28th District from 1983 through 2012, was a candidate in the newly drawn 30th District in 2012.³ Berman's principal campaign committee was Berman for Congress ("Berman Committee"). The Complaint alleges that an independent expenditure-only political committee called the Committee to Elect an Effective Valley Congressman ("CEEVC") — which the Complaint refers to as the "Berman Super PAC" — coordinated an expenditure for slate card mailers with Berman and the Berman Committee.⁴

The Complaint alleges that the coordination occurred through a common vendor, specifically, political consultant Jerry Seedborg and two companies of which Seedborg is the founder and principal, namely, Seedborg Campaigns, Inc. and Voter Guide Slate Cards ("VGSC") (collectively, "the Seedborg entities").⁵ The Complaint asserts that Berman has a longstanding relationship with Seedborg and that the Berman Committee paid Mr. Seedborg and Seedborg Campaigns, Inc. \$132,300 from January through March 2012 for consulting and other services.⁶ The Complaint alleges that Seedborg then began creating and producing the mailers for CEEVC through his other company, VGSC.⁷ In its 2012 April Quarterly Report, CEEVC disclosed a \$23,595 debt to VGSC, and on June 4 it filed a "Notice of Independent Expenditures" for "Slate Mail" in support of Berman for the same amount.⁸ The payment was reported as occurring on May 29, 2012, a week before Berman's primary election.

The Complaint alleges that the mailers expressly advocated the election of Berman, but did not include copies of the mailers or describe their contents. However, the absence of these documents is not material because CEEVC admits that the mailers endorsed Berman and constituted "a public communication that expressly advocated the election of a candidate for federal office."⁹ CEEVC also submitted a document

³ Berman and fellow Democratic Congressman Brad Sherman ran against each other during the June 5, 2012 primary election. Because California's election system places the two candidates who received the most votes in the primary against each other regardless of party, the two Congressmen again faced each other in the November 6, 2012 general election, which Sherman won.

⁴ CEEVC registered with the Commission as an independent expenditure-only committee in December 2011. CEEVC's Statement of Organization includes a letter stating that, consistent with *SpeechNow.org v. FEC*, 599 F.3d, 685, 689 (D.C. Cir. 2010) (*en banc*), it intends to make independent expenditures and raise funds in unlimited amounts but will not use those funds to make direct or in-kind contributions to, or coordinated communications with, federal candidates or committees. CEEVC acknowledges that its specific purpose was to "accept contributions and to make independent expenditures in support of [Berman's] election. . . ." CEEVC Resp. at 2.

⁵ Compl. at 1-2. In their response, Seedborg, Seedborg Campaigns, Inc. and VGSC refer to themselves as the "Seedborg Entities." See Seedborg Entities Resp.

⁶ Compl. at 2. As evidence of the "longstanding relationship" between Congressman Berman and Seedborg, the Complaint cites quotations from Congressman Berman's brother, Michael Berman, and his partner on Seedborg's company websites. Compl. at 1.

⁷ Compl. at 2.

⁸ See Notice of Independent Expenditures, available at <http://images.nictusa.com/pdf/484/12951937484/12951937484.pdf#navpanes=0>.

⁹ CEEVC Resp. at 4.

purporting to be a file containing “different messages” that CEEVC wished to have printed in the mailers; the messages appear to be endorsements by prominent individuals targeted to various groups of voters.¹⁰ Also, the Seedborg entities provided a copy of one mailer entitled “2012 Primary Election Recommendations.”¹¹ The relevant text in that mailer states: “CD30 U.S. Representative — HOWARD L. BERMAN — Democrats are uniting in support of Congressman Howard Berman! Howard Berman is endorsed by: Governor Jerry Brown, Senators Dianne Feinstein and Barbara Boxer and Congressman Henry Waxman.”¹² *Id.*

The Complaint alleges that the mailers satisfy the three-prong test for coordinated communications set forth in the Commission’s regulations at 11 C.F.R. § 109.21, as discussed below.¹³ Accordingly, the Complaint concludes that “Respondents have violated [the] bar on coordinated communications.”¹⁴

The respondents deny the coordination allegations. CEEVC asserts that the conduct prong of the coordination analysis is not satisfied because CEEVC was unaware that Seedborg had any involvement with the Berman campaign when it purchased advertising space on the VGSC slate cards and Seedborg did not use or convey any information about the Berman campaign that was material to the creation of the mailers. The Berman Committee asserts that the Committee and Berman had no contact with CEEVC, VGSC, or Seedborg regarding the mailers and argue that the Complaint presents no evidence that non-public information about Berman’s campaign was conveyed to CEEVC. Seedborg, Seedborg Campaigns, Inc., and VGSC also maintain that they did not use or convey any information obtained from the Berman campaign to CEEVC.

II. The Law

The Federal Election Campaign Act of 1971, as amended (“the Act”), provides that no person shall make contributions to any candidate and his or her authorized political committee with respect to any election for federal office which, in the aggregate, exceed \$2,000.¹⁵ The Act also provides that no candidate or political committee shall knowingly accept a contribution in excess of the contribution limitations.¹⁶

¹⁰ CEEVC Resp. at Ex. 4.

¹¹ See Seedborg Entities Resp., Ex. A.

¹² The slate card disclaimer states, in relevant part: “Howard Berman’s placement paid for by the Committee to Elect an Effective Valley Congressman, P.O. Box 14008, Van Nuys, CA 91409-4008, and not authorized by candidate or his committee.” *Id.*

¹³ Compl. at 4.

¹⁴ Compl. at 7.

¹⁵ 2 U.S.C. § 441a(a)(1)(A); see *SpeechNow.org*, 599 F.3d at 696; Advisory Op. 2010-09 (Club for Growth); Advisory Op. 2010-11 (Commonsense Ten). After indexing for inflation, the individual contribution limit to candidates and candidate committees for the 2012 election cycle is \$2,500. *Price Index Adjustments for Contribution and Expenditure Limits and Lobbyist Bundling Disclosure Threshold*, 76 Fed. Reg. 8368, 8370 (Feb. 14, 2011).

¹⁶ 2 U.S.C. § 441a(f).

The Act provides that an expenditure made by any person "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or his authorized committee or agent is considered a contribution made to the candidate, and potentially a contribution accepted by the candidate.¹⁷ A communication is coordinated with a candidate, an authorized committee, a political party committee, or an agent thereof if it meets a three-part test: (1) it is paid for, in whole or in part, by a third party (a person other than the candidate, authorized committee, or political party committee); (2) it satisfies at least one of the five "content" standards described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the six "conduct" standards described in 11 C.F.R. § 109.21(d).¹⁸

In contrast, an independent expenditure is an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate *that is not made in concert or cooperation with or at the request or suggestion of* a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.¹⁹

The only part of the coordination analysis in dispute in this matter is the conduct prong. Under the Commission's regulations, six types of conduct between the payor and the committee, regardless of whether there is agreement or formal collaboration, satisfy the conduct prong of the coordination standard:

(1) *Request or suggestion*: The communication "is created, produced, or distributed at the request or suggestion of a candidate or an authorized committee," or the communication is created, produced, or distributed at the suggestion of the payor and the candidate or authorized committee assents to the suggestion.

(2) *Material involvement*: The candidate, his or her committee, or their agent, is materially involved in decisions regarding the content, intended audience, means or mode of communication, the specific media outlet used, the timing or frequency of the communication, or the size or prominence of a printed communication or duration of a broadcast, cable or satellite communication.

(3) *Substantial discussion*: The communication is created, produced, or distributed after at least one substantial discussion about the communication between the person paying for the communication, or that person's employees or agents, and the candidate or his or her authorized

¹⁷ See 2 U.S.C. §§ 441a(a)(7)(B)(i) and 441a(f).

¹⁸ 11 C.F.R. § 109.21(a).

¹⁹ 2 U.S.C. § 431(17); 11 C.F.R. § 100.16 (emphasis added).

committee, his or her opponent or opponent's authorized committee, a political party committee, or any of their agents.²⁰

(4) *Common vendor*: A commercial vendor has had a previous relationship (defined in terms of nine specific services) with the candidate, the candidate's authorized committee, the candidate's opponent or that opponent's authorized committee or a political party committee, during the previous 120 days, uses or conveys information material to the creation, production, or distribution of the communication.

(5) *Former employee or independent contractor*: A former employee or independent contractor uses or conveys information material to the creation, production, or distribution of the communication.

(6) *Dissemination, distribution, or republication*: Campaign materials prepared by the candidate or his or her committees or agents are disseminated, distributed, or republished by others.²¹

The Complaint specifically alleges that CEEVC and the Berman Committee coordinated CEEVC's expenditure for the slate cards through common vendor Jerry Seedborg and his companies, Seedborg Campaigns, Inc. and VGSC.

The common vendor analysis has three parts under the Commission's regulations: First, the person paying for the communication, or an agent of such person, must contract with or employ a "commercial vendor" to create, produce, or distribute the communication.²²

Second, the commercial vendor, including any owner, officer, or employee of the commercial vendor, must provide any of nine specific services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee during the previous 120 days. The specific services are: (1) development of media strategy, including the selection or purchasing of advertising slots; (2) selection of audiences; (3) polling; (4) fundraising; (5) developing the content of a public communication; (6) producing a public communication; (7) identifying voters or developing voter lists, mailing lists, or donor lists; (8) selecting personnel, contractors, or subcontractors; or (9) consulting or otherwise providing political or media advice.²³

²⁰ A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, and that information is material to the creation, production, or distribution of the communication. See 11 C.F.R. § 109.21(d)(3).

²¹ 11 C.F.R. § 109.21(d)(1)-(6). The last standard applies only if there was a request or suggestion, material involvement, or substantial discussion that took place after the original preparation of the campaign materials that are disseminated, distributed, or republished.

²² 11 C.F.R. § 109.21(d)(4)(i).

²³ 11 C.F.R. § 109.21(d)(4)(ii).

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Third, the commercial vendor must use or convey (1) information about the campaign plans, projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a political party committee, and that information is material to the creation, production, or distribution of the communication; or (2) information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication. The third part of the analysis is not satisfied if the information used or conveyed by the commercial vendor was obtained from a publicly available source.²⁴

III. Analysis

At issue is whether the mailers paid for by CEEVC were independent expenditures or whether they were coordinated with the Berman Committee, such that CEEVC made, and the Berman Committee accepted, an excessive contribution.

A. Payment and Content Prongs

None of the respondents disputes that the payment and content prongs are satisfied. CEEVC, a third party payor, paid VGSC a total of \$23,595 to purchase advertising space in the slate card mailers, and CEEVC specifically admits that the "express advocacy" content prong is satisfied.²⁵

B. Conduct Prong

The three parts of the common vendor test, as they relate to the facts of this matter, are discussed below.

1. Commercial vendor

As stated, the person paying for the communication, or an agent of such person, must contract with or employ a "commercial vendor" to create, produce, or distribute the

²⁴ 11 C.F.R. § 109.21(d)(4)(iii). The Berman Committee notes that, as the asserted recipient of the alleged in-kind contribution, it would not be deemed to have received or accepted a contribution resulting from common vendor conduct unless, as stated in 11 C.F.R. § 109.21(b)(2), the candidate or authorized committee "engages in conduct described in paragraphs (d)(1) through (d)(3) of this section" (*i.e.*, request or suggestion, material involvement or substantial discussion). *See* Berman Committee Resp. at 5-6. However, any use of material information by VGSC or Seedborg, as agents of CEEVC, as described above would, at a minimum, likely satisfy the material involvement standard at 11 C.F.R. § 109.21(d)(2). The Complaint also alleges that the "substantial discussion" standard would be satisfied because Seedborg "inevitably has had conversations with" Berman or Berman for Congress "regarding the campaign's 'plans, projects, activities or needs . . .'" Compl. at 7.

²⁵ *See* 11 C.F.R. § 109.21(a)(1), (c)(3). In addition, the mailers meet the content standard at 11 C.F.R. § 109.21(c)(4), since they are public communications that refer to a clearly identified House candidate and appeared to have been publicly disseminated in the candidate's district 90 days or fewer before the primary election, which occurred on June 5, 2012.

communication. "Commercial vendor" is defined as any person providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.²⁶ Here, the first part of the common vendor analysis is satisfied because CEEVC contracted with VGSC to produce and distribute the slate card mailers. VGSC is a commercial vendor as defined in the Commission's regulations, as its website advertises its business of producing and distributing slate cards through direct mail in the state of California for the past 25 years.²⁷

2. Providing Services to Campaign

One of the unresolved issues in this matter is whether the Seedborg entities provided any of the nine above-described services to Berman or the Berman Committee during the 120 days before CEEVC contracted with VGSC to produce the slate cards.²⁸ These particular services are relevant to a coordination analysis because they may place the common vendor in a position to convey information about the candidate's or party committee's campaign plans, projects, activities, or needs to the person paying for the communication where that information is material to the communication.²⁹

The Complaint asserts that this part of the common vendor analysis is satisfied because Seedborg "provided consulting and other services" listed in the regulation during the relevant time period.³⁰ The responses from the Berman Committee and the Seedborg entities assert that Seedborg was retained as an independent contractor to the Berman Committee from December 2011 to March 2012, which would fall within the 120-day window before CEEVC contracted with VGSC to produce and distribute the slate cards.³¹

Both the Seedborg entities and the Berman Committee characterize Seedborg's role with the Berman Committee as "administrative" — which is consistent with the Committee's characterization of disbursements to Seedborg Campaigns, Inc. from December 27, 2011, through March 20, 2012, for "administrative services" on its disclosure reports.³² The responses do not describe what is meant by "administrative" services; however, the Seedborg entities note that those services included "locating and opening the campaign headquarters,"³³ and the Berman Committee states that it engaged the Seedborg entities to administer its "day-to-day operations."³⁴

²⁶ 11 C.F.R. § 116.1(c).

²⁷ See www.voterguideslatecards.com.

²⁸ 11 C.F.R. § 109.21(d)(4)(ii).

²⁹ See Explanation & Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (2003) ("2003 E&J").

³⁰ Compl. at 6.

³¹ See Berman Committee Resp. at 2; Seedborg Entities Resp. at 2; CEEVC Resp. at 2-3.

³² See Berman Committee Resp. at 2; Seedborg Entities Resp. at 2, 5.

³³ Seedborg Entities Resp. at fn. 5.

³⁴ Berman Committee Resp. at 2.

The available information suggests that the Seedborg entities, at a minimum, may have provided “consulting” services or “otherwise provid[ed] political or media advice” to the Berman Committee, and may have provided one or more of the other enumerated services. The responses do not specifically deny the Complaint’s allegation that the Seedborg entities provided consulting services to the Berman Committee; indeed, the Berman Committee expressly acknowledges engaging “Seedborg and his *political consulting* firm, Seedborg Campaigns . . .”(emphasis added).³⁵ Also, the Seedborg entities state that their involvement was “primarily” administrative, leaving open whether they advised the campaign on non-administrative matters such as media strategy.³⁶ Even if the term “administrative” is narrowly construed to exclude media, polling or fundraising advice or services, a reasonable reading would seem to encompass general management decisions such as “selecting personnel, contractors, or subcontractors.”³⁷ The respondents have provided no information to assist the Commission in resolving these issues, such as an affidavit from one of the principals at Seedborg Campaigns, Inc. specifically setting forth the types of services provided to the Berman Committee.³⁸ Indeed, given that \$42,000 of the \$132,300 in campaign disbursements to the Seedborg entities in early 2012 were paid to Seedborg himself, we would expect there to be a direct statement from Seedborg or other witnesses with personal knowledge about what the Seedborg entities did — or did not do — for the Berman Committee, but there was a notable absence of any such document or statement. Accordingly, I believe there was a strong reason to investigate whether the Seedborg entities provided one or more of the services enumerated in the common vendor regulation.

3. Use or Conveyance of Material Information

If the first two parts of the common vendor test are satisfied, the communication in question is deemed coordinated — and therefore treated as an in-kind contribution to the candidate — so long as the Seedborg entities either used, or conveyed to CEEVC, information about the Berman Committee’s plans, projects, activities or needs to which they were privy as a result of their role as vendors to the Berman Committee; or whether

³⁵ Berman Committee Resp. at 2.

³⁶ Seedborg Entities Resp. at fn. 5.

³⁷ 11 C.F.R. § 109.21(d)(4)(ii).

³⁸ Although the Commission does not require respondents to respond to each and every allegation contained in complaint or to respond to the complaint at all, the response process provides an opportunity for respondents to demonstrate to the Commission why it should not commence an enforcement action, or to clarify, correct, or supplement the information in the complaint. See “Guidebook for Complainants and Respondents on the FEC Enforcement Process” (“Guidebook”), available at http://www.fec.gov/em/respondent_guide.pdf, at 10. While there is no prescribed format for responses, providing documentation, including sworn affidavits from persons with first-hand knowledge of the facts, tends to be helpful. *Id.* In a recent judicial challenge by a complainant following a “no reason to believe” finding by the Commission that was based on an affidavit attached to the response, the court held that the Commission lacked “substantial evidence” to conclude there was no reason to believe, noting, *inter alia*, that the affidavit was unreliable because it was “summary in fashion” and failed to identify a basis for the affiant’s personal knowledge. See *LaBetz v. FEC*, __ F. Supp. 2d __, Civ. No. 11-1247, at 13-16 (D.D.C. Sept. 5, 2012) (slip. op.).

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the Seedborg entities so used or conveyed information they had used previously in the course of their work for the Berman Committee.³⁹

Here, all the respondents deny that the Seedborg entities used or conveyed information to CEEVC about the Berman campaign's plans, projects, or needs that was material to the creation, production, or distribution of the slate card mailers. The responses note that during the 2002 coordinated communication rulemaking, the Commission specifically rejected the idea that use of a common vendor alone would establish a "presumption of coordination." In considering various alternatives, the Commission promulgated a regulation that "does not presume coordination from the mere presence of a common vendor," but instead "focuses on the sharing of information . . . through a common vendor to the spender who pays for a communication that could not then be considered to be made 'totally independently' from the candidate."⁴⁰ However, the suggestion that the allegations in the Complaint rely on a "presumption" of coordination confuses the ultimate satisfaction of the regulatory test itself with the much lower threshold for merely commencing a Commission investigation. Indeed, if the Commission "presumed" coordination based on the facts at this preliminary stage, there would be no need to conduct an investigation.

Before the Commission opens an investigation of a possible violation, the Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation."⁴¹ A "reason to believe" finding is not a finding that a respondent violated the Act, but instead simply means that the Commission believes a violation may have occurred. The Commission in fact clarified, in a 2007 Statement of Policy, that such a finding "*does not establish that the law has been violated.*" (emphasis added).⁴² Where a close examination of the available information in a coordination case suggests the likelihood that a common vendor may have used or conveyed material information as set forth in the regulations, I believe the Commission should, in the appropriate circumstances, make a reason to believe finding in order to investigate whether an in-kind contribution has been made in violation of the Act.

A prior MUR applying the common vendor test, in which the Commission found reason to believe in order to investigate the relevant facts, is instructive. In MUR 5598 (John Swallow for Congress, Inc., *et al.*), the complaint alleged that brochures printed and mailed by a common vendor and paid by a state party committee constituted excessive contributions to a candidate committee. In finding reason to believe, the Commission stated in its Factual and Legal Analysis that, although the responses generally denied that the mailings were coordinated with the candidate committee, "we do not know whether [the common vendor] used information, or conveyed information to the [state party] regarding the [candidate committee's] plans, projects, activities or needs that was material to the creation, production, or distribution of the mailings. Nor do we

³⁹ See 11 C.F.R. § 109.21(c)(4)(iii)(A) and (B).

⁴⁰ 68 Fed. Reg. 436-37 (2003) ("2003 E&J").

⁴¹ 2 U.S.C. § 437g(a)(2).

⁴² See 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

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know whether information used previously by [the common vendor] in providing services . . . was so used or conveyed.⁴³ In authorizing an investigation, the Commission concluded that, "because the first two elements of the common vendor test are met, there is reason to investigate whether the use or exchange of information . . . occurred in this matter."⁴⁴

A similar situation exists here. It is significant that, in response to a specific allegation that Seedborg used non-public material information obtained as a result of his work with the Berman Committee in making decisions about content, timing and audience of the mailers, the respondents did not provide *any* affidavits or statements (whether under oath or not) from *any* individuals involved in this matter. In determining whether to find reason to believe, the Commission must weigh these allegations against the Seedborg entities' unsworn claims that Seedborg had no involvement in or knowledge of the campaign's "slate strategy," including the text used in the mailers as well as the "mail universe" of recipients.⁴⁵ The Commission must also factor in similar unsworn denials in the other responses, such as CEEVC's argument that "it was solely CEEVC" that "chose the advertising message" — which it supports by attaching a copy of an invoice from VGSC to CEEVC that directs CEEVC to provide the text for the mailers.⁴⁶ Until the Commission has examined statements from individuals with personal knowledge of the facts or other credible information, and consistent with the Commission's approach in MUR 5598, it would be premature to rule out the possibility that Seedborg was privy to particular needs of the Berman campaign, such as mailers targeting specific demographic groups, with tailored endorsements, to be disseminated during a specific time period before the June 2012 primary election. Indeed, the Seedborg entities acknowledge that Seedborg left the Berman campaign in March 2012 and "returned his attention" to VGSC, at which time he was "first contacted" by CEEVC to buy space in VGSC's mailers in support of Berman.⁴⁷ Given Seedborg's dual roles and consequent opportunities for using information material to the mailers that he may have obtained during his prior substantial work for the Berman Committee, I believe this matter warranted further review by the Commission.⁴⁸

⁴³ Factual and Legal Analysis for Utah Republican Party at 12-13, available at <http://eqs.nictusa.com/eqsdocsMUR/29044230998.pdf>. I voted, along with Commissioner Weintraub and two other Commissioners, to find reason to believe. See Commission Certification in MUR 5598 dated June 27, 2006, available at <http://eqs.nictusa.com/eqsdocsMUR/29044230990.pdf>.

⁴⁴ *Id.* at 13. For reasons unrelated to the common vendor test, the Commission voted to dismiss MUR 5598 in an exercise of prosecutorial discretion following the investigation, "given the complicated history of the application of the volunteer materials exemption . . ." See MUR 5598 Statement of Reasons of Vice Chair Petersen and Commissioners Bauerly, Hunter and Weintraub, dated April 9, 2009, available at <http://eqs.nictusa.com/eqsdocsMUR/29044231285.pdf>. I voted against the motion to dismiss and would have preferred to enter into pre-probable cause conciliation with the respondents, as recommended by OGC, in light of the strong evidence showing violations of the Act resulting from common vendor coordination.

⁴⁵ Seedborg Entities Resp. at 5.

⁴⁶ CEEVC Resp. at 3.

⁴⁷ Seedborg Entities Resp. at 2.

⁴⁸ Also, neither CEEVC nor the Seedborg entities provided any information suggesting they had established and implemented a firewall pursuant to the safe harbor provisions set forth at 11 C.F.R. § 109.21(h). Under that provision, the conduct standards are not satisfied if the "commercial vendor, former employee, or

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Although the information available at this stage is not conclusive as to whether material information was used or conveyed so as to satisfy the conduct prong of the Commission's coordinated communication regulations, the facts before us present a sufficient basis to open a limited investigation to flesh out the relevant facts. In this matter, such an investigation would have consisted of OGC making inquiries as to the precise services that the Seedborg entities provided to the Berman Committee. If the facts showed that they did not provide any of the enumerated services within the prescribed common vendor 120-day time frame, the Commission could then close the file. However, without adequate answers to some basic questions concerning the Seedborg entities' role and possible involvement in this matter, I believe it was premature for the Commission to dismiss at this juncture.

For these reasons, I voted against OGC's recommendation to dismiss this matter.

1/4/13
Date

Steven T. Walther
Steven T. Walther
Commissioner

political committee" has set up a firewall that meets specific requirements (e.g., designed and implemented to prohibit the flow of information between employees and consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication). See 11 C.F.R. § 109.21(h)(1), (2).

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