



State of New Jersey

ELECTION LAW ENFORCEMENT COMMISSION

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Respond to:
P.O. Box 185
Trenton, New Jersey 08625-0185

(609) 292-8700 or Toll Free Within NJ 1-888-313-ELEC (3532)

Website: <http://www.elec.state.nj.us/>

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JAMES P. WYSE
Legal Counsel

January 11, 2011

Hugh E. DeFazio, Jr., Esq.
18 Bank Street
Morristown, NJ 07960

Re: Advisory Opinion 02-2010

Dear Mr. DeFazio:

The Commission considered your request for an advisory opinion at its meeting of December 21, 2010, and directed me to issue this response. Commissioner English recused herself from participation in the consideration of your request.

You submitted the request on behalf of Michael Luther, a successful candidate in the 2005 general election and an unsuccessful candidate in the 2009 general election for Mayor in Parsippany-Troy Hills Township, Morris County. Mr. Luther established single candidate committees in both the 2005 and 2009 general elections (hereafter referred to as the “2005 candidate committee” and the “2009 candidate committee,” respectively).

Your request concerns the resolution of outstanding obligations in the amount of \$93,697.33 owed by the 2005 candidate committee for legal fees and expenses incurred in connection with the defense of a recount challenge. This proposal is made as a result of negotiation arising out of litigation instituted by the creditor law firm, and would settle the amount of the outstanding obligation for approximately \$40,000.

Question Presented

May a candidate and a creditor to whom the candidate owes outstanding obligations engage in a settlement of those outstanding obligations at less than the amount that has been billed by the creditor and reported by the candidate committee? Does that settlement result in a reportable in-kind contribution received by the candidate?

Commission Response

The Commission hereby advises you that under the particular facts stated in your request, the proposed settlement of the debt for less than the amount owed does not result in a “contribution” as that term is defined by the Reporting Act and the regulations promulgated thereunder. The Commission reaches this conclusion based upon the unique facts and

circumstances of this case, including the fact that the outstanding obligations arose post-election in response to a challenge to the election that the candidate was required to defend, and which the candidate could not reasonably have foreseen or planned for during the campaign.

Discussion

The results of the 2005 general election for Mayor in Parsippany-Troy Hills Township, Morris County, showed Mr. Luther as the winning candidate by forty-one votes. After an initial recount, the results were certified by the Morris County Clerk on November 22, 2005 and showed Mr. Luther the winning candidate by forty votes. The opposing candidate then filed a petition in Superior Court to challenge the election. This election challenge went through the court system over the next two years and in the end, Mr. Luther was confirmed as the winning candidate. See case narratives at 388 N.J. Super. 663 (App. Div. 2006); and 192 N.J. 546 (2007). Mr. Luther's 2005 candidate committee engaged the services of the law firm, "Genova, Burns & Vernoia," now "Genova, Burns & Giantomasi" (hereafter, the "law firm" or the "creditor"), to defend the certified results of the election. The resulting legal bill was in an amount of approximately \$213,697.35.

The 2005 candidate committee has paid an amount of approximately \$120,000 of the total amount owed, leaving an outstanding balance of \$93,697.33. The 2005 candidate committee has reported this amount in outstanding obligations on Schedule E – Outstanding Obligations, of the post-election quarterly reports, including the October 15, 2010 report, the most recent report filed.

As you have indicated, the law firm sent billing and demand letters and a final arbitration letter, followed by the filing of a civil complaint in the Superior Court of New Jersey on March 24, 2010, seeking payment of the balance owed. Genova, Burns & Vernoia v. Michael Luther, Docket No. L-2452-10. You state that the two parties have engaged in "arms-length" settlement negotiations of the disputed debt amount and are prepared to sign an agreement "upon settled amount". Upon payment of the settlement amount of approximately \$40,000, both parties have agreed to release each other from "any and all past, present and future actions."

Applicable law

The Commission notes preliminarily that the use of campaign funds for legal fees in connection with a recount or election challenge is a permissible use of campaign funds. N.J.A.C. 19:25-6.10(a)1.

Definition of "contribution." N.J.S.A. 19:44A-3d defines "contributions" as "all loans and transfers of money or other thing of value to or by any candidate, candidate committee...and all pledges or other commitments or assumptions of liability to make such transfer." N.J.A.C. 19:25-1.7 provides that a "contribution" includes "every loan, gift, subscription, advance or transfer of money or other thing of value, including any in-kind contribution..." An "in-kind contribution" is a contribution of goods or services received by a candidate committee, which is paid for by a person or entity other than the recipient committee. N.J.A.C. 19:25-1.7.

Under the definition of a “contribution,” a debt settled for less than its reported amount results in a reduction of liability and a thing of value received by the campaign. Therefore, settlement of the disputed debt using the figures you provided would, under ordinary circumstances, result in an “in-kind” contribution in the approximate amount of \$53,697.33, an amount in excess of the \$2,600 applicable limit in either the 2005 or 2009 general election. N.J.S.A. 19:44A-11.3 and N.J.A.C. 19:25-11.2. Because partnerships are prohibited from making contributions, the resulting in-kind contribution would be attributed to and allocated among individual partners or members. N.J.A.C. 19: 25-11.10.

The Pay-to-Play laws. Whether or not a transaction constitutes a “contribution” also concerns the pay-to-play requirements. The “pay-to-play” laws enacted in 2004 and 2005 contain prohibitions and disclosure requirements relevant to “contributions” by business entities that have or are seeking New Jersey government contracts. See N.J.S.A. 19:44A-20.3 through 20.25 (prohibition laws) and N.J.S.A. 19:44A-20.26, 20.27 (disclosure laws), and Commission regulations, N.J.A.C. 19:25-24.1 through 26.1 et seq.

Termination of committee reporting with net debt. N.J.S.A. 19:44A-16b provides that concurrent with the 20-day post-election report, “or at any time thereafter,” a candidate committee may certify a final report, which certification shall be accompanied by a final accounting including “the arrangements which have been made for the discharge of any obligations remaining unpaid at the time of dissolution.” This statutory provision also provides the Commission with authority to provide for post-election termination of reporting by candidate committees.

In its rulemaking, the Commission has addressed both termination of committee reporting and retirement of net debt, or outstanding obligations, after the election. These regulatory provisions provide for the transfer of outstanding obligations from one election to the next, and for the raising of contributions post-election to retire net debt, subject to the contribution limits. See N.J.A.C. 19: 25-8.7 (b) and N.J.A.C. 19:25-8.7A. These regulations are based upon the premise that the candidate committee will pay off the debt owed or transfer it to a future election.

Gubernatorial public financing regulations. In 2009, the Commission adopted regulations which provide for the finalization by publicly-financed gubernatorial candidates who have continued to report net debt, see N.J.A.C. 19:25-15.47B and 15.47C relevant to the general election and N.J.A.C. 19:25-16.34A and 16.34B relevant to the primary election. These regulations are largely premised upon the inability of publicly-financed gubernatorial candidates to transfer outstanding obligations from one election to another, see N.J.S.A. 19:44A-34 and N.J.A.C. 19:25-15.7, and provide that application for finalization cannot be made before expiration of the six-year statute of limitations for collection of debts. These regulations do not apply to the instant case.

Federal law. Federal law provides for settlement of debts owed by terminating committees and review by the Federal Elections Commission (FEC) of debt settlement plans on a case by case basis. FEC rules examine criteria to determine whether or not a settlement is “commercially reasonable” including the treatment of the debt by the vendor, whether or not

credit was extended in the ordinary course of business, efforts by the committee to satisfy the debt, and pursuit of remedies, including litigation, by the vendor. 11 CFR 116.1 to 116.4.

The Commission finds that the facts of this case are highly unique and that several facts in particular are compelling in reaching its determination. First, the debt was incurred post-election. Second, the legal fees were incurred through defense of the election results and were not a result of action initiated by the candidate. The candidate was placed in a position post-election that required him to defend the results of the election. The candidate could not have anticipated during the campaign that he would be placed in this unique position. Our democratic process includes the right of a candidate to challenge the results of an election but just as surely the right and obligation of a candidate to defend the results of an election. Finally, the Commission is convinced, based upon the particular facts and circumstances presented, that the law firm made bona fide and commercially diligent efforts to collect the debt, that the proposed settlement agreement is the result of legitimate arms' length negotiations motivated by a sincere desire by both parties to resolve the dispute, and that the settlement is not, nor does it have the appearance of being, the product of any pre-arranged plan to avoid the contribution limits.

Conclusion

Based upon the narrow and unique facts of this case, the Commission finds that settlement of the outstanding obligations in these circumstances for an amount less than the full amount owed, does not result in a reportable contribution.

The Commission therefore approves the procedure requested. The 2005 candidate committee may transfer its net debt to the 2009 candidate committee and file a final report after bringing its depository account balance to zero. The 2009 candidate committee may pay the agreed-upon balance of the bills owed by the 2005 candidate committee out of the 2009 candidate committee's depository account. The disposition of the outstanding obligations should be disclosed on Schedule E of the Form R-1 of the quarterly report period in which they are finally settled as made pursuant to this Advisory Opinion. The resulting difference between the amount of net debt owed to the creditor law firm and the final amount paid by the 2005 and 2009 candidate committees is not a reportable contribution.

Since the Commission has long taken the view that fair market value, for purposes of determining the reportable amount of an in-kind contribution of goods, should be determined by the campaign, see N.J.A.C. 19:25-10.4 ("Computation of contribution amounts"), the Commission believes that the actual figures involved are matters between the candidate committee and the creditor. The Commission notes however that the settlement figures you propose in your Advisory Opinion Request are based upon the depository account balances reported on the 2010 second quarterly reports filed by the 2005 and 2009 candidate committees. The Commission recommends that you advise your client to consult the Commission's Compliance Division concerning reporting and finalization requirements.

The Commission emphasizes that its response is based upon the specific facts and circumstances presented in this Request and its conclusions concerning the veracity of those facts and circumstances, and does not intend that this response serve as precedent for purposes of any other advisory opinion request.

Thank you for your inquiry and for your interest in the work of the Commission.

Very truly yours,
Election Law Enforcement Commission

By: _____
Carol L. Hoekje, Esq.



Advisory Opinion Request
For Candidates and Committees

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
P.O. Box 185, Trenton, NJ 08625-0185
(609) 292-8700 or Toll Free Within NJ 1-888-313-ELEC (3532)
Website: www.elec.state.nj.us

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SEP - 3 2010

PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

A person, committee or entity subject to, or reasonably believing he, she or it may be subject to, any provision or requirement of the Campaign Reporting Act may request that the Commission provide an advisory opinion pursuant to N.J.S.A. 19:44A-6. Such request must include the following:

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of Person, Committee, or Entity:

Michael Luther, Luther for Mayor Committee, Re-elect Mayor Luther Committee

Mailing Address:

P. O. Box 5131

Parsippany, NJ 07054

*Day Telephone Number:

(973) 713-2404

*Evening Telephone Number:

(973) 713-2404

2. Indicate if the above named person, committee, or entity currently files reports with the Commission:

[X] Yes [] No

a. If yes, indicate in what capacity it is filing:

- Candidate committee [X]
Joint candidates committee []
Political committee []
Continuing political committee []
Political party committee []
Legislative leadership committee []

- Recall committee []
Recall defense committee []
Personal financial disclosure statement []
Other (please describe): []

b. If no, indicate if the above named person, committee, or entity has in the past filed reports with the Commission, giving elections (i.e., 2005 general election) or calendar years, and identify filing capacity:

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

3. Please provide below a statement of the cognizable question of law arising under the Campaign Reporting Act, including specific citations to pertinent sections of the Campaign Reporting Act and Commission regulations (if known).

Whether reporting for a candidate committee may be closed under N.J.A.C. 19:25-8.7 after payment of a settled debt for professional services rendered in an arms-length commercial transaction and whether the forgiveness of such debt must be treated as an in-kind contribution subject to the contribution limits set forth under N.J.A.C. 91:25-11.27

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, committee, or entity requesting the opinion, and that the person, committee, or entity has standing to seek the opinion, that is the opinion will affect the person's or committee's reporting or other requirements under the Act. Attach additional sheets if necessary.

Statement of Facts:

In 2005 Michael Luther stood for election for the office of Mayor of Parsippany, NJ and was elected by a very close margin, 40 votes. In 2009 Mayor Luther ran for a second term as Mayor of Parsippany but lost that election. The first election was contested and the Luther for Mayor 2005 Candidate Committee hired Genova, Burns and Giantomasi to represent him in the election contest before the New Jersey Superior Court and appeals to the New Jersey Appellate and Supreme Courts. Michael Luther's 2005 election was finally approved by Judge Ted Bozonelis. Michael Luther would like to use the funds left in the Luther for Mayor and Re-elect Mayor Luther Committee accounts to pay the outstanding invoice with Genova, Burns and Giantomasi.

We want to make clear that the Luther for Mayor Committee does not expect to receive any further contributions into either campaign committee.

In the event that ELEC doesn't approve the arms-length settlement of a disputed commercial debt, both the candidate and the vendor may have to incur additional and/or unnecessary costs to litigate the settlement.

Please see the following page.

5. Please provide below a statement of the result that the person, committee, or entity seeks, and a statement of the reasoning supporting that result:

Michael Luther, the Luther for Mayor Committee, and the Re-Elect Mayor Luther Committee seek approval from ELEC of the procedure outlined in Section 4 to fund the Settlement Agreement between themselves and Genova, Burns and Giantomasi.

6. Person who is submitting this advisory opinion request on behalf of the committee or entity listed in Question #1:

Full Name:

Hugh E. DeFazio, Esq.

Mailing Address:

18 Bank Street

Morristown, NJ 07960

*Day Telephone Number:

973-292-5100

*Evening Telephone Number:

973-610-1629

Fax Number:

973-292-5125

a. Official Capacity of Person Requesting Opinion:

Candidate

Treasurer

Organizational Treasurer

New Jersey Attorney representing requesting person, committee, or entity

Other (please describe):

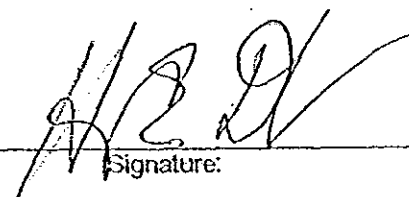
7. I hereby consent to an extension of the 10-day response period provided in N.J.S.A. 19:44A-6f to a 30-day period for Commission response, which period shall start on the date of Commission receipt of the completed advisory opinion request.

(CROSS OUT THIS PARAGRAPH IF CONSENT IS WITHHELD).

8. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

9-2-2014

Dated:


Signature:

*ATTACHMENT TO
THE ADVISORY OPINION REQUEST
ON BEHALF OF MICHAEL LUTHER*

Continuation of Question 4:

The Luther for Mayor Committee has paid the law firm approximately \$120,000 in legal fees for services rendered in the matter. The Firm has sought payment of additional legal fees incurred by Luther through numerous demand letters, an arbitration letter threatening litigation and by instituting a Civil Action in the Superior Court of New Jersey in the matter of Genova, Burns & Vernoia v. Michael Luther, Docket No. L-2452-10 (annexed hereto as Exhibit A); and

Schedule E of Luther for Mayor's 2005 Candidate Committee (hereinafter the "2005 Luther for Mayor Committee")'s April 15, 2010 Election Law Enforcement Commission (hereinafter "ELEC") for the first quarter of 2010 shows outstanding obligations (hereinafter the "Debt") to the Firm for a total of \$93,697.35 as follows:

- \$17,798.21 incurred on March 31, 2007;
- \$21,801.77 incurred on May 31, 2007;
- \$10,720.00 incurred on September 30, 2007; and
- \$43,377.35 on March 31, 2008.

Luther has disputed and contested the amount of additional legal fees set forth above;

The parties have agreed through negotiation to the amicable resolution, compromise and settlement of the Debt and all other claims reflected in the foregoing demands, arbitration and Civil Action asserted by the Firm against Luther pursuant to the terms and conditions of this Agreement;

The procedure that the Petitioner is seeking approval from ELEC is as follows:

1. The 2005 Luther for Mayor Committee shall remit the sum of \$3,468.93 to the Firm:
 - a. Upon making a payment of \$3,468.93, the 2005 Luther for Mayor Committee shall file a final quarterly report with ELEC no later than October 15, 2010.
 - b. The 2005 Luther for Mayor Committee's report for the third quarter of 2010 due for filing on or about October 15, 2010 shall be certified as a final report for the 2005 general election and shall reflect:
 - i. A payment to the Firm of \$3,468.93;
 - ii. A closing balance of \$0.00; AND

- iii. A transfer of \$90,228.42 in outstanding obligations to the Firm from the 2005 Luther for Mayor Committee to the 2009 Re-elect Mayor Luther Committee.
2. The 2009 Re-elect Mayor Luther Committee shall make a payment \$36,531.07 to the Firm:
 - a. Upon making a payment of \$36,531.07 to the Firm, the 2009 Re-elect Mayor Luther Committee shall file a quarterly report with ELEC no later than October 15, 2010.
3. The 2009 Re-elect Mayor Luther Committee's report for the third quarter of 2010 due for filing on or about October 15, 2010 shall be certified as a interim report for the 2009 general election and shall show:
 - a. A transfer of an outstanding obligation to the Firm of \$90,228.42 from the 2005 Luther for Mayor Committee to the 2009 Re-elect Mayor Luther Committee;
 - b. A payment to the Firm from the 2009 Re-elect Mayor Luther Committee of \$36,531.07 representing a compromise to settle the fee dispute between the Firm and the 2005 Luther for Mayor Committee; AND
 - c. The 2009 Re-elect Mayor Luther Committee's October 15, 2010 quarterly report for the third quarter of 2010 shall indicate that the payment of \$36,531.07 to the Firm represents "a reasonable compromise of the Committee's disputed and contested outstanding obligation of \$90,228.42 to the Firm for legal fees incurred in connection with the 2005 general election."

RECEIVED
VIA FAX

Hugh E. DeFazio, Jr.
Attorney at Law

9/27/10
cl

18 Bank Street
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e-mail: hdefazio@defaziogroup.com

(973) 292-5100
(973) 292-5125 (f)

September 27, 2010

Ms. Carol Hoekje
Legal Director
NJ Election Law Enforcement Commission
28 West State Street
13th Floor
Trenton, New Jersey 08608

RE Advisory Opinion Request on behalf of
Michael Luther
Luther for Mayor Committee
Re-elect Mayor Luther Committee

Dear Ms. Hoekje:

Please accept this letter as a supplement to our Advisory Opinion Request dated September 2, 2010. This supplement provides an overview of the legal procedural history of the above-referenced matter.

As set forth in our Advisory Opinion Request, Genova, Burns & Giantomasi (the "Firm") represented "Luther for Mayor 2005" (the "Committee") in connection with an election contest before the New Jersey Superior Court and in connection with appeals to the New Jersey Appellate and Supreme Courts.

The Committee paid the Firm \$120,000.00 for legal services rendered. The Firm submitted additional invoices in the amount of \$93,697.35 for legal services performed. The Firm sent the Committee numerous demand letters for payment of the additional invoices. The Firm then sent the Committee an arbitration letter threatening litigation. The Committee disputed the amount of additional legal fees presented. The Firm ultimately instituted a Civil Action (L-2452-10) against the Committee.

Ms. Carol Hoekje
September 27, 2010
Page 2

Upon the Firm instituting a Civil Action against the Committee, both parties began arms-length settlement discussions each represented by an attorney. As a result of these discussions and negotiations, the parties entered a Confidential Settlement and Release Agreement. The Committee then submitted an Advisory Opinion Request to the Election Law Enforcement Commission seeking the Commission's approval to settle the disposition of the disputed debt.

The Committee set forth the procedure for settling the debt in the supplement to Section 4 of the Request for an Advisory Opinion.


The Committee hopes to receive an Advisory Opinion from the Commission providing confirmation that the proposed disposition of the debt complies with New Jersey campaign finance law. The Firm has then agreed to dismiss the Civil Action instituted against the Committee with prejudice. The parties have also mutually agreed (upon the Committee's payment of its settled outstanding obligations to the Firm) to release one another from any and all past, present and future actions; causes of action, suits, debts, dues, sums of money, covenants, accounts, reckonings, bonds, bills, specialties, contracts, controversies, agreements, promises, variances, trespasses, equity and from such other rights and obligations of whatever nature.

If the Advisory Opinion is not favorable with respect to the proposed disposition of the debt, the Firm has indicated that it intends to proceed with the litigation and the Committee will assert its defenses.

I trust this letter will provide the Commission with the additional supplemental information necessary for the Commission to make a determination. Should you have any questions please feel free to contact me.

Thank you in advance for your assistance.

Sincerely,


Hugh E. DeFazio Esq.

IIED/fac

cc: Angelo Genova, Esq., Genova, Burns & Giantomasi
Michael Luther

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NOV 15 2010

Hugh E. DeFazio, Jr.
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October 12, 2010

Ms. Carol Hoekje
Legal Director
NJ Election Law Enforcement Commission
28 West State Street
13th Floor
Trenton, New Jersey 08608

RE *In the Matter of Advisory Opinion Request on behalf of
Michael Luther
Luther for Mayor Committee
Re-elect Mayor Luther Committee*

Dear Ms. Hoekje:

Please accept this letter as a supplement to our Advisory Opinion Request dated September 2, 2010. This supplement provides additional factual and procedural history in the above-referenced matter.

LEGAL ISSUE PRESENTED:

Is a Settlement Agreement, that settles a matter before the New Jersey Superior Court, which was reached between a Vendor and Political Committee through an arms length negotiation, considered a "commercially reasonable business decision" or is it a "disguised political contribution" in violation of New Jersey Political Contribution limitations?

FACTUAL BACKGROUND:

This matter arose out of the November 8, 2005, election for the office of Mayor for the Township of Parsippany-Troy Hills. After the results were tallied, Michael Luther was credited with a total of 7,110 votes and Rosemarie Agostini with a total of 7,069 votes. The election results were certified by the Morris County Clerk on November 22, 2005 and Michael Luther was declared a winner of the mayoral contest.

On December 8, 2005, Rosemarie Agostini filed a Verified Petition before the New Jersey Superior Court to challenge the election. Over the next two years, this matter moved from the New Jersey Superior Court Law Division to the Appellate Division to the

Supreme Court and back to the Law Division involving petitions, appeals and additional hearings. After two years of expensive legal proceedings, Michael Luther's election was confirmed.

LEGAL PROCEDURE:

As set forth in our Advisory Opinion Request, Genova, Burns & Giantomasi (the "Firm") represented "Luther for Mayor 2005" (the "Committee") in connection with an election contest before the New Jersey Superior Court and in connection with appeals to the New Jersey Appellate and Supreme Courts.

The Committee has paid the Firm \$120,000.00 for legal services rendered. The Firm submitted additional invoices in the amount of \$93,697.35 for legal services performed. The Firm sent the Committee numerous demand letters for payment of the additional invoices. The Firm then sent the Committee an arbitration letter threatening litigation. The Committee disputed the amount of additional legal fees presented. The Firm ultimately instituted a Civil Action (L-2452-10) against the Committee.

Upon the Firm instituting a Civil Action against the Committee, both parties began arms-length settlement discussions each represented by an attorney. As a result of these discussions and negotiations, the parties entered into a Confidential Settlement and Release Agreement and reached a "commercially reasonable settlement" of \$40,000.00. The Committee then submitted an Advisory Opinion Request to the Election Law Enforcement Commission seeking the Commission's approval to settle the disputed debt.

The Committee set forth the procedure for settling the debt in the supplement to Section 4 of the Request for an Advisory Opinion.

The Committee seeks to receive an Advisory Opinion from the Commission confirming that the proposed disposition of the debt complies with New Jersey Campaign Finance Law and is a reasonable business decision and not a disguised political contribution. The Firm has agreed to dismiss the Civil Action instituted against the Committee with prejudice. The parties have also mutually agreed (upon the Committee's payment of its settled outstanding obligations to the Firm) to release one another from any and all past, present and future actions; causes of action, suits, debts, dues, sums of money, covenants, accounts, reckonings, bonds, bills, specialties, contracts, controversies, agreements, promises, variances, trespasses, equity and from such other rights and obligations of whatever nature.

If the Advisory Opinion is not favorable with respect to the proposed disposition of the debt, the Firm has indicated that it intends to proceed with the litigation and the Committee will assert its defenses.

NEW JERSEY ELECTION LAW:

Title 19, et. seq. is silent on the issue of the "settlement of a debt" in local elections. On the other hand, the issue of "settlement of a debt" is dealt with at the gubernatorial level. Title 19:25-15.47B (C).2, in gubernatorial elections, permits a campaign to retire outstanding obligations, including, without limitation, efforts to compromise or resolve the debt with the vendor or service provider.

ELEC rules recognize that there are legitimate commercial circumstances where candidates incur debt, but are unable to pay any of it after several years and thus permit even a publicly financed gubernatorial candidate to terminate reporting without paying any of the debt and without incurring a contribution from the vendor. NJAC 19:25-15.47B and 47C. It is arguable as good public policy that an arm's length negotiated settlement of a disputed debt has the benefit of first, providing the vendor with some payment and permitting the candidate to close the campaign with the candidate's reputation in tact. It also has the secondary benefit of unclogging the Court Docket with an unnecessary trial.

Settlement of a debt has also been dealt with at the federal level. The Federal Election Commission has dealt with "settlement of a debt" in 11 CFR, Chapter 1, Part 116 – Debts Owed by Candidates and Political Committees. Sub-Section 116.4 (C) speaks to a forgiveness of debt that is not a political contribution if the vendor treats the debt in a "commercially reasonable manner." Section 116.4C states:

Reasonable Efforts By a Political Committee:

A debt or obligation owed by a candidate or a political committee may be totally forgiven (see 11 CFR 116.8) provided that –

- (2) The candidate and the political committee have undertaken all reasonable efforts to satisfy the outstanding debt and the requirements of 11 CFR 116.7.*

D. Commercially Reasonable: *The Commission will determine that a debt settlement between a political committee and a commercial vendor is commercially reasonable if –*

- (2) The candidate or political committee has undertaken all reasonable efforts to satisfy the outstanding debt.*
- (3) The commercial vendor has pursued its remedies as vigorously as it would pursue the remedies against a nonpolitical debtor in similar circumstances. Such remedies may include, but are not limited to, the following:*
 - (i) Oral and written requests for payment;*
 - (ii) Withholding delivery of additional goods or services until overdue debts are satisfied;*
 - (iii) Imposition of additional charges or penalties for late payment;*

- (iv) Referral of overdue debts to a commercial debt collection service; and
- (v) Litigation.

ARGUMENT:

The matter before the Commission is to confirm and authorize that this Settlement was done at arms length between the parties and is commercially reasonable. The services provided by the Genova Law Firm were not the normal political campaign expenses such as advertising, radio and TV commercials, paying for brochures and palm cards, rent for campaign headquarters, etc., etc. The services provided were to defend the certification of an election by the Morris County Board of Elections. The factors that support the conclusion that the Settlement in this case is not a political contribution are:

1. *The vendor provided time-sensitive and needed services to the candidate and incurred costs in providing those services in the expectation of being paid;*
2. *The extension of credit by the vendor to the candidate was a reasonable business practice in light of the immediate need for those services;*
3. *The vendor has taken every reasonably commercial step to obtain payment (demand letters, brought suit, etc.);*
4. *The vendor has no political motive to obtain future favorable treatment from the candidate who is leaving public office;*
5. *The candidate has no reasonable prospect for raising additional contributions;*
and
6. *There is no evidence of collusion or bad faith.*

If the Commission denies vendors an option to settle old debts, vendors are going to be reluctant to extend any credit to candidates. That would be very damaging to the election process. For example, Luther, who had the immediate need to finance a recount, would be unable to meet the strict timetable for a recount unless he had the unlikely good fortune to have enough funds left in his campaign account after the election.

The idea of free and open elections could also be undermined if a winning candidate with limited means was unable to defend his election victory. In this case the total bill for professional services was \$213,687.00. Michael Luther's net salary for a four year term as Mayor of Parsippany Township was \$280,000.00. Good candidates would not stand for public office if they could not raise money through political committees and were able to settle matters such as the case before the Commission in a commercially reasonable manner.

Ms. Carol Hoekje
November 12, 2010
Page 5 of 5

CONCLUSION:

The Luther Committees have paid the Genova Firm \$120,000.00; the Committees are prepared to pay an additional \$40,000.00 of an outstanding disputed obligation of \$93,625.35; the parties have negotiated a commercially reasonable settlement of the Disputed Debt; and the New Jersey Court System would not be further burdened if this settlement is confirmed.

For all the above reasons, we respectfully request that the Commission authorize the proposed settlement as commercially reasonable and not a disguised contribution.

Sincerely,



Hugh E. DeFazio, Jr.

HED/fac

cc:

*Jeffrey M. Brindle, Executive Director, ELEC
Angelo Genova, Esq., Genova, Burns & Giantomasi
Michael Luther*