



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
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) MUR 6501
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**STATEMENT OF REASONS
OF CHAIR ELLEN L. WEINTRAUB
AND COMMISSIONER STEVEN T. WALTHER**

The Complaint in this matter alleged that John Brunner failed to timely file his Statement of Candidacy for the United States Senate and that his principal campaign committee failed to timely file its Statement of Organization and timely disclose its receipts and disbursements.¹ The Office of General Counsel (“OGC”) recommended that the Commission find no reason to believe that Respondents violated the Act. OGC reasoned that Brunner’s activities prior to October 3, 2011 –the date Respondents filed both the Statement Candidacy and Statement of Organization – fell within the Commission’s limited regulatory exemption for “testing the waters” activities. In our opinion, however, there was sufficient basis to find reason to believe that Brunner became a candidate on or before September 2, 2011, which in turn would have triggered an earlier initial reporting deadline for receipts and disbursements. Accordingly, we could not support OGC’s recommendation.²

Brunner ran unsuccessfully for the Republican nomination for United States Senator from Missouri. He filed his Statement of Candidacy, and his principal campaign committee filed its Statement of Organization, on the day of his official announcement, October 3, 2011. The committee filed its first report, the 2011 Year-End Report, on January 31, 2012. According to

¹ Under the Act, an individual becomes a candidate for federal office when he or she has received contributions or made expenditures in excess of \$5,000. 2 U.S.C. § 431(2). A candidate has fifteen days from the date his or her candidacy begins to file a Statement of Candidacy with the Commission, which must designate a principal campaign committee, *id.* § 432(e)(1). That committee then has ten days to file a Statement of Organization, *see id.* § 433(a), and must thereafter file disclosure reports in accordance with 2 U.S.C. § 434(a) and (b).

² Vice Chairman McGahn and Commissioners Hunter and Petersen supported the motion to find no reason to believe that Respondents violated the Act. Chair Weintraub and Commissioners Binerly and Walther dissented. See Certification in MUR 6501, dated January 29, 2013.

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the Complaint, however, at the time Brunner announced his candidacy he had already been an active candidate for "more than five months."³

To support the allegation that Brunner was already a candidate, the Complaint attaches a number of news articles quoting statements that Brunner and his staff made between April and September 2011. Notably, on September 2, 2011, the *Kansas City Star* ran a story quoting Brunner's paid spokesman, John Hancock, who was asked by a reporter whether Brunner was "definitely running." Hancock responded by saying: "I wouldn't be talking to you if he wasn't."⁴ By the time he was quoted, it appears Hancock had already been on Brunner's staff for several months.⁵

The Complaint also attaches a transcript of an interview that Brunner himself gave to another reporter at a July 23, 2011 barbeque held by the Greene County, Missouri Republicans. During the interview, Brunner told the reporter:

[T]his is going to be one of the biggest, toughest campaigns in Missouri history. Claire is a brilliant politician, she has great staff and resources ... this is something that is going to require great organization, a great team, a lot of dedicated people, and that's what we've been doing here for the last 90 days is putting together the very best team, the best resources, best organization we can find. We've just about got it together here. Now we're looking at the launch plan, and that's where we are right now.⁶

The reporter followed up by asking when the launch would take place and whether it could be expected in "the next month" or "the next couple months." Brunner replied: "Very soon. You're talking some numbers that are right there."⁷ He also spoke about his qualifications for office and the contrast between himself and the two other leading primary candidates, then-U.S. Representative Todd Akin (the eventual nominee) and State Treasurer Sarah Steelman.⁸

The Commission's "testing the waters" regulations exempt from the definitions of "contribution" and "expenditure" funds received, and payments made, solely for the purpose of

³ Complaint at 1. There does not appear to be a serious dispute that, prior to his official announcement, Brunner had spent over \$5,000 of his personal funds for campaign-related activities. His initial disbursements, all from personal funds, were disclosed as "Testing the Waters" expenses on the committee's 2011 Year-End Report, filed on January 31, 2012. See MUR 6501, First General Counsel's Report ("FGCR") at 4 n.3. That report disclosed that Brunner had spent over \$300,000 prior to his announcement. *Id.*

⁴ Compl. Ex. A.

⁵ Hancock accompanied Brunner to the July 23, 2011 barbeque discussed below, where he along with Brunner fielded questions from the press. See *id.* Ex. D.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

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testing the viability of a potential candidacy. An individual who is testing the waters need not register or file disclosure reports with the Commission unless and until he or she becomes a candidate. All funds raised and spent for testing the waters activities, however, are subject to the Act's limitations and prohibitions.⁹

Determining when an individual has crossed the line from a potential candidate testing the waters to an actual candidate running for office is necessarily a fact-specific inquiry. Under the Commission's regulations, activities that indicate an individual has gone beyond testing the waters to become a candidate include (but are not limited to): "The individual makes *or authorizes* written or oral statements that refer to him or her as a candidate for a particular office" and "[t]he individual conducts activities in close proximity to the election *or over a protracted period of time.*"¹⁰ Both types of activities are in evidence here.

First, Hancock's September 2 statement unmistakably suggests that Brunner was "definitely running" by that time. Respondents do not assert that Brunner ever disavowed this statement or even that Hancock lacked authority to make it. Instead, through counsel, they merely speculate that Hancock may have been misquoted.¹¹ However, Respondents provide no sworn affidavits from Hancock, Brunner, or any other person likely to have first-hand knowledge of what was actually said.¹² Moreover, Hancock was not simply a personal associate or informal advisor; he was Brunner's paid spokesman. It is difficult to imagine who else would have more authority to speak on Brunner's behalf regarding his candidacy.

Also relevant, though less definitive, are Brunner's own statements at the July 23 barbeque – particularly his indication that he had been putting together a campaign organization "for the last 90 days" and was preparing for a formal launch "very soon."¹³ These statements suggest, at a minimum, that Brunner was engaged in significant campaign-related activities over at least a five to six-month period before his official announcement and registration on October 3, 2011. There was no suggestion that Brunner had yet to make a final decision about whether to run based on some unresolved contingency.¹⁴ Standing alone, these statements might not be enough to show that Brunner had become a candidate, but, coupled with Hancock's September 2

⁹ See 11 C.F.R. §§ 100.72, 100.31(a).

¹⁰ 11 C.F.R. § 100.72(b)(3), (b)(4) (emphasis added).

¹¹ See Response at 6-7. The Response also observes that "[t]he decision to run for office was Mr. Brunner's to make, not Mr. Hancock's," *id.*, which is true but sheds no light on when Brunner actually made his decision.

¹² Cf. *La Botz v. FEC*, ___ F. Supp. 2d ___, 2012 WL 3834865, at *7 (D.D.C. Sept. 5, 2012) (in a 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).

¹³ See Compl. Ex. D.

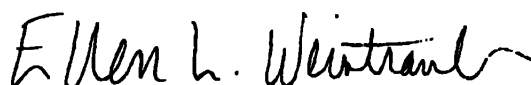
¹⁴ Compare, e.g., MUR 6224 (Fiorina) (final decision contingent on success of candidate's follow-up treatments for breast cancer); MUR 5930 (Schuring) (final decision contingent on incumbent's retirement).

statement, they provide more than sufficient basis to find reason to believe that Respondents' initial filings were untimely.¹⁵

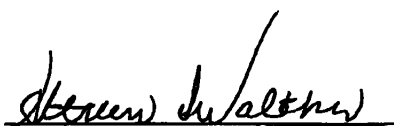
A reason to believe finding does not, of course, establish that the law has been violated, but only that the Commission has found sufficient factual and legal justification to open a pre-probable cause investigation.¹⁶ As previously noted, such an investigation need not be extensive.¹⁷ In this case, a few pointed questions to Brunner and Hancock could have revealed whether their statements were misquoted or taken out of context.

The Commission had a responsibility, however, at least to ask these questions. As the sole authority charged with civil enforcement of the Act, the Commission should have done more to vindicate the public's interest in timely disclosure in this matter. For these reasons, we could not support the Office of General Counsel's recommendation.

3/4/13
Date


Ellen L. Weintraub
Chair

3/4/13
Date


Steven T. Walther
Commissioner

¹⁵ If Brunner became a candidate on September 2, 2011, his Statement of Candidacy would have been due no later than September 19, 2011 and his committee's Statement of Organization would have been due September 29, 2011. See 2 U.S.C. §§ 432(e)(1), 433(a). The committee's first disclosure report would thus have been due by October 15, 2011. See 2011 Reporting Deadlines, at http://www.fec.gov/info/report_dates_2011.shtml#frequency_1. Instead, the committee did not file its first disclosure report until January 31, 2012. See FGCR, at 4 n.3.

¹⁶ See 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007); Guidebook for Complainants and Respondents on the FEC Enforcement Process, May 2012, available at http://www.fec.gov/em/respondent_guide.pdf.

¹⁷ E.g., MUR 6368 (Friends of Roy Blunt, et al.), Statement of Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther.

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