FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 25, 1990

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-2

Patricia K. Baker, Treasurer
Dave Baker for Congress
13722 Redhill Avenue, #41
Tustin, California 92680

Dear Ms. Baker:

This responds to your letter dated February 10, 1989, supplemented by your letter of March 6, 1989, in which you request an advisory opinion on behalf of Dave Baker for Congress (the "Committee") concerning application of the Federal Election Campaign Act of 1971, as amended, (the "Act") and Commission regulations to the Committee's proposed payments to a Committee creditor.

Your letters and Commission records reveal that the Committee is the principal campaign committee of C. David Baker, an unsuccessful candidate in the June 7, 1988, Republican primary election in California's 40th Congressional District. The Committee owes twelve creditors a total of $78,867.[1] Your inquiry concerns one of these creditors, Wilcox & Sons, a California corporation, to whom the committee reportedly owes $10,643.50 for printing services. Wilcox & Sons has filed a breach-of-contract action against the Committee and against Mr. Baker individually in a California state court. The firm seeks to recover the full $10,643.50 debt plus interest and attorney fees.[2]

The Committee's current bank balance is $5,719.76. You assert that "[b]ecause of long and drawn out negative publicity [during the campaign] . . . the supporters are no longer there." You further explain that no one would be willing to buy or lease the Committee's one asset, its list of contributors, because all Orange County Republicans use the same lists. You therefore conclude that "at this time there are no likely future fundraising possibilities."

Your request raises two questions. First, if the breach-of-contract action by Wilcox & Sons proceeds to judgment and the judgment goes against the Committee, do the Act and Commission regulations preclude the Committee's using all or most of its funds to pay the judgment? Second, if Wilcox & Sons and the Committee agree to settle the debt for less than $10,643.50, would the Act and Commission regulations permit the settlement? Your underlying concern is that, in view of the Committee's modest bank balance and its inability to raise additional funds, any substantial payment to Wilcox & Sons may be considered under the Act to be unlawful discrimination in favor of one particular Committee creditor.[3]

The Commission has long held that State law governs whether an alleged debt in fact exists, what the amount of a debt is, and which persons or entities are responsible for paying a debt. See, e.g., Advisory Opinion 1975-102 ("In general, debt claims and liabilities are subject to relevant State law, and [a political committee's] 'responsibility' for satisfying the obligations would have to be determined with reference to those laws"). Therefore, the California court, applying California law, is the proper forum for determining whether the Committee breached its contract and, if it did, what amount it owes Wilcox & Sons. The Act and Commission regulations do not preclude the Committee's paying the judgment rendered under State law, although this may require the Committee to use all or most of its cash on hand.

Wilcox & Sons and the Committee may agree to a settlement of the Committee's debt for less than $10,643.50-- or for less than the amount of any court judgment, even if the judgment is for a different sum--provided that the settlement meets the conditions set out at 11 CFR 114.10. Under subsection (c) of that regulation, a corporation may lawfully forgive a debt or settle a debt for less than the full amount owed only if the corporate creditor has "treated the outstanding debt in a commercially reasonable manner." 11 CFR 114.10(c). See also 11 CFR 100.7(a)(4). Cf. 2 U.S.C. 441b(a) (prohibition of corporate contributions).

Subsection (c) explains that a settlement will be considered "commercially reasonable" if three conditions are met. First, the creditor made the initial extension of credit in accordance with Commission regulations.[4] Second, the debtor political committee or debtor candidate "has undertaken all commercially reasonable efforts to satisfy the outstanding debt." And, third, the creditor "has pursued its remedies in a manner similar in intensity to that employed by the corporation in pursuit of a non-political debtor." 11 CFR 114.10(c).

When a corporate creditor and a political debtor have agreed upon a settlement, either or both parties to the settlement must file a Statement of Settlement with the Commission for the Commission to review. This document must report the initial terms of the steps the debtor has taken to satisfy the debt, and the remedies pursued by the creditor. 11 CFR 114.10(c).[5]

The Act and Commission regulations do not prescribe the priority of creditors' claims. So long as any settlement that the Committee and Wilcox & Sons may reach satisfies the Commission's debt settlement requirements, the Committee may use all or a substantial portion of its funds for the settlement.

This response constitutes an advisory opinion concerning application of the Act or regulations prescribed by the Commission to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Yours truly,

(signed)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosure (AO 1975-102 and FEC Revised Directive No. 3 (effective July 22, 1982)).

1/ The Committee's Year-End Report for 1988 shows debts and obligations of $183,946. This total, however, includes $105,079 owed to Mr. Baker, the candidate, who lent the Committee $11,000 and also paid $94,079 of the Committee's debts. Your letter of February 10th states that Mr. Baker has decided to recharacterize his $105,079 as a gift to the Committee. This leaves the Committee with debts totalling $78,867.

2/ According to the Committee's July 1988 Quarterly Report, the Committee incurred its $10,643.50 debt to Wilcox & Sons between May 19 and June 30, 1988. In June, Wilcox & Sons billed the Committee for $5,000. The Committee failed to pay the sum. In July, the firm billed the Committee again and raised the "threat of a collection agency." In addition to these bills, the Committee received "numerous phone calls" from the creditor, who claimed that "the business will go bankrupt if payment is not made." In February 1989, Wilcox & Sons filed the breach-of-contract action for the total debt of $10,643.50.

Your initial letter to the Commission asked whether the Act would permit the Committee to pay the $5,000 bill. This inquiry was later modified to take into account the creditor's lawsuit.

3/ You state that the owners of Wilcox & Sons are neither relatives nor business associates of C. David Baker, members of his family, or members of his staff. You also state that "we have not heard from <u>any</u> other creditor requesting payment other than the initial billing that was received."

4/ 11 CFR 114.10(a) states in relevant part that a "corporation may extend credit to a candidate, political committee, or other person in connection with a Federal election provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors which are of similar risk and size of obligation."

5/ Revised Commission Directive No. 3 (effective July 22, 1982) explains debt settlement procedures. Under the Directive, an agreement by a creditor and a political committee concerning the amount of a <u>disputed</u> debt is not a "debt settlement" provided that the political committee pays the amount agreed to. Because your request indicates that the Baker Committee does not dispute that it owes Wilcox & Sons $10,643.50, Directive No. 3 will apply to any settlement that the Committee reaches with Wilcox & Sons.