

FEDERAL ELECTION COMMISSION
OCT 31 2012

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OFFICE OF GENERAL
COUNSEL

**BEFORE THE
FEDERAL ELECTION COMMISSION**

North Dakota Democratic-NPL Party
1902 E. Divide Ave.
Bismarck, ND 58501

Complainant,

v.

Berg for Senate
P.O. Box 9394
Fargo, ND 58106

MUR #

6680

Respondent.

COMPLAINT

Complainant files this complaint under 2 U.S.C. § 437g(a)(1) against Berg for Senate for violations of the Federal Election Campaign Act ("Act"). In the past four months, Berg for Senate has regularly made use of a private aircraft without paying for it. A review of the campaign's filings also shows that the campaign failed to disclose its use of the private aircraft to the Federal Election Commission ("FEC"), as it was required to do by law. This conduct violates federal campaign finance law, and the Berg for Senate must immediately correct the violations and be held accountable by the FEC.

A. FACTUAL BACKGROUND

For the past four months, Berg for Senate has made use of a private aircraft without paying for it. The campaign has also failed to report this use to the FEC. The private aircraft at issue is owned by 714 LLP, a limited partnership consisting of Congressman Berg and his two

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partners – Bradley Williams and James Wieland.¹ Mr. Williams has donated \$2,500 to Berg for Senate, designated for the primary election.² Mr. Wieland has already donated the maximum \$5,000 to Berg for Senate.³

From June through September of this year, Congressman Berg took at least thirteen flights on the 714 aircraft for campaign travel:

- On June 23, Congressman Berg made round trip flights on the 714 aircraft from Fargo, ND to Grand Forks, ND (Flights #1 and 2) to attend a parade in Grafton, ND.⁴ The parade was a campaign event, as Congressman Berg marched with volunteers holding "Berg for Senate" banners.⁵
- On June 30, Congressman Berg made round trip flights on the 714 aircraft from Fargo, ND to Dickinson, ND (Flights #3 and 4) to attend the Dickinson Roughrider Days Parade.⁶ This was a campaign event, as Congressman Berg stood with volunteers who were holding "Berg for Senate" signs.⁷
- On July 3, Congressman Berg flew on the 714 aircraft from Fargo, ND to Bismarck, ND (Flight #5) to hold a campaign press conference criticizing the Affordable Care Act.⁸ At the press conference, he answered questions about his Senate race.⁹ On July 4, Congressman Berg attended the Mandan Parade, where he participated as a candidate, and also a fireworks ceremony on the Capitol lawn.¹⁰ Later that day, he flew on the 714 aircraft from Bismarck back to Fargo (Flight #6).¹¹
- On August 14, Congressman Berg made round trip flights on the 714 aircraft from Fargo, ND to Bismarck, ND for a campaign event, stopping in Minot, ND on the return leg back

¹ See <http://www.scribd.com/doc/111043261/714-LLP-2011-2012-Corp->

² See <http://images.nictusa.com/cgi-bin/fecimg/?12020571864>.

³ See <http://images.nictusa.com/cgi-bin/fecimg/?11931845692>. The contribution was made to Berg for Congress, and subsequently transferred to Berg for Senate. For limits purposes, it counts as a contribution to Berg for Senate. See 11 C.F.R. § 110.3(c)(5).

⁴ See http://www.scribd.com/doc/111095961/714-LLP-Flight-History-N23714?secret_password=2i5bn8iv9p14436dwsz2

⁵ See <https://www.facebook.com/media/set/?set=a.412650795439966.88702.2037251>.

⁶ See <http://flightaware.com/live/flight/N23714/history/20120630/1303Z/KFAR/KDIK> and <http://flightaware.com/live/flight/N23714/history/20120630/1901Z/KDIK/KFAR>.

⁷ See <https://twitter.com/RickBergND/status/219224895719079936>.

⁸ See <http://flightaware.com/live/flight/N23714/history/20120703/1700Z/KFAR/KBIS>.

⁹ See http://bismarcktribune.com/news/local/govt-and-politics/berg-calls-for-health-care-law-repeal/article_d7db7692-c55e-11e1-9278-0019bb2963f4.html.

¹⁰ See http://www.washingtonpost.com/politics/north-dakotas-booming-economy-gives-the-political-dynamic-a-rarefied-air/2012/07/07/gJOAL!bpUW_print.html.

¹¹ See <http://flightaware.com/live/flight/N23714/history/20120705/0215Z/KBIS/KFAR>.

to Bismarck (Flights #7-9).¹² While in Bismarck, Congressman Berg attended the North Dakota Republican Party's "Road to Victory" lunch as a candidate.¹³

- On August 23, Congressman Berg made round trip flights on the 714 aircraft from Fargo, ND to Bismarck, ND (Flights #10 and 11)¹⁴ for a campaign press conference with Senator John Barrasso criticizing the Affordable Care Act.¹⁵ At the press conference, Congressman Berg spoke at a podium with a "Berg for Senate" sign affixed.¹⁶
- On September 29, Congressman Berg made round trip flights on the 714 aircraft from Fargo, ND to Minot, ND (Flights #12 and 13)¹⁷ for a campaign event at the Norsk Hostfest. Congressman Berg posted photos of the visit on his campaign's Facebook¹⁸ and Twitter accounts.¹⁹

In its June and September Quarterly Reports, Berg for Senate reported only one expenditure for travel aboard the 714 aircraft –\$1,261.75 expenditure for travel on July 25, 2012.²⁰ Berg for Senate did not report any other payments to 714 LLP for travel, nor did it report any in-kind contributions from Mr. Berg for travel during this period.

B. LEGAL DISCUSSION

1. Berg for Senate Did Not Pay for Use of a Private Aircraft

Federal law requires campaign committees to pay fair market value for the use of private aircraft. Specifically, the law requires the committee to pay the aircraft owner "the pro rata share of the fair market value of [the] flight ... within a commercially reasonable time frame after the date on which the flight is taken."²¹ Campaigns are bound by this requirement even if the

¹² See <http://flightaware.com/live/flight/N23714/history/20120814/1802Z/KFAR/KBIS> and <http://flightaware.com/live/flight/N23714/history/20120814/1930Z/KBIS/KMOT> and <http://flightaware.com/live/flight/N23714/history/20120815/0030Z/KMOT/KFAR>.

¹³ See <https://twitter.com/RickBergND/status/235452722785169409>.

¹⁴ See <http://flightaware.com/live/flight/N23714/history/20120907/1145Z/KFAR/KBIS> and <http://flightaware.com/live/flight/N23714/history/20120823/1800Z/KBIS/KFAR>.

¹⁵ See <http://www.kxnet.com/story/19355636/wyoming-senator-speaks-about-health-care?clienttype=printable>.

¹⁶ See <https://www.facebook.com/media/set/?set=a.434131413291904.94305.203725139665867&type=1>

¹⁷ See <http://flightaware.com/live/flight/N23714/history/20120929/1400Z/KFAR/KMOT> and <http://flightaware.com/live/flight/N23714/history/20120930/0100Z/08D/KFAR>.

¹⁸ See <https://www.facebook.com/media/set/?set=a.446791598692552.97598.203725139665867&type=1>

¹⁹ See <https://twitter.com/RickBergND/status/252079297144168448/photo/1/large>.

²⁰ See Berg for Senate, October Quarterly Report at 425, available at <http://herndon1.sdrdc.com/pdf/772/12020890772/12020890772.pdf#navpanes=0>.

²¹ 2 U.S.C. § 439a(c)(1)(B).

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candidate has an ownership interest in the aircraft. If the campaign's use of the aircraft does not exceed the candidate's ownership share, the campaign must pay the hourly, mileage, or other applicable rate charged.²² On the other hand, if the campaign's use of the aircraft does exceed the candidate's ownership share, the campaign must pay the pro rata share of the normal and usual charter fare or rental charge for travel on a comparable aircraft of comparable size.²³

Berg for Senate did not comply with these rules. Congressman Berg took at least thirteen flights on the 714 aircraft in the past four months for which his campaign paid only \$1,261.75, significantly less than the fair market value. To the extent that the campaign's use of the aircraft did not exceed Congressman Berg's ownership interest in 714 LLP, the campaign should have paid the hourly, mileage, or other applicable rate charged for each use of the aircraft. Or, alternatively, Congressman Berg could have paid for each use with personal funds and treated the payments as an in-kind contribution to the campaign. To the extent that the campaign's use did exceed Congressman Berg's ownership interest in the aircraft, the campaign should have paid the usual charter fare or rental charge for travel on a comparable aircraft of comparable size.

But the campaign did not pay fair market value for the thirteen flights, nor did it report an in-kind contribution from Congressman Berg for these flights. This strongly suggests that the campaign's use of the aircraft constitutes an excessive in-kind contribution from 714 LLP. While 714 LLP was permitted to donate \$2,500 to Berg for Senate for the general election, the campaign's use of the aircraft clearly exceeded that amount. Consequently, it appears that Berg for Senate received an excessive in-kind contribution, which it must repay immediately.²⁴

2. Berg for Senate Failed to Report its Use of the Private Aircraft to the FEC

Federal law requires candidate committees to itemize on their FEC reports any in-kind

²² 11 C.F.R. § 100.93(g)(1)(i).

²³ *Id.* §§ 100.93(c), (g)(1)(ii).

²⁴ 2 U.S.C. § 441a(a)(1)(A).

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contributions that they receive from donors who have contributed more than \$200 in the aggregate for the election cycle.²⁵ An in-kind "contribution" includes "... anything of value made by any person for the purpose of influencing any election for Federal office."²⁶ Federal law also requires candidate committees to itemize on their FEC reports any expenditures that they make to a person or entity to whom more than \$200 has been paid in the aggregate for the election cycle.²⁷ An "expenditure" means any "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."²⁸

The thirteen flights that Congressman Berg took were expenditures because they were undertaken for the purpose of promoting his Senate campaign. Furthermore, because the campaign did not pay fair market value for these flights, they appear to have been in-kind contributions from 714 LLP (or another unidentified source). Berg for Senate failed to report these expenditures or in-kind contributions, as it was required to do, except for the \$1,261.75 disbursement on July 25. By failing to report these expenditures or contributions, Berg for Senate appears to have violated federal reporting requirements.²⁹ The campaign should immediately amend its FEC filings to disclose these expenditures and contributions.

C. CONCLUSION

As we have shown, there is substantial evidence that Berg for Senate has violated federal campaign finance law. We respectfully request the FEC to investigate these violations, including whether they were knowing and willful. Should the FEC determine that Berg for Senate has

²⁵ *Id.* § 434(b)(3).

²⁶ *Id.* § 431(8)(A)(i).

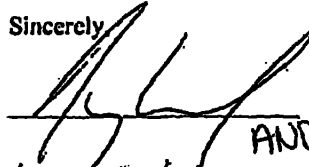
²⁷ *Id.* § 434(b)(5).

²⁸ *Id.* § 431(9)(A)(i).

²⁹ Because the flights were not between Washington D.C. and North Dakota, the reporting exemption at 11 C.F.R. § 106.3(d) does not apply.

violated the Act, we request that Berg for Senate be enjoined from further violations and be fined
the maximum amount permitted by law.

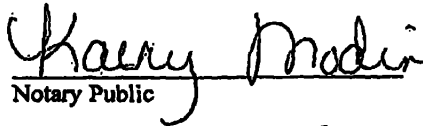
Sincerely



ANDY ZABEL

Executive Director, North Dakota
Democratic-NPL
Party

SUBSCRIBED AND SWORN to before me this 25 day of October, 2012.


Notary Public

My Commission Expires:

6-29-2016

Burleigh County
North Dakota

