

OCT 27 2004

FEDERAL ELECTION
COMMISSION
SECRETARIAT

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

MUR 5103

2004 OCT 27 P 4: 57

Anthony "Todd" Banasack)

Acacia National Mortgage Corporation)

Gerald Youhanaie)

j2 Global Communications, Inc.)

SENSITIVE

GENERAL COUNSEL'S REPORT # 2

I. ACTIONS RECOMMENDED

Take no further action against Anthony "Todd" Banasack. Find no reason to believe that Acacia National Mortgage Corporation; its president, Gerald Youhanaie; and j2 Global Communications, Inc. violated 2 U.S.C. § 441d(a) in this matter. Close the file as to all respondents.

II. INTRODUCTION

This complaint-generated matter involves allegations that fraudulent anonymous facsimile transmissions ("faxes") were sent to residents and businesses of the First Congressional District of Arizona attacking Susan Bitter Smith, a congressional candidate, and using Bitter Smith's name to attack another candidate, Jeff Flake, between August 6, 2000 and the Arizona primary election on September 12, 2000.¹ See First General Counsel's Report dated October 3, 2003. Information at the top of the faxes showed "TAB" or "TAB Enterprises" as the sender of the faxes and showed an (815) 364-0842 fax number. The faxes did not include disclaimers. In a supplemental complaint, complainant identified Anthony "Todd" Banasack as the individual responsible for the faxes, alleging that Banasack was the subscriber of the (815) 364-0842 number. In his response to the supplemental complaint, Banasack implied that he sent the faxes,

¹ Bitter Smith and Flake were Republican candidates in the primary election, along with Salvatore "Sal" DiCiccio and Thomas Liddy. Flake won the primary election and went on to win the general election.

1 asserting his constitutional right to do so. For example, in his response Banasack stated, "any
2 communications which may have been made by me were made solely in my capacity as an
3 individual citizen."

4 On October 15, 2003, the Commission found reason to believe that Banasack violated
5 2 U.S.C. § 441d(a) by failing to include a disclaimer on the faxes that contained express
6 advocacy.² See Commission Certification dated October 16, 2003. The Commission also
7 approved document subpoenas directed to Banasack; j2 Global Communications, Inc. ("j2
8 Global"), the distributor of the (815) 364-0842 fax number; Focal Communications Corporation
9 of Illinois ("Focal Communications"), the telephone company that leased the (815) 364-0842
10 number to j2 Global; and America Online ("AOL"), the company that leased Banasack's e-mail
11 account. In addition, the Commission approved orders to submit written answers to Banasack
12 and j2 Global, and a deposition subpoena directed to Banasack. The Commission made no
13 findings regarding the other respondents - j2 Global; Acacia National Mortgage Corporation
14 ("Acacia Mortgage"), Banasack's former employer; and Gerald Youhanaie, Acacia Mortgage's
15 president.

16 At the pre-reason to believe stage, significant details of the activity were unknown. This
17 investigation was intended to substantiate whether Banasack sent the faxes, to determine whether
18 he acted in concert with or on behalf of a federal candidate or committee, and to explore the
19 details and costs of the faxes. As discussed below, despite a total lack of cooperation from
20 Banasack, the primary source of information about the faxes, this Office obtained sufficient

² All of the events relevant to this matter occurred prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all references or statements of law in this report regarding the Federal Election Campaign Act of 1971, as amended ("the Act"), pertain to that statute as it existed prior to the effective date of BCRA. Similarly, all references or statements of law regarding the Commission's regulations pertain to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

1 relevant information from third parties and publicly available sources to conclude that this matter
2 does not warrant additional Commission resources.

3 **III. DISCUSSION**

4 **A. Investigation**

5 In response to the Commission's formal discovery, j2 Global provided information and
6 documents confirming that Banasack was the subscriber of the (815) 364-0842 number from
7 February 1999 to September 2001. Attachment 1. j2 Global provided a copy of its Customer
8 Agreement showing that it provides a service ("eFax BroadcastSM") that enables a customer to
9 "upload a database or spreadsheet to the eFax Website and to fax broadcast a document to each
10 fax number on that database or spreadsheet. . . ." Attachment 1 at 3. j2 Global further stated that
11 during the period of the anonymous faxes at issue, Banasack subscribed to one of its services
12 "which allows the user to receive and send faxes." Attachment 1 at 18. Finally, j2 Global
13 provided billing information showing that Banasack was charged \$9.95 per month for use of the
14 (815) 364-0842 number.³ Attachment 2.

15 Although Banasack subscribed to j2 Global's services, both j2 Global and Focal
16 Communications, the telephone company that leased the (815) 364-0842 number to j2 Global,
17 informed this Office that they do not have records that show that faxes originated from the (815)
18 364-0842 number during the relevant period. Attachments 3 and 4. In a telephone conversation,
19 counsel for j2 Global explained that she has been informed that it is possible to program a fax
20 machine to make it appear that faxes transmitted from that fax machine are actually coming from

³ j2 Global provided billing documents for the months of July to September 2001. In subsequent telephone discussions, j2 Global informed this Office that it had no additional billing information other than that provided. In a written response to this Office's request for billing information for August and September 2000, when the anonymous faxes were sent, j2 Global stated that there were no invoices for that period. Attachment 4 at 2. In a telephone conversation, j2 Global explained that since it had Banasack's credit card information, it automatically debited the credit card account monthly, and thus did not send out invoices to Banasack.

1 another fax machine; knowledgeable individuals can manipulate the fax number that appears on
2 the top of a fax to disguise the true origination of the fax. Therefore, counsel opined that
3 although their records did not indicate that faxes were sent from the (815) 364-0842 number
4 during the relevant time period, it is possible that the (815) 364-0842 number appeared on the
5 anonymous faxes at issue through the kind of manipulation noted above.

6 In addition to the contacts with j2 Global and Focal Communications, this Office made
7 several efforts to obtain responses from Banasack, the alleged responsible party, to no avail.
8 Banasack steadfastly refused to respond to the Commission's finding and discovery requests,
9 which postal documents show that either he or an agent received.⁴ Follow-up letters this Office
10 sent to Banasack by certified mail/return receipt requested were returned with postal designations
11 stating, "REFUSED"/"Refused, Return to Sender" and "FORWARD TIME EXP" "RTN TO
12 SEND." Attachment 6. When contacted by telephone, an official at the United Parcel Service
13 ("UPS") store that supplied the postal box at which Banasack received mail informed this Office
14 that when Banasack came to pick up his mail and was told that he had another certified letter
15 from this Office, Banasack refused to sign for the letter. The letter was subsequently returned to
16 this Office via U.S. mail. Banasack's estranged wife, whom this Office located by running
17 Banasack's name through various "person locator" databases, informed this Office that she told
18 Banasack about our interest in reaching him, but expressed her inability to influence Banasack's
19 action in this matter, stating "I can't make him call you."

⁴ The green postal return receipt card was returned to this Office showing that the Commission's reason-to-believe notice, subpoena, and order were received by an agent on behalf of Banasack. Attachment 5. Through this Office's investigators, we learned that Banasack used a United Parcel Service ("UPS") postal box, and that the reason-to-believe package was received by UPS employees on Banasack's behalf. The reason-to-believe package was originally sent via certified mail to Banasack's last known address; it apparently was forwarded to the UPS postal address.

1 This Office also informally sought information about Banasack and his whereabouts from
2 Banasack's employer, Acacia Mortgage, and its president, Gerald Youhanaie, who previously
3 denied any involvement with the faxes in response to the complaint. In telephone interviews,
4 Youhanaie stated that he terminated Banasack in April 2002 for reasons unrelated to this matter
5 and was no longer in contact with Banasack.⁵ Youhanaie also stated that he was not aware of
6 Banasack sending political faxes from Acacia Mortgage and that Banasack never mentioned
7 being associated with any political organization(s) while at Acacia Mortgage.⁶

8 During the course of the investigation, complainant informed this Office of the existence
9 of a new Arizona company using the "TAB" acronym that appeared on the anonymous faxes.⁷
10 Attachment 8. According to corporate documents provided by complainant, the company, TAB
11 Services, L.L.C., was incorporated on December 10, 2003. Todd A. Bradford appeared on the
12 corporate documents as the sole principal of the company. Complainant pointed out that
13 Bradford was a full time paid employee of Sal DiCiccio, one of Bitter Smith's opponents in the
14 2000 congressional race. This Office's review of the Commission's database showed various
15 disbursements to Bradford between March and December 2000 from DiCiccio's campaign and

⁵ Youhanaie added that Banasack also "hijacked" his company's website and was selling information he obtained from the site to others. Youhanaie stated that he obtained a restraining order against Banasack and provided a copy of the order, which was issued by Mesa (Arizona) Municipal Court on May 17, 2002. The restraining order, titled "Injunction Against Workplace Harassment," restricted Banasack from Acacia's property, from contacting Acacia, and from misusing Acacia's phone number, name, and so on. Attachment 7.

⁶ Although in its discovery responses j2 Global stated that both Youhanaie and Acacia Mortgage subscribed to its service, it stated that Youhanaie and Acacia Mortgage were not affiliated with the (815) 364-0842 number at issue. Attachment 1 at 2, 17.

⁷ As previously mentioned, the top of the faxes showed that they were sent from TAB or TAB Enterprises, non-existent or unregistered entities. In its response, j2 Global identified TAB or TAB Enterprises as subscribers to its services. Attachment 1 at 2. However, j2 Global stated that it had no information regarding the entities and that they were not affiliated with the fax number in question. Attachment 1 at 17. Publicly available corporate documents showed Banasack was the president of a company called TAB Leasing, Inc., which was incorporated in Illinois in 1986. According to the documents, the company was involuntarily dissolved on April 1, 1989.

1 several disbursements to Bradford from the campaign of another candidate, Thomas Liddy,
2 during January and February 2000.⁸

3 Recognizing certain similarities between Bradford and Banasack (both use the names
4 "Todd" and both individual's initials are spelled "TAB" when Banasack uses Todd as his first
5 name), this Office sought to determine whether Bradford and Banasack were the same person or
6 were related in some way. All of the information this Office obtained, including photographic
7 and other information from relevant state motor vehicle authorities, showed that Bradford and
8 Banasack are separate individuals. They have separate photographs, social security numbers,
9 driver licenses, birthdates, addresses, work, and school histories.⁹ In addition, Bradford does not
10 have a criminal history. Attachment 9. This Office also interviewed Bradford, who disavowed
11 any knowledge or relationship with Banasack or the activity at issue. Bradford acknowledged
12 working for the Liddy and DiCiccio campaigns during the 2000 election cycle and stated that
13 Banasack was not associated with either campaign or with any other campaigns or political
14 entities that he is aware of.

15 This Office also learned that Banasack is an ex-felon, and he has recently been arrested
16 and incarcerated on felony charges in San Diego, California for alleged unauthorized use of
17 computer data, the details of which are unknown at this time. Attachment 10. Banasack was a
18 fugitive for some time prior to his arrest. His bail is currently set at \$250,000, and he is
19 scheduled to appear in court on November 8, 2004. Attachment 10 at 4-5. To date, Banasack

⁸ The disbursements from the DiCiccio campaign were for salary, consulting, office supplies, mail, etc. and range from \$28 to \$3,400. The disbursements from the Liddy campaign were for consulting fees and radio advertisements, and range from \$150 to \$1,000.

⁹ In his telephone interview, Youhanaie also stated that he was not aware of any relationship between Banasack and Bradford, whom he had never heard of.

1 has neither contacted this Office nor responded to the Commission's finding or discovery
2 requests.

3 **B. Analysis**

4 The available information indicates that Banasack was independently responsible for the
5 anonymous faxes at issue. The information and the documents j2 Global provided confirm that
6 Banasack was the sole subscriber of the (815) 364-0842 number when the anonymous faxes were
7 distributed, and that he had the means and the ability to distribute the faxes in the manner that
8 they were distributed.

9 Information from third parties also indicates that Banasack did not act in concert with or
10 on behalf of a federal candidate or committee. In his interview with this Office, Bradford, a
11 former employee with the Liddy and DiCiccio 2000 campaigns, stated that to his knowledge
12 Banasack was not associated with either campaign or with any other campaigns or political
13 entities. Youhanaie, Banasack's employer and a respondent in this matter, also stated that
14 Banasack never mentioned that he was associated with any political organization(s) while at
15 Acacia Mortgage. In response to the complaint, Banasack asserted that he acted independently,
16 stating that "I assure you that no political candidate, organization, or any other person or entity
17 asked me to make, authorized or even consented to any communications which may have been
18 made by me" The communications from the (815) 364-0842 number in question contained
19 varied and conflicting messages.¹⁰ Therefore, although his motives are unknown, this Office's
20 investigation indicates that Banasack was individually responsible for the faxes.

¹⁰ Some of the faxes attacked Flake while other communications (recorded telephone messages) expressed support for Flake's candidacy. See First General Counsel's Report at 3-4. Some of the faxes attacking Bitter Smith showed Flake as the sender while faxes attacking Flake showed Bitter Smith as the sender. Finally, recorded telephone messages that endorsed Flake were changed to endorse Liddy, another candidate in the congressional race at issue.

1 The available information also shows that the faxes involved minimal costs and did not
2 require substantial resources. In fact, according to the information from j2 Global, the service to
3 which Banasack subscribed costs only \$9.95 per month. Apparently, the faxes were distributed
4 by "broadcast fax" – a mechanism that allows for simultaneous distribution of multiple faxes at
5 minimal cost.

6 As Banasack has refused to respond to the Commission's subpoena, we would need to
7 seek subpoena enforcement to compel his response. Considering Banasack's persistent refusal to
8 respond to the Commission's discovery requests and to accept this Office's related
9 correspondences, and his repeated lack of respect for the law and law enforcement, it is unlikely
10 that he would accept service of the subpoena enforcement process. Statements by Banasack's
11 wife and the UPS official previously mentioned show that Banasack is aware of this Office's
12 efforts to contact him. Therefore, we would have to utilize more aggressive efforts to serve
13 Banasack personally (e.g., U.S. Marshals Service), if he makes bail or is released. There is also
14 the possibility that he would not respond to the judicial process, even if he were served.
15 Furthermore, if he remains incarcerated, we would have to coordinate with the criminal
16 authorities to serve him in prison. Finally, based on the minimal amount of money involved
17 (\$9.95/month), subpoena enforcement would likely involve significant Commission resources
18 and time, for minimal returns. In light of all the above factors, this Office does not believe that it
19 is worthwhile to seek subpoena enforcement against Banasack in this instance.

20 **C. Conclusion**

21 Considering the minimal costs and resources associated with the faxes, the lack of
22 evidence of involvement of a federal candidate or committee, and the level of additional
23 resources that would be required to continue pursuing this respondent, this Office believes that

1 this matter does not warrant further use of Commission resources. Accordingly, this Office
2 recommends that the Commission take no further action against Anthony "Todd" Banasack. As
3 the available information does not appear to implicate the other respondents, this Office also
4 recommends that the Commission find no reason to believe that Acacia Mortgage, Gerald
5 Youhanaie, and j2 Global violated the Act in this matter. This Office also recommends that the
6 Commission close the file in this matter.

7 **IV. RECOMMENDATIONS**

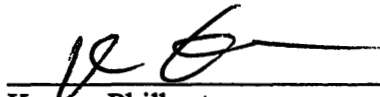
- 8 1. Take no further action regarding Anthony "Todd" Banasack.
9
10 2. Find no reason to believe that Acacia National Mortgage Corporation violated
11 2 U.S.C. § 441d(a).
12
13 3. Find no reason to believe that Gerald Youhanaie violated 2 U.S.C. § 441d(a).
14
15 4. Find no reason to believe that j2 Global Communications, Inc. violated 2 U.S.C.
16 § 441d(a).
17
18 5. Close the file.
19
20 6. Approve the appropriate letters.
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Lawrence H. Norton
General Counsel

27 10/27/04
28
29 Date

BY: Rhonda J. Vosdingh
Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

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34 Cynthia E. Tompkins
35 Cynthia E. Tompkins
36 Assistant General Counsel
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Kamau Philbert
Attorney

Attachments

1. j2 Global discovery responses dated December 9 and 18, 2003; January 20, 2004; and March 12 and 18, 2004
2. j2 Global discovery response dated April 23, 2004
3. Focal's April 30, 2004 discovery response
4. j2 Global discovery response dated June 8, 2004
5. Commission's RTB notice return receipt card
6. OGC's follow-up letters to Banasack dated December 10 and 23, 2003; January 9 and 14, 2004; and Returned/Refused letters designations
7. Youhanaie March 11, 2004 fax
8. Complainant's January 27, 2004 letter
9. Assorted personal information on Banasack and Bradford
10. Banasack's arrest information