BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5181
	)	
Spirit of America PAC and Garrett Lott, as treasurer	)	
Ashcroft 2000 and Garrett Lott, as treasurer	)	
Precision Marketing, Inc.	)	
Precision List, Inc.	)	

GENERAL COUNSEL'S REPORT #5[1]

I. ACTIONS RECOMMENDED

This Office is making no additional recommendations or changes to the recommendations made in General Counsel's Report #4 ("GC Report #4"), dated June 30, 2003, which are as follows: (1) Find probable cause to believe that Ashcroft 2000 and Garrett Lott, as treasurer, and Spirit of America PAC ("the PAC") and Garrett Lott, as treasurer, violated 2 U.S.C. §§ 441a(a)(1)(A), 441a(f), 433(b) and 434(b), and approve the related conciliation agreement attached to GC Report #4; or find probable cause to believe that the PAC and Garrett Lott, as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A) and 434(b) and Ashcroft 2000 and Garrett Lott, as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b), and approve the related conciliation agreement attached to GC Report #4; (2) take no further action against Precision Marketing, Inc. ("PMI") and Precision List, Inc. ("PLI") and close the file in regard to PMI and PLI; and (3) take no further action regarding Ashcroft 2000 and Garrett Lott, as treasurer, in connection with the reason to believe finding with respect to 2 U.S.C. § 441b(a).[2]

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[1] This Report is intended to serve as a supplement to General Counsel's Report #4 dated June 30, 2003.

[2] The activity in this matter is governed by the Federal Election Campaign Act of 1971, as amended, ("the Act"), and the regulations in effect during the pertinent time period, which precedes the effective date of the amendments made by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). All references to the Act and regulations in this Report exclude the changes made by BCRA.

II. BACKGROUND

The following supplements the background section in GC Report #4 that was before the Commission at the July 8, 2003 Executive Session. At that time, the Commission did not vote on the recommendations contained in GC Report #4 and instead directed this Office to conduct limited additional discovery on the issue of redirection of list rental income ("LRI") from the PAC to Ashcroft 2000.

This Office subsequently deposed Garrett Lott, executive director of the PAC and treasurer of the PAC and Ashcroft 2000, and conducted an interview with William Griffiths, Vice President of Bruce W. Eberle & Associates ("Eberle & Associates") and Omega List Company ("Omega"). Mr. Griffiths was knowledgeable about the redirection of LRI in this matter and signed an affidavit to this effect.[3]

The information obtained as a result of conducting additional discovery does not alter the legal theories or recommendations set forth in the General Counsel's Brief ("GC's Brief") and GC Report #4, both of which are incorporated by reference. On August 25, 2003, a Supplemental General Counsel's Brief ("Supplemental GC's Brief"), also incorporated by reference, that discusses new information regarding the redirection of LRI was sent to counsel for the PAC and Ashcroft 2000 along with a copy of Mr. Griffiths' affidavit.[4] A Supplemental Reply Brief was received on September 16, 2003 and is discussed below.

III. ANALYSIS

In their Supplemental Reply Brief, Respondents assert that the new discovery contravenes the recommendations made in the GC's Brief and bolsters their argument that they

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[3] This Office also conducted an interview with Kathy Ryan, former client services manager at Eberle & Associates. Ms. Ryan did not recall details regarding the redirection of LRI from the PAC to Ashcroft 2000, and this Office did not seek an affidavit from her.

[4] Respondents requested and were granted a 7-day extension to submit their reply after executing a tolling agreement of an equivalent time period.

"legally conducted the activities that are the subject of this MUR." Supplemental Reply Brief at 1-2. Respondents set forth two major arguments: first, that the redirection of LRI was commercially reasonable and, second, that a mistake occurred with respect to the initial direction of LRI to the PAC. Neither argument is supported by the evidence in this matter. To the contrary, LRI redirection was addressed in the GC's Brief, *see* GC's Brief at 28-31, and the Supplemental GC's Brief merely recounts additional information about the circumstances surrounding the redirection and Mr. Lott's inability to articulate a rationale for the commercial reasonableness of the redirection. *See* Supplemental GC's Brief at 3. These facts do not lead to any changes in the analysis and conclusions made in GC Report #4 with respect to probable cause-to-believe recommendations regarding the excessive in-kind contribution theory. Similarly, the information garnered while conducting additional discovery is consistent with our theory that the PAC and Ashcroft 2000 were affiliated.[5]

A. That the Redirection of LRI Was an Outgrowth of the Work Product Agreement and the List License Agreement Confers Commercial Reasonableness on Neither the Redirection nor the Agreements

Respondents argue that the redirection of LRI was an outgrowth of the WPA and LLA and therefore the redirection of LRI was commercially reasonable.[6] Supplemental Reply Brief at 7. However, the WPA and LLA were not commercially reasonable transactions. Neither was

[5] In fact, Respondents' own description of the relationship between the PAC and Ashcroft 2000 provides a helpful analogy when examining the two entities' affiliation. Respondents assert that the two committees "were no different than two persons taking turns driving a vehicle; once the first person stops driving, the second driver takes his/her turn". *See* Supplemental Reply Brief at 9, fn. 8; GC's Brief at 9-11. To extend the analogy, the facts of this matter are analogous to a situation where a parent first passes the car keys to one sibling and then later passes the keys to the other sibling. The parents control which sibling receives the keys and the time at which the keys are received by either sibling -- a situation not unlike Mr. Ashcroft controlling to which entity, the PAC or Ashcroft 2000, the LRI was directed.

[6] Remarkably, Respondents also describe the WPA and LLA as arm's-length transactions. Supplemental Reply Brief at 2. However, this description is not supported by any fact or assertion made in the Supplemental Reply Brief or any evidence gathered during the investigation or by the face of any documents. Indeed, in their original Reply Brief, Respondents argued that the lack of arm's-length bargaining over the WPA was irrelevant. Reply Brief at 9-10. As set forth in the GC's Brief, the WPA was not an arm's-length transaction because Mr. Ashcroft was on both sides of the transaction and exercised control and maintained a principal role for both the PAC and Ashcroft 2000. GC's Brief at 25-26.

the redirection of the LRI. The WPA and LLA were merely mechanisms by which PAC mailing lists, which cost the PAC $1.7 million to develop, were provided to Ashcroft 2000 at no cost. *See* GC Report #4 at 10-13; GC's Brief at 15-16 and 25-26. The WPA was not an exchange of equal value because Mr. Ashcroft received more from the PAC in the form of mailing lists than he gave the PAC in the form of rights to use his name and likeness in its mailings. *See* GC's Brief at 26-27.

Respondents essentially base their conclusion that the WPA and LLA were commercially reasonable arm's-length transactions on factual descriptions of the WPA and LLA without providing any analysis of the transactions. Respondents also attempt to support their conclusion using the affidavits of Joanna Boyce Warfield and William Griffiths.[7] Respondents assert that the affidavits support a finding that the consideration received by Mr. Ashcroft in exchange for the use of his name/likeness by the PAC in its fundraising efforts, namely, the work product resulting from such efforts, was commercially reasonable.[8] Supplemental Reply Brief at 4-5. Neither affidavit, however, states that an exchange of a signature for permanent ownership (as opposed to limited use) of a list is standard practice or that the transactions were commercially reasonable. *See* GC Report #4 at 13. Of course, in this matter, Ashcroft 2000, through Mr. Ashcroft, received permanent and exclusive ownership. *See* GC's Brief at 23-24. In particular, Respondents rely on Mr. Griffiths's statement that recognizable personalities signing fundraising letters sometimes get something in exchange for their signature but usually receive nothing, and

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[7] The affidavit of Joanna Boyce Warfield was attached to Respondents' Reply Brief dated June 5, 2003 and the Griffiths affidavit was attached to the Supplemental GC's Brief. As noted in GC Report #4, Ms. Warfield's affidavit addresses neither the WPA nor the surrounding circumstances and so cannot support any interpretation of the facts in this matter. *See* GC Report #4 at 13.

[8] As described in GC Report #4, "commercial reasonableness," as demonstrated by customary practice in the relevant industry, is not the *sine qua non* of whether equal value was exchanged in a transaction; however, it is an important signpost, much like the presence or absence of arm's-length bargaining, that the Commission has looked to to determine whether equal value was exchanged, and a contribution made or not made, in transactions where the "usual and normal charge" is difficult to determine. *See* GC Report #4 at 11-13.

when individuals do receive something, it can be cash but "sometimes it is *use* of the names." Griffiths Affidavit at ¶ 1 (emphasis added). But there is a critical difference in value between use and exclusive ownership. The Griffiths affidavit addresses the former, but not the latter.

Respondents also assert that the redirection of LRI was commercially reasonable because it was derivative of the WPA and the LLA, and that because those transactions were commercially reasonable the redirection of LRI must have been. Their factual assertion that the redirection was an outgrowth of the WPA and the LLA is unremarkable, and we do not contest it here. However, their argument implies that if the WPA and LLA were not commercially reasonable, then neither was the redirection of the LRI. We also note that Respondents do not address Mr. Griffiths's statement that he did not personally recall seeing LRI earned by one entity go to a different entity unless there had been a clerical error or a check had been miscut, or seeing LRI reassigned from one client to another for checks that had not yet been cut. *See* Griffiths Affidavit at ¶ 5. Further, they do not address Mr. Lott's inability to testify, in response to a line of questions the Commission specifically discussed pursuing with him, that he had any basis for concluding that the LRI redirection was commercially reasonable or that he knew of any similar direction of LRI between entities. *See* Supplemental GC's Brief at 3 (quoting Garrett Lott deposition transcript, August 7, 2003, at 87-88).

B. Respondents' Assertion that the Checks Recut to Ashcroft 2000 Were Mistakenly Issued to the PAC Is Unfounded and in Any Event Would Not Contravene the Excessive Contribution Theory

Respondents assert that the LRI checks that were recut to Ashcroft 2000 had been "mistakenly" issued to the PAC, Supplemental Reply Brief at 7, but provide no supporting evidence. Neither of Garrett Lott's December 1999 letters to Omega directing the vendor to rewrite LRI checks to Ashcroft 2000 nor Mr. Lott's testimony refers in any way to a mistake or

implies that one had been made. *See* GC's Brief at 16-17; Memorandum to the Commission dated July 1, 2003 attaching Mr. Lott's letters to Omega. The LRI arising from the PAC's mailing list was directed by Eberle & Associates to the PAC on the basis of the March 12, 1998 Direct Mail Fund Raising Agreement between the two parties.[9] According to Respondents, what they describe as a "mistake" occurred because "Ashcroft 2000 (with John Ashcroft's authority pursuant to the LLA) chose to begin to exercise its right to sub-license John Ashcroft's data to third parties," i.e., receive LRI, after the PAC's debt was retired. Supplemental Reply Brief at 8. But Respondents provide no explanation as to why it was several months after the PAC paid off its debt that Garrett Lott first contacted Eberle & Associates regarding shifting the payment of LRI to Ashcroft 2000.[10] The retroactive approach to the LRI redirection thus belies Respondents' assertion that a mistake was made with respect to the payment of LRI. In any event, even if the PAC initially received the LRI "by mistake," the LRI nevertheless was ultimately provided to Ashcroft 2000. These funds, along with subsequent LRI flowing through the vendor Precision List, Inc., the sale of the PAC's accounts receivables, and Ashcroft 2000's use of the PAC's mailing list, all of which are discussed comprehensively in the GC's Brief, comprise the contribution from the PAC to Ashcroft 2000 in the excessive contribution theory. *See* GC's Brief at 28-31 and GC Report #4 at 9-10.

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[9] *See* Paragraph 8, Section b. "List Usage" of the Direct Mail Fundraising Agreement which states that "[a]ny rentals, exchanges or other use of any lists created under this Agreement shall be to the sole benefit of the Client during the course of this Agreement."

[10] Garrett Lott testified that the PAC's debt had been paid off on or around June 30, 1999, *see* Deposition of Garrett Lott, August 7, 2003, at 35; however, four LRI checks, dated between September 28, 1999 and October 31, 1999 and constituting more than one-third of the redirected LRI, were issued before the November 10, 1999 memorandum from Kathy Ryan to Mr. Lott. Although from the context of this memorandum it is clear that it is a follow-up to an earlier conversation, the memorandum is the earliest specific evidence in the record of such a conversation between Mr. Lott and anyone at Eberle & Associates or Omega regarding the redirection of the LRI.

IV. CONCLUSION

The information set forth above does not alter the legal theories or recommendations set forth in the GC's Brief, Supplemental GC's Brief and GC Report #4. The WPA and the LLA, as well as the LRI redirection, are part of the evidence that the PAC and Ashcroft 2000 were affiliated; and alternatively, that for the reasons set forth in the GC's Brief and GC Report #4, the WPA and LLA were not an exchange of equal value. *See* GC's Brief at 12, 15-17, 23-28; GC Report #4 at 5-13. This Office is thus maintaining the recommendations regarding the affiliation and excessive contribution theories that were set forth in GC Report #4.

In addition, we continue to recommend that the Commission take no further action with respect to the Commission's reason-to-believe findings that Precision Marketing, Inc., Precision List, Inc. and Ashcroft 2000 and Garrett Lott, as treasurer, violated 2 U.S.C. § 441b(a) and close the file in regard to Precision Marketing, Inc. and Precision List, Inc. as recommended in GC Report #4.

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