BEFORE THE
FEDERAL ELECTION COMMISSION

2010 FEB 17 P 12: 20

SENSITIVE

In the matter of:	)	
Aristotle International, Inc., Respondent	)	**MUR 5625**

SUPPLEMENTAL BRIEF OF ARISTOTLE INTERNATIONAL, INC.
IN RESPONSE TO THE
BRIEF OF THE GENERAL COUNSEL

Respondent Aristotle International, Inc. submits this supplemental brief in response to the General Counsel's Brief dated June 10, 2009 ("GC Brief") in the above-captioned MUR, to bring to the Commission's attention the relevance of the recent decision in *Citizens United v. Federal Election Commission*, 558 U.S. ___, 130 S. Ct. ___(Jan. 21, 2010). That decision eviscerates the General Counsel's argument that the Commission may discriminate against Aristotle by permitting so-called media corporations to publish the same information that Aristotle must be punished for publishing. Under *Citizen's United*, it is irrefutable that the General Counsel's position is unconstitutional and would result in a violation of Aristotle's First Amendment rights. The decision also instructs the Commission to be wary of enforcing "vague" and "prolix" laws with "amorphous regulatory interpretation[s]," which is precisely the situation here. *Id.* slip op. at 7.

PROCEDURAL HISTORY

On December 14, 2004 and December 27, 2004, the Commission notified Aristotle that one of its competitors had filed a complaint with the Commission. Aristotle filed a response, but nevertheless, on December 8, 2005, the Commission found reason to believe that a violation had occurred.

The General Counsel submitted a brief dated June 10, 2009 ("GC Brief") to Aristotle in which she recommended that the Commission find probable cause to believe that Aristotle knowingly and willfully violated 2 U.S.C. § 438(a)(4) by selling Aristotle's Campaign Manager software upgrade ("CM5"), which includes a compliance/vetting feature -- a small, incidental part of a large, sophisticated campaign committee accounting and filing program -- that permits a campaign to view the contribution history of a single contributor who is already in the campaign's database. The contribution history is obtained from the information filed by political committees with the Commission and is published within CM5 expressly to enable campaigns to use the contribution data lawfully for compliance and vetting reviews of their contributors. *See* Aristotle's Brief at 9-18 for a more detailed description of the compliance/vetting feature.

On July 28, 2009, after obtaining an extension, Aristotle submitted a response to the General Counsel's Brief in which Aristotle denied any violation of 2 U.S.C. § 438(a)(4) and requested a Probable Cause Hearing. On August 5, 2009, the Commission approved the request, and the hearing was held on September 23, 2009.

Two days later, September 25, 2009, Aristotle published the same data that is available through the CM5 compliance/vetting look-up feature, which is at issue here, on its public web site, free to all. *See* http://www.aristotle.com/content/view/419/191 (This look-up feature can be found by going to www.aristotle.com, click on "Political Data", and click on "Free Contributor Lookup").

On January 21, 2010, the Supreme Court issued its decision in *Citizens United*.

DISCUSSION

Aristotle asked the Commission to dismiss this MUR because there was no factual and legal basis to find a violation of 2 U.S.C. § 438(a)(4), or in the alternative, to exercise its prosecutorial discretion and dismiss this case due to the ambiguous and conflicting precedent applicable to the facts in this matter. Aristotle submits this supplemental brief because the *Citizens United*'s holding -- that non-media corporations have the same First Amendment rights as media corporations -- has mooted the General Counsel's argument that commercial media corporation respondents in previously dismissed MURs are distinguishable from Aristotle merely because those respondents owned a so-called media outlet.[1] The *Citizens United* decision resolves one of the issues that has led to ambiguity and conflicts within the advisory opinions, enforcement decisions, case law and Commission regulations that interpreted and applied 2 U.S.C. § 438(a)(4), in which some but not all publishers of contributor and contribution information were found to be in violation of 2 U.S.C. § 438(a)(4). That is, *Citizens United* makes clear in unmistakable terms that the Commission's discrimination between different types of corporations that publish the same information cannot be sustained under the First Amendment.

Aristotle's Brief, *inter alia*, specifically called the Commission's attention to the dismissal of MURs 5155, 6063 and 6065 that also concerned alleged violations of 2 U.S.C. § 438(a)(4) by commercial entities that published more contributor and contribution information than the compliance/vetting feature of CM5 published. Aristotle Brief at 32-38, 45. The General

[1] As illustrated by the discussion during the Probable Cause Hearing, what is a publication and what is a media corporation are amorphous. The General Counsel and the Commission in various MURs described herein apparently may consider the mere downloading of any FEC data independent of any news story for viewing by a third party as a publication. Consequently, Aristotle's compliance/vetting feature also could be considered a publication. However, for this Brief, we refer to Aristotle as a "non-media" corporation even if it publishes FEC data because CM5 is sold for accounting and reporting purposes, and any FEC data is provided at no charge.

Counsel has argued that the dismissal of at least MUR 5155 is distinguishable based on the media exception. GC Brief at 6 n.3 (The General Counsel did not discuss MURs 6063 and 6065.). The sole reason the Commission provided for dismissing MURs 6063 and 6065 was based on the media exception even though the commercial entities in those MURs permitted users, independent of any news story, to download and use more information from the Commission's files than the compliance/vetting feature in CM5 publishes.

Accordingly, because *Citizens United* has rendered moot the General Counsel's argument distinguishing these MURs on the basis of the media exception, the Commission should dismiss this MUR as it has dismissed the earlier MURs, as described in more detail below.

1. *Citizens United v. Federal Election Commission*, 558 U.S. ___ (Jan. 21, 2010) prohibits discrimination against non-media corporations.

The issue before the Supreme Court in *Citizens United* concerned independent expenditures and the constitutionality of 2 U.S.C. § 441b, rather than 2 U.S.C. § 438(a)(4) and the media exemption regulation, 11 CFR 104.15(c), promulgated thereunder, which are at issue here. However, *Citizens United*'s holding -- that the First Amendment precludes laws that grant special speech privileges to media corporations compared to other corporations -- is applicable here.

2 U.S.C. § 438(a)(4), like 2 U.S.C. § 441b found unconstitutional in *Citizens United*, is an infringement on the First Amendment right of free speech. The D.C. Circuit considered 2 U.S.C. § 438(a)(4) to be an infringement on the First Amendment and analyzed the level of scrutiny to be applied to 2 U.S.C. § 438(a)(4) because the First Amendment applied to the defendant list broker's conduct. *Federal Election Commission v. International Funding Institute, Inc.*, 969 F.2d 1110 (D.C. Cir 1092)("*IFI*").[2] *See also*, Aristotle's Brief at 23-24 for a more

[2]Although *Citizen United* raises questions about the continued validity of *IFI*'s denial of the facial and as applied First Amendment challenge to 2 U.S.C. § 438(a)(4), that issue does not

detailed description of *IFI*. Similarly, the Second Circuit, in *FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2d Cir. 1991) ("*PCD*"), also held that 2 U.S.C. § 438(a)(4) is an infringement on free speech, and in fact, its holding foreshadowed *Citizens United*'s holding. In *PCD*, the Second Circuit held that the then-Commission's highly restrictive reading of 2 U.S.C. § 438(a)(4) "would very likely run afoul of the First Amendment." [3] *Citizens United* now confirms the Second Circuit's prediction that applying the Commission's regulation to favor a media corporation's publication of FEC data over a non-media corporation's publication of less data is unconstitutional.

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have to be addressed here because, as shown in Aristotle's Brief at 38-42, the discussion of the facts in *IFI* support dismissal of this matter. In addition, *IFI* does not discuss the disparate situation between the dismissal of the earlier MURs based on the media exception and the General Counsel's opposite enforcement recommendation here, which is the specific issue addressed in *Citizens United*.

[3] In *PCD*, "[t]he FEC contend[ed] that PCD's activities [fell] squarely within the sweep of the "commercial purposes" prohibition, since PCD sold information compiled from FEC reports for a profit." *PCD* at 194. Relying on a District of Columbia District Court case, the General Counsel essentially has repeated the same argument in her Brief here even though the Second Circuit emphatically rejected that argument and found that this argument was not substantially justified, awarding attorneys fees to the defendant in *PCD*. *FEC v. Political Contributions Data, Inc.*, 995 F.2d 383 (2nd Cir. 1993) ("*PCD II*").

> The [*PCD*] panel ruled that an analysis of legislative history established that the Commission had adopted an unreasonably restrictive interpretation of the provision in question and of its own corresponding regulation, 11 C.F.R. § 104.15(c) (1991). It further ruled that such interpretation, by prohibiting the distribution of appellant's contributor lists, had defied the congressional intent behind the Act, namely to require disclosure of campaign contributions and contributors 'in order to inform the electorate where campaign money comes from, to deter corruption, and to enforce the act's contribution requirements,' 943 F.2d at 191. It observed that the government's reading of its regulation 'would very likely run afoul of the First Amendment,' *id.* at 197.

PCD II at 384-385 (summarizing the holding in *PCD*, footnote omitted). For a more detailed discussion of *PCD* and *PCD II*, see Aristotle's Brief at 21-23, 38-42.

Thus, D.C. Circuit and the Second Circuit have confirmed that the First Amendment applies to speech proscribed by U.S.C. § 438(a)(4). Accordingly, *Citizens United*'s First Amendment analysis and holding are directly applicable to this MUR. First, the *Citizens United* Court analyzed the First Amendment principle described in *First Nat. Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784-85 (1978) "that the Government lacks the power to ban corporations from speaking," and concluded "the First Amendment does not allow political speech restrictions based on a speaker's corporate identity." *Citizens United*, slip op. at 31. Then the Court specifically held that, "There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be exempt as media corporations and those which are not." *Id.* at 36. This statement could not be clearer and could not be more relevant to this matter.

The same *Citizens United* analysis requires dismissing the complaint against Aristotle. 2 U.S.C. § 438(a)(4) and the Commission's media exemption regulation, 11 CFR 104.15(c), promulgated thereunder, like 2 U.S.C. § 441b, distinguish media and non-media corporations by specifically exempting media corporations from 2 U.S.C. § 438(a)(4)'s prohibition on speech. Therefore, under the *Citizen United* analysis, the Commission may not impose this prohibition on non-media corporations like Aristotle.

This is not merely a theoretical construct. As described below, based on the media exception, the Commission has previously dismissed MURs alleging violations of 2 U.S.C. § 438(a)(4) where the respondents provided contributor and contribution information obtained from the Commission's database of committee filings to their customers in a form exactly like a list broker. In contrast, Aristotle's compliance/vetting feature does not obtain and publish information from the Commission's files useable for list brokering (which requires contributor names and addresses), and the feature does not permit downloading of lists of information about multiple contributors(another essential characteristic of list brokering).

2. MUR 5155

The respondent in MUR 5155 was a commercial internet company that provided users with political data and information, both for free and for a fee. One of the services was a stand-alone feature that permitted the user to search, download and publish information from the Commission's files. However, unlike Aristotle's compliance/vetting feature, the feature in MUR 5155 could be and was used to download and publish lists that included contributors' identifying information and their contribution information in lists similar to those sold by list brokers. The features in both CM5 and MUR 5155 were small parts of the services provided, and in both matters the feature is provided at no charge on the respondents' web sites. (Unlike Aristotle, the respondent in MUR 5155 also provided, for a fee, a more sophisticated compilation suitable for use as a mailing list). *See* Aristotle's Brief at 32-36 for a more detailed description of MUR 5155.

The General Counsel asserts that MUR 5155 was dismissed by the Commission because the respondent, "as an information-gathering service," was "more akin to [the defendant] in *Federal Election Commission v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991), with respect to the information it provides and maintains." General Counsel's Brief at 6 n.3. In that case, the court considered the Commission's media exemption regulation, 11 CFR 104.15(c), and concluded, among other things that "PCD used the information obtained from the FEC in a communication 'similar' to a newspaper, magazine, or book." *PCD*, 943 F.2d at 195. Accordingly, the court dismissed the Commission's complaint pursuant to the media exception. Although Aristotle disagrees with the General Counsel's understanding of why MUR 5155 was dismissed, even if the General Counsel were correct, this MUR should also be dismissed.[4]

[4] The Commission dismissed MUR 5155 after finding that there was no commercial use of the information because the information was able to be obtained from the Respondent for free even

Now that the *Citizens United* Court has held that it is improper to deny First Amendment rights to a non-media corporation that are granted to a media corporation, the General Counsel's argument distinguishing MUR 5155 is irrelevant. Aristotle's compliance/vetting feature certainly provides less information than the feature in MUR 5155 – and in fact, the compliance/vetting feature is incapable of generating lists of any kind and does not produce information essential for list brokering). Therefore, it would be arbitrary and capricious to treat the complaint against Aristotle differently than the complaint in MUR 5155. Accordingly, like MUR 5155, this matter should be dismissed.

3. MURs 6053 and 6065

The respondents in MURs 6053 and 6065 were commercial news and opinion websites that sold or intended to sell advertising space. One of the features of their web sites was a stand-alone feature that provided their customers with the ability to search and download information from the Commission's database of information filed by political committees. The information included contributor identifying information and contribution information. Although this stand-alone feature was independent of any news story or opinion article, the Commission dismissed the MURs based on the media exception. *See* Aristotle's Brief at 36 – 38 for a more detailed description of these MURs.

These MURs provide specific examples of the general situation criticized in *Citizens United*. The Court compared corporations that meet the definition of media organizations "and participate in endeavors other than news." *Citizens United*, slip op. at 36. "At the same time,

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though it was also available in a format more useable for list making for a fee. *See* Aristotle Brief at 35 for a more detailed analysis. Aristotle also makes the compliance/vetting feature available to the public for free on its web site. *See* http://www.aristotle.com/content/view/419/191. Go to www. Aristotle.com, click on "Political Data", and click on "Free Contributor Lookup". If this reason was determinative in MUR 5155, it would be arbitrary and capricious to produce a different finding here and fail to dismiss this MUR. *See also* Aristotle's Brief at 45 (the compliance vetting/feature is not sold).

some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment." *Id.* at 36-57. Both commercial respondent corporations in these MURs downloaded and provided FEC contributor and contribution data as stand-alone ventures to attract advertising income, independent of any news story. But merely because Aristotle does not own a media outlet, the General Counsel recommends a finding that providing the public some of the same information is a violation of 2 U.S.C. § 438(a)(4). Thus, this recommendation is inconsistent with the holding in *Citizens United* and should be rejected. Accordingly, this MUR should also be dismissed.

4. *Citizens United v. Federal Election Commission*, 558 U.S. ___ (Jan. 21, 2010) requires the Commission to exercise its prosecutorial discretion.

Citizens United instructs the Commission to be wary of enforcing "vague" and "prolix" laws with "amorphous regulatory interpretation[s]." *Citizens United*, slip op. at 7. Such laws and interpretations chill speech by forcing speakers "to retain a campaign finance attorney," *id.* at 7, and to consider the "costs and burdens of litigation," *id.* at 6, before speaking. The Court later emphasized its concern that "threats of criminal liability and the heavy costs of defending against FEC enforcement" chill speech to the extent that it gives the Commission the power of a censor. *Id.* at 18.

The Court's concern about the costs and burdens caused by ambiguous interpretations adds weight to Aristotle's request that this MUR be dismissed due to the ambiguous and often conflicting advisory opinions and court precedent regarding 2 U.S.C. § 438(a)(4) described in Aristotle's Brief. *See* Aristotle's Brief at 55-58 describing conflicting and ambiguous advisory opinions. In addition, as even the General Counsel admits, the courts in two circuits have conflicting opinions on the proper application of 2 U.S.C. § 438(a)(4). *Compare, FEC v. Political Contributions Data, Inc.*, 943 F.2d 190 (2nd Cir. 1991)("*PCD*") with *FEC v. Legi-Tech*,

967 F. Supp. 523 (D.D.C. 1997); *see also* GC Brief at 13 ("the District Court in *Legi-Tech* criticized *PCD*'s interpretation of Section 438(a)(4)."). Thus, in close matters or in matters involving ambiguous and conflicting precedents that involve First Amendment activity, such as found in this matter, *Citizens United* instructs the Commission to exercise its prosecutorial discretion to avoid the costs and burdens of litigation. Aristotle urges the Commission to comply with *Citizens United* by exercising its prosecutorial discretion to decline to punish Aristotle for doing what others have done, where the only basis for any penalty is that Aristotle does not own a "media" outlet.

CONCLUSION

For the reasons set forth in Aristotle's Brief dated June 10, 2009 and the reason described above, the Commission should find no probable cause to believe that Aristotle International, Inc. violated the Act, and should close the file.

Respectfully submitted,

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