



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5625
Aristotle International, Inc.)

**STATEMENT OF REASONS
OF VICE CHAIR CYNTHIA L. BAUERLY
AND COMMISSIONERS STEVEN T. WALTHER
AND ELLEN L. WEINTRAUB**

On March 17, 2010, the Commission failed, by a vote of 3-3, to find probable cause to believe that Aristotle International, Inc., (“Aristotle”) violated 2 U.S.C. § 438(a)(4) of the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”).¹ In 2005, the Commission found reason to believe that Aristotle knowingly and willfully violated 2 U.S.C. § 438(a)(4) by designing and marketing a product that impermissibly downloaded FEC contributor data and marketed it as a solicitation tool.² Based upon the results of an investigation conducted by the Office of General Counsel (“OGC”) and the facts discovered during that investigation, the subsequent briefs, and a probable cause hearing at which Aristotle had an opportunity to present its case directly to the Commissioners, we supported a motion to find probable cause to believe Aristotle violated the Act. The evidence supported a probable cause finding that Aristotle sold and used FEC data for commercial purposes and that Aristotle marketed its software product in a way that encouraged and assisted its customers in using FEC data for the purpose of soliciting contributions.³

¹ Vice Chair Bauerly and Commissioners Walther and Weintraub voted affirmatively for a motion to find probable cause. Chairman Petersen and Commissioners Hunter and McGahn voted against the motion. *See* MUR 5625, Certification dated March 17, 2010.

² Commissioners Mason, McDonald, Toner, and Weintraub voted affirmatively for the decision. Commissioner Thomas dissented. *See* MUR 5625, Certification dated December 8, 2005.

³ The Office of General Counsel recommended proceeding on a knowing and willful basis, but we felt that although there was a clear violation in this matter, the facts and circumstances did not support a knowing and willful finding. Accordingly, Vice Chair Bauerly made a motion to find probable cause on a non-knowing and willful basis. After Vice Chair Bauerly’s motion did not succeed, Commissioner Weintraub offered a motion to try to settle the matter with a conciliation agreement containing a minimal civil penalty, significantly lower than the penalty proposed in

10044264323

In an April 30, 2010 press release, Aristotle announced that it has filed a patent application for its software program, the title of which is “Integration of Voter and Contributor Data Into Political Software and Compliance Systems *for Purposes of Solicitation, Compliance, Vetting and Calls to Action.*”⁴ (Emphasis added). This undercuts the company’s argument that its use of contributor data in its software was not for the purposes of solicitation.⁵ We based our decision to find probable cause in this matter on the plain language of the statute: “no information copied from [FEC] reports or statements may be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose”⁶

I. Factual Background

Aristotle is a Washington, DC, based company engaged in political data management and consulting. Since 1983, Aristotle has been publishing the “Campaign Manager” software program, which is described as being designed to assist campaigns with functions such as generating FEC and state disclosure reports, tracking contributions and expenditures, complying with federal and state rules, fundraising, and general campaign organization.

In April of 2004, Aristotle published Campaign Manager 5.0 (“CM5”) as an upgrade from its existing product. One of the new features of CM5 was described as a “compliance/vetting feature” (“CV feature”), which operates by accessing and downloading FEC data relating to contributor histories of individuals from the Commission’s online public records database onto its own computer server.

The CV feature enables a customer who goes to the “Fundraising” screen of the software to type in the name of a contributor, which the software then matches to the up-to-date contributor data in the FEC’s database in real time. The information, which is displayed in a drop-down format, consists of the contributor’s aggregate contribution history, including the dates, amounts, committees (federal, state and PACs), candidates, and type of contributions the particular donor has made as reported by the committees to the FEC.⁷

Before the official launch of CM5, Aristotle’s marketing materials described how the FEC data could be used to solicit donations. The first piece, entitled “5 Benefits of Campaign Manager 5” stated:

other matters involving violations of 2 U.S.C. § 438(a)(4). That motion deadlocked as well. *See* MUR 5625, Certification dated March 17, 2010.

⁴ *See* Press Release, Aristotle Int’l, Inc., *Aristotle Beats Competitors in Satisfaction* (April 30, 2010), available at <http://www.aristotle.com/content/blogcategory/0/122/> (last visited May, 18, 2010).

⁵ *See* Aristotle Reply Brief at 9-13; Declaration of John A. Phillips, dated October 31, 2007 at ¶ 25; Probable Cause Hearing Transcript at 6-7, 24-25.

⁶ 2 U.S.C. § 438(a)(4).

⁷ Aristotle Reply Brief at 14-16.

10044264324

Only Campaign Manager 5 instantly tells you how much your contributors have given to other state and federal candidates, PACs, or party organizations – insuring you’re not leaving money on the table when soliciting a contribution. Don’t ask for \$250 from a donor who gives \$1,000 to others.

In another piece of marketing material entitled, “Introducing the New Features of Campaign Manager 5.0,” Aristotle again promotes CM5’s ability to use FEC data as a solicitation tool by explaining:

Predictive Fundraising features: These features allow users to set target amounts for fundraisers both individually and by groups. Additionally, donors are automatically cross-referenced with Aristotle’s Federal and State Contributor files, which allow fundraisers to get instant information about each of their donor’s histories outside of their particular committee.

The 2004 user manual for CM5 highlighted the new feature by stating, “Want to know how much to ask for from prospects? FEC and state contributor lists are now fully integrated into Fundraising screens so you can know everything about your prospect’s history of contributions to others.”

According to Aristotle’s founder, John Phillips, during the initial months when CM5 was being launched, these materials may have been inadvertently released to customers without review by Aristotle’s legal department.⁸ Aristotle claimed that after these initial months it revised its marketing language. Yet the evidence showed that Aristotle continued to market the CV feature as a solicitation tool. In a Power Point Presentation posted on its website as late as March 2005, Aristotle described how CM5 could allow customers to use FEC contributor data to improve fundraising. According to this document, “Reason #1” for buying CM5 was to “Raise More Money:”

Only Campaign Manager 5 has a seamless interface to millions of detailed contribution records. When soliciting a contribution, Campaign Manager 5 will tell you exactly how much the prospect has given to others, which suggests how much you should ask for. Never again leave money on the table by asking for too little, or the wrong amount, from a qualified prospect.⁹

⁸ See Declaration of John A. Phillips, dated October 31, 2007 at ¶ 3.

⁹ In an email dated November 28, 2004, an Aristotle sales representative told a customer that one of the benefits of CM5 was to “Increase fundraising effectiveness/FEC Contributor Match: Bring forth all Federal and State donations a contributor/supporter has made to other state and federal candidates. Contribution history updated with a click of a button!”

10044264325

Similar language appears in Aristotle's recent press release touting its newest software product. According to the press release, "We show you the money." The press release continues:

The biggest sin in fundraising is not to ask. The second sin is not to ask for enough. With the state contributor and voter files, fundraisers for PACs and campaigns will never again overlook a prospect, or leave money on the table by asking for too little. With this technology, PAC's and advocacy groups will raise much more money than ever before.¹⁰

II. Legal Analysis

The Act provides that the Commission shall make reports and statements filed with it available to the public for inspection and copying within 48 hours after receipt. 2 U.S.C. 438(a)(4). However, no information copied from such reports or statements may be sold or used by any person *for the purpose of soliciting contributions or for any commercial purpose*, other than using the name and address of any political committee to solicit contributions from such committee. 2 U.S.C. § 438(a)(4); 11 CFR 104.15(a) (emphasis added).

In requiring disclosure of contributor information, Congress provided limitations to ensure the information was not misused. Congress was concerned that the Act's reporting requirements would "open up the citizens who are generous and public spirited enough to support our political activities to all kinds of harassment" ¹¹ As the Commission has explained in previous Advisory Opinions, the purpose of restricting the sale or use of information obtained from FEC reports is to protect contributors from having their names sold or used for commercial purposes and it is a "broad prophylactic measure intended to protect the privacy of the contributors about whom information is disclosed in FEC public records." ¹² Additionally, the prohibition protects any potentially adverse effects of the disclosure requirements by protecting political committees' intellectual property. ¹³

Our colleagues aver that "the statute, the regulation and the legislative history show that not all uses of FEC data are banned." We agree. In fact, the regulations carve out a specific

¹⁰ See Press Release, Aristotle Int'l, Inc., *Aristotle Beats Competitors in Satisfaction* (April 30, 2010); see note 4, *infra*.

¹¹ 117 Cong. Rec. 30057 (1971)(statement of Senator Bellmon).

¹² Advisory Opinion 2003-24 (National Center for Tobacco Free-Kids). See also Advisory Opinions 1998-04 (White Oak Technologies); 1995-05 (TRIM); 1991-16 (Feigenbaum); 1989-19 (Johnson); 1986-25 (Public Data); 1981-38 (CAMPAC Publications); 1980-101 (Weinberger).

¹³ See *FEC v. Int'l Funding Institute, Inc.*, 969 F.2d 1110 (D.C.Cir. 1992) (holding that § 438(a)(4) is not subject to strict scrutiny and does not violate the First Amendment on its face or as applied).

10044264327

exemption for FEC data that is used “in newspapers, magazines, books or other similar communications...as long as the principal purpose of such communications is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes.”¹⁴ For example, in MUR 5155 (TRKC, Inc.), the Commission took no further action as to TRKC, which operated a website, The Political Money Line, devoted to the topic of political money. TRKC was an internet news and tracking service and the FEC information that it provided was made available free of charge to the public. Part of the consideration in the disposition of that MUR was that TRKC “[did] not sell a product or service that aggregates an individual’s donor contributions” but rather “was more of an information-gathering service.”¹⁵ Likewise, in MUR 6065 (Politicalbase.com) and MUR 6053 (Huffingtonpost.com), the Commission found no reason to believe that respondents violated section 438(a)(4) where internet media sites provided FEC contributor data for free, in a manner similar to TRKC.

Aristotle, in contrast, was not providing the FEC data for free, but rather as part of a software package for which its customers paid several hundred thousand dollars. Although Aristotle characterizes the CV feature as a “free upgrade,” that upgrade was only available to customers who had already paid for the software (or were purchasing the software new at the time of the upgrade) and the company’s licensing fees. The fact that the CV feature was only one component of a larger software package for which Aristotle did not charge separately is not relevant to the analysis. If it were, despite the substantial cost for the entire software package, one could argue that no single component could ever cause a violation of the Act simply because there was no separate charge for that component.

A. Solicitation of Contributions

Despite Aristotle’s contention that the downloading of FEC data was for compliance and vetting purposes, the factual record, as discussed above, is replete with evidence demonstrating that Aristotle used FEC data for the commercial purpose of making its CM5 software package more attractive to its customers and, in turn, to enable its customers to utilize its software to solicit contributions in violation of 2 U.S.C. § 438(a)(4). Aristotle specifically marketed the CV feature as a crucial way to enhance its customers’ ability to solicit contributions by reviewing donors’ giving history so as to ask for the maximum amount they are likely to give. This feature is not incidental to the CM5 software; it is a crucial fundraising selling point that it touted in its marketing literature. Even if the feature could be used for some compliance purpose, it doesn’t negate the fact that it can also be used for, and was marketed for, the purpose of soliciting contributions.

Although the subject of lengthy discussion at the probable cause hearing, the “compliance purpose” of this software appears to be negligible at best. When a CM5 customer inputs the name and address of a targeted contributor into the feature, all federal, state and PAC

¹⁴ 11 C.F.R. § 104.15(c).

¹⁵ See MUR 5155 (TRKC, Inc.), General Counsel’s Report #3, at 10.

10044264328

aggregate contribution histories are displayed simultaneously.¹⁶ Given that some states do not have limitations on amounts donated by individuals to state campaigns, these contributions would be irrelevant to clients running state campaigns and further irrelevant to federal candidates. Aristotle claims the FEC data is used to check a donor's aggregate election cycle contributions to avoid receiving illegal or excessive contributions.¹⁷ However, all donations received by a campaign committee should already be recorded in the committee's own database, which is not linked to the CV feature, making this feature unnecessary to determine if a donor has exceeded the contribution limits to that particular campaign committee. After conceding this point, Aristotle argued at the hearing that the feature could be used to ensure compliance with individual biennial limits under 2 U.S.C. §§ 441a(a)(1) and (3).¹⁸ To the extent that political committees have an interest in tracking their contributors' biennial limits, however, it would be for the purpose of maximizing solicitation efforts.¹⁹

B. Commercial Purpose

Under the statute, the only prohibition on the use of FEC data is that it "may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes." The CV feature of the CM5 software, a commercial product sold by Aristotle for the purpose of enabling its clients to solicit contributions, falls squarely within this prohibition. In our view, this conduct constitutes the sale or use of FEC data by Aristotle for commercial purposes, which, as discussed above, encouraged and assisted Aristotle's customers in making solicitations using the FEC data.

Our colleagues' statement of reasons in this matter focuses primarily on the "or for any commercial purpose" language of the statute and regulation. They rely heavily on a Second Circuit case *Federal Election Commission v. Political Contributions Data, Inc.* ("PCD") in which the court found PCD's use of FEC data permissible under 2 U.S.C. § 438(a)(4).²⁰ In that matter, PCD had compiled FEC data for the intended and stated purpose of conveying information to the public, specifically, how financial contributions support the current political structure by providing an advantage to incumbents over challengers.

As our colleagues correctly point out, the Second Circuit rejected the argument that any sale of FEC data is a "commercial purpose" prohibited by the Act and determined that PCD's

¹⁶ See Aristotle Reply Brief at 10; Complaint at Exhibit 1.

¹⁷ Probable Cause Hearing Transcript at 6.

¹⁸ Probable Cause Hearing Transcript, at 36-37.

¹⁹ It is the responsibility of the contributor to stay within the biennial limits, not that of the recipient political committees that comprise Aristotle's customer base.

²⁰ 943 F.2d 190, 197 (2d Cir. 1991).

reports had an informative, rather than a commercial, purpose.²¹ However, there is a critical distinction between the PCD case and the Aristotle software at issue: the court began its analysis by acknowledging that “it is undisputed that PCD did not use information ‘for the purpose of soliciting contributions’” and therefore did not analyze the portion of the statute that is most relevant to the Aristotle fact pattern.²²

Solicitations aside, Aristotle’s integration of access to FEC data into its software product and promotion of that accessibility as a major selling point for the CM5 software package make Aristotle’s sale and use of FEC data distinguishable from the reports at issue before the Second Circuit, which the court determined would be used for informational research purposes. Although Aristotle claims that its use of the FEC data was an “incidental, ancillary feature” that was rarely used by its customers, Aristotle’s marketing paints a wholly different picture.²³ Regardless of how many customers actually used the CV feature, Aristotle was touting the FEC data feature to generate sales for the CM5 software package, a package that earned the company hundreds of thousands of dollars.²⁴

C. Disclaimers

Aristotle argues that beginning in August 2004, it placed warnings on its product and marketing brochures informing customers that FEC data could not be used for solicitation or for any commercial purpose. The inclusion of such disclaimers does not cure otherwise illegal use of FEC data. *See Legi-Tech, Inc.*, 967 F. Supp. at 526, 530 (inclusion of warnings concerning illegal use of FEC data failed to shield company from liability under section 438(a)(4) where evidence showed that company had actual or constructive knowledge that some of its customers planned to or already used such data for solicitation purposes).²⁵ As Aristotle’s recent press

²¹ The court likened PCD to a traditional purveyor of news, and as such, the facts in the PCD case are similar to those in MURs 5155, 6053 and 6065, discussed above.

²² 943 F.2d at 194. The court’s discussion of the solicitation provision at the end of the opinion suggests, moreover, that if PCD had sold or used the data for solicitation purposes, the outcome of the case would have been different. In fact, the court actually viewed the ‘commercial purposes’ language of the statute as an expansion of the solicitation prohibition, explaining that “[w]ithout the ‘commercial purposes’ prohibition, the only solicitations at which the statute would be aimed would be solicitations for contributions.” *Id.* at 197. In addition, we note that the Second Circuit’s decision in *PCD* narrowly construes the meaning of “commercial purpose” under section 438(a)(4) by holding that the statute only proscribes the use of FEC information for solicitation of “all kinds.” *See PCD*, 943 F.2d at 197. In *Legi-Tech, Inc.*, the District Court for D.C., which would likely have had jurisdiction over this matter had the Commission found probable cause and then authorized suit, has declined to follow the Second Circuit’s narrow construction, stating that the Second Circuit “read the phrase ‘or for commercial purposes’ out of the statute.” 967 F.Supp. at 531

²³ Aristotle Reply Brief at 13.

²⁴ Our colleagues’ assertion that 438(a)(4)’s prohibitions apply only to list making and list brokering are similarly unpersuasive because the statute makes no mention of lists and instead pertains to “any information.”

²⁵ Nor does the fact that Aristotle’s product may contain many legitimate features entitle the Respondent to include within the package an illegal feature.

release indicates, the company is still touting the solicitation features of its software package.²⁶ We cannot accept the notion that a disclaimer in tiny font at the end of press release can otherwise permit a company to market its software touting its use precisely for purposes that are illegal under the Act.²⁷

III. Conclusion

The weight of the evidence shows that Aristotle marketed the CV feature with access to FEC data as a main selling point of its CM5 software product for the stated purpose of enabling its customers to solicit contributions. We cannot ignore the clear statutory language prohibiting any FEC reports or statements from being sold or used by any person for the purpose of soliciting contributions or for any commercial purpose. Accordingly, we voted to find probable cause to believe that Aristotle violated 2 U.S.C. § 438(a)(4).

5/19/2010
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Vice Chair

5/19/10
Date

Steven T. Walther
Steven T. Walther
Commissioner

5/19/10
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

²⁶ See Press Release, Aristotle Int'l, Inc., *Aristotle Beats Competitors in Satisfaction* (April 30, 2010); see note 4, *infra*.

²⁷ Aristotle also made numerous arguments claiming that the Commission's enforcement of section 438(a)(4) in this matter is unconstitutional. Neither we, nor apparently our colleagues (since they did not include a discussion of these arguments in their Statement of Reasons), found these arguments persuasive.

10044264330