



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

DEC 20 2010

Daniel M. Gray  
President  
Declaration Alliance  
2400 Earls Gate Court  
Reston, Virginia 20191

RE: MUR 6296  
Declaration Alliance

Dear Mr. Gray:

On May 26, 2010, the Federal Election Commission notified Declaration Alliance of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On December 14, 2010, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe Declaration Alliance violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Elena Paoli, the attorney assigned to this matter at (202) 694-1548.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Q. Luckett".

Roy Q. Luckett  
Acting Assistant General Counsel

Enclosure  
Factual and Legal Analysis

11044284387

11044284388

**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENT: Declaration Alliance**

**MUR: 6296**

**I. GENERATION OF MATTER**

This matter was generated based by a complaint filed with the Federal Election Commission ("the Commission") by Charles R. Grice, Jr. See 2 U.S.C. § 437g(a)(1).

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Background**

Kenneth R. Buck is the Republican nominee for Senate in Colorado. His authorized committee is respondent Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer ("Buck Committee" or the "Committee"). The complaint and supplemental complaint allege that around March 2009 or in the first half of 2009, Buck held interviews with prospective campaign consultants. Complaint at 3, Supplemental Complaint at 2. The complaint asserts that Buck was accompanied by Jerry Morgensen, the chairman of the board of Hensel Phelps Construction Co. ("Hensel Phelps") and a friend of Buck's. Hensel Phelps is a Greeley, Colorado, based construction company and federal government contractor. The complaint alleges that Buck informed the prospective consultants that Morgensen would contribute or spend up to or invest \$1 million or more on Buck's campaign, "presumably as an independent expenditure." Complaint at 3, Supplemental Complaint at 2. Further, the complaint maintains that Morgensen confirmed at the interviews that he was planning to "invest" \$1 million or more in connection with Buck's campaign. Complaint at 3. The supplemental complaint alleges that thereafter, pursuant to Buck's instructions, at least \$1 million has been contributed by Hensel

1 Phelps employees and/or Morgensen and “funnelled” by Morgensen and/or Hensel Phelps and  
2 other individuals to several 501(c) non-profit corporations, including Declaration Alliance  
3 (“DA”). Supplemental Complaint at 2; *see also* Complaint at 3.

4 The complaint and its supplement further allege that the funds were then used by AJS to  
5 disseminate advertisements supporting Buck and opposing other candidates. *Id.* Specifically,  
6 the complaint alleges that in February and March 2010, DA spent approximately \$158,000 on a  
7 television ad attacking one of Buck’s primary opponents. *Id.*, Complaint Exh. I.

8 The complaint argues that DA paid for the advertisements with “excessive” contributions  
9 from Buck supporters who had already reached the individual contribution limit with direct  
10 contributions to Buck’s campaign. Complaint at 3-4. The complaint alleges that Morgensen  
11 and/or Hensel Phelps funnelled these “contributions” from Buck supporters to DA, “intending to  
12 benefit Buck.” Complaint at 3. The complaint further alleges “upon information and belief” that  
13 Buck advised Morgensen and/or other contributors to make “excessive contributions” to DA. *Id.*  
14 The complaint argues that Hensel Phelps’ effort to “funnel” contributions to DA resulted in  
15 illegal coordination, excessive in-kind contributions, and prohibited corporate and government  
16 contractor contributions.

17 Buck and the Committee state “they have not cooperated with, consulted with, acted in  
18 concert with, requested, or suggested that Declaration Alliance ... or any of their employees,  
19 officers, directors, or agents make any public communications supporting Buck’s candidacy.”

20 DA responds that it has not communicated directly or indirectly with anyone at the Buck  
21 campaign at any time. DA Response, ¶ 1. According to DA, its ads were developed  
22 independently, and DA obtained information for them from publicly available sources. *Id.*,  
23 ¶¶ 2, 3. DA also maintains that there is no common vendor between DA and any campaign, and

1 media buys are public record and can be known by anyone contacting stations. *Id.*, ¶¶ 5, 6. DA  
2 also states that its ads are not electioneering communications, and do not advocate supporting or  
3 rejecting any candidate. *Id.*, ¶ 2. Morgensen states that he has not been involved in any financial  
4 transaction with DA.

5 **B. Analysis**

6 The complaint alleges that many Hensel Phelps employees, Morgensen, and/or other  
7 Buck supporters made contributions to Ken Buck's campaign up to permissible limits than make  
8 "excessive" donations to DA so that DA could produce and disseminate advertisements in  
9 support of Buck, or attacking his opponents. The complaint suggests that Buck and his  
10 committee engaged in coordinated activity with Morgensen to accomplish this plan.

11 Under the Act, corporations are prohibited from making any federal political  
12 contributions. 2 U.S.C. § 441b.

13 The issue is whether the advertisements paid for by DA were independent expenditures  
14 or were coordinated with Buck and thereby, resulted in prohibited contributions. The Act  
15 defines in-kind contributions as, *inter alia*, expenditures by any person "in cooperation,  
16 consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized  
17 political committees, or their agents . . . ." 2 U.S.C. § 441a(a)(7)(B)(i). The Commission's  
18 regulations provide a three-prong test to determine whether a communication is coordinated. All  
19 three prongs of the test must be satisfied to support a conclusion that coordinated communication  
20 occurred. *See* 11 C.F.R. § 109.21(a).

21 The first prong of the test provides that the communication must be paid for by a person  
22 other than the Federal candidate, the candidate's authorized committee, political party  
23 committee, or any agent of the foregoing. 11 C.F.R. § 109.21(a)(1). For purposes of a

1 coordination analysis, "agent" is defined as, "any person who has actual authority, either express  
2 or implied, to engage in [certain activities set forth below, *inter alia*]." 11 C.F.R. § 109.3(a).  
3 Here, the payment prong is met as DA paid for the advertisements at issue. The content prong  
4 need not be decided because the conduct prong does not appear to be satisfied.<sup>1</sup>

5       The conduct prong of the coordination test requires that the parties have engaged in  
6 conduct that meets any of the following standards: (1) the communication is created, produced or  
7 distributed at the request or suggestion or assent of a candidate, his authorized committee, or an  
8 agent of the foregoing; (2) the candidate, authorized committee, or agent is materially involved  
9 in decisions regarding the content, intended audience, means or mode of communication;  
10 (3) there is substantial discussion about the communication between the person paying for the  
11 communication and the candidate, the authorized committee, or an agent; (4) the person paying  
12 for the communication and the campaign share common vendors; or (5) the communication is  
13 paid for by a person or by the employer of a person who was an employee or independent  
14 contractor of the candidate or candidate's committee. 11 C.F.R. § 109.21(d)(2)-(5).

15       The complaint's allegations regarding DA fail to satisfy the conduct prong. At most, the  
16 complaint alleges that "upon information and belief" Buck and/or Morgensen informed Buck  
17 supporters to make donations to DA. Buck states that he has not cooperated with, consulted  
18 with, acted in concert with, requested, or suggested that DA or any of its employees, officers,  
19 directors, or agents make any public communication supporting his candidacy. In addition, DA

---

<sup>1</sup> The content standard requires that the communication be either an electioneering communication, a public communication that disseminates, distributes, or republishes campaign materials, a public communication that expressly advocates, or a public communication that refers to a Senate candidate in the relevant jurisdiction 90 days or fewer before the election. 11 C.F.R. § 109.21(c). It appears that the ads in this case were disseminated more than 90 days before the August 10, 2010, Colorado primary election; thus, the only relevant content standard would be an express advocacy public communication.

1 specifically states that it did not communicate with Buck or anyone from his campaign regarding  
2 the ads.

3 Given the complaint's lack of facts regarding Buck's conduct, Buck's statement that he  
4 was not involved with the communications at issue, and DA's specific, definitive response that it  
5 had no contact with Buck, his Committee or anyone known to be associated with Buck, there is  
6 not enough information to find that the advertisements were coordinated.

7 Moreover, in order to find coordination based on Morgensen's actions, the facts alleged  
8 would need to establish that Morgensen was Buck's or the Committee's agent. The complaint  
9 does not allege any facts to suggest that Morgensen was acting as the agent of either. Thus,  
10 Morgensen's actions, if any, appear to be independent of Buck and are not relevant to a  
11 coordination analysis.

12 In sum, even if Morgensen solicited donations to DA so that DA would disseminate pro-  
13 Buck materials, there would not be a reason to believe the Act had been violated absent  
14 allegations or information connecting Morgensen to Buck or the Committee. The complaint and  
15 supplemental complaint, however, do not allege sufficient facts indicating that Morgensen was  
16 an agent of Buck's or even worked on his campaign; thus, there is no information tying Buck and  
17 his Committee to the communications disseminated by DA.

18 Therefore, there is no reason to believe that Declaration Alliance violated 2 U.S.C.  
19 § 441b by making prohibited in-kind corporate contributions in the form of coordinated  
20 communications.