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FIRST GENERAL COUNSEL'S REPORT

CELA
SENSITIVE

MUR: 6366

DATE COMPLAINT FILED: September 2, 1010

DATE OF NOTIFICATION: September 8, 2010

LAST RESPONSE RECEIVED: December 16,
2010

DATE ACTIVATED: February 15, 2011

EXPIRATION OF SOL: August 2, 2015

COMPLAINANT:

Ryan Miskell

RESPONDENTS:

Jane Norton for Colorado Inc. and Barbara A.
Jenkins, in her official capacity as treasurer
U.S. Chamber of Commerce
Josh Penry
Bill Miller
Charles R. Black
Judy Black

**RELEVANT STATUTES AND
REGULATIONS:**

2 U.S.C. § 441a
2 U.S.C. § 441b
11 C.F.R. § 100.26
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns allegations that the U.S. Chamber of Commerce ("the Chamber") made a prohibited corporate in-kind contribution to Jane Norton for Colorado Inc. ("Norton Committee" or "Committee"), Jane Norton's principal campaign committee for U.S. Senate in Colorado in 2010. Complainant alleges that the Chamber coordinated its expenditures for a television advertisement supporting Jane Norton with the Norton Committee via communications

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1 between the Chamber's Vice President, Bill Miller, and various Norton Committee
2 representatives. Complainant also alleges that the Chamber and the Committee coordinated
3 fundraising for the electioneering communication through Charles and Judy Black. All of the
4 respondents maintain that the advertisement was not coordinated.

5 Because the available information does not indicate that the Chamber coordinated its
6 advertisement with the Norton Committee or any of the Committee's representatives, we
7 recommend that the Commission find no reason to believe that the Chamber and Bill Miller
8 violated 2 U.S.C. § 441b by making a prohibited in-kind contribution in the form of a
9 coordinated communication. We further recommend that the Commission find no reason to
10 believe that the Norton Committee and Josh Penry violated 2 U.S.C. § 441b by receiving a
11 prohibited in-kind contribution. Finally, we recommend that the Commission dismiss the
12 complaint as to Charles R. Black and Judy Black.

13 **II. FACTUAL SUMMARY**

14 **A. Background**

15 The Chamber is an unincorporated trade association that represents the interests of over
16 three million businesses and business associations. Chamber Response at 1. It is organized
17 under section 501(c)(6) of the Internal Revenue Code. See www.uschamber.com/about. Bill
18 Miller is the Chamber's Senior Vice President for Political Affairs and Federation Relations.
19 Miller Affidavit at ¶ 1.

20 Jane Norton was a candidate in the Republican primary election for Senate from
21 Colorado in 2010 and Jane Norton for Colorado Inc. was her principal campaign committee.
22 Barbara Jenkins is the Committee's treasurer. Josh Penry was the campaign manager for Norton
23 and the Committee.

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Judy Black, Jane Norton's sister, is a Policy Director at Brownstein Hyatt Farber Schreck, LLP ("Brownstein"). Judy Black Affidavit at ¶ 1. Charles Black, Judy Black's husband, is Chairman of Prime & Policy, Inc. Charles Black Affidavit at ¶ 1.

On August 2, 2010, the Chamber sponsored a television advertisement entitled "Stand up to Washington," which supported Jane Norton's candidacy in the Colorado Republican Senate primary election.¹ Chamber Response at 2. Available at http://www.politiao.com/blogs/bensmith/0810/Chamber_up_backing_Norton_in_CO.html. On July 29, 2010, the Chamber filed a Form 9 (24-Hour Notice of Disbursements/Obligations for Electioneering Communications) with the Commission, which disclosed that the Chamber spent \$250,000 on the advertisement and listed Bill Miller as a person "sharing/exercising control" over the electioneering communication.

B. Alleged Coordination

1. Complaint

The complaint alleges that the Chamber coordinated the "Stand up to Washington" advertisement with the Norton Committee, resulting in the Chamber making, and the Norton Committee accepting, a prohibited corporate contribution. Complaint at 1. The complaint contends that the Chamber endorsed Ms. Norton on June 28, 2010 and that Bill Miller made the endorsement. On that same date, Bill Miller, Jane Norton, and Norton Committee campaign manager, Josh Penry, participated in a conference call to announce the endorsement. *Id.* The complaint alleges that the Chamber launched the "Stand up to Washington" advertisement after meeting with Ms. Norton and her staff and after formally endorsing her, resulting in *per se*

¹ The complaint identifies the name of the advertisement as "Rock Ribbed Conservative," however the Chamber's response explains that the title was changed to "Stand up to Washington." Chamber Response at 2.

1 coordination. *Id.* at 2. The complaint attaches several articles about the Chamber's endorsement
2 of Jane Norton to support this assertion.

3 The complaint also contends that Bill Miller, who was listed as a person exercising
4 control over the advertisement on the Form 9, communicated his support and endorsement of
5 Jane Norton through Twitter and in person and had met with Ms. Norton and Committee
6 representatives to discuss their campaign strategy for use in the Chamber's issue advocacy
7 campaign. *Id.* at 2-3. Finally, the complaint asserts that "public information and knowledgeable
8 sources" indicate that Josh Penry and Bill Miller coordinated with Charles and Judy Black to
9 raise money for the advertisement, and that Judy Black is a representative of the Norton
10 Committee who is employed by a lobbying firm that works for the Chamber. *Id.* at 2.

11 2. Responses

12 a. The Chamber

13 The Chamber and Bill Miller deny coordinating the advertisement with the Norton
14 Committee. Chamber Response at 1. The attached affidavit of Bill Miller states that he is aware
15 of the requirements of the coordination regulations and that he complied with the Chamber's
16 coordination policy, which establishes a firewall that prohibits Chamber personnel involved in
17 the creation of independent expenditures and electioneering communications from discussing
18 information about a campaign that may be material to the creation, production, or dissemination
19 of such communications with candidates and their representatives. *See* Exhibit A and Miller
20 Affidavit at ¶ 3. Mr. Miller states that as part of the Chamber's endorsement decision-making
21 process, he participated in a telephone call with Norton campaign manager Josh Penry and a
22 meeting with Jane Norton and Judy Black, Ms. Norton's sister, and her husband Charles Black, a
23 Republican political consultant, but that he only recalls speaking about the Chamber's potential

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1 endorsement and not any information about the Committee's plans, projects, or needs that would
2 have been material to the creation, production, or dissemination of any Chamber electioneering
3 communication. Miller Affidavit at ¶ 5. Mr. Miller avers that he did not participate in the June
4 28, 2010 conference call to announce the Chamber's endorsement and that at no time before,
5 during, or after the call did he discuss with Ms. Norton or the Norton Committee the Chamber's
6 advertising or the Committee's non-public plans, projects, activities, or needs material to any
7 future electioneering communication by the Chamber. Further, Mr. Miller is not aware of any
8 other Chamber representative who had such a discussion. *Id.* at ¶¶ 6-7.

9 The Chamber's response contends that the conduct prong of the coordinated
10 communications analysis is not satisfied by the facts alleged in the complaint. Chamber
11 Response at 6. *See* 11 C.F.R. § 109.21(d). Mr. Miller's affidavit states he participated in the
12 creation and distribution of the advertisement at issue, but did so without any knowledge of the
13 Norton Committee's non-public plans, projects, activities, or needs material to any future
14 electioneering communication. Miller Affidavit at ¶ 8. Miller explains that while a separately
15 incorporated affiliate of the Chamber, the Institute for Legal Reform ("ILR"), has retained Judy
16 Black's employer, Brownstein, to lobby on its behalf, Mr. Miller has not worked with the ILR,
17 Ms. Black, or Brownstein, and is not aware of any involvement by Ms. Black or Brownstein in
18 the Chamber's "Stand up to Washington" advertisement. *Id.* at ¶ 9.

19 The response asserts that the Chamber had an established firewall to prevent its personnel
20 from obtaining information about Ms. Norton's campaign plans, projects, activities, or needs
21 material to the creation, production, or distribution of the communication. Because Mr. Miller
22 claims to have adhered to the firewall, the conduct standards are not satisfied unless there is
23 specific information that despite the firewall, such information was used or conveyed to the

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1 Chamber. The Chamber maintains that no such information exists. Chamber Response at 8. *See*
2 11 C.F.R. § 109.21(h).

3 The Chamber contends that the two facts alleged in the complaint – that Mr. Miller and
4 the Chamber learned of the Norton Committee's campaign plans through the endorsement
5 conference call and that the ILR retained Brownstein for lobbying services – do not support the
6 claim that the "Stand up to Washington" advertisement was coordinated and are speculative.
7 Chamber Response at 6-7. The response asserts that the advertisement was prepared and
8 disseminated independently of the Norton Committee and does not satisfy the "request or
9 suggestion," "material involvement," or "substantial discussion" conduct prongs of the
10 coordinated communications analysis. *Id.* at 7. *See* 11 C.F.R. § 109.21(d)(1)-(3). The "common
11 vendor" prong is also not satisfied because there is no allegation that Brownstein was retained as
12 a vendor to the Norton Committee and neither Brownstein nor Judy Black participated in the
13 production or dissemination of the Chamber's advertisement. Chamber Response at 7. *See*
14 11 C.F.R. § 109.21(d)(4).

15 **b. The Norton Committee**

16 The response from the Norton Committee and its treasurer, Barbara Jenkins, asserts that
17 Ms. Jenkins does not know Bill Miller and has never spoken or communicated with him in any
18 manner. Norton Committee Response at 1. Ms. Jenkins contends that she was not aware of the
19 planning or purchase of a television ad for the Committee paid for by the Chamber. *Id.* Josh
20 Penry did not separately respond to the complaint.

21 **c. Charles and Judy Black**

22 Charles and Judy Black deny that they raised money for any Chamber communications
23 and that they have any knowledge of coordination between the Chamber and the Norton

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1 Committee. Black Response at 2. The attached affidavits of Charles and Judy Black state that
2 neither participated in any discussion with the Chamber regarding any independent expenditures
3 or electioneering communications; are aware of any discussions between representatives of the
4 Chamber and the Norton Committee regarding any such communications; raised any funds for
5 the Chamber for any communication on behalf of the Norton Committee; or coordinated with
6 Josh Penry and Bill Miller to raise funds for any communications by the Chamber or any other
7 organization. Charles Black Affidavit at ¶¶ 2-4 and Judy Black Affidavit at ¶¶ 2-4. The
8 response confirms that Judy Black works for Brownstein and that Brownstein lobbies for the
9 ILR, but asserts that Brownstein's lobbying representation of the ILR has no relationship to the
10 Norton Committee or any of the Chamber's expenditures for the Colorado election. Black
11 Response at 2.

12 **III. ANALYSIS**

13 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), a corporation
14 is prohibited from making any contribution in connection with a Federal election, and candidates
15 and political committees are prohibited from knowingly accepting corporate contributions.
16 2 U.S.C. § 441b. An expenditure made by any person "in cooperation, consultation, or concert,
17 with, or at the request or suggestion of, a candidate, his authorized political committees or their
18 agents" constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i).

19 A communication is coordinated with a candidate, a candidate's authorized committee, or
20 agent of the candidate or committee when the communication satisfies the three-pronged test set
21 forth in 11 C.F.R. § 109.21(a): (1) the communication is paid for by a person other than that
22 candidate or authorized committee; (2) the communication satisfies at least one of the content
23 standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of

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the conduct standards set forth in 11 C.F.R. § 109.21(d). The Commission's regulations at 11 C.F.R. § 109.21 provide that coordinated communications constitute in-kind contributions from the party paying for such communications to the candidate, the candidate's authorized committee, or the political party committee which coordinates the communication.

While it appears that the Chamber's "Stand up to Washington" advertisement satisfies the payment and content prongs of the coordinated communications analysis, there is no available information indicating that the conduct prong is satisfied.

A. Payment

The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied. The Chamber's response acknowledges that it was responsible for the advertisement at issue in the complaint. Chamber Response at 2. The Chamber filed a Form 9 with the Commission on July 29, 2010, disclosing that it spent \$250,000 on the "Stand up to Washington" advertisement.

B. Content

The content prong of the coordination regulation is also satisfied. The content prong is satisfied if the communication at issue meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate's authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for Federal office; or (4) a public communication, in relevant part, that refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated in the

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1 clearly identified candidate's jurisdiction 90 days or fewer before the candidate's primary
2 election.² See 11 C.F.R. § 109.21(c).

3 The Chamber's advertisement identified Senate candidate Jane Norton and was broadcast
4 on television on August 2, 2010, eight days before the August 10, 2010 Republican primary
5 election in Colorado. Thus, the communication at issue in the complaint satisfies the content
6 prong by constituting a public communication referring to a clearly identified candidate
7 distributed within 90 days of an election.

8 C. Conduct

9 The Commission's regulations set forth the following six types of conduct between the
10 payor and the committee, whether or not there is agreement or formal collaboration, that satisfy
11 the conduct prong of the coordination standard: (1) the communication "is created, produced, or
12 distributed at the request or suggestion of a candidate or an authorized committee," or if the
13 communication is created, produced, or distributed at the suggestion of the payor and the
14 candidate or authorized committee assents to the suggestion; (2) the candidate, his or her
15 committee, or their agent is materially involved in the content, intended audience, means or
16 mode of communication, the specific media outlet used, or the timing or frequency of the
17 communication; (3) the communication is created, produced, or distributed after at least one
18 substantial discussion about the communication between the person paying for the
19 communication, or that person's employees or agents, and the candidate or his or her authorized
20 committee, his or her opponent or opponent's authorized committee, a political party committee,

² A "public communication" is defined as a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general public political advertising. 11 C.F.R. § 100.26.

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1 or any of their agents;³ (4) a common vendor uses or conveys information material to the
2 creation, production, or distribution of the communication; (5) a former employee or independent
3 contractor uses or conveys information material to the creation, production, or distribution of the
4 communication; and (6) the dissemination, distribution, or republication of campaign materials.
5 11 C.F.R. § 109.21(d)(1)-(6).

6 The complaint alleges that the Chamber aired the "Stand up to Washington"
7 advertisement after endorsing Jane Norton and after representatives of the Chamber, including
8 Bill Miller, met with representatives of the Norton Committee, including Jane Norton, Judy
9 Black, and Josh Penry. The complaint also suggests that the Chamber and the Norton
10 Committee communicated about the Committee's campaign strategy. Complaint at 2-3.

11 The respondents have specifically denied facts that would give rise to a conclusion that
12 the conduct prong is satisfied pursuant to 11 C.F.R. § 109.21(d), and have provided sworn
13 affidavits from several key individuals supporting those denials. *See* Miller Affidavit, Charles
14 Black Affidavit, and Judy Black Affidavit. Namely, the respondents have specifically rebutted
15 any implication that the advertisement was created at the request or suggestion of, with the
16 material involvement of, or after substantial discussions with, the candidate or her agents,
17 thereby negating the existence of conduct at 11 C.F.R. § 109.21(d)(1)-(3). *See* Chamber
18 Response at 7, Norton Committee Response at 1, and Black Response at 2. In addition, the
19 Chamber has provided documentation of a firewall policy that existed at the time of the
20 communication and appears to satisfy the safe harbor criteria at 11 C.F.R. § 109.21(h); *i.e.*, the
21 policy appears to have been designed to prohibit the flow of information between its employees

³ A "substantial discussion" includes informing the payor about the campaign's plans, projects, activities, or needs, or providing the payor with information material to the communication. *See* 11 C.F.R. § 109.21(d)(3).

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1 and consultants and those of federal candidates, and it was distributed to relevant employees and
2 consultants. See Miller Affidavit Exhibit A.

3 The available information also indicates that the Chamber and the Norton Committee did
4 not share a common vendor and that no former Norton Committee employee worked with the
5 Chamber on its advertisement. See 11 C.F.R. § 109.21(d)(4)-(5). While the complaint alleges
6 that Judy Black, a representative of the Norton campaign, was employed by a lobbying firm that
7 worked for the Chamber, the responses of the Chamber and Charles and Judy Black clarify that
8 Brownstein was retained by the ILR, a separate entity, and thus not a vendor to the Chamber.
9 The responses also assert that Brownstein had no involvement with the "Stand up to
10 Washington" advertisement. Finally, Charles and Judy Black specifically deny that they raised
11 any funds for the Chamber's advertisement or were involved in its production or dissemination.

12 Given the speculative nature of the complaint, the respondents' specific denials, and the
13 absence of any other information suggesting coordination, it appears that the conduct prong of
14 the coordinated communications regulations has not been met. Accordingly, we recommend that
15 the Commission find no reason to believe that the U.S. Chamber of Commerce and Bill Miller
16 violated 2 U.S.C. § 441b by making a prohibited in-kind contribution in the form of a
17 coordinated communication. We also recommend that the Commission find no reason to believe
18 that Jane Norton for Colorado Inc. and Barbara A. Jenkins, in her official capacity as treasurer,
19 and Josh Penry violated 2 U.S.C. § 441b by receiving a prohibited in-kind contribution.

20 Finally, we recommend that the Commission dismiss the complaint as to Charles R.
21 Black and Judy Black. The complaint does not allege that Mr. and Mrs. Black violated the Act,
22 only identifies them as possible conduits of information to establish alleged coordination

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between the Chamber and the Committee. Accordingly, it appears that they were notified out of an abundance of caution, and that dismissal is appropriate.

IV. RECOMMENDATIONS

1. Find no reason to believe that the U.S. Chamber of Commerce and Bill Miller violated 2 U.S.C. § 441b.
2. Find no reason to believe that Jane Norton for Colorado Inc. and Barbara A. Jenkins, in her official capacity as treasurer, and Josh Penry violated 2 U.S.C. § 441b.
3. Dismiss the complaint as to Charles R. Black and Judy Black.
4. Approve the attached Factual and Legal Analyses.
5. Approve the appropriate letters.
6. Close the file.

Christopher Hughey
Acting General Counsel

June 7, 2011
Date

BY:

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