DICKSTEINSHAPIROLLP
1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

December 7, 2010

Confidential

Via Hand Delivery

Christopher Hughey
Acting General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Matter Under Review 6403

Dear Mr. Hughey:

On behalf of Ahtna, Inc. ("Ahtna") and NANA Regional Corporation, Inc. ("NANA"), we are responding to the complaint filed by the Joe Miller for U.S. Senate campaign ("Complainant") in the above-captioned matter. The allegation of Complainant, in essence, is that the expenditures made by Ahtna and NANA supporting an independent "super PAC" (Alaskans Standing Together or "AST") should be deemed contributions by government contractors in violation of 2 U.S.C. § 441c.

Introduction

As respondents will show herein, the Commission should dismiss this matter forthwith for several reasons.

- First, application of the ban on contributions by government contractors to a situation like this runs directly contrary to the Supreme Court's legal theory in *Citizens United v. FEC*, 130 S.Ct. 876 (2010), and the related *en banc* holding of the U.S. Court of Appeals for the District of Columbia in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). The two Native American corporations involved were expending funds for purely independent speech entitled to full First Amendment protection. Moreover, unlike 2 U.S.C. §§ 441b (corporate and union prohibition) and 441e (foreign national prohibition), section 441c's text only prohibits "contributions," not "expenditures," so the Commission could easily conclude that the government contractor provision is not even applicable to the independent spending here involved which doesn't involve any direct or indirect contributions to candidates.

- Second, both corporations merely *lease* real property to the U.S. Government. The statutory provision at issue only attaches, in relevant part, to "*selling* any land or building to the United States or any department or agency thereof [emphasis added]." The FEC's advisory opinion extending § 441c to a lease situation, Advisory Opinion 1984-53 (cited with approval in Advisory Opinion 2008-11), represents a questionable leap in statutory construction. The Commission should exercise its discretion to not pursue enforcement in a context where the arrangement is merely a lease, not a sale, of property to the Government.

- Third, the facts involving the Ahtna and NANA donations show that any enforcement action seeking to impose penalties of any sort would be excessive and unjust. In Ahtna's case, its miniscule office and parking space lease arrangement with the U.S. Government stems from virtual necessity. The Ahtna building is the only real option for the Government in the town of Glennallen, Alaska. The Government approached Ahtna for the lease, and there is no plausible argument that Ahtna would make any political donations in order to help secure this lease. Application of the government contractor ban in such circumstances would be a gross distortion of the intended application of the law. In NANA's case, its even more miniscule lease arrangement with the government—which was not even known by the NANA officials deciding whether to make the donation to AST—likewise does not warrant application of a statute designed to prevent potential *quid pro quo* situations. This $400 per year lease for land near an airport serving Buckland, Alaska, essentially is the only option for the Federal Aviation Administration. Enforcement sanctions are inappropriate in this set of circumstances as well.

- Fourth, before the donations were made by Ahtna and NANA, the legal advice provided by counsel for AST and other legal advisors—relying on the *Citizens United* decision, the *SpeechNow.org* decision, and the FEC's advisory opinions—gave Ahtna and NANA representatives reason to believe the expenditures at issue were perfectly permissible. They were by non-foreign entities, and they were for purely independent election-related activity. They were not "contributions" to a candidate committee or some other federal political committee that would be making contributions to candidates. The rational reliance by Ahtna and NANA on the available legal advice, coupled with the other circumstances noted above, argues for dismissing this complaint against Ahtna and NANA.

Factual Background

Ahtna Facts. Ahtna is one of 13 Alaska Native Regional Corporations (ANC's) established by Congress under terms of the Alaska Native Claims Settlement Act in 1971. Ahtna's function is

to provide a broad range of opportunities for its shareholders and to preserve their Native culture. Headquartered in Glennallen, Alaska, Ahtna has a 13-member board to direct corporate operations. It has ten operating subsidiaries. While some of these subsidiaries are active in federal government contracting, Ahtna itself has not been a government contractor historically. See Attachment 1 (chart of Ahtna structure) and the description of Ahtna subsidiaries at http://www.ahtna-inc.com/subsidiaries.html.

In May of 2010, the General Services Administration (GSA) approached Ahtna about the possibility of leasing a small amount of space in the Ahtna office building in Glennallen, Alaska. As of the 2000 Census, Glennallen had a population of 554. The reality is that the Ahtna office building is the only practical option in town for the Government to rent a functional office that meets applicable federal standards. In June of 2010, the GSA issued a formal Solicitation for offers to lease approximately 250 square feet of office space, plus parking. See Attachment 2 (Affidavit of Kathryn Martin).

It would be difficult to pin a beginning to the "negotiations" over the lease arrangement. (Section § 441c imposes the government contractor ban "at any time between the commencement of negotiations for and the later of (A) the completion of performance under; or (B) the termination of negotiations for, such contract . . . ."[1]) It is important to note, though, that Ahtna did not actually sign the lease agreement until October 26, 2010, and the GSA representative signed thereafter. Clearly, when the donation was made by Ahtna to AST on September 28, Ahtna was not actually a government contractor. But, because the Government personnel were allowed to start using the space at some point in August, 2010, Ahtna will not contest that the "commencement of negotiations" had begun before the donation was made. See Attachment 2 and Attachment 3 (copy of lease agreement signed by Ahtna representative on October 29, 2010).

Even if this lease is considered to fall within the language of § 441c,[2] it must be noted that it is for a very small dollar amount ($9,000 per year). This fact, plus the fact that the Government practically had to lease this space if it wanted to carry out its functions in the area, should weigh

[1] The FEC's regulations purport to move the beginning of the government contractor ban to a point potentially preceding the negotiation stage: "the earlier of the commencement of negotiations or *when the requests for proposals are sent out* [emphasis added]." 11 C.F.R. § 115.1(b). Given that "negotiations" clearly have not commenced in any logical sense when the Government has merely sent out requests for proposals, the quoted regulation probably is unenforceable if applied from the request for proposals stage.

[2] As noted earlier, this arrangement is a lease, not a sale of property. The statute in relevant part speaks to "selling any land or building to the United States . . . ," so the Commission's extension of the statute's reach to leasing means potentially unfounded as a legal proposition.

heavily in the Commission's determination of whether this matter should be pursued. Clearly this is not a typical contractor enforcement case where an agreement with the Government is much pursued and of great financial significance to the party entering the agreement.[3]

With regard to the funds used for Ahtna's donation of $50,000 on September 28, 2010, it can be easily demonstrated that Ahtna had more than enough funding on hand from sources other than Government contract revenue.[4] See Attachment 5 (Affidavit of David Fahrenbruch). Ahtna suggests, by the way, that this analysis could be applied by the Commission not only regarding revenue received from any subsidiaries that engage in government contracting but also to the revenue generated by the small lease described above. Plainly, the lease proceeds were not needed for, or relevant to, the decision to make the expenditure at issue.

NANA facts. NANA is one of the 13 Alaska Native Corporations noted above. Like Ahtna, NANA's function is to provide a broad range of opportunities for its shareholders and to preserve their Native culture. NANA is governed by a 23 person board elected by the shareholders. NANA owns a subsidiary called NANA Development Corporation. The latter in turn owns several subsidiaries, and some of those in turn own other subsidiaries. See Attachment 6 (chart of NANA company structure) and the description of the subsidiaries at http://nana-dev.com/companies/. While several of the NANA-related subsidiaries—distinct legal entities—enter significant government contracts on a regular basis, NANA itself historically has not entered into government contracts.

As a result of the complaint in this matter, it came to the attention of in-house counsel for NANA that there has been in place since November, 2007, a lease arrangement between NANA and the U.S. Federal Aviation Administration (FAA). This is a lease through the year 2026 for a parcel of land to enable installation and maintenance of a beacon, engine generator building, and related

[3] Ahtna's only other financial agreement with the U.S. Government worthy of mention is a Cooperative Agreement with the Department of Interior's Bureau of Land Management whereby Ahtna is to oversee a survey near certain Alaska villages for the benefit of Alaskan Natives in the area. See Attachment 4 (copy of agreement and relevant attachments). This is an agreement issued pursuant to Pub. L. 93-638, Title I, the Indian Self-Determination and Education Assistance Act of 1975. As the Commission knows, this type of self-determination agreement has been determined to fall outside the government contractor ban at § 441c. *See* Advisory Opinion 1993-12 (Mississippi Band of Choctaw Indians). Any federally-funded grants are considered clearly outside the reach of § 441c as well. *Id.*

[4] The requirement that a parent company be able to demonstrate that it is not using funds from any subsidiary that could be seen as government contract revenue is set forth in Advisory Opinions 2005-01 (Mississippi Band of Choctaw Indians) and 1999-32 (Tohono O'odham Nation).

equipment and facilities. Similar to the Ahtna lease, this is an arrangement that came about because of necessity: the land the FAA needed essentially was only available through some sort of lease, sale, or transfer by NANA. Moreover, the lease is for a mere $400 per year—which helps explain why the existence of the lease only came to the awareness of NANA counsel in recent days. See Attachment 7 (copy of lease). See Attachment 8 (Affidavit of Jeffrey Nelson). Further, it should be noted that the lease payments for the last several years have not in fact been made to NANA, but instead to NANA Development Corporation. Thus, the practical reality is that important aspects of the lease arrangement actually flow through a legal entity separate from NANA. See Attachment 9, ¶5 (Affidavit of Maude R. Blair).

If the Commission takes the position that this unique *de minimis* lease arrangement technically falls within the language of § 441c, it should note that the officials making the determination regarding the donation to AST on September 28, 2010, were unaware of the existence of the lease. See Attachment 10 (Affidavit of Marie N. Greene). While this may not bear directly on whether there legally was a government contract in place, the Commission's enforcement process simply should not be used to penalize NANA under the circumstances.

NANA can demonstrate that it had sufficient non-government-contract funds to make the expenditure supporting AST's independent spending effort. See Attachment 11 (Affidavit of Kevin E. Thomas).

Reliance on legal advice indicating allowance created by Citizens United. When AST's request for funding of an independent "super PAC" first came to the attention of Ahtna, NANA, and other ANC representatives, there was an effort among some of the ANC representatives to get guidance from AST's own legal resources and various ANC legal advisors. The result was the exchange of certain information about legal issues surrounding potential election-related activity just before the expenditure decisions were made.

The legal guidance made available gave no indication that the expenditures supporting the AST effort would be impermissible. Given the Supreme Court's broad ruling shielding independent speech from government prohibitions, and the equally broad rulings by the *SpeechNow.org* court and the Commission regarding funds provided for purely independent speech, this is understandable. The legal guidance was thorough, focusing for example even on a provision in the Alaska Native Claims Settlement Act (43 U.S.C. § 1605) that prohibits using funds paid or distributed from the "Alaska Native Fund" for propaganda or intervening in any political campaign. The result is that representatives of Ahtna and NANA relied on the guidance provided by AST representatives and their counsel for a generalized understanding that the donation of funds to AST would be fully permissible. See Attachment 9 (Affidavit of Maude R. Blair) and Attachment 12 (Affidavit of Roy Tansy, Jr.).

Constitutional Infirmity of § 441c in This Situation

The legal reality created by the Supreme Court's decision in *Citizens United* is that non-coordinated campaign-related messaging simply cannot be subject to a Government prohibition. The contractor ban at § 441c is designed to be enforced in some circumstances as a criminal sanction. The Supreme Court stated, "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[5] The Court further noted, "By suppressing the speech of manifold corporations, both for-profit and non-profit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests."[6] It added, "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful."[7] More specifically, regarding non-coordinated messaging, the Court clarified:

> Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing *quid pro quo* corruption. The anticorruption interest is not sufficient to displace the speech here in question. . . .
>
> . . . .
>
> . . . . For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.
>
> . . . .
>
> We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical pre-election period is not a permissible remedy.[8]

All of the foregoing analysis reaches very broadly, and its logic clearly extends to situations like those presented in this matter—where any Government interests in regulating government

---

[5] 130 Sup.Ct. 904.

[6] 130 Sup.Ct. 907.

[7] 130 Sup. Ct. 908.

[8] 130 Sup.Ct. 908, 909, 911.

contractors certainly would be truly miniscule. Ahtna and NANA have steered clear of government contractor status, with the possible exception of the two insignificant instances that have come to light. As a practical and legal matter, Ahtna and NANA should be on a par with the corporations that were given broad First Amendment protection in *Citizens United*.

Further, the holding in *SpeechNow.org* and the holdings in the advisory opinions issued by the FEC as a result of *Citizens United* and *SpeechNow.org*[9] should be similarly applied to the Ahtna and NANA donations supporting the independent "super PAC" messaging effort of AST. These decisions do not preclude application of the same principles to government contractor donations to a "super PAC,"[10] and that certainly should be the result where the only arguable government contract activity is truly *de minimis*.[11]

Just as the Commission used its inherent authority to apply the constitutional holdings of *Citizens United* and *SpeechNow.org* in Advisory Opinions 2010-09 and 2010-11, it should use such authority to determine that Ahtna and NANA need not be penalized in the enforcement process for funding their independent speech through AST.[12]

11044304844

---

[9] Advisory Opinion 2010-11 (Commonsense Ten) (permitting even unlimited corporate donations to a "super PAC" for independent expenditure activity) and Advisory Opinion 2010-09 (Club for Growth) (using same logic to allow unlimited donations by individuals to a "super PAC" making independent expenditures).

[10] Club for Growth and Commonsense Ten voluntarily had decided to not accept any donations from government contractors, but the FEC's analysis in Advisory Opinions 2010-09 and 2010-11 does not turn on this factual element of the requests.

[11] Note that the Federal Acquisition Regulation (FAR) has completely exempted contracts of $150,000 or less from the certification and disclosure provisions implementing the restrictions of the so-called "Byrd Amendment" at 31 U.S.C. § 1352. *See* FAR § 3.804, *available at* https://www.acquisition.gov/Far/.

[12] The Commission can rely on a statutory analysis as well to reach the conclusion that applying § 441c is inappropriate here. The statute only prohibits a "contribution" and does not therefore reach any independent expenditures outlays ("It shall be unlawful for any person . . . [w]ho enters into any contract with the United States . . . directly or indirectly to make any *contribution* of money or other things of value . . . to any political party, committee, or candidate for public office or to any person for any political purpose or use . . . .[emphasis added]"). While the FEC's regulation purports to expand the ban to reach a "contribution or expenditure" (11 C.F.R. § 115.2(a)), this seems to be based on legislative history interpreted by the FEC in 1977 to encompass "spending of funds by a government contractor for campaign purposes regardless of whether the funds were given to the candidates or spent by the government contractor." *Communication from the Chairman, Federal Election Commission, Transmitting the*

Conclusion

For the foregoing reasons, the Commission should use its prosecutorial discretion and its authority to interpret and apply the law to dismiss the allegations against Ahtna and NANA. The *de minimis* (and virtually required) lease arrangement that each has should be seen as insufficient to trigger the full range of penalties the Commission can seek in the enforcement process. Ahtna and NANA were effecting independent political speech that is indistinguishable in all material aspects from the speech that many other businesses undertook in the aftermath of *Citizens United*. They should not be singled out for harsh consequences.

Respectfully submitted,

Scott E. Thomas
Of Counsel
Dickstein Shapiro LLP

Attachments: 1-12

ST/kb

11044304845

Commission's Proposed Regulations . . . ," p. 121 (GPO 1977), *available at* http://www.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf#page=43. In view of the *Citizens United* and *SpeechNow.org* decisions treating independent spending and donations for such spending as distinct from "contributions" to candidates or committees that contribute to candidates, the Commission should interpret § 441c to only reach the latter, not the former. This interpretation would be justifiable in light of the congressional practice of actually adding the word "expenditure" in the statute if the intent was to somehow reach non-coordinated expenditure activity. *See* 2 U.S.C. §§ 441b(a) (unlawful to make a "contribution or expenditure") and 441e (unlawful to make a "contribution," "donation," "expenditure," "independent expenditure," or "electioneering communication"). Given (A) the dearth of FEC applications of § 441c and § 115.2 in the independent spending context, (B) the fact that the statute plainly uses only the term "contribution," and (C) that the Commission retains authority to adopt an interpretation that is "reasonable" even where there is statutory ambiguity (*Shays v. Federal Election Commission*, 528 F.3d 914, 919, 924-25 (D.C. Cir. 2008), citing *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)), the application of §441c that best squares with *Citizens United* and *SpeechNow.org* is highly advisable.