

## BEFORE THE FEDERAL ELECTION COMMISSION

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 FEDERAL ELECTION COMMISSION  
 OCTOBER 28, 2020 9:53 AM  
 OFFICE OF GENERAL COUNSEL

CAMPAIGN LEGAL CENTER  
 1101 14th Street, NW, Suite 400  
 Washington, DC 20005  
 (202) 736-2200

v.

MUR No. **7844**

KIRBY-SMITH MACHINERY, INC.  
 6715 W Reno Ave.  
 Oklahoma City, OK 73127

**COMPLAINT**

1. This complaint is filed pursuant to 52 U.S.C. § 30109(a)(1) and is based on information and belief that Kirby-Smith Machinery, Inc. has violated FECA's prohibition on federal contractors making contributions to political committees while negotiating or performing federal contracts, 52 U.S.C. § 30119(a)(1), by contributing \$10,000 to Restore Oklahoma (ID: C00753491).
2. "If the Commission, upon receiving a complaint . . . has reason to believe that a person has committed, or is about to commit, a violation of [the FECA] . . . [t]he Commission *shall* make an investigation of such alleged violation . . . ." 52 U.S.C. § 30109(a)(2) (emphasis added); *see also* 11 C.F.R. § 111.4(a).

**FACTS**

3. Restore Oklahoma is an independent expenditure-only political action committee (i.e., a "super PAC").<sup>1</sup> The "Donate" page of Restore Oklahoma's website contains a disclaimer

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<sup>1</sup> Restore Oklahoma, Statement of Organization, FEC Form 1 at 1, 5 (filed July 31, 2020), <https://docquery.fec.gov/pdf/027/202007319261200027/202007319261200027.pdf>.

stating that “[f]ederal government contractors should consult counsel prior to making a contribution to Restore Oklahoma.”<sup>2</sup>

4. So far in the 2020 election cycle, Restore Oklahoma has reported over \$300,000 in independent expenditures opposing Kendra Horn or supporting Stephanie Bice in the race for Oklahoma’s 5th Congressional District.<sup>3</sup>
5. Kirby-Smith Machinery, Inc. is a heavy equipment and crane distribution company with locations in Oklahoma, Texas, Kansas, Missouri, and Illinois, according to its website.<sup>4</sup> According to USAspending.gov, “the official source for spending data for the U.S. Government,”<sup>5</sup> Kirby-Smith Machinery, Inc., located at 6715 W Reno Ave, Oklahoma City, OK, 73127, is and has been the recipient of numerous federal contracts and grants,<sup>6</sup> including a contract with the Department of Defense for \$276,591 that began on February 14, 2020 and a contract with the Department of Defense for \$103,151 that began on February 26, 2020.<sup>7</sup>

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<sup>2</sup> See *Donate*, RESTOREOKLAHOMA.COM, <https://secure.anedot.com/restore-oklahoma/donate> (last visited Oct. 26, 2020).

<sup>3</sup> See *Restore Oklahoma, Independent Expenditures (24- and 48-hour reports), 2019-20*, FEC.GOV, [https://www.fec.gov/data/independent-expenditures/?data\\_type=processed&committee\\_id=C00753491&is\\_notice=true&most\\_recent=true&min\\_date=01%2F01%2F2019&max\\_date=12%2F31%2F2020](https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00753491&is_notice=true&most_recent=true&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020) (last visited Oct. 26, 2020).

<sup>4</sup> *About Us*, KIRBY-SMITH MACHINERY, INC., <https://www.kirby-smith.com/about/our-company> (last visited Oct. 26, 2020); *Locations*, KIRBY-SMITH MACHINERY, INC., <https://www.kirby-smith.com/branches/locations> (last visited Oct. 26, 2020).

<sup>5</sup> USAspending.gov, *Mission*, <https://www.usaspending.gov/#/about> (last visited Oct. 26, 2020).

<sup>6</sup> See *Advanced Search for Recipient “Kirby-Smith,”* USASPENDING.GOV, <https://www.usaspending.gov/search/d166016bc6f9b46e372c2abf29a23e97> (last visited Oct. 26, 2020).

<sup>7</sup> USAspending.gov, *Contract Summary, Award ID SPE7L320P3012*, [https://www.usaspending.gov/award/CONT\\_AWD\\_SPE7L320P3012\\_9700\\_-NONE\\_-NONE](https://www.usaspending.gov/award/CONT_AWD_SPE7L320P3012_9700_-NONE_-NONE) (last visited Oct. 26, 2020) (showing a \$276,591 contract from the U.S. Department of Defense to Kirby-Smith Machinery, Inc. with a period of performance of February 14, 2020 through October 6, 2020); USAspending.gov, *Contract Summary, Award ID SPE4A620V7106*, [https://www.usaspending.gov/award/CONT\\_AWD\\_SPE4A620V7106\\_9700\\_-NONE\\_-NONE](https://www.usaspending.gov/award/CONT_AWD_SPE4A620V7106_9700_-NONE_-NONE) (last visited Oct. 26, 2020) (showing a \$103,151 contract from the U.S. Department of Defense to Kirby-Smith Machinery, Inc. with a period of performance of February 26, 2020 through November 23, 2020).

6. On September 10, 2020, Restore Oklahoma received a \$10,000 contribution from “Kirby-Smith Machinery Inc,” 6175 W Reno, Oklahoma City, OK, 73127, according to the committee’s 2020 October Quarterly Report filed with the Commission.<sup>8</sup>

#### **SUMMARY OF THE LAW**

7. “Contribution” is defined as “any gift . . . of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 52 U.S.C. § 30101(8)(A)(i).
8. Federal law prohibits a federal contractor from making any “contribution to any political party, committee, or candidate for public office” at any time between the commencement of negotiations for a federal contract and the completion of performance or termination of negotiations for the contract. 52 U.S.C. § 30119(a)(1).
9. Federal law additionally prohibits any person from knowingly soliciting such a contribution from a federal contractor. 52 U.S.C. § 30119(a)(2).
10. The contractor contribution ban applies to any person “who enters into any contract with the United States or any department or agency thereof” for “the rendition of personal services” or for “furnishing any material, supplies, or equipment,” or for “selling any land or building,” if “payment for the performance of such contract or payment for such material, supplies, equipment, land, or building is to be made in whole or in part from funds appropriated by the Congress.” 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.1(a).
11. The ban applies from when a request for proposals is sent out (or when contractual negotiations commence) until the completion of performance of the contract or the termination of negotiations. 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.1(b).

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<sup>8</sup> Restore Oklahoma, 2020 October Quarterly Report, FEC Form 3X at 11 (filed Oct. 13, 2020), <https://docquery.fec.gov/pdf/043/202010139285519043/202010139285519043.pdf>.

12. Since 2011, the Commission has made clear that the government contractor prohibition applies to contributions to independent expenditure-only political committees (i.e., “super PACs”) following the U.S. Supreme Court’s decision in *Citizens United v. FEC*<sup>9</sup> and the D.C. Circuit decision in *SpeechNow.org v. FEC*.<sup>10</sup> See, e.g., Advisory Opinion 2011-11 (Colbert) at 4-5, 10 (June 30, 2011); see also Press Release, FEC, FEC statement on Carey v. FEC reporting guidance for political committees that maintain a non-contribution account, n.1 (Oct. 5, 2011), <https://www.fec.gov/updates/fec-statement-on-carey-fec/>. In MUR 6403, the Commission emphasized that a contractor making a contribution to a political committee to fund independent expenditures is not itself making an expenditure; therefore, a contribution to such a committee falls “squarely within the statute’s prohibitions.” MUR 6403 (Alaskans Standing Together), Notification with Factual and Legal Analysis to Ahtna, Inc. and NANA Regional Corporation, Inc. at 5, 9 (Nov. 10, 2011). In 2017, the Commission found reason to believe that federal contractor Suffolk Construction Company, Inc. had violated 52 U.S.C. § 30119(a)(1) by contributing \$200,000 to Priorities USA Action, a super PAC supporting then-presidential candidate Hillary Clinton. See MUR 7099 (Suffolk Construction Company, Inc.), Notification to Campaign Legal Center at 1 (Sep. 25, 2017). The Commission emphasized that there is no *de minimis* exception to section 30119(a)(1), finding that even if a contributor’s federal contract work is only a “small fraction” of its overall business, this “does not negate the company’s status as a federal contractor.” MUR 7099, Factual and Legal Analysis at 4-5.
13. In 2019, the Commission found reason to believe that federal contractor Ring Power Corporation violated 52 U.S.C. § 30119(a)(1) when it contributed \$50,000 to the super PAC

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<sup>9</sup> 130 S. Ct. 876 (2010).

<sup>10</sup> 599 F.3d 686 (D.C. Cir. 2010).

New Republican PAC while holding active federal contracts. MUR 7451 (Ring Power Corporation), Notification to Campaign Legal Center at 1 (June 19, 2019). The Commission found reason to believe, and entered into pre-probable cause conciliation, even though the super PAC ultimately refunded the illegal contribution. MUR 7451, Conciliation Agreement at 2-3 (June 4, 2019). In recommending a reason-to-believe finding, the Commission’s Office of General Counsel emphasized that Ring Power Corporation’s assertion that the active contract constituted only a small proportion of the company’s overall revenue “does not negate the company’s status as a federal contractor under the Act, or obviate the violation.” MUR 7451, First General Counsel’s Report at 6 (Apr. 8, 2019). “Similarly,” OGC proceeded, “Ring Power’s remedial measures—obtaining a refund and other steps taken to ensure it would no longer make prohibited contributions—do not excuse the violation.” *Id.* Pursuant to the conciliation agreement, Ring Power Corporation agreed to pay the Commission a \$9,500 penalty. MUR 7451, Conciliation Agreement at 2-3. Similarly, in 2020, the Commission found reason to believe that Alpha Marine Services violated 52 U.S.C. § 30119(a)(1) by contributing \$100,000 to the super PAC Congressional Leadership Fund while holding active federal contracts, notwithstanding the fact that Alpha Marine sought and obtained a refund upon learning of the complaint. MUR 7458 (Alpha Marine Services), Notification to Campaign Legal Center at 1 (July 22, 2020); MUR 7458, Conciliation Agreement at 3-4. Alpha Marine Services agreed to pay the Commission a \$17,000 penalty. MUR 7458, Conciliation Agreement at 4.

14. The federal contractor ban was upheld unanimously by the *en banc* D.C. Circuit in *Wagner v. Fed. Election Comm’n*, 793 F.3d 1 (D.C. Cir. 2015) (*en banc*). The *en banc* court stressed that “the record offers every reason to believe that, if the dam barring contributions were

broken, more money in exchange for contracts would flow through the same channels already on display.” *Id.* at 18.

### CAUSE OF ACTION

#### **I. KIRBY-SMITH MACHINERY, INC. VIOLATED THE CONTRACTOR CONTRIBUTION BAN**

15. Federal law and Commission regulations prohibit a federal contractor from making any contribution to any political committee during the period in which a federal contract is being negotiated or performed. 52 U.S.C. § 30119(a)(1); 11 C.F.R. Part 115.
16. According to USAspending.gov, “the official source for spending data for the U.S. Government,” Kirby-Smith Machinery, Inc. is a federal contractor and was a federal contractor when it made the \$10,000 contribution to Restore Oklahoma on September 10, 2020.<sup>11</sup>
17. Consequently, there is reason to believe that Kirby-Smith Machinery, Inc., as a federal contractor, violated the federal contractor contribution ban by making a “contribution to any political . . . committee,” namely Restore Oklahoma, during the period its federal contracts were being negotiated and/or performed. 52 U.S.C. § 30119(a)(1).

### PRAYER FOR RELIEF

18. Wherefore, the Commission should find reason to believe that Kirby-Smith Machinery, Inc. violated 52 U.S.C. § 30101 *et seq.*, and conduct an immediate investigation under 52 U.S.C. § 30109(a)(2).
19. The Commission should seek appropriate sanctions for any and all violations, including civil penalties sufficient to deter future violations and an injunction prohibiting the respondents

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<sup>11</sup> See *supra* ¶¶ 5-6.

from any and all violations in the future, and should seek such additional remedies as are necessary and appropriate to ensure compliance with the FECA.

Respectfully submitted,



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October 28, 2020




**VERIFICATION**

The complainant listed below hereby verify that the statements made in the attached Complaint are, upon their information and belief, true.

Sworn pursuant to 18 U.S.C. § 1001.

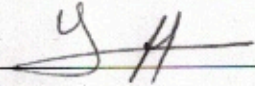
For Complainant Campaign Legal Center



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Brendan M. Fischer

Sworn to and subscribed before me this 27 day of October 2020.



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Notary Public

