



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Protect Colorado Jobs, Inc.)	MUR 6056
John Berry)	
Curt Cerveney)	
Armstrong for Congress and Brian Watson,)	
in his official capacity as treasurer.)	

**STATEMENT OF REASONS
COMMISSIONER CYNTHIA L. BAUERLY
COMMISSIONER ELLEN L. WEINTRAUB**

This matter concerns a mailer about a candidate that was prepared with corporate funds and possibly coordinated with one of the candidate's opponents. The complaint alleged that Protect Colorado Jobs, Inc. ("PCJ") used corporate funds to pay for a mailer attacking Mike Coffman, a candidate in the Republican primary for the 6th Congressional District in Colorado (the complainant), and included as respondents John Berry as PCJ's secretary and present treasurer, as well as Curt Cerveney, PCJ's former treasurer and the alleged signatory of the check used to pay for the mailer. Consistent with its standard practice, the Office of General Counsel ("OGC") reviewed the complaint, the response, and publicly available information in the course of preparing its recommendations for the Commission. Based upon publicly available information suggesting that PCJ may have coordinated the mailer with the campaign of Wil Armstrong, a primary election opponent of Coffman, OGC notified Armstrong for Congress ("AFC") and its treasurer Brian Watson and provided them with an opportunity to respond. OGC subsequently recommended that the Commission find reason to believe that the mailer was coordinated between PCJ and AFC.¹

The complaint is brief, but to the point. It states, in pertinent part:

During the last week of July, 2008, approximately three weeks before the Republican primary for the 6th Congressional District, PCJ used corporate funds to pay for an attack mailing against Coffman. The attack piece was mailed to every Republican voter

¹ Chairman Walther and Commissioners Bauerly and Weintraub voted to approve OGC's recommendation to find reason to believe and to open an investigation, while Vice-Chairman Petersen and Commissioners Hunter and McGahn voted against the recommendation.

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who requested a primary absentee ballot. Cerveny signed PCJ's corporate check to pay for the mailing.

The Federal Election Campaign Act ("FECA") requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated. In fact, "reason to believe" determinations indicate only that the Commission found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred.² Before the Commission votes to find reason to believe, the Act requires the Commission to notify respondents of the complaint and respondents may demonstrate, in writing, why no action should be taken against them. 2 U.S.C. § 437g(a)(1). Before the Commission finds probable cause that a violation occurred, the General Counsel provides respondents with a brief stating its position on the legal and factual issues, to which respondents may submit a written brief in response. 2 U.S.C. § 437g(a)(3).

Under the Act, corporations are generally prohibited from making contributions or expenditures from general corporate funds in connection with federal elections. 2 U.S.C. § 441(b). An expenditure that is made "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or political party committee "shall be considered to be a contribution." 2 U.S.C. § 441a(a)(7)(B). Therefore, an expenditure made by a corporation in coordination with a candidate committee constitutes an impermissible in-kind corporate contribution.

There was sufficient basis to investigate this matter. The Commission should have found reason to believe that PCJ made, and Curt Cerveny, as a PCJ officer, consented to, a prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a). The Commission should have further found reason to believe that AFC accepted and received a prohibited in-kind contribution in violation of 2 U.S.C. § 441b(a) and failed to report the prohibited in-kind corporate contribution in violation of 2 U.S.C. § 434(b). We could then have conducted a focused investigation that would have either established probable cause or exonerated the respondents.

² See 72 Fed. Reg. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007, approved by a unanimous Commission). Additionally, our colleagues appear to have misread the formulation of the reason-to-believe standard expressed in our Statement of Reasons in MURs 6051 & 6052 (Wal-Mart Stores, Inc.). In that Statement, we explain that while there was not enough information to conclusively determine that the respondent (Wal-Mart) had violated the Act, there was "certainly enough information to find reason to believe a violation occurred to authorize a limited investigation" which is why we voted in favor of finding reason to believe in the Wal-Mart case. *Id.* at 2. We also noted that given the public statements of the employees and the corporations' response, there was clearly not enough information to disprove the allegations and thus not enough information to find "no reason to believe" - which was the motion voted for by three of our colleagues in that matter. It is not surprising that since we thought there *was* reason to believe, we would not have supported a motion to find "*no* reason to believe."

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FACTUAL AND LEGAL ANALYSIS

A. FACTUAL BACKGROUND

During the pertinent time period, the Complainant, Mike Coffman, served as the Secretary of State for Colorado. With the impending retirement of the 6th District incumbent, Mr. Coffman announced his candidacy for the seat and joined a crowded field of Republican primary candidates including Wil Armstrong. The primary was held on August 12, 2008.

1. Protect Colorado Jobs, Inc.

PCJ is a nonprofit corporation registered with the Colorado Secretary of State. PCJ organized May 4, 2007, and listed as its primary purpose "to promote economic development for its members in Colorado without engaging in regular business . . ."³ Its registered agent is John Berry, the current treasurer and initial incorporator of the organization. At all relevant times, Cerveny was an agent and treasurer of PCJ. PCJ's primary activity supported the Colorado Right-to-Work Initiative, a ballot initiative on the November 4, 2008, general election ballot.

The Right-to-Work Initiative was also supported by Colorado Right-to-Work Committee ("CRTW"), a state-registered issue committee.⁴ In addition to being PCJ's registered agent, John Berry is CRTW's registered agent. Cerveny was the political consultant running the campaign for the Right-to-Work Initiative.⁵ CRTW's counsel was Scott Gessler, who is also campaign legal advisor for Wil Armstrong and AFC.⁶ During the relevant time period, Gessler, Cerveny, and Berry worked towards passing the Right-to-Work Initiative through the combined efforts of PCJ and CRTW.

Available information shows that PCJ contributed \$289,000 to CRTW to support the collection of signatures to put the measure on the November ballot, and, in fact, PCJ was the only source of funds to CRTW.⁷ PCJ steadily contributed funds to CRTW from December 10, 2007 through April 10, 2008. State financial disclosure records reflect no further contributions by PCJ to CRTW after the initiative was certified for the general election on April 28, 2008.⁸ Local reports revealed that CRTW's campaign efforts also ceased after April 2008.⁹

³ See COLORADO SECRETARY OF STATE, ARTICLES OF INCORPORATION, PROTECT COLORADO JOBS, INC.

⁴ Additional organizations involved in the effort to pass the initiative include Defend Our Economy, registered agent John Berry, which has the same registered address as PCJ, and A Better Colorado, whose registered agent, Mario Nicolais, is Respondents' counsel and an associate attorney for the law firm of Hackstaff and Gessler of which Scott Gessler is a principal.

⁵ See *Colorado Right to Work Initiative (2008)*,

http://ballotpedia.org/wiki/index.php?title=Colorado_Right_to_Work_Initiative_%282008.

⁶ See Vuong, Andy, *Right to Work Committee Penalized \$9,750*, THE DENVER POST, October 16, 2008; Bragg, Chris, *Gessler Fingerted in Mail Attack on Coffman*, THE COLORADO STATESMAN, August 8, 2008.

⁷ See *Colorado Right to Work Initiative (2008)*,

http://ballotpedia.org/wiki/index.php?title=Colorado_Right_to_Work_Initiative_%282008.

⁸ See COLORADO SECRETARY OF STATE, CONTRIBUTION RECORDS,

<http://www.sos.state.co.us/cpf/ContribCriteriaPage.do;jsessionid=0000QKCfb2RvrOPbvX>; *Colorado Right to Work Initiative (2008)*, http://ballotpedia.org/wiki/index.php?title=Colorado_Right_to_Work_Initiative_%282008.

⁹ See *Campaign 2008*, <http://www.politicswest.com/campaign2008?page=4>.

2. The PCJ Mailer

In July 2008, funds from PCJ's corporate account were used to pay for the creation and distribution of the subject mailer, distributed to approximately 50,000 Sixth District registered Republican voters.¹⁰ One side of the mailer consists of a large photograph identified as that of Mike Coffman and a statement: "Call Mike Coffman and ask him to stop increasing his office budgets, comply with immigration laws, and adopt strict office protocols to prevent political influence." The other side of the mailer begins with a bold print headline, "**MIKE COFFMAN: AFTER 20 YEARS IN PUBLIC OFFICE, HE'S TURNED INTO A BIG GOVERNMENT PROFESSIONAL POLITICIAN.**" The mailer further states that during Coffman's public service as State Treasurer and his current role as Secretary of State, he increased office budgets and failed to adequately manage staff. The mailer includes quotes from local newspapers critical of Coffman. A single quote refers to Coffman's congressional bid: "'The chief of staff to Secretary of State Mike Coffman is doing campaign work for Coffman's congressional bid in an apparent breach of ethics, according to government watchdog groups.' *ROCKY MOUNTAIN NEWS, March 7, 2008.*" The bottom portion of this side of the mailer includes a disclaimer stating that it is paid for by PCJ, listing PCJ's address, and stating that the mailer is not authorized by any candidate or candidate's committee.

PCJ issued the mailer shortly before the primary held on August 12, 2008. The 6th District race drew substantial local media attention, as did the PCJ mailer. Coffman's primary opponents Wil Armstrong, Ted Harvey, and Steve Ward denied responsibility for the mailer.¹¹ On July 31, 2008, John Berry issued a press release on behalf of PCJ apologizing to Coffman and stating that PCJ officer/treasurer Curt Cerveney produced the mailer without the knowledge or consent of PCJ members to use its corporate account to pay for the mailer. Several newspaper articles quoted Berry asserting that Cerveney may have used funds belonging to another person that were deposited into PCJ's account.¹² Local media reported that unnamed members of the Coffman campaign stated Gessler paid approximately \$15,000 to PCJ for the mailer, and Cerveney was paid \$3,000 to \$4,000 for producing the mailer.¹³ The Commission does not have information at this time indicating whether the \$15,000 reportedly paid by Gessler represents the actual costs of producing and disseminating the mailer. The press release further advised that Cerveney had resigned from PCJ on July 31, 2008.

While Coffman's primary opponents continued to deny any involvement with the PCJ mailer, reports in the local media suggested that Scott Gessler, the campaign legal advisor of Wil Armstrong, was responsible for the mailer.¹⁴ Local media reported the Coffman campaign's

¹⁰ See 501(c)(4) Chair Arranged Unauthorized Anti-Coffman Attack Piece, <http://www.politicker.com/colorado/5281/501c4-chair-arranged-unauthorized-anti-coffman-attack-piece>.

¹¹ See *Politigab*, THE COLORADO SPRING GAZETTE, August 5, 2008.

¹² See *id.*

¹³ See Bragg, Chris, *Gessler Fingered in Mail Attack on Coffman*, THE COLORADO STATESMAN, August 8, 2008.

¹⁴ *Id.*

assertion that Wil Armstrong instigated the mailer, though the Armstrong campaign denied such action.¹⁵

B. LEGAL ANALYSIS

OGC analyzed whether PCJ's payment for the mailer might have been impermissible as (1) a corporate expenditure; (2) an electioneering communication; or (3) a coordinated communication. It concluded that investigation was warranted only as to coordination, a conclusion with which we agree.¹⁶

The Commission's regulations set forth a three-part test to determine whether a communication is coordinated: (1) The payment must be by someone other than the candidate, his committee or political party committee; (2) the communication must satisfy one or more of four content standards; and (3) the communication must satisfy one or more of six conduct standards. 11 C.F.R. § 109.21.¹⁷

1. Payment

PCJ's disclaimer on the mailer states that it paid for the communication.¹⁸ PCJ also issued a statement admitting that it sent the mailer and apologizing for doing so.¹⁹ PCJ's response does not dispute that it used corporate funds for the mailer. *See* PCJ Response. Thus, the payment prong of the coordination regulation is satisfied.

2. Content

The mailer also satisfies the content prong. Commission regulations provide that the content prong may be satisfied by meeting one of four standards. The relevant standard here is whether the mailer is a public communication that refers to a clearly identified federal candidate, was publicly distributed or disseminated 90 days or fewer before a primary or general election, and was directed to voters in the jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.21(c)(4).

¹⁵ *See Campaign 2008*, <http://www.politicswest.com/campaign2008?page=4>.

¹⁶ If the activity was coordinated, the funds spent on the mailer would constitute an in-kind contribution to AFC from PCJ. Such an in-kind contribution from a corporation would be prohibited under the Act. *See* 2 U.S.C. §§ 441b(a) and 431(8)(A)(i); 11 C.F.R. §§ 100.52(d)(1) and 114.2(b)(1). In addition, the failure to have reported any such contributions would be an independent violation of the reporting requirements. *See* 2 U.S.C. § 434(b); 11 C.F.R. §§ 109.21(b)(1) and (3).

¹⁷ The Commission is in the process of revising its coordination regulations in response to the decision in *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007), *affirmed in pertinent part*, *Shays v. FEC*, 528 F.3d 914 (D.C.Cir. 2008). The regulations described in text are those that were in effect during the time period relevant to the complaint.

¹⁸ A copy of the mailer was attached to the complaint and is available on the FEC website at <http://eqs.sdrdc.com/eqsdocs/29044232707.pdf>.

¹⁹ Morson, Bery, *Group Apologizes For Derogatory Mailing In 6th CD Race* ROCKY MOUNTAIN NEWS, July 31, 2008.

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The PCJ mailer meets the definition of a public communication because it: (1) consisted of "a communication by means of . . . mass mailing . . . to the general public;" and (2) clearly identified Mike Coffman, a candidate in the Republican primary election for Colorado's 6th Congressional District held on August 12, 2008, using his name and image. *See* 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. A "mass mailing" means a mailing by "United States mail . . . of more than 500 pieces of mail matter of an identical . . . nature within any 30-day period." 2 U.S.C. § 431(23); 11 C.F.R. § 100.27. The response acknowledged that PCJ sent the mailers via the "U.S. Postal system." PCJ Response at 4. Public information reviewed provides that PCJ sent the mailer to approximately 50,000 6th District registered Republican voters, starting the week of July 13, approximately four weeks before the primary. The Complaint asserts the mailer was distributed to "every Republican voter who requested a primary absentee ballot," and PCJ acknowledged the mailer was distributed to "voters in the 6th Congressional District." *See* Complaint at 2 and PCJ Response at 1. Accordingly, the content standard was satisfied.

3. Conduct

The Commission's regulations set forth six types of conduct between the payor and the committee or candidate that can satisfy the conduct prong, even if there is no agreement or formal collaboration. 11 C.F.R. § 109.21(d). Three of these standards appear to be relevant in this case: (1) request or suggestion, (2) material involvement, and (3) substantial discussion. The first standard of the conduct prong is met when a communication is created, produced or distributed by a third party at the request or suggestion of a candidate or authorized committee; or when a candidate or committee assents to a request or suggestion that the public communication be created, produced, or distributed, and that suggestion came from the third-party payor. 11 C.F.R. §§ 109.21(d)(1)(i) and (ii). Material involvement is met if a candidate, authorized committee, or political party is materially involved in decisions regarding a communication's content, intended audience, means or mode of communication, specific media outlet, timing or frequency, or the size, prominence, or frequency of the communication. 11 C.F.R. § 109.21(d)(2). 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).

Here, there was reason to believe that the conduct prong may have been satisfied. The Complaint alleges that PCJ used corporate funds to pay for a mailer critical of Coffman that was targeted only to registered Republican voters in the 6th Congressional District shortly before the August 12 primary election in which Coffman and Armstrong were candidates. *See* Complaint at 1-2. The available information indicates that Scott Gessler, legal advisor to Wil Armstrong and the Armstrong campaign, reportedly donated \$15,000 to PCJ for the creation and distribution of the anti-Coffman mailer, which was paid for with a PCJ check signed by Curt Cerveny, PCJ's agent/treasurer at the time. Gessler and Cerveny were involved in the Colorado Right-to-Work Initiative: Gessler served as primary counsel for CRTW, which received its entire funding of \$289,000 from PCJ, and Cerveny worked as a campaign consultant on the Initiative. Also involved in both PCJ and the Initiative was John Berry, who serves as treasurer of PCJ and registered agent of CRTW.

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AFC denies involvement with the "preparation, development, or distribution" of the mailer. See Armstrong Response at 1. AFC also states it is unaware of any coordinated efforts between its agents and PCJ. *Id.* As legal advisor for Armstrong and AFC, however, Gessler may have had actual authority to engage in activities on behalf of AFC. See 11 C.F.R. § 109.3 (for purposes of the coordinated communications regulations, an agent is a person with actual authority, express or implied, to act on behalf of a specified person). If this is true, his actions would be imputed to AFC. See *id.* The content of the mailer, which focuses on a candidate in the primary, does not appear to be relevant to the ballot initiative or PCJ's stated goal of "promot[ing] economic development." In light of the connected relationships and the possibility that agents of Armstrong's campaign were involved in the payment, creation or distribution of the mailer, we agreed with OGC that a limited investigation of these issues was necessary.

Such an investigation need not have been onerous or wide-ranging. An appropriately focused investigation could have determined the key unknown facts in this matter, i.e.: (1) whether Gessler was an agent of AFC; (2) the relationship between PCJ agent/treasurer Cerveny and Gessler; (3) whether AFC was involved in requesting or suggesting the creation or distribution of the mailer; and (4) whether Gessler was the source of the reported \$15,000 donation to PCJ for the mailer.

To determine whether the candidate or authorized committee made a request or suggestion, had material involvement, or a substantial discussion regarding a communication's creation, production or distribution by a third party, one would need to know facts that are inherently within respondents' knowledge. It is exceedingly unlikely that a complainant would ever have personal knowledge of discussions between a campaign and third party. To expect the complainant to provide verified facts regarding the conduct prong could effectively prevent the Commission from investigating a potential coordination violation.

Moreover, the FECA very clearly provides that the Commission should consider information ascertained in the normal course of carrying out its supervisory responsibilities *prior to making a reason to believe finding*. See 2 U.S.C. § 437g(a)(2)(emphasis added). To review publicly filed documents, public statements made by relevant witnesses, and even press reports that include anonymous sources does not go beyond the scope of the statute in any way. In fact, it is exactly the type of examination envisioned by statute and the Courts:

[T]he Commission may not rely solely on the facts presented by the sworn complaint when deciding whether to investigate. Although the facts provided in a sworn complaint may be insufficient, when coupled with other information available to the Commission gathered either through similar sworn complaints or through its own work the facts may merit a complete investigation. By the same turn, a persuasive and strong complaint may not merit an investigation because the Commission possesses reliable evidence indicating that no violation has occurred. Thus, it is clear that a consideration of all available material is vital to a rational review of Commission decisions. In addition, section 437g(a)(2) envisions this broad examination of all evidence available to the Commission. Its

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language provides that the Commission must investigate a sworn complaint "if it has reason to believe that any person has committed a violation" of the election laws; the statute's reference to the Commission's "belief" calls for the Commission to exercise its informed discretion. This discretion must be based on all the information which the FEC possesses, including the individual sworn complaint, other sworn complaints, and facts which the FEC has ascertained in the normal course of carrying out its supervisory responsibilities.²⁰

The complaint in this matter was brief, but it contained sufficient information, when coupled with publicly available information, to warrant investigation.²¹ A complaint "should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 114.4(d)(3). The complaint filed in this matter contains a clear and concise recitation of facts that describe potential FECA violations as it: (1) states that a corporation funded a mailer; (2) provides the content of the mailer; and (3) estimates the number of individuals to whom the mailer was sent, which is relevant to whether it was a public communication under Commission regulations. The Commission is charged with investigating allegations of violations of the Act. We should not require complainants to conduct the investigations for us before we are willing to act.

We reject the suggestion that in assessing whether an investigation is warranted, the Commission need limit itself to the four corners of the complaint and ignore publicly available information. The Commission is not a court judging the merits of arguments posed by private litigants. Rather, the Commission is a civil enforcement agency, charged with investigating whether or not the law was violated and enforcing the law. *See* 2 U.S.C. 437g, *Enforcement*. We should not perform this task with blinders on, refusing to take into account what is publicly known. To do so would be a disservice to the public and the parties involved in a particular matter, and would rightly foster the view that the Commission's decisions are out of touch with reality. Indeed, for many years, the Commission has expected OGC to review such information and to advise the Commission based on an assessment of that information as well as the complaint and the response. In many cases, the available information may support a finding that there is no reason to believe that a violation of the Act has occurred, or may otherwise support dismissing the matter. The Act itself provides for the Commission to consider information beyond the four corners of a complaint. *See* 2 U.S.C. 437g(a)(2).²² Moreover, if other

²⁰ *In re* Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1046 (D.D.C. 1979).

²¹ *See* Antosh v. Federal Election Com'n, 599 F.Supp. 850, 855 (D.D.C. 1984) (holding the Commission's dismissal of a complaint was arbitrary and capricious where it ignored publicly filed reports and quoting *In re Federal Election Campaign Act Litigation* for the proposition that the Commission must take into account *all* available information when considering alleged wrongdoing).

²² It is worth noting that although our colleagues are affronted that OGC considered information on the public record, they themselves refer to a number of facts not included in the complaint or response to speculate about various individuals' motivations in this matter. For example, our colleagues refer to news reports in an attempt to hypothesize why Curt Cerveny may have been motivated to create the mailer. *See e.g.*, MUR 6056 Statement of Reasons of Vice-Chairman Petersen and Commissioners Hunter and McGahn at 9-10. Our colleagues' use of publicly available information also may suggest that PCJ or Cerveny may have coordinated with another candidate. *Id.* at 10, n. 28 (noting that Cerveny contributed to another primary candidate's campaign and that Cerveny's

Commissioners wanted PCJ to receive notice of a particular newspaper article or the coordination recommendation, it would have been possible to instruct OGC to send a letter to PCJ before voting on the reason to believe recommendation.

For the foregoing reasons, we voted to adopt OGC's recommendations in this matter.

6/2/09
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Commissioner

6/2/09
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

consulting firm, Politically Direct, received business from that candidate's campaign and relying upon reports filed with the FEC as well as newspaper reports).

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