

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Kenneth R. Buck; Buck for Colorado and)
Kenneth Salazar, in his official capacity)
as treasurer; Perry Buck; Hensel Phelps)
Construction; Cache Bank and Trust;) MUR 6296
Jerry Morgensen; Americans for Job)
Security; Campaign for Liberty;)
Declaration Alliance)

CERTIFICATION

I, Shawn Woodhead Werth, recording secretary of the Federal Election Commission executive session, do hereby certify that on December 14, 2010, the Commission took the following actions in the above-captioned matter:

1. Decided by a vote of 5-0 to:
 - a. Find no reason to believe that Perry Buck violated 2 U.S.C. § 441a(a)(1)(A).
 - b. Find no reason to believe that Hensel Phelps Construction violated 2 U.S.C. §§ 441b and 441c.
 - c. Find no reason to believe that Cache Bank and Trust violated 2 U.S.C. §§ 441a or 441b.
 - d. Find no reason to believe that Campaign for Liberty violated 2 U.S.C. § 441b.
 - e. Find no reason to believe that Declaration Alliance violated 2 U.S.C. § 441b.

Commissioners Hunter, McGahn II, Petersen, Walther and Weintraub voted affirmatively for the decision. Commissioner Bauerly did not vote.

11044284349

2. Failed by a vote of 2-3 to:

- a. Find reason to believe that Kenneth R. Buck violated 2 U.S.C. §§ 441a(f), 441b, and 441i(e).
- b. Find reason to believe that Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f), 441b and 441i(e).
- c. Find reason to believe that Jerry Morgensen violated 2 U.S.C. § 441a(a)(1)(A).
- d. Find reason to believe that Americans for Job Security violated 2 U.S.C. § 441b.
- e. Revise the Factual and Legal Analyses, as recommended in the First General Counsel's Report dated November 1, 2010, consistent with this motion.
- f. Authorize the use of compulsory process.
- g. Approve the appropriate letters and investigation.

Commissioners Walther and Weintraub voted affirmatively for the motion.

Commissioners Hunter, McGahn II and Petersen dissented. Commissioner Bauerly did not vote.

3. Failed by a vote of 3-2 to:

- a. Find no reason to believe that Kenneth R. Buck violated 2 U.S.C. §§ 441a(f) and 441b.
- b. Find no reason to believe that Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b.
- c. Find no reason to believe that Jerry Morgensen violated 2 U.S.C. § 441a(a)(1)(A).
- d. Find no reason to believe that Americans for Job Security violated 2 U.S.C. § 441b.
- e. Approve the Factual and Legal Analyses, as recommended in the First General Counsel's Report dated November 1, 2010.
- f. Approve the appropriate letters.
- g. Close the file.

11044284350

Commissioners Hunter, McGahn II and Petersen voted affirmatively for the motion.

Commissioners Walther and Weintraub dissented. Commissioner Bauerly did not vote.

4. Decided by a vote of 5-0 to:
 - a. Approve the appropriate letters.
 - b. Close the file.

Commissioners Hunter, McGahn II, Petersen, Walther and Weintraub voted affirmatively for the decision. Commissioner Bauerly did not vote.

Attest:

December 16, 2010
Date

Shawn Woodhead Werth
Shawn Woodhead Werth
Secretary and Clerk of the Commission

11044284351



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

Ernest J. Panasci
Cache Bank & Trust.
5613 DTC Parkway, Suite 970
Suite 970
Greenwood Village, Colorado 80111

RE: MUR 6296
Cache Bank & Trust

Dear Mr. Panasci:

On May 26, 2010, the Federal Election Commission notified Cache Bank & Trust 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 other available information, that there is no reason to believe Cache Bank & Trust violated 2 U.S.C. §§ 441a or 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. Lockett".

Roy Q. Lockett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

11044284372

11044284373

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Cache Bank and Trust 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

This matter involves Kenneth R. Buck, the 2010 Republican candidate for Senate in Colorado. The complaint alleges that Cache Bank and Trust violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by making an excessive contribution to Buck, which he then improperly loaned to Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer ("Buck Committee" or the "Committee").

On March 30, 2010, Buck loaned \$100,000 to his Committee, and the Committee disclosed the loan in its April 2010 Quarterly Report, Schedule C. The complaint alleges that the source of the \$100,000 was a \$120,000 bank loan from Cache Bank based on collateral – a townhouse – owned by Buck and his wife Perry Buck. Although the complaint does not specify how the loan in question violates the Act, it appears to allege that this transaction constituted an excessive or prohibited contribution from Cache Bank to Buck and the Committee because the alleged loan-to-collateral ratio represents 71.5% of the assessed value (\$167,852) of the townhouse. Complaint at 4.

1 According to Jerry Morgensen, a member of the board of Cache Bank and part owner,
2 bank employees confirmed that the loan to Buck in December 2008 was made through normal
3 procedures and approved by the loan committee.

4 Corporations are prohibited from making any federal political contributions. 2 U.S.C.
5 § 441b. The complaint did not attach any documents concerning the Cache Bank loan. Instead,
6 it attaches documents regarding ownership of the townhouse and what appears to be a
7 refinancing loan obtained by the Bucks in November 2009. According to Morgensen, the Bucks
8 obtained the Cache Bank loan in 2008 for the purpose of buying out his brothers' interest in the
9 deceased mother's home, though neither respondent knows for sure how the proceeds from the
10 loan were used.

11 **B. Analysis**

12 The complainant alleges that Cache Bank was the source of the \$100,000 that Buck
13 loaned to his Committee. Based on the available information, it appears that complainant was
14 simply incorrect about the source of the money used to fund Buck's loan to his Committee. As
15 discussed above, the Cache Bank loan cited by complainant was unrelated to Buck's candidacy
16 and repaid in full in November 2009.

17 Therefore, the Commission has determined to find no reason to believe that Cache Bank
18 and Trust violated 2 U.S.C. §§ 441a or 441b by making an excessive or prohibited corporate
19 contribution.

11044284374



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

John S. Miles
William J. Olson, P.C.
370 Maple Avenue West
Suite 4
Vienna, Virginia 22180-5615

RE: MUR 6296
Campaign for Liberty

Dear Mr. Miles:

On May 26, 2010, the Federal Election Commission notified your client, Campaign for Liberty, 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 Campaign for Liberty 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. Lockett".

Roy Q. Lockett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

11044284376

11044284377

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Campaign for Liberty 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 Campaign for Liberty
3 (“CFL”). Supplemental Complaint at 2; *see also* Complaint at 3.

4 The complaint and its supplement further allege that the funds were then used by CFL to
5 disseminate advertisements supporting Buck and opposing other candidates. *Id.* Specifically,
6 the complaint alleges that in January 2010, CFL aired a television ad attacking one of Buck’s
7 primary opponents that reportedly cost \$329,000. Complaint at 3, Complaint Exh. J.

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

17 Buck and the Committee state that the complaint makes many conclusory allegations but
18 contains no facts. Specifically, Buck and the Committee state that “they have not cooperated
19 with, consulted with, acted in concert with, requested, or suggested that ... Campaign for Liberty
20 ... or any of their employees, officers, directors, or agents make any public communications
21 supporting Buck’s candidacy.”

22 CFL states that it ran an issue ad, which complimented Buck for completing a survey
23 form sent to all Colorado candidates, with no involvement of anyone mentioned in the complaint.

1 CFL Response, Affidavit of President John Tate, ¶¶ 4, 6. CFL also maintains that it did not
2 communicate with the Buck campaign or anyone known to be associated with it prior to running
3 the ad, and it created, produced, and ran the ad independent of any candidate or political party.
4 *Id.*, ¶ 6. Morgensen states that he has not been involved in any financial transaction with CFL.

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 then made
8 "excessive" donations to CFL so that CFL 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 CFL 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 CFL paid for the advertisements at issue. The content prong
4 need not be decided because the conduct prong does not appear to be satisfied.¹

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

¹ 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.

11044284380

MUR 6296
Campaign for Liberty
Factual and Legal Analysis

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 CFL's specific, definitive response that
5 it 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 CFL so that it 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 CFL.

18 Therefore, the Commission has determined to find no reason to believe that Campaign for
19 Liberty violated 2 U.S.C. § 441b by making prohibited in-kind corporate contributions in the
20 form of coordinated communications.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

James A. Sivesind
Reed & Davidson
3699 Wilshire Boulevard
Suite 1290
Los Angeles, California 90010

RE: MUR 6926
Kenneth R. Buck
Buck for Colorado and Kenneth
Salazar, in his official capacity as
treasurer

Dear Mr. Sivesind:

On May 26, 2010, the Federal Election Commission notified your clients, Kenneth R. Buck and Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer ("the Committee"), of a complaint alleging that they had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

On December 14, 2010, the Commission considered the complaint, but there was an insufficient number of votes to find no reason to believe Kenneth Buck and the Committee violated 2 U.S.C. §§ 441a(f) and 441b. On the same date, there was an insufficient number of votes to find reason to believe Kenneth Buck and the Committee violated 2 U.S.C. § 441i(e). Accordingly, the Commission closed its file in this matter. One or more Statements of Reasons providing a basis for the Commission's decision will follow.

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).

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. Lockett".

Roy Q. Lockett
Acting Assistant General Counsel

11044284370



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

James A. Sivesind
Reed & Davidson
3699 Wilshire Boulevard
Suite 1290
Los Angeles, California 90010

RE: MUR 6296
Perry Buck

Dear Mr. Sivesind:

On May 26, 2010, the Federal Election Commission notified your client, Perry Buck, 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 Perry Buck violated 2 U.S.C. § 441a(a)(1)(A). Accordingly, the Commission closed its file in this matter. One or more Statements of Reasons providing a basis for the Commission's decision will follow.

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).

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

11044284368



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

Dirk D. Haire
Smith, Currie & Hancock
1901 Pennsylvania Avenue, N.W.
Suite 601
Washington, D.C. 20006

RE: MUR 6296
Jerry Morgensen

Dear Mr. Haire:

On May 26, 2010, the Federal Election Commission notified your client, Jerry Morgensen, of a complaint alleging that he had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

On December 14, 2010, the Commission considered the complaint, but there was an insufficient number of votes to find no reason to believe Jerry Morgensen violated 2 U.S.C. § 441a(a)(1)(A). Accordingly, the Commission closed its file in this matter. One or more Statements of Reasons providing a basis for the Commission's decision will follow.

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).

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. Lockett".

Roy Q. Lockett
Acting Assistant General Counsel

11044284383



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. Lockett".

Roy Q. Lockett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

11044284387

11044284388

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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 made
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.¹

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

¹ 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.

11044284391

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.

11044284392



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

Dirk D. Haire
Smith, Currie & Hancock
1901 Pennsylvania Avenue, N.W.
Suite 601
Washington, D.C. 20006

RE: MUR 6296
Hensel Phelps Construction

Dear Mr. Haire:

On May 26, 2010, the Federal Election Commission notified your client, Hensel Phelps Construction, 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 Hensel Phelps Construction violated 2 U.S.C. §§ 441b and 441c. Accordingly, the Commission closed its file in this matter. One or more Statements of Reasons providing a basis for the Commission's decision will follow.

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).

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

Sincerely,

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

Roy Q. Lockett
Acting Assistant General Counsel

11044284385



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 20 2010

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Charles R. Grice, Jr.

Aurora, Colorado 80016

RE: MUR 6296
Kenneth R. Buck, et al.

Dear Mr. Grice:

On December 14, 2010, the Federal Election Commission reviewed the allegations in your complaint dated May 18, 2010, and supplemental complaint dated May 18, 2010, and found that on the basis of the information provided in your complaints, and information provided by the respondents, there is no reason to believe:

- Perry Buck violated 2 U.S.C. § 441a(a)(1)(A);
- Hensel Phelps Construction Company violated 2 U.S.C. §§ 441b and 441c;
- Cache Bank & Trust violated 2 U.S.C. §§ 441a and 441b;
- Campaign for Liberty violated 2 U.S.C. § 441b; or
- Declaration Alliance violated 2 U.S.C. § 441b.

Enclosed, you will find Factual and Legal Analyses that provide a basis for some of the Commission's decisions noted above.

On the same date, there were an insufficient number of votes to find no reason to believe:

- Kenneth R. Buck violated 2 U.S.C. §§ 441a(f) and 441b;
- Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) and 441b;
- Jerry Morgensen violated 2 U.S.C. § 441a(a)(1)(A); or
- Americans for Job Security violated 2 U.S.C. § 441b.

Finally, on the same date, there were an insufficient number of votes to find reason to believe that Kenneth R. Buck and Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer, violated 2 U.S.C. § 441i(e).

11044284353

Accordingly, on December 14, 2010, the Commission closed the 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). One or more Statements of Reasons providing a basis for these decisions of the Commission will follow.

The Federal Election Campaign Act allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8). If you have any questions, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548.

Sincerely,

Christopher Hughey
Acting General Counsel

BY:



Roy Q. Lockett
Acting Assistant General Counsel

Enclosures

11044284354

11044284355

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Cache Bank and Trust 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. Grieb, Jr. *See* 2 U.S.C. § 437g(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

This matter involves Kenneth R. Buck, the 2010 Republican candidate for Senate in Colorado. The complaint alleges that Cache Bank and Trust violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by making an excessive contribution to Buck, which he then improperly loaned to Buck for Colorado and Kenneth Salazar, in his official capacity as treasurer (“Buck Committee” or the “Committee”).

On March 30, 2010, Buck loaned \$100,000 to his Committee, and the Committee disclosed the loan in its April 2010 Quarterly Report, Schedule C. The complaint alleges that the source of the \$100,000 was a \$120,000 bank loan from Cache Bank based on collateral – a townhouse – owned by Buck and his wife Perry Buck. Although the complaint does not specify how the loan in question violates the Act, it appears to allege that this transaction constituted an excessive or prohibited contribution from Cache Bank to Buck and the Committee because the alleged loan-to-collateral ratio represents 71.5% of the assessed value (\$167,852) of the townhouse. Complaint at 4.

1 According to Jerry Morgensen, a member of the board of Cache Bank and part owner,
2 bank employees confirmed that the loan to Buck in December 2008 was made through normal
3 procedures and approved by the loan committee.

4 Corporations are prohibited from making any federal political contributions. 2 U.S.C.
5 § 441b. The complaint did not attach any documents concerning the Cache Bank loan. Instead,
6 it attaches documents regarding ownership of the townhouse and what appears to be a
7 refinancing loan obtained by the Bucks in November 2009. According to Morgensen, the Bucks
8 obtained the Cache Bank loan in 2008 for the purpose of buying out his brothers' interest in the
9 deceased mother's home, though neither respondent knows for sure how the proceeds from the
10 loan were used.

11 **B. Analysis**

12 The complainant alleges that Cache Bank was the source of the \$100,000 that Buck
13 loaned to his Committee. Based on the available information, it appears that complainant was
14 simply incorrect about the source of the money used to fund Buck's loan to his Committee. As
15 discussed above, the Cache Bank loan cited by complainant was unrelated to Buck's candidacy
16 and repaid in full in November 2009.

17 Therefore, the Commission has determined to find no reason to believe that Cache Bank
18 and Trust violated 2 U.S.C. §§ 441a or 441b by making an excessive or prohibited corporate
19 contribution.

11044284356

11044284357

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Campaign for Liberty 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 Campaign for Liberty
3 (“CFL”). Supplemental Complaint at 2; *see also* Complaint at 3.

4 The complaint and its supplement further allege that the funds were then used by CFL to
5 disseminate advertisements supporting Buck and opposing other candidates. *Id.* Specifically,
6 the complaint alleges that in January 2010, CFL aired a television ad attacking one of Buck’s
7 primary opponents that reportedly cost \$329,000. Complaint at 3, Complaint Exh. J.

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

17 Buck and the Committee state that the complaint makes many conclusory allegations but
18 contains no facts. Specifically, Buck and the Committee state that “they have not cooperated
19 with, consulted with, acted in concert with, requested, or suggested that ... Campaign for Liberty
20 ... or any of their employees, officers, directors, or agents make any public communications
21 supporting Buck’s candidacy.”

22 CFL states that it ran an issue ad, which complimented Buck for completing a survey
23 form sent to all Colorado candidates, with no involvement of anyone mentioned in the complaint.

11044284358

1 CFL Response, Affidavit of President John Tate, ¶¶ 4, 6. CFL also maintains that it did not
2 communicate with the Buck campaign or anyone known to be associated with it prior to running
3 the ad, and it created, produced, and ran the ad independent of any candidate or political party.
4 *Id.*, ¶ 6. Morgensen states that he has not been involved in any financial transaction with CFL.

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 then made
8 "excessive" donations to CFL so that CFL 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 CFL 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

MUR 6296
Campaign for Liberty
Factual and Legal Analysis

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 CFL paid for the advertisements at issue. The content prong
4 need not be decided because the conduct prong does not appear to be satisfied.¹

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 CFL 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 CFL. Buck states that he has not cooperated with, consulted
18 with, acted in concert with, requested, or suggested that CFL or any of its employees, officers,
19 directors, or agents make any public communication supporting his candidacy. In addition, CFL

¹ 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.

11044284360

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 CFL's specific, definitive response that
5 it 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 CFL so that it 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 CFL.

18 Therefore, the Commission has determined to find no reason to believe that Campaign for
19 Liberty violated 2 U.S.C. § 441b by making prohibited in-kind corporate contributions in the
20 form of coordinated communications.

11044284361

11044284362

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENT: Declaration Alliance MUR: 6296**
5
6

7 **I. GENERATION OF MATTER**
8

9 This matter was generated based by a complaint filed with the Federal Election
10 Commission ("the Commission") by Charles R. Grice, Jr. See 2 U.S.C. § 437g(a)(1).
11

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 **A. Factual Background**

14 Kenneth R. Buck is the Republican nominee for Senate in Colorado. His authorized
15 committee is respondent Buck for Colorado and Kenneth Salazar, in his official capacity as
16 treasurer ("Buck Committee" or the "Committee"). The complaint and supplemental complaint
17 allege that around March 2009 or in the first half of 2009, Buck held interviews with prospective
18 campaign consultants. Complaint at 3, Supplemental Complaint at 2. The complaint asserts that
19 Buck was accompanied by Jerry Morgensen, the chairman of the board of Hensel Phelps
20 Construction Co. ("Hensel Phelps") and a friend of Buck's. Hensel Phelps is a Greeley,
21 Colorado, based construction company and federal government contractor. The complaint
22 alleges that Buck informed the prospective consultants that Morgensen would contribute or
23 spend up to or invest \$1 million or more on Buck's campaign, "presumably as an independent
24 expenditure." Complaint at 3, Supplemental Complaint at 2. Further, the complaint maintains
25 that Morgensen confirmed at the interviews that he was planning to "invest" \$1 million or more
26 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

11044284363

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 then made
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

11044284364

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.¹

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

¹ 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.

11044284365

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.

11044284366



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

January 5, 2011

William McGinley
Patton Boggs LLP
2550 M Street, N.W.
Washington, D.C. 20037

RE: MUR 6296
Americans for Job Security

Dear Mr. McGinley:

On May 26, 2010, the Federal Election Commission notified your client, Americans for Job Security, of a complaint alleging that it had violated certain sections of the Federal Election Campaign Act of 1971, as amended.

On December 14, 2010, the Commission considered the complaint, but there was an insufficient number of votes to find no reason to believe Americans for Job Security violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter. One or more Statements of Reasons providing a basis for the Commission's decision will follow.

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).

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. Lockett".

Roy Q. Lockett
Acting Assistant General Counsel

11044284394