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**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE ALASKA PUBLIC OFFICES COMMISSION**

Arthur J. Hackney)
)
v.) OAH No. 09-0338-APO
) Agency Case No.: 09-07-CD
Alaskans Against the Mining Shutdown)
Council of Alaska Producers)
NANA Regional Corporation.)
_____)

RESPONSE TO REQUEST FOR WRITTEN SUBMISSIONS

The parties respectfully request acceptance of this proposed consent agreement. The public was entitled to a better, timely, and ultimately more accurate disclosure of media and consulting expenditures made by the respondents during their advocacy against Ballot Measure Four, and APOC Staff believes that this consent decree will ensure such disclosure in the future. In June 2008, Alaskans Against the Mining Shutdown (AAMS), which was funded by the Council of Alaska Producers (CAP), accelerated expenditures in an effort to sway public opinion against Ballot Measure 4. This Consent Agreement establishes that with that acceleration comes great responsibility to the Citizens of Alaska.

Accepting the Consent Agreement establishes a number of things. First, pre-ballot certification expenditures are reportable if the expense takes aim at the ultimate passage or defeat of the ballot measure. Second, producing and purchasing advertising has been a rapid process in whereby

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well funded groups rely upon third party vendors to produce and purchase advertisements. The proposed Consent Agreement establishes that groups must work closely with third party vendors to define expenditures in the days and weeks leading up to a reporting deadline, and that groups cannot simply plead ignorance to what the vendors are doing. Thus, the proposed Consent Agreement is a step towards effectuating an industry wide change. The use of third party vendors is an efficient means for well funded groups to express First Amendment rights for or against ballot measures in the State of Alaska. The Consent Agreement does not infringe upon that right. Instead, it validates this practice to the public by noting that these activities require close and timely accounting. The agreement strikes an appropriate balance between respecting the rights of groups to make efficient use of their expenditure dollars, and the right of the public to accurate disclosure.

ANALYSIS

1. The Consent Agreement, Supporting Documentation, and the January 29th, 2010 Oral Argument Clarify the Parties' Conclusions Regarding Each of the Remaining Seven Allegations.

The entire record of this consent agreement consists of the language in the proposed Consent Agreement, the motion supplied in support of that agreement, these writings, and the oral argument. Through this process, the

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2 reasoning with respect to all remaining allegations should be made clear.

3 Arguments made below are for purposes of this Consent Agreement only.

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5 A. CAP was required to, but did not, report \$375,000 in payments to
6 W&M that were incurred before March, 11, 2008

7 Thomas Amodio counseled both CAP and AAMS during their
8 advocacy against ballot measure 4. The evidence presented would have
9 shown that Mr. Amodio contacted APOC Staff to confirm his belief that
10 precertification expenditures were not reportable. Exhibit N and likely
11 testimony of prior APOC Staff members would have confirmed this.
12 Administrative Law Judge Christopher Kennedy noted that AAMS's
13 estoppel argument would be addressed at trial. The Consent Agreement
14 affords CAP and AAMS the benefit of this defense. Yet the Consent
15 Agreement affirms that informal advice is not to be relied upon. Pg. 3 fn. 2.
16 Here, had CAP and AAMS sought an advisory opinion, both groups would
17 not have been subject to litigation. This is addressed on Page 3 ¶ 1 of the
18 Consent Agreement.

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21 B. CAP Should Have Reported a \$75,000 obligation to W&M paid
22 August 1st, 2008 on a 30-day Report Rather than on its 7-day Report
23 and a \$37,500 obligation to W&M Paid September 1, 2008, in its 30-
24 day Report rather than in its year-end report

25 APOC Staff seeks to withdraw these claims for purposes of this
26 Consent Agreement. An expenditure is reportable as a cash outlay but also

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when there exists a promise or agreement to transfer money. These contractual obligations did not create a per se promise or agreement to transfer money especially when the parties contemplated progress payments through the term of the ballot measure process. The Consent Agreement in no way establishes that all contracts are susceptible to this conclusion. But here, CAP reported when they agreed that work was completed and that they were obligated to pay for the services paid. This logic is consistent with the AAMS admissions and the evidence that would be produced at trial. CAP reported expenses as they were incurred during the life of these contracts. This is briefly addressed on Page 2 (last paragraph) of the consent decree.

C. CAP Should have Reported a \$50,000 Obligation to Mercury on its 7-day report

CAP concedes the violation in footnote 3 on page 3 of the Consent Agreement. Together, CAP and AAMS reported approximately \$10 million in expenditures.¹ Thus, the error constitutes approximately .5% of the entire campaign. No evidence suggests CAP intentionally failed to report this obligation. It was an error. And the error is somewhat mitigated by the fact the same amount, \$50,000, appears on CAP's 30 day report, when, despite APOC Staff guidance to the contrary, AAMS reported that amount from a precertification expenditure made to Mercury. *Cf In Re: Petition to Audit*

¹ This figure includes the precertification expenditures.

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2 *Campaign Finance Reports of Jerry Carthwright, Jr.*, 900 A.2d 448, 453-54
3 (2006). The public, ultimately, has a right to know not only if an expenditure
4 is made, but *when* an expenditure is made. The Consent Agreement upholds
5 this principle because CAP concedes the violation.
6

7 D. CAP Should Have Reported a \$50,000 Obligation to Mercury on its
8 30 day Report

9 The parties conclude that CAP did not create a per se promise or
10 agreement to transfer money to AAMS until the August 1st progress payment
11 came due for purposes of the Consent Agreement.
12

13 E. CAP was Required to, but did not, Report one \$50,000 Payment to
14 Mercury that was incurred before March 11, 2008

15 CAP relied upon the same advice given to AAMS. They shared
16 counsel in an attempt to timely disclose all expenditures. The Consent
17 Agreement affirms that this should not have been treated as a routine
18 question and answer from the public. Rather, APOC Staff, CAP, and
19 AAMS should have sought an advisory opinion from APOC in order to
20 clarify what finally became clear through litigation: that a group must
21 register and report precertification expenditures when incurred prior to the
22 30 day report even if those expenditures are in advance of the ballot measure
23 certification.
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25 F. AAMS failed to timely report \$568,491.30 in expenditures to MSI
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AAMS admits that it failed to timely report over half of these MSI expenditures. By admitting to this violation, AAMS agrees to the most significant allegation in this case-that AAMS considered the arrival of an invoice as the point in time where an expenditure becomes reportable. The admission language is on pages 3-4 of the Consent Agreement.

G. AAMS failed to timely report a \$44,632.42 expenditure to CAI

The evidence at trial would have shown that AAMS legitimately contested the \$44,632.42 charge by Communication Analytics Incorporated (“CAI”). APOC’s withdrawal of this allegation (for purposes of the Consent Agreement) is consistent with the overall conclusion of the Consent Agreement: “debts incurred are reportable.” But AAMS had a legitimate dispute with a vendor at the time it could have reported this on the 7 day report. APOC Staff does not submit that a legitimate dispute with a vendor will in every case lead to nondisclosure. That conclusion invites abuse. But in this case, the CAI expenditure is distinguishable from the MSI expenditures. This expenditure is not specifically addressed in the Consent Agreement, but it is reflected in the admission that AAMS failed to timely report roughly \$300,000 of expenditures.