

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6038
DATE COMPLAINT FILED: July 14, 2008
DATE OF NOTIFICATION: July 18, 2008
LAST RESPONSE RECEIVED: September 10, 2008
DATE ACTIVATED: September 30, 2008

EXPIRATION OF SOL: July 11, 2011

COMPLAINANTS:

Matthew J. Werner

RESPONDENTS:

Doug Lamborn
Lamborn for Congress and Kathleen Ann
Rockefeller, in her official capacity as Treasurer
Club for Growth State Action
Christian Coalition of Colorado
Liberty Service Corporation
Tactical Data Solutions, Inc.
Blue Point, LLC
Chuck Gosnell
Mark Hotaling
Jonathan Hotaling
Tom Bjorklund
Christopher Baker

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(7)(B)(i)
2 U.S.C. § 441b
11 C.F.R. § 109.20(a)
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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1 **I. INTRODUCTION**

2 This matter arises out of a complaint alleging that Club for Growth State Action
3 ("CFGSA") and Christian Coalition of Colorado ("Christian Coalition") coordinated their
4 communications with Lamborn for Congress ("Lamborn Committee") by using the same voter
5 list used by the Lamborn campaign to send flyers attacking Doug Lamborn's primary opponents
6 during his 2006 campaign for Colorado's 5th Congressional District. The complaint also requests
7 that, based on new information, the Federal Election Commission ("the Commission") reopen
8 MUR 5774, which concerned similar allegations against the same respondents.

9 The available information indicates that (1) Jonathan Hotaling, Lamborn's campaign
10 manager, instructed Tactical Data Solutions ("TDS"), the political campaign data firm that was
11 the source of the absentee voter list used by the Lamborn Committee (and a company for which
12 Hotaling allegedly served as a director), to sell Christian Coalition the same voter list, and
13 (2) that Christian Coalition then used this information to send flyers clearly targeting Lamborn's
14 leading opponents shortly before a federal election. Therefore, we recommend that the
15 Commission find reason to believe that Christian Coalition violated 2 U.S.C. § 441b by making
16 prohibited in-kind contributions to the Lamborn Committee in the form of coordinated
17 expenditures, and that the Lamborn Committee and Kathleen Ann Rockefeller, in her official
18 capacity as Treasurer, violated 2 U.S.C. §§ 441b and 434(b) by knowingly accepting and failing
19 to disclose prohibited in-kind contributions.

20 CFGSA, however, appears to have purchased an unenhanced list containing publicly-
21 available voter data from TDS, and does not appear to have met any of the coordination conduct
22 standards. Therefore, we recommend that the Commission find no reason to believe that CFGSA

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1 violated 2 U.S.C. § 441b. Finally, even if coordination occurred, there is no information
2 suggesting that the candidate, Doug Lamborn, was personally involved, nor is there a basis to
3 hold the vendors, officers, and directors liable. We thus recommend that the Commission find
4 no reason to believe that Tactical Data Solutions, Inc., Blue Point, LLC, Liberty Service Corp.,
5 Tom Bjorklund, Christopher Baker, Jonathan Hotaling, Mark Hotaling, Chuck Gosnell, or Doug
6 Lamborn violated the Federal Election Campaign Act of 1971, as amended ("the Act"), in
7 connection with the allegations in this matter.

8 **II. FACTUAL BACKGROUND**

9 **A. 2006 Complaint**

10 Doug Lamborn was a candidate in the open Republican Primary in Colorado's 5th
11 Congressional District, held on August 8, 2006, and won the nomination with 27 percent of the
12 vote. In a complaint filed in 2006, MUR 5774, Robert Gardner alleged that Lamborn's
13 authorized committee obtained the names and addresses of absentee voters from the El Paso
14 County Clerk and Recorder and provided them to CFGSA and Christian Coalition, and that these
15 organizations used the addresses to send mailers to voters attacking two of Lamborn's primary
16 opponents, Jeff Crank and Lionel Rivera, in July 2006. The 2006 complaint relied on a series of
17 inferences – that two recipients received the flyers at their work addresses, which they had used
18 to request absentee ballots; that only the Lamborn Committee and four other entities had
19 requested absentee voter data from the county clerk's office; and that the Lamborn Committee
20 and Christian Coalition were closely connected because Jonathan Hotaling, Lamborn's campaign
21 manager, and Mark Hotaling, the Executive Director of Christian Coalition, are brothers – to
22 conclude that CFGSA and Christian Coalition received the addresses from the Lamborn

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1 Committee. Because the allegations were speculative, and the respondents provided information
2 sufficient to rebut them, the Commission found no reason to believe that the respondents violated
3 the Act.¹

4 **B. 2008 Complaint**

5 In 2008, a different complainant, Matthew Werner, submitted the instant complaint styled
6 as a "Request to Reopen" MUR 5774. Although this complaint incorporates by reference the
7 information from the 2006 complaint, it also provides new information suggesting that
8 coordination between the Lamborn Committee and the Christian Coalition may have occurred –
9 namely, an affidavit by Alan Farina, TDS's former president,² attesting that Jonathan Hotaling,
10 Lamborn's campaign manager, instructed TDS to provide the same absentee voter list used by
11 the Lamborn campaign to Christian Coalition and, after the 2006 complaint was filed, asked the
12 Chairman and CEO of TDS to change file names on TDS computers to conceal that Lamborn
13 was a client to avoid any "red flags" in a Commission investigation.³ Werner and Farina also
14 allege that TDS sold the same voter list to CFGSA through a sub-vendor, Blue Point LLC, which
15 used the absentee voter list to send CFGSA mailers criticizing Lamborn's primary opponents for
16 their positions on tax issues.⁴

¹ See MUR 5774 (Lamborn for Congress), First General Counsel's Report dated Nov. 17, 2006, at 4, available at <http://ens.nictusa.com/ensdocs/00005A19.pdf>, and Certification dated Nov. 27, 2006, available at <http://ens.nictusa.com/ensdocs/00005A1A.pdf>.

² See Farina Aff. at ¶ 2; TDS Response at 2; see also TDS Website, at <http://web.archive.org/web/20051210094424/http://tacticaldatasolutions.net/contact.html> (Oct. 13, 2005) (archived website listing Farina as President of TDS).

³ See Farina Aff. at ¶¶ 16-20.

⁴ See *id.* at ¶¶ 9-13.

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1 The list at issue included the names and addresses of registered Republican voters who
2 had requested absentee ballots in El Paso County – the county that accounted for 83 percent of
3 voters in the 5th District⁵ – and identified which voters had returned their absentee ballots.⁶
4 Many voters in Colorado vote by absentee ballot,⁷ and in the 2006 5th District Republican
5 primary, early and absentee votes accounted for 42.6 percent of all ballots cast.⁸ Lamborn's
6 campaign reportedly targeted absentee voters, using the absentee voter list to call and canvass
7 voters and send multiple direct-mail flyers.⁹ Absentee ballots apparently played a determinative
8 role in the election: before absentee votes were counted, Lamborn's opponent, Jeff Crank, was
9 ahead in the vote count, but Lamborn won when El Paso County posted the results from its
10 absentee voters.¹⁰ Jonathan Hotaling reportedly commented, "We out-hustled the other
11 campaigns on the absentees, and we won absentees overwhelmingly, 2-to-1 over Jeff Crank. ...

⁵ See Erin Emery, *Absentees Key in Springs: Lamborn Focused 5th District Campaign on Mail-In Ballots*, DENVER POST, Aug. 10, 2006, at B5.

⁶ See Farina Aff. at ¶¶ 5, 6.

⁷ See *id.* at ¶ 5; see generally Kirk Johnson, *In Colorado, Voting by Mail Alters both Campaign Strategies*, NY TIMES, Oct. 17, 2008, at A19; John Ingold, *Mail-ins Changing Election Equation: The Number of Ballots Already in Voters' Hands is Forcing an Earlier Start to Campaigning*, DENVER POST, Aug. 10, 2008, at B1; Karen Crumney, *Early Votes Bust October "Surprises:" In Some States, 50 Percent Cast Ballots before Election Day, Altering Political Parties' Campaign Tactics*, DENVER POST, Oct. 15, 2006, at A1.

⁸ See Emery, *supra* n. 5

⁹ See *id.*

¹⁰ See *id.*; see also Dick Foster and Joe Garner, *Late Surge by Lamborn Stuns Crank: El Paso's Absentees Set Up Race Against Democrat Fawcett*, ROCKY MTN. NEWS, Aug. 9, 2006, at A7 ("[W]hen about 17,000 absentee votes were released... Lamborn immediately went from trailing Crank by 1,500 votes to victory."); Anthony Surace, *Was the Crank/Lamborn Race a Preview of McCain/Obama?*, ROCKY MTN. RIGHT, at <http://rockymountainright.com/?q=node/428> (Oct. 30, 2008) ("As the results from the 2006 Republican primary in CD-5 rolled in on election night[,] Jeff Crank took a decent lead over Doug Lamborn. Crank was ahead of Lamborn in every county including El Paso[,] and every major media outlet in the state declared him the victor. Much to everyone's surprise, El Paso County entered all of the absentee ballots [after] the other votes had been tallied. The electorate had turned so sharply [against] Lamborn in the final days of the election that Crank won the votes on election day and the final days of early voting. Lamborn's lead in the absentee votes cast weeks prior was enough to negate all of Crank's gains.").

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1 Other candidates were out talking to the general populace, but when we knew a voter had a
2 ballot in their hand, we went to them."¹¹

3 The complaint centers on the following players and transactions.

4 **PLAYERS**

- 5 • TDS, a political campaign data management firm headquartered in Grand Junction,
6 Colorado, that collects, assembles, and sells voter data information, including donor files,
7 survey data, personal contact information, master voter files, and phone records.¹² The
8 CEO and Chairman of TDS is Tom Bjorkland.¹³
- 9 • Jonathan Hotaling, who, at the time of the alleged coordination, was the campaign
10 manager for Lamborn and a board member of TDS.¹⁴ He also previously was the
11 Executive Director of the Christian Coalition.¹⁵
- 12 • Liberty Service Corp. (a/k/a Liberty Media), a sub-vendor owned and operated by
13 Jonathan Hotaling.¹⁶ Liberty Service Corp. contracted with Lamborn for Congress
14 during the 2006 election cycle to perform campaign management services, including
15 database management and enhancement, and contracted with TDS to obtain their
16 "specialized data management and enhancement services."¹⁷
- 17 • Christian Coalition, a non-profit, 501(c)(4) organization incorporated and headquartered
18 in Denver, Colorado.¹⁸ In July 2006, Christian Coalition sent mailers criticizing

¹¹ Emery, *supra* n. 5

¹² See TDS Response at 1-3.

¹³ See Farina Aff. at ¶ 3; TDS Response at 1; TDS Website, at <http://tacticaldatasolutions.net/contact.html> (last visited Sept. 14, 2009).

¹⁴ See Farina Aff. at ¶¶ 3, 8; *but cf.* TDS Response at 2 ("... Mr. Hotaling participated in one meeting as an advisor to help TDS determine what opportunities exist in the political arena. Jonathan Hotaling does not participate in the day to day operations of Tactical Data Solutions nor does Mr. Hotaling have authority to conduct business on behalf of Tactical Data Solutions, or make demands on employees of Tactical Data Solutions."); Liberty Service Corp. Response at 2 ("[N]either I nor LSC directs or controls any of TDS business or efforts with their other clients, nor have I or LSC ever attempted to do so.").

¹⁵ See MUR 5774, Complaint at 3; see also Jennifer Talhelm, *Despite Urgings, Hefley Won't Run as Write-In*, ASSOC. PRESS, Aug. 29, 2006, available at <http://chs4denver.com/politics/ColoradoNews/Colorado.2.551887.html>.

¹⁶ See Farina Aff. at ¶ 7; Liberty Service Corp. Response at 1; Liberty Service Corp., Articles of Incorporation (Aug. 15, 2000).

¹⁷ See Liberty Service Corp. Response at 1; TDS Response at 1.

¹⁸ See About Christian Coalition, at <http://www.ccco.org> (last visited Sept. 14, 2009).

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1 Lamborn's leading opponents, Jeff Crank and Lionel Rivera.¹⁹ Mark Hotaling is the
2 Executive Director of Christian Coalition and the brother of Jonathan Hotaling.²⁰

3 • CFGSA, a 501(c)(4) organization that serves as the "umbrella group" for Club for
4 Growth's state affiliates.²¹

5 • Blue Point LLC, a political consulting firm hired by CFGSA to create, design, print, and
6 mail three anti-tax flyers to absentee voters in El Paso County, Colorado, over the
7 course of four days in July 2006.²² Christopher Baker is the principal of Blue Point.²³

8 ALLEGED TRANSACTIONS

9 • TDS collected data identifying which voters had requested absentee voters and which
10 voters had returned their absentee ballots from Jonathan Hotaling and from county clerks
11 and recorders.²⁴ TDS then "enhanced" this data using approximately 10-14 different
12 processes and deemed it fit for resale.²⁵

13 • TDS sold the enhanced absentee voter data to Liberty Service Corp., a sub-vendor owned
14 by Jonathan Hotaling that provided media and fundraising consulting to the Lamborn
15 Committee.²⁶ The Lamborn campaign apparently used this voter list to target absentee
16 voters.²⁷

¹⁹ See MUR 5774, Complaint at 2, Attach. 1, available at <http://ega.nictusa.com/egadocs/00005A0F.pdf>; see also Foster and Garner, *supra* n. 10.

²⁰ See Farina Aff. at ¶ 15; Christian Coalition Response.

²¹ See Chris Casteel, *Group Funding Lawmaker's Ad*, DAILY OKLAHOMAN, June 24, 2006; see also CFGSA, 2007 Form 990 (Jul. 31, 2008), available at <http://www.guidestar.org/FinDocuments/2007/900/135/2007-900135424-048e645d-90.pdf>.

²² See MUR 5774, Baker Aff. at ¶¶ 5-7, available at <http://ega.nictusa.com/egadocs/00005A17.pdf>; MUR 5774, Compl. Attach. 2-4, available at <http://ega.nictusa.com/egadocs/00005A0F.pdf>.

²³ Baker Aff. at ¶ 2; MUR 5774, Baker Aff. at ¶ 2; cf. MUR 5609 (Club for Growth), First General Counsel's Report dated Aug. 5, 2005, at 4, available at <http://ega.nictusa.com/egadocs/00004846.pdf>

²⁴ See Farina Aff. at ¶ 6.

²⁵ See TDS Response at 3; see also TDS Services, at <http://tacticaldataolutions.net/services.html> (last visited Sept. 14, 2009).

²⁶ See Farina Aff. at ¶¶ 7-8; TDS Response at 1; Liberty Service Corp. Response at 1; see also Lamborn for Congress, 2006 July Quarterly Report (amended Sept. 25, 2009) (listing \$15,000 disbursement to Liberty Service Corp. for media and fundraising consulting).

²⁷ See Emery, *supra* n.8; cf. MUR 5774, Complaint at 2 (identifying Lamborn for Congress as a recipient of absentee voter data from the El Paso County Clerk and Recorder); Lamborn for Congress, 2006 Pre-Primary Report (amended Sept. 25, 2009) (listing \$250 disbursement to El Paso County Clerk and Recorder for absentee voter information); Lamborn for Congress, Amended July Quarterly Report (amended Sept. 25, 2009) (listing \$450 disbursement for absentee voter information)

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- 1 • TDS sold the same voter list to Christian Coalition. Mark Hotaling allegedly told Farina
2 that the Christian Coalition planned to send mail pieces to primary voters in the 5th
3 District and wanted to purchase the same voter list as Jonathan Hotaling had used.²⁸
4 Jonathan Hotaling allegedly instructed TDS to provide the voter list to his brother and,
5 based on these instructions, TDS did so.²⁹
- 6 • TDS also sold the absentee voter list to Blue Point, which used it to send CFGSA mail
7 pieces.³⁰ Farina allegedly received a call from a representative of Blue Point, presumably
8 Christopher Baker, and transferred the call to Tom Bjorkland, who later told Farina that
9 the voter data would be used by CFGSA as part of its efforts in the 5th District.³¹
10 Bjorkland also allegedly informed Farina that Jonathan Hotaling had referred Blue Point
11 to TDS and instructed Farina not to tell anyone about this because it was "a gray area."³²

²⁸ See Farina Aff. at ¶¶ 15-16.

²⁹ See *id.* at ¶ 17; *but cf.* TDS Response at 1 (stating that TDS sold data to Christian Coalition at fair market value and had been employed to provide data management services to it prior to the 2006 primary); Christian Coalition Response (stating that Christian Coalition asked TDS for voter data with clean up and enhancement work done for lobbying mail projects).

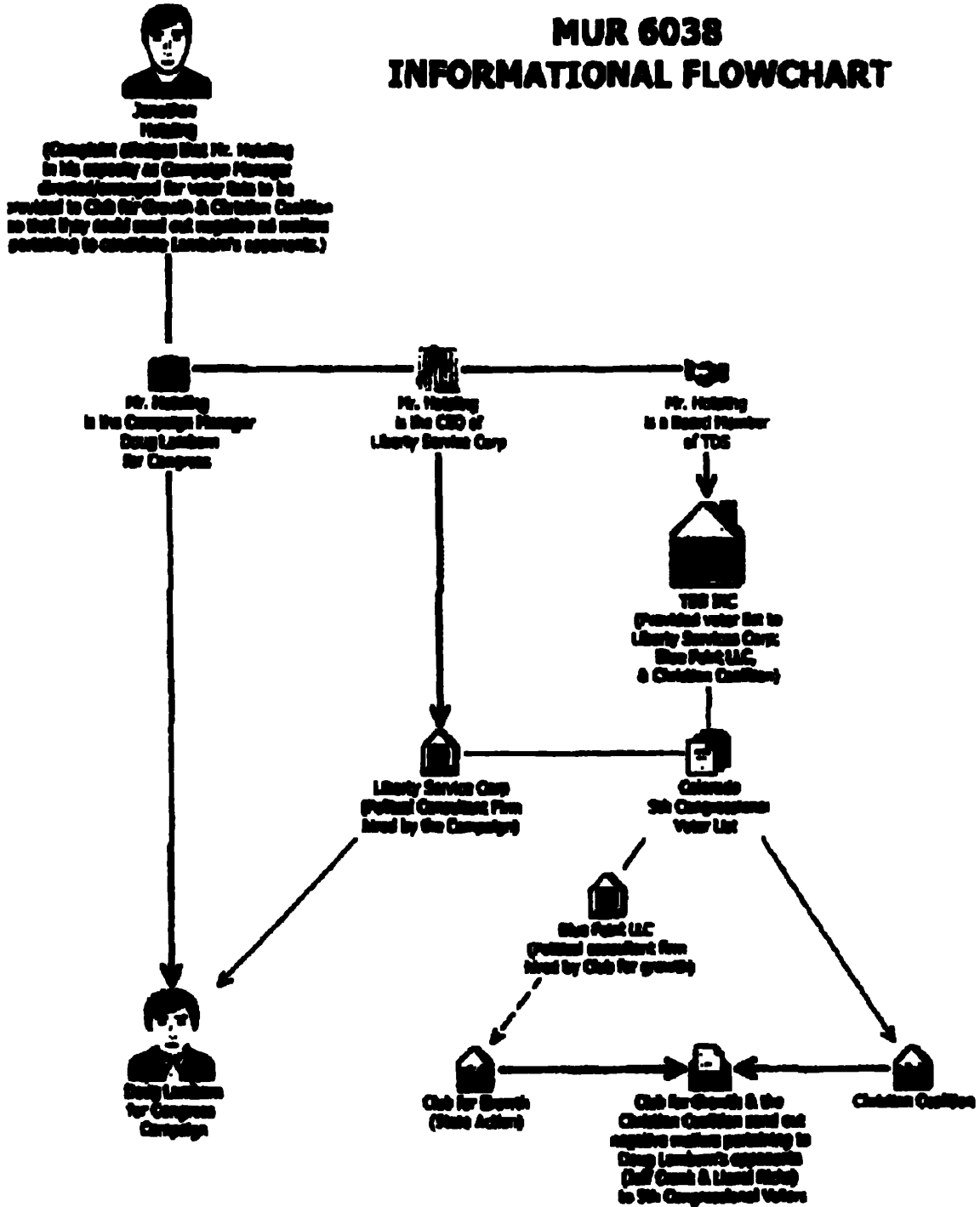
³⁰ See Farina Aff. at ¶¶ 10-13; Baker Aff. at ¶¶ 6-10; MUR 5774, Baker Aff. at ¶¶ 7, 8, 10.

³¹ See Farina Aff. at ¶ 10.

³² See *id.* at ¶ 11. This paragraph states, "I referred the caller from Blue Point to Tom Bjorkland. He told me that John Hotaling had referred Blue Point to TDS, and he also told me not to tell anyone about it, because it was, in his words, 'a gray area.'" Although it is unclear from this wording whether "he" refers to the caller from Blue Point or Bjorkland, based on Christopher Baker's affidavit attesting that he had no knowledge that TDS directly or indirectly provided voter lists to the Lamborn campaign, see Baker Aff. at ¶¶ 10-12, we assume that Bjorkland was the source of this information.

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MUR 6038 INFORMATIONAL FLOWCHART



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1 **III. LEGAL ANALYSIS**

2 According to the complaint, CFGSA and Christian Coalition coordinated with the
3 Lamborn Committee when they used the same voter lists to send flyers attacking Lamborn's
4 opponents in the 5th District Republican primary, resulting in prohibited in-kind contributions.
5 See 2 U.S.C. § 441b. Under the Act, an expenditure made by any person "in cooperation,
6 consultation, or concert, with, or at the request or suggestion of" a candidate constitutes an in-
7 kind contribution. See 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a). A communication
8 is coordinated with a candidate or candidate committee when: (1) the communication is paid for
9 by a person other than that candidate, authorized committee or agent thereof; (2) the
10 communication satisfies at least one of the four "content" standards described in 11 C.F.R.
11 § 109.21(c),³³ and (3) the communication satisfies at least one of the six "conduct" standards
12 described in 11 C.F.R. § 109.21(d). See 11 C.F.R. § 109.21(a).

13 The first and second prongs of the coordination regulations are met. The flyers were paid
14 for by Christian Coalition and CFGSA, not the Lamborn Committee, see 11 C.F.R.
15 § 109.21(a)(1), and the mailings were "public communications" identifying Lamborn's primary

³³ After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(e) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. See *Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (*Shays III*) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. See *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III Appeal*). On October 8, 2009, the Commission began a rulemaking to comply with this ruling. See *Notice of Proposed Rulemaking, Coordinated Communications*, 74 Fed. Reg. 53,893 (Oct. 21, 2009).

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1 opponents, directed to 5th District absentee voters, and sent within 90 or 120 days before the
2 primary election.³⁴ See 11 C.F.R. § 109.21(c)(4). Therefore, the only question is whether the
3 alleged activities satisfy any of the conduct standards.

4 **A. Publicly Available Sources Safe Harbor**

5 TDS claims that it sold "public data" to Christian Coalition, CFGSA, and the Lamborn
6 Committee, raising a threshold question as to whether the absentee voter data was obtained from
7 a "publicly available source," and is thus excluded from the "material involvement," "substantial
8 discussion," "common vendor," and "former employee" conduct standards. See 11 C.F.R.
9 §§ 109.21(d)(2)-(5); *Revised Explanation and Justification, Coordinated Communications*,
10 71 Fed. Reg. 33,190, 33,205 (Jun. 8, 2006). Under this safe harbor, a communication that uses
11 public information (e.g., information from newspaper or magazine articles, candidate speeches or
12 interviews, materials on a candidate's website or other publicly available website, transcripts
13 from television shows, and press releases) is not a coordinated communication unless it meets
14 the "request or suggestion" conduct standard. See *Revised E&J*, 71 Fed. Reg at 33,205. The
15 person paying for the communication bears the burden of showing that the information used in
16 creating, producing, or distributing the communication was obtained from a publicly available
17 source – for example, by demonstrating that media buying strategies regarding a communication
18 were based on information obtained from a television station's public inspection file, and not on
19 private communications with a candidate or political party committee. See *id.*

³⁴ Effective July 10, 2006, section 109.21(c) requires a "public communication" within 90 days of a House or Senate election, as opposed to the previous 120-day standard. See *Explanation and Justification, Coordinated Communications*, 71 Fed. Reg. 33,190, 33,197-98 (Jul. 10, 2006). It is unclear whether the mailers in this case were distributed before or after the effective date of this change, but the alleged activities appear to have occurred well within either time frame – the July 11, 13, 15, and 18, 2006 dates cited in the complaint were 28 or fewer days before the primary election. See Complaint at 2.

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1 TDS asserts that it sells two categories of data to political clients: proprietary data,
2 including survey data, donor files, and personal contact information, and public data, including
3 master voter files from election offices, phone records.³⁵ Although TDS characterizes the
4 absentee voter list as "public data," its response suggests that TDS did not sell raw data obtained
5 from the El Paso County Clerk and Recorder, but instead sold "processed" or "enhanced" data:

6 After TDS processes the data, which takes approximately between
7 10-14 different processes before TDS deems it fit for resale, TDS
8 offers this enhanced data for sale to campaigns, issue
9 committee[s], consultants, and political campaigns that ask for it.
10 Besides accommodating specific requests (such as females
11 between the age of [sic], or people aged 30 and over[,] etc.), the
12 processed data that TDS received may be packaged differently
13 from client to client and the final product that it sold does not look
14 anything like the data TDS receives.

15 TDS takes great pains to enhance the data and each data request is
16 processed differently depending on the type of request. We want
17 to make sure our clients are provided a better product than what
18 can be purchased directly from the Secretary of State or the County
19 Clerks.³⁶

20 While TDS does not explain the processes it used to "enhance" the absentee voter data sold here,
21 its website states that, among other things, it can update public voter lists by comparing
22 addresses to the national change of address database to reduce the number of "bad" addresses;
23 identifying voters who voted in previous elections; and identifying voters who prefer early
24 and absentee voting, allowing campaigns to "use this information to target mailings timed to
25 reach particular voters when they are most likely to be voting."³⁷ Moreover, TDS, Christian

³⁵ See TDS Response at 3.

³⁶ *Id.* at 3-4.

³⁷ TDS Website, at <http://tacticaldataolutions.net/services.htm> (last visited Dec. 4, 2009).

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1 Coalition, and Liberty Service Corp. all admitted that TDS provided enhanced voter data.³⁸
2 Thus, the voter list sold by TDS to Christian Coalition and Liberty Service does not appear to be
3 covered by the publicly available source safe harbor.

4 By contrast, CFGSA states that Blue Point purchased a "commoditized" list containing
5 information about Republican primary voters who had requested absentee ballots in El Paso
6 County, not a specially packaged list, and that Blue Point did not ask for advice from TDS as to
7 the type of list to use or how best to use the list.³⁹ Because the available information suggests
8 that CFGSA purchased unenhanced absentee voter data from TDS, the publicly available
9 source safe harbor appears to apply, and the Commission should find no reason to believe as to
10 CFGSA. *See also* Section III.C, *infra*.

11 **B. Christian Coalition**

12 A communication meets the "material involvement" conduct standard if a candidate,
13 authorized committee, or political party committee is materially involved in decisions regarding
14 the content, intended audience, means or mode, specific media outlet, or timing or frequency of a
15 communication; the size or prominence of a printed communication; or the duration of a
16 communication by means of broadcast, cable, or satellite. *See* 11 C.F.R. § 109.21(d)(2).⁴⁰ This
17 standard "does not impose a requirement of direct causation, but focuses instead on the nature of
18 the information conveyed and its importance, degree of necessity, influence or the effect of

³⁸ *See* TDS Response at 3 (Christian Coalition and Liberty Service Corp. employed it to perform "data enhancement services"); Christian Coalition Response at 1 (Christian Coalition purchased voter data from TDS "with their clean up and enhancement work done to it for our lobbying mail projects"); Liberty Service Corp. Response at 1 (Liberty Service Corp. retained TDS to provide "specialized data management and enhancement services").

³⁹ *See* CFGSA Response at 6-7; Baker Aff. at ¶¶ 12-13.

⁴⁰ The "material involvement" conduct standard was not at issue in *Shays III* and is not addressed in the current rulemaking. *See NPRM*, 74 Fed. Reg. at 53,895.

1 involvement by the candidate, authorized committee, political party committee, or their agents in
2 any of the communication decisions listed in 11 C.F.R. § 109.21(d)(2).” *See Explanation and*
3 *Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 433 (Feb. 3, 2003)*
4 *(“2003 E&J”).* The standard is not a bright-line rule, but instead requires a fact-based
5 determination to discover whether the interaction was “important to the communication.” *Id.* As
6 an example of material involvement, the Commission explained that “a candidate [or a
7 representative of his or her authorized committee] is materially involved in a decision regarding
8 the content of a communication paid for by another person if he or she has a staffer deliver
9 to that person the results of a polling project recently commissioned by that candidate, and the
10 polling results are material to the payor’s decision regarding the intended audience for the
11 communication.” *Id.* at 434.

12 Jonathan Hotaling’s actions appear to constitute material involvement sufficient for
13 coordination between Lamborn for Congress and Christian Coalition. Jonathan Hotaling, acting
14 as the campaign manager and agent for the Lamborn campaign, allegedly instructed TDS to
15 provide the same voter data list to Christian Coalition as that used by Lamborn for Congress.⁴¹
16 Based on this instruction, TDS then allegedly sent to Christian Coalition the same voter
17 information that it had sold to the Lamborn Committee through Liberty Service.⁴² Subsequently,
18 Christian Coalition allegedly used this voter data to send mailings to the same people whom the
19 Lamborn Committee had targeted earlier – absentee voters who had not yet returned their

⁴¹ See *Farina Aff.* at ¶¶ 14-18.

⁴² See *id.*; see also TDS Response at 1 (acknowledging that it sold data to Blue Point, Christian Coalition, and Liberty Service).

1 ballots.⁴³ Hotaling, Christian Coalition and TDS all responded with general denials of
2 coordination, but did not specifically address these allegations. Thus, Hotaling may have
3 been materially involved in Christian Coalition's decisions regarding the intended audience for
4 the flyer.

5 At first blush, the apparent sharing of a voter list containing information about absentee
6 voters may not seem sufficiently "important to the communication" to constitute material
7 involvement. Yet targeting absentee voters reportedly was a key part of Lamborn's primary
8 campaign strategy, and the race was won by absentee ballots.⁴⁴ Directing TDS to supply
9 enhanced voter information that enabled Christian Coalition to target the same voters using the
10 same direct-mail medium, as Lamborn's campaign manager is alleged to have done, was critical
11 to determining the intended audience for the communication, and is far from the sort of
12 "incidental participation that is not important to, or does not influence, decisions regarding a
13 communication" that does not trigger the material involvement conduct standard. *See 2003 E&J*,
14 68 Fed. Reg. at 433. Indeed, these facts, like the polling data cited in the *2003 E&J*, appear to
15 present exactly the sort of "real world" coordination that the Commission intended the material
16 involvement standard to capture. *See id.*

17 Accordingly, we recommend that the Commission find reason to believe that Christian
18 Coalition of Colorado violated 2 U.S.C. § 441b by making prohibited in-kind contributions in
19 the form of coordinated expenditures, and that Lamborn for Congress and Kathleen Ann

⁴³ See Complaint at 2-3.

⁴⁴ See *supra* n. 5-10 and accompanying text.

1 Rockefeller, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441b and 434(b) by
2 knowingly accepting and failing to disclose such prohibited in-kind contributions.

3 **C. Club for Growth State Action**

4 As discussed above, the publicly available safe harbor appears to apply to the voter list
5 purchased by Blue Point for use by CFGSA. *See supra* pp. 11-13. Even if it does not, CFGSA's
6 response appears to have sufficiently refuted the allegation that it engaged in coordination.

7 While Farina's affidavit asserts that TDS sold the same voter list to Blue Point for CFGSA's
8 direct-mail efforts in the 5th District, it does not allege that Blue Point or CFGSA requested the
9 same voter list used by the Lamborn Committee or received this voter list in response to a
10 suggestion by Jonathan Hotaling.⁴⁵ Moreover, Christopher Baker attests that the voter list
11 requested and received by Blue Point was not specially packaged; that he did not inform
12 Jonathan Hotaling of the reason for requesting the voter list or mention CFGSA or its proposed
13 mailers or any other of its projects, plans, activities or needs; that he did not discuss with
14 Hotaling the plans, projects, activities, or needs of the Lamborn campaign or list vendors for a
15 particular Congressional District or area in Colorado; and that he took steps to avoid employing
16 vendors used by the Lamborn campaign.⁴⁶

17 Even if Farina's affidavit is true, brief and vague discussions about a voter list do not
18 constitute "substantial discussions" about Lamborn's plans, projects, activities or needs, or
19 establish that the CFGSA's flyers were created, produced, or distributed after such discussions.
20 *Cf.* MUR 5887 (RMSP PAC), Factual and Legal Analysis (possible substantial discussions

⁴⁵ *Compare* Farina Aff. ¶¶ 9-13 (discussing sale of list to CFGSA) with ¶¶ 14-17 (discussing sale of list to Christian Coalition).

⁴⁶ *See generally* Baker Aff. at ¶¶ 4-13; MUR 5774, Baker Aff. at ¶¶ 5-16; *see also* CFGSA Response at 5-8.

1 where candidate's campaign manager reportedly "hounded" third party and "kept telling" the
2 third party to get ads on the air). Nor is the alleged conduct sufficient to meet the "request or
3 suggestion," "material involvement," or "common vendor" conduct standards. Based on the
4 quality of the competing affidavits, the available facts do not establish that CFGSA met any of
5 the conduct standards in 11 C.F.R. § 109.21(a).⁴⁷ Therefore, we recommend that the
6 Commission find no reason to believe that Club for Growth State Action violated 2 U.S.C.
7 § 441b.

⁴⁷ CFGSA also asserts that the Commission's no-reason-to-believe finding on the 2006 complaint bars examination of the 2008 complaint on the grounds of *res judicata*. Because *res judicata* is an affirmative defense, see FED. R. CIV. P. 8(c)(1), and we recommend that the Commission find no reason to believe that CFGSA violated the Act in the instant matter, the Commission need not reach this issue. Nonetheless, in the interest of completeness, we conclude that the prior no-reason-to-believe finding does not preclude Commission consideration of this complaint. *Res judicata*, which includes claim and issue preclusion, applies to administrative agency decisions only when the agency acted "in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *U.S. v. Utah Construction and Mining Company*, 384 U.S. 394, 421-22 (1966); see also *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 111 (1991). This same analysis applies to determine whether an agency's actions preclude its own subsequent consideration. See *Duvall v. Attorney Gen. of the U.S.*, 436 F.3d 382 (3d Cir. 2006).

Claim and issue preclusion do not apply here; the Commission does not act in a judicial capacity at the reason to believe stage. See *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 241-243 (1980) ("[T]he Commission's averment of 'reason to believe' that Social was violating the Act is not a definitive statement of position. It represents a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings. ... Thus, the averment of reason to believe is a prerequisite to a definitive agency position on the question whether Social violated the Act, but itself is a determination only that adjudicatory proceedings will commence."); cf. *Democratic Senatorial Campaign Comm. v. FEC*, 660 F.2d 773, 778 n.27 (D.C. Cir. 1980) (rejecting argument that claim and issue preclusion prevented court from reviewing Commission's no-reason-to-believe finding because the Act provides for judicial review), *rev'd on other grounds*, 454 U.S. 27, 39-41 (1981). Indeed, the reason to believe stage is simply the statutory mechanism by which the Commission initiates an investigation. See 2 U.S.C. § 437g(a)(2). Moreover, not only does the 2008 complaint include new information unknown to the 2006 complainant, the two complainants are different, and there is no known privity between them. See *Taylor v. Sturgell*, 128 S.Ct. 2161, 2172-2173, 2176, 2178 (2008) (rejecting preclusion based on "virtual representation" of a non-party by a party in a prior proceeding); *Federal Trade Comm'n v. Raladam*, 316 U.S. 149, 150, 153 (1942) (judicial vacatur of a cease and desist order based on an insufficient factual record to support charges of unfair competition did not preclude a second agency proceeding and cease and desist order based on an improved record).

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1 **D. Other Respondents**

2 **Also named as Respondents are the vendors and sub-vendors through which coordination**
3 **is alleged to have occurred, officers or personnel associated with these vendors and sub-vendors,**
4 **and officers associated with Christian Coalition of Colorado. Even if coordination occurred,**
5 **there is no basis to hold these individuals and entities liable under the Act, and therefore we**
6 **recommend that the Commission find no reason to believe that Tactical Data Solutions, Inc.;**
7 **Blue Point, LLC; Liberty Service Corp.; Tom Bjorklund; Christopher Baker; Jonathan Hotaling;**
8 **Mark Hotaling; and Chuck Gosnell violated the Act. Similarly, there is no information**
9 **suggesting that Doug Lamborn was personally involved in any of the alleged violations,**
10 **and therefore we recommend that the Commission find no reason to believe that Doug Lamborn**
11 **violated the Act.**

12 **IV. PROPOSED INVESTIGATION**

13 **This matter will require an investigation**

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17 **conduct interviews**

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As such, we intend to

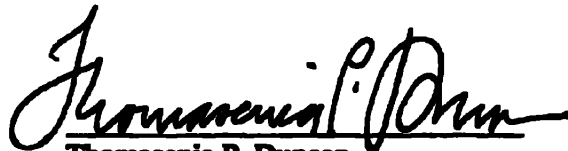
While we expect that we will be able
to conduct some of this investigation informally, we request that the Commission authorize the
use of compulsory process in this matter, including the issuance of appropriate interrogatories,
document subpoenas, and deposition subpoenas, as necessary, subject to circulation on a 48-hour
tally.

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V. RECOMMENDATIONS

1. Find reason to believe that Christian Coalition of Colorado violated 2 U.S.C. § 441b;
2. Find reason to believe that Lamborn for Congress and Kathleen Ann Rockefeller, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441b and 434(b);
3. Find no reason to believe that Club for Growth State Action violated 2 U.S.C. § 441b;
4. Find no reason to believe that Tactical Data Solutions, Inc.; Blue Point, LLC; Liberty Service Corp.; Tom Bjorklund; Christopher Baker; Jonathan Hotaling; Mark Hotaling; Chuck Gosnell; or Doug Lamborn violated the Federal Election Campaign of 1971, as amended, in connection with the allegations in this matter;
5. Approve the attached Factual and Legal Analyses;
6. Authorize the use of compulsory process in this matter; and
7. Approve the appropriate letters.

2/18/2010
Date


Thomasenia P. Duncan
General Counsel


Stephen Gura
Deputy Associate General Counsel


Julie McConnell
Assistant General Counsel


Joshua B. Smith
Attorney

Previously Assigned: Ana J. Peña-Wallace

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