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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

California Democratic Party

Democratic State Central Committee of California—Federal

and Katherine Moret, as treasurer

Democratic State Central Committee of California—Non-Federal

and Katherine Moret, as treasurer

2002 OCT -9 P 2:42

MUR 4788

SENSITIVE

GENERAL COUNSEL'S REPORT #4

I. ACTIONS RECOMMENDED: Make probable cause to believe findings as to the above-captioned respondents (collectively "CDP"); approve the appropriate letters.

II. BACKGROUND

MUR 4788 arose out of a complaint alleging that the CDP used money from its non-federal account to finance communications (mail pieces and radio advertisements) that expressly advocated the election of Lois Capps in the March 10, 1998, special election in the 22nd Congressional District of California and that the expenses for the communications were excessive and prohibited contributions from the CDP to the Capps campaign. The CDP reported the \$99,079.06 spent for these communications as generic voter contact expenses and allocated the expenses between its federal (\$21,797.39) and non-federal (\$77,281.67) accounts.

The Federal Election Commission (the "Commission"), on June 22, 1999, made reason to believe findings based on the making and receiving of excessive and prohibited contributions, exceeding the coordinated party expenditure limits, the impermissible use of funds from a non-federal account to finance federal activity, the failure to include disclaimers in the communications, and the failure to properly report the disbursements. Specifically, the Commission found reason to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated

2 U.S.C. §§ 441b, 441a(a)(2)(A), 441a(d), 441d(a), and 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b); the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i); and the Friends of Lois Capps and David Powdrell, as treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b). This Office conducted an investigation.

The investigation did not reveal any evidence of coordination. *See* General Counsel’s Report #3, dated January 17, 2002. Thus, the Commission decided to take no further action regarding the reason to believe findings based on coordination. Accordingly, the Commission closed the file as to the Friends of Lois Capps and David Powdrell, as treasurer, and took no further action as to the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, regarding 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d).

On April 30, 2002, this Office sent the CDP a General Counsel’s Brief (“GC Brief”). *See* GC Brief, dated April 30, 2002. The GC Brief recommended that the Commission find probable cause to believe the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441d(a), and 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b); and the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C.

§ 441b and 11 C.F.R. § 102.5(a)(1)(i). The CDP submitted its Reply Brief on June 11, 2002.¹
Attachment 1. The Reply Brief is analyzed below.

For the reasons set forth in the GC Brief, incorporated herein by reference, and stated below, this Office recommends that the Commission find probable cause to believe that the CPD violated the Act and approve a conciliation agreement with the CDP. Attachment 2.

III. ANALYSIS

As demonstrated in the GC Brief, the CDP produced and paid for five pieces of direct mail and several radio advertisements that were not only targeted to a wholly federal election but contained express advocacy of a clearly identified candidate. The communications at issue contained references to Walter Capps and the statements “Continue the Walter Capps tradition,” “Vote Democratic” and “Special Election, Tuesday, March 10th.” The statements were targeted to a wholly federal election because they were aimed at only one race, the special election held on March 10, 1998, to fill the vacancy in the House seat for the rest of Walter Capps’ term. *Cf.* 11 C.F.R. § 106.5(a) (allocating expenses for joint federal and non-federal activity). Moreover, the communications only ran during the period running up to the special election. The communications also contained express advocacy of a clearly identified candidate because they contained explicit words of exhortation to vote and because they unambiguously referred to the Democratic candidate. *See* 11 C.F.R. §§ 100.22 and 100.17. The special election involved only one Democratic candidate, Lois Capps, the widow of Walter Capps. Despite the fact that these communications were targeted, contained express advocacy of a clearly identified candidate, and helped Lois Capps to prevail in the election, the CDP treated the communications as generic

¹ The CDP requested a 20-day extension, until June 11, 2002, to respond to the GC Brief. This Office granted the extension after the CDP consented to extend the statute of limitations for an additional 20 days pursuant to a tolling agreement

1 voter activity and financed the communications primarily out of impermissible funds from its
2 non-federal account. Finally, the CDP misreported payments related to these advertisements as
3 allocated generic voter expenses instead of independent expenditures and failed to include proper
4 disclaimers in the advertisements. *See* 2 U.S.C. §§ 434(b) and 441d(a).

5 Under Commission regulations, only joint federal and non-federal activity may be
6 allocated; targeted or candidate-specific activity may not be allocated. 11 C.F.R. § 106.5(a).
7 Because the communications were targeted to a wholly federal election and were candidate-
8 specific, expenses for the communications should not have been allocated and should have been
9 paid out of federal funds only. *Id.* In addition, because the communications contained express
10 advocacy of a clearly identified candidate, they should have had the proper disclaimers and
11 should have been reported as independent expenditures. 2 U.S.C. §§ 434(b) and 441d(a).

12 In its Reply Brief, the CDP does not dispute the facts of this case. Specifically, the CDP
13 does not dispute that the direct mail pieces and radio ads contained an explicit exhortation to
14 vote, but the CDP maintains that the mail pieces and radio ads are not candidate-specific and thus
15 were generic voter activity rather than independent expenditures. Attachment 1, pages 3 and 5.
16 The CDP also argues that the Commission has misinterpreted its regulations at 11 C.F.R. § 106.5
17 by improperly excluding allocation for disbursements relating to special elections. *Id.* at 2-3.
18 The CDP argues that because the communications were generic voter activity, the disbursements
19 for these communications were properly allocated and reported and the Commission should find
20 no probable cause to believe that they violated the Act and regulations. *Id.* at 1-3. In support of
21 its assertions, the CDP essentially makes the same arguments as in previous submissions.²

² See First General Counsel's Report, dated May 6, 1999, pages 11-14; the Factual and Legal Analysis, pages 8-12, General Counsel's Report #2, dated April 18, 2002, page 8, footnote 7, and Attachment 3, pages 14-17; and the GC Brief

1 First, the CDP argues that the candidate, Lois Capps, is not “clearly identified” in the
2 communications because her identity is not apparent by unambiguous reference but is based on
3 context and the reader’s perception. *Id.* at 3-6. Specifically, the CDP argues that the
4 communications only urge the public to vote Democratic in a special election and that the
5 determination that the communications refer to one Democratic candidate is based on “extrinsic
6 information” where “the average reader may conclude that these were multiple races or multiple
7 Democratic candidates.” *Id.* The CDP notes that such context-driven analysis is contrary to case
8 law on express advocacy, the Act, and regulations. *Id.* at 4-5.

9 The express advocacy cases cited by the CDP on this issue are not applicable to this case
10 because they focused on the distinction between “express advocacy” and “issue advocacy” rather
11 than on whether a candidate was clearly identified. In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct.
12 612, 46 L.Ed.2d 659 (1976), the Supreme Court focused on this distinction because it wanted to
13 ensure “that Congress was only regulating ‘spending that is unambiguously related to the
14 campaign of a particular federal candidate’ and not regulating ‘issue discussion and advocacy of
15 a political result.’” *Virginia Society for Human Life, Inc. v. Federal Election Commission*, 263
16 F.3d 379, 383 (4th Cir. 2001) (quoting *Buckley*, 424 U.S. at 79-80). Based on this distinction
17 between “express advocacy” and “issue advocacy,” the court in *Virginia Society for Human Life*
18 recognized that “[r]elying on audience impression to determine the advocacy category would
19 ‘compel [] the speaker to hedge and trim’ and curtail the right of free expression.” *Id.* at 392
20 (quoting *Buckley*, 424 U.S. at 43). *See also, Federal Election Commission v. Christian Action*
21 *Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996) (affirming the district court’s reasoning that the
22 communications at issue were not express advocacy and that it was not appropriate “to interpret
23 the meaning behind images”); *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir.

1 1987) (finding that express advocacy is speech that is subject to only one reasonable
2 interpretation); and *Federal Election Commission v. The Christian Coalition*, 52 F. Supp.2d 45,
3 62 (D.D.C. 1999) (finding that express advocacy requires an explicit directive, a verb or word, in
4 context of a communication and considering proximity to the election, that unmistakably exhort
5 someone to take electoral action). The communications at issue in this matter, however, do not
6 require “audience impression to determine the advocacy category.” See *Virginia Society for*
7 *Human Life, Inc.*, 263 F.3d at 392. They explicitly exhort a partisan vote at an upcoming
8 election. Thus, the issue here is far narrower. It is not whether “reference to external events” is
9 necessary to determine if the communications contained an explicit exhortation to vote (11
10 C.F.R. § 100.22(b)), but rather whether the identity of the candidate is apparent “through an
11 unambiguous reference to his or her status as a candidate.” 11 C.F.R. § 100.17.

12 The definition of clearly identified candidate is not limited to providing the candidate’s
13 name or picture but also includes unambiguous references to the candidate such as a reference to
14 a candidate’s status, e.g., “your Congressman,” or a reference to someone’s status as a candidate,
15 e.g., “the Republican candidate for the Senate in the State of Georgia.”³ See 11 C.F.R. § 100.17.
16 Thus, by definition, an unambiguous reference may rely on an extrinsic fact. Moreover, even the
17 definition for express advocacy at 11 C.F.R. § 100.22(a) lists examples of communications
18 where extrinsic information is required to ascertain the actual identity of the candidate, such as
19 “support the Democratic nominee.” As discussed in previous General Counsel’s reports, the
20 Factual and Legal Analysis, and in the GC Brief, the language urging the public to “Continue the

³ Under the Act, a candidate is “clearly identified” when the name, photograph, or drawing of the candidate appears or the identity of the candidate is otherwise apparent by unambiguous reference. See 2 U.S.C. § 431(18). Commission regulations provide examples of unambiguous reference such as “your Congressman” or “the incumbent” and references to the candidate’s status such as “the Republican candidate for the Senate in the State of Georgia.” 11 C.F.R. § 100.17.

1 Walter Capps Tradition” and to “Vote Democratic” in the “Special Election, Tuesday, March
2 10th,” on its face is exclusively directed at one specific election—the special election on March
3 10th.⁴ Because there was only one office at stake in the March 10th special election and only one
4 Democrat on the ballot, the message can mean no other candidate but the Democratic nominee in
5 the March 10th special election for the House seat for the 22nd Congressional District of
6 California.⁵ Because the message in the communications can only refer to one candidate, the
7 identity of the candidate is apparent by unambiguous reference. *See* 11 C.F.R. § 100.17; *see also*
8 MUR 4643 (Democratic Party of New Mexico) (Commission found probable cause to believe
9 that a state party’s communications exhorting a partisan vote at a wholly federal special election
10 involving only one race and only one nominee from each party violated 2 U.S.C. § 441b and
11 11 C.F.R. § 102.5(a)(1)(i) because they were candidate-specific).

12 Second, the CDP argues, as in previous submissions, that the allocation regulations at
13 11 C.F.R. § 106.5 apply to special elections. Specifically, the CDP argues that for purposes of
14 allocating generic party expenditures through the ballot composition method, the regulations do
15 not differentiate between a special election and other elections. Attachment 1, pages 2, 7-9. The
16 CDP argues that the Commission considers all generic voter activity in the context of a special
17 election as candidate-specific because it found that communications targeted to a special election
18 are candidate-specific. *Id.* The CDP also disagrees with the reference in footnote 3 of the GC
19 Brief that even apart from candidate-specific activity, generic voter drive expenses that pertain to
20 wholly federal or wholly non-federal elections are not allocable. *Id.* at 8.

⁴ *See* footnote 2, *supra*.

⁵ As discussed in the GC Brief, the communications contain multiple references to “Walter Capps,” the previous officeholder, deceased incumbent of the Congressional District, and spouse of the Democratic nominee, Lois Capps.

1 The CDP mischaracterizes this Office's position regarding allocation of expenses for
2 special elections. Whether expenses may be allocated depends not on whether the activity
3 involves a special election but on whether it is mixed activity, i.e., activity in connection with
4 federal and non-federal elections. 11 C.F.R. § 106.5. Thus, disbursements for activity that is not
5 mixed, i.e., activity that is targeted to a particular election or that is attributable to or mentions a
6 specific candidate, are not allocable. Moreover, as discussed in the Factual and Legal Analysis,
7 the Commission concluded that communications in this fact pattern are candidate-specific not
8 because they addressed a special election but because the message conveyed in the
9 communications combined with the reference to a specific election involving only one race
10 resulted in a clear identification of the candidate.

11 As discussed in the GC Brief and above, the CDP's communications were not generic
12 voter activity because they contained express advocacy of a clearly identified candidate. *See*
13 2 U.S.C. § 431(17). Accordingly, the communications were independent expenditures and
14 should have been financed exclusively from federal funds. *See* 2 U.S.C. §§ 431(9) and (17). The
15 CDP's use of impermissible funds from a non-federal account to finance federal activity violated
16 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a). In addition, the CDP's misreporting of expenses for
17 these communications as allocated expenditures rather than independent expenditures violated
18 2 U.S.C. § 434(b). Finally, the CDP's failure to include complete disclaimers in these express
19 advocacy communications violated 2 U.S.C. § 441d(a). Accordingly, this Office recommends
20 that the Commission find probable cause to believe that the California Democratic Party and the
21 Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer,
22 violated 2 U.S.C. §§ 441b, 441d(a), and 11 C.F.R. § 102.5(a)(1)(i); the Democratic State Central
23 Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b);

1 and the Democratic State Central Committee of California—Non-Federal and Katherine Moret,
2 as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i). This Office also
3 recommends that the Commission enter into conciliation with the CDP.

4 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

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V. RECOMMENDATIONS

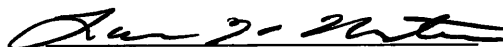
1. Find probable cause to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441d(a), and 11 C.F.R. § 102.5(a)(1)(i).


2. Find probable cause to believe that the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b).


3. Find probable cause to believe that the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

4. Approve the attached conciliation agreement and appropriate letter.

10/9/02
Date


Lawrence H. Norton
General Counsel


Rhonda J. Vosdingh
Associate General Counsel for Enforcement


Jonathan A. Bernstein
Assistant General Counsel


Dominique Dillenseger
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Other staff assigned:
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Attachments:
1. Reply Brief from CDP
2. Proposed Conciliation Agreement