BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Charles Ball for Congress	)	
and Justin Briggs, as treasurer	)	MUR 4919
Adrian Plesha	)	
Heather Patterson	)	
	)	

GENERAL COUNSEL'S REPORT #11

I. ACTIONS RECOMMENDED: (i) Find probable cause to believe that Adrian Plesha knowingly and willfully violated the statute and refer his violation to the Department of Justice; (ii) find probable cause to believe that Charles Ball for Congress knowingly and willfully violated the statute, that Justin Briggs violated the statute, and approve the conciliation agreement with them; (iii) take no further action against Heather Patterson.

II. PROCEDURAL HISTORY

The Election Fraud Unit of the California Secretary of State's Office referred this matter to the Commission. It involves thousands of fraudulent mailers and telemarketing calls. The East Bay Democratic Committee or Democrat Committee[1] purportedly sponsored the fraudulent communications. They were disseminated to Democratic voters in California's 10th Congressional District shortly before the general election on November 3, 1998.[2] In that election, the Republican candidate, Charles Ball, challenged the Democratic incumbent,

[1] The mailing was purportedly sponsored by the "East Bay Democratic Committee," while the telemarketing script, perhaps in error, indicates that the "East Bay Democrat Committee" sponsored it. *See* Attachment 4 at pp. 2 and 22, GC Brief for Plesha at pp. 3-4.

[2] The U.S. Attorney's Office in the San Francisco area of California launched an investigation into the fraudulent communications shortly after the November 1998 election. The FBI was unable to discover who was responsible and the US Attorney's Office did not pursue the matter. During discussions at the outset of the Commission's investigation in 1999, the US Attorney's Office expressed a strong interest in pursuing this matter criminally if we discover who was responsible.

Representative Ellen Tauscher. The communications urged recipients not to vote for Tauscher. Ball was defeated.

On August 17, 1999, the Commission found reason to believe that persons unknown knowingly and willfully violated 2 U.S.C. § 441d(a). Based upon information ascertained during the investigation, on August 23, 2000, the Commission found reason to believe that Charles Ball for Congress ("Ball campaign," or "Ball Committee"), Ball campaign manager Adrian Plesha and Finance Director Heather Patterson knowingly and willfully violated 2 U.S.C. § 441h. The Commission also found reason to believe that the Committee's treasurer, Justin Briggs, violated 2 U.S.C. § 441h. At the same time, the Commission notified the Ball campaign and its treasurer of its earlier Section 441d(a) findings.

On September 5, 2001, this Office mailed one General Counsel's Brief ("GC Brief") to the Ball campaign and its treasurer and a separate Brief to Adrian Plesha (Plesha is now represented by his own counsel). This Office also provided to Plesha all requested materials, including access to the deposition transcript of Charles Ball and copies of all affidavits and documents cited in the GC Brief. The Reply Briefs are attached and are analyzed below. Attachments 1 and 2. For the reasons set forth in the GC Briefs, incorporated herein by reference, and stated below, this Office recommends that the Commission find probable cause to believe that the Ball campaign and its treasurer and Plesha violated the Act.[4]

The GC Briefs set forth how the evidence overwhelmingly shows that Plesha is responsible for the knowing and willful violations, though he denied it in a sworn written

[4] The Briefs were circulated to the Commission on September 5, 2001.

statement submitted to this agency. Attachment 6. In light of the circumstances described in detail in the GC Brief sent to Plesha, this Office recommends that the Commission refer his violation to the Department of Justice ("DOJ") for possible criminal prosecution pursuant to 2 U.S.C. § 437g(a)(5)(C). This Office also recommends that the Commission approve a conciliation agreement with the Ball campaign and its treasurer. Attachment 3.

III. BACKGROUND

On October 31, 1998, just three days before the election, thousands of mailers were sent to Democratic households in California's 10th Congressional District. The one-page letter was typewritten on the personalized letterhead stationary of the "East Bay Democratic Committee." It contained a fraudulent address, and carried the name George Miller at the end as "East Bay Democratic Chairman." George Miller represents a neighboring congressional district and is a strong supporter of Tauscher. Miller publicly denounced the mailer and denied any involvement.[5] The letter urged Democrats not to vote for Tauscher, yet contained no disclaimer identifying who paid for the mail piece or whether it was authorized by any candidate or committee. The text of the letter is reproduced below:

[5] Representative George Miller from California (D-7) and the California Democratic Party brought suit in state court against candidate Charles Ball, his campaign committee, the Charles Ball for Congress Committee, and Adrian Plesha. The complaint alleged that producers of the mailer violated state law by fraudulently using Miller's and the party's names and that Ball and Plesha should have stopped the fraudulent campaign mailer and phone operation. Daniel Borenstein, *Lawsuit Targets Phony Mailer, Calls,* THE TIMES, CONTRA COSTA, Nov. 5, 1998, at A3. The suit was voluntarily dismissed.

EAST BAY DEMOCRATIC COMMITTEE
"Representing all Democrats in the East Bay"
1960 John F. Kennedy Dr.
Antioch, CA 94509

IMPORTANT MESSAGE!

November 1st, 1998

Dear fellow Democrat,

Election day is drawing near and it is crucial that we support the Democratic team. The Republican party and big business will stop at nothing to derail our positive agenda for working families.

Each year we provide you with the slate of our Democratic team we are supporting. This year we have done the same for all major candidates in the East Bay who have been supportive of our President, Bill Clinton, and the goal of our party including 100,000 new teachers, a Patients Bill of rights and protection of Social Security.

However, as loyal Democrats, we find it very troubling that Rep. Ellen Tauscher abandoned President Clinton and the Party when she voted with the Republicans to launch an Impeachment Inquiry in the personal life of a truly great President who has accomplished so much for the Democratic Party and working families.

It is with great regret that we will not be supporting the re-election of Rep. Ellen Tauscher because of her votes against the President and against our Party. Her voting with the Republicans on issues such as the impeachment inquiry, stealing from Social Security for tax cuts for the rich and minimum wage make her unacceptable to us.

We know that many Democrats have chosen to send her a message by not voting for her or against her on November 3rd because of her abandonment of the party. They have chosen simply not to vote for either candidate in the race for Congress.

And while we have chosen not to forget how Ellen Tauscher turned her back on our party we ask that you remember to support our Democratic team for the other offices on the ballot on Election Day. Unfortunately, we have been left with no choice but to send Ellen Tauscher a message. Because she abandoned us, we are abandoning her.

We could not support her opponent. And Ellen Tauscher will win re-election. But it is critical that she receive the message loud and clear. She must support our President to enjoy our support. Not voting for her is the best way for her to receive this message.

Thanks for remembering to support our other loyal Democrat candidates on the ballot on Tuesday.

Sincerely,

George Miller
East Bay Democratic Chairman

Additionally, on the same day the mailing was received, thousands of registered Democrats in the 10th Congressional district received phone calls from persons claiming to be from the "East Bay Democrat Committee." The calls contained a message similar to the mailings and urged voters not to vote for Ellen Tauscher. Some of the persons who received the calls and mailers complained about them to local authorities. The script stated:

> **Hi, I'm calling for the East Bay Democrat Committee, representing all Democrats in the East Bay, to remind you to vote for our Democrat Team on Tuesday. But we are not endorsing Ellen Tauscher for Congress. Ellen voted with Newt Gingrich and the Republican Congress to continue the impeachment process of President Bill Clinton.**
>
> **We could never support her opponent, but since she did not support our President - we are not supporting her. Thank you. Goodbye.**

The evidence discussed in detail in the GC Briefs demonstrates that the Ball campaign financed express advocacy communications without a disclaimer and misrepresented itself as the "East Bay Democratic (or Democrat) Committee" through approximately 40,000 mailings and 10,000 completed phone calls urging Democrats not to vote for Ellen Tauscher, in violation of Sections 441d(a) and 441h. Although Adrian Plesha explicitly denies any involvement, the evidence indicates Plesha, acting as the Committee's agent, actually spearheaded these efforts. Plesha planned the effort weeks in advance, conveying small pieces of information about it to other campaign staff. The Ball campaign's computers contained drafts of the communications, along with emails of Democratic voters lists sent to Plesha at his request. The Ball campaign stockpiled stamps for the mailing and ordered its printing firm to hide all traces of the transaction. The Ball campaign ordered and financed the "East Bay" phone banks, and attempted to disguise the nature of the calls. Then, after the communications were disseminated, Plesha made statements implicating himself and the campaign.

The key evidence gathered includes the following:

- This Office found on the Ball campaign's computer a draft of the East Bay Democratic Committee mailing and telemarketing phone bank script, which pre-dated the dissemination of the communications. Attachment 4 at pp. 3, 4, 7, 22, 24, 29, 30.
- Ball campaign staff members Heather Patterson and Deputy Campaign Manager Christian Marchant provided affidavits indicating that Plesha made incriminating statements before and/or after the dissemination of the communications. GC Brief for Plesha, pp. 6-11.
- Plesha stockpiled over 40,000 first class stamps for the mailing. Attachment 4 at pp. 31-41; GC Brief for Plesha p. 8.
- Plesha instructed Marchant to send Democratic voter lists to Stevens Printing. Attachment 4 at pp. 13, 17-18; GC Brief for Plesha at pp. 9-10.
- Plesha instructed its print house, Stevens Printing, to use "live stamps" for the mailing (rather than the postal meter that is traceable). Attachment 4 at pp. 13, 17-18; GC Brief for Plesha at pp. 9-10.
- Stevens instructed Greg Holman (owner of mail house Ireland Direct) to hide all traces of the mailing by not issuing an invoice, accepting cash payment, and returning all spoils. Attachment 4 at pp. 55-56.
- Plesha hired Jeff Butzke ("Butzke") of Direct Impact Marketing Services to arrange the East Bay Democrat Committee telemarketing operation. Brief for Plesha at p. 10. Plesha authored an electronic mail message on October 30, 1998 through which he forwarded the East Bay Democrat Committee telemarketing phone script to Butzke. Attachment 4 at p. 21. Butzke provided this Office with a copy of the East Bay Democrat Committee telemarketing script and represented it as related to the telemarketing phone bank his firm arranged for Plesha in October 1998. GC Brief for Plesha at p.10.
- Plesha wrote a $4,500 campaign check to Butzke for the telemarketing operation, and misrepresented on the check and on the campaign's check register (and ultimately campaign reports) that it was for "GOTV/GOP Men." Attachment 4 at pp. 38, 42-43; GC Brief for Plesha at pp. 10-11.
- The sub-vendor who was hired by Butzke produced a copy of the East Bay Democrat Committee phone script along with lists of voters within the district, including those who had filed complaints with local authorities. GC Brief for Plesha at p. 11.

As discussed in more detail below at Section VI, the investigation found no evidence that Patterson had any role in the violations. In addition, also as discussed below, we found no

evidence that the candidate Charles Ball, who is not a respondent in this matter, had any role in the violations.

IV. DISCUSSION OF REPLY BRIEFS

Plesha fails to address or contest most of the key factual evidence set forth in the GC Brief. Instead, he relies primarily on one legal argument. The Ball campaign does not contest that its agent, Plesha, was responsible for the East Bay Democratic Committee communications at issue, stating that it has "no independent information by which it can augment or refute these facts...." Attachment 2 at p. 3. Thus, the Ball campaign relies exclusively on legal arguments to support its claim that it should not be held liable. We first address the legal arguments and then turn to the limited factual arguments.

A. LEGAL ARGUMENTS

1. Section 441h Covers the Communications

Plesha dedicates most of his Reply Brief to a single legal argument: that Section 441h does not apply to this activity because there was no East Bay Democratic Committee. Attachment 1 at pp. 1-10. He states that the statute does not cover "a communication in the name of a 'fictitious' or 'non-existent' candidate or party committee." Attachment 1 at p. 10.

Plesha's interpretation of Section 441h is novel and overly restrictive. Contrary to his claims, Section 441h clearly applies to the facts of this matter. The statute imposes liability on any candidate or agent of such candidate who fraudulently misrepresents himself as speaking on behalf of any other candidate or political party on a matter that is damaging to that other candidate or political party. 2 U.S.C. § 441h. The GC Brief explains that Plesha's fraudulent communications concerned a matter which was damaging to the Democratic Party because they made it appear as though a local committee of that Party, speaking through a local prominent

Congressman as its "Chairman," urged Party members not to vote for their own nominee. Attachment 4 at p. 2.

The Ball campaign went through substantial efforts to convince the targeted Democratic recipients that the Democratic Party and Congressman Miller were responsible for the approximately 40,000-piece mailing. It designed the communications to make it appear that a legitimate local committee of the Democratic Party sponsored them. It included the words "Democratic" or "Democrat" in the name of the "Committee." Attachment 4 at pp. 2 and 22. The direct mailing stated that this committee was "Representing all Democrats in the East Bay." *See* Attachment 4 at p. 2, GC Brief for Plesha at p. 3. The letter further conveyed actual local party committee status by stating: "each year we provide you with a slate of our Democratic team we are supporting." Attachment 4 at p. 2. The Ball campaign used the identity of Miller as the individual who was purportedly speaking on behalf of this "Democratic Committee" as its "Chairman." Attachment 4 at p. 2.

The Ball campaign crafted the text of the mailing to make it appear that the source was the Democratic Party, i.e., Congresswoman Tauscher voted "against our Party," and "our President [Clinton]," and described the committee members "as loyal Democrats." *See* Attachment 4 at p. 2, GC Brief for Plesha pp. 3-4. The text was consistent with messages of the Democratic Party, *e.g.*, "[T]he Republican Party and big business will stop at nothing to derail our positive agenda for working families," and described the goals of the Democratic Party as "including 1000 new teachers, a Patients Bill of Rights and protection of Social Security." It describes the Republicans' votes as "stealing from Social Security for tax cuts to the rich." Attachment 4 at p. 2.

To help convince readers that the East Bay Democratic Committee was a legitimate and loyal Party committee, the Ball campaign's letter did not call for Tauscher's defeat. The letter even assured recipients that Tauscher would "win re-election" and argued that not voting for her was simply "the best way for her to receive [the] message" that fellow Democrats were displeased with her votes in Congress. Attachment 4 at p. 2. The Ball campaign's letter also made clear that these allegedly loyal Democrats could not support her Republican opponent, i.e., Charles Ball. *Id.* In short, the Ball campaign made every effort to convince recipients that the East Bay Democratic Committee was an actual local party committee -- it cannot now avoid liability because it used a fraudulent name for that committee.[6]

Beyond misrepresenting the Ball campaign as a local Democratic Party committee, the Ball campaign's letter misrepresented the person signing it as George Miller, himself a House candidate for reelection in the neighboring 7th Congressional District. Plesha asserts that George Miller is a common name. Attachment 1 at p. 5. But the name must be put in context: Miller is a prominent Congressman within the area known as the "East Bay," this was a purported Democratic committee, he was held out as the committee's "Chairman," and the communications were targeted to registered Democratic voters. Contrary to what Plesha claims in his Reply Brief (Attachment 1 at p. 5, fn. 1), because of George Miller's stature as a prominent local Democrat, recipients of the mailing believed that he was associated with the letter and some even called his

[6] The logical result of Plesha's argument is that someone could escape liability for a Section 441h violation by slightly altering the name of a real committee or candidate. For example, a person could escape liability by naming an entity "Bob Jones for Congress" when the committee name was "Bob Jones for Congress Committee," or naming the committee the "Alameda Democratic Committee" when the "real" name was the Alameda County Democratic Committee."

office to complain.[7] The letter was damaging to Miller because it made it appear that he was speaking out against his fellow Democrats in a neighboring district, which would hurt his reputation among those who opposed the message of the piece and his perceived disloyalty.

Despite Plesha's assertions, nothing in the legislative history or past Commission cases supports his argument. The legislative history indicates that the law was prompted by the "dirty tricks" that came to light during the Watergate hearings. In those cases, as in this one, a candidate's campaign paid for and disseminated letters containing statements damaging to a candidate of an opposing party and fraudulently attributed them to a member of that opposing party. *See* Legislative History of Federal Election Campaign Act Amendments of 1974 at 521 (April 11, 1974). While in those cases the responsible committee used phony candidate stationery, in this case the committee used the letterhead and/or name of a phony local Democratic Party committee and, with respect to the letters, also used the name of a candidate signing as "Chairman." Nothing in the legislative history supports Plesha's claim that the statute would not apply to a fabricated branch of a legitimate party committee. Prior Commission matters that Plesha cites and quotes simply reiterate the language of the statute

[7] A total of 13 persons mentioned George Miller by name during complaints filed with the California Voter Fraud Unit, and five of those persons explicitly stated that they associated the name with Congressman George Miller. At least two of those persons called Congressman Miller's office to complain.

and add nothing to his argument.[8]

Plesha asserts that a finding that he violated Section 441h would amount to "rulemaking through [an] enforcement" matter, which he claims is not permissible. Attachment 1 at pp. 1, 9-10. Plesha mistakenly relies on *General Electric v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). In that case, the D.C. Circuit held that an agency violates due process if it sanctions persons for mistakenly violating regulations or policy statements that do not make sufficiently clear that such conduct is illegal. Yet this matter involves a straightforward application of 2 U.S.C. § 441h, and the Commission has the power to enforce the statute itself. *See* 2 U.S.C. §§ 437d, 437g; *SEC v. Chenery*, 332 U.S. 194, 203-204 (1947). In *Chenery*, the Supreme Court rejected the argument that an agency could only interpret and apply its law through regulations, stating that there is "a very definite place for the case-by-case evolution of statutory standards," and that the choice of whether to proceed by "general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at p. 203. Moreover, it is Plesha's narrow interpretation of the statute that is novel.

In summary, nothing in the language of Section 441h, its legislative history or Commission precedent supports Plesha's overly restrictive interpretation of the statute.

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[8] Plesha cites to the findings and recitation of the law in MURs 178A, 1451, 1711 and 3536 to support his contention that the Commission limits Section 441h findings to communications done on behalf of an existing entity. Attachment 1 at pp. 8-9. In MURs 178A, 1451 and 1711, the Commission found no reason to believe that Section 441h violations had occurred. In MUR 3536, the Commission made the initial Section 441h finding and investigated, the opposing candidate testified that he was not responsible, this Office did not discover the responsible party and the file was closed. The facts in these matters, however, are not analogous to the facts at issue and they have no relevance to Plesha's legal argument. MUR 178A involved an allegation that an advertisement paid for by a police association may have misrepresented an endorsement by that association. In MUR 1451, the allegation related to a committee disclaimer stating that the state party had financed communications that it did not, but it was the result of the state party's allegedly backing out of an agreement after the communications were printed. MUR 1711 involved a candidate's use of another candidate's name on a sign, but there was no evidence of a misrepresentation of acting for or on behalf of the other candidate or intent to damage that candidate. Finally, MUR 3536 involved a letter put out on a candidate's stationery and containing a damaging statement about a candidate from another party. None of these matters involved whether an entity existed or not.

2. Section 441h Does Not Require Proof of Common Law Fraudulent Misrepresentation

The Ball Committee contends that to pursue a Section 441h violation, the Commission must prove each of the elements of "fraudulent misrepresentation": misrepresentation, knowledge of falsity, intent to defraud, justifiable reliance, and resulting damage. Attachment 2 at pp. 4-5. It argues that the General Counsel's Brief fails to establish those elements. While Plesha does not claim that the Commission must establish the elements of fraudulent misrepresentation, he asserts that the Commission must prove that the misrepresentation caused damage to Tauscher. Attachment 1 at p. 6, fn.3. Plesha points to Tauscher's election results in 1996, 1998, and 2000 as proof that she was not damaged. *Id.*

This Office rejects the claim that establishing a violation of Section 441h requires proof of each of the elements of common law fraudulent misrepresentation. We discuss below several bases for rejecting this interpretation of the statute.

First, Section 441h is part of a federal statute designed to address campaign abuses, not common law fraud. Common law fraudulent misrepresentation is most often a civil tort that enables a party to recover damages. Section 441h gives rise to no tort action; it is part of an enforcement scheme enacted to promote the integrity of the financing of federal elections, and to prevent corruption or the appearance of corruption. *See generally Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). The Commission remedies violations of the Federal Election Campaign Act of 1971, as amended ("FECA") through civil penalties and/or injunctive relief, not proof of monetary loss or damages. *See* 2 U.S.C. § 437g(a)(5) and (6). Congress enacted the FECA to protect the public interest. It does not directly compensate candidates or other individuals for harm they might suffer through fraud that might occur during an election.

Indeed, in fashioning relief in an FEC reporting and disclaimer case, the Ninth Circuit stated: "the importance of the FECA's reporting and disclosure provisions, [footnote omitted] and the difficulty of proving that violations of them actually deprived the public of information, justify a rule allowing a district court to presume harm to the public from the magnitude or seriousness of the violation of these provisions." *Federal Election Commission v. Furgatch*, 869 F.2d 1256, 1259 (9th Cir. 1989); *cf. United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172 (9th Cir. 1987) (irreparable injury is presumed when the federal government brings a preliminary injunction action pursuant to a federal statute (FDCA)). In this matter, the Ball campaign's communications fraudulently appeared to be sponsored by a Democratic Party committee and attempted to suppress votes for a Democratic candidate. Given the seriousness of this fraudulent misrepresentation, the magnitude, and the difficulty in establishing the harm caused, the logic of Ninth Circuit's rule fully applies to this Section 441h matter.[9]

The Supreme Court has recognized that statutes that address schemes to defraud do not require proof of the common law requirements of "justifiable reliance" and "damages." *Neder v. United States*, 527 U.S. 1, 24-25 (1999)("The common law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in federal fraud statutes."... "By prohibiting the 'scheme to defraud' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted"), *citing United States v. Stewart*, 872 F.2d 957, 960 (C.A. 10 1989)([Under the mail fraud statute], [t]he government does not have to prove actual reliance upon the defendant's misrepresentations ...."). Section 441h(2)

[9] Congress considered knowing and willful violations of Section 441h so serious that it explicitly removed any monetary limitation on criminal prosecutions. *See* 2 U.S.C. § 437g(d)(1)(C).

explicitly applies to persons who knowingly and willfully conspire to participate in schemes and plans to engage in the type of fraudulent misrepresentation at issue here.

Second, Section 441h states that the fraudulent misrepresentation must be "on a matter which is damaging to [the misrepresented] candidate or political party." The Ball campaign's argument ignores this specific language by focusing on proof of "damage" in the context of a common law tort of fraud. If Section 441h includes proof of damage as required by common law fraudulent misrepresentation, then the phrase "on a matter damaging" is superfluous. Courts construe statutes so "as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991); *see also Federal Election Commission v. Arlen Specter '96*, 150 F. Supp.2d 797, 806 (2001), *quoting Bennett v. Spear*, 520 U.S. 154, 173 (1997). "Damaging" means "causing or able to cause damage." WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). In contrast, common law fraudulent misrepresentation requires establishing "damage," which is defined as, "Loss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect to the latter's person or property." BLACK'S LAW DICTIONARY (7th ed. 1999). In short, if Congress intended to require proof of legal damages, or that the misrepresentation changed the outcome of an election, it would not have included language explicitly stating that the misrepresentation must be on a

matter "damaging" to the candidate or party.[10]

Finally, Courts have refused to adopt the common law meaning of a term of art like "fraudulent misrepresentation" if to do so would be inconsistent with Congress' general purpose in enacting a law. *Moskal v. United States*, 498 U.S. 103, 117 (1990), *citing United States v. Turley*, 352 U.S. 407, 411 (1957). In such instances, a court looks to whether the statutory construction is inconsistent with Congress' broad purpose in enacting the statute. As discussed above, Section 441h was specifically enacted to protect the public from fraudulent campaign practices and prevent the types of "dirty tricks" that came to light during the Watergate hearings; communications similar in respects to those at issue here. It would be inconsistent with Congress' intent to interpret Section 441h as requiring proof of all the elements of fraudulent misrepresentation and to treat the statute like a private action for damages, i.e., a tort.[11] *See also Cook v. Corbett*, 446 P.2d 179, 85 (Or. 1968) ("To require the contestant in every case involving a violation of the [state's] Corrupt Practices Act, no matter how deliberate and material the

[10] The legislative history does not support the Ball campaign's assertions. The law was passed in response to documents put out by an agent of President Nixon's campaign that bore the letterhead of former Senator Muskie's campaign and that falsely accused former Senators Humphrey and Jackson of "bizarre personal conduct." Legislative History of Federal Election Campaign Act Amendments of 1974 at 521 (April 11, 1974). Nothing in the legislative history suggests that Congress concluded that these "dirty tricks" affected the outcome of the 1972 election, or that the provision required proof that they did. One of the sponsors of the legislation, Senator Bayh, stated that the statute would apply "where not only does the candidate or his agent know that the statements about another candidate are false but that they are, in fact, damaging to him." *Id.* Given that there was no discussion in the legislative history about proof of damages caused by the "dirty tricks" that served as the impetus for passage of Section 441h, the "damaging" that Senator Bayh must have had in mind was harm caused by communications designed to damage a candidate's electoral prospects. This is precisely the type of damage that is at issue in this matter in which the Ball campaign intended to damage the Democratic Party by attempting to suppress votes for its nominee.

[11] In prior matters, this Office, at only the initial stage, analyzed the matter using the common law elements of fraudulent misrepresentation. *See* MURs 3690, 3700, and 4735. Having fully investigated this matter and more thoroughly studied the law and the ramifications of that approach, this Office reaches the conclusion set forth above.

violation, to prove that the violation affected the outcome of the election, would render the act nugatory and impossible of enforcement.")[12]

3. Candidate Committees May Be Liable For Section 441h Violations

The Ball campaign argues that Section 441h only imposes liability on a "person who is a candidate" *or* an individual who is an "employee or agent of such a candidate" who then makes fraudulent misrepresentations of campaign authority. 2 U.S.C. § 441h. Respondents contest that the candidate's principal campaign committee, Charles Ball for Congress, can be an agent of the candidate, and also therefore argue that the campaign manager, Plesha, cannot impute liability to the committee. However, neither the law nor facts support Respondent's position.

Section 441h states: "No person who is a candidate for Federal Office or an employee or agent of such a candidate shall— (1) fraudulently misrepresent himself or any committee...."[13] *Id.* Because the Act defines "person" to include a "committee" under 2 U.S.C. § 431(11), Respondents can be liable for violating Section 441h with a simple two-step analysis. First, a candidate's principal campaign committee is an agent of the candidate. Second, when a committee's agent fraudulently misrepresents his campaign committee's authority by

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[12] The statute would be virtually impossible to enforce if proof of the elements of fraudulent misrepresentation was required. Proving reliance would presumably require showing that, after reasonably relying on the East Bay Democratic Committee communications, recipients changed their minds about voting for Tauscher. Establishing damages within the meaning of common law fraud would require proof that recipients of the communications did not vote for Tauscher in 1998, or, as the respondents argued in the context of a civil suit filed against them, proof that the candidate lost the election due to the misrepresentation. *See* Attachment 5 at pp. 14-15. We do not believe that Congress intended to pass a statute in which only a candidate who succeeds in defeating his opponent by engaging in the prohibited conduct could be pursued for a violation. *Cf. United States v. Norberg*, 612 F.2d 1, 4 (1st Cir. 1979) *quoting United States v. Goberman*, 458 F.2d 226, 229 (3d Cir. 1972) (Requiring proof of reliance in prosecutions for filing false statements with a lending institution "would wreak havoc on enforcement of the provision.").

[13] Respondent's argument that Section 441h only applies to an "individual person" ignores that the verb "is" separates the noun "person" from the predicate nouns set apart in disjunctive ("or"). Thus, under a strict statutory construction, the phrase "No person" applies to either "a candidate for federal office" or "an employee or agent of such a candidate." It does not require that an employee or agent of a federal candidate be also an individual because the definition of "person" is not that restrictive. *See* 2 U.S.C. § 431(11).

impersonating the opposing Party's candidate in an effort to get his committee's candidate elected with voter suppression, the agent's fraud is imputed to the Committee. Consequently, the Committee is subject to the provisions of Section 441h.

a. The Committee is an Agent of the Candidate.

The Act provides that after an individual becomes a candidate, the candidate must authorize a separate entity, the "authorized committee," to act on the candidate's behalf as an agent of the candidate. 2 U.S.C. § 432(e)(1); 2 U.S.C. § 431(6) (defining "authorized committee"). Indeed, the filing of the committee's statement of organization provides notice to the world that the authorized committee has received actual authority to act on the principal candidate's behalf in conducting campaign activity. 2 U.S.C. §§ 432(g); 433. Here, Charles Ball for Congress is the "authorized committee" of the candidate, Charles Ball, and is thereby an agent of the candidate when it takes actions to misrepresent a candidate, committee or political party. 2 U.S.C. § 441h.[14]

b. The Campaign Manager is an Agent of the Committee.

General rules of agency law "apply to a federal statute when those traditional rules are consistent with the statute's purpose and Congress has not indicated otherwise." *Gunderson v. ADM Investor Services, Inc.*, 2001 WL 624834, *19 (N.D. Iowa) (holding that ADM as a corporate "person" was vicariously liable for a knowledge offense on account of the acts of its agents). The Restatement (Second) of Agency defines an agent as one who exercises the actual

[14] Although the Act does not generally define an "agent," Commission regulations do define "agent" for the purpose of determining whether an expenditure is attributable to a candidate's campaign or is an independent expenditure. *See* 11 C.F.R. § 109.1(b)(5) (defining agent as one who exercises "actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate" or who occupies a position that third parties would reasonably believe to confer such authority). This definition is wholly consistent with settled principles of agency law. As such, committee staff who are authorized to make expenditures and/or to conduct business for the committee are considered agents of the committee for purposes of the FECA.

authority of a principal and provides that actual authority exists where a principal makes an express or implied grant of authority to the agent. RESTATEMENT (SECOND) OF AGENCY §§ 1; 26. Where a principal grants an agent express or implied authority, the principal generally is responsible for the agent's acts "within the scope of his authority." *See Weeks v. United States*, 245 U.S. 618, 623 (1918). The conduct of a servant is within the scope of employment if: "(a) it is of the kind he is employed to perform; (b) it occurs within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master."[15] RESTATEMENT (SECOND) OF AGENCY § 228(1); *see also United States v. A & P Trucking Co.*, 358 U.S. 121, 125 (1958).

First, information developed in discovery shows that Plesha, the senior managerial person on the Committee, exercised broad authority in running the campaign, including the authority to make decisions about campaign advertising, hire vendors, handle invoices, expend committee funds, and the authority to develop and approve scripts for direct mail and phone banks. Second, all the vendors involved in the direct mail and phone banks dealt solely or primarily with Plesha while he was the campaign manager. Third, as both the direct mail and phone bank calls were each designed to suppress opposing party voter turnout, to the benefit of Charles Ball, clearly Plesha's payment for the direct mail pieces and phone bank with campaign money was designed at least in part to serve the purpose of his master. Therefore, Charles Ball for Congress (acting through its campaign manager) fraudulently misrepresented itself as the East Bay Democratic

[15] Subsection (d),"if force is intentionally used by the servant against another, the use of force is not unexpectable by the master," is not relevant to this case.

Committee and, as an agent of the candidate, the authorized campaign committee is liable for violating Section 441h.[16]

4. Respondent Treasurers Named in Enforcement Matters are Liable

The Ball campaign also argues that the Committee's current treasurer, Justin Briggs, should not be found liable for any of the violations because he was not the treasurer at the time of the violations and had no involvement with either the direct mail or the phone banks.[17]

Under the Commission's treasurer policy, successor treasurers are named in their *official* capacity as respondents in an enforcement matter along with the committee. Briggs was not named as an *individual* respondent in this matter and this Office is not recommending making knowing and willful findings against Briggs. Although in MUR 4643 (New Mexico Dems/Serna Committee), the Commission decided to defer action as to the candidate committee treasurer (Serna) on findings relating to coordinated expenditures pending re-examination of the Commission's "treasurer policy," part of this reasoning was based on this Office's anticipation that it may continue to litigation. *See* General Counsel's Report ("GCR") #5. However, this Office believes that unlike MUR 4643, where the DPNM treasurer was named as a defendant in subsequent litigation, this matter will not go to litigation, but is likely to settle. In addition, as with previous matters where treasurers have argued that they were not involved, specific language can be added to the conciliation agreement to clarify the issue that Briggs was not the treasurer at the time of the violations.

[16] In prior cases, the Commission has made findings regarding candidate committees in Section 441h cases. *See* MUR 4735 (finding reason to believe a candidate committee violated 2 U.S.C. § 441h); MUR 1451 (finding no reason to believe that a candidate committee violated 2 U.S.C. § 441h).

[17] According to disclosure reports, Justin Briggs became treasurer of the Ball Committee on January 31, 2000.

5. **Constitutionality of Section 441h**

The Committee argues that Section 441h "may" pose an unconstitutional burden on free speech, in violation of the First Amendment. A federal agency should not generally entertain facial challenges to its own statute. *See Robertson v. Federal Election Commission*, 45 F.3d 486, 489 (D.C. Cir. 1995) ("It [is] hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional"). An agency may, however, weigh the constitutional implications of the application of its statute. We believe that the case law shows that the statute is fully constitutional as applied to the facts in this matter.

The investigation has established that the Ball campaign created communications that falsely conveyed that a Democratic committee, the East Bay Democratic Committee, was urging Party members not to vote for their nominee. The Ball campaign crafted the East Bay Democratic Committee communications to promote the Ball campaign's electoral chances by deceiving recipients into not voting for Tauscher. The Supreme Court has held that a communication containing statements made with "'actual malice'— that is, with knowledge that it is false or with reckless disregard of whether it was false or not" do not enjoy First Amendment immunity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) (alleged defamation of an elected official concerning his official conduct).

In a case involving criminal prosecution for defamation for a statement made by a candidate during a campaign, the Court discussed speech that was not constitutionally protected, stating: "At the time the First Amendment was adopted, as today, there were those skillful enough to use the deliberate and reckless falsehood as an effective political tool to unseat the public servant or even topple an administration." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964),

citing Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COL. L.REV. 1085, 1088-1111 (1942). The Court continued: "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government." *Garrison*, 379 U.S. at 75. As the Court found that the standard used by the lower court was not consistent with *New York Times*, it reversed. *Id.* at 79; *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971) (involving defamation of a candidate); *Vanasco v. Schwartz*, 401 F. Supp. 87, 92-93 (E.D. N.Y. 1975) (Although the court ruled unconstitutional on its face a New York statute that prohibited misrepresentations made in the course of a campaign, it recognized that calculated falsehoods during political campaigns are not constitutionally protected), *aff'd* 423 U.S. 1021 (1976).[18] More recently, the Court recognized in dicta that a state's interest in preventing fraud "carries special weight during election campaigns when false statements, if credited, may have serious adverse consequences for the public at large." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 350 (1995). The Court wrote that the "State may, and does, punish fraud directly." *Id.* at 357.[19]

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[18] Although the Court recognizes that the government's "interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the [government's] interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment remain paramount." *Brown v. Hartlage*, 456 U.S. 45, 61. (1982). In *Brown*, there was no evidence that the candidate made the statement with knowledge that it was false or with reckless disregard for the truth, and thus the Court reversed the lower court's ruling. *Brown*, 456 U.S. at 61-62.

[19] While the Court ruled unconstitutional the statute at issue in *McIntyre*, that statute targeted anonymous, not fraudulent, communications. *McIntyre*, 514 U.S. at 338, fn. 3. Moreover, although the Court found deterrence "of false statements by unscrupulous prevaricators" insufficient to justify Ohio's "extremely broad prohibition" on anonymous speech, *Id.* at 350, it recognized that Ohio's interest in enforcing a ban on such false statements "might justify a more limited identification requirement." *Id.* at 335. The case also involved leaflets handed out by a single individual, not mass mailing and telemarketing paid for and sponsored by a candidate's agent. *See also Federal Election Commission v. Public Citizen*, No. 99-14823, 2001 U.S. App. LEXIS 21692 (11th Cir. Oct. 11, 2001) (The court rejected a First Amendment challenge to Section 441d, finding it narrowly tailored to address compelling government interest and distinguishing it from the statute at issue in *McIntyre*).

In this matter, the Ball campaign went beyond knowingly making a false statement; it intentionally schemed to deceive voters by pretending to be a member of the opposing political party. There is no doubt that the Ball campaign attempted to suppress votes by acting as a local branch of the Democratic Party known as the East Bay Democratic Committee, speaking through Miller as "Chairman," and urging Democrats not to vote for Tauscher.[20] The cases discussed above make clear that such calculated falsehood is not entitled to First Amendment protection.

6. Section 441d(a) Violations For Telemarketing

Neither the approximately 40,000 mailings nor the approximately 10,000 completed telemarketing calls included disclaimers stating who paid for the communications or whether any candidate or candidate's committee authorized them, as required by 2 U.S.C. § 441d(a). The statute requires disclaimers on, among other things, direct mail and communications that constitute "general public advertising" and which expressly advocate the election or defeat of clearly identified candidates. Of course, if the East Bay Democratic Committee communications had contained such disclaimers, the scheme would have been exposed.

The Ball campaign does not contest the Section 441d(a) violation as it applies to the 40,000 letters. Relying on Advisory Opinion 1988-1, however, the Ball campaign argues that telemarketing communications are not "general public political advertising" requiring a disclaimer. Attachment 2 at p. 4. AO 1988-1 involved the issue, among others, of whether certain campaign communications by a candidate for delegate to a national convention were

[20] The Ball campaign mistakenly relies on *Meyer v. Grant,* 486 U.S. 414 (1988) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Neither of those cases involved statutes narrowly tailored to prevent fraud upon the voting public. *Meyer* involved a law that prohibited anyone from paying persons who circulated political petitions. *Cantwell* involved a law that prohibited solicitation of funds for any religious, charitable or philanthropic causes unless a government official approves such cause. Though the Court in *Cantwell* struck down the statute, it made clear that "[w]ithout doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." *Cantwell*, 310 U.S. at 306.

required to include a disclaimer notice. The communications involved palm cards, phone banks, and direct mail and they all contained references to Michael Dukakis, a federal candidate. It was also noted in AO 1988-1 that the phone banks would "be staffed by volunteers and will only use lists generated by yourself [the delegate], the Dukakis campaign and the state party." The Commission found, without further elaboration, that although all three forms of communications would reference a federal candidate, two of them—the palm cards and phone banks—would not require disclaimer notices because they would not involve "general public political advertising." In MUR 2638, involving the issue of whether telemarketing activity conducted by a commercial vendor on behalf of a federal candidate required a disclaimer, the Commission applied AO 1988, finding no reason to believe that Section 441d was violated by the failure to include a disclaimer in the calls. *See* MUR 2638, National Security Political Action Committee, *et al.,* Factual and Legal Analysis ("F&LA"), pp. 6-7.

In 1995, the Commission considered a regulatory amendment that would explicitly include phone banks in the listing of activities that would constitute "general public political advertising." *See* 59 FED. REG. 50708 (October 5, 1994). Unable to reach a majority decision on this issue, the Commission did not adopt the proposed amendment. 60 FED. REG. 52069, 52070 (October 5, 1995). The Notice of Proposed Rulemaking described AO 1988-1 broadly, suggesting that the Commission's policy did not require disclaimers on phone banks regardless of whether they were staffed by volunteers or a commercial vendor or used commercial lists ("The Commission held in Advisory Opinion 1988-1 that oral disclaimers were not required as part of phone bank campaign communications with express advocacy content").

Based on the prior proposed rulemaking, this Office, in MUR 4735 (Bordonaro) recommended to the Commission, and the Commission decided, to take no action against a

respondent political committee for failing to include disclaimers with commercial phone banks. *See* MUR 4735, First GCR, dated March 16, 1999. In sum, given the Commission's interpretation of this provision in AO 1988-1 and in MUR 2638, and its action in the rulemaking, this Office is not recommending that the Commission pursue the disclaimer violations relating to the phone banks.[21]

B. FACTUAL ARGUMENTS

Although Plesha challenges some of the facts and, through counsel, denies certain conversations occurred, he does not deny, as he did in his earlier sworn statements, that he was involved in any way with the East Bay Democratic Committee communications at issue.[22] Instead, he claims there is insufficient evidence to hold him responsible. Attachment 1 at p. 10. He also does not deny that the Ball campaign, the committee he managed, was responsible. In fact, in an attempt to avoid personal liability he even suggests that other campaign staff may have been responsible for the communications. Attachment 1 at pp. 12-14.

First, Plesha challenges campaign staffer Patterson's affidavit. As discussed previously, Patterson swore that Plesha told her in early October 1998 about his idea of undertaking a voter suppression effort using the name of an "organization he made up." GC Brief to Plesha at pp. 6-

[21] The impact of the Bipartisan Campaign Reform Act of 2002 ("BCRA") on this precise issue remains to be analyzed because competing interpretations could arise from different portions of BCRA. *Compare* BCRA, Pub. L. No. 107-155, § 311, 116 Stat. 81 (2002) (amending Section 441d) with *id.* at § 101 (adding definitions of "public communication" and "telephone bank" to Section 431).

[22] Plesha was subpoenaed for deposition, but refused to appear. *See* GCR # 10, dated August 22, 2001 (referring to GCR #9, dated April 28, 2001, where this Office recommended the Commission move to probable cause rather than enforce Plesha's subpoena for deposition because a formal referral of Mr. Plesha for criminal prosecution could only take place at that stage and because the Commission had sufficient evidence of Plesha's involvement). In his Reply Brief, counsel makes factual assertions on Plesha's behalf, e.g., "Respondent has denied this conversation [informing Ball campaign Finance Director Heather Patterson about the fraudulent mailing] ever took place[,]" "Respondent denies ever making such a statement" (telling Deputy Campaign Manager Christian Marchant that he had "a few tricks up his sleeve"). *See* Attachment 1 at pp. 11-12.

7. Patterson swore that when she entered his office at least a week later and saw Plesha composing a document on his computer, he ordered her out of his office. GC Brief to Plesha at p. 7. In his reply brief, however, Plesha denies that he discussed with Patterson a plan for a fictitious mailing. Attachment 1 at p. 11. He also argues that Patterson's account that she was ordered out of the office undermines her credibility because if Plesha had already informed her about the plan, there would be no reason for him to order her out of his office. *Id.* at 11. Yet Plesha omits the fact, set forth in the GC Brief at p. 7, that when he first informed Patterson about his idea, she had "expressed concern" about it. In Patterson's affidavit, which was provided to Plesha, she specifically swore that she conveyed to Plesha her concern "about the risk of doing something unethical." Attachment 4 at p. 10; GCR #7, dated February 27, 2001, Attachment 1 at p. 1. Thus, it appears that Plesha was apparently composing or editing the mailing at the time Patterson entered his office and that he ordered her out of his office because he was aware that she did not approve of the mailing.[23] Plesha attacks Patterson's credibility on the grounds that his relationship with her deteriorated over the course of the campaign. Attachment 1 at p. 11. Patterson, however, indicates that she maintained a friendly relationship with Plesha after the election, speaking frequently (every other week) by telephone through 1999. *See* Attachment 4 at p. 53.

[23] Plesha also argues that Patterson's claim that he ordered her out his office is undermined by Ball's apparent lack of knowledge or memory concerning this event. Attachment 1 at pp. 11-12. During his deposition, Ball testified to little or no memory or knowledge concerning much of what went on in the campaign. *See, e.g.*, Deposition of Charles Ball dated June 14, 2001, at pp. 77-78, 90-91, 155, 198, (the deposition transcript is available at the following location: Ntsrv1/ogcproj/Commissioners/Depos-Transcript/4919). Patterson made no claim that Ball knew in advance about the mailing, but according to her affidavit, in the close quarters of the campaign offices Ball witnessed the encounter. According to Patterson, as she was leaving Plesha's office, she specifically remembered making eye contact with Ball over this unusual exchange, Attachment 4 at p. 11. More significant than any tension between Patterson's specific memory and Ball's hazy one, however, is the stark fact that Plesha's carefully worded assertions about this exchange do not contain a denial that he did in fact order Patterson out of his office, Attachment 1 at pp. 11-12, as she averred.

Second, Plesha challenges Deputy Campaign Manager Marchant's affidavit. Marchant swore that during a conversation in early October 1998 Plesha informed him that he had a "few tricks up his sleeve." Attachment 1 at p. 12. Plesha minimizes this account because Marchant stated that Plesha refused to provide additional information. Yet Plesha's Brief omits the most salient aspect of the evidence: Marchant's specific memory that Plesha "used the phrase 'suppressing voter turn-out.'" Attachment 4 at p. 13. This part of the conversation, which was discussed in the GC Brief for Plesha at p. 7 and is detailed in the affidavit provided to Plesha, is most significant since the East Bay Democratic Committee communications were, in fact, a voter suppression effort. Thus, Plesha's refusal to share additional information with Marchant shows a desire to keep knowledge about the undertaking to a minimum. Plesha also questions Marchant's credibility because their relationship "soured." Attachment 1 at p.11. Yet Marchant described the relationship as "good," indicating that Plesha had invited him to lunch shortly after Marchant began his current position on Capitol Hill. Attachment 4 at p. 15; GCR #9, dated April 26, 2001, Attachment 1 at p. 7.[24]

Third, Plesha challenges the evidence linking him to the incriminating documents found on the campaign committee's computers for three reasons. He argues that the computer containing the copy of the draft East Bay Democratic Committee letter and telemarketing phone script was not "assigned to him" and that others had access to that computer; he points to Ball's testimony that the computer changed hands both before and after the election, citing the Ball deposition transcript at pages 225-35; and he argues that the computer's hard drive lists other

[24] Marchant was not eager to provide this Office with the incriminating evidence about Plesha; he only provided it during a third interview when investigators from this Office showed him then newly discovered evidence that he had sent the Democratic voters lists to Plesha just prior to when the East Bay Democratic Committee communications were disseminated. *See* GCR #9, dated April 26, 2001, Attachment 1 at pp. 1 and 3.

individuals as the authors of the documents, specifically "Charles Ball" on the draft mailing and "Jody" on the phone bank script. Attachment 1 at pp. 12-13.

Plesha does not dispute that the computer was physically located in his office – indeed Ms. Patterson remembered Plesha drafting a Word document on the computer in his office when he ordered her out. Additionally, the pages cited from Ball's deposition do not support Plesha's contention that the computer changed hands prior to the campaign, and the post-election custody of the computer is irrelevant because the hard drive of the computer indicates that the communications were created prior to the distribution of the East Bay Democratic Committee communications, hence prior to the end of the campaign. Attachment 4 at pp. 4-7, 24-30. Moreover, this Office's discovery of the incriminating documents on Plesha's computer is only one of many facts that support the conclusion that he was responsible. *See id.* at p. 16-17; GC Brief for Plesha at pp. 6-11.[25]

Plesha's argument about the document authors identified by the Microsoft Word software requires more explanation. "Charles Ball" is listed as the author of almost every Word document created and stored on the campaign committee's hard drive. Attachment 4 at pp. 6-7. The candidate's name appears to have been the default author for the Microsoft Word program. Thus, the fact that the draft letter listed Charles Ball as the author is not probative of whether another user who had access to the computer kept in Plesha's office created the draft letter. *See* GCR #7, dated February 27, 2001, p. 8, fn. 5.

The Ball campaign computer identifies the author of the telemarketing phone script as "Jody." Attachment 4 at pp. 23, 26 and 28. This Office discovered the script in a folder of

[25] Apparently because the Ball campaign's computer system was interconnected, a copy of the phone script and draft mailing were located on other campaign computers.

attachments to electronic mail. As explained in the GC Brief at p. 10, Plesha hired Butzke to arrange the East Bay Democrat Committee telephone bank. A hard copy of an electronic mail message indicates that Plesha sent a version of the telemarketing phone script to Butzke on October 30, 1998. Attachment 4 at p. 21. Butzke then provided this Office with a copy of the East Bay Democrat Committee phone script, and represented that it was the script Plesha hired him to disseminate for the Ball campaign just before the election. Butzke then hired Jody Novachek who in turn hired Milford Marketing to make the calls. Novachek thus created or edited the telemarketing script provided by Butzke and then forwarded or returned that script via electronic mail to Plesha at the Ball campaign where it was found on the computer. In short, the "Jody" listed as the author of the document found on the Ball campaign's computer is the subcontractor of the vendor Plesha hired to provide the telemarketing phone banks. Thus, rather than exonerating Plesha, this evidence is just another link establishing his responsibility.[26]

Fourth, Plesha attempts to diminish the significance of Greg Hollman's affidavit. Hollman owns Ireland Direct, a mail-house used by Stevens in connection with the Ball campaign. Plesha asserts that Holman does not mention his name "even once." Attachment 1 at p. 14. Working directly for Stevens Printing as a subcontractor for the Ball campaign, Hollman never had direct contact with Plesha or the Ball campaign. Interestingly, Plesha never challenges Hollman's most incriminating statements, i.e., that the mailing was for the Ball campaign, that Stevens Printing instructed him to keep hidden all aspects of the mailing, using live stamps, not issuing an invoice and retuning all the spoils. Attachment 4 at pp. 55-56.

[26] It was when this Office performed a search of the name "Plesha" on the hard drive of the campaign's computer that the East Bay Democrat Committee phone script was first located.

Finally, Plesha attempts to shift blame to other Ball campaign staff. Plesha points out that Patterson and Marchant placed orders with Stevens Printing and that this "casts further doubt onto the proposed finding against the Respondent." Attachment 1 at p. 14. But the investigation has shown that only he had the authority to make such expenditures, that he in fact issued the payments for the communications, and other staff swore that he shared the idea for such an effort prior to when it occurred, and made statements indicating responsibility afterward. Attachment 4 at pp. 10-14, 39-43; *see also* Deposition of Charles Ball at p. 79. Thus, the facts do not support Plesha's attempt to shift blame away from himself to other staff members.

V. DISCUSSION OF RECOMMENDED DOJ REFERAL & CONCILIATION

The Act provides that the Commission may refer knowing and willful violations to DOJ for criminal prosecution. *See* 2 U.S.C. § 437g(a)(5)(C). Plesha initiated and executed this scheme to deceive the voters in California's 10th Congressional district. Plesha fraudulently misrepresented the opposing candidate's party and a Congressman who was a local leader of that party. Plesha's scheme was extensive, reaching approximately 40,000 voters by mail and 10,000 by telemarketing. Plesha timed the scheme for maximum impact; the communications were all disseminated a day or two prior to the election.

The investigation revealed that Plesha went to great lengths to cover up the scheme. As discussed in the GC Brief at pp. 12-13, the printing firm he hired destroyed all traces of the job, apparently pursuant to Plesha's instructions. *See* Attachment 4 at pp. 55-56. Plesha also disguised the nature of the telemarketing phone banks on the Ball campaign's check and check register, i.e., "GOTV/GOP MEN," and it was eventually disguised on Ball campaign reports. Attachment 4 at pp. 38, 42-43. Most significantly, Plesha submitted a sworn statement to the Commission absolutely denying his involvement in the East Bay Democratic Committee

communications. Attachment 6. Specifically, in his sworn response dated October 16, 2000, Plesha states that he first saw the East Bay Democratic Committee letter when a reporter contacted the Ball campaign about it. *Id.* at p. 1. Moreover, Plesha swore that he "did not create, edit, review, approve, authorize, finance or disseminate this [East Bay Democratic Committee] document." *Id.* at p.1; *see also* GC Brief to Plesha at p.13. He also swore that he "did not approve, authorize, or finance a phone bank or calls like those you have described." *Id.* at p. 2. Yet there is now overwhelming evidence that these sworn statements are false. Accordingly, this Office recommends that the Commission refer Adrian Plesha to DOJ for criminal prosecution rather than attempt to settle this matter civilly through conciliation. This Office will bring to DOJ's attention provisions that may have been violated, including 2 U.S.C. §§ 441h, 441d(a) (aiding and abetting),[27] 18 U.S.C. § 1001 (filing false statements with this agency), and perjury.[28]

Attached for the Commission's approval is a conciliation agreement with the Ball campaign and its treasurer.

[27] Although the three-year statute of limitations period for misdemeanor criminal violations of FECA has passed, *see* 2 U.S.C. § 455(a), DOJ often accepts pleas for such violations in lieu of prosecutions for more serious offenses, *e.g.*, felony perjury and 18 U.S.C. § 1001.

[28] Pursuant to the statute, the Attorney General shall report to the Commission any action taken within sixty days after the referral, and every thirty days thereafter until final disposition of the apparent violations. 2 U.S.C. § 437g(c).

VI. INVOLVEMENT OF OTHER PERSONS

When the Commission first received reliable information about the Ball campaign's involvement in these fraudulent communications, there was nothing indicating that the candidate, Ball, may have been involved. Thus, Ball was never made a respondent in this matter. Through both informal and formal discovery, this Office examined Ball's possible involvement in the violations. Several former campaign staff members, including Patterson, Marchant, and volunteer Susan O'Neill, conveyed to investigators their strong belief that Ball had absolutely nothing to do with the activities at issue. These persons also indicated that Plesha essentially ran the Ball campaign as he wished, and that he relied on the Ball campaign's general political consultant Mike Mihalke for major decisions. Marchant stated that Ball was shut out of decisions. *See* GCR, dated April 26, 2001, Attachment 1 at p. 6. Marchant and Mihalke described Ball as politically naïve. *Id.* On June 14, 2001, this Office deposed Ball. He testified to limited involvement in major strategy and spending decisions, that he had no role in the

[29] As previously reported, the Audit Division provided material assistance in this matter. The Audit Division calculates that the mailing cost approximately $34,000 ($12,800 for stamps, $1,600 for envelopes and $19,582 for the letters). *See* GCR #7, dated February 27, 2001, Attachment 7 at p. 7. The costs for the letters themselves are based upon four invoices produced by the Ball campaign or its vendors that appear to have been fabricated to disguise payment for the mailing at issue. The phone bank costs $4,500. *See* Attachment 4 at pp. 40-41.

activity at issue and does not know who was responsible. *See* Deposition of Charles Ball at pp. 153-154, 199-225. Based upon this lack of evidence of Ball's involvement, this Office does not recommend pursuing him.[30]

The Commission's reason to believe finding against the Ball campaign's former Finance Director, Patterson, was based upon a sworn statement from the owners of Stevens Printing, Jeff and Steve Clark ("the Clarks"). When provided with a copy of the East Bay Democratic Committee mailing the Clarks admitted that they "believe that we printed this piece," but could not recall specifically and indicated that either Plesha or Patterson placed orders for the Ball campaign. *See* GCR #5, dated August 4, 2000, Attachment 1 at p. 4. Later, counsel for Stevens Printings represented that Plesha alone would have placed the order in question. Patterson cooperated with FEC investigators, provided information about Plesha's involvement and denied any role in the creation or dissemination of the fraudulent communications. *See* Attachment 4 at pp. 10. As discussed above, when Plesha raised the idea of the mailing with Patterson, she voiced her concerns. *Id.* After that point, Plesha excluded her from the plan, even ordering her out of his office when she entered because he was apparently composing the mailing on his computer. *Id.* In short, there is no evidence that Patterson had a role in the creation or dissemination of the fraudulent communications at issue. Accordingly, this Office recommends that Commission take no further action against her and close the file as it pertains to her.

[30] Marchant informed this Office that, sometime in 1999, he expressed concerns to Ball that Plesha may have been responsible for the fraudulent communications. *See* GCR #9, dated April 26, 2001, Attachment 1 at p. 6. Marchant claimed that he could not recall whether he told Ball specifics, such as that he sent the voter lists to Plesha just before the election. *Id.* Ball testified that he could not recall whether anyone, including Marchant, expressed concern that Plesha was responsible. *See* Ball Deposition at pp. 218-219, 236-238. Although there is no evidence that Ball knew about or was involved in the communications at issue prior to their dissemination, this Office questions the portions of his testimony in which he claims no memory of ever discussing Plesha's involvement after the fact.

There is some indication that other consultants and vendors may have been involved in this fraud, or at least have additional knowledge about the communications that they refused to reveal to this Office. For instance, Patterson informed this Office that Plesha told her that the Ball campaign's general consultant Mihalke was involved in the idea that led to the communications at issue. GCR #7, dated February 27, 2001, Attachment 1 at p. 1. As noted above, Marchant informed this Office that Mihalke and Plesha made the decisions. GCR #9, dated April 26, 2001, Attachment 1 at p. 6. Ball testified that Plesha and Mihalke handled all the mailings. Deposition of Charles Ball at p. 225. This Office's interview of Mihalke raised questions, and aspects of his statements did not seem credible.[31]

The owners of Stevens Printing, the Clarks, stated that they believed that they provided the printing for the East Bay Democratic Committee mailing to the Ball campaign, but refused to provide details. *See* GCR #5, dated August 4, 2000, Attachment 1 at p. 1. Yet Hollman, the owner of the mail-house hired by Stevens, described a vivid account of an extremely unusual transaction, i.e., Stevens gave him explicit instructions on keeping the mailing secret, including creating no invoice, paying in cash, and returning any spoils to Stevens. Attachment 4 at pp. 55-56; *see also* GCR #7, dated February 27, 2001, Attachment 1 at pp. 1-2. Even when reminded of these unusual terms, the owners of Stevens claim lack of memory and refused to cooperate. Similarly, this Office did not find fully credible Butzke's claim that he lacked memory regarding the facts related to his involvement in the telemarketing phone banks at issue. Finally, former

[31] Following that first interview, counsel for Mihalke informed this Office that her client would provide additional information. Mihalke subsequently hired new counsel, who informed this Office that his client had no additional information to provide, and would meet only to clarify any unresolved issues related to the interview. *See* Attachment 7.

Ball campaign spokesperson Bob Hopkins refused to talk informally with this Office, leaving open questions about his knowledge about or involvement in the fraudulent communications.

Although this Office does not find credible the denials of further knowledge or involvement by Mihalke, the Clarks, or Butzke, rather than formally deposing them to test their credibility and generating them as respondents, we believe it is best to conclude this investigation, reasoning that DOJ, with its more extensive resources, will be better equipped to explore the involvement of these persons while proceeding against Plesha.[32]

VII. RECOMMENDATIONS

1. Find probable cause to believe that Adrian Plesha knowingly and willfully violated 2 U.S.C. § 441h.

2. Refer Adrian Plesha to the Department of Justice pursuant to 2 U.S.C. § 437g(a)(5)(C).

3. Find probable cause to believe that Charles Ball for Congress knowingly and willfully violated 2 U.S.C. §§ 441d(a) and 441h.

4. Find probable cause to believe that Justin Briggs, as treasurer of Charles Ball for Congress, violated 2 U.S.C. §§ 441d(a) and 441h.

5. Approve the attached conciliation agreement with Charles Ball for Congress and Justin Briggs, as treasurer.

6. Take no further action against Heather Patterson, and close the file as it pertains to her.

[32] Section 441h(2) imposes liability on those who "willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate Section 441h(1)." In addition, DOJ may pursue any person for aiding and abetting in any FECA violation, *e.g.*, Section 441d(a).

7. Approve the appropriate letters.

6/10/02
Date

Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel

Jonathan Bernstein
Assistant General Counsel

Dominique Dillenseger
Attorney

Other Staff Assigned: Dan Pinegar
Wade Sovonick
Julie Obi

Attachments

1. Reply Brief from Plesha
2. Reply Brief from Committee
3. Proposed Conciliation Agreement – Charles Ball for Congress, and Justin Briggs, as treasurer
4. Various Documents
5. Document from Ball's civil case
6. Plesha's sworn response
7. Response from Mihalke