

FEDERAL ELECTION COMMISSION
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Washington, D.C. 20463

FEDERAL ELECTION
COMMISSION
SECRETARIAT

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 5089

DATE COMPLAINT FILED: 09/06/2000

DATE OF NOTIFICATION: 09/12/2000

DATE ACTIVATED: 07/26/2001

EXPIRATION OF STATUTE OF
LIMITATIONS: 08/18/2005

COMPLAINANT:

Crusader¹

RESPONDENTS:

Matta Tuchman for Congress and
Daralyn E. Reed, as Treasurer
Democratic Party of Orange County FED PAC and
Jim Pantone, as Treasurer²
Deborah Buelna
Linda Coley

RELEVANT STATUTES:

2 U.S.C. § 431(18)
2 U.S.C. § 441d(a)
2 U.S.C. § 441h
11 C.F.R. § 100.17
11 C.F.R. § 100.22(a)
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleged that Matta Tuchman for Congress ("the Tuchman Committee") failed to conspicuously display a disclaimer on a mailing criticizing Loretta Sanchez's plans to

¹ Considering his unusual name, Crusader provided a copy of his driver's license and social security card as proof of his legal name.

² The committee's name was changed from Orange County Democratic Party, Christopher Carnes, as Treasurer. The committee was notified of the complaint under that name. The current treasurer is Jim Pantone.

1 host a political fundraiser at the Playboy mansion.³ The mailing bore the letterhead of a
2 nonexistent or unregistered entity and included a partial disclaimer in small letters stating that the
3 mailing was paid for by the Tuchman Committee.

4 **II. FACTUAL AND LEGAL ANALYSIS**⁴

5 **A. Complaint**

6 The complainant alleged that the Tuchman Committee violated the Act and Commission
7 regulations because the disclaimer for the mailing is not conspicuously displayed and is difficult
8 to read due to the extremely small font size of the print. The complaint included a copy of the
9 mailing, which consists of a one-page typewritten letter, a newspaper article, and an envelope.
10 The letter, dated August 18, 2000, was addressed to specific individuals. It was typed on
11 stationery with a letterhead stating "Orange County Democrats" and was signed by three
12 individuals, Deborah Buelna, Linda Coley, and Ericka Belona.⁵ Each individual's typewritten
13 name and the name of an Orange County community appeared below each signature, to wit:
14 "Deborah Buelna, Anaheim;" "Linda Coley, Garden Grove;" and "Ericka Belona, Santa Ana."

³ Loretta Sanchez was the Democratic incumbent in California's 46th Congressional District. Gloria Matta Tuchman was Sanchez's Republican opponent in the 2000 general election. Due to redistricting, the district is now the 47th.

⁴ All of the events relevant to this matter occurred prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all references or statements of law in this report regarding the Federal Election Campaign Act of 1971, as amended, pertain to that statute as it existed prior to the effective date of BCRA. Similarly, all references or statements of law regarding the Commission's regulations pertain to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

⁵ A search of available public sources, including the FEC's database and the California Secretary of State's website, revealed no organization or committee known as Orange County Democrats. The California Secretary of State's website did reveal two groups, Orange County Democratic Alliance, a recipient committee listed as terminated, and the Orange County Democratic Central Committee (a/k/a Orange County Democratic Party and Democratic Party of Orange County FED PAC), a respondent in this matter. The three individuals who signed the letter were not notified of the complaint initially because this Office was unable to locate them. This Office has since obtained addresses for two of the three individuals, Deborah Buelna and Linda Coley, and they were notified of the complaint by letter dated November 1, 2001. No response has been received from either respondent.

1 Pertinent text of the letter states:

2 We were shocked and outraged to hear that our Congresswoman --
3 Loretta Sanchez -- scheduled a political fundraiser at the Playboy
4 Mansion Immorality, sexual exploitation and degradation of
5 women are not the kinds of messages our political leaders should
6 be sending to our community -- particularly not Sanchez, who as a
7 woman should know better Only after being publicly censured
8 and ridiculed by her own colleagues -- and pressured by Vice
9 President Al Gore -- did Loretta Sanchez cave in and change the
10 event, after stating "over the years, plenty of fundraisers have been
11 held [at the mansion]." But the damage is done. Loretta Sanchez
12 showed her true loyalty is not to the Orange County women and
13 minorities she professes to represent, but rather to money and her
14 Hollywood friends This is not the kind of leadership we want
15 from our elected officials. This is utter disdain and contempt, not
16 only for those close to her, but toward all of her Orange County
17 constituents. We'll remember this contempt when Loretta Sanchez
18 asks for our vote again in November.

19
20 P.S. Please take a look at Loretta Sanchez's opponent, Gloria
21 Matta Tuchman. She is a teacher who will fight for better schools
22 --and she won't make us feel ashamed.
23

24 Included in the mailing was a newspaper article entitled "*Loretta Sanchez: A Loose*
25 *Cannon*," from the National Journal Convention Daily dated Sunday, August 13, 2000. The
26 article discussed the Playboy fundraiser controversy and its potential impact on Sanchez's re-
27 election prospects. The article included interview comments by several Democrats, who
28 generally opined that the controversy may have had a negative impact on Sanchez's previously
29 anticipated re-election and on her stature within the Democratic Party. The article also contains
30 comments by Matta Tuchman, who opined that the controversy would damage Sanchez, and by
31 Sanchez's representative, who defended the fundraiser. The article contained margin annotations
32 highlighting certain text from the article; one annotation states that "[i]n November, Sanchez
33 faces Gloria Matta Tuchman, an award-winning schoolteacher for 35 years and veteran Hispanic
34 Republican activist who appears to be a good fit in the swing Orange County district." *Id.*

1 Immediately after the statement, the article further reported that "[a]lthough Tuchman is a
2 serious contender, Sanchez was generally expected before the Playboy controversy to win re-
3 election." *Id.*

4 The envelope for the mailing displayed the name "Orange County Democrats" in the
5 front upper left corner with no return address. The following disclaimer appeared on the flap at
6 the back of the envelope in small letters: "*Paid for by Gloria Matta Tuchman for Congress*
7 *12438 Brookhurst Street, Garden Grove, CA 92840 ID# C00346866.*" According to
8 complainant, because most people open mail and immediately discard the envelope, the majority
9 of the constituents targeted by the mailing would not have seen the disclaimer on the back flap of
10 the envelope and would not know who paid for the mailing.

11 **B. Responses**

12 **1. Tuchman Committee**

13 In response to the complaint, the Tuchman Committee asserted that the mailing clearly
14 and conspicuously contained information regarding the identity of the sender on the outside of
15 the envelope, on the flap where anyone opening the envelope would see it. The Tuchman
16 Committee noted that the disclaimer included not merely its name, but its address and FEC
17 identification number. According to the Tuchman Committee, the information was printed in a
18 "simple, easy to read font in dark blue against a white background." Tuchman Committee
19 Response at 2. The Tuchman Committee asserted that the Act and regulations do not specify a
20 font size for a disclaimer and that the disclaimer on the envelope meets the requirement of
21 11 C.F.R. § 110.11(a)(5).

22 The Tuchman Committee also stated that the campaign never anticipated that the
23 materials included in the mailing would be distributed separately. According to the Tuchman

1 Committee, the letter was intended to be read in conjunction with the accompanying newspaper
2 article; the article with its annotations would not convey the desired message without the reader
3 seeing the cover letter. Accordingly, the Tuchman Committee stated that it was its belief that the
4 disclaimer on the envelope was sufficient and that the letter did not require a separate disclaimer
5 under 11 C.F.R. § 110.11(a)(5)(ii). It asserted that if its belief was in error, the error was
6 inadvertent.

7 **2. Democratic Party of Orange County**

8 In response to the complaint, the Democratic Party of Orange County FED PAC
9 ("DPOC") asserted that it was not involved with the letter or the mailing. The DPOC pointed out
10 that Matta Tuchman was the Republican challenger and was not, to the best of its knowledge, a
11 member of the Democratic Central Committee and its related organizations. It opined that,
12 though the three individuals who signed the letter may be registered Democrats, they were not
13 members of the Central Committee or related Democratic Party clubs. The DPOC further
14 asserted that neither the Central Committee Executive Board nor its general membership had any
15 involvement with the letter or the mailing, and it requested that it be dismissed as a respondent in
16 this matter.

17 **C. Disclaimer**

18 **1. Analysis**

19 While this Office thinks that this matter presents a relatively close call, we believe that
20 the letter does not rise to the level of express advocacy. The letter does not include the specific
21 or equivalent "magic words" listed in 11 C.F.R. § 100.22(a). However, as expressed in the
22 regulations, those words are illustrative, not exclusive. A communication may constitute express
23 advocacy where the words are "in effect" express advocacy. *See FEC v. Christian Coalition*, 52

1 F. Supp. 2d 45, 62 (D.C. 1999). Although the letter urges readers to "take a look at Loretta
2 Sanchez's opponent," it does not appear that the statement is "in effect express advocacy." The
3 statement does not appear sufficiently explicit that it "in context can have no other reasonable
4 meaning than to urge the election" of Matta Tuchman or the defeat of Sanchez. See 11 C.F.R.
5 § 100.22(a).

6 The letter does not satisfy the standard set out by the courts in *Christian Coalition* or
7 *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), cert. denied, 484 U.S. 850 (1987). Although the letter
8 used an active verb, "take a look," it does not appear that a reasonable person would understand
9 that the statement, "considered in the context of the entire communication, contains an explicit
10 directive to take electoral action in support of the election or defeat of a clearly identified
11 candidate." *Christian Coalition*, 52 F. Supp. 2d at 62. Therefore, though the letter as a whole
12 criticizes Sanchez's actions and asks the recipients of the mailing to "take a look" at Matta
13 Tuchman, the letter does not clearly exhort actions to elect or defeat Matta Tuchman or Sanchez.

14 Additionally, the instant communication is unlike the communication in the Ninth
15 Circuit's *Furgatch* opinion.⁶ It cannot be said that the letter "when read as a whole, and with
16 limited reference to external events, [is] susceptible of no other reasonable interpretation but as
17 an exhortation to vote for or against a specific candidate." *Furgatch*, 807 F.2d at 864. Although
18 the letter, dated August 18, 2000, specifically refers to the impending November 7, 2000 general
19 election, it is not clear that the statement "[w]e'll remember this contempt when Loretta Sanchez
20 asks for our vote again in November" advocates Sanchez's defeat. The statement, in conjunction
21 with the "take a look at Loretta Sanchez's opponent" language, also does not satisfy the

⁶ The respondents in the instant matter are within the jurisdiction of the Ninth Circuit.

1 *Furgatch* standard.⁷ Consequently, this Office concludes that the mailing does not expressly
2 advocate the election or defeat of a clearly identified candidate.⁸

3 If the mailing at issue did not expressly advocate the election or defeat of a clearly
4 identified candidate, it did not require a disclaimer.⁹ Accordingly, this Office recommends the
5 Commission find no reason to believe that Matta Tuchman for Congress and Daralyn E. Reed, as
6 Treasurer; Deborah Buelna; Linda Coley; and the Democratic Party of Orange County FED PAC
7 and Jim Pantone, as Treasurer, violated 2 U.S.C. § 441d(a).

8 **D. Fraudulent Misrepresentation**

9 **1. Law**

10 The available information raises the issue of whether the Tuchman Committee or the
11 signers of the letter may have violated section 441h of the Act.¹⁰ That provision provides that no
12 person who is a candidate for Federal office or an employee or agent of such a candidate shall
13 fraudulently misrepresent himself or any committee or organization under his control as speaking
14 or writing or otherwise acting for or on behalf of any other candidate or political party or agent
15 thereof on a matter which is damaging to such other candidate or political party or employee or
16 agent thereof. 2 U.S.C. § 441h.

⁷ The Ninth Circuit recently explained that while a communication may be considered "as a whole" in determining whether it contains express advocacy, "a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit words of advocacy." *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1098 (9th Cir. 2003) (emphasis in original).

⁸ The newspaper article included in the mailing appears to be a legitimate press article, and it also does not contain express advocacy. 2 U.S.C. § 431(9)(B)(i).

⁹ If the letter did contain express advocacy, it would have needed a separate disclaimer under 11 C.F.R. § 110.11(a)(5)(ii), which requires a disclaimer for each communication in a package of materials that would otherwise require a disclaimer if distributed separately. See 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11.

¹⁰ The complaint did not assert violations of section 441h. However, this Office believes that the issue is sufficiently apparent in the complaint and should therefore be addressed at this stage.

2. Analysis

As noted earlier, the letter included in the mailing was written on stationery bearing the letterhead of the Orange County Democrats, a non-existent or unregistered entity. The DPOC asserts that neither it nor any related Democratic Party organization was responsible for or was involved with the letter. The envelope in which the letter was mailed included a disclaimer disclosing that the Tuchman Committee paid for the mailing. The Tuchman Committee's address and its FEC identification number were also included in the disclaimer.

Based on the involvement of the Tuchman Committee in the mailing, it appears that the Act's threshold requirement that a candidate for Federal office or the candidate's employee or agent be involved in the misrepresentation is satisfied.

In evaluating matters similar to the instant matter, the Commission has emphasized the requirement that the misrepresentation be fraudulent, an element of which is the intent to deceive. *See* MURs 3700, 3690 and 2205. In those matters, the Commission concluded that the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation, since the disclaimer discloses the source of the mailing. In the related matters, MURs 3700 and 3690 (National Republican Congressional Committee ("NRCC")), the NRCC paid for and distributed post cards containing negative satirical communications about the records of Democratic congressional candidates. The post cards appeared to be written by the candidates themselves, but they included a disclaimer disclosing the opposing candidate and committee as the source of the communication. *See* First General Counsel's Reports dated June 30, 1993. The Commission found no reason to believe the respondent committees violated section 441h because of the presence of the disclaimer. *See* FEC Certifications dated July 23, 1993. The Commission concluded that the disclaimer evidences the respondents' intent to

1 expose themselves as the source of the political message. The Commission previously made
2 similar findings in MUR 2205 (Thomas Foglietta). See First General Counsel's Report dated
3 September 9, 1986 at 2 and 4. In that matter, the Commission found no reason to believe that the
4 respondent committee violated section 441h because the advertising material contained a
5 disclaimer, although the respondent committee attempted to damage its opponent's campaign by
6 altering the opponent's disclosure reports in its ads and by making unsubstantiated negative
7 statements. See FEC Certification dated September 12, 1986.

8 Therefore, based on the presence of the Tuchman Committee's disclaimer on the mailing
9 at issue, this Office recommends that the Commission find no reason to believe Matta Tuchman
10 for Congress and Daralyn E. Reed, as Treasurer; Deborah Buelna; and Linda Coley violated
11 2 U.S.C. § 441h.¹¹ In making our recommendations in this matter, this Office notes that the
12 available information does not indicate that the Democratic Party of Orange County FED PAC
13 and its treasurer were involved with the mailing.¹²

14 **III. RECOMMENDATIONS**

- 15 1. Find no reason to believe Matta Tuchman for Congress and Daralyn E. Reed, as
16 Treasurer, violated 2 U.S.C. § 441d(a).
17
- 18 2. Find no reason to believe the Democratic Party of Orange County FED PAC and Jim
19 Pantone, as Treasurer, violated 2 U.S.C. § 441d(a).
20
- 21 3. Find no reason to believe Deborah Buelna violated 2 U.S.C. § 441d(a).
22
- 23 4. Find no reason to believe Linda Coley violated 2 U.S.C. § 441d(a).
24

¹¹ The fact that the letter did not comply with 11 C.F.R. § 110.11(a)(5)(ii) (as stated in footnote 9) does not alter this Office's conclusion in this instance, because the disclaimer on the envelope disclosed the identity of the source of the mailing and the available information does not indicate that the letter was distributed separately.

¹² This Office attempted to notify one of the signers of the letter, Ericka Belona, of the complaint. As noted previously in footnote 4, Ms. Belona was not located and was not notified of the complaint. Consequently, this Office makes no recommendation as to her at this time.

5. Find no reason to believe Matta Tuchman for Congress and Daralyn E. Reed, as Treasurer, violated 2 U.S.C. § 441h.
6. Find no reason to believe Deborah Buelna violated 2 U.S.C. § 441h.
7. Find no reason to believe Linda Coley violated 2 U.S.C. § 441h.
8. Close the file.
9. Approve the appropriate letters.

Lawrence H. Norton
General Counsel

Date

1/21/09

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