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2003 OCT -3 P 1:12

FIRST GENERAL COUNSEL'S REPORT

MUR: 5103

DATE COMPLAINT FILED: September 25, 2000

DATE AMENDED COMPLAINT FILED: March 6, 2001

DATE OF NOTIFICATION OF AMENDED

COMPLAINT: March 27, 2001

DATE AMENDMENT TO AMENDED

COMPLAINT FILED: April 11, 2001¹

DATE OF NOTIFICATION OF AMENDMENT

TO AMENDED COMPLAINT: May 7, 2001

DATE ACTIVATED: January 29, 2001

STATUTE OF LIMITATIONS: August 6, 2005

COMPLAINANT: Jasen Hutchinson

RESPONDENTS: Acacia National Mortgage Corporation
Gerald Youhanaie
Anthony "Todd" Banasack
j2 Global Communications, Inc.

RELEVANT STATUTE: 2 U.S.C. § 431(18)
2 U.S.C. § 441d
11 C.F.R. § 100.22(a)
11 C.F.R. § 100.17

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter was generated by a complaint from Jasen Hutchinson of Friends of Susan Bitter Smith committee. The complaint alleges that fraudulent facsimile transmissions and telephone calls were made to residents and businesses of the First Congressional District of

¹ Between the April 11, 2001 amendment and August 19, 2002, complainant submitted several supplements to the complaint. A First General Counsel's Report dated August 10, 2001 was withdrawn from circulation to the Commission by memorandum dated August 16, 2001 to notify respondents of one of those supplements and to include the responses in the report.

1 Arizona attacking Susan Bitter Smith, a congressional candidate, ~~and using Bitter Smith's name~~
2 to attack another candidate, Jeff Flake, between August 6, 2000 and the Arizona primary election
3 on September 12, 2000.² The faxes and telephone calls did not include disclaimers, and
4 consequently, this Office initially was unable to identify the responsible party. The respondents
5 named in this report were subsequently identified after an amendment to the complaint was filed
6 with the Commission and were notified accordingly. Based on the responses received from the
7 respondents, it appears that respondent Anthony "Todd" Banasack was responsible for the faxes
8 and telephone calls. Accordingly, this report recommends that the Commission find reason to
9 believe Anthony "Todd" Banasack violated 2 U.S.C. § 441d(a) by failing to include a disclaimer
10 in the communications. The report also recommends approval of subpoenas and orders to submit
11 written answers to Banasack and to the providers or distributors of the telephone and fax number
12 from which the alleged unlawful communications were transmitted.

13 **II. FACTUAL AND LEGAL ANALYSIS**³

14 **A. Complaint**

15 Several faxes transmitted between August 6 and 28, 2000 urged potential voters to "stop"
16 Bitter Smith and compared her to two former indicted governors of Arizona. In particular, those
17 faxes stated:

18 Arizona already had Meecham & Symington. Do
19 we need Susan Bitter Smith too? STOP HER! Stop
20 Bitter Smith before it [*sic*] too late!

² Bitter Smith and Flake were Republican candidates in the primary election. Bitter Smith lost the September 12, 2000 primary election. Flake won the primary election and went on to win the November 7, 2000 general election

³ 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.

1 According to complainant, the faxes appeared to be sent from a telephone number in
2 Illinois (815-364-0842) and showed the sender as either "TAB Enterprises" or "TAB."⁴ The
3 faxes also advised those wishing to have their numbers removed from the transmission list to call
4 the telephone number. Between August 31 and September 1, 2000, additional faxes were sent
5 with similar language, but the last sentence read "Stop her before she embarrasses Arizona!
6 (Whoops Too Late !!! Read the front page of Wednesday's East Valley Tribune or Thursday's
7 AZ Republic)."⁵ These faxes showed the sender as "TAB."

8 According to the complaint, those faxes were followed by another group of faxes on
9 September 1, 2000 that showed a copy of an editorial cartoon of Bitter Smith from a local
10 newspaper identifying her as "Susan 'Gutter' Smith" and with the words "Do we need Bitter
11 Smith?" The faxes also referred to the front page of the two Arizona newspapers mentioned
12 above.⁶ The faxes in this group listed the sender as "Flake," not "TAB."

13 A final group of faxes was transmitted on September 8, 2000. Those faxes attacked
14 Flake, and listed the sender as "Susan Smith." The faxes consist of an Arizona Republic
15 newspaper article alleging election improprieties by Flake with the following additional
16 statement overwritten on the article:

⁴ Complainant identified TAB, the only viable respondent at the time, as a company doing business in Arizona, but provided no address or other particulars on the company. This Office was unable to ascertain TAB's existence from publicly available sources. As a result, this Office was unable to notify TAB of the complaint.

⁵ One of the faxes, which did not show a sender, had identical language except the last phrase "or Thursday's AZ Republic" was omitted.

⁶ This Office reviewed what appears to be the "Thursday AZ Republic" article referenced in the faxes. That article, dated August 31, 2000, reported on Bitter Smith's highly publicized attempt to smear another Republican opponent, despite her prior pledge to conduct a clean campaign. According to the article, Bitter Smith's campaign assembled personal information on Flake and provided it to Thomas Liddy, another Republican candidate in the primary election, in hopes that Liddy would use the information to disparage Flake.

1 Jeff Flake **CLAIMS** to be a "Real Conservative we can
2 Trust," **his actions tell a different story . . [sic]**
3 **FLAKE IS A FAKE!**
4

5 According to complainant, when he called the 815-364-0842 telephone number on
6 September 4, 2000, there was a recorded message stating:

7 Hi. If you would like to have your fax number removed
8 from our database, please write it down on a piece of paper
9 and send it over now. If you happen to live in Arizona, we
10 endorse Jeff Flake for the first [sic] Congressional district
11 [sic]. Please vote for Jeff. Thanks. Bye.
12

13 Complainant further states that by September 11, 2000 the message had changed. The message
14 began the same as above, but the ending was changed to state:

15 If you happen to live in the First Congressional District in
16 Arizona, please vote for Thomas Liddy. We endorse
17 Mr. Liddy for Congress.⁷
18

19 In addition to the above faxes, several telephone calls were made to individuals on
20 September 11, 2000, the day before the Arizona primary election. The complaint states that the
21 calls seem to have been made from an automated dialer and consisted of the following recorded
22 message from a person who identified himself as "Randy Williams" with the Bitter Smith
23 campaign:⁸

24 It has "... come to my attention concerning congressional candidate Jeff Flake,
25 ahhh, he fooled all of us into believing that he is someone we can trust when in
26 fact, according to the Arizona Republic and the East Valley Tribune, ahhh, he's
27 been accused of laundering \$50,000 to a charity only to have the money given
28 back to himself as an annual consulting fee and this is an effort to feed his
29 campaign coffers and in the words of Larry Makinson, who is the Director of the
30 Washington, D.C. based Center for Responsive Politics. [sic] He says if 'this
31 scheme of his is not illegal, it bloody well ought to be.' There also [sic] a FEC
32 and IRS investigation against him currently, so when you cast your vote

⁷ Liddy lost the primary election.

⁸ Complainant included a transcript and a cassette tape of the recorded message at issue.

1 tomorrow, be very, very careful. Again this is Randy Williams with the Bitter
2 Smith campaign.”

3
4 In a March 6, 2001 amendment to the complaint, the complainant informed this Office of
5 a potential source of the communications at issue. See Attachment 1.⁹ The complainant
6 provided a more recent cassette recording (February 2001) from the 815-364-0842 number at
7 issue. According to complainant, the recording states that the caller has reached Acacia National
8 Mortgage Corporation and the person on the recording identifies himself as “Ed.”¹⁰ The
9 complainant concluded that the individual’s voice sounds very similar to the voice heard on the
10 September 11, 2000 telephone calls. From the new message, the complainant concluded that
11 Anthony T. Banasack (a.k.a. Todd Banasack), whom he determined to be affiliated with Acacia
12 National Mortgage Corporation (“Acacia Mortgage”), may be responsible for the
13 communications. Complainant based his conclusion on the fact that the 815-364-0842 number
14 was distributed by eFax.com, a California company also known as j2 Global Communications,
15 Inc. (“j2 Communications”). According to the complainant, Banasack is listed as the subscriber
16 of the 815-364-0842 number, he is the eFax account holder and has access to the account to
17 change voice mail messages.¹¹ The complainant also noted that Gerald Youhanaie, President of
18 Acacia Mortgage, contributed \$250 to the campaign of Salvatore “Sal” DiCiccio, another

⁹ This Office issued notices of the March 6, 2001 amendment to respondents Anthony T. Banasack; j2 Global Communications, Inc.; Acacia National Mortgage Corporation; and its President, Gerald Youhanaie, on March 27, 2001 and gave them an opportunity to respond to the amendment. See Attachment 2. We received responses from all respondents. The responses are discussed *infra*.

¹⁰ This Office has reviewed the cassette tapes provided by the complainant and notes that the statements in the complaint regarding the recordings conform to those on the tapes.

¹¹ Complainant provided personal and e-mail addresses for Banasack and an address and telephone number for Acacia Mortgage.

1 Republican candidate in the primary election, and that Youhanaie also authorized the DiCiccio
2 campaign to list his name as an endorser.¹²

3 In an amendment to the amended complaint dated April 11, 2001, which was received on
4 April 17, 2001, complainant provided yet another tape recording with what he believed to be
5 Banasack's voice. See Attachment 3.¹³ In the amendment, complainant explained that the Bitter
6 Smith committee received a recorded "sales pitch" about Acacia Mortgage's loan rates at its old
7 campaign telephone number. According to complainant, he traced the recorded "sales pitch" to
8 "Todd," whose voice appears similar to the one on the fraudulent campaign messages.

9 On April 23, 2001, this Office received a supplement to the amended complaint from
10 complainant. See Attachment 5. In that supplement, dated April 17, 2001, the complainant
11 submitted copies of two newspaper articles about Acacia Mortgage to show that the company
12 could have issued the fraudulent communications.¹⁴ The articles addressed Acacia Mortgage's
13 practice of engaging in "wireless spam," the transmission of unsolicited advertising to cellular
14 telephones. On January 2, 2002, this Office received supplemental information from the
15 complainant consisting of an article reporting that Acacia Mortgage had entered into a settlement
16 with Verizon Wireless regarding its "wireless spam" activities. See Attachment 7.¹⁵ This Office
17 received additional supplementary materials from complainant on July 23, 2002. See

¹² DiCiccio lost the primary election.

¹³ This Office issued notices of the April 11, 2001 amendment to the respondents in this matter on May 7, 2001 and gave them an opportunity to respond to the amendment. See Attachment 4. We received responses from Acacia Mortgage and its President, Gerald Youhanaie, and j2 Communications. The responses are discussed *infra*.

¹⁴ This Office notified respondents of the supplement on August 21, 2001. See Attachment 6. No responses have been received.

¹⁵ The supplement was dated October 15, 2001; its delivery appeared to have been delayed by the anthrax concerns at the time. This Office notified respondents of the supplement on January 11, 2002. See Attachment 8. A joint response has been received from Acacia Mortgage and its President, Gerald Youhanaie. That response is discussed *infra*.

Attachment 9. The materials consist of a copy of Schedule A of Friends of Sal DiCiccio's 2002 contributions report filed with the Arizona Secretary of State, a newspaper article from the July 15, 2002 Arizona Republic, and what appears to be an opinion letter published in the July 15, 2002 Scottsdale Tribune.¹⁶ The Arizona Republic article reported on a lawsuit against Acacia Mortgage regarding its "wireless spam" activities. The Scottsdale Tribune opinion letter criticized DiCiccio for sending out his own "telemarketing calls" to promote his candidacy for the Office of Arizona Secretary of State. Finally, this Office received further additional supplementary materials from complainant on August 19, 2002. The supplement, dated August 12, 2002, consists of a newspaper article from the July 31, 2002 Scottsdale Tribune. See Attachment 11. The article, titled "*Omission in campaign's phone calls sparks probe*," reported on an investigation by Arizona state officials regarding allegations that DiCiccio violated Arizona campaign finance laws in his campaign for the Office of Arizona Secretary of State.¹⁷

B. Responses

As previously mentioned, no responses to the original complaint were received in this matter because this Office was unable to locate TAB, the entity identified in the complaint. The responses of the respondents identified in the amended complaint are set forth below.

1. Acacia Mortgage and Gerald Youhanaie

In an April 10, 2001 joint response to the March 6, 2001 amended complaint, Acacia Mortgage and its President, Gerald Youhanaie, acknowledged that Banasack was employed as a loan officer with the company at the time but denied any involvement or responsibility for the

¹⁶ On August 6, 2002, this Office notified respondents of the supplement. See Attachment 10. A joint response (discussed *infra*) was received from Acacia Mortgage and its President, Youhanaie.

¹⁷ This Office notified respondents of the supplement on September 13, 2002. See Attachment 12. A joint response (discussed *infra*) was received from Acacia Mortgage and its President, Youhanaie.

1 alleged communications. See Attachment 13. They assert that, if Banasack was involved in the
2 alleged communications, he acted independently. Youhanaie requested that the complaint be
3 dismissed as to him and the company. In a May 18, 2001 joint response to the April 12, 2001
4 amendment to the amended complaint, Acacia Mortgage and Youhanaie reiterated much of the
5 information and assertions in their earlier response. See Attachment 14. In a February 15, 2002
6 joint response to the October 15, 2001 supplemental information about the "wireless spam" that
7 complainant provided, Acacia Mortgage and Youhanaie asserted that the practice was not
8 prohibited by law and acknowledged that it had amicably agreed to suspend the practice with
9 Verizon subscribers for two years. See Attachment 15. In an August 12, 2002 joint response to
10 the July 23, 2002 supplemental information, Acacia Mortgage and Youhanaie pointed out that
11 Acacia Mortgage's loan marketing practices are unrelated to Youhanaie's freedom to donate
12 money to political candidates. They also reiterated that they were not responsible for the
13 communications at issue. See Attachment 16. Finally, in a September 27, 2002 joint response to
14 the September 13, 2002 supplemental information Acacia Mortgage and Youhanaie again denied
15 any involvement in the activity at issue and requested that the matter be dismissed as to them.
16 See Attachment 17.

17 2. j2 Communications

18 In its April 3, 2001 response to the March 6, 2001 amended complaint, j2
19 Communications requested that the Commission take no further action against the company. See
20 Attachment 18. j2 Communications explained that it merely acts as a conduit for its customers -
21 it provides unique telephone numbers by which its customers send and receive faxes and
22 voicemails through the Internet. j2 Communications advised that it neither reviews nor saves
23 any of the data, but offered to provide relevant customer information upon receipt of a subpoena.

1 In a May 15, 2001 response to the April 11, 2001 amendment to the amended complaint, j2
2 Communications asserted that it was not associated with Acacia Mortgage and stated that it has
3 no control over the activities of its customers. See Attachment 19. It acknowledged that the
4 individual from Acacia Mortgage who made the "sales pitch" on the committee's telephone may
5 be a customer of j2 Communications and suggested that the person be contacted directly
6 regarding the allegations at issue.

7 **3. Anthony "Todd" Banasack**

8 In an undated response, which this Office received on April 20, 2001, Banasack refused
9 to acknowledge making or being involved with the communications; instead he expressed his
10 belief that he could constitutionally engage in the activity. See Attachment 20. Nevertheless, he
11 implied involvement in the activity, stating for example, "**any communications which may**
12 **have been made by me were made solely in my capacity as an individual citizen.**" (emphasis
13 added). In refusing to acknowledge responsibility for the communications, Banasack states that
14 he did not specifically address them because he believes that the communications did not violate
15 the Federal Election Campaign Act. Banasack asserts his belief that he has a constitutional right
16 to independently express his views about political candidates and that the Federal Election
17 Campaign Act only applies to paid communications or communications by candidates,
18 committees, corporations or entities other than individuals. He further asserts that he was not
19 affiliated with any political candidate, committee or organization and that no such entity
20 authorized or paid him to make any alleged communication. Although he confirms his
21 employment at Acacia Mortgage, he asserts that neither the company nor anyone affiliated with
22 it was involved in the communications.

1 **C. Law**

2 1. Disclaimer

3 The Federal Election Campaign Act of 1971, as amended ("the Act"), requires that
4 whenever any person makes an expenditure for the purpose of financing communications
5 expressly advocating the election or defeat of a clearly identified candidate, such communication
6 shall clearly state who paid for the communication and whether the communication was
7 authorized by a candidate or authorized committee. 2 U.S.C. § 441d(a).¹⁸ See 11 C.F.R.
8 § 110.11(a)(1).

9 2. Express Advocacy

10 The Commission regulations at 11 C.F.R. § 100.22(a) define "expressly advocating" as
11 any communication that--

12 Uses phrases such as "vote for the President," "re-elect your
13 Congressman," "support the Democratic nominee," "cast your
14 ballot for the Republican challenger for U.S. Senate in Georgia,"
15 "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or
16 "vote Pro-Choice" accompanied by a listing of clearly identified
17 candidates described as Pro-Life or Pro-Choice, "vote against Old
18 Hickory," "defeat" accompanied by a picture of one or more
19 candidate(s), "reject the incumbent," or communications of
20 campaign slogan(s) or individual word(s), which in context can
21 have no other reasonable meaning than to urge the election or
22 defeat of one or more clearly identified candidate(s), such as

¹⁸ BCRA made several pertinent modifications to the existing law. BCRA replaced the word "expenditure" with the word "disbursement" and deleted the word "direct" from "direct mailing." BCRA also requires additional information to be included in the disclaimer – the permanent street address, telephone number, or World Wide Web address" of the person paying for the communication. BCRA also added a specific provision for political committees, requiring a disclaimer whenever a committee makes disbursements for the financing of any communication through any "mailing, or any other type of general public political advertising." See BCRA, Pub. L. No. 107-155, § 311, 116 Stat. 81 (2002). Finally, under BCRA and the new Commission's regulations, a disclaimer is required for mailings consisting of more than 500 pieces of substantially similar mail. See 11 C.F.R. § 110.11. See also, FEC Explanation and Justification, 67 Fed. Reg. 76962, 76964 (Dec. 13, 2002).

1 posters, bumper stickers, advertisements, etc. which say "Nixon's
2 the One," "Carter '76," "Reagan/Bush" or "Mondale!"¹⁹

3
4 In *FEC v. Furgatch*, 807 F.2d 857, 862-864 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987),
5 the Ninth Circuit Court of Appeals held that speech need not include any of the specific words
6 listed in *Buckley* to constitute express advocacy. *Furgatch* concerned a negative advertisement
7 about President Carter placed three days before the 1980 general election. After criticizing
8 President Carter, the advertisement stated, "If he succeeds the country will be burdened with four
9 more years of incoherencies, ineptness and illusion, as he leaves a legacy of low-level
10 campaigning. DON'T LET HIM DO IT." *Id.* at 858. In holding the advertisement constituted
11 express advocacy, the Ninth Circuit concluded that for a communication to constitute express
12 advocacy it must, "when read as a whole, and with limited reference to external events, be
13 susceptible of no other reasonable interpretation but as an exhortation to vote for or against a
14 specific candidate."²⁰ *Id.* at 864.

15 In *FEC v. Christian Coalition*, 52 F.Supp. 2d 45 (D.D.C. 1999) ("*Christian Coalition*")
16 the court declared that, to be express advocacy, a communication must "in effect contain an
17 explicit directive," which takes the form of an "action verb or its functional equivalent." *Id.* at
18 62. According to the *Christian Coalition* court, once the identity of the speaker (i.e., the
19 organization paying for the communication) and the content of the communication are proven, a
20 communication will be considered express advocacy only when a reasonable person would

¹⁹ This provision was based on prior Supreme Court decisions in *Buckley v. Valeo*, 424 U.S. 1 (1976) and *FEC v Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). In *Buckley*, the Supreme Court gave examples of express advocacy, which included phrases such as "vote for," "elect," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." 424 U.S. at 44 n.52.

²⁰ In an opinion concerning a challenge to a similar definition of express advocacy in a California state statute, 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).

1 understand that the speech used, considered in the context of the entire communication,
2 contained an explicit directive to take electoral action in support of the election or defeat of a
3 clearly identified candidate. *Id.* at 62.

4 3. Clearly Identified

5 The term “clearly identified” means the candidate's name, nickname, photograph, or
6 drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous
7 reference such as “the President,” “your Congressman,” or “the incumbent,” or through an
8 unambiguous reference to his or her status as a candidate such as “the Democratic presidential
9 nominee” or “the Republican candidate for Senate in the State of Georgia.” 2 U.S.C. § 431(18);
10 11 C.F.R. § 100.17.

11 **D. Analysis**

12 1. **August and September 1, 2000 “stop her” faxes**

13 The August and September 1, 2000 “stop her” faxes appear to contain language that
14 expressly advocates the election or defeat of a clearly identified candidate. The words in those
15 faxes - “STOP HER! Stop Bitter Smith before it [*sic*] too late!” or “Stop her before she
16 embarrasses Arizona!” - appear equivalent or synonymous to the phrases and language specified
17 in the Commission’s definition of “expressly advocating” in 11 C.F.R. § 100.22(a). In particular,
18 the language in the faxes are similar to the phrase “vote against Old Hickory” listed in 11 C.F.R.
19 § 100.22(a). The faxes clearly contain an explicit directive to take electoral action in defeat of a
20 clearly identified candidate, namely, Bitter Smith. *See Christian Coalition* at 62. The language
21 in the faxes appears sufficiently explicit that it “in context can have no other reasonable meaning
22 than to urge the election or defeat of” Bitter Smith. *See* 11 C.F.R. § 100.22(a). The language

1 also appears similar to the "DON'T LET HIM DO IT" language in *Furgatch*, which the court
2 found to be express advocacy.

3 **2. September 1, 2000 cartoon faxes**

4 The September 1, 2000 faxes that showed an editorial cartoon of Bitter Smith and
5 referred to Bitter Smith as "Susan 'Gutter' Smith" with the words – "Do we need Bitter Smith"
6 are less specific and do not appear to fall within the definition of "expressly advocating" in
7 11 C.F.R. § 100.22(a). The faxes do not use language equivalent or synonymous to that set forth
8 in 11 C.F.R. § 100.22(a). They also do not contain a call to action to engage in electoral activity.
9 *See Christian Coalition*, 52 F. Supp. at 62.

10 Unlike the language in *Furgatch*, the words - "Do we need Bitter Smith" - do not
11 advocate any kind of action. In *Furgatch*, the court construed the words "DON'T LET HIM" as
12 a command, words expressly advocating action of some kind. *Furgatch* at 864. The court
13 further concluded that, although unstated, the proposed action was the rejection of former
14 President Jimmy Carter at the polls, the only action open to those who would not "let him do it."
15 *Id.* The language in the instant faxes does not rise to the level of a command; it does not appear
16 to exhort any kind of action. The language is more akin to a query rather than advocacy.
17 Notably, even if one concludes that one does not need Bitter Smith, the language does not urge
18 voters to take any kind of action.

19 **3. September 8, 2000 Flake faxes**

20 As with the September 1, 2000 faxes, the September 8, 2000 faxes that included a
21 newspaper article alleging election improprieties by Flake and a statement overwritten on the
22 article stating that "FLAKE IS A FAKE" do not appear to involve express advocacy as defined
23 by 11 C.F.R. § 100.22(a). Those faxes appear to express a negative opinion of Jeff Flake but do

1 not appear to advocate his election or defeat. Similar to the September 1, 2000 faxes, the
2 September 8, 2000 faxes do not urge voters to take any kind of action.

3 **4. September 4 and 11, 2000 telephone messages**

4 The September 4 and 11, 2000 telephone answering machine messages that stated, "If
5 you happen to live in Arizona, we endorse Jeff Flake for the first Congressional district. Please
6 vote for Jeff" and "If you happen to live in the First Congressional District in Arizona, please
7 vote for Thomas Liddy. We endorse Mr. Liddy for Congress" constitute express advocacy as
8 defined in 11 C.F.R. § 100.22(a); they contain specific language that expressly advocates the
9 election of clearly identified candidates, Jeff Flake and Thomas Liddy. However, it is not clear
10 that these communications, which expressly advocate the election of Jeff Flake and Thomas
11 Liddy, are covered by 2 U.S.C. § 441d(a). Specifically, it is uncertain whether phone banks and
12 other telephone communications constitute "general public political advertising" within section
13 441d(a). In Advisory Opinion 1988-1 and MUR 2638, the Commission concluded that phone
14 banks and other telephone communications constitute "general public political advertising"
15 within section 441d(a), but the Commission was unable to codify that position in a subsequent
16 rulemaking.²¹

17 AO 1988-1 involved the issue, among others, of whether certain campaign
18 communications by a candidate for delegate to a national convention were required to include a
19 disclaimer notice. The communications involved palm cards, phone banks, and direct mail and
20 they all contained references to Michael Dukakis, a federal candidate. It was also noted in AO
21 1988-1 that the phone banks would "be staffed by volunteers and will only use lists generated by

²¹ Under the Commission's new BCRA regulations, the disclaimer provisions now would apply to telephone banks. See 11 C.F.R. §§ 100.26 and 110.11. See also, FEC Explanation and Justification, 67 Fed. Reg. 76962, 76963 (December 13, 2002).

1 yourself [the delegate], the Dukakis campaign and the state party.” The Commission found,
2 without further elaboration, that although all three forms of communications would reference a
3 federal candidate, two of them—the palm cards and phone banks—would not require disclaimer
4 notices because they would not involve “general public political advertising.” In MUR 2638,
5 involving the issue of whether telemarketing activity conducted by a commercial vendor on
6 behalf of a federal candidate required a disclaimer, the Commission applied AO 1988-1, finding
7 no reason to believe that Section 441d was violated by the failure to include a disclaimer in the
8 calls. *See* MUR 2638, National Security Political Action Committee, *et al.*, Factual and Legal
9 Analysis (“F&LA”), pp. 6-7.

10 In a 1995 rulemaking, the Commission considered a regulatory amendment that would
11 explicitly include phone banks in the listing of activities that would constitute “general public
12 political advertising.” *See* 59 Fed. Reg. 50708 (October 5, 1994). Unable to reach a majority
13 decision on this issue, the Commission did not adopt the proposed amendment. 60 Fed. Reg.
14 52069, 52070 (October 5, 1995). The Notice of Proposed Rulemaking described AO 1988-1
15 broadly, suggesting that the Commission’s policy did not require disclaimers on phone banks
16 regardless of whether they were staffed by volunteers or a commercial vendor or used
17 commercial lists.

18 Based on the prior proposed rulemaking, in MUR 4735 (Bordonaro for Congress) the
19 Commission took no action against a respondent political committee for failing to include
20 disclaimers with commercial phone banks. *See* Commission Certification dated March 25, 1999.
21 More recently, in MUR 4919 (Charles Ball for Congress), the Commission also did not pursue
22 disclaimer violations for telephone communications at probable cause. *See* General Counsel’s

1 Report # 11 dated June 10, 2002 at 24 and Commission Certification dated June 10, 2002.²² In
2 sum, given the Commission's interpretation of this provision in AO 1988-1 and prior MURs, and
3 its action in the rulemaking, this Office recommends that the Commission not pursue the instant
4 telephone communications.²³

5 5. Disclaimer

6 As the August and September 1, 2000 "stop her" faxes that contained the words "Stop
7 Bitter Smith" expressly advocated the election or defeat of a clearly identified candidate, those
8 faxes required a disclaimer. *See* 2 U.S.C. § 441d(a). Such a disclaimer would have accurately
9 revealed the person(s) or entity paying for the communications and would have indicated
10 whether a campaign committee authorized the communications. *Id.* However, the
11 communications lacked the requisite disclaimer. Accordingly, the person(s) who authorized and
12 paid for these communications appear to have violated 2 U.S.C. § 441d(a).²⁴

13 The available information implicates Banasack and connects him to the 815-364-0842
14 number. The complainant concluded that Banasack's voice sounded very similar to the voice
15 heard on the September 11, 2000 telephone calls, that Banasack is listed as the subscriber of the

²² The ultimate impact of 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).

²³ The September 11, 2000 telephone calls to voters accusing Flake of wrongdoings do not contain express advocacy.

²⁴ The person(s) or entity responsible for the communications appears also to have utilized a fraudulent identity in the communications - activity that may involve violations of 2 U.S.C. § 441h (misrepresentation of campaign authority). At this time, the available information is insufficient to support any reasonable recommendation regarding 2 U.S.C. § 441h. For example, although it appears that Banasack is responsible for the communications, it is uncertain whether he was an employee or agent of a candidate for federal office, an essential element of 2 U.S.C. § 441h. Additionally, the expenditures for the communications may be reportable to the Commission under section 434(c) of the Act, if they are independent and meet the \$250 threshold of that provision. If during the course of the investigation information is ascertained that identifies additional respondents or implicates 2 U.S.C. §§ 434(c) or 441h, this Office will make appropriate recommendations to the Commission.

1 815-364-0842 number, and that Banasack has access to the account to change voice mail
2 messages. Notably, in his response, Banasack implied making the communications, stating for
3 example, "any communications which may have been made by me were made solely in my
4 capacity as an individual citizen," and asserting his constitutional right to make the
5 communications. Banasack also asserted that he acted independently. Therefore, this Office
6 recommends that the Commission find reason to believe that Anthony "Todd" Banasack violated
7 2 U.S.C. § 441d(a). This Office also recommends that the Commission take no action at this
8 time with respect to Acacia Mortgage, Gerald Youhanaie, and j2 Communications because the
9 available information does not appear to implicate these respondents. However, if this Office
10 obtains additional information during the investigation regarding these respondents, this Office
11 will make appropriate recommendations at that time.

12 **III. PROPOSED DISCOVERY**

21

²⁵ The available information indicates that j2 Communications is a "d/b/a" of Jfax.Com, Inc. Therefore, its subpoena is addressed accordingly

IV. RECOMMENDATIONS

1. Find reason to believe that Anthony "Todd" Banasack violated 2 U.S.C. § 441d(a).
2. Approve the attached Factual and Legal Analysis.
3. Approve the attached subpoenas to produce documents and orders to submit written answers to Anthony "Todd" Banasack and j2 Global Communications, Inc.
4. Approve the attached subpoenas to produce documents to AOL and Focal Communications Corporation of Illinois.
5. Approve the attached deposition subpoena to Anthony "Todd" Banasack.
6. Approve the appropriate letters.

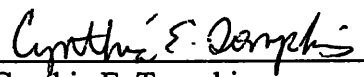
Lawrence H. Norton
General Counsel


Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

Date

10/3/03

BY:


Cynthia E. Tompkins
Assistant General Counsel


Kamau Philbert
Attorney

Attachments

1. Complainant's March 6, 2001 amendment
2. March 27, 2001 amendment notice
3. Complainant's April 11, 2001 amendment
4. May 7, 2001 amendment notice
5. Complainant's April 17, 2001 supplement

- 1 6. August 21, 2001 supplement notice
- 2 7. Complainant's supplement received 1/2/02, dated 10/15/01
- 3 8. January 11, 2002 supplement notice
- 4 9. Complainant's July 15, 2002 supplement
- 5 10. August 6, 2002 supplement notice
- 6 11. Complainant's August 12, 2002 supplement
- 7 12. September 13, 2002 supplement notice
- 8 13. Acacia's April 10, 2001 response
- 9 14. Acacia's May 18, 2001 response
- 10 15. Acacia's February 15, 2002 response
- 11 16. Acacia's August 12, 2002 response
- 12 17. Acacia's September 27, 2002 response
- 13 18. j2's April 3, 2001 response
- 14 19. j2's May 15, 2001 response
- 15 20. Banasack's response, April 20, 2001
- 16 21. Factual and Legal Analysis
- 17 22. Subpoenas and orders to submit written answers