



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAR 1 1 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Kirk L. Jowers, Esq.
Caplin & Drysdale
One Thomas Circle, NW
Suite 1100
Washington, DC 20005

RE: MUR 5379
Heriberto Valdes

Dear Mr. Jowers:

On July 30, 2003, the Federal Election Commission notified your client, Heriberto Valdes, of a complaint (MUR 5379) alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information provided by your client, the Commission, on February 13, 2004, found that there is reason to believe Heriberto Valdes violated 2 U.S.C. § 441b(a). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Jack Gould or Renee Salzmman, the attorneys assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT: Heriberto Valdes**

MUR: 5379

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8 **I. GENERATION OF MATTER**

9 This matter was generated by a complaint filed with the Federal Election Commission by
10 Ryan Hampton, Financial Director, Peter Deutsch for Senate. See 2 U.S.C. § 437g(a)(1).

11 **II. FACTUAL AND LEGAL ANALYSIS**

12 **A. Facts**

13 The complaint, citing to an article published in The Miami Herald on March 30, 2003,
14 alleges that employees and vendors of CarePlus Medical Centers, Inc. ("CarePlus") were
15 solicited in an illegally coercive manner to make contributions to Alex Penelas' U.S. Senate
16 campaign committee ("Penelas Committee"). Michael B. Fernandez is owner and chief
17 executive officer of CarePlus. Mr. Fernandez reportedly instructed Heriberto Valdes, Vice
18 President of CarePlus, to collect contributions from CarePlus employees for Mayor Penelas'
19 Senate campaign. Jim DeFede, *Fundraising effort raises concerns*, The Miami Herald, March
20 30, 2003. Mr. Valdes allegedly sent an email, which states in pertinent part:

21 The following is directed to all physicians and executive level staff at
22 CarePlus Medical Centers Inc. Mr. Michael B. Fernandez, owner and
23 Chief Executive Officer of CarePlus Medical Centers Inc. is asking for
24 your help. Alex Penelas, Dade County Mayor and strong supporter of
25 Mike Fernandez and CarePlus Medical Centers is running for United
26 States Senate. * * * Mr. Mike Fernandez is asking each of you for a
27 \$1,000.00 campaign contribution for the Alex Penelas for Senate
28 Campaign. The deadline for this contribution is Friday the 28th. He has
29 asked for an accounting of the individuals that donate and those that did
30 not. He will be contacting the individuals that donate to thank you

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1 personally. * * * As painful as this may seem, it will not be any easier
2 tomorrow so pull out your checkbooks and write the check today to the
3 order of Alex Penelas for Senate and the check must be dated April 2,
4 2003 or later. All physicians, large vendors and executive level staff will
5 be expected to donate. The center administrator has been assigned to
6 collect and submit the contributions to Ed Rubio, Director of Operations.

7 On April 1, 2003, two days after *The Miami Herald's* article was published, Mr.

8 Fernandez sent an email to the medical center administrators. In his email, Mr. Fernandez told
9 his employees that he did not authorize the email requesting contributions to Mayor Penelas'
10 Senate campaign, that the email should be disregarded in its entirety, and that any contributions
11 received as a result of the email should be returned. Mr. Fernandez's email further stated that he
12 intended to hold a fundraiser for Mayor Penelas and that anyone interested may contribute at that
13 time. The email concluded, "You may refuse to contribute without reprisal and contributions to
14 Penelas for Senate or any other candidate committee are strictly voluntary."

15 A week after Mr. Fernandez sent his email, *The Miami Herald* reported that "employees
16 who were pressured to write checks for Alex Penelas' Senate campaign were given those checks
17 back." Jim DeFede, *Was helping hand from strong arm?* *The Miami Herald*, April 8, 2003. One
18 CarePlus employee reportedly told *The Miami Herald*, "To tell me that a list was going to be
19 kept, and that we are going to know who did and did not contribute, it was just too much strong-
20 arming for me." *Id.*

21 Reportedly, this was not the first time that CarePlus employees were pressured to make
22 contributions to a candidate supported by Mr. Fernandez. According to *The Miami Herald*, in
23 April of 2002, Mr. Fernandez solicited CarePlus employees for contributions to Senator Bill
24 Nelson's campaign committee. The letter Mr. Fernandez sent to company employees reportedly
25 stated, "this is not a requirement, but a request." *Id.* Yet, according to *The Miami Herald*, "[t]wo

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1 employees who received the letter said despite the language that this was only a 'request,'
2 supervisors at the clinics told them they were expected to donate." *Id.* One employee stated,
3 "The administrator told me that a list was going to be kept of who did and did not contribute
4 because Michael [Fernandez] had asked for a list." *Id.*

5 On May 8, 2003, Mr. Fernandez held a fundraiser for the Penelas Committee. Thirty-
6 three physicians and executive level employees of CarePlus and CarePlus Health Plans made
7 contributions to the Penelas Committee, ranging from \$250 to \$2,000.¹ In addition, ten "Benefits
8 Consultants" contributed \$200 each and one gave \$100 to the Penelas Committee.

9 **B. Law and Analysis**

10 Under the Federal Election Campaign Act of 1971, as amended ("Act"), corporations are
11 permitted to communicate to their stockholders and executive or administrative personnel and
12 their families on any subject. 2 U.S.C. § 441b(b)(2)(A). Such communications can include a
13 solicitation or suggestion that they contribute to a particular candidate, "so long as the
14 corporation limits its activity to communication only and does not actually facilitate the making
15 of the member's contribution to the candidate." Advisory Opinion 1987-29 (citing 11 C.F.R.
16 § 114.3).

17 The Commission's regulations define "facilitation" as "using corporate . . . resources or
18 facilities to engage in fundraising activities in connection with any federal election"
19 11 C.F.R. § 114.2(f)(1). The Act's broad prohibition on corporate contributions (2 U.S.C.
20 § 441b(a)) extends to "anything of value" given to any candidate in connection with any federal
21 election. 2 U.S.C. § 441b(b)(2). When a corporation fundraises for a federal candidate and the

¹ Twenty employees made \$1,000 contributions, six gave \$2,000, and seven gave \$500 or less.

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1 campaign accepts contributions collected by the corporation, the committee has accepted
2 something of value from that corporation. See MUR 3987 (Friends of Jane Harman)
3 (Commission found probable cause to believe that Committee violated section 441b(a) by
4 accepting contributions that were solicited, collected, and forwarded by corporate employees).

5 Facilitation also can involve "[u]sing coercion, such as the threat of a detrimental job
6 action, the threat of any other financial reprisal, or the threat of force, to urge any individual to
7 make a contribution or engage in fundraising activities on behalf of a candidate or political
8 committee." 11 C.F.R. § 114.2(f)(2)(iv).

9 Directors and officers of a corporation are liable under the Act for consenting to corporate
10 contributions and expenditures that violate the Act. 2 U.S.C. § 441b(a).

11 The Valdes email appears to coercively solicit contributions to the Penelas Committee.
12 First, the email says that Mr. Fernandez is asking for the contribution. Thus, recipients of the
13 email know that the person who is ultimately responsible for making decisions regarding salaries,
14 bonuses, and promotions is asking them to contribute. Second, it states that Mr. Fernandez has
15 asked for an accounting of the individuals who do and do not contribute. As such, Mr.
16 Fernandez will know who has not complied with his request for contributions. Third, and most
17 significantly, it allegedly states that all physicians, large vendors, and executive level staff are
18 "expected" to contribute, thereby signifying that this is a requirement and not merely a request.

19 The Valdes email also stated, "The center administrator has been assigned to collect and
20 submit the contributions to Ed Rubio, Director of Operations." Corporate facilitation includes
21 collecting earmarked contributions and delivering them to the candidate. See Advisory Opinion
22 1986-4. For a corporation to properly collect and forward contributions earmarked to a

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1 candidate, such activity must be performed by the corporation's separate segregated fund, in
2 accordance with the provisions of 11 C.F.R. § 110.6; otherwise, such activity is considered
3 improper facilitation. 11 C.F.R. § 114.2(f)(3)(ii). CarePlus does not have a separate segregated
4 fund.

5 **III. CONCLUSION**

6 Therefore, there is reason to believe Heriberto Valdes violated 2 U.S.C. § 441b(a) by
7 consenting to corporate contributions to the Penelas Committee.

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