



FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

AUG - 7 2006

**Steven M Salky, Esquire
Zuckerman Spaeder, LLP
1201 Connecticut Ave , N W
Suite 1200
Washington, D C 20036-2638**

**RE MUR 5379
Heriberto Valdes**

Dear Mr Salky

Based on a complaint filed with the Federal Election Commission on July 23, 2003, and information supplied by your client, Heriberto Valdes, the Commission, on February 13, 2004, found that there was reason to believe Mr Valdes violated 2 U S C § 441b(a), and instituted an investigation of this matter

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a knowing and willful violation has occurred

The Commission may or may not approve the General Counsel's recommendation Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

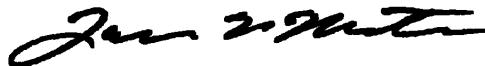
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A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement

Should you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter, at (202) 694-1650

Sincerely,



Lawrence H. Norton
General Counsel

Enclosure
Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 5379
Heriberto Valdes)

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

This matter was initiated by a signed, sworn, and notarized complaint filed by Ryan Hampton. The complaint alleged that CarePlus Medical Centers, Inc ("CPMC") coerced its employees into making contributions to Miami-Dade County Mayor Alex Penelas' U S Senate campaign committee, Alex Penelas US Senate Campaign ("the Penelas Committee"). The Vice President and Chief Operating Officer of CPMC was, at all relevant times, Heriberto Valdes. Based on his alleged role in the activity at issue, the Federal Election Commission ("the Commission") found reason to believe that Mr. Valdes violated 2 U S C § 441b(a). The ensuing investigation uncovered facts that demonstrate Mr Valdes knowingly and willfully violated the Federal Election Campaign Act of 1971, as amended ("the Act"). Thus, the General Counsel is prepared to recommend the Commission find probable cause to believe that Heriberto Valdes knowingly and willfully violated 2 U S.C § 441b(a).

CPMC operated patient care facilities throughout south Florida. Miguel B Fernandez was the President and Chief Executive Officer of CPMC. Mr Valdes, as Vice President, was second in command at CPMC and in that capacity, oversaw CPMC's patient care facilities and the centers' administrators. See CPMC's Objections and Responses to the Commission's Interrogatories and Request for Production of Documents (May 3, 2005), Attachment B (Organizational Chart); Eduardo Rubio Deposition ("Rubio Dep "), pp 24-26. Eduardo Rubio,

1 Director of Operations, was in charge of the day-to-day operations of the medical centers and
2 reported directly to Mr. Valdes, as did Dr. Jose Perez, CPMC's Medical Director See Rubio
3 Dep , pp 24-26, Dr Jose Perez's Objections and Responses to the Commission's Interrogatories
4 and Request for Production of Documents, (May 3, 2005), p 2 Admmistrators were required to
5 attend meetings with Mr. Rubio on a weekly basis and Mr. Valdes attended all of those meetings,
6 for at least a portion of each meeting Rubio Dep , pp 32, 129-30 Dr. Perez held monthly
7 meetings with the Physicians-In-Charge from all of the centers. Id at 132-33 Mr Valdes
8 attended some of those meetings as well Id at 134

9 In early 2003, Miami-Dade County Mayor Alex Penelas asked Mr Fernandez to help
10 raise money for his campaign for the U S Senate Mr Fernandez, in turn, asked Mr Valdes to
11 assist him in raising funds for Mayor Penelas' campaign See Miguel B. Fernandez Deposition
12 ("Fernandez Dep "), pp 28-31 Mr. Valdes told Mr Rubio that he had a goal of raising \$30,000
13 for the Penelas campaign from CPMC executives and doctors Rubio Dep , p 30 In particular,
14 Mr Valdes specified that they should attempt to collect \$1,000 per doctor at CPMC Id at 62-
15 63 On March 24, 2003, Mr. Valdes sent an e-mail to the center administrators at CPMC's
16 patient care facilities The e-mail stated

17 The following is directed to all physicians and executive level staff at
18 CarePlus Medical Centers Inc Mr Michael B. Fernandez, owner and Chief
19 Executive Officer of CarePlus Medical Centers Inc is asking for your help.
20

21 Alex Penelas, Dade County Mayor and strong supporter of Mike Fernandez
22 and CarePlus Medical Centers is running for United States Senate. He has
23 been working closely with Mr. Mike Fernandez and other community
24 leaders to effect change in the indigent care programs that could represent
25 opportunities for companies like ours to increase revenue while serving our
26 indigent population and providing alternatives other than Jackson Memorial
27 Health Systems
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Mr Mike Fernandez is asking each of you for a \$1,000.00 campaign contribution for the Alex Penelas for Senate Campaign. The deadline for this contribution is Friday the 28th. He has asked for an accounting of the individuals that donate and those that did not. He will be contacting the individuals that donate to thank you personally. I am sure you are probably wondering why Mike Fernandez does not make the contribution himself. I am sure he would if he could. It would be illegal, as individual maximum allowable contributions are \$2,000.00. As painful as this may seem, it will not be any easier tomorrow so pull out your checkbooks and write the check today to the order of Alex Penelas [sic] for Senate and the check must be dated April 2, 2003 or later.

All physicians, large vendors and executive level staff will be expected to donate. The center administrator has been assigned to collect and submit the contributions to Ed Rubio, Director of Operations.

Complaint Exhibit 4 ("Compl Ex ")

This e-mail prompted discussions at CPMC concerning fundraising for Mayor Penelas' campaign, the topic was discussed during at least one of Mr. Rubio's meetings with the administrators and during at least one of Dr. Perez's meetings with the Physicians-In-Charge. Rubio Dep., pp. 32, 134-35, Jesus Vidueira Answers to Questions ¶ 4 (April 15, 2004), Dr. Jose Perez Statement (May 23, 2005) ("Perez Stmt.") and Attachment. It also appears that some of the administrators may have handed out copies of Mr. Valdes' e-mail to the doctors. See Rubio Dep., pp. 106-07. See also Dr. Manual Aran Deposition ("Aran Dep."), pp. 29-32 (discussing memo doctors received at one of the medical centers regarding contributions to the Penelas campaign). Further, an agenda for the Physicians-In-Charge/Medical Director Meeting of March 27, 2003, lists "Alex Penelas Campaign Fund" as an item on the agenda. Perez Stmt. and Attachment. Finally, Mr. Valdes acknowledges that during an administrators' meeting, he asked the administrators if they would be interested in supporting the Penelas campaign. Heriberto Valdes Statement ¶ 7 ("Valdes Stmt.") (September 19, 2003).

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1 Soon after CPMC's administrators received Mr. Valdes' e-mail during the week of
2 March 24, 2003, Mr Valdes directed CPMC's Director of Information Technology, William
3 Bounds, to delete the e-mail from CPMC's e-mail server Mr Valdes provided Mr Bounds the
4 subject line, the date, and the approximate time of the e-mail to assist in locating and deleting the
5 e-mail Mr Bounds, in turn, asked Sherwin Singh, a technician in CPMC's information
6 technology office, to handle the actual technical steps involved in deleting Mr Valdes' e-mail
7 Using the information provided by Mr Valdes, Mr Singh located and deleted this e-mail from
8 CPMC's e-mail server, and Mr Bounds told Mr Valdes that the e-mail had been deleted See
9 CPMC's Objections and Responses to the Commission's Interrogatories and Request for
10 Production of Documents, p. 13 (July 21, 2005)

11 After the e-mail was deleted, Jim DeFede, a reporter for the *Miami Herald*, obtained a
12 copy of Mr Valdes' e-mail and wrote an article about it that appeared in the *Miami Herald* on
13 March 30, 2003 In his article, DeFede quoted and paraphrased most of Mr Valdes' e-mail,
14 including the statement about who was expected to contribute to the Penelas campaign See
15 Compl Ex 1 In a subsequent news article, one CPMC employee reportedly told the *Miami*
16 *Herald*, "To tell me that a list was going to be kept, and that we are going to know who did and
17 did not contribute, it was just too much strong-arming for me " Jim DeFede, *Was Helping Hand*
18 *From Strong Arm?*, The Miami Herald, April 8, 2003, at 1B.

19 Additionally, after his e-mail was deleted from CPMC's e-mail server, Mr Valdes
20 created a shorter, different version of his e-mail, which, though never sent to CPMC employees,
21 stated:

22 The following should be discussed with all physicians and executive level
23 staff at CarePlus Medical Centers Inc Michael B. Fernandez, owner and

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Chief Executive Officer of CarePlus Medical Centers Inc. is asking for your help.

Alex Pinelas [sic], Dade County Mayor and supporter of CarePlus Medical Centers is running for United States Senate. Mr Mike Fernandez is asking each of you for a \$1,000.00 campaign contribution for the Alex Pinelas [sic] for Senate Campaign. The deadline for this contribution is Friday the 28th. He has asked for an accounting of the individuals that donate. We will be contacting the individuals that donate to thank you personally. I am sure you are probably wondering why Mike Fernandez does not make the contribution himself. I am sure he would if he could. It would be illegal, as individual maximum allowable contributions are \$2,000.00. As painful as this may seem, it will not be any easier tomorrow so pull out your checkbooks and write the check today to the order of Alex Pinelas [sic] for Senate and the check must be dated April 2, 2003 or later.

The center administrator has been assigned to collect and submit the contributions to Ed Rubio, Director of Operations.

CPMC's Objections and Responses to the Commission's Interrogatories and Request for Production of Documents, at Ex C (April 30, 2004)

In this shorter version of his e-mail, Mr Valdes deleted or modified certain passages from his original e-mail to make it seem less coercive. For example, the original e-mail stated, "He [Mr Fernandez] has asked for an accounting of the individuals that donate and those that did not. He will be contacting the individuals that donate to thank you personally." In the second version, Mr Valdes deleted the phrase "and those that did not" and changed "He" to "We." In addition, Mr Valdes' revised e-mail did not include the sentence that read, "All physicians, large vendors and executive level staff will be expected to donate." These changes are significant.

In any event, as noted above, despite having revised the e-mail, Mr. Valdes did not send it to CPMC's administrators. See Rubio Dep., pp. 120-21. He did, however, provide it to Mr. Fernandez, who asked Mr. Valdes why there were two e-mails. According to Mr. Fernandez, Mr. Valdes told him that he had no idea where the other [original] e-mail came from and denied

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1 sending that e-mail to CPMC's administrators. Fernandez Dep , pp 103-04 Mr. Valdes pointed
2 out to Mr. Fernandez inconsistencies between the e-mail he (Mr Valdes) wrote and the e-mail
3 Mr. DeFede quoted from in his article According to Mr Fernandez, Mr. Valdes told him
4 "somebody must have altered [his] email . " See Fernandez Dep., pp. 78-80.

5 Approximately six months after he directed Mr Bounds to delete his e-mail from
6 CPMC's e-mail server, Mr Valdes submitted a sworn written statement to the Commission in
7 which he stated that he had been unable to locate his original e-mail See Valdes Stmt ¶ 12
8 (September 18, 2003) Mr Valdes omitted from his sworn statement the material fact that he
9 directed Mr Bounds to delete his original e-mail from CPMC's e-mail server in March 2003

10 **II. MR. VALDES KNOWINGLY AND WILLFULLY VIOLATED THE ACT WHEN**
11 **HE COERCED CAREPLUS EMPLOYEES TO CONTRIBUTE TO MAYOR**
12 **PENELAS' CAMPAIGN FOR THE U.S. SENATE**
13

14 The Act makes it unlawful for corporations to make contributions or expenditures in
15 connection with any election of any candidate for Federal office 2 U S C § 441b(a) In
16 addition, corporate officers and directors are prohibited from consenting to such contributions or
17 expenditures *Id* Commission regulations also prohibit facilitating the making of contributions
18 to candidates or political committees Facilitation means using corporate resources or facilities
19 to engage in fundraising activities in connection with any Federal election 11 C.F.R.
20 § 114.2(f)(1) One manner of facilitating the making of contributions is through the use of
21 coercion, such as the threat of a detrimental job action, the threat of any other financial reprisal,
22 or the threat of force, to urge any individual to make a contribution or engage in fundraising
23 activities on behalf of a candidate or political committee. 11 C.F.R. § 114.2(f)(2)

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Mr. Valdes' original e-mail sent a clear message to employees that they were obligated to contribute to Mayor Penelas' Senate campaign. Employees were informed in the e-mail that their employer, the President and CEO of CPMC, not only "expected" all physicians and executive level staff to contribute \$1,000 each, but that he would be apprised of who did not comply with this expectation. Thus, recipients of Mr. Valdes' original e-mail could reasonably infer (and did infer) that failure to contribute to Mayor Penelas' U.S. Senate campaign would be detrimental to their employment at CPMC. See MUR 5268 (Kentucky State District Council of Carpenters) (finding probable cause to believe facilitation took place through coercion where employees felt intimidated into making the suggested contributions). Cf. MUR 4780 (Harris) (finding no reason to believe facilitation took place and no evidence of coercion in part because the Respondents kept no records and made no inquiries regarding who contributed).

The Act also addresses violations that are knowing and willful. See 2 U.S.C. § 437g(a)(5)(B). The knowing and willful standard requires knowledge that one is violating the law. The phrase "knowing and willful" indicates that "acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976), see also *AFL-CIO v. FEC*, 628 F.2d 97, 98, 101-02 (D.C. Cir.), cert. denied, 449 U.S. 982 (1980) (noting that a "willful" violation includes "such reckless disregard of the consequences as to be equivalent to a knowing, conscious, and deliberate flaunting of the Act," but concluding on the facts before it that this standard was not met) (cited in *National Right to Work Comm. v. FEC*, 716 F.2d 1401, 1403 (D.C. Cir. 1983)).

An inference of knowing and willful conduct may be drawn "from the defendant's elaborate scheme for disguising" his or her actions. *United States v. Hopkins*, 916 F.2d 207,

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214-15 (5th Cir 1990) The evidence need not show that the defendant "had specific knowledge of the regulations" or "conclusively demonstrate" a defendant's "state of mind," if there are "facts and circumstances from which the jury reasonably could infer that [the defendant] knew her conduct was unauthorized and illegal " *Id* at 213 (quoting *United States v Bordelon*, 871 F 2d 491, 494 (5th Cir), *cert denied*, 439 U.S 838 (1989))

Under the facts and circumstances here, it is reasonable to infer that Mr. Valdes knew his conduct was illegal. Specifically, Mr Valdes sought to disguise his original e-mail by preparing a shorter, different version of the e-mail, which did not include the coercive language from his original e-mail, and then denying authorship of the original e-mail when confronted by Mr Fernandez about it. Further, Mr Valdes took steps to conceal his original e-mail by directing a subordinate to delete it from the corporation's e-mail server, a material fact that he omitted from his sworn statement to the Commission.

Finally, Mr Valdes was given the opportunity to explain his actions by testifying at a deposition in this matter. However, Mr Valdes invoked his Fifth Amendment right not to testify in response to the deposition subpoena.¹ See Valdes Affidavit (July 8, 2005). Mr Valdes' invocation of his Fifth Amendment right not to testify in this matter further supports an inference that he knew his conduct was illegal. See *Baxter v Palmigiano*, 425 U.S. 308, 318 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . ."); see also *SEC v*

¹ Mr Valdes was aware that invoking his Fifth Amendment right not to testify could lead to the Commission drawing an adverse inference. In lieu of appearing at his deposition, Mr. Valdes signed an Affidavit stating, *inter alia*, that the Commission had advised him that it may draw an adverse inference from his assertion of his Fifth Amendment rights, and that the Commission may find probable cause to believe that he violated the Act, based in part on the adverse inference.

1 *International Loan Network, Inc*, 770 F Supp 678, 695-96 (D.D C 1991), *aff'd*, 968 F 2d 1304
2 (D.C. Cir 1992) (adverse inference drawn from defendants' assertion of their Fifth Amendment
3 right not to testify during depositions), *Pagel, Inc v S E C*, 803 F 2d 942, 946-47 (8th Cir 1986)
4 (agency did not err in taking into account adverse inference based on broker-dealer's invocation
5 of Fifth Amendment privilege against self-incrimination), *Cerrone v. Shalala*, 3 F Supp 2d
6 1174, 1175 n 3, 1180 (D Colo 1998) (agency's finding, based in part on adverse inference
7 drawn against disability benefit recipient who invoked the Fifth Amendment, was supported by
8 substantial evidence)

9 Thus, because Mr Valdes disguised and concealed his e-mail and invoked his
10 Fifth Amendment right not to testify in this matter, the Commission can conclude that
11 Mr Valdes knew that using coercion to solicit CPMC employees to contribute to Mayor Penelas'
12 Senate campaign was illegal By consenting to CPMC's facilitating the making of contributions
13 to the Penelas Committee he thereby consented to CPMC's illegal corporate contributions For
14 the reasons discussed above, the General Counsel is prepared to recommend that the Commission
15 find probable cause to believe that Mr Valdes knowingly and willfully violated 2 U S C
16 § 441b(a)

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1 **III. GENERAL COUNSEL'S RECOMMENDATION**

2 Find probable cause to believe that Heriberto Valdes knowingly and willfully violated

3 2 U.S.C. § 441b(a)

4
5
6 8/7/06
7 Date

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