

BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of

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MUR 5379

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Heriberto Valdes

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RESPONDENT'S OPPOSITION TO GENERAL COUNSEL'S BRIEF

Heriberto Valdes did not knowingly and willfully violate 2 U S C § 441b(a) The Commission, contrary to the recommendation of its General Counsel, should not find probable cause to believe that he knowingly and willfully coerced employees of CarePlus Medical Centers, Inc ("CPMC")¹ into making contributions to Miami-Dade County Mayor Alex Penelas' U S Senate campaign ("the Penelas Committee") As we explain below, the evidence in this case fails to establish that Mr Valdes either coerced anyone to contribute to the Penelas Committee or that he did so "knowingly and willfully "

I. Counter Statement Of The Case²

In March 2003, CPMC operated ten patient care health centers that served the medical needs of primarily indigent Cuban-American senior citizens in Miami-Dade County, Florida (Fernandez Dep at 22-25, Rubio Dep at 17-24) The centers have long been the primary source of basic health-care services for these residents, but they were abruptly closed in December 2001 by their previous owner, Pan American Hospital (Rubio Dep at 15-29) The closure of the centers left thousands of uninsured Miami-Dade residents without adequate healthcare services,

¹ CarePlus Medical Centers, Inc was renamed CAC Florida Medical Centers, LLC on January 1, 2004

² Because the General Counsel's Brief ("GC Brief") both misstates several important facts and fails to include many material facts, we have set forth a counter statement of the case In this counter statement, we have tried to distinguish between the evidence which we know has been made part of the record and the evidence we surmise is part of the record While the General Counsel agreed to share with us copies of the documents cited in its brief, including the deposition transcripts of Michael Fernandez, Eduardo Rubio, and Dr Manuel Antonio Aran, we have only limited portions of the remaining record in this MUR

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until the centers were purchased and reopened in January 2002 by CPMC (Rubio Dep at 23) Mayor Penelas played a critical role in the re-opening of the centers and restoring healthcare coverage for these Miami-Dade residents (Rubio Dep at 29-30) *See also*, Jim DeFede, *Was Helping Hand From Strong Arm?*, The Miami Herald, Apr 8, 2003, at ¶ 9 ("The 12 clinics, originally owned by Pan American Hospital, briefly closed in December 2001 for financial reasons. The clinics, which cater primarily to elderly Cuban Americans, reopened after Pan American sold them to Fernandez in a deal negotiated in Penelas' office. At the time, Penelas said he became involved because many constituents were affected by the closing.") Indeed, the vast majority of center administrators, doctors, nurses and other employees, most of whom are also Cuban-Americans, were grateful to Mayor Penelas for his role in re-opening the centers and helping them get their jobs back (Rubio Dep at 29-30, Fernandez Dep at 32, 53) (We believe that numerous sworn statements to this effect have also been made part of the record in this MUR.)

Mr. Valdes, at all times relevant to this case, was CPMC's Chief Operating Officer (GC Brief at 1, 2). A review of FEC records establishes that prior to March 2003, Mr. Valdes had never previously made any contributions to any person running for any federal office.

CPMC's majority owner and its Chairman and Chief Executive Officer was, at all times relevant to this matter, Miguel "Mike" Fernandez (GC Brief at 1). Prior to March 2003, Mr. Fernandez had made "many donations to many people running for office" and had raised money for other candidates for public office (Fernandez Dep at 27). His prior fundraising activities included raising money for the Bill Nelson for Senate campaign committee in the Spring of 2002 (Fernandez Dep at 27, 188-192). In that instance, Mr. Fernandez wrote a memorandum seeking contributions from CPMC employees that praised Mr. Nelson for being helpful in

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reopening the centers (Fernandez Dep at 188-189) According to a Miami Herald article, CPMC employees were asked for a donation to the Nelson campaign of between \$1,000 and \$2,000 in a written solicitation, but were also told by an administrator "that a list was going to be kept of who did and did not contribute because Michael had asked for a list " Jim DeFede, *Was Helping Hand From Strong Arm?*, The Miami Herald, Apr 8, 2003, at ¶ 13 According to Mr Fernandez, he normally asks for a list of contributors, but not a list of non-contributors, "for the purpose of calling those who did [contribute] to thank them," (Fernandez Dep at 191) and has "never subjected any employee to reprisal for their decision not to contribute or engage in political activity " (Fernandez Dep at Exhibit 9 ¶ 13) There is no evidence that adverse employment action was ever taken against any CPMC employee who failed or refused to contribute to the Nelson campaign

In early 2003, Mr Fernandez was visited by Mayor Penelas, who told Mr Fernandez that he was planning on running for Senate, should then Senator Graham decide not to run, and asked Mr Fernandez to help him raise campaign funds (Fernandez Dep at 28) Mr Fernandez had a brief "30 second[]" conversation with Mr Valdes about helping to raise money for the Penelas Committee from CMPC employees (Fernandez Dep at 30-31) ("With regard to the Penelas campaign, I remember passing Bert and asking if he would be helpful in getting some contributions from the Medical Centers folks for the Penelas campaign ") (Fernandez Dep at 30) At that time, Mr Fernandez did not know that there were any restrictions on using the corporation's facilities, equipment, or employees in connection with raising funds for a federal candidate (Fernandez Dep at 34-36) Indeed, while Mr Fernandez had previously been advised by an attorney that he could not reimburse employees who made contributions, he was

generally ignorant of all other legal restrictions related to fundraising for federal candidates (Fernandez Dep at 27-40)

Mr Fernandez subsequently issued a memorandum to Mr Valdes dated February 28, 2003, that told Mr Valdes that Mr Fernandez was counting on him to raise \$30,000 That memorandum also told Mr Valdes, *inter alia*, the following "[T]he rules are simple Checks payable to Alex Penelas for the U.S. Senate Check Maximums \$2,000 Individuals \$4000 Family No Corporate Checks " (Fernandez Dep Exhibit 15) (Emphasis in original)

It is undisputed that Mr Valdes subsequently drafted an e-mail that contained the address line "directed to all physicians and executive level staff at CarePlus Medical Centers, Inc " and that was dated March 24, 2003 While the GC Brief states that Mr Valdes sent the e-mail "to the center administrators at CPMC's patient care facilities," Mr Valdes actually sent the e-mail to a single administrator, Jesus Vidueira, who then forwarded the e-mail to the other administrators without Mr Valdes' direction (Rubio Dep at 31, 102-105) See also (Fernandez Dep Exhibit 9 at ¶ 8) ("He [Bert Valdes] also told me that he had only sent his e-mail to one administrator at the company, although he acknowledged that he had no way of knowing how many others had been forwarded the email ") The administrators "may have handed out copies of Mr Valdes' e-mail to the doctors," (GC Brief at 3), who were the highest wage earners among the CPMC employees and, therefore, the primary focus of the fundraising effort (Fernandez Dep at 53-55, Rubio Dep at 31-32, 63)

The e-mail was only a small part of the fundraising effort, most of which occurred in one-on-one discussions between CPMC administrators and CPMC physicians (Rubio Dep at 32, 80-81) See also, (Vidueira Answers to Questions at ¶ 14) ("I asked physicians working out of the Westland Center for donations I encouraged them to donate ") The matter was also

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discussed at an administrators meeting on March 26 and appeared on an agenda for a Physicians-In-Charge/Medical Director meeting on March 27, 2003 (Rubio Dep at 30-32, Vidueira Answers to Questions at ¶ 4, Dr Jose Perez's Statement of May 23, 2005, and attachment) All patient care center administrators attended meetings on a bi-weekly basis,¹ and Mr Valdes normally attended at least a portion of each meeting (Rubio Dep at 128-130) Similarly, Dr Perez, the CPMC Chief Medical Officer, held regular monthly meetings with the Physicians-In-Charge of each of the centers, and Mr Valdes attended some of those meetings, as well (GC Brief at 2) These oral discussions made clear that the fundraising effort was a request, not a demand, and that employees were free not to contribute (Statement of Eduardo Rubio at ¶ 3) ("To demonstrate my support and assist the Penelas campaign, not only did I write a personal check to 'Alex Penelas for Senate,' but I also encouraged people to support Penelas I have never felt that making political contributions is expected of me as a condition of my employment at CarePlus and certainly did not believe contributing to Penelas for Senate was required in any way ") (Vidueira Answers to Questions at ¶ 4) ("An administrators meeting was held after the e-mail was sent by Bert Valdes During this meeting we discussed the need to request donations from physicians It was made clear that it was not a demand but rather a request "), (Dr Aran Dep at 29-35) (explaining that after he received the March 24 e-mail, he discussed it with two other doctors who were "slightly irritated that they were suggested to give the money, because they were Republicans and they did not feel that they wanted to contribute to a Democrat's campaign") Indeed, it is our understanding that CPMC's lawyers have submitted statements

¹ The GC Brief misstates that the administrator meetings occurred weekly According to Mr Rubio, who ran them, "[t]hey were typically every two weeks, but depending on how relevant some matters might have been or anything new, we could have them every two weeks, we could have them every three weeks, we could have them back-to-back weeks " (Rubio Dep at 128)

from every employee who wrote a check to the Penelas campaign between March 24 and April 1, 2003, and that every individual has testified that they contributed on a purely voluntary basis

At some point during the week of March 24, Miami Herald reporter Jim DeFede obtained a copy of the March 24 e-mail. Mr. DeFede was then the Miami Herald's chief investigative reporter and had a well-earned reputation as being a very tough interrogator. See Manuel Roig-Franzia, *Suicide's Aftermath Rocks Miami*, The Washington Post, July 29, 2005 at ¶¶ 1, 4 (calling DeFede a "muckraking columnist" as recognizable for his Hitchcockian silhouette as for his habit of pricking the powerful). Based on an article he first published on Sunday, March 30, 2003, titled *Fundraising Effort Raises Concerns*, it appears that Mr. DeFede called and spoke to Mr. Valdes about the e-mail on Friday, March 28 ("In an interview Friday, Valdes defended the solicitation.") That interview focused on the link between Mike Fernandez's fundraising efforts on behalf of Mayor Penelas and financial benefits that may have been received by CPMC as a result of Mayor Penelas' health care initiatives. Thus, according to his article, Mr. DeFede read Mr. Valdes at least two passages from the e-mail: "the section regarding how the mayor's healthcare initiatives 'represent opportunities for companies like ours to increase revenue'" and "the line in the e-mail in which recipients were 'expected to donate'." *Fundraising Efforts Raises Concerns* at ¶¶ 14-16. Mr. DeFede later that day called the Mayor and read (or sent) the e-mail to the Mayor's Chief of Staff. *Fundraising Effort Raises Concerns* at ¶ 18. DeFede again focused on the relationship between Mr. Fernandez's fundraising and the Mayor's Healthcare Access Task Force, eliciting the following quote from the Mayor's Chief of Staff: "I know that Mike Fernandez in public meetings of the Healthcare Task Force has stated that neither he nor his enterprise would seek to engage in any type of business relationship with anything that is created or occurs as a result of the efforts of the Healthcare Access Task Force. So, I am a little

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surprised to hear about this e-mail " *Fundraising Efforts Raises Concerns* at ¶ 19 According to the article, "[A]n hour later, the mayor's chief of staff called back, saying the company had just sent him a copy of the e-mail and that the sentence that referred to increasing revenue and the sentence that talked about all physicians and executive level staff being 'expected to donate' were not in the version sent to him *Fundraising Effort Raises Concerns* at ¶ 20

The e-mail sent to the Mayor's office ("second e-mail" or "shorter e-mail") was similar to the e-mail in Mr DeFede's possession ("original e-mail") in several important respects and different in other critical respects The second e-mail had four separate paragraphs as did the original More importantly, each sentence in the second e-mail was virtually identical to a sentence in the original e-mail However, the second e-mail removed the following language from the second paragraph of the original "He [Mayor Penelas] has been working closely with Mike Fernandez and other community leaders to effect changes in the indigent care programs that could represent opportunities for companies like ours to increase revenue while serving our indigent population and providing alternatives other than Jackson Memorial Health Systems " The second e-mail also removed the phrase "[A]ll physicians, large vendors, and executive level staff will be expected to donate" from the last paragraph and the words "and those that did not" in a prior sentence about Mike Fernandez having asked for an accounting Finally, the second e-mail described the Mayor as a "supporter of CarePlus Medical Centers" instead of as a "strong supporter of Mike Fernandez" and the Medical Centers Interestingly, both e-mails misspelled the name of the Mayor as "Pinelas," the original e-mail only one time in the third paragraph and the second e-mail three different times in three separate paragraphs We have attached as Exhibit 1, a red-lined version of the original e-mail that shows all of the deletions and changes made in the second e-mail

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The GC Brief mistakenly insinuates that Mr. Valdes directed CPMC's Director of Information Technology, William Bounds, to delete the original e-mail from CPMC's e-mail server *before* Mr. DeFede confronted Mr. Valdes about the e-mail.⁴ In fact, the most persuasive reading of the evidence indicates that Mr. Valdes asked Mr. Bounds to purge the e-mail from the CPMC server only after Mr. DeFede spoke to Mr. Valdes. It was only then that Mr. Valdes was given reason for the first time to believe that public attention was likely to be drawn to the fundraising effort. Additionally, the GC Brief claims that Mr. Valdes created a shorter version of his e-mail "*after* his e-mail was deleted from CPMC's e-mail server" (GC Brief at 4) (emphasis added). To the contrary, the obvious similarities between the two e-mails, the fact that the second e-mail was prepared in such haste that the single misspelling of "Pinelas" was repeated several additional times, and the fact that the shorter version deleted only those particular portions Mr. DeFede questioned, all strongly suggests that the second e-mail was created *before* the original e-mail was deleted from the server.

Mr. Fernandez returned from a day trip to Puerto Rico on Friday evening March 28 and retrieved multiple messages from his voice mail (Fernandez Dep. at 59). The first three messages were from Mr. Valdes, each of which expressed a rising sense of alarm, followed by messages from Jim DeFede asking about the e-mail from Mr. Valdes. ("[W]hen I got back into Miami in the evening, I retrieved multiple messages on my voice mail. The first few were from Bert, and you can hear a sense of intensity and a tense sense of alarm arising from one message to the other. So after that, there were two or three calls from a reporter that I would

⁴ While the GC Brief cites a CPMC response to an interrogatory regarding the timing of Mr. Valdes' request to Mr. Bounds, we believe that the current record is at best unclear on this subject. Witness statements and the FEC's interviews subsequent to CPMC's response to the interrogatory have, we believe, called into doubt the accuracy of the original answer. Unfortunately, we do not have access to all the witness statements. We have, however, sought to clarify the record by submitting a statement from Sherwin Singh, the employee who actually deleted the e-mail from the server. A statement from Mr. Singh is attached as Exhibit 2.

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like to talk to you about Bert Valdes and the e-mail he sent to your employees") (Fernandez Dep at 59-60) Later that evening, Mr Fernandez returned several voicemail messages left by Mr DeFede, who "was very, very aggressive and very accusatory and very opinionated " in the ensuing conversation (Fernandez Dep at 60, 67-68)

On Monday, March 31, 2003, Mr Fernandez confronted Mr Valdes about the e-mail that Mr DeFede had written about in his article, and Mr Valdes denied having created that e-mail (Fernandez Dep at 75-80, 105-106) Mr Valdes instead claimed that he had authorized a shorter e-mail that did not contain several phrases that the DeFede article quoted (Fernandez Dep at 84) According to Mr Fernandez, Mr Valdes claimed at that time not to have seen the e-mail described by Mr DeFede and provided Mr Fernandez with a copy of only the second e-mail (Fernandez Dep at 103-104)

Subsequently, on Tuesday, April 1, 2003, Mr Fernandez sent his own e-mail, authored by newly engaged outside counsel,³ to all administrators at CPMC This e-mail directed employees to disregard the March 24 Valdes e-mail "in its entirety " (Fernandez Dep Exhibit 8) This e-mail also directed that all checks written to the Penelas Senate campaign which had been collected prior to that date be returned (Fernandez Dep Exhibit 8) The e-mail specified that CPMC employees "may refuse to contribute without reprisal and contributions to Penelas for Senate or any other candidate committee are strictly voluntary " (Fernandez Dep Exhibit 8) All checks written by CPMC employees to Peneles for Senate were, in fact, returned by April 3, 2003 (Rubio Dep at 34 and Exhibit 4 at ¶ 6) ("Once the article came out in the newspaper, we

³ Mr Fernandez contacted election law lawyers from Caplin & Drysdale, including former FEC Chairman Trevor Potter, on Monday, March 31, 2003 (Fernandez Dep at 108) Not only did the lawyers draft the e-mail sent the next day, April 1, 2003, but they immediately conducted a seminar on federal campaign and election law, which seminar was attended by Bert Valdes, among others (Fernandez Dep at 111) See also, (Fernandez Dep Exhibit 9 at ¶ 12) ("On March 31, 2003, I therefore retained a law firm to brief our executives, provide handouts ")

returned any checks that we had received Most contributions came from doctors (only one administrator had contributed at that point) ")

II. Mr. Valdes' Original E-mail Did Not Actually Coerce Any CPMC Employee to Contribute To the Penelas Campaign and Was Not Reasonably Capable of Coercing Those Employees To Whom It Was Directed

The General Counsel argues both that recipients of Mr Valdes' original e-mail could reasonably infer that failure to contribute to Mayor Penelas' U S Senate campaign would be detrimental to their employment at CPMC and that some employees did, in fact, make such an inference Neither argument bears close scrutiny

As for what employees actually inferred, we understand that statements from all of the recipients of Mr Valdes' e-mail who made contributions to the campaign during the week of March 24, 2003, confirm that they contributed to the campaign voluntarily and without fear of reprisal ⁴ According to the individual who collected the pledges and contributions during the week of March 24, Eduardo Rubio, employees either pledged to make contributions or gave contributions enthusiastically, as a result of Mayor Penales' involvement in the re-opening of the clinics by CPMC (Rubio Dep at 88-89)

The only "evidence" of which we are aware to support the General Counsel's claim of coercion is what Jim DeFede reported he was told by an anonymous source after all contributions had been returned "To tell me that a list was going to be kept, and that we are going to know who did and did not contribute, it was just too much strong-arming for me It's just not American The election process is very sacrosanct " Jim DeFede, *Was Helping Hand From Strong Arm?*, The Miami Herald, Apr 8, 2003 at ¶ 4 We respectfully submit that such

⁴ Because we do not have access to these statements, we would request the General Counsel to provide them to the Commission

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anonymous hearsay should not be relied upon by the Commission to make a 'probable cause' determination.¹ But even if the Commission were to rely upon what Mr DeFede reported he was told, this anonymous employee never claimed that she/he feared adverse employment action were she/he not to contribute, the FEC's definition of coercion 11 C F R § 114.2(f)(2) (coercion defined to include "the threat of a detrimental job action ") Mr Fernandez has testified unequivocally that no employee was ever retaliated against for failing to contribute to the Penelas Committee (or to any other campaign) (Fernandez Dep at 115-118, 125-127)

The General Counsel's second argument - that a typical recipient of Mr Valdes' e-mail would reasonably draw an inference that she/he would face adverse employment action if they failed to contribute - is similarly weak. The allegedly coercive e-mail merely states that a list is being kept in order that those who do contribute can be thanked personally by Mike Fernandez ("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.") The natural inference from this statement is not that those who fail to contribute will be punished, but rather that those who fail to contribute will not receive Mr Fernandez's personal thanks. For obvious reasons, the General Counsel cannot cite a case in which the favoritism of a "thank you" gave rise to an inference of coercion of those employees who chose not to contribute and who expected not to be thanked. Indeed, in light of the fact that Mr Fernandez kept a list of CPMC employees who contributed to the Nelson campaign in 2002 and that not a single employee who failed to contribute to that campaign suffered adverse employment action, the most reasonable inference to be drawn by

¹ In other contexts in which "probable cause" is the determinative legal standard, such as justifying governmental intrusions upon interests protected by the Fourth Amendment, courts have unanimously held that information from an anonymous source alone is not sufficiently trustworthy or reliable to justify such a finding. *United States v Wilhelm*, 80 F.3d 116, 119-20 (4th Cir. 1996), citing *United States v Blackwood*, 913 F.2d 139, 142 (4th Cir. 1990), *United States v Peck*, 317 F.3d 754, 756-57 (7th Cir. 2003), *United States v Wells*, 223 F.3d 835, 839 (8th Cir. 2000), *United States v Danbauer*, 229 F.3d 1002, 1006 (10th Cir. 2000), *United States v Campbell*, 920 F.2d 793, 796-97 (11th Cir. 1991).

recipients of Mr Valdes' e-mail is that no reprisal would be taken against anyone who failed to contribute to the Penelas Committee ¹

III. Mr. Valdes' Actions Were Not "Knowing and Willful"

Based on Mr Valdes' conduct after his e-mail was written and distributed, the General Counsel argues that "it is reasonable to infer that Mr Valdes knew his conduct was illegal " As we explain below, each of the inferences upon which the General Counsel relies is unwarranted

It is worth noting at the outset that the GC Brief understates the applicable legal standard for knowing and willful violations of the Federal Election Campaign Act ("FECA") While paying lip service to the rule that a "knowing and willful" FECA violation must reflect a "knowing, conscious, and deliberate flaunting of the Act," see *AFL-CIO v FEC*, 628 F 2d 97, 100-102 (D C Cir 1980), the General Counsel then attempts to dilute that high standard Claiming that it need not prove that Mr Valdes "had specific knowledge of the regulations" so long as a "jury reasonably could infer that [his] conduct was unauthorized and illegal," (G C Brief at 8), the General Counsel cites inapposite case law outside the FECA context See *United States v Hopkins*, 916 F 2d 207, 214 n 7 (5th Cir 1990) ("The Hopkins were not charged with violating the election laws or conspiring to violate them ") A showing of willfulness in the FECA context, however, requires proof that Mr Valdes *actually knew* of the FECA prohibitions and *deliberately* flouted them See *AFL-CIO*, 628 F 2d at 100-02, *National Right to Work Committee v FEC*, 716 F 2d 1401, 1403-04 (D C Cir 1983), see also *FEC v Malenick*, 310 F Supp 2d 230, 238 n 9 (D D C 2004), *rev'd on other grounds*, 2005 WL 588222 (D D C Mar 7,

¹ In evaluating the coercive potential of Mr Valdes' e-mail, the General Counsel has ignored the fact that the solicitation was directed to CPMC physicians and administrators, most of whom had been with the company since the purchase of the centers in 2001, and not to lower-level employees Indeed, when the same physicians and administrators were later invited to attend a May 8, 2003, fundraising event for Mayor Penelas at Mr Fernandez's house, many of them neither attended nor contributed See (Fernandez Dep Exhibit 7 at ¶ 11 and attachment F)

2005) (distinguishing FECA provisions requiring proof of a "knowing" violation from those requiring proof of a "knowing and willful" violation) (citing *FEC v John A. Drame*; for *Congress Comm*, 640 F Supp 985, 987 (D N J 1986)) Such proof is wholly lacking in this case

First, there is no evidence that Mr Valdes had ever previously been involved in any campaign activities during which he might have been exposed to any federal campaign finance law Second, even Mike Fernandez, who had engaged in political fundraising before, did not know the law, including the rules governing corporate involvement in campaign fundraising Third, when Mr Fernandez asked Mr Valdes to assist him in raising money from CPMC employees for the Penelas Committee, he told Mr Valdes that "[T]he rules are simple," and never mentioned any legal restrictions other than the monetary limits for each individual donation Thus, the actual evidence in this MUR is that Mr Valdes was completely ignorant of the campaign finance laws at the time he wrote the original e-mail

Notwithstanding the evidence of ignorance, the General Counsel argues that the Commission should instead infer that Mr Valdes knew that the law prohibited his original e-mail because he subsequently prepared a second version "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" (GC Brief at 8) But this inference ignores numerous critical facts First and foremost, it ignores the fact that after Mr Valdes wrote his initial e-mail, the Miami Herald's chief investigative reporter questioned him sharply about the very phrases in the e-mail which Mr Valdes later removed Second, it ignores what the ensuing article makes clear, that Mr DeFede was critical of Mr Fernandez's relationship with the Mayor, insinuating that there was an illicit connection between the fundraising effort and benefits received by CPMC Thus, it

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is not surprising that Mr. Valdes' second e-mail sought to soften the original e-mail's potentially embarrassing description of the relationship between his boss and Mayor Penelas. Third, the General Counsel's inference ignores the fact that the Mayor's Chief of Staff, who first "expressed concerns at [the e-mail's] contents," called Mr. DeFede back just an hour later saying "the company [CPMC] had just sent him a copy of the e-mail, and that the sentence that referred to increasing revenue and the sentence that talked about all physicians and executive level staff being expected to donate were not in the version sent to him." *Fundraising Effort Raises Concerns* at ¶¶ 18-19. Finally, the General Counsel's inference ignores the fact that Mr. Valdes called Mr. Fernandez repeatedly after being confronted by Mr. DeFede, leaving numerous urgent messages. Considering all of these ignored facts, there is only one reasonable inference to be drawn: that after being confronted by Mr. DeFede, Mr. Valdes was concerned about embarrassing his boss and created a second version of his e-mail in extreme haste that eliminated the original version's challenged phrases, which Mr. Valdes thereafter portrayed to both the Mayor's office and to his boss as the only e-mail he had authored.

As further support for its thesis that Mr. Valdes knew the law, the General Counsel relies on the fact that "Mr. Valdes took steps to conceal his original e-mail by directing a subordinate to delete it from the corporation's e-mail server." (GC Brief at 8). However, trying to make the original e-mail disappear is more consistent with Mr. Valdes' panicked response to being challenged by Mr. DeFede than that Mr. Valdes knew the law prohibited the solicitation. Remember, Mr. Valdes created a second e-mail which, but for the concepts challenged by Mr. DeFede, essentially duplicates his initial solicitation. If Mr. Valdes knew the law, he would not have created a second similar e-mail and sent it to the Mayor's office. Furthermore, at the time he sought to make the original e-mail disappear from the company server, Mr. Valdes knew that

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numerous other people, including a Miami Herald reporter, had possession of that e-mail. The only reason to seek destruction of the document on the server is, consistent with his denial to Mr Fernandez that he created the original e-mail, to "cover his tracks." Seeking the deletion of the e-mail from the server proves nothing about his knowledge of campaign finance laws, but rather is entirely consistent with his having created a second e-mail immediately after Mr DeFede confronted him about the original e-mail and not wanting to admit that he created the original.⁹

The General Counsel's final support for an inference that Mr Valdes knew his original e-mail was illegal is the fact that he has previously asserted the Fifth Amendment to a series of topics about which the FEC sought to depose him. While the General Counsel correctly claims that an adverse inference may be drawn in a civil case against a party who asserts the Fifth Amendment privilege, the adverse inference that the General Counsel seeks to draw about Mr Valdes' state of mind is not legally appropriate for two independent reasons. First, the Fifth Amendment serves not only to protect the guilty, but "to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances." *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (quoting *Slochower v. Board of Higher Ed. of New York City*, 350 U.S. 551, 557-58 (1956) (emphasis in original)). Thus, while a finder of fact is allowed to draw an adverse inference from the assertion of the Fifth Amendment in a civil case, the courts uniformly prevent an adverse inference from being drawn from the assertion of the Fifth Amendment unless other independent

⁹ Interpreting this entire chain of events as the General Counsel suggests can only be premised on the acceptance of either of two highly implausible scenarios: either Mr Valdes had the clairvoyance to create a second version of his e-mail which eliminated precisely those phrases with which Mr DeFede would later take issue, or Mr Valdes – despite having just gone to great lengths to delete any trace of the e-mail from the company's servers – nevertheless kept a personal copy on hand just in case he would later need to recreate an altered version that would be identical to the first, character by character, except as needed to "cover his tracks."

We suggest that the almost identical similarities of the two e-mails, and the specific differences that precisely mirror the concerns presented in the DeFede article, are far more logically and rationally explained by the conclusion that Mr Valdes did not create the second e-mail, and therefore did not arrange for the deletion of the first, until after Mr DeFede brought his concerns about the e-mail to Mr Valdes' attention.

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evidence demonstrates that the inference is reasonable *Doe ex rel Rudy Glanzer v Glanzer*, 232 F 3d 1258, 1264-65 (9th Cir 2000)(“ lower courts interpreting *Baxter* have been uniform in suggesting that the key to the *Baxter* holding is that such adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer”), *National Acceptance Co v Bathalter*, 705 F 2d 924, 930 (7th Cir 1983) (same), *Farace v Independent Fire Ins Co*, 699 F 2d 204, 210-211 (5th Cir 1983) (same), *United States v Inc Vill at Island Park*, 888 F Supp 419, 445 (E D N Y 1995) (“The government may rely on [defendant’s] assertion of his privilege against self-incrimination to show intent only if that inference is supported by independent evidence”) In this case, such “independent evidence” is absent, as we have demonstrated above

Second, the assertion of the Fifth Amendment privilege does not entitle a finder of fact to draw *any* adverse inference an opposing party may seek Rather, because the Fifth Amendment may only be asserted on a question-by-question or topic-by-topic basis, the adverse inference to be drawn, if any, must necessarily be limited to the subject matter of the assertion *Doe ex rel Rudy Glanzer v Glanzer*, 232 F 3d at 1265-66 Mr Valdes asserted his Fifth Amendment privilege to “any questions regarding” seven (7) topics about which the Office of the General Counsel sought to inquire¹⁰ None of those topics concerned Mr Valdes’ knowledge of the law

¹⁰ The seven topics were as follows

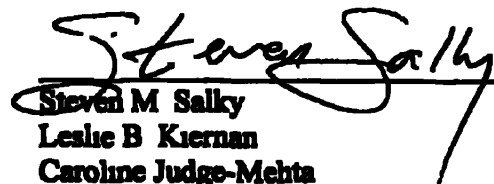
- 1 My involvement in helping to raise money for Alex Penelas’ 2004 campaign for the US Senate
- 2 My communications with CarePlus Medical Centers’ executives and employees in connection with raising money for Alex Penelas’ 2004 campaign for the U S Senate
- 3 My e-mail dated March 24, 2003 in connection with raising money for Alex Penelas’ 2004 campaign for the U S Senate
- 4 Any other versions of my e-mail dated March 24, 2003 in connection with raising money for Alex Penelas’ 2004 campaign for the U S Senate
- 5 The alleged deletion of my e-mail dated March 24, 2003 in connection with raising money for Alex Penelas’ 2004 campaign for the U S Senate
- 6 The alleged deletion of other documents or e-mails concerning my involvement and other CarePlus Medical Centers’ executives and employees involvement in connection with raising money for Alex Penelas’ 2004 campaign for the U S Senate

when he wrote the e-mail. Thus, the Commission may not draw the adverse inference sought by the General Counsel from Mr. Valdes' assertion of the Fifth Amendment.

CONCLUSION

For all the foregoing reasons, and after reviewing the entire record in this MUR, the Commission should find "probable cause" for a knowing and willful violation of 2 U.S.C. § 441b(a) to be lacking.

Respectfully submitted,


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⁷ The alleged use of CarePlus Medical Centers' corporate resources and facilities to solicit, collect, and forward contributions to Alex Penelas' 2004 campaign for the U.S. Senate.
See Valdes Affidavit of July 8, 2005.

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Exhibit 1 to Respondent's Opposition to General Counsel's Brief

March 24, 2003

The following ~~is directed to~~ should be discussed with all physicians and executive level staff at CarePlus Medical Centers Inc

Mr Michael B Fernandez, owner and Chief Executive Officer of CarePlus Medical Centers Inc is asking for your help

Alex Peñelas, Dade County Mayor and strong supporter of Mike Fernandez and CarePlus Medical Centers is running for United States Senate. He has been working closely with Mr. Mike Fernandez and other community leaders to effect change in the indigent care programs that could represent opportunities for companies like ours to increase revenue while serving our indigent population and providing alternatives other than Jackson Memorial Health Systems.

Mr Mike Fernandez is asking each of you for a \$1,000.00 campaign contribution for the Alex Peñelas 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. We 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 Pinelas 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.

Sincerely,

**Bert Valdes, Vice President
Dr Jose Perez, Medical Director**

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BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF

MUR 5379

HERIBERTO VALDES

DECLARATION OF SHERWIN SINGH

1 As I explained in my prior statements, I recall being asked by Bill Bounds to delete an email from the company server

2 I recall Bill asking me to do this late in the afternoon and remember doing it the same evening

3 I still do not recall the exact date I performed this task nor the exact day of the week. However, I do remember that this occurred shortly before - most likely a day or two before - a news camera crew appeared outside the company offices, the only time I remember that happening. Though I did not read the Miami Herald article of March 30, 2003, at the time it first appeared, I believe the camera crew's appearance related to the matters addressed in the Miami Herald article

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge

Dated September 21, 2006


Sherwin Singh

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