



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

THIS IS THE BEGINNING OF MUR # 2216

DATE FILMED 8/3/88 CAMERA NO. 4

CAMERAMAN K.A.U.

88040712305

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

WASHINGTON, D.C. 20515

16 JUL 2 5:00

July 23, 1986

Hon. Joan Aikens  
Chair, Federal Elections Commission  
1325 K Street NW  
Washington, DC 20463

Dear Ms. Aikens:

I request the Federal Election Commission to investigate one or more slate mailings sent by the Berman and D'Agostino Campaign firm (or firms related to it) in Alameda County, California prior to the June 3 primary elections. Attached is a copy of one slate card in question.

Specifically, my name was included on one or more slate cards sent to registered voters in the county and constitute an unauthorized expenditure. Further, I sent the enclosed memo to two local candidates for County Supervisor and sent a copy of the Berman and D'Agostino organization specifically asking that my name not be included in the slate mailers endorsing one or another of the supervisorial candidates. That request was ignored.

Second, I believe that the slate mailers involved were funded in some substantial part by corporate money in violation of Federal campaign laws relating to corporate contributions and thus are a violation of my efforts to always comply with FEC rules and regulations.

Thank you for your help in investigating this situation. I would not want to see a repeat of this situation in the general elections or in the next primary elections.

Sincerely,



Fortney H. (Pete) Stark  
Member of Congress

FHS:wkv  
Enclosures

*District of Columbia ss  
Mary C. Boorman  
Kathy Public  
Com by May 30, 89*

88040712306



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 1, 1986

The Honorable Fortney H. Stark  
House of Representatives  
Washington, D.C. 20515  
Attn: William K. Vaughan

Dear Mr. Stark:

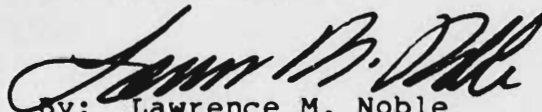
This is to acknowledge receipt of your letter, which we received on July 28, 1986. Your letter was not properly sworn to.

You must swear before a notary that the contents of your complaint are true to the best of your knowledge and the notary must represent as part of the jurat that such swearing occurred. A statement by the notary that the complaint was sworn to and subscribed before him will be sufficient. We are sorry for the inconvenience that these requirements may cause you, but we are not statutorily empowered to proceed with the handling of a compliance action unless all the statutory requirements are fulfilled. See 2 U.S.C. § 437g.

If you have any questions concerning this matter, please feel free to contact me at (202) 376-8200 or Lorraine Ramos at (202) 376-3110.

Sincerely,

Charles N. Steele  
General Counsel

  
By: Lawrence M. Noble  
Deputy General Counsel

Enclosure

38040712307

RECEIVED  
GENERAL COUNSEL  
CONGRESS OF THE UNITED STATES  
HOUSE OF REPRESENTATIVES  
WASHINGTON, D.C. 20515

16 AUG 6 11:48  
August 1, 1986

Hon. Joan Aikens  
Chair, Federal Elections Commission  
1325 K Street NW  
Washington, DC 20463

Dear Ms. Aikens:

I request the Federal Election Commission to investigate one or more slate mailings sent by the Berman and D'Agostino Campaign firm (or firms related to it) in Alameda County, California prior to the June 3 primary elections. Attached is a copy of one slate card in question.

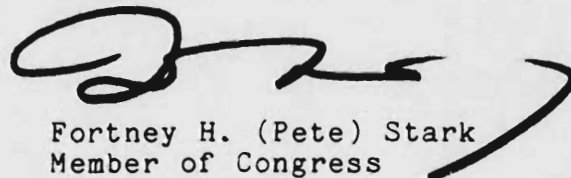
Specifically, my name was included on one or more slate cards sent to registered voters in the county and constitute an unauthorized expenditure. Further, I sent the enclosed memo to two local candidates for County Supervisor and sent a copy to the Berman and D'Agostino organization specifically asking that my name not be included in the slate mailers endorsing one or another of the supervisorial candidates. That request was ignored.

Second, I believe that the slate mailers involved were funded in some substantial part by corporate money in violation of Federal campaign laws relating to corporate contributions and thus are a violation of my efforts to always comply with FEC rules and regulations.

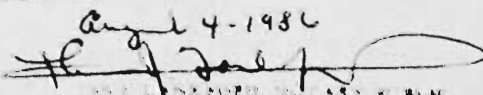
Thank you for your help in investigating this situation. I would not want to see a repeat of this situation in the general elections or in the next primary elections.

Sincerely,

SIGNED AND SWORN TO BY

  
Fortney H. (Pete) Stark  
Member of Congress

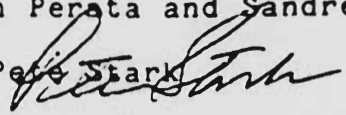
FHS:wkv  
Enclosures

August 4, 1986  
  
U.S. HOUSE OF REPRESENTATIVES  
WASHINGTON, D.C. 20515  
\* Committee Expires March 14, 1988

CONGRESS OF THE UNITED STATES  
HOUSE OF REPRESENTATIVES  
WASHINGTON, D.C. 20515

May 7, 1986

To: Don Perata and Sandre Swanson

From: Pete Stark 

Re: Slate Mailer

In the spirit of my long friendship with both of you, I wanted to note that I have heard rumors that my name might be used on a slate mailer card supporting one of you.

As you know, as a Federal legislator, I try to stay out of local elections, particularly when they involve contests between my friends. I have not given and will not give an endorsement in this race. It would be a serious breach of fair campaign practices for any of your supporters to use my name in any way without my permission. I would have to protest if such improper use is made.

I hope you can both understand my desire to stay neutral in this matter. Please ask your supporters to respect that position.

Best wishes to both of you in the hard month ahead!

POSTAGE PAID

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Bill  
 (Handwritten signature/initials)

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ALAMEDA'S HOMETOWN DEMOCRAT



**Don Perata**  
 Democrat  
 for  
 Supervisor

"Don Perata, Alameda's favorite son, is clearly the best Democrat for Supervisor. No other candidate can even come close to his experience and ability."

"We need a Supervisor who will fight for Alameda. Don Perata is honest and courageous. He will be a great Democratic Supervisor."

-- DEMOCRATIC STATE SENATOR BILL LOCKYER

**Gray Davis for Controller**

"Gray Davis' leadership in finding missing children proves that one man can make a difference. Vote for Gray Davis for Controller."

-- Democratic Congressman Pete Stark

**Toxic Polluters Must Be Stopped -- NO on 51**

"Proposition 51 says that toxic polluters who cause cancer shouldn't be held fully accountable. Vote NO on 51."



Bulk Rate  
 U.S. Postage  
 PAID  
 Voter Guide

**You Vote At**



**HOUSE**  
 2701 BAYVIEW DR

CAR-RT SORT \*\* CR 33

M/M Charles A. Tillman  
 2415 Roosevelt Dr  
 Alameda, CA 94501

**Election Day is Tuesday, June 3**  
**Polls Open at 7:00 a.m. -- Close at 8:00 p.m.**

Paid for and authorized by candidates and ballot measures marked with asterisk (\*) Published by:  
**Voter Guide--Not An Official Political Gro**  
1438 So. La Cienega Blvd., #101, Los Angeles, CA 90035. Consultants: Bo & D'Agostino Campaigns, Inc. Endorsements by elected officials and candidate endorsements and ballot measures only.

# Democratic Voter Guide 0 4 0 7 1 2 3 1 1

A COMPLETE GUIDE TO ALL THE OFFICES AND MEASURES ON YOUR BALLOT.  
TAKE THIS CARD WITH YOU TO THE POLLS.

<b>Governor</b> <b>TOM BRADLEY</b>	<b>Supt. of Public Instruction</b> <b>BILL HONIG</b>
<b>Lieutenant Governor</b> <b>LEO T. McCARTHY</b>	<b>County School Superintendent</b> <b>WILLIAM "BILL" BERCK</b>
<b>Secretary of State</b> <b>MARCH FONG EU</b>	<b>County Supervisor</b> <b>DON PERATA *</b>
<b>Controller</b> <b>GRAY DAVIS *</b>	<b>Assessor</b> <b>DONALD L. KROGER *</b>
<b>Treasurer</b> <b>JESSE M. UNRUH</b>	<b>Auditor</b> <b>PATRICK O'CONNELL *</b>
<b>Attorney General</b> <b>JOHN VAN de KAMP</b>	<b>County Clerk-Recorder</b> <b>RENE C. DAVIDSON</b>
<b>Board of Equalization</b> <b>WILLIAM M. BENNETT</b>	<b>District Attorney</b> <b>JOHN J. MEEHAN</b>
<b>U.S. Senator</b> <b>ALAN CRANSTON</b>	<b>Sheriff</b> <b>CHARLEY PLUMMER *</b>
<b>U.S. Congress</b> <b>FORTNEY PETE STARK</b>	<b>Treasurer-Tax Collector</b> <b>DONALD R. WHITE</b>
<b>State Assembly</b> <b>ELIHU M. HARRIS</b>	<b>State Ballot Measures</b> 42. YES                      47. YES 43. YES                      48. YES 44. YES *                    49. NO 45. YES                      50. YES 46. YES *                    51. NO * 52. YES *
<b>Democratic Central Committee</b> CLARA B. PROVOST MIKE "DOC" PRESTON EDWARD C. GUSTELY HENRY FRANK MOZELL	<b>County Measures</b> <b>YES on A and B</b>
<b>Judge of the Superior Court</b> <b>ROD DUNCAN *</b>	<b>"PATRICK O'CONNELL IS THE DEMOCRATIC CHOICE FOR AUDITOR."</b> -- SENATOR MCK PETRIS -- ASSEMBLYMAN ELIHU HARRIS
<b>DEMOCRATS AGREE! VOTE NO ON PROP. 51</b>  "IF PROP 51 PASSES, TOXIC POLLUTERS WILL NOT BE HELD FULLY ACCOUNTABLE FOR THE CANCER THEY CAUSE! "TOXIC POLLUTERS MUST BE STOPPED." -- MAYOR TOM BRADLEY -- RALPH NADER	<b>ATTENTION DEMOCRATS! THOUGH REGISTERED AS A REPUBLICAN, CHARLEY PLUMMER IS THE BEST QUALIFIED FOR SHERIFF</b>

Bill V.  
1 & 2



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 13, 1986

Berman & D'Augustino Campaigns, Inc.  
1435 South La Cienega Boulevard  
#101  
Los Angeles, CA 90035

Re: MUR 2216

Gentlemen:

The Federal Election Commission received a complaint which alleges that Berman & D'Augustino Campaigns, Inc. may have have violated certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 2216. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against you in this matter. Your response must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath.

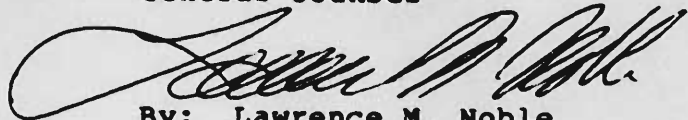
This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and a statement authorizing such counsel to receive any notifications and other communications from the Commission.

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If you have any questions, please contact Eric Kleinfeld, the attorney assigned to this matter, at (202) 376-5690. For your information, we have attached a brief description of the Commission's procedure for handling complaints.

Sincerely,

Charles N. Steele  
General Counsel



By: Lawrence M. Noble  
Deputy General Counsel

Enclosures  
Complaint  
Procedures  
Designation of Counsel Statement

38040712313



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 13, 1986

The Honorable Fortney H. Stark  
Congress of the United States  
House of Representatives  
Washington, D.C. 20515

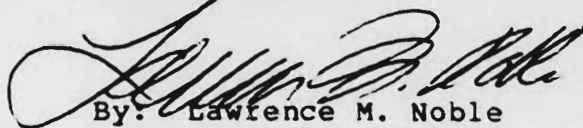
Dear Mr. Stark:

This letter will acknowledge receipt of a complaint filed by you which we received on August 6, 1986, alleging possible violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Mr. Carl J. D'Augustino and Berman & D'Augustino Campaigns, Inc. The respondents will be notified of this complaint within five days.

You will be notified as soon as the Commission takes final action on your complaint. Should you receive any additional information in this matter, please forward it to this office. We suggest that this information be sworn to in the same manner as the original complaint. For your information, we have attached a brief description of the Commission's procedures for handling complaints. We have numbered this matter under review MUR 2216. Please refer to this number in all future correspondence. If you have any questions, please contact Lorraine F. Ramos at (202) 376-3110.

Sincerely,

Charles N. Steele  
General Counsel

  
By: Lawrence M. Noble  
Deputy General Counsel

Enclosure

86040712314



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 13, 1986

Voter Guide  
Carl J. D'Augustino, Treasurer  
1435 South La Cienega Boulevard  
#101  
Los Angeles, CA 90035

Re: MUR 2216

Dear Mr. D'Augustino:

The Federal Election Commission received a complaint which alleges that Voter Guide and you, as treasurer, may have violated certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). A copy of the complaint is enclosed. We have numbered this matter MUR 2216. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate in writing that no action should be taken against you and Voter Guide in this matter. Your response must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath.

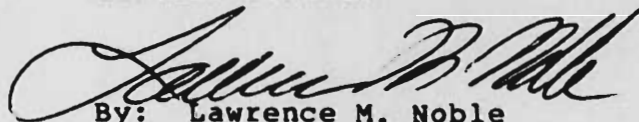
This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. If you intend to be represented by counsel in this matter please advise the Commission by completing the enclosed form stating the name, address and telephone number of such counsel, and a statement authorizing such counsel to receive any notifications and other communications from the Commission.

83040712315

If you have any questions, please contact Eric Kleinfeld, the attorney assigned to this matter, at (202) 376-5690. For your information, we have attached a brief description of the Commission's procedure for handling complaints.

Sincerely,

Charles N. Steele  
General Counsel



By: Lawrence M. Noble  
Deputy General Counsel

Enclosures  
Complaint  
Procedures  
Designation of Counsel Statement

88040712316

UCLA Law School  
405 Hilgard  
Los Angeles, California 90024  
(213) 825-5148

August 27, 1986

Eric Kleinfeld  
Federal Election Commission  
Washington, D.C. 20463

Re: MUR 2216

Dear Mr. Kleinfeld,

I represent "Voter Guide" and its treasurer, Carl D'Agostino, in connection with the above-numbered MUR. The Statement of Designation of Counsel, signed by Mr. D'Agostino is either enclosed herewith or will be sent to you shortly. I am writing in response to Mr. Noble's letter dated August 13, 1986.

In his complaint against Voter Guide, Mr. Stark makes two charges. The first is that the endorsement of his candidacy for Congress in mail distributed in Alameda County was not authorized by him. This is true, but nothing in federal law requires Voter Guide to obtain Mr. Stark's permission before it urges voters to vote for him. To the contrary, Voter Guide's right to urge voters to vote for whomever it wishes is protected by the First Amendment. The fact that the mail was sent without Mr. Stark's authorization and apparently contrary to his wishes simply emphasizes that so far as Mr. Stark is concerned, disbursements for the mail constituted independent expenditures.

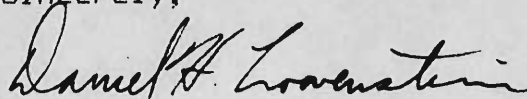
Although it is irrelevant to any matter within the jurisdiction of the Federal Election Commission, Voter Guide emphatically denies that its mail was in any sense misleading or that it suggested in any way that Mr. Stark was supporting or endorsing Don Perata, candidate for Board of Supervisors. The mail suggested, honestly, that both Mr. Stark and Mr. Perata were endorsed by Voter Guide.

Mr. Stark's second complaint is that he believes the slate mailers were funded in part by "corporate money." We doubt that Mr. Stark's utterly unfounded and unsupported belief provides a basis for the FEC to trouble either itself or Voter Guide by opening an investigation. In any event, Voter Guide emphatically denies that it received any corporate contributions. To the contrary, Voter Guide's campaign statements, signed under oath and on file with the Federal Election Commission, show that

Voter Guide has received no contributions at all, corporate or otherwise.

I trust that this matter will be closed promptly.

Sincerely,



Daniel H. Lowenstein  
Attorney for Voter Guide and  
Carl D'Agostino

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CCC#1453

# Voter Guide

September 3, 1986

86 SEP 10 PM 12:14

RECEIVED  
GENERAL INVESTIGATIVE  
DIVISION

Eric Kleinfeld  
Federal Election Commission  
Washington, D.C. 20463

Re: MUR 2216

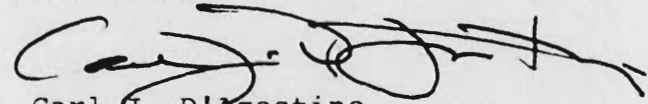
Dear Mr. Kleinfeld:

I am enclosing a letter from our attorney, Daniel H. Lowenstein and the Statement of Designation of Counsel.

Unfortunately, I was on vacation and Michael Berman has been in the hospital.

My apologies for the delay of this transmittal.

Sincerely,



Carl G. D'Agostino  
Treasurer for Voter Guide

CJD:ed

Enclosures: 2


1435 South La Cienega Boulevard, Suite 101, Los Angeles, California 90035  
Telephone (213) 652-3321

STATEMENT OF DESIGNATION OF COUNSEL

NUR 2216  
NAME OF COUNSEL: DANIEL H. LOWENSTEIN  
ADDRESS: UCLA LAW SCHOOL  
405 HILGARD  
LOS ANGELES, CA 90024  
TELEPHONE: 213-825-5148

The above-named individual is hereby designated as my  
counsel and is authorized to receive any notifications and other  
communications from the Commission and to act on my behalf before  
the Commission.

September 3, 1986  
Date

  
Signature

RESPONDENT'S NAME: VOTER GUIDE  
ADDRESS: Carl J. D'Agostino, Treasurer  
1435 S. La Cienega Blvd., #101  
Los Angeles, California 90035  
HOME PHONE: (916) 988-3154  
BUSINESS PHONE: (213) 652-3321

88040712320



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MEMORANDUM TO: CHARLES N. STEELE  
GENERAL COUNSEL

FROM: *MWE* MARJORIE W. EMMONS/CHERYL A. FLEMING *CAF*

DATE: SEPTEMBER 24, 1986

SUBJECT: MUR 2216 - FIRST GENERAL COUNSEL'S REPORT  
SIGNED SEPTEMBER 22, 1986

The above-captioned matter was received in the Office of the Secretary of the Commission Tuesday, September 23, 1986 at 10:15 A.M. and circulated to the Commission on a 24-hour no-objection basis Tuesday, September 23, 1986 at 4:00 P.M.

There were no objections received in the Office of the Secretary of the Commission to the First General Counsel's Report at the time of the deadline.

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SENSITIVE

Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

RECEIVED  
THE FEC  
OFFICE  
COMMISSION SECRETARY

First General Counsel's Report

Date and Time of Transmittal  
By OGC to the Commission \_\_\_\_\_

MUR 2216  
Date Complaint Received  
by OGC August 7, 1986  
Date of Notification to  
Respondent August 13, 1986  
Staff Eric Kleinfeld

Complainant's Name: Fortney H. Stark  
Respondents' Names: Voter Guide  
Carl D'Augustino, treasurer  
Berman and D'Augustino Campaigns, Inc.  
Relevant Statutes 2 U.S.C. §§ 431(17), 441b  
11 C.F.R. § 102.5(a)

Internal Reports Checked: MURs 1461, 2181

Federal Agencies Checked: None

Summary of Allegations

On August 6, 1986, the Commission received a signed, sworn and notarized complaint from Representative Fortney H. (Pete) Stark alleging that the "Berman and D'Augustino Campaign firm" violated the Federal Election Campaign Act of 1971, as amended ("Act") in connection with a slate card mailed to California voters prior to the June 3, 1986 California primary election. The slate card in question, a copy of which was attached to the complaint, is entitled "Democratic Voter Guide" and includes a slate of district-wide offices and ballot measures pertaining to Congressman Stark's district. Mr. Stark is listed on the slate under the office "U.S. Congress."

Factual and Legal Analysis

Congressman Stark specifically alleges that the inclusion of his name on the slate card constitutes "an unauthorized

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expenditure." Mr. Stark states that he asked respondents not to include his name on the slate card. Mr. Stark also alleges that the slate mailers were "funded in some substantial part by corporate money."

Respondent Voter Guide, the successor organization to Californians for Democratic Representation ("CDR"), is a reporting political committee. Voter Guide allocated a portion of the value of the entire slate mailer program to non-participating federal candidates, which it reported as independent expenditures on behalf of those candidates. On its July Quarterly report, Voter Guide reported an independent expenditure on behalf of the "Pete Stark Re-election Committee."

The issues involved in this complaint were the subject of recent litigation between the Commission and Voter Guide's predecessor CDR. See, FEC v. Californians for Democratic Representation, No. CV 85-2086 JMI (C.D. Cal., Judgment entered 1-9-86). In light of this decision, plus the complex issues raised in a related complaint involving separate respondents, MUR 2181, the Office of General Counsel is undertaking a review of this entire matter, and will, upon its completion make a further report to the Commission.

Charles N. Steele  
General Counsel

Date

9/22/86

By:

Lawrence M. Noble  
Deputy General Counsel

*Lawrence M. Noble*  
*(Signature)*

38040712323

SENSITIVE

Before the Federal Election Commission

In the Matter of )

Voter Guide )

Carl D'Agostino, treasurer )

Berman and D'Agostino Campaigns, Inc. )

MUR 2215;

P 1: 21

General Counsel's Report

I. Background

On August 6, 1986, the Office of General Counsel of the Federal Election Commission ("Commission") received a signed, sworn and notarized complaint from Representative Fortney H. (Pete) Stark alleging that the "Berman and D'Agostino Campaign firm" violated the Federal Election Campaign Act of 1971, as amended ("Act") in connection with a slate card mailed to California voters prior to the June 3, 1986 California primary election. The slate card in question, a copy of which was attached to the complaint, is entitled "Democratic Voter Guide" and includes a slate of district-wide offices and ballot measures pertaining to Congressman Stark's district. Mr. Stark is listed on the slate under the office "U.S. Congress."

Factual and Legal Analysis

Congressman Stark specifically alleges that the inclusion of his name on the slate card constitutes "an unauthorized expenditure." Mr. Stark states that he asked respondents not to include his name on the slate card. Mr. Stark also alleges that the slate mailers were "funded in some substantial part by corporate money."

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On September 10, 1986, a response was received on behalf of "Voter Guide." Voter Guide is a reporting political committee (I.D. # C00204479), and the successor organization to Californians for Democratic Representation ("CDR"). See MUR 1461. In its one page response, Voter Guide states that the amount spent for Mr. Stark's inclusion in the mailer (since he did not pay to be included) constituted an independent expenditure on his behalf, and as a result, Voter Guide was not required to obtain Mr. Stark's authorization prior to making this expenditure. In its 1986 July Quarterly report, Voter Guide allocated a portion of the value of the entire slate mailer program to non-participating federal candidates, which it reported as independent expenditures on behalf of those candidates. Voter Guide reported an independent expenditure on behalf of the "Pete Stark Re-election Committee" on its July Quarterly report.

Also in its response, Voter Guide denies receiving any corporate contributions, because, as Voter Guide claims its reports disclose, it received no contributions at all.

Respondent Voter Guide registered with the Commission on March 31, 1986. On its 1986 12 Day Pre-primary and July Quarterly reports, covering the reporting periods April 1, 1986 through June 30, 1986, Voter Guide reported \$1,932,167 in receipts on Schedule A, all of which were payments by participants in the slate mailer. As noted above, Voter Guide also reported a pro-rata share of the slate mailer's cost on Schedule E, as independent expenditures made on behalf of each

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non-paying candidate listed on the slate. Schedule E was accompanied by the following statement:

The candidates listed on Schedule E were endorsed on but did not participate in the slate mail published and distributed by this committee. In the opinion of this committee, each of the campaigns listed on Schedule A received advertising services equal in value to the amounts they paid. However, the Federal Election Commission requires that a portion of the value of these services be allocated to the non-participating candidates. This allocation, reflected on Schedule E and on the detailed summary page, is based on the assumption that one per cent of the value of the entire slate mail program accrued to the non-participating federal candidates.

The issues and analysis of this matter are substantially similar to those of MURs 2181 and 2255, Republic Media Group, et. al. Several aspects of the Act are implicated by the complaint in this matter. Pursuant to 2 U.S.C. § 431(8)(A)(i), a "contribution" is defined as any gift, subscription, loan, advance, or deposit of money or anything of value, made by any person for the purpose of influencing any election for Federal office. A political committee is included within the meaning of "person," pursuant to 2 U.S.C. § 431(11). "Anything of value" includes all in-kind contributions, pursuant to 11 C.F.R. § 100.7(a)(1)(iii)(A), whether goods or services. Additionally, the provision of goods or services without charge or at a charge which is less than the usual or normal charge for such goods or services is a contribution. 11 C.F.R. § 100.7(a)(1)(iii)(A).

B 8 0 4 0 7 1 2 3 2 6

Pursuant to 2 U.S.C. § 431(17), an "independent expenditure" is defined as

an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate and which is not in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

88040712327  
An expenditure not qualifying as an independent expenditure is considered a coordinated expenditure on behalf of a candidate, unless otherwise exempted. The Act does provide an exception to the definition of expenditure for the costs of preparing and mailing printed slate cards or sample ballots. However, this exception is limited to "a state or local committee of a political party." See 2 U.S.C. § 431(8)(B)(v) and (9)(B)(iv). Since Voter Guide is a partnership and political committee, but not a political party committee, this exception does not apply here.

Advisory Opinion 1984-62 dealt with a situation nearly identical to that which is covered by the complaint. In that AO, a corporation, engaged primarily in the business of managing campaigns, sought to prepare and mail a slate card which, like the one at issue here, included a full slate of candidates, some of which were paying Federal candidates (i.e., paid to be listed) and some of which were non-paying Federal candidates. With

regard to those Federal candidates who paid to be listed in the slate mailer, the Commission concluded that a prohibited corporate contribution or expenditure would result where a paying Federal candidate pays less than the normal and usual charge for the services. With regard to non-paying Federal candidates, the Commission concluded that their inclusion on the slate would constitute campaign advertising and a gift to them. Therefore, the inclusion of such non-paying Federal candidates would constitute a prohibited contribution or expenditure.

A similar matter was also the subject of recent litigation in FEC v. Citizens for Democratic Representation. Citizens for Democratic Representation ("CDR") prepared and mailed a slate card under the same format as the one which is the subject of the complaint, that is, a full slate of candidates was listed, however only those candidates who paid for the listing were "featured." Other non-paying candidates were merely "listed." With regard to the paying Federal candidates, the District Court for the Central District of California concluded that the payments by the candidates for featuring in the slate did not constitute contributions to CDR, nor did the featuring constitute in-kind contributions from CDR to the paying candidates. However, the court did determine that the featuring of paying Federal candidates did constitute "an expenditure by CDR to" the candidates, pursuant to 2 U.S.C. § 431(9). With regard to the non-paying Federal candidates, the court concluded

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that the inclusion of these candidates constituted "expenditures by CDR to the named [non-paying] Federal candidates as defined by 2 U.S.C. § 431(9)."

Resolution of this matter ultimately turns on the characterization of respondent Voter Guide's activities and corresponding treatment of the paying and non-paying Federal candidates. Voter Guide is already a registered entity. Thus, compliance with 2 U.S.C. § 433 is not at issue. However, with respect to the contribution and expenditure issues, the two aspects of the slate card transaction need to be examined separately. The first aspect of the transaction is the service flowing from respondent Voter Guide to all of the candidates included in the slate. This involves the preparation and mailing of the slate, i.e., the provision of the service. The second aspect of the transaction is that flowing in the "opposite" direction, from the candidates to Voter Guide. With regard to the Federal candidates involved, this consists of either payment for inclusion in the slate or non-payment.

First, concerning the preparation and mailing of the slate card by Voter Guide, because both paying and non-paying candidates were included, the latter distinction will not alter the analysis. For both sets of candidates, Voter Guide was

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providing a service for the purpose of influencing an election for Federal office. The service was the slate card; the elections to be influenced were those of the Federal candidates included on the slate. This service is a "thing of value," and as such, is an expenditure under the Act. The classification of Voter Guide's activities as expenditures is consistent with the court's holding in FEC v Citizens for Democratic Representation, which found both the listing of non-paying Federal candidates and the featuring of paying Federal candidates to be "expenditures" on their behalf.

The determination that Voter Guide's activities on behalf of Federal candidates are expenditures has two legal consequences. The provision of services by Voter Guide may be either a coordinated expenditure or an independent expenditure for the recipient candidate, depending on whether the recipient paid for the services.

For those Federal candidates who did not pay to be included on the slate, the expenditure by Voter Guide was an independent expenditure in that it was an expenditure by a person for a communication expressly advocating the election of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of the non-paying Federal candidates. See 2 U.S.C. § 431(17); 11 C.F.R. § 109.1(a). Here, Voter Guide satisfies the meaning of "person" which includes any partnership.

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11 C.F.R. § 109.1(b)(1). The slate expressly advocates. Candidates are clearly identified by virtue of their names appearing on the slate. Finally, the participation of non-paying Federal candidates was solicited by respondent Voter Guide, and they refused to participate by not paying for the listing. Their names were included anyway. There is no evidence to indicate, nor does complainant allege, that the non-paying Federal candidates cooperated or consulted with Voter Guide as to the subsequent inclusion of their names, or that they requested or suggested that their names be included despite the fact they were not paying for their inclusion. There is no evidence of any further communication between Voter Guide and the non-paying Federal candidates subsequent to the original solicitation for their participation.

Thus, under the Act, the expenditures made by Voter Guide on behalf of non-paying Federal candidates should be considered independent expenditures. On Schedule E of its July Quarterly report, Voter Guide did report independent expenditures on behalf of non-participating Federal candidates. Voter Guide allocated 1.0% of the value of the entire slate mailer to the non-participating Federal candidates.

A different result is reached with regard to paying or participating Federal candidates. The expenditures made by Voter Guide on their behalf will not qualify as independent under

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2 U.S.C. § 431(17) or 11 C.F.R. § 109.1. By virtue of the participating Federal candidates' payment for inclusion, the expenditure becomes one "made with the cooperation or with the prior consent of, or in consultation with" the candidates. Any arrangement by a candidate or his agent prior to publication is sufficient for an expenditure not to qualify as independent. See 11 C.F.R. § 109.1(b)(4)(i). Furthermore, an expenditure which is made by any person who receives compensation from the candidate, the candidate's committee or agent is presumed to be made with the cooperation or consent of the candidate. See 11 C.F.R. § 109.1(b)(4)(i)(B). Here, Voter Guide is receiving compensation from the participating Federal candidates for inclusion on the slate. Thus, the expenditures made by Voter Guide on their behalf are not independent expenditures, because they are not considered made without cooperation, consent or consultation.

Any expenditure not qualifying as an independent expenditure under 11 C.F.R. § 109.1 is a coordinated expenditure on behalf of the candidate. This is consistent with the court's holding in CDR which was litigated with regard to respondent's identical activity during the previous election cycle. Under this analysis, Voter Guide would be required to report such amounts as disbursements on Schedule B.

The second aspect of the transaction in which Voter Guide is engaged involves the participating candidates and their payment for the services provided by Voter Guide, that is, their payment to be listed on the slate card.

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The amounts transmitted by the participating Federal candidates should be considered expenditures by the candidates and receipts by Voter Guide, in that they are payments for services made for the candidates' own elections. Under the Act and regulations, certain funds received by a political committee are considered in the category of receipts. For example, in 11 C.F.R. § 104.3(a)(2), all unauthorized political committees are required to report "the total amount of receipts received." This includes seven categories of receipts:

- (i) Contributions from persons other than any committees;
- (ii) Contributions from political party committees;
- (iii) Contributions from political committees;
- (iv) Transfers from affiliated committees or party committees;
- (v) Loans;
- (vi) Offsets to operating expenditures;
- (vii) Other receipts.

Thus, the regulations contemplate other receipts which are not contributions. Voter Guide could still be required to report amounts received from participating candidates as receipts on Schedule A, without such amounts being contributions.

Additionally, the intent of the participating candidates appears to be more consistent with the making of an expenditure to benefit their own campaigns, rather than with the making of a contribution to Voter Guide or any other candidate. The transaction entered into by Voter Guide is distinguishable from

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past Advisory Opinions wherein the Commission concluded a contribution was being made when a person transmits money to a political committee. Those Opinions dealt, in general, with the sale of goods or assets whose purpose was to raise funds for the seller committee. There the transactions took on a business or commercial guise, when their true character was additional political activity through the sale of fundraising items. Political committees have sought to sell books, Advisory Opinion 1979-76; artwork, AO 1980-34; jackets, AO 1981-7; and computer equipment, AO 1983-2. All of these situations involved items being sold primarily for general fundraising purposes. Here, the transaction is more analogous to the sale of advertising services rather than the sale of a fundraising item. Voter Guide is engaged in commercial transactions with the participating candidates. The primary motivation for the sale of its advertising services appears not to be general political fundraising, but rather business oriented, i.e., the profit-motive.

It is also relevant to look at which election the participating candidates intend to influence. Presumably that is their own. Thus, their payment to Voter Guide is more likely to be an expenditure on the candidates' own behalf. If the conclusion is reached that the payments by the participating Federal candidates were expenditures, then they would be correctly reported on Schedule A as receipts by Voter Guide.

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The above discussion has several different legal consequences under the Act as to whether any violations occurred and if so, as to which sections of the Act were violated. The following recommendations are made with regard to Voter Guide, a registered political committee and its treasurer. The Office of General Counsel recommends that the Commission find no reason to believe that the other named respondent, Berman and D'Agostino Campaigns, Inc., violated the Act.

#### **Reporting**

The ramifications for the reporting of Voter Guide transactions regarding the slate card were discussed above and involves those candidates who paid to be listed on the slate. The expenditures which Voter Guide made on behalf of the participating candidates should have been reported as disbursements on Schedule B. Voter Guide failed to report these amounts as disbursements. Therefore, the Office of General Counsel recommends that the Commission find reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 434(b).

#### **Deposit of Impermissible Funds**

Pursuant to 11 C.F.R. § 102.5(a)(1), an organization which finances both Federal and non-Federal elections must either establish a separate Federal account which is treated as a "political committee" subject to the requirements of the Act, 11 C.F.R. § 102.5(a)(1)(i), or limit itself to receiving only those contributions that are subject to the prohibitions and

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limitations of the Act, regardless of whether the contributions are to be used in connection with Federal or non-Federal elections, 11 C.F.R. § 102.5(a)(1)(ii).

Voter Guide financed activity with regard to both Federal and non-Federal elections. According to its Statement of Organization, Voter Guide had only one account. Because it did not establish a separate Federal account, Voter Guide was limited to receiving only those funds that conformed with the prohibitions and limitations of the Act. Voter Guide's July Quarterly report shows receipts from entities entitled to accept corporate and labor union contributions under California state law. Thus, it appears that Voter Guide may have had corporate and labor union money deposited in the same account as its other funds. Accordingly, the Office of General Counsel recommends that the Commission find reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1), for using prohibited funds in connection with a Federal election.

**Insufficient Disclaimer**

Voter Guide's slate card states,

Paid for and authorized by candidates ...  
marked with an asterisk (\*).

Pursuant to 2 U.S.C. § 441d, whenever a person makes an expenditure for the purpose of financing communications expressly advocating the election of a clearly identified candidate, such

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communication (a) if paid for by a candidate's authorized political committee, shall so state, but (b) if not authorized by a candidate shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate.

Here, Voter Guide produced a slate and which was paid and authorized for by certain candidates and not paid for and authorized by other candidates. The paying candidates are delineated on the slate by asterisks. However, although the reader of the slate card can presumably deduce that those candidates without asterisks by their names did not pay to be included, there is no statement on the slate indicating that it was not authorized by the non-paying candidates. Such a statement must be included, pursuant to 2 U.S.C. § 441d, if, as Voter Guide asserts, they made independent expenditures on behalf of the non-paying candidates. Therefore, the Office of General Counsel recommends that the Commission find reason to believe that Voter Guide and Carl D'Agostino, as treasurer violated 2 U.S.C. § 441d.

### III. Recommendations

The Office of General Counsel recommends that the Commission:

1. Find reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 434(b).
2. Find reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a).

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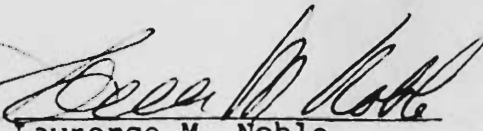
3. Find reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d.
4. Find no reason to believe that Berman and D'Agostino Campaigns, Inc. violated the Act.
5. Approve the attached letters.

Charles N. Steele  
General Counsel

Date

3/12/87

By:

  
Lawrence M. Noble  
Deputy General Counsel

Attachments

1. Responses
2. Disclosure Reports, Voter Guide
3. Letters

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MEMORANDUM TO: LAWRENCE M. NOBLE  
ACTING GENERAL COUNSEL

FROM: MARJORIE W. EMMONS / JOSHUA MCFADDEN *JM*

DATE: MARCH 18, 1987

SUBJECT: OBJECTIONS TO MUR 2216 - GENERAL COUNSEL'S REPORT  
SIGNED MARCH 12, 1987

The above-captioned document was circulated to the  
Commission on Friday, March 13, 1987 at 2:00 P.M.

Objections have been received from the Commissioners  
as indicated by the name(s) checked:

Commissioner Aikens	_____
Commissioner Elliott	_____ X _____
Commissioner Josefiak	_____ X _____
Commissioner McDonald	_____ X _____
Commissioner McGarry	_____ X _____
Commissioner Thomas	_____ X _____

This matter will be placed on the Executive Session  
agenda for March 24, 1987.

Please notify us who will represent your Division  
before the Commission on this matter.

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Voter Guide ) MUR 2216  
Carl D'Agostino, treasurer )  
Berman and D'Agostino Campaigns, Inc.)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session of March 31, 1987, do hereby certify that the Commission took the following actions in MUR 2216:

1. Decided by a vote of 4-1 to reject recommendation number 1 in the General Counsel's report dated March 12, 1987, and instead find no reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 434(b).

Commissioners Elliott, Josefiak, McGarry, and Thomas voted affirmatively for the decision; Commissioner McDonald dissented; Commissioner Aikens was not present at the time of the vote.

2. Decided by a vote of 5-0 to find reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 44ld, and direct the Office of General Counsel to inform the respondents in a letter on what basis the Commission made this finding.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens was not present at the time of the vote.

(continued)

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3. Decided by a vote of 5-0 to find no reason to believe that Berman and D'Agostino Campaigns, Inc. violated the Act.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens was not present at the time of the vote.

4. Decided by a vote of 5-0 to reject recommendation number 2 in the General Counsel's report dated March 12, 1987, and instead find no reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441b.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens was not present at the time of the vote.

5. Failed in a vote of 3-3 to pass a motion to reject recommendation number 2 in the General Counsel's report dated March 12, 1987, and instead find no reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 11 C.F.R. § 102.5(a).

Commissioners Aikens, Elliott, and Josefiak voted affirmatively for the motion; Commissioners McDonald, McGarry, and Thomas dissented.

6. Decided by a vote of 6-0 to direct the Office of General Counsel to send appropriate letters to the respondents in this matter.

Commissioners Aikens, Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision.

Attest:

4-1-87

Date

Marjorie W. Emmons

Marjorie W. Emmons  
Secretary of the Commission

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

April 28, 1987

Carl D'Agostino  
Berman and D'Agostino Campaigns, Inc.  
1435 South La Cienega Blvd.  
#101  
Los Angeles, CA 90035

RE: MUR 2216  
Berman and D'Agostino  
Campaigns, Inc.

Dear Mr. D'Agostino:

On August 13, 1986, the Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended.

The Commission, on March 31, 1987, determined that on the basis of the information in the complaint, there is no reason to believe that a violation of any statute within its jurisdiction has been committed by Berman and D'Agostino Campaigns, Inc. Accordingly, the Commission closed its file in this matter as it pertains only to Berman and D'Agostino Campaigns, Inc. This matter will become a part of the public record within 30 days after the file has been closed with respect to all respondents. The Commission reminds you that the confidentiality provisions of 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) remain in effect until the entire matter is closed. The Commission will notify you when the entire file has been closed.

Sincerely,

A handwritten signature in cursive script, reading "Lawrence M. Noble", is written over the typed name.

Lawrence M. Noble  
Acting General Counsel

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

May 1, 1987

Daniel H. Lowenstein, Esquire  
UCLA Law School  
405 Hilgard  
Los Angeles, CA 90024

RE: MUR 2216  
Voter Guide and  
Carl D'Agostino, as treasurer

Dear Mr. Lowenstein:

The Federal Election Commission notified your clients on August 13, 1986, of a complaint 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 supplied by you, the Commission, on March 31, 1987, determined that there is reason to believe that your clients have committed the violation stated in C. below.

A. Findings Relating to 2 U.S.C. § 434

The Commission determined that there is no reason to believe that Voter Guide and its treasurer violated 2 U.S.C. § 434, by failing to report expenditures made on behalf of federal candidates, in connection with its slate mailer.

B. Findings Relating to 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a).

The Commission determined that there is no reason to believe that Voter Guide and its treasurer violated 2 U.S.C. § 441b, but was equally divided on the question whether Voter Guide and its treasurer violated 11 C.F.R. § 102.5(a) by depositing prohibited funds into an account maintained for federal political activity.

C. Findings relating to 2 U.S.C. § 441d

The Commission determined that there is reason to believe that Voter Guide and its treasurer violated 2 U.S.C. § 441d(a), by failing to affix a disclaimer to its slate mailer indicating that it was not authorized by non-paying candidates.

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You may submit any factual or legal materials that you believe are relevant to the Commission's analysis of this matter. Please file any such response within fifteen days of your receipt of this notification.

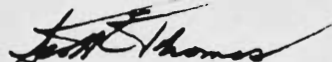
If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending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

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 General Counsel is not authorized to 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 matter to be made public.

If you have any questions, please contact Celia Jacoby, the attorney assigned to this matter, at (202) 376-8200.

Sincerely,



Scott E. Thomas  
Chairman

Enclosures  
Procedures

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RECEIVED  
OFFICE OF THE  
GENERAL COUNSEL

UCLA Law School  
405 Hilgard  
Los Angeles, California 90024

May 11, 1987

Scott E. Thomas  
Chairman  
Federal Election Commission  
Washington, D.C. 20463

RE: MUR 2216  
Voter Guide and  
Carl D'Agostino, as treasurer

Dear Mr. Thomas,

I am astonished by the contents of your letter dated May 1, 1987, informing me that the Commission had met more than a month earlier regarding the above-entitled matter. So far as your letter indicates, the Commission took no action at all on the flagrantly groundless allegations contained in Fortney H. (Pete) Stark's complaint, which was the occasion for opening this MUR. Instead, the Commission apparently voted on several matters that were not raised by Mr. Stark.

As to the matters set forth in parts A and B of your letter, you report that the Commission either determined there was no reason to believe any violation of the federal election law occurred, or by a tie vote it failed to find such "reason to believe." Although I cannot understand what caused the Commission to consider these matters without providing prior notice to my clients, in view of the conclusions the Commission reached I have nothing more to say about them.

In Part C of your letter you state the Commission found reason to believe my clients violated Section 441d(a), "by failing to affix a disclaimer to its slate mailer indicating that it was not authorized by non-paying candidates." For the reasons set forth below, the Commission had neither procedural nor substantive basis for making this finding.

Your letter of May 1 states that the March 31 actions of the Commission were taken "[u]pon further review of the allegations contained in the complaint, and information supplied" by me in behalf of the respondents. There is nothing whatever in Mr. Stark's complaint having to do with Section 441d, or with the general subject of disclosures contained in campaign literature distributed by the respondents. Mr. Stark complained, first of all, of the inclusion of his name over his objection in campaign literature. As I pointed out in my letter to Mr. Kleinfeld of the FEC staff, nothing in federal law requires a sender of campaign mail to obtain the approval of persons mentioned or endorsed in the mail. Second, Mr. Stark complained of alleged use of corporate money to fund campaign mail. This charge was

contrary to the facts. Mr. Stark's complaint said nothing at all about any disclosures that were or were not included in the campaign literature.

My response to the complaint, addressed to Mr. Kleinfeld, contained this statement: "Although it is irrelevant to any matter within the jurisdiction of the Federal Election Commission, Voter Guide emphatically denies that its mail was in any sense misleading...." Neither this statement nor anything else in my letter provided any basis for finding reason to believe a violation of Section 441d was committed. My statement does make it clear, however, that I believed matters relating to the contents of the literature in question were "irrelevant" to the matters raised by Mr. Stark's complaint, with the sole exception of the unquestioned fact that Mr. Stark was endorsed. No other reading of Mr. Stark's complaint is possible.

Section 437g of the FECA and Section 111.6 of the Commission's regulations both make it clear that as a matter of right a respondent must be given 15 days to make a response before the Commission has jurisdiction in a matter initiated by complaint to find "reason to believe" a violation has been committed. This right is denied when the Commission acts on matters that are not charged or fairly implicated in the complaint.

Section 111.4(3) of the regulations requires that the complaint "should contain a clear and concise recitation of the facts which describe a violation." Mr. Stark's complaint recites no facts at all relating to matters covered by Section 441d. 1/ When Section 111.4(3) is considered in conjunction with the right to notice and reply contained in Section 111.6 and statutory Section 437g, it is clear that the notice goes only to those alleged violations described in the complaint by a "clear and concise recitation of the facts," and that the Commission's jurisdiction to find "reason to believe" is limited to these specified violations. These important requirements are not satisfied in the present case with respect to any alleged violation of Section 441d, and the conclusion follows inexorably that the Commission's purported finding of March 31 was unlawful and without effect.

1/ It cannot be maintained that the attachment to Mr. Stark's complaint of a copy of the campaign literature in question constitutes a "recitation of the facts which describe a violation" of Section 441d. The attachment of the copy of the literature constituted "documentation," as required by Section 111.4(4) of the regulations, but the documentation requirement is in addition to the requirement in Section 111.4(3). If the regulations did not thus require a description of the alleged violation as well as a mere attachment of campaign documents, respondents would be placed in the impossible position of having either to anticipate every conceivable unspecified objection that the Commission might raise to the documents, or to lose their right of reply following notice of the charges.

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It is true that the Commission has authority to make "reason to believe" findings in the absence of complaints, based on information received "in the normal course of carrying out its supervisory responsibilities." Section 111.8. When the Commission acts under this authority it is not subject to the procedural requirements that attend action upon a complaint, but it must follow a different set of procedural requirements, which are also intended for the protection of potential respondents. There are at least two and probably three reasons why the Commission is without jurisdiction to conduct an investigation (see Section 111.10) based on this theory.

First, it is clear from Section 111.3, that the Commission must elect to proceed either under the complaint or on its own initiative, but that it cannot do both at the same time. In this case the Commission has explicitly elected to follow the complaint procedure. Thus, the MUR was opened, and initial notice sent to the respondents, based solely on the complaint, as called for in Section 111.5. And in your letter you make it clear that the Commission's actions of March 31 were based on the complaint and on no independent initiative of the Commission. For the reasons stated above, the Commission's actions are void under the complaint procedure, and the Commission has not purported to act on any other procedure.

Second, Section 111.8(a) provides that a "reason to believe" finding not based on a complaint can be made only upon a recommendation in writing from the General Counsel. It is true that the regulations do not require notice of such a recommendation to the potential respondent, and we therefore cannot be certain that no such written recommendation was submitted. However, since the Commission mistakenly believed it could act under the complaint procedures, it seems unlikely to us that there was any written recommendation from the General Counsel. Under the circumstances, we believe we are entitled to be informed whether such a written recommendation exists and was submitted to the Commission on or before March 31. If not, this would be a second reason for the Commission's being without jurisdiction.

Third, Section 111.8(b) requires that when the Commission finds "reason to believe" on its own initiative rather than on the basis of a complaint, the notification to the respondent must "include a copy of a staff report setting forth the legal basis and the alleged facts which support the Commission's action." Your letter does not purport to satisfy this requirement, because it is not a copy of anything, you are not a member of the staff, and the conclusory statement in Part C of your letter hardly states "the legal basis and the alleged facts which support" the finding of "reason to believe." The failure to enclose a copy of a staff report further confirms my belief that the Commission does not purport to be acting other than on the basis of Mr. Stark's complaint. To the extent the Commission does believe it is so acting, its failure to submit the report to us is an additional reason why the Commission lacks jurisdiction.

For the foregoing reasons we deny that the Commission presently has jurisdiction to investigate, we do not recognize the lawfulness of any such investigation, and we demand that the March 31 finding of "reason to believe" be retracted.

At the same time, we recognize that if the Commission chooses, it may seek a written recommendation from the General Counsel regarding whether or not Voter Guide may have violated Section 441d, with the purpose of proceeding properly under Section 111.8 of the regulations. In other words, our procedural objections require that the Commission begin anew, but they do not dispose of this matter substantively. For that reason, I turn now to the merits. As will be seen, there is no possible basis for believing that Voter Guide violated Section 441d.

Section 441d(a) requires certain information to appear on the face of campaign mail supporting federal candidates. The subsection is divided into three paragraphs. The first of these applies when the mail is "paid for and authorized by a candidate...." The second is clearly inapplicable to Voter Guide. The third applies to mail "not authorized by a candidate...."

The particular piece of mail attached to Mr. Stark's complaint includes endorsements for two federal candidates, Alan Cranston and Mr. Stark, neither of whom paid for or authorized the mailing. In other parts of California, the Voter Guide slate endorsed other candidates for Congress running in those areas, some of whom, such as Matthew Martinez, did pay for and authorize the mailing. Since the slate mail program as a whole was paid for in part by federal candidates, it seems likely that the program as a whole is governed by the first paragraph of Section 441d(a), even in areas such as Mr. Stark's district, where no federal candidates who had paid or given authorization were listed. Another view would be that the first paragraph is applicable to the areas where a federal candidate paid for and authorized the mail, and that the third paragraph is applicable to areas such as Mr. Stark's district. It makes little difference, however, because the requirements of the first and third paragraph are substantially identical as applied to slate mail such as that published by Voter Guide.

The first paragraph requires a statement "that the communication has been paid for by such authorized political committee." Note that the very language of this paragraph ("paid for by such authorized political committee") makes it clear that the disclosure is not to follow the language of the paragraph verbatim, but is to communicate the idea set forth in the paragraph. The third paragraph, where it is applicable, requires a statement of "the name of the person who paid" and a statement to the effect that "the communication is not authorized by any candidate or candidate's committee."

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The Voter Guide slate mailing contained recommendations not only on federal candidates but on state and local candidates and state and local ballot measures as well. As we have seen, in some areas the mailing contained an endorsement for a federal candidate who had paid, and in other areas it did not. In all areas, the Voter Guide used a single verbal formula that had to satisfy and did satisfy not only Section 441d(a) but comparable state law requirements as well: "Paid for and authorized by candidates and ballot measures marked with an asterisk (\*)." This statement appears on both the front and the back of the postcard attached to Mr. Stark's complaint.

This method of disclosure contained on the Voter Guide slate is clear to the voters and serves to identify both those candidates who have paid for and authorized the mailing and those who have not. Those marked with an asterisk have paid, those not marked have not paid or given authorization. Without question, the letter and the spirit of Section 441d(a) are satisfied.

It is true that the disclosure, which is cast in the affirmative, does not track the exact language of the third paragraph of Section 441d(a), which is cast in the negative. But Section 441d(a) does not purport to prescribe any particular verbal formula, and we have seen that the very language of the statute suggests no intent that the statutory language be tracked.

If Voter Guide had tracked the language of the third paragraph, the result would have been so seriously deceptive that it would have been flagrantly unethical. In that case, the postcard attached to Mr. Stark's complaint would have contained the statement, "This communication is not authorized by any candidate or candidate's committee." Yet the communication was authorized by Gray Davis, a candidate for state controller, by Rod Duncan, a candidate for judge, and by several candidates for county office.

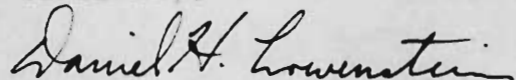
When the word "candidate" is used in Section 441d(a), it is a term of art, limited to candidates for federal office. See Section 431(2). To suggest that statutory language including an everyday word such as "candidate" that is being used in an unusual stipulative sense is intended to be reproduced verbatim in a disclosure to a mass electorate that would certainly understand the term in its normal sense, thereby engendering serious confusion and deception, is absurd. Congress certainly did not intend to require respondents to mislead the voters by telling them that no "candidates" had authorized their slate mail, when in fact several state and local candidates had paid for and authorized the mail.

The plain meaning of Section 441d(a) is that campaign mail should disclose to the voters which, of all the candidates endorsed, have paid for and authorized the mail and which have

not. This the Voter Guide slate mail does by a clear and accurate method that heretofore has never been questioned.

In summary, the Commission has failed to follow the procedural prerequisites for finding "reason to believe" my clients violated Section 441d(a). Its finding of March 31 is therefore void, and it is without jurisdiction to begin an investigation. If the Commission should opt to consider this matter in accordance with proper procedures, for the reasons that have been stated it will be forced to conclude that there is no reason whatever to believe any such violation occurred.

Sincerely,



Daniel H. Lowenstein  
Attorney for Voter Guide and  
Carl D'Agostino

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**SENSITIVE**

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )

Voter Guide and Carl D'Agostino, )  
as treasurer )

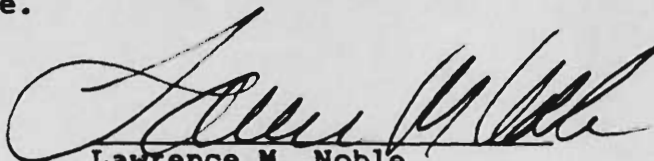
MUR 2216

**GENERAL COUNSEL'S REPORT**

The Office of the General Counsel is prepared to close the investigation in this matter as to Voter Guide and Carl D'Agostino, as treasurer, based on the assessment of the information presently available.

Date

7/13/87



Lawrence M. Noble  
Acting General Counsel

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COMMUNICATIONS SECTION

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

July 17, 1987

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MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble *LMN*  
Acting General Counsel

SUBJECT: MUR # 2216

Attached for the Commission's review is a brief stating the position of the General Counsel on the legal and factual issues of the above-captioned matter. A copy of this brief and a letter notifying the respondents of the General Counsel's intent to recommend to the Commission a finding of probable cause to believe was mailed on July 17, 1987. Following receipt of the respondents' reply to this notice, this Office will make a further report to the Commission.

Attachments

1. Brief
2. Letter to respondents

38040712352



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 17, 1987

Daniel H. Lowenstein, Esquire  
UCLA Law School  
405 Hilgard  
Los Angeles, California 90024

RE: MUR 2216  
Voter Guide and  
Carl D'Agostino,  
as treasurer

Dear Mr. Lowenstein:

Based on a complaint filed with the Federal Election Commission on August 6, 1986, and information supplied by you, the Commission, on March 31, 1987, found that there was reason to believe your clients, Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(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 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 (10 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 on whether there is probable cause to believe a violation has occurred.

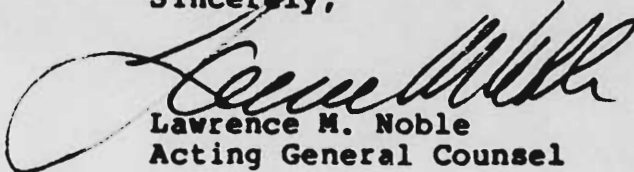
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If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extension of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated.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

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 Celia L. Jacoby, the attorney assigned to handle this matter, at (202) 376-8200.

Sincerely,



Lawrence M. Noble  
Acting General Counsel

Enclosure  
Brief

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of  
Voter Guide and  
Carl D'Agostino, as  
treasurer

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MUR 2216

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

On August 6, 1986, the Federal Election Commission (the "Commission") received a complaint from Representative Fortney H. ("Pete") Stark, alleging that the Federal Election Campaign Act of 1971, as amended (the "Act"), had been violated by the "Berman and D'Agostino Campaign firm (or firms related to it)" in its issuance of a slate mailer to California voters prior to the 1986 California primary election. Congressman Stark principally alleged that (i) the inclusion of his name on the slate card was an "unauthorized expenditure," and (ii) the slate mailer was "funded in some substantial part by corporate money."

On September 10, 1986, Voter Guide responded to this complaint, stating that the sums paid for Mr. Stark's inclusion in the mailer constituted an independent expenditure which was properly reported to the Commission. Further Voter Guide denied receiving or utilizing any corporate contributions because, as indicated in its reports as filed with the Commission, Voter Guide had received no contributions, corporate or otherwise.

The slate card produced by Voter Guide included the names of candidates who had authorized and paid for such inclusion, and the names of candidates who had not. The paying candidates were identified on the slate mailer by asterisks. The slate card stated that it was "[p]aid for and authorized by candidates ... marked with an asterisk (\*)." There is no statement that the slate was not authorized by non-paying candidates.

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On March 31, 1987, the Commission found reason to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a) by failing to affix a disclaimer to its slate mailer indicating that the communication was not authorized by non-paying candidates. On May 1, 1987, the respondents were notified of the Commission's findings.

By letter dated May 11, 1987, Voter Guide challenged the finding of a Section 441d disclaimer violation. Voter Guide asserted that "the Commission had neither procedural nor substantive basis for making this finding." The grounds for this contention were that (i) the "complaint said nothing at all about any disclosures that were or were not included in the campaign literature," and (ii) a respondent's rights under the Act and the regulations to respond are denied "when the Commission acts on matters that are not charged or fairly implicated in the complaint." Voter Guide also argued that, if the Commission has made this finding of a Section 441d disclaimer under its supervisory responsibilities, then the appropriate procedure was not followed as no staff report on the factual and legal issues was sent to Voter Guide. The respondents also claimed that "the Commission must elect to proceed either under the complaint or on its own initiative, but that it cannot do both at the same time." Based on these propositions, Voter Guide concluded that "we deny that the Commission presently has jurisdiction to investigate, we do not recognize the lawfulness of any such investigation, and we demand that the March 31 finding of 'reason to believe' be retracted."

Further the existence of a violation under 2 U.S.C. § 441d was denied. Voter Guide claimed that the method used on the

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slate mailer "is clear to the voters and serves to identify" as required for disclosure. "Those marked with an asterisk have paid, those not marked have not paid or given authorization." It was also argued that tracking the language under the third paragraph of Section 441d(a) would have been "so seriously deceptive that it would have been flagrantly unethical." This argument rests on the word "any" contained in that provision. Because some candidate, albeit a state or local candidate, authorized the communication, it would be deceptive to make the disclaimer, "this communication is not authorized by any candidate." For these reasons Voter Guide asserts that there is no reason to believe a violation under 2 U.S.C. § 441d(a) occurred.

## II. ANALYSIS

A. There exists no procedural bar to the Commission's consideration of this matter as the complaint filed with the Commission fairly implicated the disclaimer requirement under 2 U.S.C. § 441d(a).

Voter Guide argues that the Commission lacks jurisdiction over this matter if either the complaint did not fairly implicate the grounds for the Commission's finding, or no factual and legal analysis was provided if the basis of that finding was internally initiated. This matter arose from a signed, sworn and notarized complaint. That complaint alleged only events which constituted violations of the Act; no specific provisions of the Act were cited. However, the complaint does fairly implicate the disclaimer requirement under the Act. The complaint to the Commission, dated July 23 and August 1, 1986, states "... my name was included... and constitute (sic) an unauthorized expenditure" (emphasis added). Attached to this complaint was a letter dated

May 7, 1986, from the complainant to Messrs. Perata and Swanson, regarding the slate mailer in question. In that May 7th letter, the complainant wrote "[i]t would be a serious breach of fair campaign practices for any of your supporters to use my name in any way without my permission. I would have to protest if such improper use is made" (emphasis added). Samples of the slate mailer were also included with the complaint. Those samples indicated that the disclosure made referred only to the paying candidates. Although explicit reference to Section 44ld or disclaimer or disclosure is not made by the complaint, the complaint and its accompanying materials make out a fair allegation on this ground.

Nor is the failure of the complaint to recite specific facts alleging a Section 44ld violation fatal to the validity of the complaint. That a complaint should contain a "clear and concise recitation of facts which describe a violation of a statute" under 11 C.F.R. § 111.4(d)(3) is not a requirement but a guideline. The complaint and its accompanying materials should be viewed together to determine the violations alleged to have occurred.<sup>1/</sup> The Commission considered all information provided

<sup>1/</sup> 11 C.F.R. § 111.4(b) states the minimum mandatory characteristics of a complaint: (1) provision of the full name and address of a complainant and (2) contents to be sworn to and signed in the presence of a notary public and notarized. A complaint "should" also conform to the provisions under subparagraph (d) of this regulation. Had only a complaint meeting the requisites, "written, signed, sworn to and notarized" and "providing the complainant's name and address," been filed with the Commission, there would still be no procedural grounds for Voter Guide to dispute. The complaint filed in this matter clearly contained information that indicates that a violation under the Act or its regulations may have occurred. Here Voter Guide was given information which fairly implicated the asserted violation.

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in the complaint; that information fairly implicated the disclosure requirements under Section 44ld. To hold otherwise would require the Commission to act only if specific statutory provisions are cited by the complainant, a requirement that would make the Commission unresponsive to complaints from the general public not trained in election law.

Nor does the Act limit the scope of the reason to believe finding by the Commission solely to the allegations stated in a complaint. Section 437g(a)(2) of the Act provides, in part, that the Commission on "receiving a complaint" may find "reason to believe that a person has committed, or is about to commit, a violation" of the Act (emphasis added). The Commission is clearly not limited to the precise allegations of the complaint. If the complaint contains sufficient information to indicate that "a violation" may have occurred, the Commission is authorized to find reason to believe and to investigate.

Upon receipt of the complaint in this matter, the Commission provided a copy of that complaint and its accompanying materials to Voter Guide, affording Voter Guide an opportunity to demonstrate that no action should be taken. Voter Guide availed itself of that opportunity. Following receipt of notice of the Commission's reason to believe determination, Voter Guide again availed itself of an opportunity to be heard. On receipt of this brief, Voter Guide will again have an opportunity to be heard in

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accordance with 2 U.S.C. § 437g(a)(3). Voter Guide has, therefore, had an opportunity to read the complaint and respond to the issues raised therein, directly or by implication. Accordingly, Voter Guide was given, and will be given, the opportunity to respond under Sections 437g(a)(1) and (3). The arguments regarding an internally initiated matter are not relevant to this matter and the reason to believe finding. The procedural arguments presented by Voter Guide, therefore, are without merit.

B. The negative implication of the disclaimer regarding those candidates who paid for and authorized the slate mailer does not satisfy the requirements for a disclaimer under 2 U.S.C. § 441d(a).

The substantive argument presented by Voter Guide is also unavailing. Although adequate disclosure was made concerning those candidates who paid for and authorized their inclusion in the slate mailer, the negative implication of that disclosure does not satisfy the requirements of Section 441d. The Act and its implementing regulations do not provide for disclaimers by inference. Rather the requisite disclaimer must "clearly" state who paid for and who did or did not authorize the communication, and the disclaimer must "appear and be presented in a conspicuous manner." 2 U.S.C. § 441d(a)(3) and 11 C.F.R. § 110.11(a)(1). Each person, such as Voter Guide, who makes an independent expenditure to advocate the election of a clearly identified candidate must comply with these requirements. 11 C.F.R. § 109.3.

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Section 44ld provides, in pertinent part, that "[w]henver any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate... such communication ... if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee" (emphasis added).

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Voter Guide produced and distributed a slate mailer which advocated the election of federal candidates, including candidates who neither authorized nor paid for the communication on his or her behalf. Those candidates who did pay for and authorize the communication were designated on the slate mailer by an asterisk. The communication in issue was the advocacy of the election of each candidate listed on the slate mailer, not the slate mailer or the medium of communication. The disclaimer requirement under 2 U.S.C. § 44ld relates to each communication made on behalf of each federal candidate whose election or defeat was advocated. However, no statement on the slate mailer indicated that the communication was not authorized by the non-paying candidates.

Such disclosure, pursuant to 11 C.F.R. § 109.3, must be made if these expenditures to produce and distribute the communication by means of a slate mailer are to constitute independent expenditures, as Voter Guide asserts, on behalf of the non-paying

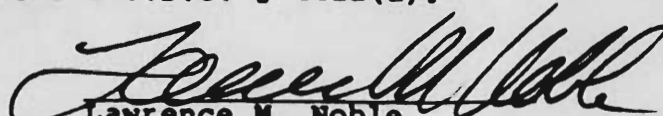
candidates. Therefore, the failure to include a statement that the non-paying candidates had not authorized the communication violates the disclosure requirement of 2 U.S.C. § 441d(a)(3).

**III. GENERAL COUNSEL'S RECOMMENDATION**

The Office of the General Counsel recommends that the Commission find probable cause to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a).

Date

7/16/87

  
Lawrence M. Noble  
Acting General Counsel

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SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
 )  
Voter Guide and Carl D'Agostino, )  
as treasurer )

EXECUTIVE SESSION

MUR 2216

GENERAL COUNSEL'S REPORT

OCT 20 1987

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FEDERAL ELECTION COMMISSION  
SECRETARIAT

I. BACKGROUND

This matter arose from a signed, sworn and notarized complaint filed with the Federal Election Commission (the "Commission") on August 6, 1986. On March 31, 1987, the Commission found reason to believe that Voter Guide and Carl D'Agostino, as treasurer (the "Respondents"), had violated 2 U.S.C. § 441d(a) by failing to affix a disclaimer to its slate mailer indicating that the communication was not authorized by the non-paying candidates. By letter dated May 1, 1987, the Respondents were notified of the Commission's findings. The Respondents replied to this determination in their letter of May 11, 1987. On July 17, 1987, the General Counsel informed the Respondents that it was prepared to recommend that the Commission find probable cause to believe that 2 U.S.C. § 441d(a) had been violated. On that date the General Counsel's Brief was transmitted to the Respondents. On August 17, 1987, the Respondents filed a brief in opposition.

II. ANALYSIS

The Office of the General Counsel principally relies on the legal analysis contained in the General Counsel's Brief, circulated to the Commission on July 17, 1987. The following addresses several misleading aspects of the Respondents' brief.

The Respondents have raised several points in opposition which misconstrue the legal principles applicable in this

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matter. First, Respondents argue that an "embarrassing conflict between federal law and state law" would arise should a violation be found in this matter and should California Senate Bill 1311 be enacted. Such an argument is meretricious. Were there any conflict between federal and state law, the federal law would control under the principle of preemption and Section 453. The Commission in considering the scope of 2 U.S.C. § 453 and its legislative history has concluded that Section 441d and the relevant Commission regulations supersede and preempt state law. See Advisory Opinions 1978-24, 1980-36 and 1981-27. However, no preemption or conflict presently exists. The possibility that a state may enact a law is not a ground for a federal agency to refuse to exercise its jurisdiction. Nor should a conflict arise in this matter. The disclosures required by 2 U.S.C. § 441d(a) are the issue. The disclosure required by the California proposed statute is compatible with the federal requirements at least to the extent that payment and authorization are disclosed. Compliance with the federal requisites would entail the further disclosure of non-authorization; such compliance with federal law would be neither incompatible with this proposed state law nor difficult for slate mailing organizations such as the Respondents.

Respondents have also argued that 2 U.S.C. § 441d(a)(1) recognizes disclosure by "negative implication." That argument postulates that by marking those candidates who paid for and authorized the communication on their behalf, the reader is informed that all unmarked parties neither paid for nor

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authorized the communication made on such unmarked parties' behalf. That conclusion ignores the affirmative disclosure mandates under Section 441d(a) for communications expressly advocating the election or defeat of a clearly identified candidate. That conclusion further ignores the central concern of Section 441d(a) disclosures concerning a communication as defined by the Federal Election Campaign Act of 1971, as amended. The communication is the advocacy of the election or defeat of a clearly identified candidate, not the method by which such communication is made. Were the slate mailer the communication as suggested by Respondents, then by their own premise the identification of a single candidate who authorized and paid for the slate mailer would suffice, regardless of the number of candidates who had paid for and authorized, or who had authorized but did not pay for, or who neither authorized nor paid for the slate mailer. The statement that certain individuals paid for and authorized a communication does not fulfill all of the disclosure requirements under Section 441d. Nor does that phrase exhaust the universe of potential meanings. The affirmative statement "paid for and authorized" contains several negative connotations: that the unmarked candidate may have authorized but not paid, or paid but not authorized, or neither authorized nor paid. It is such ambiguities that Section 441d and the implementing regulations would avoid by requiring clear and conspicuous disclaimers.

Finally, the Respondents suggest that the Commission lacks jurisdiction to consider this matter because the specific

violation is not explicitly alleged in the underlying complaint. The facts and circumstances set forth in the complaint refer to an unauthorized communication, a fact which clearly implicates the finding in this matter. As set forth in the General Counsel's Brief, the Commission is not required to wear blinders nor have the Respondents been denied their opportunity to respond.

Based on the facts in this matter and the analysis set forth in the General Counsel's Brief, this Office recommends that the Commission find probable cause to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a).

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

1/ In the 1986 July Quarterly Report in Schedule E, Respondents allocated a pro rata share of the cost of the slate mailer as an independent expenditure on behalf of the non-paying candidates. The Respondents stated that this allocation "is based on the assumption that one per cent of the value of the entire slate mail program accrued to the non-participating federal candidates." This Office expresses no view on the validity of that assumption.

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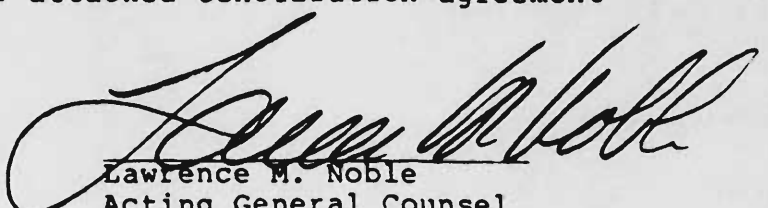
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IV. RECOMMENDATIONS

1. Find probable cause to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a).
2. Approve and send the attached conciliation agreement and letter.

Date

10/2/07

  
Lawrence M. Noble  
Acting General Counsel

Attachments

1. Reply of Respondents
2. Conciliation Agreement and Letter

2/ Respondent, Voter Guide, is the successor organization to Californians for Democratic Representation ("CDR"). CDR and its counsel, Daniel Lowenstein, were previously involved in investigations and civil suits with the Commission, including a lawsuit regarding slate mailers.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )

Voter Guide and Carl D'Agostino, )  
as treasurer )

MUR 2216

CERTIFICATION

I, Mary W. Dove, recording secretary for the Federal Election Commission executive session on October 20, 1987, do hereby certify that the Commission decided by a vote of 5-0 to take the following actions on MUR 2216:

1. Find probable cause to believe that Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a).
2. Approve and send the conciliation agreement and letter attached to the General Counsel's Report dated October 2, 1987.

Commissioners Aikens, Elliott, Josefiak, McGarry, and Thomas voted affirmatively. Commissioner McDonald did not cast a vote.

Attest:

10-21-87

Date

Mary W. Dove

Mary W. Dove  
Administrative Assistant

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

27 October 1987

Daniel H. Lowenstein, Esquire  
UCLA Law School  
405 Hilgard  
Los Angeles, California 90024

RE: MUR 2216  
Voter Guide and  
Carl D'Agostino,  
as treasurer

Dear Mr. Lowenstein:

On October 20, 1987, the Federal Election Commission found that there is probable cause to believe your clients, Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a), a provision of the Federal Election Campaign Act of 1971, as amended, in connection with the failure to affix an adequate disclaimer statement on a slate mailer.

The Commission has a duty to attempt to correct such violations for a period of 30 to 90 days by informal methods of conference, conciliation, and persuasion, and by entering into a conciliation agreement with a respondent. If we are unable to reach an agreement during that period, the Commission may institute a civil suit in United States District Court and seek payment of a civil penalty.

Enclosed is a conciliation agreement that the Commission has approved in settlement of this matter. If you and your clients agree with the provisions of the enclosed agreement, please sign and return it, along with the civil penalty, to the Commission within 10 days. I will then recommend that the Commission approve the agreement. Please make your check for the civil penalty payable to the Federal Election Commission.

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If you have any questions or suggestions for changes in the enclosed conciliation agreement, or if you wish to arrange a meeting in connection with a mutually satisfactory conciliation agreement, please contact Celia L. Jacoby, the attorney assigned to this matter, at (202) 376-8200.

Sincerely,

*Lawrence M Noble (LZ)*

Lawrence M. Noble  
General Counsel

Enclosure  
Conciliation Agreement

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MEMORANDUM TO:                    LAWRENCE M. NOBLE  
                                      GENERAL COUNSEL

FROM:                                MARJORIE W. EMMONS/JOSHUA MCFADDEN *JM*

DATE:                                FEBRUARY 9, 1988

SUBJECT:                            COMMENTS TO MUR 2216 - General Counsel's Report  
   Signed February 4, 1988

Attached is a copy of Commissioner Thomas's vote  
sheet with comments regarding the above-captioned matter.

Attachment:  
copy of vote sheet

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SENSITIVE



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

DATE & TIME TRANSMITTED: FRIDAY, FEBRUARY 5, 1988 12:00

COMMISSIONER: AIKENS, ELLIOTT, JOSEFIAK, McDONALD, MCGARRY, THOMAS

RETURN TO COMMISSION SECRETARY BY TUESDAY, FEBRUARY 9, 1988 4:00

SUBJECT: MUR 2216 - General Counsel's Report  
Signed February 4, 1988

- (✓) I approve the recommendation  
( ) I object to the recommendation

COMMENTS: The latter part of the 3rd paragraph of the proposed letter now  
seems inappropriate.

DATE: 2/9/88

SIGNATURE [Signature]

A DEFINITE VOTE IS REQUIRED. ALL BALLOTS MUST BE SIGNED AND DATED.  
PLEASE RETURN ONLY THE BALLOT TO THE COMMISSION SECRETARY.  
PLEASE RETURN BALLOT NO LATER THAN DATE AND TIME SHOWN ABOVE.

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UCLA Law School  
405 Hilgard  
Los Angeles, California 90024

May 18, 1988

Celia Jacoby  
Office of the General Counsel  
Federal Election Commission  
Washington, D.C. 20463

Re: MUR 2216  
Voter Guide and  
Carl D'Agostino, as  
treasurer

Dear Ms. Jacoby,

In response to Mr. Noble's letter dated May 3, and received by me on May 10, I hereby request an extension of time for reply to June 17, 1988.

This matter involves campaign mail sent prior to the California June 1986 primary election, almost exactly two years ago. The complaint that, in the view of the Commission, inaugurated this matter, was received by the Commission on August 6, 1986. During the intervening year and nine-and-a-half months, the Commission has run no significant factual investigation, and since we have responded promptly at every stage, the length of time that has transpired reflects the apparent and quite sensible judgment of the Commission and its staff that this case is a low-priority item.

My clients are in the campaign consulting business, and are actively engaged in the California primary election, to be held June 7. Although, as mentioned above, we have responded promptly to communications from the Commission in this matter, the weeks between now and June 7 are extremely busy ones for my clients. Between now and June 7 the principals of Voter Guide, including Mr. D'Agostino, will be working 7-day weeks, usually at least 16 hours per day.

The choice facing my clients, as they see it, is either to succumb to what they believe is an unjust demand, paying a substantial fine and suffering a loss of reputation when in their view they have done no wrong and violated no statute, or to bear the cost in money, time, and aggravation of litigating what they believe is a trivial and pointless law suit. This is not an easy decision for them to make, and it warrants careful deliberation.

Given the nearly two years that have passed through no fault of ours, it does not seem reasonable that my clients should be forced to make a final decision at a time that causes disruption

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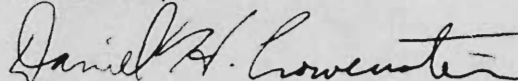
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to their professional activity and precludes deliberate consideration.

An extension to June 17 will give them a chance to attend to the inevitable business left over from the primary election and have a short rest, before turning their consideration to the present matter. At the same time, the extra three weeks beyond the deadline set by Mr. Noble is minimal, given the history of this matter.

Sincerely,



Daniel H. Lowenstein  
Attorney for Voter Guide and  
Carl D'Agostino

38040712374

88 MAY 25 PM 4:21

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of )  
 )  
Voter Guide and Carl D'Agostino, ) MUR 2216  
as treasurer )

GENERAL COUNSEL'S REPORT

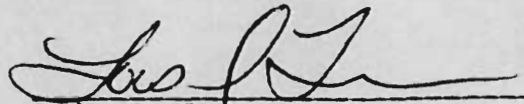
On April 28, 1988, the Federal Election Commission (the "Commission") approved a conciliation agreement to resolve an outstanding matter with Voter Guide and Carl D'Agostino, as treasurer (the "Respondents"). Because the ninety-day conciliation period had expired, the Commission also authorized the Office of the General Counsel to file suit if an agreement was not reached within fifteen days. On May 10th, counsel for the Respondents received the conciliation agreement. During a conversation on May 18, Mr. Lowenstein indicated that the Respondents were actively involved in the California election process and that he would be unable to obtain their decision on the conciliation agreement within the period stipulated. He requested until June 17 to make a determination in this matter. By letter received on May 20, Mr. Lowenstein again expressed this obstacle to a timely response and requested that the response period be extended until June 17, 1988 (Attachment 1).

38040712375

This Office believes that an agreement can be achieved and that the requested postponement would facilitate that agreement. Accordingly, this Office will extend the conciliation period until June 17, 1988. Should no signed agreement be received by that date, this Office will file civil suit as authorized by the Commission.

Lawrence M. Noble  
General Counsel

5/25/88  
Date

By:   
Lois G. Lerner  
Associate General Counsel

Attachments

1. Respondents' letter
2. Letter

88040712376

BEFORE THE FEDERAL ELECTION COMMISSION

88 JUL -8 AM 10:52

In the Matter of )  
 ) MUR 2216  
Voter Guide and Carl D'Agostino, )  
as treasurer )

**SENSITIVE**

GENERAL COUNSEL'S REPORT

I. BACKGROUND

Attached is a conciliation agreement which has been signed by Carl D'Agostino, the treasurer of Voter Guide.

The attached agreement contains no changes from the agreement approved by the Commission on April 28, 1988. A check in the amount of \$2000 in payment of the civil penalty has also been received.

II. RECOMMENDATIONS

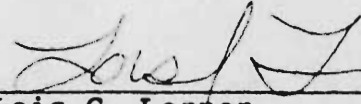
1. Accept the attached conciliation agreement with Voter Guide and Carl D'Agostino, as treasurer.
2. Close the file.
3. Approve the attached letters.

Lawrence M. Noble  
General Counsel

Date

7/7/88

BY:

  
Lois G. Lerner  
Associate General Counsel

Attachments

1. Conciliation Agreement
2. Photocopy of civil penalty check
3. Letters to Respondent (2)
4. Letter to Complainant

Staff Assigned: C. Jacoby

88040712377



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE  
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/KAREN E. TRACH *MET*  
COMMISSION SECRETARY

DATE: JULY 12, 1988

SUBJECT: MUR 2216 - GENERAL COUNSEL'S REPORT  
SIGNED JULY 7, 1988

Attached is a copy of Commissioner Aikens  
vote sheet with comments regarding the above-captioned matter.

Attachment:  
Copy of Vote Sheet

88040712378

BALLOT



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

DATE & TIME TRANSMITTED: FRIDAY, JULY 8, 1988, at 12:00 P.M.

COMMISSIONER: ~~ADKINS~~ ELLIOTT, JOSEPHAK, McDONALD, McGARRY, THOMAS

RETURN TO COMMISSION SECRETARY BY TUESDAY, JULY 12, 1988, at 4:00 P.M.

SUBJECT: MUR 2216 - GENERAL COUNSEL'S REPORT  
SIGNED JULY 7, 1988

- ( ) I approve the recommendation  
(✓) I object to the recommendation

COMMENTS:

for record only

DATE: 7-12-88

SIGNATURE

Joan S. Adams

A DEFINITE VOTE IS REQUIRED. ALL BALLOTS MUST BE SIGNED AND DATED.

PLEASE RETURN ONLY THE BALLOT TO THE COMMISSION SECRETARY.

PLEASE RETURN BALLOT NO LATER THAN DATE AND TIME SHOWN ABOVE.

88 JUL 12 PM 4:45

FEDERAL ELECTION COMMISSION

88040712379

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of )  
Voter Guide and Carl D'Agostino, ) MUR 2216  
as treasurer )

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on July 12, 1988, the Commission decided by a vote of 5-1 to take the following actions in MUR 2216:

1. Accept the conciliation agreement with Voter Guide and Carl D'Agostino, as treasurer, as recommended in the General Counsel's Report signed July 7, 1988.
2. Close the file.
3. Approve the letters, as recommended in the General Counsel's Report signed July 7, 1988.

Commissioners Elliott, Josefiak, McDonald, McGarry, and Thomas voted affirmatively for the decision; Commissioner Aikens dissented.

Attest:

7-12-88

Date

Marjorie W. Emmons

Marjorie W. Emmons  
Secretary of the Commission

Received in the Office of Commission Secretary: Fri., 7-8-88, 10:52  
Circulated on 48 hour tally basis: Fri., 7-8-88, 12:00  
Deadline for vote: Tues., 7-12-88, 4:00

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 18, 1988

Daniel H. Lowenstein, Esquire  
UCLA Law School  
405 Hilgard  
Los Angeles, CA 90024

RE: MUR 2216  
Voter Guide and Carl  
D'Agostino, as  
treasurer

Dear Mr. Lowenstein:

On July 12, 1988, the Federal Election Commission accepted the signed conciliation agreement and civil penalty submitted on your clients' behalf in settlement of a violation of 2 U.S.C. § 441d(a), a provision of the Federal Election Campaign Act of 1971, as amended. Accordingly, the file has been closed in this matter. This matter will become a part of the public record within 30 days. If you wish to submit any factual or legal materials to appear on the public record, please do so within ten days. Such materials should be sent to the Office of the General Counsel.

Please be advised that information derived in connection with any conciliation attempt will not become public without the written consent of the respondent and the Commission. See 2 U.S.C. § 437g(a)(4)(B). The enclosed conciliation agreement, however, will become a part of the public record.

Enclosed you will find a copy of the fully executed conciliation agreement for your files. If you have any questions, please contact Celia L. Jacoby, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble  
General Counsel

*Lois G. Lerner*

BY: Lois G. Lerner  
Associate General Counsel

Enclosure  
Conciliation Agreement

38040712381

BEFORE THE FEDERAL ELECTION COMMISSION

60049645

In the Matter of )  
 Voter Guide and Carl D'Agostino, )  
 as treasurer )

MUR 2216

FEDERAL ELECTION COMMISSION  
 88 JUN 28 AM 10:12

CONCILIATION AGREEMENT

This matter was initiated by a signed, sworn, and notarized complaint by Representative Fortney H. (Pete) Stark. An investigation was conducted, and the Federal Election Commission (the "Commission") found probable cause to believe that Voter Guide and Carl D'Agostino, as treasurer (the "Respondents"), violated 2 U.S.C. § 441d(a).

NOW, THEREFORE, the Commission and the Respondents, having duly entered into conciliation pursuant to 2 U.S.C. § 437g(a)(4)(A)(i), do hereby agree as follows:

I. The Commission has jurisdiction over the Respondents and the subject matter of this proceeding. Although the Respondents have disputed this jurisdiction on procedural grounds, Respondents hereby expressly waive their objections to the Commission's jurisdiction.

II. Respondents have had a reasonable opportunity to demonstrate that no action should be taken in this matter.

III. Respondents enter voluntarily into this agreement with the Commission.

IV. The pertinent facts in this matter are as follows:

1. Respondent, Voter Guide, is a political committee within the meaning of 2 U.S.C. § 431(4).
2. Respondent, Carl D'Agostino, is the treasurer of Voter Guide.

RECEIVED  
 FEDERAL ELECTION COMMISSION  
 88 JUN 30 AM 10:30

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3. "Whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contributions through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general public political advertising, such communication --

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee."

2 U.S.C. § 441d(a).

4. Respondents produced a slate mailer to advocate the election of numerous candidates clearly identified by name.

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The slate mailer was paid for and authorized by certain candidates, and neither paid for nor authorized by other candidates whose election was advocated.

5. The slate mailer contained the following statement on both the outside (or, in the case of a post card, the address side) and the page (or side) containing the slate of endorsements: "Paid for and authorized by candidates and ballot measures marked with an asterisk (\*)."

6. Respondents contend that the above statement was intended to and in their belief did inform the public of the source of financing and authorization of the slate mailer. Respondents acknowledge that no express statement (except as indicated in paragraph 5 above) appeared on the slate mailer indicating that a candidate whose name was not denoted by an asterisk had not authorized the communication made in support of such candidate.

7. Respondents distributed the slate mailer to millions of California households.

V. Respondents violated 2 U.S.C. § 441d(a) by failing to affix a disclaimer to their slate mailer that clearly stated that the communication was not authorized by the non-paying candidates. 2 U.S.C. § 441d(a) and its implementing regulation (11 C.F.R. § 110.11) require an explicit disclaimer to appear and to be presented in a clear and conspicuous manner on the communication. Respondents state that they believed and continue

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to believe that identification by asterisk of the candidates who did pay and authorize served to identify by clear and obvious implication the unasterisked candidates as those who did not pay or authorize the communication made on their behalf.

VI. Respondents will pay a civil penalty to the Federal Election Commission in the amount of Two Thousand dollars (\$2,000), pursuant to 2 U.S.C. § 437g(a)(5)(A).

VII. The Commission, on request of anyone filing a complaint under 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review compliance with this agreement. If the Commission believes that this agreement or any requirement thereof has been violated, it may institute a civil action for relief in the United States District Court for the District of Columbia.

VIII. This agreement shall become effective as of the date that all parties hereto have executed the same and the Commission has approved the entire agreement.

IX. Respondents shall have no more than thirty (30) days from the date this agreement becomes effective to comply with and implement the requirements contained in this agreement and to so notify the Commission.

X. This Conciliation Agreement constitutes the entire agreement between the parties on the matters raised herein, and no other statement, promise, or agreement, either written or

3 9 0 4 0 7 1 2 3 8 5

oral, made by either party or by agents of either party, that is not contained in this written agreement shall be valid.

FOR THE COMMISSION:

Lawrence M. Noble  
General Counsel

By: Lois G. Lerner  
Associate General Counsel

July 18, 1988  
Date

FOR THE RESPONDENTS:

Carl D'Agostino  
Treasurer

June 21, 1988  
Date

380407123886



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 18, 1988

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

The Honorable Fortney H. Stark  
House of Representatives  
Washington, D.C. 20515

RE: MUR 2216

Dear Mr. Stark:

This is in reference to the complaint you filed with the Federal Election Commission on August 6, 1986, concerning a slate mailer distributed in Alameda County, California.

After conducting an investigation in this matter, the Commission found that there was probable cause to believe Voter Guide and Carl D'Agostino, as treasurer, violated 2 U.S.C. § 441d(a), a provision of the Federal Election Campaign Act of 1971, as amended. On July 12, 1988, a conciliation agreement signed by the respondent was accepted by the Commission, thereby concluding the matter. Accordingly, the Commission closed the file in this matter on July 12, 1988. A copy of this agreement is enclosed for your information.

If you have any questions, please contact Celia L. Jacoby, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble  
General Counsel

*Lois G. Lerner*

BY: Lois G. Lerner  
Associate General Counsel

Enclosure  
Conciliation Agreement

88040712387



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

July 18, 1988

Berman & D'Agostino Campaigns, Inc.  
1435 South La Cienega Boulevard  
Suite 101  
Los Angeles, CA 90035

RE: MUR 2216  
Berman & D'Agostino  
Campaigns, Inc.

Dear Gentlemen:

This is to advise you that the entire file in this matter has now been closed and will become part of the public record within 30 days. Should you wish to submit any legal or factual materials to be placed on the public record in connection with this matter, please do so within ten days. Such materials should be sent to the Office of the General Counsel.

Should you have any questions, contact Celia L. Jacoby, the attorney assigned to this matter, at (202) 376-5690.

Sincerely,

Lawrence M. Noble  
General Counsel

*Lois G. Lerner*

BY: Lois G. Lerner  
Associate General Counsel

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

THIS IS THE END OF MJR # 2216

DATE FILMED 8/3/88 CAMERA NO. 4

CAMERAMAN K.A.U.

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