

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

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3 In the Matter of)
4) MUR 4643
5 Friends of Eric Serna for Congress)
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9 **GENERAL COUNSEL'S REPORT # 5**
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13 **I. RECOMMENDATIONS:** Find probable cause to believe that Friends of Eric Serna for
14 Congress violated 2 U.S.C. § 441a(f); approve the attached conciliation agreement for Friends of
15 Eric Serna for Congress; authorize contingent suit authority; approve the appropriate letters.
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17 **II. BACKGROUND**

18 MUR 4643 involves an examination of disbursements made during a special election
19 period in the spring of 1997, by the Democratic Party of New Mexico ("DPNM" or "Party") on
20 behalf of a Democratic congressional candidate, Eric Serna, and the Friends of Eric Serna for
21 Congress committee ("Serna campaign").¹ The Federal Election Commission ("Commission")
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¹ On February 26, 2002, the Commission found probable cause to believe that the Democratic Party of New Mexico and Judy Baker, as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2)(A), 441a(d)(3), 441b and 11 C.F.R. § 102.5(a)(1)(i); and that the Democratic Party of New Mexico-Non-Federal (State) and Judy Baker, as treasurer, violated U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i). This Office currently is in Probable Cause conciliation with the DPNM.

1 found reason to believe that Friends of Eric Serna for Congress violated 2 U.S.C. § 441a(f).²

2 This Office conducted an investigation which included depositions and the review of
3 documents from the respondents and witnesses. Based on this investigation, on February 1,
4 2002, this Office submitted the General Counsel's Brief to Respondent. On February 22, 2002,
5 this Office received a faxed response brief from Respondent.³

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7 **III. LEGAL ANALYSIS**

8 The General Counsel's Brief provides an analysis of the violations in this matter and is
9 incorporated in this Report in its entirety.⁴ As demonstrated in the General Counsel's Brief, the
10 Serna campaign and the Party worked together in cooperation and in concert with each other, and
11 the Serna campaign consulted the Party on various aspects of the campaign. Discussions
12 between the Party and candidate's committee amounted to control by the Serna campaign over

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² The Commission decided to take no action with respect to the General Counsel's recommendation to find reason to believe that Friends of Eric Serna for Congress violated 2 U.S.C. § 441b, and this Office makes no recommendation on this provision. During the investigation, this Office focused on the merits of the 2 U.S.C. § 441a(f) violations pertaining to this Respondent. Furthermore, although the Commission found reason to believe that the Serna campaign violated 2 U.S.C. § 434(b), this Office did not recommend finding probable cause as to this Respondent. Commission regulation states that 2 U.S.C. § 441a(d) contributions "by a political party committee shall not be reported as contributions." 11 C.F.R. § 104.3(a)(3)(iii). See also 11 C.F.R. § 106.1(b), *Wertheimer v Federal Election Commission*, 268 F.3d 1070, 1073 (D.C. Cir. 2001) ("A candidate is not ... required to report as contributions coordinated expenditures by his political party.").

³ Counsel for Respondent states that he mailed a response brief to the Commission on February 14, 2002, from Santa Fe, New Mexico; however, no documents were received prior to those faxed on February 22, 2002. Given the delays that this and other federal agencies have had in receiving United States mail, on February 22, 2002, this Office asked counsel for Respondent to fax the response brief, which was received that day.

⁴ Copies of the deposition transcripts relied upon in the Brief are available in the electronic format through the shared drive. A copy of the exhibits to each deposition transcript also is available in the Commission Secretary's office.

1 the timing, location, mode or intended audience, or volume of communications by the Party.
2 During the campaign period, a steady flow of information passed between the candidate's
3 campaign and the Party. Tom Carroll, the Serna campaign manager, admits telling the state party
4 what the Serna campaign was doing, how much money they had, where their weaknesses were,
5 and so forth. Likewise, Randy Dukes, the key person with the Party, admits providing the Serna
6 campaign with a copy of the Party program plan, which included projections for the timing, cost
7 and intended audience of some radio and press, absentee ballot application packages and other
8 get-out-the-vote ("GOTV") activity. Through a flow of information between key party and Serna
9 campaign personnel, the Party discerned what the candidate needed, and then filled in with
10 assistance where needed. These communications allowed the Party to target limited resources for
11 the benefit of the Serna campaign. As a result, the Serna campaign received excessive in-kind
12 contributions from the DPNM. *See* 2 U.S.C. § 441a(f).

13 Respondent failed to dispute any of the facts enumerated in the General Counsel's Brief,
14 but alleges that the Commission should not find probable cause to believe it violated the Federal
15 Election Campaign Act of 1971, as amended ("the Act"). The Serna campaign erroneously
16 asserts that the actor must know that he or she violated the specific provision of
17 2 U.S.C. § 441a(f).

18 Additionally, the response brief contains an assertion concerning the liability of the
19 treasurer of the Serna campaign, John B. Pound. Specifically, the response brief states that the
20 treasurer should not be liable for a violation of the committee in this matter because he had no
21 direct knowledge of the coordinated expenditures made by the Democratic Party of New Mexico.
22 While the Commission's practice generally has been to find the treasurer in violation of the same
23 provisions of the Act and Commission regulations as it finds the committee violated, this Office

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1 believes that a re-examination of the legal foundation for this practice is appropriate.
2 Respondent's assertion concerning the treasurer is being analyzed by this Office and will be
3 brought before the Commission soon.

4 **Facts Not In Dispute.** Answers to interrogatories, depositions and documents provided
5 pursuant to Commission subpoenas reveal that the DPNM and the Serna campaign had regular
6 communications during the special election period from March 1, 1997, to May 13, 1997,
7 including discussions of state party budgeting, planning, voter drive and GOTV efforts. The
8 DPNM reported making numerous disbursements totaling approximately \$202,000 for absentee
9 ballot applications and voter identification/GOTV efforts during the 1997 Special Election
10 period. The 1997 Special Election in New Mexico, in which Eric Serna ran as a candidate for the
11 only office on the ballot was the only election in the entire state that calendar year. The DPNM
12 reported over 83% of its disbursements in 1997 during the special election period. Thus, clearly,
13 the bulk of money expended by the Party in 1997 focused on the special election to benefit Eric
14 Serna in his campaign. The DPNM reported coordinated expenditures of \$15,127 on behalf of
15 Eric Serna for the 1997 Special Election out of a possible \$31,810 coordinated expenditure limit.
16 Thus, the DPNM could have reported only an additional \$16,683 in coordinated expenditures
17 during the 1997 Special Election, placing the DPNM \$185,501.06 over the limits of
18 2 U.S.C. § 441a(d), and resulting in an excessive in-kind contribution to the Serna campaign of
19 \$185,501.06. Respondent does not dispute these facts.

20 **Analysis.** Respondent erroneously analyzes "knowingly" when interpreting
21 2 U.S.C. § 441a(f).⁵

⁵ Respondent also appears erroneously to state that a corporate contribution of less than \$1,000 is permissible pursuant to the Act. Response Brief, p. 4. As previously stated, the Commission did not find reason to believe that the Serna campaign violated 2 U.S.C. § 441b and this Office makes no recommendations pertaining to the same

1 The Serna campaign erroneously asserts that the actor must know that he or she violated
2 the specific provisions of 2 U.S.C. § 441a(f). The Serna campaign cites no case law, statute or
3 regulation in support of its position.

4 Section 441a(f) of the Act provides:

5 No candidate or political committee shall knowingly accept any contribution or make any
6 expenditure in violation of the provisions of this section. No officer or employee of a
7 political committee shall knowingly accept a contribution made for the benefit or use of a
8 candidate, or knowingly make any expenditure on behalf of a candidate, in violation of
9 any limitation imposed on contributions and expenditures under this section.
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11 The standard for knowingly accepting a contribution is different from a “knowing and
12 willful violation.” “Knowing” acceptance of a contribution in violation of 2 U.S.C. § 441a, “as
13 opposed to a knowing and willful [acceptance], does not require knowledge that one is violating
14 the law, but merely requires an intent to act.” *Federal Election Commission v. John A. Dramesi*
15 *For Congress Committee*, 640 F. Supp. 985, 987 (D. N.J. 1986) (citing *United States v. Marvin*,
16 687 F.2d 1221, 1225 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983)). *See also, Federal*
17 *Election Commission v. Friends of Jane Harman*, 59 F. Supp.2d 1046, 1056, n.11 (C.D. Cal.
18 1999) (finding liability under a “knowingly” analysis even though the law on corporate
19 facilitation was “arguably unclear ... at the time of the events in question”). An “intent to act”
20 can be shown through “a party’s knowledge of the facts rendering its conduct unlawful [which]
21 constitutes a ‘knowing acceptance,’” *Dramesi*, 640 F. Supp. at 987 (quoting *Federal Election*
22 *Commission v. California Medical Association*, 502 F. Supp. 196, 203-204 (N.D.Cal. 1980)). As
23 stated above, the Serna campaign does not dispute the facts presented in the General Counsel’s
24 Brief, including the fact that regular communications took place between key persons on the
25 Serna campaign and the DPNM during the special election period from March 1, 1997, to May

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1 13, 1997, including discussions of state party budgeting, planning, voter drive and GOTV
2 efforts.⁶ By participating in these communications, the Serna campaign "knowingly accepted"
3 the resulting contributions.

4 The Commission has already found probable cause to believe that the DPNM and its
5 treasurer made excessive contributions to the Serna campaign, based on the same facts and
6 analysis presented in this Report and General Counsel's Brief. Similarly, this Office now
7 recommends that the Commission find probable cause to believe that Friends of Eric Serna for
8 Congress violated 2 U.S.C. § 441a(f) by accepting excessive in-kind contributions based on the
9 Democratic Party of New Mexico's coordinated expenditures.⁷

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11 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

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⁶ Respondent appears to concede coordination between the Party and the Serna campaign. See Response Brief, pp 2-4, 5. Respondent also erroneously states that the General Counsel's Brief stands for the proposition that Serna campaign staff "should avoid communications of any sort with" the DPNM. Response Brief, p. 2. This Office did not assert that the Serna campaign and Party should avoid all communications; rather, under the circumstances, the substance and extent of the communications have legal consequences.

⁷ In the General Counsel's Brief, p. 11, footnote 3, this Office acknowledged that although no court has required express advocacy as an element of a finding that an otherwise coordinated communication was in connection with or for the purpose of influencing a federal election, the communications in this matter expressly advocated the election of a clearly identified candidate. To "Vote Democratic on May 13, 1997" in a year in which only one election was held for only one office and that was a federal office can "have no other reasonable meaning than to urge the election .. of one ... clearly identified candidate" 11 C.F.R. § 100.22(a)

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V. CONTINGENT SUIT AUTHORITY

In an effort to streamline the enforcement process, this Office also is requesting contingent suit authority due to that fact that the statute of limitations for Friends of Eric Serna for Congress will begin to run on April 16, 2002, and will run completely on May 15, 2002.⁹ See 1997 DPNM disclosure reports: Twelfth day reporting preceding the Special Election on May 13, 1997, in the state of New Mexico; and Thirtieth day report following the Special Election on May 13, 1997, in the State of New Mexico.

⁹ Taking into consideration the DPNM's maximum permissible coordinated contribution limit, the statute of limitations for violations committed by the Serna campaign will begin to run on April 16, 2002, rather than April 3, 2002 (five years from the date on which the first disbursement at issue was reported), since the first \$16,683 in disbursements from April 3, 2002, to April 14, 2002, were not excessive.

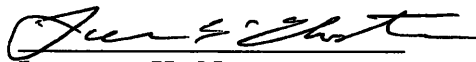
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VI. RECOMMENDATIONS

1. Find probable cause to believe that Friends of Eric Serna for Congress violated 2 U.S.C. § 441a(f).
2. Approve the attached conciliation agreement for Friends of Eric Serna for Congress.
3. Authorize contingent suit authority.
4. Approve the appropriate letters.

Date

3/6/02


Lawrence H. Norton
General Counsel

Attachment

Conciliation Agreement

Staff assigned: Margaret J. Toalson

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