

BEFORE THE FEDERAL ELECTION COMMISSION

2002 DEC 10 P 2:39

In the Matter of)
Bordonaro for Congress and Betty Presley, as treasurer)
Tom J. Bordonaro Jr.)

MUR 4735

SENSITIVE

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED

Reject the attached conciliation agreement with Bordonaro for Congress and Betty Presley, as treasurer; take no further action, and close the file. Take no further action and close the file regarding Tom J. Bordonaro Jr.

II. BACKGROUND

On March 25, 1999, the Federal Election Commission ("Commission") found reason to believe that Bordonaro for Congress and Betty Presley, as treasurer, violated section 441h of the Federal Election Campaign Act of 1971, as amended ("the Act"). On May 23, 2000 as a result of an investigation, the Commission also found reason to believe that Tom J. Bordonaro Jr., violated section 441h of the Act and approved pre-probable cause to believe conciliation with Respondents.¹ The Commission's findings were based on information showing that Respondents used a phone bank to make telephone calls that conveyed negative and false information about Bordonaro's Democratic opponent, Lois Capps, during the March 10, 1998 special election for the United States House of Representatives seat in California's 22nd Congressional District. Phone bank callers represented themselves as

¹ Hereinafter, Tom J. Bordonaro Jr., Bordonaro for Congress and Betty Presley, as treasurer, will be collectively referred to as "Respondents."

28 calling on behalf of "Central Coast Democrats for Honest Representation," in efforts to
29 persuade Democratic voters to support Tom J. Bordonaro Jr.

30 **III. DISCUSSION**

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As Respondents noted, no court has considered whether section 441h of the Act may be applied to the misrepresentation of a non-existent entity, a significant issue in this matter. This Office does not believe that this matter is an appropriate vehicle to test this issue. Although it appears that there was intent to mislead the phone call recipients, this is a difficult case to say that Respondents' actions fall within the narrow terms of the Act. Specifically, section 441h does not prohibit all fraudulent activity that injures a candidate, but only "fraudulently misrepresent[ing] oneself as speaking on behalf of any other candidate or political party." The mere fact that the word "Democrats" was used would not appear to be enough to bring the activity within the scope of speaking on behalf of a political party under the terms of the Act.

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Respondents' phone bank call script contained

99 only two ambiguous references to "Democrats." First, Respondents' phone bank callers

100 identified themselves as calling on the behalf of "Central Coast Democrats for Honest

101 Representation," and second, callers simply urged recipients to "join your Democrat

102 neighbors." In addition, Respondents' campaign consultant Steve Presson and campaign

103 manager Jim Kjol submitted an affidavit to this Office stating that their use of the "Central

104 Coast Democrats for Honest Representation" identifier was not intended to mislead anyone

105 into believing the calls originated with a Democratic Party organization, and they further

106 asserted that they deliberately avoided using the words "party" and "committee" so as not to

107 imply that the calls were from an official party organization.

108 Thus, Respondents do not purport to speak on behalf of a political party under
109 section 441h of the Act. a credible argument can be made that the
110 callers, "Central Coast Democrats for Honest Representation," appear to constitute a public
111 advocacy group made up of Democrats and that recipients of the phone calls could have
112 easily believed that "Central Coast Democrats for Honest Representation" simply
113 represented an issue advocacy group, rather than an affiliate of the Democratic Party.
114 Similarly, an argument can also be made that the words "join your Democrat neighbors" in
115 Respondents' script could be interpreted as a mere call to join other Democrats concerned
116 with the issue of honest representation in government.

117 Because of the ambiguity in Respondents' phone script, especially compared to the
118 mailings in the case which clearly appeared to suggest that the Committee was
119 speaking on behalf of the Democratic Party, there is less support for finding that
120 Respondents in the instant matter violated section 441h of the Act. Therefore, this Office
121 does not believe that it is worthwhile to proceed to the briefing stage. Accordingly, this
122 Office recommends that the Commission reject Respondents' counteroffer, take no further
123 action, and close the file in this matter.

127 **IV. RECOMMENDATIONS**

- 128 1. Reject the attached counteroffer submitted on behalf of Bordonaro for Congress and
129 Betty Presley, as treasurer.
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131 2. Take no further action against Bordonaro for Congress and Betty Presley, as treasurer.
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133 3. Take no further action against Tom J. Bordonaro Jr.
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135 4. Approve the appropriate letters.
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137 5. Close the file.
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12/10/02
Date

Cynthia E. Tompkins
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Attachment: August 1, 2000 signed copy of counteroffer by Respondents' counsel.