

APR 24 2009

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6104
DATE COMPLAINT FILED: 10/23/08
DATE OF NOTIFICATION: 10/29/08
LAST RESPONSE RECEIVED: 12/15/08
DATE ACTIVATED: 01/27/09

EXPIRATION OF SOL: May 3, 2012 –
September 30, 2012

COMPLAINANT:

National Republican Congressional
Committee

RESPONDENTS:

Montagano for Congress Inc. and
Joseph A. Montagano, in his official
capacity as treasurer
Michael Montagano
Joseph Montagano

RELEVANT STATUTES:

2 U.S.C. § 431(26)
2 U.S.C. § 434(b)
2 U.S.C. § 439(a)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
11 C.F.R. § 100.33
11 C.F.R. § 110.10
11 C.F.R. § 113.1(g)

INTERNAL REPORTS CHECKED:

Disclosure Reports
Statement of Candidacy

FEDERAL AGENCIES CHECKED:

None

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I. INTRODUCTION

The Complaint alleges that Joseph Montagano ("Joseph"), made excessive contributions to his son, Michael Montagano ("Montagano"), a candidate for the U.S. House of Representatives in 2008, in connection with the purchase of a house for Montagano and the payment of property taxes during his election campaign. The Complaint also questions Montagano's purchase or lease of a Hummer H3 vehicle, and the source of \$25,000 that Montagano contributed to his campaign and \$8,500 that he loaned to his campaign during 2007, despite not having a job or substantial personal assets during his candidacy. In addition, the Complaint alleges that Montagano's authorized committee, Montagano for Congress Inc. and Joseph Montagano in his official capacity as treasurer ("the Committee"), failed to report these excessive contributions. The Complaint alleges that during the campaign, Joseph made the payments for Montagano's personal automobile lease, for the house in which Montagano and his wife lived, and for the property taxes for Montagano's house, and that Joseph had no history of making such payments prior to, and irrespective of, Montagano's candidacy.

The joint response filed on behalf of Montagano, the Committee, and Joseph, in his official capacity as treasurer, denies that Joseph provided funds for Montagano's personal expenses and so concludes that Joseph did not contribute more than the maximum allowable to Montagano and the Committee. After evaluating the available information, we recommend that the Commission dismiss these allegations as a matter of prosecutorial discretion, caution Respondents, and close the file because it appears that, except for \$3,712.46, Joseph was merely acting as a surety for his son and did not provide funds for Montagano's personal expenses.

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IL. FACTUAL AND LEGAL ANALYSIS

A. FACTUAL BACKGROUND

Michael Montagano was the 2008 Democratic nominee for Congress in Indiana's 3rd Congressional District. According to the available information, Montagano graduated from law school in 2005 or 2006, joined a Lafayette, Indiana law firm during 2006, and took a leave of absence from his job to run for Congress at age 27 against the 3rd District of Indiana incumbent Mark Souder. Montagano filed his Statement of Candidacy with the Commission on May 3, 2007. He also filed a Financial Disclosure Statement with the Clerk of the U.S. House of Representatives indicating that during 2006, he had earned \$32,364.53 from the law firm, and that through April 30, 2007, he had earned \$22,666.66 from the firm (later amended to \$28,666.66 earned prior to his taking a leave of absence). Montagano also disclosed having sold an asset during 2006 identified as Dennison Utility A valued at between \$50,000 and \$100,000, and having a Chase bank account valued at between \$15,000 - \$50,000. See Financial Disclosure Statement, Complaint Exhibit B. Montagano made two contributions to the Committee, giving \$1,500 on May 1, 2007, and \$23,500 on June 26, 2007, and made two loans, \$6,500 to the Committee on June 29, 2007, and an additional \$2,000 on September 30, 2007, according to the Committee's disclosure reports. The Committee also disclosed receiving from Joseph \$2,300 for the 2008 primary and \$2,300 for the 2008 general election.

According to Montagano's response, during 2007, he and his wife looked for a home to purchase in Indiana's 3rd District. They found a house that suited them but which was owned by a trust that also owned the two adjoining lots. The trust owners required that all three properties be sold together. Joseph and Montagano decided to buy the three lots and the house jointly and

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1 then convey the two unimproved lots solely to Joseph. The owners of the trust wanted to move
2 quickly to sell the property, and Joseph and Montagano could not obtain a mortgage on the group
3 of properties by the time that the trust owners wanted to close the sale at the agreed-upon price of
4 \$326,000. Therefore, Joseph, using his own assets as collateral, obtained a \$226,000 bridge loan
5 on July 12, 2007, and put up \$100,000 of his personal funds to purchase the three properties
6 jointly with Montagano on July 13, 2007. See Response at 2 and Exhibit B. Montagano and
7 Joseph then conveyed the two unimproved lots solely to Joseph on July 13, 2007. See Response
8 Exhibit C.

9 By checks dated August 29 and September 20, 2007, each in the amount of \$1,500,
10 Montagano and his wife paid Joseph for their use of the house. See Response at 2 and Exhibit D.
11 In October 2007, Joseph and Montagano obtained a joint \$226,000 mortgage on the house, the
12 proceeds of which were immediately used to pay off the bridge loan. See Response at 2 and
13 Exhibits E & F. According to the Response, beginning in December 2007, Montagano and his
14 wife have made the full monthly mortgage payments in the amount of \$1,465.83 directly to Lake
15 City Bank, the mortgage holder. See Response at 2 and Exhibit G (copies of checks and other
16 financial instruments).

17 In response to the allegation regarding Montagano's vehicle, the Response states that
18 prior to Montagano's candidacy, on December 28, 2006, Montagano co-leased a Hummer H3
19 vehicle with Joseph, and that Montagano has been making the lease payments. See Response
20 at 3.

21 Montagano's response acknowledges that Joseph provided security for Montagano's
22 personal financial commitments prior to and during the time that he was a candidate for
23 Congress by jointly purchasing the real estate and co-leasing his Hummer vehicle. Response

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1 at 3. Montagano asserts, however, that at no time during his candidacy did Joseph actually pay
2 for Montagano's personal expenses or make any excessive contribution to Montagano. *Id.* At
3 all times, Montagano asserts, he himself made timely payments for all of his personal expenses,
4 including the leased vehicle and the home, using his savings and his wife's income. *Id.* at 3.
5 The response, however, did not address the allegation that Joseph paid \$712.46 in property taxes
6 for Montagano's house on November 13, 2007. *See* Complaint Exhibit C. In addition, although
7 the response included copies of two \$1,500 checks covering Montagano and his wife's use of the
8 house that appear to cover a total of two months,¹ the available information suggests that
9 Montagano lived in the house for four months before making the first mortgage payment in
10 December 2007.² Accordingly, they may not have paid for use of the house for two months
11 during 2007. Finally, the response does not address the source of Montagano's contributions and
12 loans to his campaign.

13 B. LEGAL ANALYSIS

14 Under the Federal Election Campaign Act of 1971, as amended, ("the Act"), individual
15 contributions to a candidate for Federal office were limited to \$2,300 per election during the
16 2008 cycle. *See* 2 U.S.C. § 441a(a)(1)(A). The Committee has disclosed that Joseph contributed
17 \$2,300, the maximum allowable for both the primary and the general election, and therefore any
18 other contribution by Joseph to the Committee would be excessive. Generally, when a person
19 other than the candidate pays for a candidate's personal expenses that would exist irrespective of
20 the candidate's campaign, such as a home mortgage or rent payment and non-campaign vehicle

¹ The \$1,500 amount of the payments by check is similar to the later monthly mortgage payment of \$1,465.83.

² Although the available information does not identify when Montagano moved in to the house, he filed public documents in mid-July 2007 listing the house address as his personal address. *See* Complaint Exhibit A (Montagano's amended Statement of Candidacy dated July 11, 2007) and Exhibit D (Montagano's Indiana Voter Registration Application dated July 14, 2007).

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1 expenses, that person makes a contribution to the candidate. See 11 C.F.R. § 113.1(g)(6); 2
2 U.S.C. § 439a(b)(2)(A). Candidates and their authorized committees are prohibited from
3 knowingly accepting contributions in excess of the limits of Section 441a(a). 2 U.S.C. § 441a(f).

4 Congressional candidates may make unlimited campaign expenditures from personal
5 funds.³ See 11 C.F.R. § 110.10. Montagano contributed \$25,000 and loaned \$8,500 to his
6 campaign. If the funds for Montagano's contributions and loans to his campaign were not
7 Montagano's personal funds, but were instead Joseph's funds, or if during Montagano's
8 candidacy Joseph began paying for Montagano's living expenses, Joseph may have made an
9 excessive contribution for which Montagano and the Committee may be liable for knowingly
10 accepting. See 2 U.S.C. §§ 441a(a) and 441a(f).

11 The available information suggests that rather than paying for Montagano's personal
12 expenses that existed irrespective of his candidacy, and therefore making excessive
13 contributions, Joseph largely served as a surety, both as a co-purchaser of the group of properties
14 that contained Montagano's house and as a co-lessor on the automobile lease. Montagano's
15 response provides copies of checks in support of his representation that he has made monthly
16 payments against the full cost of the house, first to Joseph while Joseph held the bridge loan, and
17 to Lake City Bank once the mortgage was obtained. See Response at 2 and Exhibits D and G.
18 Montagano's response also indicates that Joseph's role in the lease of the Hummer H3 vehicle
19 was similar to Joseph's role in the purchase of the house. See Response at 3. With the exception
20 of the property tax payments of \$712.46, as to which Montagano provided no response, and the

³ "Personal funds" include all assets in which a candidate has legal title or an equitable interest, as well as salary and other earned income from bona fide employment; dividends and proceeds from the sale of the candidate's stocks or other investments; bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy of which the candidate is the beneficiary; gifts of a personal nature which had been customarily received prior to candidacy; and proceeds from lotteries and similar legal games of chance. See 2 U.S.C. § 431(26); 11 C.F.R. § 100.33.

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possible two months of unpaid use of the house,⁴ it appears that Joseph's assistance to Montagano with his personal financial dealings during his candidacy has been in the form of intangible support as a surety rather than as making payments to or for Montagano. See 2 U.S.C. §§ 439a(b)(1) and 441a(a)(1)(A).

In addition, it appears from Montagano's Financial Disclosure Statement filed when he declared his candidacy that he sold an asset (Dennison Utility A) during 2006 – prior to his candidacy – valued at between \$50,000 and \$100,000. He also reported a Chase bank account valued at between \$15,000 and \$50,000 at the time of his initial filing in May 2007, and reported that the value of this account had fallen to a range between \$1,000 to \$15,000 during 2008. See Financial Disclosure Statement, Complaint Exhibit B. The sale of this asset prior to the declaration of Montagano's candidacy, coupled with the reduction in value of the Chase bank account, could account for the funds Montagano contributed and loaned to his campaign, and the Complaint offers no additional information to suggest otherwise. In sum, the response, including the documents provided and Montagano's Financial Disclosure Statements, appears to adequately refute the bulk of the allegations in the Complaint. However, the \$712.46 that Joseph appears to have paid in property taxes on Montagano's house during his candidacy, along with Montagano's possible unpaid use of the house for two months during 2007, may constitute an excessive contribution because Joseph contributed the maximum allowable amount in connection with Montagano's primary and general election.

Considering the modest amount of the possible violation, however, we recommend that the Commission dismiss as a matter of prosecutorial discretion the allegations that Joseph

⁴ Joseph and Montagano replaced the bridge loan with the mortgage in mid-October, and the first payment on the mortgage was due on December 1, 2007. However, Montagano lived in the house during October and November 2007, so it would appear that he may have owed Joseph \$1,500 for use of the house for each of those months, consistent with the two earlier \$1,500 payments, even if the mortgage payments were not yet due.

Montagano made, and Michael Montagano accepted, excessive in-kind contributions, and Montagano for Congress Inc. and Joseph Montagano, in his official capacity as treasurer, accepted and failed to report these excessive contributions. *See Statement of Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement Process*, 72 Fed. Reg. 12545 (March 16, 2007); *see also Heckler v. Chaney*, 470 U.S. 821 (1985). We further recommend that the Commission caution all Respondents to make sure that their actions comply with the law. Lastly, we recommend that the Commission close the file.

III. RECOMMENDATIONS

1. Dismiss the allegations that Joseph Montagano, Michael Montagano, Michael Montagano for Congress Inc. and Joseph Montagano, in his official capacity as treasurer, violated the Act in connection with the alleged excessive contributions and reporting violations in this matter.
2. Approve the attached Factual and Legal Analyses.
3. Approve the appropriate letters cautioning Respondents.
4. Close the file.

Thomasenia P. Duncan
General Counsel

4/24/09

Date

BY:



Stephen Gura
Deputy Associate General Counsel for
Enforcement



Mark Allen
Assistant General Counsel

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Audra Hale-Maddox
Attorney

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