

HOLTZMAN VOGEL JOSEFIAK PLLC

Attorneys at Law

45 North Hill Drive
Suite 100
Warrenton, VA 20186
p/540-341-8808
f/540-341-8809

December 20, 2012

Anthony Herman
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6675 (Vernon Parker For Congress)

Dear Mr. Herman,

By and through the undersigned counsel, this Response to the Complaint designated as Matter Under Review 6675 is submitted on behalf of Vernon Parker for Congress, and Kelly Lawler in her capacity as Treasurer of Vernon Parker for Congress. For the reasons set forth below, the Commission should find no reason to believe that any respondent violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Commission should dismiss the Complaint.

The Complaint contends that the Respondent did not provide the required disclaimers in a so-called "push poll." In MUR 5835 (DCCC), the Commission lacked four votes to find that survey, research, and polling telephone calls require a "paid for by" disclaimer under the Act and Commission regulations. The Respondent was justified in relying on the result in MUR 5835 in which the Commission took no action against the Democratic Congressional Campaign Committee in a substantially similar matter.

Alternatively, this matter should be dismissed on the basis of the very small amount of money spent on the telephone calls in question (\$500) and the nature of the alleged violation.

I. Neither The Act Nor Commission Regulations Require Disclaimers In Survey, Research, or Polling Telephone Calls

The Act does not require a disclaimer for survey, research, or polling telephone calls. See Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 4 ("The plain language of [§ 441d(a)] does not impose disclaimer requirements

13044350399

upon polls, survey research, or anything of the sort.”).¹ Under Section 441d(a), a disclaimer is required:

whenever a political committee makes a disbursement for the purpose of financing any communication [including a solicitation of contributions] through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, ... makes a disbursement for an electioneering communication.

Section 441d(a) uses the term “communication” rather than “public communication.” With respect to the disclaimer provisions, the Commission subsequently conflated the two terms. Section 441d, though, “does not include any reference to ‘telephone bank,’ let alone the separate concept of polls.” Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 5.

Commission regulations at 11 C.F.R. § 110.11 also do not mention survey, research, polling, or “push poll” telephone calls. Rather, under the Commission’s regulations, disclaimers are required on “all public communications, as defined at 11 CFR 100.26, made by a political committee,” as well as on certain political committee emails and websites. “Public communication” is defined to include a:

communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.

11 C.F.R. § 100.26.

By regulation, the Commission requires disclaimers for “telephone banks to the general public.” (This term is defined at 11 C.F.R. § 100.28.) A survey/research/polling call, however, is not a “telephone bank to the general public,” and it is not a form of “general public political advertising.” See Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 7 (“there is a clear distinction between telephone banks, which tend to convey information and thus can arguably be viewed as a form of general public political

¹ The other three Commissioners did not issue a Statement of Reasons, but their views are presumably reflected in the General Counsel’s Reports in MUR 6675, as well as the Probable Cause Hearing Transcript.

advertising ... and polls, which by their very nature do not, and thus cannot be viewed as a form of 'general public political advertising'); *see also* Statement of Reasons of Commission von Spakovsky in MUR 5587R (Vitter/McCree, Inc.) at 4 ("the disclaimer requirements apply only to 'telephone banks to the general public' that have the character of, and can reasonably be considered to be, 'general public political advertising'").

II. Polls Conducted Over The Telephone Are Not "Telephone Banks"

Telephone banks and polls are two very different concepts. The purpose of a "telephone bank" is inform the recipient of a certain policy or action, and these calls are most often a form of political advertising. Telephone banks often urge the recipient to take a position on a policy and to urge the recipient to take action concerning the policy.²

By contrast, survey, research, and polling calls collect information and are used by political committees to inform a campaign about its public, test potential messages and gauge reactions, and develop campaign strategies.³

By its plain language, the Act does not require disclaimers for survey, research, and polling telephone calls. The broader language of the regulation – requiring disclaimers for "telephone banks" – also does not capture survey, research, and polling calls, as these types of telephone calls are not forms of "general public political advertising."

III. Survey, Research, and Polling Calls Versus So-Called "Push Polls"

As noted in the Statement of Reasons in MUR 5835, "the term 'push poll' is not defined in the Act, [t]herefore, usage of the term is of no legal significance here." The Complaint alleges: "One of Mr. Parker's campaign consultants, the Summit Group, began conducting a so called *push poll* on October 15, 2012 to voters in Arizona's Congressional District 9" (emphasis added).

"Push polls" operate "under the guise of legitimate survey research to spread lies, rumors, and innuendo about candidates. Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 10 *quoting* Larry Sabato & Glenn R. Simpson, *Dirty Little Secrets* 245 (1996). Legitimate public opinion surveys may, however, still

²Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 7 (quoting "Legal Definition of Phone Bank", <http://definitions.uslegal.com/p/phone-bank/>).

³ *Id.* citing Michael W. Traugott and Paul Lavrakas, *The Voter's Guide To Election Polls* 1 (2d ed. 1999); *see also* Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 7 (quoting Alan Quinlan's definition of a poll).

13044350402

contain negative information about a candidate. *Id.* at 12. As Neil Newhouse reported, “testing negatives about candidates on a public opinion poll doesn’t make the instrument a push poll.” *Id.* at 12 *quoting* Neil Newhouse, *Think You’ve Been ‘Push Polled’? Maybe Not*, Politico (Nov. 19, 2007). Finally, Mark Blumenthal explained, “campaign pollsters routinely conduct surveys that test campaign messages and try to simulate the dialogue of a real campaign. That message testing can involve negative information.” *Id.* *quoting* Mark Blumenthal, *‘Pushing’ The Ethics of Message Testing* (Nov. 16, 2007).

Three Commissioners therefore concluded the fact that the DCCC telephone call “provides voters with seemingly negative information about Congressman Boswell’s opponent Stan Anderson did not transform the calls into ‘push polls’ or ‘advocacy calls.’ There is no reason to think that the DCCC’s polls were anything other than a fundamental data collection tool to inform legitimate campaign strategies” Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn in MUR 5835 at 12.

IV. The Poll At Issue Here Was Used To Inform The Campaign And Shape The Campaign’s Message

The poll at issue in this matter was a legitimate polling call designed to assist the campaign in properly calibrating its message in the final weeks before the election; it was not “political advertising.” The poll was conducted on October 15, three weeks before the election, to test a potential message regarding opponent Kyrsten Sinema. The campaign placed 6,596 telephone calls to likely voters; 596 individuals responded to the first question and 480 responded to the second question. (The other 6,000 calls presumably went unanswered or the call recipient simply hung up.) The total cost of the survey was \$500.

The first question asked for whom the call recipient intended to vote and instructed the call recipient to press 1 for Republican Vernon Parker; press 2 for Democrat Kyrsten Sinema; or press 3 if undecided. Then, the second question tested a potential campaign message regarding Ms. Sinema. The call recipient was told, truthfully, that Ms. Sinema once served as a criminal defense attorney and that she had represented murderers. The pollster then asked, “Do you think Sinema should release her client list?” The call recipient was told to press 1 for ‘yes’ and 2 for ‘no.’

The results of this question proved helpful to the Parker campaign in determining that Ms. Sinema’s prior professional work was of public interest, and also that the public favored the release of her client list. At no time did the poll advocate the election or defeat of Ms. Sinema, nor did the telephone call advocate the call recipient take any particular action.

13044350403

The poll results indicated that 44.6% said they would vote for Mr. Parker, while 41.7% said they were voting for Ms. Sinema. However, 63% of respondents said that Ms. Sinema should release her client list. See Complaint, Exhibit 1 at 1. With this information, the Parker campaign saw that the "client list" issue was a viable issue, and that even some of those who said they would vote for Ms. Sinema were interested in the public release of her client list. During the next couple of weeks, the Parker campaign used the results of this poll as part of its messaging. This messaging successfully garnered the support of the chief prosecutor for Maricopa County who joined in Mr. Parker's call for Ms. Sinema to release her client list. The National Organization of Victims of Juvenile Lifers also endorsed Vernon Parker because of this issue. This poll and its results were therefore quite important in shaping Mr. Parker's messaging in the election.

V. **Alternatively, The Complaint Should Be Dismissed As A Low Rated Matter That Does Not Warrant Additional Commission Resources**

As noted above, the total cost of the telephone calls in question was \$500. These calls were placed to 6,596 phone numbers, of which 596 listened long enough to respond to the first question, while only 480 responded to a second question. In addition, Mr. Parker lost the election in which these calls were placed. Accordingly, given the total cost involved, the nature of the alleged violation, and the fact that Mr. Parker did not prevail in the election, the matter warrants dismissal pursuant to *Heckler v. Chaney*.

Conclusion

For the foregoing reasons, the Commission should find no reason to believe a violation occurred and dismiss the matter, or alternatively, dismiss the matter pursuant to its authority under *Heckler v. Chaney*.

Sincerely,



Jason Torchinsky

Michael Bayes

Shawn Sheehy

Counsel to Vernon Parker For
Congress



FEDERAL ELECTION COMMISSION

999 E Street, NW

Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL

Please use one form for each Respondent/Entity/Treasurer

FAX (202) 219-3923

MUR # 6675

NAME OF COUNSEL: Jason Torchinsky; Michael Bayes; Shawn Sheehy

FIRM: Holtzman Vogel Josefiak PLLC

ADDRESS: 45 North Hill Drive, Suite 100

Warrenton, VA 20186

TELEPHONE- OFFICE (540) 341-8808

FAX (540) 341-8809

The above-named individual and/or firm 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.

11/7/12

Date

Kelly Lawler

Respondent/Agent Signature

Treasurer

Title (Treasurer/Candidate/Owner)

NAMED RESPONDENT: Vernon Parker for Congress; Kelly Lawler, Treasurer

MAILING ADDRESS: 5635 E Lincoln Drive #18
(Please Print)

Paradise Valley, AZ 85253

TELEPHONE- HOME ()

BUSINESS ()

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation

Rev. 2006

13044350404