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CELA

FIRST GENERAL COUNSEL'S REPORT

MUR 6690

DATE COMPLAINT FILED: November 9, 2012

DATE SUPPLEMENTAL COMPLAINT

FILED: February 25, 2013

DATE ACTIVATED: April 10, 2013

LAST RESPONSE RECEIVED: May 17, 2013

ELECTION CYCLE: 2012

EXPIRATION OF SOL: November 4, 2017 (earliest)

November 6, 2017 (latest)

COMPLAINANT:

Jim Gibbons, Campaign Manager for Dan Bongino for
U.S. Senate

RESPONDENT:

Sobhani for Maryland and William Caldwell in his
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441d

11 C.F.R. § 100.26

11 C.F.R. § 100.28

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The complaint alleges that Sobhani for Maryland and William Caldwell in his official capacity as treasurer ("Committee") made robo calls that lacked a required disclaimer. For the reasons discussed below, we recommend that the Commission find reason to believe that the Committee violated 2 U.S.C. § 441d by failing to include a proper disclaimer in a phone bank and authorize an investigation to ascertain the cost and number of robo calls made without a disclaimer.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

Rob Sobhani was an Independent candidate for U.S. Senate in Maryland in the 2012 general election held on November 6, 2012, and the Committee was his authorized campaign committee. The complaint alleges that on November 4, 2012, the Committee placed robo calls to Maryland residents without a disclaimer, in violation of the Commission's regulations. Compl. at 1 (Nov. 9, 2012).¹ The complaint states that the robo call contained the following message:

Hi, this is Mary. I'm a lifelong conservative Republican here in Maryland. I just learned something shocking. The Republican nominee for U.S. Senate doesn't support making English the official language. But Independent candidate Rob Sobhani supports making English the official language. You know, we conservatives can finally beat Ben Cardin if we vote for the real conservative in this race, Rob Sobhani. So don't waste your vote. Let's elect a real conservative in this race. Rob Sobhani for U.S. Senate. Thanks for listening.

Id.

Complainant, the campaign manager for Sobhani's opponent, Dan Bongino, asserts that the Bongino campaign received a recording of the robo call from a supporter, who purportedly recorded the call on an answering machine.² Email from Jim Gibbons, Campaign Manager, Dan Bongino for U.S. Senate to Frankie Hampton, CELA, FEC (Nov. 8, 2012 05:03 PM EST).

¹ The complaint was dated November 5, 2012. Complainant also sent an email dated November 8, 2012. OGC received the complaint on November 9, 2012.

² In his November 8, 2012 email, *see supra*, note 1, the Complainant addresses a reported allegation that its recording of the robo call was doctored to exclude the disclaimer. Two newspapers reported on the Committee making robocalls without a disclaimer. According to a press account, a spokesperson for Sobhani for Maryland acknowledged that the campaign had a robo call about Sobhani's support of the use of the English language but stated that "perhaps Bongino campaign's video cut off the end of the call." *See* Pamela Wood, *Bongino Accuses Sobhani of Robo Call Violation*, Capital Gazette, Nov. 5, 2012; http://www.capitalgazette.com/news/election/bongino-accuses-sobhani-of-robocall-violation/article_47a8409c-9291-5b2c-8ca9-0782087ecbc5.html. Additionally, the article noted that the campaign spokesperson emailed the newspaper an audio file from the campaign's contractor in California that included the disclaimer, but he could not provide the name of the contractor who arranged the robo call. *Id.*

1 Complainant also asserts that he "received further complaints that evening from other Republicans
2 across the state mentioning that the call failed to leave a disclaimer. Unfortunately, they either
3 heard it live or deleted the message on the machine." *Id.* Complainant also provided a YouTube
4 link to the robo call, but it did not work. *Id.*

5 Subsequently, on February 25, 2013, the complainant supplemented the complaint with an
6 email enclosing an audio file of the robo call that lacked a disclaimer; that call matched the
7 transcript provided in the complaint. Email from Jim Gibbons, Campaign Manager, Dan Bongino
8 for U.S. Senate to Jeff Jordan, Supervisory Attorney, FEC (Feb. 25, 2013 02:17 PM EST)
9 ("Supplemental Complaint"). Respondents were notified of the Supplemental Complaint on
10 February 28, 2013.

11 In his response to the initial complaint, Rob Sobhani requested that the matter be dismissed
12 because the robo call in question included a disclaimer. He provided a copy of the message
13 which included the following statement: "This message is approved and paid for by Sobhani for
14 Maryland."³ Email from Rob Sobhani to Frankie Hampton, CELA FEC (Dec. 5, 2012 10:54 AM
15 EST) attaching recording and letter to Jeff Jordan dated Dec. 5, 2012 ("Sobhani Response"). On
16 April 9, 2013, Rob Sobhani sent an email in response to the notification of the Supplemental
17 Complaint stating that his answer to the initial complaint "still stands," because he provided an

³ Sobhani also argued that the complaint should be dismissed because the Committee did not receive the complaint within 5 days of the Commission's receipt of the complaint, as the complaint was stamped received by FEC on November 5, 2012, and the Committee received the complaint 11 days later. While the Commission's mail room stamped the complaint on Monday, November 5, 2012, OGC received the complaint on Friday, November 9, 2012, and notified respondents on Friday, November 16, 2012, which is within five days of OGC's receipt of the complaint. See 11 C.F.R. § 111.5(a) (upon receipt of the complaint, the General Counsel shall review the complaint for substantial compliance, and shall within five days after receipt, notify each respondent of the complaint, advise them of the Commission compliance procedures, and enclose a copy of the complaint). The Committee's treasurer, William Caldwell, also responded to the complaint. He stated merely that he understood that the campaign had sent a letter to the Commission providing a recording of the disclaimer and requesting dismissal of the matter. Letter from William Caldwell, Treasurer of Sobhani for Maryland, to Frankie Hampton, CELA, FEC (December 7, 2012) ("Caldwell Response").

1 audio of the call that included a disclaimer. He also stated, however, that "[i]f indeed a disclaimer
2 was not included by the vendor, it was corrected. It is my understanding that if a robo call without
3 a disclaimer was recorded by supporters of Mr. Bongino, then it was an isolated event based on a
4 possible mistake by the vendor." Email from Rob Sobhani to Jeff Jordan, CELA, FEC (Apr. 9,
5 2013 12:55 PM EST). Because it was unclear whether Sobhani had information that the vendor he
6 referenced did, in fact, omit the disclaimer on any robo calls distributed on behalf of his campaign,
7 we invited him to voluntarily clarify this, and if so, when and how "it was corrected," along with
8 any other relevant information about the circumstances he wished to provide. Letter from Susan
9 L. Lebeaux, Asst. Gen. Couns., FEC, to Rob Sobhani (May 10, 2013).

10 Sobhani responded to our clarification request by providing a message he received from
11 the robo call vendor, 2 Cent Autocalls. The message states "what happened was that we tried to
12 get you to play the correct message but your campaign manager insisted it wasn't necessary.
13 Someone from your staff later called to correct the mistake and so the calls were stopped and the
14 correct message with disclaimer was played to the remainder of the list." Email from Rob
15 Sobhani to Frankie Hampton, CELA, FEC (May 17, 2013 04:25 PM EST). In its message to
16 Sobhani, the vendor did not indicate the dates that it communicated with the campaign manager or
17 other campaign staff regarding the robo calls at issue, and Sobhani did not indicate to us what date
18 he received the vendor's message. Sobhani provided contact information for the vendor. *Id.*

19 The Committee's disclosure reports contain no references to 2 Cent Autocalls. 2 Cent
20 Autocalls, however, appears to be associated with Constituent Calling, a vendor that is listed on

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1 the Committee's disclosure reports.⁴ The Committee's disclosure reports list disbursements to
2 Constituent Calling in the amount of \$14,082 on October 29, 2012, \$5,559 on November 5, 2012,
3 and \$2,000 on November 6, 2012, with the purpose of the disbursements described as "phone
4 banks." Sobhani for Maryland 2012 Post-General Report at 22, 53 and 56 (December 5, 2012).

5 **B. Legal Analysis**

6 The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that when a
7 political committee "makes a disbursement for the purpose of financing any communication
8 through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing or
9 any other type of general public political advertising," it must place a disclaimer in the
10 communication identifying the authorized political committee that paid for the communication.
11 2 U.S.C. § 441d(a).

12 The Commission's regulations further provide that disclaimers are required in "[a]ll public
13 communications, as defined in 11 C.F.R. § 100.26, made by a political committee." 11 C.F.R.
14 § 110.11(a)(1). A "public communication" includes "communication by means of any . . .
15 telephone bank to the general public, or any other form of general public political advertising."
16 See 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. "'Telephone bank' means more than 500 telephone
17 calls of an identical or substantially similar nature were made within any 30-day period." 2 U.S.C.
18 § 431(24); 11 C.F.R. § 100.28. Telephone calls are "substantially similar" when they "include
19 substantially the same template or language, but vary in non-material respects such as
20 communications customized by the recipient's name, occupation, or geographic location."
21 11 C.F.R. § 100.28.

⁴ The website for 2 Cent Autocalls provides a Boston, Massachusetts address and states: "Copyright
Constituent Calling, all rights reserved 2011." In the Committee's disclosure report, the address for Constituent
Calling is listed as Chestnut Hill, Massachusetts.

1 There is reason to believe that the Committee violated the Act by making disbursements
2 for a phone bank without including the necessary disclaimer. Although we do not know how
3 many robo calls containing the message set forth above were made, it is likely there were more
4 than 500 of them within 30 days because Sobhani was conducting a statewide U.S. Senate
5 campaign. The complaint alleges that a robo call without a disclaimer was made on November 4,
6 2012, two days before the election, and the Committee's disbursements to Constituent Calling
7 totaled more than \$21,000 between October 29, 2012, and November 6, 2012.⁵ Therefore, it
8 appears that the robo calls were "public communications" made by the Committee and thus
9 required a disclaimer. *See* 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. Further, as the Committee
10 acknowledged, it is responsible for the robo calls here, and it has provided information indicating
11 that a portion of those calls did not include a disclaimer. *See* Email from Rob Sobhani to Frankie
12 Hampton, CELA, FEC (May 17, 2013 04:25 PM EST). Accordingly, we recommend that the
13 Commission find reason to believe that Sobhani for Maryland and William Caldwell in his official
14 capacity as treasurer violated 2 U.S.C. § 441d by failing to include a disclaimer in robo calls
15 authorized and paid for by the Committee.

16 III. INVESTIGATION

17 We also recommend that the Commission authorize a limited investigation to determine
18 the amount in violation, *i.e.*, the number of calls that lacked a disclaimer, and to confirm the

⁵ While we do not know what portion of the disbursements to Constituent Calling were attributable to the robo calls at issue here, it is reasonable to infer from the overall amount disbursed to Constituent Calling that more than 500 calls were made. 2 CentAutocalls' website has a Frequently Asked Questions ("FAQ") page, which contains the question, "Is it really 2 cents, or are there any hidden costs or expenses?" The website's answer to this question is "[t]here are no hardware or software costs, no long distance charges, no service or installation fees and no phone lines required. The 2 cent per-call rate is the only expense you will incur for using 2 cent auto calls." *See* <http://www.2centautocalls.com/faq.html>. *See also* Second Gen. Counsel's Rept. at 2, MUR 6137 (Informed Catholic Citizens (investigation revealed low costs for robo calls in Colorado for the 2008 presidential election); Second General Counsel's Rept. at 2, MUR 5819 (U.S. Chamber of Commerce) (Chamber of Commerce spent \$2,474 for 54,979 calls regarding the 2006 U.S. Senate race in Hawaii).

1 overall number of the calls made. *See* First Gen. Counsel's Report at 9 and Certification at 2
2 (January 10, 2013), MUR 6560 (Victory Ohio Super PAC) (the Commission authorized an
3 investigation to determine the identity of individuals responsible for the robocalls lacking
4 disclaimers and to ascertain the cost, timing and number of such calls). *See also* First Gen.
5 Counsel's Rept. at 14 and Certification at 2, (January 24, 2011), MUR 6137 (Informed Catholic
6 Citizens) (the Commission authorized an investigation to ascertain the amount of money spent on
7 the calls, the timing of the calls and the number of calls). Although we will attempt to conduct the
8 investigation informally, formal discovery may be necessary if the vendor requests a subpoena.
9 Therefore, we recommend that the Commission authorize the use of compulsory process,
10 including subpoenas for answers to written questions, production of documents, and depositions,
11 as necessary.

12 **IV. RECOMMENDATIONS**


- 13 1. Find reason to believe Sobhani for Maryland and William Caldwell in his official
14 capacity as treasurer violated 2 U.S.C. § 441d.
15
16 2. Authorize the use of compulsory process.
17
18 3. Approve the attached Factual and Legal Analysis.
19
20 4. Approve the appropriate letter.

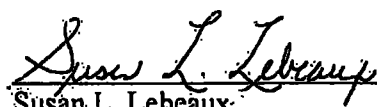
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22 Anthony Herman
23 General Counsel

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27 Date

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34 BY:


Kathleen Guith
Deputy Associate General Counsel for
Enforcement


Susan L. Lebeaux
Assistant General Counsel

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Delbert K. Rigsby
Delbert K. Rigsby
Attorney

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