



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

AUG 6 2010

Jason Adrian Bezis
3661-B Mosswood Drive
LaFayette, CA 94549

RE: MUR 6207

Dear Mr. Bezis:

On July 14 and July 27, 2010, the Federal Election Commission reviewed the allegations in your complaint dated July 23, 2009 and its supplement dated August 10, 2009.

The Commission dismissed the allegations that Mark DeSaulnier violated 2 U.S.C. § 441i(e)(1)(B) and that Mark DeSaulnier and Mark De Saulnier for Senate 2012 violated 2 U.S.C. § 441i(f)(1) on the basis of prosecutorial discretion. The Commission also found no reason to believe that DeSaulnier for Congress, Rita Copeland, in her official capacity as treasurer and Mark DeSaulnier for Senate 2012 violated 2 U.S.C. §§ 441a or 441b, and that Mark DeSaulnier for Senate 2012 violated 2 U.S.C. § 441d. Additionally, the Commission found no reason to believe that Shara Perkins, campaign manager for DeSaulnier for Congress, violated any provision of the Act or regulations and closed the file as it pertained to her. Accordingly, on July 27, 2010, the Commission closed the file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's no reason to believe findings, is enclosed for your information. A Statement of Reasons further explaining the basis for the Commission's dismissal of other allegations will follow.

10044280224

Jason Adrian Bezis
MUR 6207
Page 2

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Shonkwiler", with a long horizontal flourish extending to the right.

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

10044280225

1
2 **FEDERAL ELECTION COMMISSION**

3
4 **FACTUAL AND LEGAL ANALYSIS**

5
6 **MUR 6207**

7
8 **RESPONDENTS:** Mark DeSaulnier, DeSaulnier for Congress
9 and Rita Copeland, in her official capacity as
10 Treasurer, Mark DeSaulnier for Senate 2012 and
11 Shara Perkins, Campaign Manager for DeSaulnier
12 for Congress
13

14
15 **I. INTRODUCTION**

16
17 This matter was generated by complaints filed with the Federal Election
18 Commission by Jason A. Bezis, Esq. *See* 2 U.S.C. § 437g(a)(1). This matter involves
19 allegations that California State Senator and former Congressional candidate Mark
20 DeSaulnier ("DeSaulnier"), Mark DeSaulnier for Senate 2012 ("State Committee"),
21 DeSaulnier for Congress and Rita Copeland, in her official capacity as treasurer ("Federal
22 Committee"), and Shara Perkins, campaign manager for the Federal Committee, (also
23 collectively referred to as "Respondents") violated the Federal Election Campaign Act of
24 1971, as amended ("Act") in connection with two mass mailings paid for by the State
25 Committee.

26 The complaint, as amended, alleges that the Respondents: (1) violated 2 U.S.C.
27 §§ 441i(e)(1) and 441i(f)(1) by using non-federal funds for "federal election activity";
28 (2) violated 2 U.S.C. §§ 441a(1)(A) and 441b by making excessive and prohibited
29 contributions via unreported coordinated communications; and (3) violated 2 U.S.C.
30 § 441d(c)(2) by failing to comply with the Act's disclaimer requirements.

1 Respondents assert that the State Committee's spending by a State candidate who
2 also happens to be a Federal candidate is explicitly exempted from the Act's restrictions
3 pursuant to 2 U.S.C. § 441i(e)(2) and 11 C.F.R. § 300.63. *See Responses.* Respondents
4 also assert that the mailers are not coordinated in-kind contributions, because neither the
5 "payment prong" nor the "conduct prong" of the Commission's coordination regulations
6 apply to communications made by a Federal candidate/officeholder, in his capacity as a
7 State candidate. 11 C.F.R. § 109.21(b). *Id.* Finally, Respondents maintain that the
8 mailings were State campaign materials and did not require Federal disclaimers. *Id.*

9 With respect to the alleged violations of sections 441i(e)(1)(B) and 441i(f)(1), the
10 Commission voted 5-0 to exercise its prosecutorial discretion, pursuant to *Heckler v.*
11 *Chaney*, 470 U.S. 821, 831 (1985), and dismiss allegations that the Respondents violated
12 2 U.S.C. §§ 441i(e)(1)(B) and 441i(f)(1). The Commission will issue a separate
13 Statement of Reasons setting forth the basis for the dismissal of these allegations.

14 With respect to the State Committee's alleged coordination of the mailers with the
15 Federal Committee and the absence of Federal disclaimers and alleged unspecified
16 violations by the Federal Committee's campaign manager, the Commission found no
17 reason to believe that there had been any violations. The basis for these no reason to
18 believe findings are set forth below.

19 **II. FACTUAL SUMMARY**

20 DeSaulnier is a California State Senator representing the 7th District who was
21 originally elected to office in November 2008, and was a declared candidate for
22 re-election to the State Senate in 2012. *See Amended Response Attachments.* On or

1 about March 26, 2009, DeSaulnier announced his intent to run for the soon-to-be-vacated
2 seat in California's 10th Congressional District. *See* Amended Response.

3 During the 90-day period prior to the September 1, 2009, special primary election
4 for the 10th Congressional District nomination, the State Committee sent two mailings
5 entitled "Your Health Services Guide: Courtesy of Senator Mark DeSaulnier" (also
6 referred to as "Health Services Guide"), and "PARENTS GUIDE TO: A Safe and
7 Healthy Family by Senator Mark DeSaulnier" (also referred to as "Parents Guide"). *See*
8 Responses. The Respondents state that the mailers were distributed to voters in the
9 overlapping California State Senate district and the 10th Congressional district. *Id.*
10 Although neither the complaint nor the response indicates the amount spent on the
11 mailers, the State Committee's disclosure reports show two June 25, 2009, payments to
12 Shallman Communications for campaign literature and mailings (\$51,885.20) and
13 postage, delivery and messenger services (\$30,016.15).¹

14 **A. The "Health Services Guide" Mailer**

15 On or about June 29, 2009, the State Committee sent a twelve-page Health
16 Services Guide to voters in the overlapping State Senate district and the 10th
17 Congressional District. *See* Complaint, Exhibit C. The guide, which includes several
18 pictures of DeSaulnier, lists health care resources within the State of California and
19 describes DeSaulnier's involvement, as a state legislator, in health care issues. *Id.* The
20 Health Services Guide contains two pages that reference President Obama and the current

¹ See <http://cal-access.ss.ca.gov/PDFGen/pdfgen.prg?filingid=1438141&amendid=0> for disclosure report filed with the California Fair Political Practices Commission.

10044280228

1 federal health care reform efforts. *Id.* One page also contains a small photograph of
2 President Obama speaking to Congress with Vice-President Biden and Speaker Nancy
3 Pelosi standing behind him. *Id.* The mailer also contains a letter from DeSaulnier
4 discussing the importance of pending federal health care legislation and the need for
5 "concerned citizens like you" and "leaders at all levels of government" to "stand behind
6 him (Obama), and help him achieve this critical goal for our country." *Id.*

7 The back cover of the mailer includes a photograph of DeSaulnier and California
8 State Senator Tom Torlakson (11th District)² with the following endorsement: "Mark
9 DeSaulnier is a natural leader, an independent thinker and a coalition builder who brings
10 people together to get things done. He has invaluable real world experience as a small
11 businessman that consistently and positively informs his work for the people of this
12 district." *Id.* The mailer indicates it was paid for by the State Committee.

13 Complainant alleged that DeSaulnier, as a Federal candidate, violated 2 U.S.C.
14 § 441i(e)(1) because the Health Services Guide, which was paid for with non-federal
15 funds, does not meet the stated requirements of the exception allowed by 2 U.S.C.
16 § 441i(e)(2) for communications that are solely in connection with the State candidate's
17 election and do not mention any candidate other than one for the same State election. *See*
18 Complaint. The Complainant alleged that the mailer "tends to promote" President
19 Obama, Vice-President Biden, Speaker of the House Pelosi, and DeSaulnier as Federal
20 candidates, and that it also references Torlakson, a non-federal candidate who is not a
21 candidate for the same office DeSaulnier seeks as a State candidate. *Id.*

² Torlakson is currently in his last term as State Senator for the 11th District of California and is a candidate for election for the California Superintendent for Public Instruction in 2010.

10044280229

B. The “Parents Guide” Mailer

On or about July 6, 2009, the State Committee sent a twenty-page mailer, the Parents Guide, to voters in the same geographic area as the first mailer. *See* Complaint, Exhibit D. The mailer opens with a letter from DeSaulnier, in his State Senate capacity, telling of his work with health, education, and public safety experts in compiling a list of useful tips – “a no-nonsense, handy guide ... for keeping our children safe, healthy, and prepared for life’s emergencies.” *Id.* It provides general family health and safety information and contact information for different federal and state health agencies in California. *Id.* In addition, it includes quotations from DeSaulnier regarding the health, education, and public safety of children. *Id.* The mailer indicates that it was paid for by the State Committee.

The complaints alleged that the Parents Guide contains “federal election activity” in violation of 2 U.S.C. § 441i(f). *See* Complaints. Complainant claimed that DeSaulnier and his State Committee do not meet the exception requirements of Section 441i(f)(2) because the timing of the mailer is an indication that it was intended to benefit DeSaulnier’s Federal campaign and not his State re-election three years in the future. *Id.*

III. LEGAL ANALYSIS

The Commission’s separate Statement of Reasons will set forth the basis for dismissing allegations that: (1) DeSaulnier, as a Federal candidate, spent non-federal funds through his State campaign in a way that did not fall within the exception for disbursements related solely to his State re-election effort, in violation of Section 441i(e)(1) of the Act; and (2) DeSaulnier, as a State candidate, and his State Committee

1 spend State funds on "federal election activity" contained in the two mailers, in violation
2 of Section 441i(f)(1).

3 This Factual and Legal Analysis sets forth the basis for the Commission finding
4 no reason to believe that (1) the State Committee violated the Act by (A) coordinating its
5 disbursements for the mailers with the Federal Committee in a manner that would result
6 in an in-kind contribution, and failing to report such an in-kind contribution; and
7 (B) failing to comply with the disclaimer requirements; and (2) no reason to believe that
8 the Federal Committee's campaign manager engaged in unspecified violations of the Act.

9 **A. Coordination Analysis**

10 The Act provides that no person shall make contributions to any candidate and his
11 or her authorized political committee with respect to any election for federal office,
12 which, in the aggregate, exceed \$2,400. 2 U.S.C. § 441a(a)(1)(A). Further, candidates
13 and political committees are prohibited from knowingly accepting any contributions in
14 excess of the Act's limitations. 2 U.S.C. § 441a(f).

15 Commission regulations set forth a three-prong test to determine whether a
16 payment for a communication is an in-kind contribution as a result of coordination
17 between the person making the payment and the candidate. *See* 11 C.F.R.
18 §109.21(a)(1)-(3). Under the first prong of the "coordinated communication" definition,
19 a communication is only subject to the regulations if it "is paid for in whole or in part, by
20 a person *other than that candidate*, authorized committee, or political party committee."
21 11 C.F.R. § 109.21(a)(1) (emphasis added).

At issue is whether the State Committee mailings were coordinated with the Federal Committee. If so, the costs of the mailers would be in-kind contributions from the State Committee to the Federal Committee, and in excess of the contribution limitations at 2 U.S.C. § 441a(a)(1)(A). The Federal Committee would also have been required to report such in-kind contributions pursuant to 2 U.S.C. § 434.

In this matter, both mailers were paid for by DeSaulnier's State Committee. Thus, this situation is similar to the situation presented in Advisory Opinion 2009-26 (Coulson). In that advisory opinion, the Commission concluded that the payment prong was not met because Representative Coulson's State Office Account or State Campaign Committee paid for the postcards promoting a seniors' fair, as Representative Coulson and her agents were paying for these communications. *Id.* at 5, 7-8. *See also* Advisory Opinion 2007-1 (McCaskill). Similarly, in the present matter, the communications were paid for by the candidate or his agents, and therefore, the payment prong is not satisfied. Accordingly, we conclude that the two mailings distributed by the State Committee do not constitute coordinated communications pursuant to 11 C.F.R. § 109.21. The Commission found no reason to believe that the State Committee made or that the Federal Committee violated 2 U.S.C. §§ 441a or 441b by making or accepting an excessive or prohibited in-kind contribution in the form of coordinated expenditure.

B. Campaign Manager

As to Shara Perkins, the amended complaint vaguely alleged that she violated the Act without providing any specific basis. There is no information in the record to indicate that Ms. Perkins has violated any provision of the Act or regulations.

1 Accordingly, the Commission found no reason to believe that Ms. Perkins violated any
2 provision of the Act.

3 **C. Disclaimer**

4 The complaint alleged that the State Committee violated the disclaimer
5 requirements by failing to place the disclaimers for the two mailers in printed boxes set
6 apart from the rest of the communication as required by Section 441d(c)(2). *See also*
7 11 C.F.R. § 110.11(c)(2). Section 441d(c)(2) provides that disclaimers are required for:
8 1) any public communication, including electronic mail and internet website, made by a
9 political committee and 2) for any public communication by “any person” that expressly
10 advocates, solicits contributions or constitutes electioneering communications. 2 U.S.C.
11 441d(c)(2); *see also* 11 C.F.R. § 110.11(a)(1) – (4). Neither criterion is satisfied in this
12 matter.

13 The State Committee does not meet the definition of a political committee, and
14 the communications at issue did not expressly advocate the election of a candidate, solicit
15 a contribution, or constitute an electioneering communication. The Act defines a
16 “political committee” as any committee, club, association, or other group of persons that
17 receives “contributions” or makes “expenditures” for the purpose of influencing a federal
18 election which aggregate in excess of \$1,000 during a calendar year.
19 2 U.S.C. § 431(4)(A). In the context of public communications, the courts have limited
20 the term “for the purpose of influencing a federal election” to those which expressly
21 advocate the election or defeat of a candidate. *See Political Committee Status:*
22 Supplemental Explanation and Justification, 72 Fed. Reg. at 5606. The courts have

1 further limited the definition of political committee to organizations whose major purpose
2 is to engage in federal campaign activity. *Id.* First, the State Committee has not made an
3 expenditure for a public communication that expressly advocates either under 11 C.F.R.
4 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b). Second, the State
5 Committee lacks the “major purpose” of engaging in federal election activity. *See*
6 Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg.
7 5595, 5597, 5601 (Feb. 7, 2007).

8 In addition to not being a federal political committee, the State Committee’s
9 mailers did not trigger a disclaimer requirement by expressly advocating the election or
10 defeat of a federal candidate. Accordingly, the Commission found no reason to believe
11 that the State Committee violated 2 U.S.C. § 441d.

12 The Commission voted to close the file as to all respondents.