

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

JODY L. NOVACEK, et al.,

Defendants.

Civ. No. 09-CV-00444

PLAINTIFF FEC'S
MOTION FOR
SUMMARY JUDGMENT

**PLAINTIFF FEDERAL ELECTION COMMISSION'S
MOTION FOR SUMMARY JUDGMENT**

The Federal Election Commission respectfully moves this Court for summary judgment pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56.3. A brief in support of this motion satisfying the requirements of Local Rule 56.3(b), an appendix, and a proposed order is submitted herewith.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Kevin Deeley
Assistant General Counsel

s/ Greg J. Mueller
Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

November 30, 2009

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Associate General Counsel

Kevin Deeley
Assistant General Counsel

Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

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I. SUMMARY

Plaintiff Federal Election Commission (“Commission” or “FEC”) submits this Memorandum in support of its Motion for Summary Judgment as to all causes of action in its Complaint. Fed. R. Civ. P. 56. Defendants made fundraising solicitations by phone and in mailers that fraudulently misrepresented the source of the solicitation as the Republican Party and/or Republican National Committee (“RNC”), in knowing and willful violation of the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-55 (“Act”). Jody L. Novacek created and operated the Republican Victory Committee (“RVC”), as well as BPO, Inc., and BPO Advantage LP (collectively here “BPO”). Through these entities Novacek made misrepresentations to vendors and the general public stating or implying that the RVC was raising money for the Republican Party and the RNC. RVC raised more than \$75,000 as a result of these solicitations. In addition, Novacek and RVC violated the Act by failing to include on their communications the required disclaimer information in the manner specified by statute. In connection with these separate violations of the Act, the Commission seeks a declaratory judgment, injunctive relief, and appropriate civil penalties.

II. BACKGROUND

A. The Commission’s Statutory Enforcement Procedures

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. Under the Act, any person may file an administrative complaint with the Commission, alleging a violation of the Act. 2 U.S.C. § 437g(a)(1). After a person alleged to have committed a violation is notified of the complaint and has an opportunity to respond, at least four of the Commission’s six members may find “reason to believe” that a

violation of the Act has occurred, authorizing the Commission to undertake an administrative investigation. 2 U.S.C. § 437g(a)(2). The Commission may also make such a determination on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities.

Id.

After an investigation, if at least four Commissioners vote to find “probable cause to believe” that a violation has occurred, the Commission must attempt to correct or prevent the violation by engaging in conciliation with the respondent for at least 30 days. 2 U.S.C. § 437g(a)(4)(A)(i). If conciliation fails, the Commission may bring a *de novo* suit against the respondent. 2 U.S.C. § 437g(a)(6).

B. Procedural History

In June 2004, the RNC filed a sworn administrative complaint with the Commission that alleged certain solicitations to the public made by the RVC violated the Act, and Novacek submitted a response. Complaint ¶¶ 9-10 (filed March 9, 2009); Response to Complaint ¶ 5 (filed July 29, 2009). On January 31, 2005, the Commission determined that there was reason to believe that Novacek and the related entities had violated the Act. Complaint ¶ 11; Response ¶ 5. On May 30, 2006 the Commission notified the defendants of these findings, provided a Factual and Legal Analysis that formed their basis, and initiated an investigation. Complaint ¶ 12; Response ¶ 5. During the investigation the Commission took Novacek’s deposition, received testimony in the form of affidavits from many witnesses, and received through subpoenas the relevant bank records. On June 19, 2007, after overseeing the investigation, the Commission’s General Counsel notified defendants that she was prepared to recommend that the Commission find probable cause to believe that defendants violated the Act and provided defendants with a brief that stated the position of the General Counsel. Complaint ¶ 13;

Responses ¶ 5. On July 6, 2007, defendants filed a written response to the General Counsel's brief. Complaint ¶ 14; Response ¶ 5. In October 2008, the Commission found probable cause to believe that the defendants violated the Act, notified the defendants, provided a proposed conciliation agreement, and thereafter sought to enter into a conciliation agreement with defendants. Complaint ¶ 15; Response ¶ 5. The Commission was unable through informal methods to secure an acceptable conciliation agreement with the defendants and then authorized the initiation of this civil action. Complaint ¶ 17; Response ¶ 5.

III. STATEMENT OF THE CASE

A. Novacek, RVC, and BPO Fundraising

Prior to the events that gave rise to this case, defendant Jody L. Novacek had extensive experience working in telemarketing fundraising for political clients, including Republican candidates and political committees. Appx. 24-25 (Novacek Dep. 24-25); Appx. 550-51 (Maddux Aff. ¶¶ 3-7). Novacek had made calls for political candidates and other political entities since 1982, and had worked as a contractor for the RNC, the National Republican Senatorial Committee, and some state political parties. Appx. 21-25, 43-44, 55, 57 (Novacek Dep. 21-25, 43-44, 55, 57); Appx. 551 (Maddux Aff. ¶¶ 4-5). She had handled RNC scripts and direct mailers, including solicitations, and had an understanding of how the RNC worked its phone banks and other solicitations. Appx. 45-47 (Dep. 45-47).

Novacek incorporated the RVC in Texas in early 2004. Appx. 70-71 (Novacek Dep. 70-71). In June 2004, Novacek filed a Statement of Organization for the RVC with the Commission. Appx. 323-30 (Novacek Dep. Exh's. 2, 3, & 4). Novacek conducted all of the RVC's activities. Other than some help from neighbors who periodically brought in her mail, no one assisted her or was an employee, member, or volunteer for the RVC. Appx. 63-64 (Novacek

Dep. 63-64). Novacek described herself as the “founder” of the RVC and stated that the entity was her “brainchild.” Appx. 62 (Novacek Dep. 62). She conducted all RVC activities from her residence. Appx. 84 (Novacek Dep. 84).

Novacek also created and owned BPO, Inc., and BPO Advantage LP, entities for which she acted as president and conducted all operations. Appx. 17-18 (Novacek Dep. 17-18). The two BPO entities functioned as one entity and were only created as two distinct legal entities for Texas tax purposes. Appx. 17-18 (Novacek Dep. 17-18). Novacek used BPO to enter into business transactions and contractual obligations on her own behalf, as well as to enter into negotiations, contracts, and agreements on behalf of the RVC. Appx. 18, 41, 109-12, (Novacek Dep. 18, 41, 109-12). Indeed, she had no personal checking account. Appx. 268 (Novacek Dep. 268). When Novacek crafted the telemarketing fundraising campaign to solicit contributions to the RVC, she made all financial and contractual arrangements through BPO. Appx. 11 (Novacek Dep. 112).

B. Novacek Originated the First Set of Solicitations by RVC through Apex

Acting through BPO, Novacek hired Apex CoVantage, L.L.C. (“Apex”) to make fundraising calls on behalf of the RVC, which took place primarily in the first half of 2004. After a recipient of these calls agreed to make a contribution, Apex or Novacek followed up the fundraising calls with mailings requesting the contributions the solicitee had agreed to make. Novacek provided Apex with a list of potential contributors and a call script, which Novacek created and edited, and Apex used its call center in India to conduct the calls. Appx. 551, 553 (Maddux Decl. ¶¶ 7, 11-13); Appx. 118 (Novacek Dep. 118).

In late 2003, Novacek contacted Apex’s Tom Maddux — a vendor with whom Novacek had previously worked when he had been employed at other companies — and proposed that

Apex do political fundraising for the RVC. Appx. 550-52 (Maddux Aff. ¶¶ 3, 6-7). Apex had never done such work in the past and Maddux was interested in obtaining new business for Apex, so he agreed to work with Novacek. Appx. 551 (Maddux Aff. ¶ 7). Novacek provided Apex with a list of potential contributors and a call script, and Apex conducted the calls. Appx. 113-18 (Dep. 113-18). Novacek created and edited the scripts. Appx. 118 (Dep. 118). If recipients agreed to send a contribution, they then received a letter created by Novacek and mailed by Novacek or Apex providing additional information and instructing the recipient where to send the contribution. Appx. 334 (Novacek Dep. Ex. 9, RVC Form Letter); Appx. 578-583 (Person Aff. Attachment, RVC letters as received by solicitee). Initially the contributions were sent directly to a post office box held by Novacek, and later some were sent to a second post office box set up by Apex to hold the checks for Novacek. Appx. 554 (Maddux Aff. ¶ 14).

Apex personnel believed that the calls were being made on behalf of the Republican Party and/or the RNC. Appx. 552 (Maddux Aff. ¶¶ 9-10). They believed the program was for the RNC in part because of the name of the Republican Victory Committee and the way in which Novacek had presented the program. For example, Novacek had told Maddux that she was working for and was on retainer with the RNC and that she was in charge of its outgoing telemarketing. Appx. 552 (Maddux Aff. ¶¶ 9-10).¹ Thus, when Novacek proposed that Apex make calls on behalf of the RVC, Maddux assumed that the calls were for the RNC. Novacek later confirmed Maddux's assumption. Appx. 552 (Maddux Aff. ¶¶ 9-10).

¹ At the time, Novacek was also working as a consultant for Advantage Direct Communications, Inc. ("Advantage"), a contractor for the RNC that was later hired by the RVC. She was assisting Advantage in setting up two call centers in Nebraska by helping with training and other management issues. Appx. 558-59 (Butzke Aff. ¶¶ 2-4). At that time, Advantage was conducting fundraising calls for the RNC. *Id.*, ¶¶ 3-4. However, Novacek was not on retainer or otherwise employed by the RNC. Appx. 570 (Person Aff. ¶ 7; Appx. 475 (Administrative Complaint, p. 3)).

Other actions by Novacek led Maddux and the others at Apex to believe they were working for the Republican Party. For example, the Statement of Work attached to the contract between Apex and BPO, signed by Novacek, described the program as “Outbound Telemarketing Fundraising for the Republican Party” and discussed the revenue split that will go to the “GOP.” Appx. 592-94 (Attachment 1, Statement of Work #1); Appx. 596 (Apex-BPO GOP Revenue Distribution Projections). When negotiating the contract between BPO and Apex on behalf of the RVC, Maddux and the others at Apex asked Novacek why the entity was called the “Republican Victory Committee” and not the RNC. In response, Novacek stated that the RNC was an “umbrella organization” and that the umbrella covered the calls proposed by Novacek. Appx. 552 (Maddux Aff. ¶ 10). A memo drafted by Novacek to Adam Booth (an Apex employee who assisted with training Apex’s employees at the call center in India) described the program as a “GOP committee.” Appx. 372 (Dep. Ex. 13).

For the RVC telephone solicitations, the callers were instructed to ask whether the recipient was a registered Republican. Appx. 339 (script); *see also* Appx. 628, 631 (transcript of recorded calls). Once that was verified, they asked for support for “our state candidates and President Bush’s agenda” because “[i]t’s going to be tough to beat the Democrats this fall.” The caller explained, “Your financial help is critical so Republicans can win” Appx. 339-40 (Dep. Ex. 7, RVC-Apex Script). The caller never stated that the RVC was not authorized by the Republican Party or a candidate. Appx. 339 (script); Appx. 619-33 (transcripts).

If a recipient expressed confusion during the call, the caller was directed to use a series of “rebuttals” drafted by Novacek. Appx. 341-43 (Dep. Ex. 8, RVC-Apex Rebuttals). The rebuttals set forth answers to possible questions by call recipients, such as questions regarding for what purpose the money would be used. When recipients of the calls expressed unhappiness

with President Bush or the war in Iraq, the “rebuttal” script drafted by Novacek instructed the caller to state that the “money will not go to President Bush.” Appx. 341 (Dep. Ex. 8, Script Rebuttals). However, when call recipients requested official Bush-Cheney ’04 or Republican Party paraphernalia or information, the “rebuttal” did not clarify the misimpressions as to who was calling, but merely directed the recipient to the actual Bush-Cheney ’04 and RNC websites. *Id.* at 343; Appx. 141 (Dep. 141).

Apex’s callers even explicitly stated that the calls were on behalf of the Republican Party on a number of occasions. For example, audio recordings provided to the Commission during its administrative investigation began by identifying the call as from the “Republican Party.” Appx. 613, 616, 619, 621, 623, 626, 628 (call transcripts).² Those taped calls typically began with a statement like this: “Hello [recipient’s name] this is Alicia calling for the Republican Party.” Appx. 619. The caller then thanked the recipient for his past support, discussed the need to oppose Senator John Kerry and Democrats, and stated that the recipient’s support was necessary to “support our state candidates and President Bush.” *Id.* In at least one instance, after an individual agreed to make a contribution, he asked, “Now, this is the Republican Party?” to which the caller responded, “yes.” Appx. 619. The caller further stated at the end of the call that the contribution was not tax deductible, but included no disclaimer elements required by the Federal Election Campaign Act.

The calls were then followed up with letters and return envelopes. The letters included the following statements, which either explicitly or implicitly referred to the Republican Party:

- “Contributions or gifts to the *Republican Party* are not deductible as charitable contributions.”

² All twenty audio recordings of calls obtained by the Commission are concurrently being filed on compact disc. *See* Vasan Decl. Ex. 1.

- “I’m grateful *our Party* can count on your help to support Republicans across the country win elections.”
- “*The Republican Party* can count on my support to help candidates at the state and local level. I’m proud to help *our Party* prepare for the November election.”
- “I am proud to help the *Republican Party* prepare for the November election.”
- “I’m grateful you are fully supportive of President Bush and *our Republican Party*.... Please join me to ensure *our Party* is ready to stand up to the liberal pundits.”

Appx. 344 (Novacek Dep. Ex. 9 RVC form letter); Appx. 578-583 (form letter as received by solicitee) (emphases added).

Many people believed they were contributing to the Republican Party, the RNC, or Bush-Cheney ’04. Nearly one hundred checks deposited by Novacek were made payable to those organizations, or the memo lines otherwise indicated that the money was intended for those entities. Appx. 639-747.

The RVC deposited well over \$50,000 as a result of the solicitations made by Apex for the RVC. Appx. 748-755. At the outset, Novacek collected the incoming contributions at a post office box she set up. Later, Novacek had Apex collect the contributions at a separate post office box. Appx. 554 (Maddux Aff. ¶¶ 14-15). In addition, Apex has been holding an additional \$14,869 in contributions that were intended for the RVC that Novacek never took possession of due to her termination of the contract with Apex after Apex requested access to BPO’s bank statements in order to check the records of contributions. Appx. 554 (Maddux Aff. ¶ 15).

On June 10, 2004, Novacek received a cease and desist letter from the RNC demanding that she stop holding out the RVC to the public as an official representative of the Republican Party. Appx. 336; Appx. 236 (Novacek Dep 236).

C. Novacek Arranged a Second Set of Solicitations by RVC through Advantage

After terminating the contract with Apex in April 2004, Novacek and the RVC engaged in a second series of solicitation calls using a different contractor, Advantage Direct Communications, Inc. (“Advantage”). Novacek had been a professional acquaintance of the president of Advantage, Jeff Butzke, for many years. Appx. 558-61(Affidavit of Jeff Butzke dated September 23, 2006 (“Butzke Aff.”), ¶¶ 2-4). Mr. Butzke had extensive experience in professional political calling and had known Novacek through that work. *Id.* Butzke had hired Novacek as a consultant to Advantage in 2003 to assist Advantage in setting up two call centers in Nebraska and to help with training and other management issues. *Id.* ¶ 4.

In October 2004, Novacek suggested to Butzke that Advantage engage in political calling for the RVC, which she described as a section 527 organization. *Id.* ¶ 5. Butzke had extensive experience in political calling and Advantage was already doing work for the RNC. Butzke understood that the RVC was not affiliated with the Republican Party, and Novacek did not convince Butzke otherwise. Appx. 560 (Butzke Aff. ¶ 6). Novacek approached Butzke to make these calls, even though she had already received a cease and desist letter from the RNC that indicated she should stop holding the RVC out to the public as an official representative of the Republican Party. Appx. 236 (Novacek Dep. 236). She did not, however, alter her call scripts to clarify the RVC’s status to call recipients after receiving the RNC’s letter.

Advantage entered into an informal arrangement with Novacek through BPO and agreed to make calls on behalf of the RVC. Appx. 560 (Butzke Aff. ¶ 8). Novacek provided call lists and scripts; the calls solicited funds from people who had previously contributed to the RVC and, therefore, many of the contributors believed that they were contributing again to the

Republican Party, RNC, or Bush-Cheney '04. Appx. 559-60 (Butzke Aff. ¶ 5); Appx. 385, 394-404 (Novacek Dep. Exs. 15, 18-19); Appx. 385-89 (RVC-Advantage Script dated October 2004); Appx. 390-94 (emails from Jody Novacek to Jeff Butzke dated Oct. 11, 2004).

The script used by Advantage stated that the caller was calling on behalf of the Republican Victory Committee and that the recipient of the call had “supported our Committee in the past.” The caller further explained that the

Presidential election is very close — which means our state and local candidate races could be at risk. Everything hinges on getting Republicans to the polls in two weeks. The Democrats are planning a massive Get-Out-The-Vote effort in [INSERT STATE] and we need your help to counter this. Otherwise the tax and spend liberals could win races from the White House to the state house and local offices. It’s crunch time and we need support to get every Republican to the polls. Help us defeat Democrats with an emergency gift of \$[INSERT], to be used for Get-Out-The-Vote efforts.

Appx. 385 (Dep. Ex. 15). *See also* Appx. 560 (Butzke Aff. ¶ 9) (explaining this was the script used by Advantage when it made calls on behalf of RVC). The calls also stated, “Election Law requires we ask your [o]ccupation and your [e]mployer” and informed the individual that “political contributions are not tax deductible.” Appx. 385 (Dep. Ex. 15, RVC-Advantage Script). The RVC received over \$10,000 in credit card transactions from these calls. Appx. 756-59; Appx 227-28 (Novacek Dep. at 227-28).

As described above, the RVC received more than \$75,000 from the solicitations made by Apex and Advantage. The defendants, however, made *no* contributions to any candidate or engaged in any political activity with the proceeds from these solicitations. Appx. 266 (Novacek Dep. 266).

IV. ARGUMENT

Summary judgment is appropriate if “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *see also Salge*

v. Edna Independent School Dist., 411 F.3d 178, 184 (5th Cir. 2005); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). As demonstrated below and in the supporting appendix, the Commission is entitled to summary judgment on each cause of action in its Complaint, as there is no genuine issue of material fact. Regarding the first cause of action, Novacek and the RVC fraudulently misrepresented themselves, *see* 2 U.S.C. § 441h(b)(1), in claiming to act on behalf of a candidate or political party committee. Similarly, the Commission is entitled to summary judgment on the second cause of action because BPO fraudulently misrepresented itself by participating in a plan or design to fraudulently misrepresent itself as acting on behalf of a candidate or political party. 2 U.S.C. § 441h(b)(2). The Commission is also entitled to summary judgment on the third cause action — for which the material facts were undisputed during the administrative process preceding this action — because Novacek and the RVC failed to include the required disclaimer in their solicitations. 2 U.S.C. § 441d(a),(c).

A. Novacek Fraudulently Misrepresented Herself, and the Entities she Created and Operated, as Acting on Behalf of the Republican Party

Novacek and the RVC knowingly and willfully violated 2 U.S.C. § 441h(b)(1) by fraudulently misrepresenting themselves as acting for or on behalf of a candidate or political party when they made phone calls and mailed solicitations on behalf of the Republican Party. Likewise, BPO knowingly and willfully violated 2 U.S.C. § 441h(b)(2) by participating in or conspiring to participate in a plan, scheme, or design to fraudulently misrepresent itself as acting for or on behalf of a candidate or political party for the purpose of soliciting contributions by phone and through the mail.

Under section 441h(b), a person cannot fraudulently misrepresent herself as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof for the purpose of soliciting contributions or donations; likewise, a person cannot

“willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to” engage in this intentionally deceptive conduct regarding any of the misrepresentations described above. 2 U.S.C. § 441h(b); *see also* 11 C.F.R. § 110.16.³ Even absent an express misrepresentation, a scheme devised with the intent to defraud is a fraud if it was reasonably calculated to deceive persons of ordinary prudence and comprehension. *See United States v. Thomas*, 377 F.3d 232, 242 (2d Cir. 2004) (citing *Silverman v. United States*, 213 F.2d 405 (5th Cir. 1954)). The phrase “knowing and willful” indicates that “actions [were] taken with full knowledge of all of the facts and a recognition that the action is prohibited by law.” 122 Cong. Rec. H3778 (daily ed. May 3, 1976); *see also FEC v. John A. Dramesi for Cong. Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (distinguishing “knowing” from “knowing and willful”).

A knowing and willful violation may be established “by proof that the defendant acted deliberately and with knowledge” that an action was unlawful. *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). In *Hopkins*, an inference of a knowing and willful violation was drawn “from the defendants’ elaborate scheme for disguising their . . . political contributions . . .” *Id.* at 214-15. The evidence did not have to show that a defendant “had specific knowledge of the regulations” or “conclusively demonstrate” a defendant’s state of mind,” if there were “facts and circumstances from which the jury reasonably could infer that [the defendant] knew her conduct was unauthorized and illegal.” *Id.* at 213 (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)).

Here, Novacek admitted she drafted the scripts and follow-up letters and hired Apex and Advantage to make the phone call solicitations. Appx. 118, 182-83 (Dep. 118, 182-83). The

³ Section 441h does not require all of the elements of common law fraud. *Compare Aiken v. Rimkus Consulting Group Inc.*, 333 Fed. Appx. 806, 811-12 (5th Cir. 2009) (discussing nine elements).

scripts and letters repeatedly referred to “the Republican Party” in various formulations. The follow-up letters in particular referred five times to the Republican Party, including a statement that “contributions to the Republican Party are not tax-deductible.” Appx. 34, 578-83.

Novacek repeatedly described the RVC as part of the Republican Party and/or the GOP in documents such as the contractual arrangement with Apex. Appx. 592-595 (Attachment 1 Statement of Work #1); *see also* Appx. 372 (Dep. Ex. 13, Memo from Jody Novacek to Adam Booth dated January 14, 2004). Indeed, Apex and its employees held the reasonable belief they were working on behalf of the Republican Party because Novacek had told them that the RNC encompassed the RVC. Appx. 552. Novacek did not correct the phone bank employees and managers when they referred to the RVC as the Republican Party. Novacek’s statements to Apex employees led them reasonably to answer “yes” when recipients asked whether it was the Republican Party that was calling. Appx. 619 (transcript). Novacek also admitted that she knew those receiving the calls were confused as to the entity calling because many recipients asked for information for the RNC or Bush-Cheney ’04, confusion Novacek created and capitalized on. Appx. 142-43.

The contrast between Novacek’s statements and conduct towards Apex — whose personnel had no reason to doubt that the RVC was a project of the RNC or Republican Party — and her statements and conduct towards Advantage — where Butzke affirmatively knew she was *not* connected to the RNC (Appx. 560) — belie any claim by Novacek that she thought she could freely represent herself as the Republican Party. For example, Novacek, in her dealings with Apex, made repeated references to the RNC/Republican Party in conversations and emails to employees of Apex (Appx. 592, 551-52, 372), while she made no references, either directly or

indirectly, in her dealings with Advantage through Butzke to suggest or imply a connection to the Republican Party or the RNC.

The RVC never made any contributions to any candidate or any other political entity, and no political activities were undertaken by the RVC. Appx. 266. In addition, contributions specifically earmarked for entities such as the RNC or Bush-Cheney '04 were never forwarded to those entities. After paying Apex and Advantage (the majority of the RVC's disbursements), Novacek directed the remaining funds to herself or to the BPO entities. Appx. 453, 455-57, 461, 463-65. Because Novacek represented herself as acting on the behalf of a political party and caused others to do so as well when they made phone calls and solicited contributions, this Court should find that Novacek, the RVC, and BPO knowingly and willfully violated 2 U.S.C. § 441h.

B. Novacek and the RVC Violated the Act by Failing to Include the Required Disclaimer

Novacek and the RVC violated the Federal Election Campaign Act by failing to include within their communications the required disclaimer information in the manner specified by the statute. Whenever "any person ... solicits any contribution" through various means, including a "mailing" or "any other type of general public political advertising," the solicitation must contain a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a); *see generally FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 296 (2d Cir. 1995). A public communication, for this purpose, includes any communication by "telephone bank." 2 U.S.C. §§ 431(22),(24); 11 C.F.R. §§ 100.26, 100.28. If the communication is not authorized by a candidate, a candidate's authorized political committee or agent, the disclaimers must state the name and street address, telephone number or Internet address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). In printed material the disclaimer must be presented in a

clear and conspicuous manner, be of sufficient type size to be clearly readable, and be contained in a printed box set apart from the other content of the communication. 2 U.S.C. § 441d(c); 11 C.F.R. § 110.11(c)(1), (c)(2)(i)-(ii). The disclaimer provision “serves important First Amendment values.” *Survival Education Fund*, 65 F.3d at 296. “Potential contributors are entitled to know that they are supporting independent critics of a candidate and not a group that may be in league with that candidate’s opponent.” *Id.*

Novacek and the RVC violated 2 U.S.C. § 441d(a),(c) by failing to include in their communications the required disclaimer information in the manner specified by statute. In the RVC’s phone calls, the callers did not state the RVC’s permanent address, phone number or website address, or state that the solicitation was not authorized by a candidate or candidate committee. Appx. 339-40 (script); Appx. 613-33 (transcripts). In the RVC’s mailings, the written materials failed to include that same information and failed to include the formatting (a printed box set apart from the content of the communication) required for mailed solicitations. Appx. 34, 578-83.

Although the calls and the follow-up letters stated that they were made (in the case of the calls) or paid for (in the case of the letters) by the “Republican Victory Committee,” it is undisputed that the telephone calls and letters did not contain a sufficient disclaimer as to who paid for or authorized the calls, despite the fact that they were direct solicitations for contributions. Novacek admitted that she knew she needed to use a disclaimer on the calls and mailers because of her prior political work, but claimed that her communications were only unintentionally out of compliance. Appx. 137 (Dep. 137). Her defense is not credible in light of the fraudulent scheme described above and her long experience with political fundraising, and in any event, her state of mind is irrelevant because the Commission does not seek a knowing and

willful finding with respect to defendants' disclaimer violations. Accordingly, this Court should find that Novacek and the RVC violated 2 U.S.C. § 441d(a).

C. The Commission is Entitled to Summary Judgment Regarding All Claims Brought Against the RVC and BPO Entities Because They Have Not Appeared to Defend this Action Through Counsel

Novacek may represent herself (individually and as a corporate officer) on a *pro se* basis, but as a non-attorney she cannot represent the Republican Victory Committee, Inc., or either of the BPO entities. “[T]he ‘clear’ rule is ‘that a corporation as a fictional legal person can only be represented by licensed counsel.’” *Donovan v. Road Rangers Country Junction, Inc.*, 736 F.2d 1004, 1005 (5th Cir. 1984) (quoting *K.M.A., Inc. v. General Motors Acceptance Corp.*, 652 F.2d 398, 399 (5th Cir.1982); accord *Southwest Express Co., Inc. v. Interstate Commerce Comm’n*, 670 F.2d 53, 56 (5th Cir. 1982). Because the RVC and BPO entities have not entered an appearance and have not defended this case, the Court should enter summary judgment in the Commission’s favor against these defendants.

D. The Court Should Fashion Remedies that Will Effectively Deter these Defendants and Other Persons From Engaging in Similar Unlawful Activities and Undermining Important Public Interests

The Act specifically authorizes four remedies in civil actions like this one to enforce its requirements: (1) a declaration that the defendants violated the Act; (2) assessment of a civil penalty for each violation of the Act; (3) an injunction to prevent repetition of the unlawful activities; and (4) any other appropriate order. 2 U.S.C. §§ 437d, 437g(a)(6)(B), (C).

The Act specifies higher penalties for violations of law that are knowing and willful. *See* 2 U.S.C. §§ 437g(a)(5)(B), 437g(d).

1. The Court Should Declare that Novacek, RVC and BPO Violated the Act

The Commission has shown, *supra* pp. 11-13, that Novacek and RVC knowingly and willfully violated 2 U.S.C. § 441h(b)(1) by fraudulently misrepresenting themselves as acting for or on behalf of a political party for the purpose of soliciting contributions. Likewise, BPO, Inc. and BPO Advantage, LP knowingly and willfully violated 2 U.S.C. § 441h(b)(2) by participating in or conspiring to participate in a plan to fraudulently misrepresent themselves as acting for or on behalf of a political party for the purpose of soliciting contributions.

Novacek and the RVC also failed to meet the disclaimer requirement in 2 U.S.C. § 441d(a),(c) by failing to include on their communications some of the required disclaimer information in the manner specified by statute. Thus, the evidence supports a declaration that they violated 2 U.S.C. §§ 441h and 441d.

2. The Court Should Assess a Civil Penalty Sufficient to Deter Such Violations and Vindicate the Compelling Interests Served by the Provisions Violated

The assessment of a civil penalty under 2 U.S.C. § 437g(a)(6) rests within the sound discretion of the district court. *Stockman v. FEC*, 138 F.3d 144, 153 (5th Cir. 1998); *AFL-CIO v. FEC*, 628 F.2d 97, 100 (D.C. Cir. 1980); *FEC v. Furgatch*, 869 F.2d 1256, 1258 (9th Cir. 1989).⁴ The purpose of a civil penalty is not only to punish a violator, but also to deter the defendant and others who might consider engaging in similar activities. *See United States v. ITT Cont'l Baking*

⁴ In addition to assessing a civil penalty, the Court may, in its discretion, order Novacek, RVC and BPO to disgorge all the contributions they received as a result of their fraudulent misrepresentations. Disgorgement is not a sanction like a civil penalty, but an equitable remedy that would return the defendants to the position they would have been in had they not engaged in the fraudulent activity. “Disgorgement wrests ill-gotten gains from the hands of a wrongdoer. It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs.” *Allstate Ins. Co. v. Receivable Finance Co.*, 501 F.3d 398, 413 (5th Cir. 2007) (citing *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir.1993)); *CFTC v. American Metals Exch. Corp.*, 991 F.2d 71, 76 (3d Cir. 1993) (disgorgement is an appropriate remedy “for the purpose of depriving the wrongdoer of his ill-gotten gains and deterring violations of the law”) (internal quotation marks and citation omitted). In this case the Court should order disgorgement of the funds the defendants received as a result of their fraudulent misrepresentations.

Co., 420 U.S. 223, 231-32 (1975). To serve these purposes adequately, a civil penalty must be sufficiently large that potential violators will *not* regard it as “nothing more than an acceptable cost of violation, rather than as a deterrence to violation.” *Id.* See also, e.g., *United States v. Reader’s Digest Ass’n*, 662 F.2d 955, 966-67 (3d Cir. 1981). Cf. *Sands, Taylor & Wood v. The Quaker Oats Co.*, 34 F.3d 1340, 1351 (7th Cir. 1994) (“There is no incentive to engage in . . . licensing negotiations when the consequence of getting caught for trade piracy is simply to pay what should have been paid earlier”); *United States v. St. Michael’s Credit Union*, 880 F.2d 579, 588 (1st Cir. 1989) (“To have any real deterrent effect, the potential fine must be large enough to have some real economic impact on potential violators”).

The penalty should also be substantial enough to emphasize the importance of the interests served by the provisions violated. Public confidence in the integrity of the fundraising process and, through it, the integrity of federal elections depends on the courts’ imposing large enough penalties to deter violations of these important protections. Section 441h was enacted in 1974 to address such impersonation of candidates and party committees; in that era, “[t]elegrams h[ad] been sent falsely bearing the names of the parties.” 120 Cong. Rec. H7825 (daily ed. August 7, 1974). Here, Novacek’s calls and mailers forced the RNC to respond to the allegation during the presidential campaign that it had outsourced fundraising calls to a call center in India, in what the party committee described as harm to it and legitimate Republican Party efforts. Appx. 475-76 (administrative complaint alleging harm); *id.* at 503 (press release issued during presidential campaign). The fact that the RVC calls were perceived to be from the RNC is further bolstered by numerous press accounts of the RVC’s fundraising effort, some of which reported that *the RNC* was making fundraising calls from India, while others questioned the story

while nonetheless providing sources from India claiming to be working for the RNC. Appx. 604-12 (press accounts).

As the Act indicates, the amount of the civil penalty should rise in proportion to the seriousness of the violation. Here, the Court should assess an appropriate civil penalty against the defendants for each violation that they are found to have committed, not to exceed the greater of \$11,000 per violation or 200% of the amount of the contribution or expenditure involved for each violation found to be knowing and willful, and not to exceed the greater of \$6,500 or the amount of the contribution or expenditure involved for each violation not found to be knowing and willful. *See* 2 U.S.C. § 437g(a)(6)(B),(C); 11 C.F.R. § 111.24. The maximum civil penalty for the violations of the fraudulent misrepresentation provisions in 2 U.S.C. § 441h(b)(2), if calculated based on the amount in violation, is approximately \$150,000.⁵ Novacek received \$50,292 as a result of the solicitations made by Apex for the RVC. Apex raised an additional \$14,869 for the RVC, which Novacek never took possession of due to the termination of the contract between Apex and the RVC. RVC received approximately \$10,063 in credit card transactions as a result of the calls made by Advantage on behalf of the RVC. Accordingly, the Court may impose a penalty as high as \$150,000 for the violations of 2 U.S.C. § 441h. This level of penalty is explicitly authorized by the statute and is 200% of the total amount of illegal funds Novacek and her related entities raised.⁶

⁵ Although the Commission could seek separate civil penalties from Novacek, RVC, and BPO, the Commission is seeking to hold the defendants jointly and severally liable for a single civil penalty for the violations at issue here. This approach reflects the fact that Novacek was solely responsible for RVC and BPO and will facilitate collection of the penalty.

⁶ The Court could impose a civil penalty for the violations of 2 U.S.C. § 441h by multiplying the \$11,000 statutory penalty by the total number of fraudulent solicitations, resulting in a much larger penalty, but the Commission is not asking for that relief.

In addition, regarding the violations of 2 U.S.C. § 441d, the Commission requests the statutory penalty of \$6,500 for each of the two sets of solicitations made by the two contractors hired by Novacek, for a total civil penalty of \$13,000. In other words, the Court should impose a \$6,500 statutory penalty for the failure to make the appropriate disclaimers in the solicitations made by Apex and another \$6,500 for the failure to make the appropriate disclaimers in the solicitations made by Advantage. *See* 2 U.S.C. § 437g(a)(6); 11 C.F.R. § 111.24.⁷

3. The Court Should Grant Injunctive Relief

This Court should also impose a permanent injunction prohibiting the defendants from committing similar violations. The Act explicitly authorizes the Court to grant a “permanent” injunction upon a showing that a defendant has violated the Act. 2 U.S.C. § 437g(a)(6)(B). “Essentially, a court makes a prediction of the likelihood of future violations based on an assessment of the totality of the circumstances surrounding the particular defendant and the past violations that were committed.” *SEC v. Bonastia*, 614 F.2d 908, 912 (3d Cir. 1980). Defendants’ knowing and willful violations — even after receiving a cease and desist letter from the RNC — and Novacek’s failure to acknowledge that her conduct violated the law demonstrate that there is a sufficient likelihood of future violations to warrant a permanent injunction.

An injunction merely prohibiting the defendants from engaging in similar violations would not harm the defendants. It would only preclude them from repeating the conduct already found to be illegal, *Reader’s Digest Ass’n*, 662 F.2d at 969-70, and thus would not interfere in any way with any future lawful activities. The public is entitled to the assurance that an

⁷ The Court could impose a civil penalty for the violations of 2 U.S.C. § 441d by multiplying the \$6,500 statutory penalty by the total number of solicitations that failed to include the required disclaimer, resulting in a much larger penalty, but the Commission is not asking for that relief.

injunction, backed by the civil contempt power, would provide that neither Novacek nor the entities she created would repeat the sort of unlawful activity in connection with future elections.

CONCLUSION

For the foregoing reasons, the Commission requests that this Court grant the Commission's motion for summary judgment and: (1) declare that Novacek and the RVC knowingly and willfully violated 2 U.S.C. § 441h(b)(1) by fraudulently misrepresenting themselves as acting on behalf of a political party for the purpose of soliciting contributions; (2) declare that BPO knowingly and willfully violated 2 U.S.C. § 441h(b)(2) by participating in a plan to fraudulently misrepresent themselves as acting for or on behalf of a political party for the purpose of soliciting contributions; and (3) declare that Novacek and RVC violated 2 U.S.C. § 441d(a),(c) by failing to include in their communications some of the required disclaimer information in the manner specified by statute. The Court should permanently enjoin the defendants from engaging in such unlawful activity, assess an appropriate civil penalty, and grant any other appropriate relief.

Respectfully submitted,

Thomasenia P. Duncan
General Counsel

David Kolker
Associate General Counsel

Kevin Deeley
Assistant General Counsel

s/ Greg J. Mueller
Greg J. Mueller
Attorney
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

November 30, 2009

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

JODY L. NOVACEK, et al.,

Defendants.

Civ. No. 09-CV-00444

Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that, on November 30, 2009, I caused Defendant Federal Election Commission's motion for summary judgment, memorandum of law and appendix in support, and proposed order to be served by email (pursuant to the stipulation of the parties under Fed. R. Civ. P. 5(b)(2)(E)) upon:

Jody L. Novacek
jodylnovacek@hotmail.com

s/ Greg J. Mueller
Greg J. Mueller
Attorney

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
(202) 694-1650

November 30, 2009