

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

FEDERAL ELECTION COMMISSION,

Plaintiff -Appellee,

v.

JODY L. NOVACEK, et al.,

Defendants-Appellants.

No. 10-10516

MOTION FOR
SUMMARY AFFIRMANCE

**APPELLEE FEDERAL ELECTION COMMISSION'S MOTION FOR
SUMMARY AFFIRMANCE**

The Federal Election Commission (“Commission”) moves this Court to summarily affirm the district court’s decision granting the Commission’s motion for summary judgment. *FEC v. Novacek*, No. 09-444, slip op. (N.D. Tex. Apr. 14, 2010) (Exh. 1) (“Op.”).¹ Appellants raised no genuine issue of material fact and the court below made no reversible error of law. *See* Fifth Cir. Rule 47.6 (judgment may be affirmed without opinion when, *inter alia*, “no genuine issue of material fact has been properly raised by the appellant” and “no reversible error of law appears”); 2A *Fed. Proc., L. Ed.* § 3:917, Criteria for Summary Affirmance or Enforcement (2010); *see, e.g., Kastner v. Texas Bd. of Law Exam’rs*, 278 Fed.

¹ Pursuant to Fifth Circuit Rule 27.4, the Commission contacted Appellant Jody L. Novacek who stated she will oppose this motion.

Appx. 346, 2008 WL 2048326 (5th Cir. 2008) (granting motion for summary affirmance).

Based on admissions made by appellant Jody L. Novacek and facts that were not in dispute below, the district court correctly found that appellants made fundraising solicitations by phone and in mailers that fraudulently misrepresented the source of the solicitation as the Republican Party and the Republican National Committee (“RNC”). Op. at 4, 11. These fundraising solicitations — in which appellants purported to be acting on behalf of the Republican Party — were found by the court to be knowing and willful violations of the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-55 (“FECA” or “Act”). *Id.* The district court also found, based on the solicitations’ text which Novacek admitted authoring, that Novacek and the Republican Victory Committee violated the Act by failing to include in those solicitations some of the required disclaimer information regarding who authorized and paid for the communications. Op. at 5, 11-12.

The lower court found that appellants’ defense consisted only of “disputation of immaterial facts” and “unsubstantiated assertions, suggestions and arguments, which are not competent summary judgment evidence,” Op. at 7, and awarded summary judgment to the Commission through a straightforward application of the Rule 56 burden-shifting analysis. The court’s carefully supported decision should be summarily affirmed.

BACKGROUND

I. THE COMMISSION

The Commission is the independent agency of the United States government with exclusive jurisdiction over the administration, interpretation, and civil enforcement of the Act. Op. at 1 (citing 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g). The Act provides a detailed administrative process. 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).

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).

II. APPELLANTS' FUNDRAISING

Jody L. Novacek is an individual with previous experience working in telemarketing fundraising for political clients. Op. at 1. Novacek created,

operated, and wholly controlled appellants Republican Victory Committee (“RVC”), BPO, Inc., and BPO Advantage LP (the BPO entities are together referenced as “BPO”). *Id.* During the first half of 2004, Novacek — making contractual arrangements through BPO — hired Apex CoVantage, L.L.C. (“Apex”) to make telemarketing fundraising calls to solicit donations to RVC that stated or implied that RVC was raising money for the Republican Party. *Op.* at 2. Novacek provided Apex with a list of potential contributors and a call script she created for use at Apex’s call center. *Id.* Apex or Novacek followed up on those calls with mailings requesting that call recipients mail in the contributions they had agreed to make. *Id.* RVC received nearly \$50,000 as a result of these solicitations. *Id.* After receiving a cease-and-desist letter from the RNC, Novacek and RVC hired a different contractor, Advantage Direct Communications, Inc., to make a second series of similar solicitations that netted over \$10,000 in contributions. *Id.* at 2-3. Appellants did not use the proceeds to make any contributions to any candidate campaigns or political committee. *Id.* at 3.

III. FEDERAL ELECTION CAMPAIGN ACT

The district court found that appellants violated two statutory provisions. First, the court found that appellants violated 2 U.S.C. § 441h(b), which prohibits any person from fraudulently misrepresenting 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; it also prohibits any person from “willfully and knowingly participat[ing] in or conspir[ing] to participate in any plan, scheme, or design to” engage in intentionally deceptive conduct regarding any of the misrepresentations described above. 2 U.S.C. § 441h(b); *see also* 11 C.F.R. § 110.16.

Second, the district court found that appellants violated 2 U.S.C. § 441d(a), which provides that when “any person ... solicit[s] 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 Educ. Fund, Inc.*, 65 F.3d 285, 296 (2d Cir. 1995). 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).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANTS RAISED NO ISSUE OF MATERIAL FACT WITH RESPECT TO THEIR VIOLATIONS OF SECTION 441h(b)

The district court correctly found that appellants knowingly and willfully violated the Act by fraudulently misrepresenting themselves as fundraisers for the Republican Party. Rather than disputing any material facts, Novacek offered speculative arguments, disputed immaterial facts, and attempted to excuse appellants' unlawful conduct. A wealth of undisputed material facts supports the district court's conclusions:

- Novacek admitted that she drafted the solicitation scripts and hired call centers to place the solicitation calls. Op. at 5, 7-8.
- Novacek admitted that she authorized the scripts to be amended so that the calls opened with the statement that the call was on behalf of the "Republican Party." Novacek admitted that the scripts repeatedly referred to the Republican Party and claimed that the funds would be used to support Republican candidates in the upcoming election. Op. at 5, 8.
- Novacek does not dispute that the call center employees explicitly stated that the calls were on behalf of the Republican Party. *Id.*
- Novacek did not deny that she authored the follow-up letters, which refer five times to the Republican Party, state that contributions to the Republican Party are not tax-deductible, and suggest that any contribution would be used by the party to support candidates. Op. at 5.
- Novacek did not dispute that many solicitees believed they were contributing to the Republican Party, the RNC, the GOP, or Bush-Cheney '04. The evidence demonstrated that Novacek deposited nearly one hundred checks that were made payable to those organizations or whose memo lines indicated that the money was intended for those entities. Op at 5-6.

- Novacek admits that she knew solicitees were confused as to the entity calling, because they would ask for information about the RNC or the Bush-Cheney '04 campaign or would send checks made out to those entities. Op. at 6.
- Novacek did not dispute that the solicitation calls failed to state that RVC was not authorized by the Republican Party or any candidate. Op. at 5.
- Novacek admits that after receiving a cease-and-desist letter from the RNC, she and RVC engaged in a second, similar series of solicitation calls and that Novacek again provided call lists and scripts. Op. at 6.
- The second set of calls informed the solicitee that political contributions are not tax-deductible, but did not inform the solicitee that the solicitation was not approved by a political party or political candidate as required by statute. *Id.*
- Novacek and the RVC never made any contributions to any candidate or any other political entity. *Id.* Instead, after paying the vendors she hired, she directed the remaining funds to the BPO entities she controlled. *Id.* at 6-7.

Novacek did not present any evidence to refute these facts and admissions, but relied instead on “unsubstantiated assertions, suggestions, and arguments.” Op. at 7. The district court correctly found that the few facts disputed by Novacek are not material. For example, Novacek disputes whether Tom Maddux, who worked for Apex (the vendor who placed the solicitation calls) was aware of the fact that RVC had no connection to the RNC. *Id.* As the district court held, however, Maddux’s “testimony is not necessary to demonstrate that the fundraising calls and letters Apex sent out at Novacek’s direction fraudulently misrepresented that they were on the behalf of the Republican Party.” *Id.* In other words,

Maddux's awareness does not matter either way: If Maddux believed RVC was part of the RNC, as he testified, it is evidence that Novacek deceived Maddux; if Maddux knew RVC was not part of the RNC, as Novacek claimed, it would show only that non-party Maddux may have been complicit in the fraudulent enterprise. Because this disputed fact was not material to the findings against appellants, it provided no basis to deny the Commission's motion for summary judgment.

With no evidentiary support, Novacek asserted that her call scripts might have been pirated (*i.e.*, altered by the call centers) or that the recordings the Commission presented as evidence may have been fabricated. She did not, however, dispute the key elements of the call scripts and mailings, which she admittedly authorized, that claimed to be on behalf of the Republican Party. *Op.* at 5. Moreover, in the face of the Commission's sworn testimony, authenticated recordings, and other documentary evidence, Novacek offered only unsubstantiated, speculative assertions, which are not competent summary judgment evidence. *Op.* at 7.

Finally, Novacek claimed that she believed she was entitled to represent that she was calling on behalf of the Republican Party, because, in her view, the RNC does not own that name. *See Op.* at 10. The district court correctly found this

position unsupportable because the Republican Party is an unincorporated association under the general management of the RNC. *Id.*

After the Commission carried its initial burden, Novacek provided no facts beyond statements in the pleadings and conclusory assertions. *Op.* at 7 & n.39. The clear implication of the scripts she admitted authoring was that she was fundraising for the Republican Party or the RNC; in fact, none of the funds were ever contributed to a political candidate or committee. *Op.* at 10. Accordingly, the lower court properly concluded that “Novacek fail[ed] to present competent evidence of any actual controversy of material fact warranting a trial on the Commission’s claims.” *Op.* at 11. The undisputed facts thus compel the conclusion that Novacek, RVC, and the BPO entities knowingly and willfully violated the fraudulent misrepresentation provision in 2 U.S.C. § 441h. Novacek — a sophisticated participant with decades of experience in telemarketing fundraising for political clients — misrepresented herself as acting on behalf of a political party and caused others to do so when soliciting contributions.

II. THE DISTRICT COURT CORRECTLY FOUND THAT APPELLANTS’ SOLICITATIONS FAILED TO COMPLY WITH FECA’S DISCLAIMER REQUIREMENTS

Appellants’ solicitations did not comply with FECA’s requirement that whenever “any person ... solicits any contribution” through a “mailing” or “any other type of general public political advertising,” the solicitation must contain a

disclaimer. 2 U.S.C. § 441d(a),(c); 11 C.F.R. § 110.11(a). Novacek does not dispute that in the solicitation calls, the callers did not state RVC's permanent address, phone number or website address, or state that the solicitation was not authorized by a candidate or candidate committee as required by law. Op. at 6, 11-12. Furthermore, Novacek does not dispute that RVC's mailings failed to put that information in sufficient type size so that it was clearly readable and in a printed box set apart from the rest of the letters. *Id.* Novacek argues only that these violations were unintentional. Op. at 12. However, Novacek's state of mind is irrelevant to this violation because intent is not an element of the offense, and the Commission is not requesting the higher civil penalties that would be available if Novacek acted intentionally regarding the disclaimer violations. Accordingly, the district court's decision should be affirmed because the content of the written solicitations — which is not in dispute — on its face did not comply with the statutory disclaimer requirements.

CONCLUSION

Because appellants made only unsubstantiated assertions that fail to create any genuine disputes over material facts, the Commission requests that this Court summarily affirm the Opinion and Order of the district court granting summary

judgment in the Commission's favor, imposing a civil penalty of \$47,414.15, and enjoining appellants from future similar violations of the Act. *See* Fifth Cir. Rule 47.6 .

Respectfully submitted,

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July 12, 2010

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I will cause the Appellee Federal Election Commission's Motion for Summary Affirmance to be filed electronically using the Court's CM/ECF system, which will then send a notification of such filing to any counsel or party using the system. I further certify that I caused the foregoing to be served by email on Defendant-Appellant Jody L. Novacek at: jodylnovacek@hotmail.com.

s/ Greg J. Mueller
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