



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FIRST CLASS MAIL

MAR -7 2014

Mark Braden, Esq.
Baker & Hostetler LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5304

RE: MUR 6645
The Conservative StrikeForce and
Scott B. Mackenzie in his official
capacity as treasurer

Dear Mr. Braden:

On September 19, 2012, the Federal Election Commission notified The Conservative StrikeForce and Scott B. Mackenzie in his official capacity as treasurer (collectively, "your Client"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On February 25, 2014, the Commission found, on the basis of information in the complaint, and information provided by you on behalf of your Client, that there is no reason to believe that The Conservative StrikeForce and Scott B. Mackenzie in his official capacity as treasurer violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b). Accordingly, the Commission closed its 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) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Emily M. Meyers, the attorney assigned to this matter at (202) 694-1650.

Sincerely

William A. Powers
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: The Conservative StrikeForce, Dennis Whitfield **MUR 6645**
 in his official capacity as Chairman, and
 Scott B. Mackenzie in his official capacity as Treasurer

I. INTRODUCTION

10 This matter was generated by a Complaint filed with the Federal Election Commission
11 (the "Commission") by Allen West for Congress ("West"), alleging violations of the Federal
12 Election Campaign Act of 1971, as amended, (the "Act") by The Conservative StrikeForce,
13 Dennis Whitfield in his official capacity as Chairman, and Scott B. Mackenzie in his official
14 capacity as Treasurer, (collectively, the "Respondent" or "StrikeForce"). The Complainant
15 alleges that StrikeForce disseminated materials that reference West and direct readers, among
16 other things, to visit a support website for West that in turn solicits donations. Yet West did not
17 authorize that website, and little, if any, of the solicited donations were directed to West. West
18 therefore asserts that the Respondent fraudulently misrepresented itself in solicitations and in
19 other communications as acting on behalf of West, in violation of 2 U.S.C. § 441h(b) of the Act
20 and 11 C.F.R. § 110.16(b).

21 The record leaves little doubt that StrikeForce sought to use Representative West's
22 likeness to raise funds independently to support his candidacy. Moreover, it appears that
23 Respondent spent very little of the money it raised to support West. Rather, the funds appear to
24 have been spent primarily on additional fundraising, much apparently to vendors in which
25 Mackenzie may have held personal financial interests. Nonetheless, the Commission cannot
26 agree with Complainant that this conduct constitutes a fraud within the reach of the Act or
27 Commission regulation. Whether it is prohibited by laws beyond the Act, criminal or otherwise,

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1 is not a matter within the Commission's jurisdiction. The Commission therefore finds no reason
2 to believe that the Respondent violated 2 U.S.C. § 441h(b) or 11 C.F.R. § 110.16(b).

3 II. FACTUAL AND LEGAL ANALYSIS

4 A. Parties

5 1. Allen West for Congress

6 Allen West was the U.S. Representative from Florida's 22nd Congressional District from
7 2011 to 2013. In a closely contested election in 2012, Allen West unsuccessfully ran for U.S.
8 Representative in Florida's newly redistricted 18th Congressional District. Allen West for
9 Congress is Allen West's principal campaign committee. Gregory Wilder is Treasurer.

10 2. The Conservative StrikeForce

11 The Conservative StrikeForce registered with the Commission on November 19, 2008, as
12 a nonconnected committee. StrikeForce filed an amended Statement of Organization with the
13 Commission on February 13, 2012, to take its current name as an independent expenditure-only
14 committee. Dennis Whitfield is StrikeForce's Chairman; Scott B. Mackenzie is its Treasurer.

15 B. Background

16 West alleges that the Respondent's solicitations and other materials violated section 441h
17 of the Act for four general reasons. First, West alleges that a "reasonable person could easily
18 conclude that [the solicitation's language] indicates that the solicitation is either from
19 Congressman West's campaign or that the solicitor is working with the West campaign."¹
20 Second, West claims that the vast majority of each Respondent's disbursements and expenditures
21 has been for operating expenses and additional fundraising communications.² Third, West points

¹ Compl. at 5 (Aug. 30, 2012).

² *Id.* at 3.

1 out that the Respondent has primarily received unitemized contributions, which has prevented
2 West from contacting the donors pursuant to Advisory Opinion 1984-02 (Gramm) to ensure that
3 they wished to contribute to the Respondent instead of to West directly.³ Fourth, West compares
4 the actions of the Respondent to those of the respondent in MUR 5385 (Groundswell Voters
5 PAC), a matter where the Commission found reason to believe that the respondent violated
6 2 U.S.C. § 441h(b) by mailing a fundraising letter requesting contributions to fund a grassroots
7 effort to benefit Richard Gephardt's presidential campaign.⁴

8 1. West Alleges that Respondent Violated 2 U.S.C. § 441h(b) by
9 Referencing West in a Solicitation

10
11 West alleges that a "reasonable person could easily conclude that [the solicitations'
12 language] indicates that the solicitation is either from Congressman West's campaign or that the
13 solicitor is working with the West campaign" and that therefore the Respondent violated section
14 441h(b) of the Act and 11 C.F.R. § 110.16(b). Compl. at 5. Because the Respondent's
15 solicitations use West's name without permission, West asserts that StrikeForce "seeks to profit
16 from the name and reputation of Congressman Allen West" in violation of the Act. Compl. at 5.
17 The Complainant also alleges that "Conservative Strikeforce's email solicitations and the linked
18 contribution webpage are intentionally designed to blur the line between Conservative
19 Strikeforce and Allen West's own campaign committee, Allen West For Congress." Compl. at 4.

20 According to the Complaint, West received a copy of two email solicitations distributed
21 by StrikeForce, one on or about August 2, 2012, and the other on or about August 21, 2012.
22 Compl. at 1, Exs. A, C. Both solicitations request that the reader donate to StrikeForce to
23 support West's campaign for reelection, and include a link to StrikeForce's website. *Id.* at 1, 2,

³ Compl. at 3.

⁴ Compl. at 4.

1 Exs. A, C. Both solicitations are presented as letters from Whitfield, StrikeForce's Chairman,
2 refer numerous times to StrikeForce's efforts to help West win the race, and contain the
3 following disclosure:

4 Paid for by the Conservative Strikeforce PAC. Scott Mackenzie, Treasurer. Not
5 authorized by any candidate or candidates [sic] committee. Contributions are not
6 deductible as charitable contributions for federal income tax purposes.

7 *Id.*, Exs. A, C. Both solicitation disclosures include links allowing the recipient to unsubscribe
8 from the email distribution.

9 StrikeForce's website also solicits a contribution to help reelect West and includes at the
10 very bottom of the page the statement "Not Authorized by Any Candidate or Candidate
11 Committee." *Id.*, Ex. B. StrikeForce's website includes a photograph of West but states
12 StrikeForce's name in a large font across the top and does not appear to be a professionally-
13 designed website. *Id.*

14 StrikeForce denies that its solicitations violated the Act. In its Response, StrikeForce
15 points out that all of the solicitations attached to the Complaint "state repeatedly in their text
16 that the solicitations are for the StrikeForce[,]" and disclose that "*the mailing was not*
17 *authorized by any candidate or candidate's committee.*" Resp. at 1-2 (Oct. 9, 2012) (emphasis
18 in original). Because of this, as well as StrikeForce's intention to support West by contributing
19 directly and by making independent expenditures on behalf of West, StrikeForce asserts that
20 there can be no violation of 2 U.S.C. § 441h(b). *Id.* at 2.

21 2. Respondent Used the Majority of Funds for Operating Expenditures

22 The Complaint further alleges that the Respondent violated 2 U.S.C. § 441h because its
23 "solicitations prey on civic-minded citizens who are led to believe that their contribution may
24 actually be used in support of Allen West, and who presumably have no idea that Conservative

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1 Strikeforce engages primarily in fundraising that ultimately pays for little more than consulting
2 fees.” Compl. at 4. West alleges that, according to Respondent’s 2012 July Quarterly Reports,
3 “[v]irtually all of the group’s reported disbursements go to operating expenditures that consist of
4 ‘email fundraising,’ ‘direct mail,’ list rentals, telemarketing services, and consulting fees paid to
5 the organization’s Treasurer and Chairman. The group is simply a fundraising vehicle.” Compl.
6 at 3.

7 StrikeForce responds that it “contributed the maximum amount permitted under the Act
8 to Mr. West’s campaign” in the 2010 election cycle, and “attempted to make a contribution to the
9 retirement of prior 2008 West campaign debts.” Resp. at 2. StrikeForce is silent as to any
10 contributions to West’s 2012 campaign. In an affidavit submitted along with its Response,
11 StrikeForce’s Treasurer, Mackenzie, points out that StrikeForce spends considerable funds on
12 fundraising because “[f]undraising is expensive and getting more so every year.” Mackenzie
13 Aff. at 2. In support of this point, Mackenzie refers to West’s October 2011 Quarterly Report,
14 which disclosed that approximately 67% of West’s Operating Expenditures were related to
15 fundraising. *Id.* at 3. Mackenzie also claims that “the amount raised through [the email
16 solicitations attached to the Complaint] represents approximately 5% of [StrikeForce’s]
17 individual contributions.” *Id.*

18 Still, StrikeForce’s disclosure reports show that it spent many thousands of dollars to
19 compensate its officers, whether directly via salary, consulting fees or other benefits, or by
20 funneling business to Mackenzie’s other ventures in fundraising and communications media.
21 According to StrikeForce’s reports for the 2011-2012 election cycle, over 88% of StrikeForce’s
22 disbursements were for operating expenditures. *See Two-Year Summary, Other Federal*

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1 Operating Expenditures (2012).⁵ These disbursements included nearly \$88,000 for consulting
2 expenses to Mackenzie & Company, the consulting firm operated by StrikeForce's Treasurer,
3 Mackenzie, \$40,000 for consulting expenses to Whitfield, StrikeForce's chairman, and over
4 \$440,000 to Base Connect Inc., a company for whom Mackenzie has served as a campaign
5 finance consultant. *Id.*

6 3. Contributions Received by StrikeForce Were Overwhelmingly Unitemized

7 As further support for a violation, the Complaints aver that approximately 78% of the
8 contributions reported in StrikeForce's 2012 July Quarterly Report are unitemized, small dollar
9 amount contributions. Compl. at 3. The names and addresses of these small-dollar donors are
10 not required to be reported to the Commission, so West was unable to correct any confusion
11 caused by the similarity of the Respondent's websites and solicitations. *See* 2 U.S.C.
12 § 434(b)(3)(A). The lack of identifying information therefore prevented West from sending
13 letters to those contributors to inform them that StrikeForce is not West's authorized campaign
14 committee, and to suggest that the contributors request a refund from StrikeForce. *See* Advisory
15 Op. 1984-02 (Gramm) at 2.

16 4. Analogous Prior Commission Decision

17
18 The Complainant compares the instant matters to MUR 5385 (Groundswell Voters PAC).
19 Compl. at 4. In MUR 5385, the Commission found reason to believe that the respondent
20 violated 2 U.S.C. § 441h(b) "by mailing a fundraising letter requesting contributions to fund a
21 grassroots effort to benefit [Richard] Gephardt's Presidential campaign." Factual & Legal
22 Analysis at 1, MUR 5385 (Groundswell Voters PAC).

23 StrikeForce's Response was silent as to MUR 5385.

⁵ StrikeForce's two-year summary, including itemized lists of operating expenditures, is available on the Commission's public website at <http://www.fec.gov/fecviewer/CandCmteTransaction.do>.

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1 **C. Legal Analysis**

2 The Act and Commission regulations prohibit persons from “fraudulently
3 misrepresent[ing] the person as speaking, writing, or otherwise acting for on behalf of any
4 candidate or political party or employee or agent thereof for the purpose of soliciting
5 contributions or donations[.]” 2 U.S.C. § 441h(b)(1); 11 C.F.R. § 110.16(b)(1).

6 As the Commission has explained, Section 441h(b) of the Act was enacted as part of the
7 Bipartisan Campaign Reform Act of 2002 to prevent others from misrepresenting that they were
8 raising funds on behalf of the candidate:

9 the Commission has historically been unable to take action in enforcement
10 matters where persons unassociated with a candidate or candidate’s authorized
11 committee have solicited funds by purporting to act on behalf of a specific
12 candidate or political party. Candidates have complained that contributions that
13 contributors believed were going to benefit the candidate were diverted to other
14 purposes, harming both the candidate and contributor.

15 Explanation and Justification, 11 C.F.R. § 110.16, 67 Fed. Reg. 76,962, 76,969 (Dec. 13, 2002).

16 Since its adoption, section 441h(b) of the Act has been enforced against respondents who
17 misled visitors to their websites by fashioning their sites to mimic the candidate’s official
18 website, and by including on the website various statements that the websites were “paid for and
19 authorized by” the candidate’s committee when the respondents knew that the website was
20 neither paid for nor authorized by the candidate or the candidate’s authorized committee.

21 See, e.g., First Gen. Counsel’s Rpt. at 3, MURs 5443, 5495, 5505 (www.johnfkerry-2004.com).

22 But “[e]ven absent an express misrepresentation, a representation is fraudulent if it was
23 reasonably calculated to deceive persons of ordinary prudence and comprehension.” *FEC v.*
24 *Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Tex. 2010). Cf. *United States v. Thomas*, 377 F.3d
25 232, 242 (2d Cir. 2004) (citing, *inter alia*, *Silverman v. United States*, 213 F.2d 405 (5th Cir.
26 1954) (holding that, if the mails are used in a scheme devised with the intent to defraud, the fact

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1 that there is no misrepresentation of a single existing fact makes no difference in the fraudulent
2 nature of the scheme)). For example, in MUR 5472 (Republican Victory Committee, Inc.), the
3 Commission found that respondents knowingly and willfully violated section 441h(b) of the Act
4 because their telephone and mail solicitations contained statements that, although making no
5 expressly false representation, falsely implied that respondents were affiliated with or acting on
6 behalf of the Republican Party. See Commission Certification ¶ 1, MUR 5472 (Republican
7 Victory Committee, Inc.) (Jan. 31, 2005); First Gen. Counsel's Rpt. at 8, MUR 5472 (Republican
8 Victory Committee, Inc.). In MUR 5472, the Respondent had stated in its direct mailings:
9 "Contributions or gifts to the *Republican Party* are not deductible as charitable contributions."
10 First Gen. Counsel's Rpt. at 9, MUR 5472 (quoting direct mailings from Republican Victory
11 Committee, Inc.) (emphasis added). A reasonable person reading that statement, which directly
12 addresses the effect of the donation, would have believed that the Republican Victory
13 Committee, Inc. was soliciting contributions on behalf of the Republican Party. *Id.*

14 The record here does not provide a reasonable basis to believe that StrikeForce made
15 fraudulent misrepresentations in violation of 2 U.S.C. § 441h(b) through its email solicitations or
16 websites. To violate Section 441h(b) of the Act, a person must fraudulently misrepresent that the
17 person speaks, writes, or otherwise acts *on behalf of or for a candidate*. Some of the language in
18 the Respondent's solicitations is ambiguous as to how the contributions will be spent to support
19 West. But ultimately, despite StrikeForce's attempts to use West's image and name to raise
20 funds, StrikeForce's solicitations were made expressly in each instance on StrikeForce's own
21 behalf, not West's.

22 Two main factors weigh against a finding of reason to believe that StrikeForce violated
23 2 U.S.C. § 441h(b). First, StrikeForce is registered with the Commission and complies with its

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1 reporting requirements, including disclosure of its expenditures and disbursements. As
2 explained in MUR 5472, “[f]ailure to file reports with the Commission indicating on what, if
3 anything, the money raised has been spent may be probative of the Committee’s intent to
4 misrepresent itself to the public.” *Id.* at 12.

5 Second, StrikeForce included adequate disclaimers in their communications that indicate
6 that StrikeForce—and not a federal candidate—authorized the solicitation.⁶ The disclaimers are
7 clear and conspicuous; and “give the reader . . . adequate notice of the identity of the person or
8 political committee that paid for and, where required, authorized the communication.”
9 *See* 11 C.F.R. § 110.11(c)(1). Each solicitation, further, referred to StrikeForce numerous times.
10 The Commission has previously held that the presence of an adequate disclaimer identifying the
11 person or entity that paid for and authorized a communication can defeat an inference that a
12 respondent maintained the requisite intent to deceive for purposes of a section 441h violation.
13 *See* MUR 2205 (Foglietta) (finding no reason to believe that respondents violated 2 U.S.C.
14 § 441h where respondents included a disclaimer on advertising material that altered opponent’s
15 disclosure reports and made unsubstantiated negative statements); MURs 3690, 3700 (National
16 Republican Congressional Committee) (finding no reason to believe that respondents violated
17 2 U.S.C. § 441h where disclaimer disclosed that respondents were responsible for the content of

⁶ Whenever any person makes a disbursement to finance a communication that solicits any contribution through any mailing, the communication must contain a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a). If the communication is not authorized by a candidate, a candidate’s authorized political committee, or any agent, the disclaimer must state the name and street address, telephone number, or World Wide Web 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). Political committees that send more than 500 substantially similar communications by email must include disclaimers in the communications. 11 C.F.R. § 110.11(a)(1). The disclaimer must be presented in a clear and conspicuous manner to give the reader adequate notice of the identity of the person or committee that paid for and authorized the communication. *Id.* § 110.11(c)(1). Among other things, the disclaimer in printed materials must 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)(2)(i)-(ii). The disclaimer need not appear on the front or cover page of the communication. 11 C.F.R. § 110.11(c)(iv).

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1 negative satirical postcards that appeared to be written by opposing candidate and committee).
2 *Cf.* MUR 5089 (Tuchman) (finding reason to believe a violation of section 441h occurred where
3 disclaimer was included only on envelope of solicitation letter because letter itself appeared to
4 come from an entity affiliated with the Democratic Party).

5 StrikeForce's email solicitations and website all contain the required disclaimers and
6 make numerous references to the Respondent. Because the communications distributed by
7 StrikeForce each included the disclaimers required under Commission regulations, the
8 Commission finds no reason to believe that StrikeForce violated 2 U.S.C. § 441h(b) and
9 11 C.F.R. § 110.16(b).

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