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BEFORE THE FEDERAL ELECTION COMMISSION

IN RE: Winning the Senate PAC)
and Jason Emert, as Treasurer)
)
)
)

MUR 6893
Response To Complaint

In accordance with 52 U.S.C. §30109(a)(1), Winning the Senate PAC and Jason Emert, in his capacity as treasurer ("Respondent") proffer this response to the complaint ("Complaint") filed by Matthew T. Sanderson ("Complainant") and identified by the Federal Election Commission ("FEC" or "Commission") as MUR 6893.

For the reasons stated below, Respondent contends that the Complainant has failed to present a cause of action which constitutes a violation the Federal Election Campaign Act of 1971, as amended ("FECA" or "Act"). As such, the Commission should make a finding of No Reason to Believe and close this matter. However, in the event the Commission is not inclined to make such a finding, Respondent believes the most appropriate disposition of this matter would be achieved through the Commission's Alternative Dispute Resolution program ("ADR").

A. FACTUAL SUMMARY

Winning the Senate PAC (WSP) filed its Statement of Organization with the Commission on September 11, 2014, as an independent expenditure only committee. Subsequently in 2014, WSP retained the services of HardenGlobal, LLC ("HG") to assist with an internet project to solicit contributions and make expenditures in eighteen (18) states in support of Republican

nominees for the United States Senate and/or in opposition to their opponents.¹ Specifically, WSP contracted with HG as the vendor to provide services for launching the WSP website and the transmission of a series of email fundraising solicitations on behalf of WSP. In return for its services, WSP agreed to pay HG a fifteen percent (15%) commission on all contributions raised as a result of the fundraising emails.

On October 12, 2014, HG resent, to a targeted group of people, an email ("10/12 email") that had previously been sent on October 10, 2014 ("10/10 email", a copy of which is attached hereto at Exhibit B). The 10/12 email is the communication that is the basis of the Complaint in this MUR. There were no substantive changes made to the 10/12 email from the 10/10 email's content other than the initial comment that stated, "(Recipient Name Omitted) you haven't had the chance to read our last message, (the 10/10 email) but its too important to ignore. Please see the forwarded email below and let me know if we can count on your support in securing a Republican victory come November".²

Prior to sending the 10/10 and the 10/12 emails, there were no conversations among staff members from either HG or WSP during which it was discussed that the email packages were sent with the knowledge or intent to mislead or confuse recipients into believing the email originated from any of the Senators named in the "From" line.³ Furthermore, after the email

¹ See attached Exhibit A, *Affidavit of Andrew Ransom* ("Affidavit") at ¶6.

² Id. ¶ 8; also see Complaint, page one of the attachment of 10/12 email.

³ Id. ¶ 9.

packages were sent, neither WSP nor HG received any indication from either emails' recipients that there was confusion or a belief that the solicitations originated from the named Senators.⁴

The 10/12 email raised a total of \$16,627. WSP paid HG the agreed upon commission of fifteen percent (15%) of this amount which totaled \$2,494.05. The 10/10 email, which was not addressed in the Complaint, raised a total of \$9,084 for which WSP paid HG a commission which totaled \$1,362.60. In sum, the two email packages raised a total of \$25,711 and WSP paid a total of \$3,865.65 in commissions to HG.⁵

On October 14, 2014, WSP received a cease and desist letter from Complainant stating that the format of the 10/12 email mislead recipients to believe that the email was being sent by Senator Paul and the other Senators whose names appeared on the "from line" of the email. After receiving the letter both WSP and HG complied with the cease and desist letter and neither entity made use of the 10/10 or 10/12 emails nor a similar format of listing Senators in the "from line" for any subsequent emails.⁶

B. SUMMARY OF COMPLAINT

The Complaint alleges Respondent violated 52 U.S.C. §30124(b) by distributing a fraudulent and misleading fundraising email dated October 12, 2014. Specifically, Complainant argues that the email in question, "was designed to deceive recipients into believing that it originated from Senator Rand Paul ("Senator Paul") and three (3) other U.S. Senators by listing their names on

⁴ Id. at ¶ 13.

⁵ Id. at ¶ 12.

⁶ Id. at ¶ 14.

the "from line" in the 10/12 email."⁷ The Complainant contends that Respondent impermissibly gave the impression that WS was authorized by the Senators to use their names in the email and on that basis should be found in violation of the Act.

The Complainant presents two (2) prior FEC enforcement cases in support of its argument. First, the Complainant cites to MUR 5472. In that matter, the Commission found respondents violated the FECA by distributing solicitations that falsely implied the sender was acting on behalf of the Republican Party.⁸ Secondly, the Complainant cites to MUR 5089 wherein the Commission found reason to believe a violation occurred despite the respondents' inclusion of a disclaimer in its solicitation materials.⁹ The Complainant argues it is immaterial that the email communications at issue in this current MUR included a disclaimer that indicated the email was sent on behalf of WSP and not authorized by any candidate or candidate's committee. The Complaint states, "any 'fine print' the PAC might have included in its fundraising email cannot paper over the fact that this solicitation was deliberately structured to make recipients think that Senator Paul and others were asking for their money."¹⁰

C. DISCUSSION

1. The solicitation emails sent by Respondent complied with the Act's disclaimer notice provisions.

Contrary to the arguments proffered in the Complaint, Respondent complied with the statutory mandates for a general public communication soliciting a contribution or expressly advocating

⁷ See Complaint, at page 1.

⁸ See Complaint at footnote 4 (citing Matter Under Review 5472).

⁹ See Complaint at footnote (citing Matter Under Review 5089).

¹⁰ Complaint at pages 1-2.

the election or defeat of a candidate. The Act requires the communication to include the following:

- (a) the name of the person who paid for the communication; and
- (b) the street address and telephone number, or World Wide Web address of the person who paid for the communication; and
- (c) a statement that the communication is not authorized by any candidate or candidate's committee.¹¹

The 10/12 email that was included as part of the Complaint and the 10/10 email both clearly indicated the communication was paid for by Winning the Senate PAC; provided the address and the World Wide Web address of the PAC; and clearly and conspicuously stated, "Paid for by Winning the Senate PAC. Not authorized by any candidate or candidate's committee." Therefore, each element of the statutory notice requirement was included in both the 10/10 and 10/12 emails' disclaimer notice.

The Complaint attempts to argue that the "size" of the type face was not large enough to meet the FEC Regulations' standards. The Regulations state that the disclaimer notice must be "...presented in a clear and conspicuous manner, to give the reader...adequate notice of the identity of the person or political committee that paid for, and where required, that authorized the communication."¹² It must be sufficient type size to be clearly readable by the recipient of the communication.¹³ Though the Regulations do contain a safe harbor provision for a disclaimer in

¹¹ 52 U.S.C. 30120 (a)(3).

¹² 11 CFR 110.11(c)(1).

¹³ 11 CFR 110.11(c)(2)(i).

twelve (12) point type, smaller type face is sufficient to meet the Regulations' standard provided it is "readable by the recipient." There is little argument that the notice included in the email is easily readable and therefore it provided clear notice to the recipient that WSP paid for the communication and it was not authorized by any candidate, including Senator Paul, or any candidate's committee.

2. The factual circumstances pertaining to the Respondent's emails do not measure up to those enforcement cases relied on by Complainant.

The Complaint cites to two MUR's as authority that the Commission should rely upon in this current matter. The Complaint cites to these MURs as a basis for the argument that the failure to comply with the disclaimer notice provisions is a prerequisite for a finding that the Respondent was in violation of 52 U.S.C. §30124(b). Respondent agrees with that premise but the corollary to that premise also applies; namely, if the Respondent is found to be in compliance with the notice requirements, then there is no stated cause of action for a violation of 52 U.S.C. §30124(b).

Respondent contends that neither of the cited MURs are comparable to the facts in this current MUR and do not serve as a valid precedent to give rise to a potential violation of §30124(b).

In MUR 5472, the FEC was presented with an egregious and straightforward violation of the FECA and specifically 2 U.S.C §441h (currently 52 U.S.C. §30124(b)). In that matter, a PAC called "Republicans for Victory Committee" ("RVC") made multiple fundraising solicitations that allegedly misled its audience to believe the PAC was acting on behalf of the Republican National Committee (RNC). RVC executed a telemarketing fundraising campaign to solicit

contributions to the RVC. The RVC telemarketers used a script and the RVC sent follow-up mailings to potential contributors. During the telephone calls, the spokespersons repeatedly referred to the RNC. *Neither the telephone script, nor the follow-up mailings contained a disclaimer as required by the Act.*

RVC's initial telephone solicitation campaign raised \$50,000. During the course of that initial solicitation campaign, the RNC sent RVC a cease-and-desist letter. However, despite receiving the letter, RVC proceeded with a second telephone solicitation campaign. The RVC neither changed the script, nor included any new disclaimer.

Furthermore, RVC's treasurer admitted that she knew people were confused and believed they were contributing to either the RNC or candidates themselves. In fact, 100 of the contribution checks received by RVC, were made payable to the RNC or specific candidates. Essentially, the targeted individuals could not have definitively known to whom they were making contributions. That confusion was evidenced by the fact that the RNC or specific candidates were being named as the intended recipient of the contributions. Despite the receipt of the cease and desist letter, the failure to comply with the FECA disclaimer requirements and the treasurer's knowledge that contributors were being misled, the RVC continued to solicit contributions using the same mechanism and ignored the cease and desist letter.

Clearly the facts in this MUR 6893 evidence that Respondent did not perpetrate any type of scheme to deceive its audience let alone undertake the elaborate and blatant disregard of the Act as the FEC witnessed in MUR 5472. Unlike the communications at issue in MUR 5472, the

WSP 10/12 email included a clear and conspicuous disclaimer that included the language "Paid for by Winning the Senate PAC. Not authorized by any candidate or candidate's committee" as required by the Act.¹⁴ Any person of ordinary prudence and comprehension would conclude that Winning the Senate PAC was the entity that sent the email.

Secondly, RVC's communications misled their audience to believe they were accepting contributions on behalf of the RNC. In the current matter, Respondent expressly stated they were accepting contributions that would "help elect conservatives who will join Mike Lee, Rand Paul, Ted Cruz, Marco Rubio, and others."¹⁵ Such language indicates a general fundraising initiative designed to generate contributions for WSP which in-turn would be used to support the election of conservative Republican nominees for Senate. The 10/12 email contained no statement or even an implication that the contributions would be used to support the specific Senators listed on the emails' "from line". The 10/12 email included no language that would mislead a reasonable reader to believe contributions were being solicited to support the election related activities of the aforementioned Senators or their authorized committees.

Third, RVC conducted a second fundraising campaign without altering its message or including a disclaimer, despite having received a cease-and-desist letter and having become aware that their efforts had confused their target audience. In the current matter, Respondents only sent a total of two (2) different emails over a period of three (3) days.

¹⁴ See Complaint, 10/12 email attached thereto.

¹⁵ Id.

In MUR 5472, RVC knew its audience was confused, but persisted in the solicitation of contributions in the same manner. Conversely, there is no such direct or circumstantial evidence showing Respondent willfully attempted to deceive its audience with either with the 10/10 or 10/12 emails. Unlike MUR 5472, Respondent did not receive any notice or communications from their targeted audience indicating they were confused or uncertain as to the email's source.¹⁶

Lastly, unlike RVC, the facts in this matter evidence Respondent acted in a responsible fashion and immediately complied with the cease and desist letter. Based on these significant differences, Respondent does not believe the analysis applied to MUR 5472 is at all applicable to the instant matter.

Turning to MUR 5089, Respondent similarly disagrees with Complainant's application to the present facts. In that MUR 5089, a California Congressional candidate's committee mailed letters criticizing the candidate's opponent and praising the candidate herself. The letter was signed by three (3) individuals, none of whom was the candidate. The letterhead and return address on the envelope read "Orange County Democrats." The disclaimer was displayed in very fine print and only placed on the back of the envelope. The FEC found that only the "very careful" reader would have been informed the mailing actually came from the campaign committee.¹⁷

¹⁶ Affidavit ¶13

¹⁷ Statement of Reasons, MUR 5089.

The Commission deemed the disclaimer in MUR 5089 to be insufficient and, as a result, found reason to believe the communication as a whole violated FECA. The Commission stated, "in most cases, we would agree that the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation since the disclaimer discloses the source of the mailing".¹⁸ However, because the disclaimer was placed so obscurely, and in such fine print that the typical reader would overlook it, the Commission found it to be ineffective.¹⁹

The disclaimer in the 10/10 and 10/12 emails were not comparable to the ineffective disclaimer in MUR 5089. Rather than being difficult to locate and in small fine print, Respondents disclaimer is both recognizable to the average reader and prominently displayed in the body of the email. The disclaimer clearly identifies Winning the Senate PAC as the entity paying for the communication and further specifies that it was not authorized by any candidate or committee.

As a result of the significant differences between the two MURs, it is unreasonable to assess the same level of ineffectiveness the FEC found in MUR 5089 to the disclaimer at issue in this matter.

3. Respondent's compliance with the disclaimer notice requirements provides the recipient with the statutory required information to preclude any type of accusation that the mailings were in violation of 52 U.S.C. §30124(b) as alleged in the Complaint.

The Act at §30124(b) states:

(b) No person shall----

¹⁸ Id.

¹⁹ Id.

- (1) fraudulently misrepresent the person 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; or
- (2) willfully and knowingly participate in or conspire to participate in any plan, scheme, or design to violate paragraph (1).

The standards of review for determining a violation of 2 U.S.C. §30124(b) are more rigorous than the standards that apply to the majority of the Act's provisions. The prohibition does not pertain to any type of misrepresentation, even a negligent misrepresentation. Rather the language of §30124(b)(1) requires that the misrepresentation be of a fraudulent nature. Similarly, a violation of §30124(b)(2) requires one to, "willfully and knowingly" conspire to violate the fraudulent misrepresentation. This is a substantial level of scrutiny to meet in order to find a violation of the section. The evidence supports the proposition that Respondent did not even remotely come within the ambit of activities that could be viewed as fraudulent in nature.

A representation is fraudulent if it is reasonably calculated to deceive persons of ordinary prudence and comprehension (*U.S. v. Thomas* 377 F.3d 232, 241 (2d Cir. 2004); also *United States v. Drake* 932 F. 2d 861, 864 (10th Cir. 1991); to establish the existence of a scheme to defraud, the government must present proof that the defendants possessed a fraudulent intent. *United States v. Wallach* 935 F.2d 445 (2d Cir. 1991) citing to *United States v. Schwartz*, 924 F. 2d 410, 420, (2d Cir. 1991); *United States v. Starr*, 816 F. 2d 94, 98 (2d Cir. 1987). The government must show that the defendants contemplated some actual harm or injury. *Starr*, 816 F.2d at 98; *United States v. Regent Office Supply Co.*, 421 F.2d 1174, 1180 (2d Cir. 1970).

Complainant failed to provide any evidence to substantiate actions or communications to prove the 10/12 email was "calculated to deceive". In fact, the contrary is evidenced by the fact WSP included a complete disclaimer notice that was fully compliant with the Act's requirements. The inclusion of that disclaimer notice in the emails that plainly stated WSP paid for the communication and that it was not authorized by any candidate or candidate's committee constituted the full and complete truth as to the source of the communication. Such a disclosure cannot lead any person to reasonably conclude that WSP calculated to deceive any person.

And once again, as the Commission has previously stated, "in most cases, we would agree...that the inclusion of a disclaimer negates the requisite intent to deceive element of fraudulent misrepresentation since the disclaimer discloses the source of the mailing."²⁰ On that basis alone, there is insufficient evidence to make a finding of fraudulent activity in this current matter.

The mere presence of the Senators' names in the "From" line coupled with the complete mandated disclaimer is wholly insufficient to evidence Respondent's intentions to willfully deceive its audience into believing the contributions would assist in the election of those named Senators. Certainly there is nothing in the emails that would lend itself to evidence Respondent contemplated some actual harm or injury to those named Senators. Nothing of a negative or derogatory nature was directed at the named Senators listed in the email. Reference to those Senators was only of a positive nature and therefore there is no attribution to Respondent of any contemplative scheme to cause harm or injury to them.

²⁰ Id.

.D. CONCLUSION

Respondent has clearly evidenced that they complied with the statutory disclaimer notice requirements in both the 10/10 and 10/12 emails. Compliance with those notice requirements negates the basis for any allegation that either of the two emails were in violation of 52 U.S.C. §30124(b). For those reasons, Respondent request that the Commission make a finding of No Reason to Believe and close the matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Paul E. Sullivan", written in a cursive style.

Paul E. Sullivan

Counsel to Respondents

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 6893

EXHIBIT A

Affidavit of Andrew Ransom

BEFORE THE FEDERAL ELECTION COMMISSION

IN RE: Winning the Senate PAC)
Jason Emert, Treasurer)
)

MUR 6893

AFFIDAVIT OF ANDREW RANSOM

I, Andrew Ransom, in accordance with the provisions of 28 U.S.C. § 1746 declare as follows:

1. I am over 18 years of age, and am fully competent to give this affidavit based upon my personal knowledge and recollection of the matters stated herein.
2. I reside at Arlington, Virginia 22203.
3. I am currently employed as the Operations Director for SurgeRED, LLC.
4. From May 2014 to December 2014 I was employed by HardenGlobal, LLC (HG).
5. While at HG, I served as the Director of Project Operations.
6. During my employment, Winning the Senate PAC (WTS), a federal independent expenditure only committee, contracted with HG to assist in an internet advertising project to solicit contributions and make expenditures in support of Republican nominees for Senate and/or in opposition to their opponents in eighteen (18) target states. The agreement between WTS and HG was a verbal agreement; there was no written contract or memorialization of the agreement.
7. The duties of HG under the agreement with WTS was twofold: (1) launch a website for WTS; and (2) send out a series of fundraising email solicitations for contributions to WTS.
8. One of those email solicitations was the October 12, 2014 email that is the subject of controversy in MUR 6893 (10/12 email). The 10/12 email was merely a

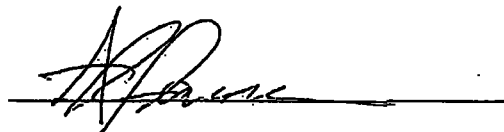
forwarded copy of an email sent on October 10, 2014 (10/10 email). There were no substantive changes made as to the original email's content other than the initial comment that states, "(Recipient Name Omitted) you haven't had the chance to read our last message, (the 10/10 email) but its too important to ignore. Please see the forwarded email below and let me know if we can count on your support in securing a Republican victory come November."

9. In my capacity as Director of Project Operations for HG, I was responsible for physically transmitting the 10/12 email to an identified group of potential contributors. Prior to sending the 10/12 email, I was not involved in any conversation with any staff member from WTS or HG, or any other person, during which it was discussed that the goal was to mislead recipients into believing the email was generated from the Senators named in the "From" line. To my knowledge, no such conversation ever occurred with any person.
10. The 10/12 email generated a total of \$16,627 in contributions to WTS. In accordance with the agreement between WTS and HG, WTS paid HG a fifteen percent (15%) commission for its services. Therefore, the total amount of the commission paid by WTS to HG for the 10/12 email was \$2,494.05.
11. The 10/10, email, generated a total of \$9,084 in contributions to WTS. Of that amount, WTS paid HG a fifteen percent (15%) commission for its services. Therefore, the total amount of the commission paid by WTS to HG for the 10/10 email was \$1,362.60.

12. In sum, the email package for the 10/10 email and the 10/12 email generated contributions totaling \$25,711. WTS paid HG a total of \$3,856.65 in commission for those emails.
13. To my knowledge, neither HG nor WTS ever received any indication from recipient of the 10/10 email or the 10/12 email that they felt misled or deceived by the emails.
14. As of the time WTS received the cease and desist letter from the Complainant, HG ceased and desisted from any further use of either the 10/10 email, the 10/12 email or any similar such format for contribution solicitations.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on the 21 day of May 2015.



Andrew Ransom

BEFORE THE FEDERAL ELECTION COMMISSION

MUR 6893

EXHIBIT B

Copy of October 10, 2014 email

Paul Sullivan

From: Cruz/Paul/Lee/Rubio (Senate) <stokes@winningthesenate.com>
Sent: Friday, October 10, 2014 10:03 AM
To: Andrew Ransom
Subject: Nightmare

Failing to Win the Senate = **Amnesty for millions of illegals**

Failing to Win the Senate = **Unsecured Borders**

Failing to Win the Senate = **Obamacare becomes Permanent**

Democrats are outspending us in numerous races, but **we are on the verge of pulling ahead in key states that will deliver Republicans control of the U.S. Senate.**

There are a handful of races that will determine who controls the Senate.

Chipping in just \$25 to one or more of these races will make a difference as we begin the last round of ads:

Donate \$25 for Arkansas | Tom Cotton

Donate \$25 for Iowa | Joni Ernst

Donate \$25 for New Hampshire | Scott Brown

Donate \$25 for Colorado | Cory Gardner

Donate \$25 for Georgia | David Perdue

Donate \$25 for Nebraska | Ben Sasse

Commit to All Six Target States (\$25 each/total of \$150.00)

Contribute \$25 To Be Spent Where It's Needed Most

Time is running out.

Help elect conservatives who will join Mike Lee, Rand Paul, Ted Cruz, Marco Rubio, and others to end our national nightmare.

T.J. Stokes

Winning The Senate



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