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2013 APR 23 AM 11: 53

2013 APR 22 PM 6: 59

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

CELA

MURs: 6633, 6641, 6643, 6645
ELECTION CYCLE: 2012
STATUTE OF LIMITATIONS: Earliest: Aug. 13, 2017
Latest: Aug. 31, 2017

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MUR 6633

COMPLAINANT:
RESPONDENTS:

Allen West for Congress
Republican Majority Campaign PAC,
Randy G. Goodwin in his official capacity as Officer, and
Gary Kreep in his official capacity as Officer

MUR 6641

COMPLAINANT:
RESPONDENTS:

Allen West for Congress
The Coalition of Americans for Political Equality PAC,
Jefferey Loyd in his official capacity as Chairman,
Nicholas Spears in his official capacity as Secretary, and
Margaret Berardinelli in her official capacity as Treasurer

MUR 6643

COMPLAINANT:
RESPONDENTS:

Allen West for Congress
Patriot Super PAC,
Thomas Freiling in his official capacity as Treasurer, and
Steve Elliott in his official capacities as Advisory
Committee Chair and Director

MUR 6645

COMPLAINANT:
RESPONDENTS:

Allen West for Congress
The Conservative StrikeForce,
Dennis Whitfield in his official capacity as Chairman, and
Scott B. Mackenzie in his official capacity as Treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441h(b)
2 U.S.C. § 441d
11 C.F.R. § 110.11
11 C.F.R. § 110.16(b)

**INTERNAL REPORTS
CHECKED:**

Disclosure Reports

**FEDERAL AGENCIES
CHECKED:**

1 **I. INTRODUCTION**

2 In each of these four matters, the Complainant, Allen West for Congress ("West"),
3 alleges that the entities and, in their official capacities, the individuals identified above, *see supra*
4 p. 1, (collectively, the "Respondents") disseminated materials that reference West and direct
5 readers, among other things, to visit a support website for West that in turn solicits donations.
6 Yet West did not authorize those websites, and little, if any, of the solicited donations were
7 directed to West. West therefore asserts that the Respondents fraudulently misrepresented
8 themselves in solicitations and in other communications as acting on behalf of West, in violation
9 of 2 U.S.C. § 441h(b) of the Federal Election Campaign Act of 1971, as amended, (the "Act")
10 and 11 C.F.R. § 110.16(b). The record leaves little doubt that Respondents sought to use
11 Representative West's likeness to raise funds independently to support his candidacy. Moreover,
12 it appears that Respondents spent very little of the money they raised to support West. Rather,
13 the funds appear to have been spent primarily on additional fundraising, much apparently to
14 vendors in which some Respondents' officers may have held personal financial interests. Also
15 troubling are the accounts of donors who mistakenly contributed funds to some Respondents
16 while intending to contribute directly to West. Nonetheless, we cannot agree with Complainant
17 that this conduct constitutes a fraud within the reach of the Act or Commission regulation.
18 Whether it is prohibited by laws beyond the Act, criminal or otherwise, is not a matter within the
19 Commission's jurisdiction. We therefore recommend that the Commission find no reason to
20 believe that the Respondents violated 2 U.S.C. § 441h(b) or 11 C.F.R. § 110.16(b).

21 In addition, Republican Majority Campaign PAC failed to include the appropriate
22 disclaimers in its email solicitation and on its website. But because the partial disclaimers
23 contained sufficient information to identify Republican Majority Campaign PAC as the source of

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1 the communications, we nonetheless recommend that the Commission exercise its prosecutorial
2 discretion to dismiss Republican Majority Campaign PAC's violation of 2 U.S.C. § 441d and
3 11 C.F.R. § 110.11. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

4 II. FACTUAL AND LEGAL ANALYSIS

5 A. Parties

6 1. Allen West for Congress

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

11 2. Republican Majority Campaign PAC

12 Republican Majority Campaign PAC ("Republican Majority") registered with the
13 Commission on December 17, 2007, as a nonconnected committee. Randy G. Goodwin is the
14 National Chairman and Treasurer, and Gary Kreep was its Executive Director, Chairman, or
15 President, or all three, until February 2012, when he became a candidate for a state judicial
16 position and was required to resign from all PACs. Republican Majority Resp. at 1 (Sept. 17,
17 2012).

18 3. Coalition of Americans for Political Equality PAC

19 The Coalition of Americans for Political Equality PAC ("CAPE") registered with the
20 Commission as an independent expenditure-only committee on February 23, 2011. Margaret
21 Berardinelli is CAPE's Treasurer. Jefferey Loyd is CAPE's Chairman and Nicholas Spears is
22 CAPE's Secretary. CAPE describes itself as "a non-profit political organization dedicated to

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1 restoring conservative values in the politicians elected to represent all citizens of the United
2 States of America.” CAPE Compl., Ex. A (Aug. 29, 2012).

3 4. Patriot Super PAC

4 Patriot Super PAC (“Patriot”) registered with the Commission on January 13, 2012, as a
5 nonconnected, independent expenditure-only committee. Thomas Freiling became Patriot’s
6 Treasurer on February 21, 2012. Before that, Steve Elliott was listed as Patriot’s Treasurer on
7 Patriot’s original Statement of Organization, filed with the Commission on January 13, 2012.
8 Patriot’s website states that Freiling is Patriot’s Executive Director and that Elliott serves on
9 Patriot’s Board and is Chairman of Patriot’s Advisory Committee. See
10 <http://www.patriotsuperpac.com/about-us/advisory-board/> (last visited Apr. 19, 2013).

11 Patriot’s Response, however, describes Elliott only as the president of Grassroots Action,
12 Inc. (“Grassroots”), a for-profit company that manages a database of conservative donors and
13 activists. See Patriot Resp. at 2, 11 (Mar. 25, 2013);¹ see also Declaration of Thomas Freiling
14 ¶ 4 (Mar. 25, 2013), Patriot Resp., Attach. A (“Freiling Decl.”). Nowhere does Patriot’s
15 Response or Freiling’s Declaration mention Elliott’s connection to Patriot, and even claims that
16 the “Complaint fails to set forth any facts upon which to base a violation of §441h(b) by Steve
17 Elliott.” Patriot Resp. at 11. Patriot claims that Elliott’s company, Grassroots, provided the
18 database and supervised the distribution of Patriot’s solicitation emails pursuant to an arm’s
19 length agreement. *Id.*

¹ On January 11, 2013, Patriot’s counsel requested an extension of time to file its response, and stated that it would submit an affidavit and brief no later than January 18, 2013. CELA granted that request, but only received Patriot’s Response on March 27, 2013.

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1 5. The Conservative StrikeForce

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

7 B. Background

8
9 West alleges that the Respondents' solicitations and other materials violated section 441h
10 of the Act for four general reasons, although only some apply to every Respondent. First, West
11 alleges that a "reasonable person could easily conclude that [the solicitation's language] indicates
12 that the solicitation is either from Congressman West's campaign or that the solicitor is working
13 with the West campaign."² Second, West claims that the vast majority of each Respondent's
14 disbursements and expenditures has been for operating expenses and additional fundraising
15 communications.³ Third, West points out that, in some instances, the Respondents have
16 primarily received unitemized contributions, which has prevented West from contacting the
17 donors pursuant to Advisory Opinion 1984-02 (Gramm) to ensure that they wished to contribute
18 to the Respondent instead of to West directly.⁴ Fourth, West compares the actions of
19 Respondents to those of the respondent in MUR 5385 (Groundswell Voters PAC), a matter
20 where the Commission found reason to believe that the respondent violated 2 U.S.C. § 441h(b)

² Republican Majority Compl. at 5 (Aug. 23, 2012); Patriot Compl. at 4 (Sept. 6, 2012); StrikeForce Compl. at 5 (Aug. 30, 2012); *see also* CAPE Compl. at 5 (similar).

³ *See, e.g.*, Republican Majority Compl. at 2-3.

⁴ Republican Majority Compl. at 2; StrikeForce Compl. at 3.

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1 by mailing a fundraising letter requesting contributions to fund a grassroots effort to benefit
2 Richard Gephardt's presidential campaign.⁵

3 1. West Alleges in Each Complaint that Respondents Violated 2 U.S.C.
4 § 441h(b) by Referencing West in a Solicitation
5

6 While the form and language of each Respondent's solicitation differs, West alleges in
7 each Complaint that a "reasonable person could easily conclude that [the solicitations' language]
8 indicates that the solicitation is either from Congressman West's campaign or that the solicitor is
9 working with the West campaign" and therefore that the Respondent violated section 441h(b) of
10 the Act and 11 C.F.R. § 110.16(b). Republican Majority Compl. at 5; CAPE Compl. at 4; Patriot
11 Compl. at 4; StrikeForce Compl. at 5. Because the Respondents' solicitations use West's name
12 without permission, West asserts that Respondents are "simply using Congressman West's name
13 to raise funds" in violation of the Act. *See, e.g.*, CAPE Compl. at 2, 4. The Complainant also
14 alleges that the Respondents' communications "are intentionally designed to blur the line
15 between [the Respondents'] and Allen West's own campaign committee, Allen West for
16 Congress." Republican Majority Compl. at 4; CAPE Compl. at 4; Patriot Compl. at 3;
17 StrikeForce Compl. at 4.

18 Each Respondent denies that its solicitations violated the Act, for reasons described as to
19 each below.

20 a. *Republican Majority Campaign PAC*

21 West received a copy of an email solicitation distributed by Republican Majority, on or
22 about August 20, 2012. Republican Majority Compl. at 1, Ex. A. The first page of the
23 solicitation includes a large banner with Republican Majority's logo and address. *Id.* at Ex. A.
24 Near the top of the solicitation is a large photo of Goodwin with a caption identifying him as

⁵ Republican Majority Compl. at 5; CAPE Compl. at 4-5; Patriot Compl. at 3-4; StrikeForce Compl. at 4.

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1 Republican Majority's Treasurer. The solicitation requests that the reader donate to support
2 West's campaign for reelection and includes links to Republican Majority's donation website.
3 *Id.* at 1, 2, Exs. A, B. The solicitation is signed by Goodwin and includes Republican Majority's
4 street address. The solicitation contains neither a web address for the entity, nor its phone
5 number, nor a disclaimer. *Id.* at Ex. A.

6 Republican Majority's referenced donation website, however, contains the following
7 disclaimer at the bottom of the page:

8 The Republican Majority Campaign is an Independent Expenditure Political
9 Action Committee. Accordingly, it makes on its own all decisions of how, when
10 and where funds are to be expended. Thus, RMC PAC's Campaign Efforts are
11 not endorsed by any Candidate or Candidate's Committee.

12 This is sponsored and paid for by Republican Majority Campaign PAC[.]

13 Republican Majority Compl., Ex. B. The disclaimer further includes Republican Majority's
14 address. *Id.* This disclaimer is set apart from the rest of the text, but its text is set in a far smaller
15 font size than the website's other content. *Id.*

16
17 In its Response, Republican Majority claims that "[i]t is highly unlikely that [its] donors
18 would confuse our pro-Allen West project with activities of the official Allen West campaign."
19 Republican Majority Resp. at 3. Rather, Republican Majority asserts that the solicitation
20 attached as Exhibit A to the Complaint was distributed only to Republican Majority's list of
21 contributors (individuals who have contributed to Republican Majority in the past and are
22 therefore familiar with Republican Majority and Goodwin), features Republican Majority's
23 letterhead prominently at the top of the email, and provides all appropriate disclaimers to the
24 potential donor. *Id.* at 2-3. Republican Majority states that, contrary to the "implicit
25 assumption" in the Complaint that Republican Majority's solicitations containing West's name

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1 must be authorized by West, it "would be illegal to coordinate [Republican Majority's]
2 independent expenditures with the Allen West campaign." *Id.* at 3.

3 *b. Coalition of Americans for Political Equality PAC*

4 On August 13, 2012, CAPE issued a press release entitled "CAPE PAC Is Working to
5 Get Out the Vote in Florida." CAPE Compl. at 1, Ex. A. The press release states that CAPE,
6 having endorsed Congressman Allen West . . . has launched Get-out-the-vote
7 (GOTV) campaigns focused on the Tuesday, August 14, 2012 primaries in
8 Florida GOTV efforts include local TV advertisements, voice broadcasts,
9 social media, search placements, and targeted videos. CAPE PAC aims to
10 educate voters about West . . . and to GOTV The organization is also
11 working to help voters find their local polling places.

12 *Id.*, Ex. A. The press release directs readers to view its television spots on behalf of West on
13 YouTube, "push out" the Twitter hashtag "#VoteAllenWest," and visit CAPE's "support"
14 website at www.votewest2012.org ("Votewest2012.org"). *Id.*

15 Votewest2012.org includes a stylized logo "Allen West for Congress 2012" in the upper
16 left hand corner and at the bottom left of the screen. *Id.* at 1-2, Ex. B. It also includes photos of
17 the candidate, and descriptions of West's positions on various issues. *Id.*, Ex. B.

18 Votewest2012.org also references CAPE. At the top right hand corner of the screen appears the
19 text in small print, "A candidate support website funded by CAPE PAC." *Id.* In the middle of
20 the right side of the screen, under the "CONNECT WITH US" tab, the following text appears:

21 "Help CAPE PAC re-elect Allen West to Congress! When you sign up today, we will send you
22 critical updates and help you stay current on the race for conservative victory in 2012." *Id.* A

23 link "About CAPE PAC" is the third link in the site navigation list near the bottom of the page.

24 *Id.* Finally, at the bottom of the page, the following text in small print appears: "Coalition of

25 Americans for Political Equality Political Action Committee is a federal independent

26 expenditure-only political action committee which independently supports Federal candidates

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1 who reflect our core values and principles through a variety of activities aimed at influencing the
2 outcome of national elections.” *Id.* Below that text is a white box with the following text: “Paid
3 for by the Coalition of Americans for Political Equality Political Action Committee / Not
4 authorized by any candidate or candidate’s committee / For more information visit
5 www.capecpac.org.” *Id.* CAPE has copyrighted the page. *Id.*

6 If a visitor to Votewest2012.org clicks the red “DONATE” button in the upper right
7 corner, a new page opens that includes at the top of the page the stylized logo, “Allen West for
8 Congress 2012” on the left and in small print on the right, “A candidate support website funded
9 by CAPE PAC.” CAPE Compl. at 1-2, Ex. C. Near the top of the page, in a black box with
10 white text against a white background is a banner that reads, “JOIN CAPE PAC’S CAMPAIGN
11 TO HELP ELECT ALLEN WEST IN 2012. WITH YOUR HELP, TOGETHER, WE CAN
12 WIN THE FUTURE FOR AMERICA!”

13 Further, CAPE states that, on its “About CAPE PAC” page, it included the following
14 language: “PLEASE BE AWARE THAT WHEN DONATING THROUGH THIS WEBSITE,
15 YOU ARE DONATING TO THE COALITION OF AMERICANS FOR POLITICAL
16 EQUALITY (CAPE) PAC AND NOT DONATING TO THE CANDIDATE DIRECTLY.”
17 CAPE Resp. at 3 (Nov. 19, 2012).

18 Although the Complaint did not include screenshots from West’s own website,
19 www.allenwestforcongress.com, the Response did. *See* CAPE Resp., Ex. C. Those screenshots
20 indicate that the two websites differ in color scheme, graphic design, and layout.

21 The Complaint asserts that CAPE confused contributors to think that they are
22 contributing to West directly. *See* CAPE Compl. at 3 (describing how a “political
23 reporter/blogger[] was misled by CAPE PAC’s website . . . to believe that he was making a

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1 contribution to another candidate's campaign directly" and asserting that "nearly 1 out of every
2 10 contributions made to CAPE PAC is ultimately refunded to the contributor[.]" which
3 indicates that "these refunds are made to individuals confused by the solicitation materials of
4 CAPE PAC").

5 In its Response, CAPE asserts that Votewest2012.org "contained multiple, clear
6 indications that CAPE PAC operates independently from the West Campaign[.]" and that
7 "CAPE PAC has also done much more than fundraise, deploying resources to promote federal
8 candidates during the 2012 election cycle through many online and off-line efforts." CAPE
9 Resp. at 1.

10 The Response asserts that the legal disclaimer provided on CAPE's website complies
11 with the requirements of 11 C.F.R. § 110.11(c)(1)-(2), and details six other ways in which the
12 Votewest2012.org website "went above and beyond [CAPE's] legal obligation" to inform
13 viewers that CAPE, not any candidate, sponsored the website. *Id.* at 2-3. The Response also
14 states that the "logos, structure, and color scheme of CAPE PAC's website bear no resemblance
15 to those found on the West Campaign's official website." *Id.* at 3, Ex. C.

16 CAPE "recognizes that some refunds were issued to confused donors[.]" but claims that
17 "this donor confusion was not the result of CAPE PAC's fraudulent misrepresentations[.]" *Id.* at
18 3. Instead, CAPE asserts that visitors to its website, just like television and radio advertisement
19 viewers and listeners, "may mistake an ad that discusses a candidate for one that is sponsored by
20 a candidate[,] despite the inclusion of legal disclaimers and other indications that the ad was
21 actually funded by an outside group." *Id.*

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1 *c. Patriot Super PAC*

2 According to the Complaint, in the late summer of 2012, Patriot created a radio
3 advertisement, which was available on its website. Patriot Compl. at 1, Ex. A. The Complaint
4 attached an audio file of the advertisement, transcribed below:

5 If you want to see Allen West return to Congress, and if you support how Allen
6 West fights for liberty and limited government, then you need to act now, because
7 George Soros, Nancy Pelosi, and a former Bill Clinton aid are gunning for
8 Congressman West. And the liberal super PACs will spend millions to defeat
9 him.

10 They've already stooped to name-calling in a desperate attempt to blatantly hang
11 false labels on our Congressmen. The only labels Allen West deserves are those
12 of conservative, competent, fighter, and patriot.

13 That's why Patriot Super PAC is reaching out to millions of freedom-loving
14 Americans who salute Congressmen Allen West, people just like you, who
15 believe in his vision for a free America.

16 Show your support of Allen West now, and visit www.wesaluteallenwest.com.
17 Allen West is a patriot who deserves our support. Visit
18 www.wesaluteallenwest.com now to defend our Congressman.

19 Patriot Super PAC is responsible for the contents of the advertising. Paid for by
20 Patriot Super PAC. Not authorized by any candidate or campaign committee.

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26 The Response states that this advertisement aired on three radio stations in Florida's 18th
27 Congressional District between August 27 and August 31, 2012. Patriot Resp. at 3; Freiling
28 Decl. ¶ 18.⁶ The Response states that in an effort to raise funds to pay for the production and
29 airing of the radio advertisement, Patriot emailed two contribution solicitations to potential
30 contributors that included links to Patriot's contribution page. Patriot Resp. at 2, Attachs. B, C;
31 Freiling Decl. ¶ 13.

⁶ According to disclosure reports filed with the Commission, Patriot spent \$6,800 on this radio advertisement. See 48-Hour Independent Expenditure Report (Aug. 27, 2012). Freiling's declaration, however, states that "the total cost of the production and the purchase of radio air time for the Ad was \$11,275." Freiling Decl. ¶ 18.

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1 According to the Complaint, www.wesaluteallenwest.com⁷ automatically redirected
2 viewers to Patriot's contribution page, www.patriotsuperpac.net/12951/offer.asp ("Patriot's
3 webpage"). Patriot Compl. at 1. Patriot's webpage, attached as Exhibit A to the Complaint,
4 included an additional solicitation:

5 DONATE NOW TO SAVE ALLEN WEST! Liberal Super PACs are unleashing
6 millions of dollars to stop Allen West. Help Patriot Super PAC fight back. We're
7 producing a radio ad next week. Please make a donation NOW to get the radio ad
8 produced and aired. Allen West is a freedom fighter. Let's not lose Allen West!

9 *Id.*, Ex. A. Patriot's webpage includes Patriot's logo in the upper left corner, and although it
10 includes West's photograph and mentions his name, it otherwise appears to be Patriot's
11 webpage. *Id.*

12 In its Response, Patriot asserts that it did not violate section 441h(b) of the Act by
13 referring to West in its solicitations. *Id.* at 5. Indeed, Patriot states that "the very definition of
14 [an] independent expenditure specifically requires the reference to a clearly identified
15 candidate[.]" *Id.* (citing 2 U.S.C. § 431(17)(A)). Patriot also denies that it fraudulently
16 misrepresented or deceived the public regarding the authorship of the solicitations, and avers that
17 it included the required disclaimers in its radio advertisement, solicitation emails, and on its
18 website. *Id.* at 1, 2, 6-7. In addition to complying "fully and accurately" with the disclaimer
19 requirements of the Act, Patriot asserts that it "went one step further in providing an additional
20 notice on the webpage under the title 'About Us' describing in layman[']s terms the fact that
21 [Patriot] is an independent expenditure committee and its efforts cannot be coordinated with any
22 campaign committee." *Id.* at 7.

⁷ The domain www.wesaluteallenwest.com is no longer active and we are unable independently to verify this allegation.

1 *d. The Conservative StrikeForce*

2 According to the Complaint, West received a copy of two email solicitations distributed
3 by StrikeForce, one on or about August 2, 2012, and the other on or about August 21, 2012.
4 StrikeForce Compl. at 1, Exs. A, C. Both solicitations request that the reader donate to
5 StrikeForce to support West's campaign for reelection, and include a link to StrikeForce's
6 website. *Id.* at 1, 2, Exs. A, C. Both solicitations are presented as letters from Whitfield,
7 StrikeForce's Chairman, refer numerous times to StrikeForce's efforts to help West win the race,
8 and contain the following disclosure:

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

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

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

19 In its Response, StrikeForce points out that all of the solicitations attached to the
20 Complaint "state repeatedly in their text that the solicitations are for the StrikeForce[.]" and
21 disclose that "*the mailing was not authorized by any candidate or candidate's committee.*"
22 Strikeforce Resp. at 1-2 (Oct. 9, 2012) (emphasis in original). Because of this, as well as
23 StrikeForce's intention to support West by contributing directly and by making independent

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1 expenditures on behalf of West, StrikeForce asserts that there can be no violation of 2 U.S.C.
2 § 441h(b). *Id.* at 2.

3 2. Respondents Used the Majority of Funds for Operating Expenditures

4 The Complaints further allege that Respondents violated 2 U.S.C. § 441h(b) because their
5 “solicitations prey on civic-minded citizens who are led to believe that their contribution may
6 actually be used in support of Allen West, and who presumably have no idea that [Respondent]
7 simply engages in an endless cycle of fundraising that ultimately pays for little more” than the
8 officers’ own fees and benefits, and further fundraising efforts. Republican Majority Compl.
9 at 4; CAPE Compl. at 4; Patriot Compl. at 3; StrikeForce Compl. at 4. West alleges as to each
10 Respondent that, according to Respondents’ 2012 July Quarterly Reports, “[v]irtually all of the
11 funds that [Respondents] raise[] are spent on ‘operating expenditures[,]’” which include
12 disbursements for fundraising (whether via email, direct mail, or telemarketing), travel, website
13 services, and disbursements to Respondents’ officers for compensation, including salary,
14 benefits, or fees for legal, management, director, or consulting services. Republican Majority
15 Compl. at 2-3; CAPE Compl. at 3; Patriot Compl. at 2; StrikeForce Compl. at 3.

16 With respect to Republican Majority, West “can find no evidence that [Republican
17 Majority] has spent any money on actual, non-fundraising public communications since
18 sometime in 2008.” Republican Majority Compl. at 3. Attached as Exhibit C to the Complaint
19 is a report by FactCheck.org, which indicates a similar spending pattern in the 2010 election
20 cycle. *Id.* at 3, Ex. C. The FactCheck.org report states that Republican Majority “spent almost
21 \$3.9 million . . . [h]owever, only \$105,220 of that amount was spent on activities such as
22 independent expenditures or campaign ads that expressly advocate the election or defeat of a
23 particular candidate, according to the Center for Responsive Politics.” *Id.* While Republican

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1 Majority contributed approximately \$20,600 directly to candidates, “the PAC spent the most
2 money—nearly \$2.7 million—on services described as ‘phone and mail communication’ through
3 a firm called Political Advertising in Arizona.” *Id.* at 3-4, Ex. C.

4 In response, Republican Majority claims that “our independent expenditures far outweigh
5 our operating expenditures” and states that “over 80 percent of our disbursements” in the 2008
6 election cycle were “made for the purpose of influencing the outcome of federal elections.”
7 Republican Majority Resp. at 2, 4.

8 CAPE counters similar allegations regarding its operating expenditures by asserting that
9 it engaged in legitimate political activity by: (1) buying advertisements designed to put content
10 favorable to the candidate at or near the top of internet search result lists, which increase traffic
11 to those sites and decrease traffic that could have gone to sites that expressed negative
12 information; (2) creating an on-line presence via Facebook, Twitter, and YouTube; (3) sending
13 millions of emails to targeted voters; (4) building an application for mobile phones to inform
14 conservative voters of their polling locations; and (5) issuing numerous press releases, and
15 sponsoring television and radio advertisements and robocalls that referenced CAPE's favored
16 candidates. CAPE Resp. at 4.

17 Patriot asserts that the contributions that it solicited to pay for the production and airing
18 of its radio advertisement were in fact used for those purposes. Patriot Resp. at 8. Patriot also
19 asserts that it circulated the solicitations and aired the radio advertisement referencing West not
20 to make a profit, but “to support a conservative incumbent congressman who was in clear
21 jeopardy of losing his reelection bid.” *Id.* at 10; Freiling Decl. ¶ 13. Moreover, Patriot claims
22 that it made only approximately 4.8 cents for each solicitation email that it sent in support of the
23 radio advertisement for West, not the “substantial profit” alleged in the Complaint. Patriot Resp.

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1 at 10, Attach. A(2) (listing each email regarding West by date delivered, the number of emails
2 delivered, the number of donors, and the total amount of funds received per email).

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

14 Still, Respondents’ disclosure reports show that they spent many thousands of dollars to
15 compensate their officers, whether directly via salary, consulting fees or other benefits, or by
16 funneling business to the officers’ other ventures in fundraising and communications media. For
17 example, according to Republican Majority’s disclosure reports for the 2011-2012 election cycle,
18 over 58% of Republican Majority’s disbursements were for operating expenditures. *See Two-*
19 *Year Summary, Other Federal Operating Expenditures (2012).*⁸ These disbursements included
20 over \$100,000 to Kreep, Republican Majority’s Executive Director until February 2012, for
21 “legal services” and “office rent.” *Id.* Republican Majority disbursed over \$80,000 in 2011-

⁸ Each Respondent committee’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 2012 to Goodwin, Republican Majority's National Director and Treasurer, for "accounting
2 services," "management services," "medical insurance," "salary," and related purposes. *Id.*

3 Patriot's reports disclose that since its inception on January 13, 2012, Patriot disbursed
4 over \$375,000 to Grassroots for "fundraising," and over \$44,000 to Fairfax Technologies LLC
5 ("Fairfax") for "rent," "generic advertising," "robocalls," and "media buy." *See Two-Year*
6 *Summary, Other Federal Operating Expenditures (2012).* Patriot's advisory committee chair,
7 Elliott, is also Grassroots' President and Chief Executive Officer, while Patriot's Treasurer,
8 Freiling, is Fairfax's registered agent. These disbursements were made in addition to over
9 \$104,000 disbursed to Freiling as "salary." *See id.* In total, over 80% of Patriot's disbursements
10 in 2012 were for operating expenditures. *Id.*

11 According to StrikeForce's reports for the 2011-2012 election cycle, over 88% of
12 StrikeForce's disbursements were for operating expenditures. *See Two-Year Summary, Other*
13 *Federal Operating Expenditures (2012).* These disbursements included nearly \$88,000 for
14 consulting expenses to Mackenzie & Company, the consulting firm operated by StrikeForce's
15 Treasurer, Mackenzie, \$40,000 for consulting expenses to Whitfield, StrikeForce's Chairman,
16 and over \$440,000 to Base Connect Inc., a company for whom Mackenzie has served as a
17 campaign finance consultant. *Id.*

18 3. Contributions Received by Republican Majority and StrikeForce Were
19 Overwhelmingly Unitemized

20 As further support for a violation, the Complaints aver that approximately 98% of the
21 contributions reported in Republican Majority's 2012 July Quarterly Report and approximately
22 78% of the contributions reported in StrikeForce's 2012 July Quarterly Report are unitemized,
23 small dollar amount contributions. Republican Majority Compl. at 2; StrikeForce Compl. at 3.
24 The names and addresses of these small-dollar donors are not required to be reported to the

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1 Commission, so West was unable to correct any confusion caused by the similarity of the
2 Respondents' websites and solicitations. *See* 2 U.S.C. § 434(b)(3)(A). The lack of identifying
3 information therefore prevented West from sending letters to those contributors to inform them
4 that neither Republican Majority nor StrikeForce is West's authorized campaign committee, and
5 to suggest that the contributors request a refund from Republican Majority or StrikeForce. *See*
6 Advisory Op. 1984-02 (Gramm) at 2.

7 4. Analogous Prior Commission Decision
8

9 The Complainant compares the instant matters to MUR 5385 (Groundswell Voters PAC).
10 *See, e.g.,* Republican Majority Compl. at 5. In MUR 5385, the Commission found reason to
11 believe that the respondent violated 2 U.S.C. § 441h(b) "by mailing a fundraising letter
12 requesting contributions to fund a grassroots effort to benefit [Richard] Gephardt's Presidential
13 campaign." Factual & Legal Analysis at 1, MUR 5385 (Groundswell Voters PAC).

14 Republican Majority disagrees, reasoning that MUR 5385 involved activity that was
15 clearly fraudulent and therefore distinguishable, in that:

16 1.) Groundswell Voters PAC was not registered with the FEC; 2.) There was no
17 disclaimer stating that the PAC efforts were not authorized by any candidate or
18 candidate's committee; 3.) The Groundswell Voters PAC published a false IRS
19 tax number to lend an air of legitimacy to their efforts; 4.) They asked that
20 donations be made out to "Ge[p]hart for President, Inc."; and 5.) They illegally
21 appropriated names from official Ge[p]hart for President FEC campaign reports,
22 and used them for their solicitations.

23
24 Republican Majority Resp. at 3. CAPE similarly argues that MUR 5385 is distinguishable
25 because the letter at issue in that matter did not include a disclaimer and "presented a false IRS
26 registration number." CAPE Resp. at 1-2.

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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) has been enforced against respondents who misled
17 visitors to their websites by fashioning their sites to mimic the candidate’s official website, and
18 by including on the website various statements that the websites were “paid for and authorized
19 by” the candidate’s committee when the respondents knew that the website was neither paid for
20 nor authorized by the candidate or the candidate’s authorized committee. *See, e.g.,* First Gen.
21 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

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 8, MUR 5472 (Republican Victory Committee, Inc.) at 9 (quoting
11 direct mailings from Republican Victory Committee, Inc.) (emphasis added). A reasonable
12 person reading that statement, which directly addresses the effect of the donation, would have
13 believed that the Republican Victory Committee, Inc. was soliciting contributions on behalf of
14 the Republican Party. *Id.*

15 The record here does not provide a reasonable basis to believe that Republican Majority,
16 CAPE, Patriot, or StrikeForce made fraudulent misrepresentations in violation of 2 U.S.C.
17 § 441h(b) through their email solicitations, radio advertisement, press releases, or websites. To
18 violate section 441h(b), a person must fraudulently misrepresent that the person speaks, writes,
19 or otherwise acts *on behalf of or for a candidate*. Some of the language in the Respondents'
20 solicitations is ambiguous as to how the contributions will be spent to support West. But
21 ultimately, despite the Respondents' attempts to use West's image and name to raise funds, the
22 Respondents' solicitations were made expressly in each instance on behalf of the individual
23 PACs that sponsored the communications, not West.

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1 Two main factors weigh against a finding of reason to believe that any Respondent
2 violated 2 U.S.C. § 441h(b). First, each Respondent is registered with the Commission and
3 complies with its reporting requirements, including disclosure of its expenditures and
4 disbursements. As explained in MUR 5472, “[f]ailure to file reports with the Commission
5 indicating on what, if anything, the money raised has been spent may be probative of the
6 Committee’s intent to misrepresent itself to the public.” *Id.* at 12.

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

⁹ 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 reports and made unsubstantiated negative statements); MURs 3690, 3700 (National Republican
2 Congressional Committee) (finding no reason to believe that respondents violated 2 U.S.C.
3 § 441h where disclaimer disclosed that respondents were responsible for the content of negative
4 satirical postcards that appeared to be written by opposing candidate and committee). *Cf.* MUR
5 5089 (Tuchman) (finding reason to believe a violation of section 441h occurred where disclaimer
6 was included only on envelope of solicitation letter because letter itself appeared to come from
7 an entity affiliated with the Democratic Party).

8 West presented some facts that would cut in favor of finding a violation—some persons
9 appear to have been misled by CAPE to think that they were contributing directly to West's
10 campaign—but this alone cannot support a finding that CAPE made fraudulent
11 misrepresentations in violation of section 441h(b). CAPE employed various measures, including
12 referencing CAPE, in addition to the Commission-required disclaimers in its communications, to
13 make clear that CAPE was responsible for its press release and website, not West. Similarly,
14 Patriot's website, email solicitations, and radio advertisement, and StrikeForce's email
15 solicitations and website, all contain the required disclaimers and make numerous references to
16 the PACs. Because the communications distributed by CAPE, Patriot, and StrikeForce each
17 included the disclaimers required under Commission regulations, we recommend that the
18 Commission find no reason to believe that CAPE, Patriot, or StrikeForce violated
19 2 U.S.C. § 441h(b)(1) and 11 C.F.R. § 110.16(b)(1).

20 On the other hand, although Republican Majority's email solicitation and website
21 included partial disclaimers, they lacked the complete disclaimer required by 2 U.S.C. § 441d

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1 and 11 C.F.R. § 110.11.¹⁰ Both the solicitation and the website identified the communication as
2 coming from Republican Majority and provided an address. But the email failed to state
3 explicitly that it was paid for by Republican Majority, while the website failed to state directly
4 that it was “not authorized” by a candidate. Those communications nonetheless contained
5 sufficient information for the recipients to identify Republican Majority as the sender or webhost
6 and payor. The Commission has previously dismissed several disclaimer matters on a similar
7 basis, and it should do so here as well.¹¹

8 Republican Majority’s less-than-complete disclaimers do not, in the context here, provide
9 reason to believe that Republican Majority fraudulently misrepresented itself as acting on behalf
10 of West under section 441h(b). Republican Majority’s email solicitation was sent from “Randy
11 Goodwin, Treasurer: Republican Majority Campaign” with the address
12 “newsletter@americanpatriot.us.” Republican Majority Compl., Ex. A. The email solicitation
13 was sent only to persons who had previously donated to Republican Majority, and the
14 solicitation itself was styled as a letter from Republican Majority. *Id.* It featured Republican

¹⁰ Although we cannot verify the number of email solicitations sent, Republican Majority stated in its Response that “the solicitation in dispute was sent to [Republican Majority’s] ‘in-house’” donor list, which include as many as 28,000 recipients, based on the amount of unitemized contributions that Republican Majority reported receiving to the Commission. Republican Majority Resp. at 2-3. Therefore, it is reasonable to infer that Republican Majority sent at least 500 similar communications, such that 11 C.F.R. § 110.11(a)(1) applies.

¹¹ In MUR 6438 (Arthur B. Robinson), the Commission exercised its prosecutorial discretion to dismiss an allegation that Robinson’s campaign did not comply with the disclaimer requirements for various emails sent by the Committee’s treasurer. See Factual & Legal Analysis at 19-21, MUR 6438 (Arthur B. Robinson). The Commission concluded that although the emails did not comply with the disclaimer requirements, they contained sufficient information for the recipients to identify the emails as authorized emails and to identify Robinson’s campaign as the payor. *Id.* In MUR 6270 (Rand Paul Committee), the Commission again exercised its prosecutorial discretion to dismiss an allegation that the Rand Paul Committee failed to include a disclaimer on certain communications, including an email signed by its political director. See Factual & Legal Analysis at 10-12, MUR 6270 (Rand Paul). In that matter, the Commission dismissed the allegations because, *inter alia*, there was sufficient information to identify the Committee payor. *Id.* Additionally, the Commission dismissed, under the Commission’s Enforcement Priority System, similar allegations in two other matters in which the committees included some identifying information. See MUR 6278 (Segers) (Commission dismissed allegations that campaign flyers lacked the requisite disclaimer where the campaign committee’s contact information was provided); MUR 6103 (Singh) (Commission dismissed the allegation that mailers did not include the requisite disclaimer where some information identifying the campaign committee was included).

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1 Majority's letterhead at the top of the email, and Republican Majority's Chairman's signature at
2 the bottom, along with Republican Majority's name and mailing address. *Id.* Republican
3 Majority's donation website also included its Chairman's signature. *Id.* at Ex. B. Republican
4 Majority's website also identified the committee as responsible for its content, and clarified that
5 Republican Majority is not affiliated with or authorized by any candidate or candidate's
6 committee. Therefore, even without the required disclaimer, Republican Majority did not
7 fraudulently misrepresent that it acted on West's behalf.

8 Accordingly, we recommend that the Commission find no reason to believe that
9 Republican Majority violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b). And, although
10 Republican Majority's email solicitation and website did not include complete disclaimers,
11 because the communications were clear about their source, we further recommend that the
12 Commission exercise its prosecutorial discretion as it has in similar prior matters and dismiss
13 with caution Republican Majority's violation of 2 U.S.C. § 441d and 11 C.F.R. § 110.11.
14 *Heckler v. Chaney*, 470 U.S. 821 (1985).

15 III. RECOMMENDATIONS

- 16
17 1. Find no reason to believe that Republican Majority Campaign PAC, Randy G.
18 Goodwin, and Gary Kreep in their official capacities as Officers violated
19 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b) via Republican Majority Campaign
20 PAC's email solicitation and donation website.
- 21
22 2. Find no reason to believe that Coalition of Americans for Political Equality PAC,
23 Jefferey Loyd in his official capacity as Chairman, Nicholas Spears in his official
24 capacity as Secretary, and Margaret Berardinelli in her official capacity as
25 Treasurer violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b) via Coalition of
26 Americans for Political Equality PAC's press release and donation website.
- 27
28 3. Find no reason to believe that Patriot Super PAC, Thomas Freiling in his official
29 capacity as Treasurer, and Steve Elliott in his official capacity as Advisory
30 Committee Chair and Director violated 2 U.S.C. § 441h(b) and 11 C.F.R.
31 § 110.16(b) via Patriot Super PAC's proposed radio advertisement and donation
32 website.

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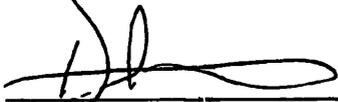
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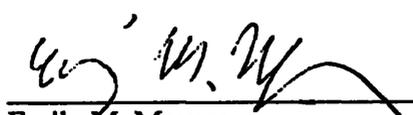
4. Find no reason to believe that the Conservative StrikeForce, Dennis Whitfield in his official capacity as Chairznan, and Scott B. Mackerzie in his official capacity as Treasurer violated 2 U.S.C. § 441h(b) and 11 C.F.R. § 110.16(b) via the Conservative StrikeForce's email solicitations and donation website.
5. Exercise prosecutorial discretion as outlined in *Heckler v. Chaney*, 470 U.S. 821 (1985), to dismiss with caution violations of 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by Republican Majority Campaign PAC, and Randy G. Goodwin and Gary Kreep in their official capacities as Officers by failing to include the required disclaimers in Republican Majority Campaign PAC's email solicitation and on its website.
6. Approve the attached Factual and Legal Analyses.
7. Approve the appropriate letters.
8. Close the file.

4/22/13
Date

Anthony Herman
General Counsel

BY: 
Daniel A. Petalas
Associate General Counsel
for Enforcement


William A. Powers
Assistant General Counsel


Emily M. Meyers
Attorney