UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FEDERAL ELECTION COMMISSION, Plaintiff, v. JODY L. NOVACEK, et al., Defendants.	Civ. No. 09-CV-00444 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

PLAINTIFF FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Page

ARGUMENT **1**

I. Novacek's Response is Not Supported By Any Sworn Testimony **1**

II. Novacek's Response Admits or Fails to Contest Facts Sufficient to Justify Summary Judgment in the Commission's Favor **3**

III. Novacek Only Speculates About Portions of One Affidavit and Fails to Create a Genuine Issue Regarding Any Material Facts **8**

IV. The Court Should Issue a Declaratory Judgment, Impose a Substantial Civil Penalty, and Enter an Injunction **10**

CONCLUSION **12**

Table of Authorities

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 1, 9

Barker v. Norman, 651 F.2d 1107 (5th Cir. 1981) 3, 8

Cantu v. Jackson Nat'l Life Ins. Co., 579 F.3d 434 (5th Cir. 2009) 9

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 1

Ellis v. Principi, 246 Fed. Appx. 867 (5th Cir. 2007).....3

FEC v. Committee of 100 Democrats, 844 F. Supp. 1 (D.D.C.1993).....11

FEC v. National Rifle Ass'n, 553 F. Supp. 1331 (D.D.C. 1983) 11

FEC v. Odzer, Civ. No. 05-3101, 2006 WL 898049 (E.D.N.Y. 2006) 10, 11

Forsyth v. Barr, 19 F.3d 1527 (5th Cir. 1994).....3

Grant v. Cuellar, 59 F.3d 523 (5th Cir. 1995).....3

Johnston v. City of Houston, Texas, 14 F.3d 1056 (5th Cir. 1994).....2

Larry v. White, 929 F.2d 206 (5th Cir. 1991) 2

Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994) (en banc) 2

Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990) 1, 2

Mace v. City of Palestine, 333 F.3d 621 (5th Cir. 2003) 2

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).....1

Morales v. Boyd, 304 Fed. Appx. 315 (5th Cir. 2008) 2

Solo Serve Corp. v. Westowne Assocs., 929 F.2d 160 (5th Cir. 1991) 2

Sony Pictures Home Entertainment Inc. v. Lott, 255 Fed. Appx. 878 (5th Cir. 2007) 3

Sturdivant v. Target Corp., 464 F. Supp. 2d 596 (N.D. Tex. 2006) 1

Tyler v. Runyon, 70 F.3d 458 (7th Cir. 1995) 8

Statutes and Regulations

2 U.S.C. § 437g(a)(4).....11

2 U.S.C. § 437g(a)(4)(A).....11

2 U.S.C. § 437g(a)(6) (2000).....10

2 U.S.C. § 437g(a)(6) (2009).....10

2 U.S.C. § 441d(a).....7

2 U.S.C. § 441d(c).....7

2 U.S.C. § 441h.....7, 9, 11

Fed. R. Civ. P. 56.....1

Republican Party, *The Rules of the Republican Party*, Sept. 1, 2008, http://www.gop.com/images/legal/2008_RULES_Adopted.pdf. 7

FEC, Conciliation Agreement, *Matter of Adrian Plesha*, Matter Under Review 4919 (Mar. 20, 2004) http://eqs.nictusa.com/eqsdocsMUR/000012C1.pdf 11

FEC. General Counsel's Rept. No. 11, *Matter of Adrian Plesha*, Matter Under Review 4919, at 31 n.29 (June 10, 2002) http://eqs.nictusa.com/eqsdocsMUR/00001172.pdf 11

The Federal Election Commission ("FEC" or "Commission") has moved this Court for summary judgment pursuant to Fed. R. Civ. P. 56. Defendant Jody L. Novacek's response entirely fails to rely on sworn testimony, and summary judgment should be granted to the Commission on that ground alone. Even if the Court were to treat the arguments in Novacek's unsworn brief as testimony, she has admitted ample facts to justify summary judgment in the Commission's favor and there are no disputed material facts that would preclude summary judgment. Novacek's brief largely addresses testimony from only a single affidavit and does not dispute the vast majority of the documentary and testimonial evidence establishing that she orchestrated a scheme to fraudulently misrepresent that a fundraising program was made on behalf of the Republican Party. Novacek has failed to "go beyond the pleadings and designate specific facts proving that a genuine issue of material fact exists." *Sturdivant v. Target Corp.*, 464 F. Supp. 2d 596, 601 (N.D. Tex. 2006) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "Summary judgment is warranted when the facts as shown in the pleadings, affidavits, and other summary judgment evidence show that no reasonable trier of fact could find for the nonmoving party as to any material fact." *Sturdivant*, 464 F. Supp. 2d at 600-601 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986)).

ARGUMENT

I. Novacek's Response is Not Supported By Any Sworn Testimony

The Commission is entitled to summary judgment because Novacek's brief in response to the Commission's summary judgment motion is not supported by any sworn testimony whatsoever. *See* Def.'s Response to Pl.'s Mot. for Summary Judgment, Dec. 21, 2009 ("Def. SJ Resp."). "[I]t is well established that a nonmovant cannot overcome summary judgment with

conclusory allegations and unsubstantiated assertions." *Mace v. City of Palestine*, 333 F.3d 621, 624 n.7 (5th Cir. 2003) (citing *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc)). "'Unsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence.'" *Johnston v. City of Houston, Texas*, 14 F.3d 1056, 1060 (5th Cir. 1994) (quoting *Larry v. White*, 929 F.2d 206, 211 n.12 (5th Cir. 1991)). *See also Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 164 (5th Cir. 1991) (The nonmovant's "burden of ensuring that the evidence presented is sufficient to establish a *genuine issue* of material fact" may be satisfied "only [by] evidence — not argument . . . ."). Novacek relies entirely on unsubstantiated assertions and argument in her unsworn brief; she thus presents no competent summary judgment testimony.[1]

The Fifth Circuit has explained that factual controversies are resolved in favor of the nonmoving party "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. *"We do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts."* *Id.* (citing *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888 (1990)). Because Novacek has failed to submit any sworn testimony in support of her response, there is no "actual controversy" of fact. *Little*, 37 F.3d at 1075.

Novacek's failure to rebut the Commission's summary judgment motion through sworn testimony is not excused because she chose to forego representation by an attorney. The nonmovant's obligation to "produce competent summary judgment evidence raising a genuine issue of material fact . . . applies equally to pro se litigants." *Morales v. Boyd*, 304 Fed. Appx. 315, 318 (5th Cir. 2008) ("'We have never allowed such litigants to oppose summary judgments

[1] Novacek similarly cites to virtually no documentary evidence, relying solely on two documents to question the authenticity of an affiant's signature (Def. Resp. at 17) as part of an immaterial argument, *see infra* p. 10.

by the use of unsworn materials.'") (quoting *Barker v. Norman*, 651 F.2d 1107, 1123 (5th Cir. 1981)); *see also Ellis v. Principi*, 246 Fed. Appx. 867, 869 (5th Cir. 2007) ("[P]laintiff's pro se status does not exempt her from the usual evidentiary requirements of summary judgment.") (citing *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995)). Thus, while courts "liberally construe a pro se litigant's pleadings in his favor, the court will not 'sift through the record in search of evidence' to support [a pro se litigant's] opposition to [a] motion for summary judgment." *Sony Pictures Home Entertainment Inc. v. Lott*, 255 Fed. Appx. 878, 880 (5th Cir. 2007) (quoting *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994)). Accordingly, this Court need not search the record for evidence supporting the unsworn contentions in Novacek's Response and may enter summary judgment in favor of the Commission.

II. Novacek's Response Admits or Fails to Contest Facts Sufficient to Justify Summary Judgment in the Commission's Favor

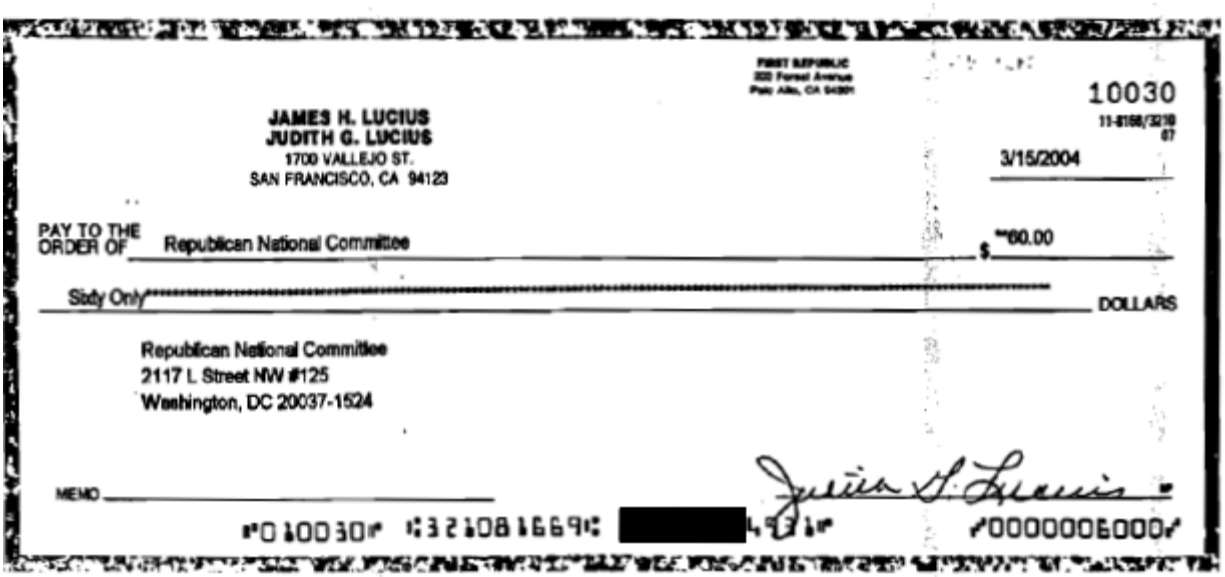
Even if Novacek had sworn under oath to the assertions in her response, she nevertheless would have failed to rebut the Commission's showing that she orchestrated fraudulent fundraising misrepresentations. Novacek does not contest the vast majority of the facts establishing her violation. The undisputed facts alone establish her fraudulent misrepresentation. She does not contest that the solicitations she oversaw claimed to be on behalf of the Republican Party. *See* FEC's Mem. in Support of Mot. for Summ. J., Nov. 30, 2009 ("FEC SJ Mem.") at 3-10; Def. SJ Resp. at 12. In particular, she does not dispute in her brief that:

- The Republican National Committee had turned down her request to engage in fundraising on their behalf due to a concern over her usage of a foreign or "offshore" calling center. Def. SJ Resp. at 5.
- She drafted the call scripts (Appx. 339-40) that were used by the callers, and she monitored the calling program to ensure that the call scripts were followed. FEC SJ

Mem. at 5; Def. SJ Resp. at 13 (indicating no disagreement with Maddux's affidavit at Appx. 553, ¶ 12).

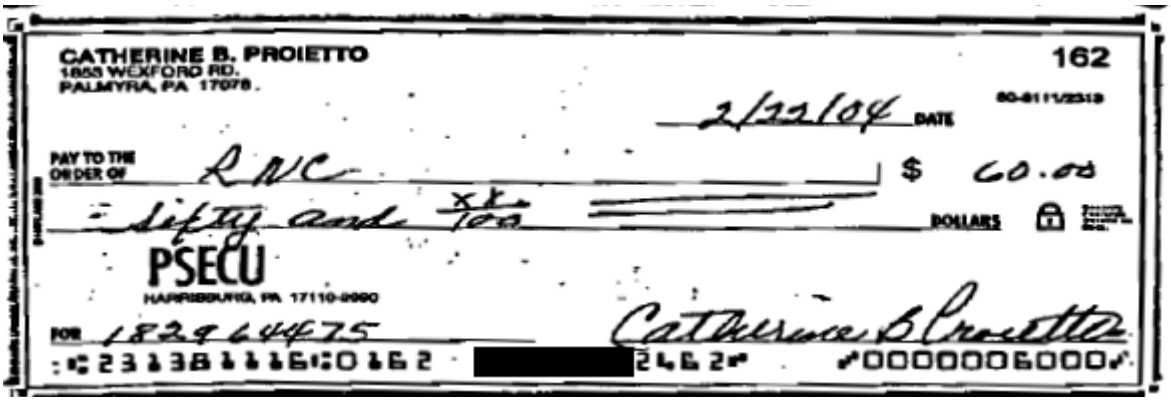
- The recordings of phone solicitations and their accompanying transcripts were representative samples of calls from Novacek's calling program. FEC SJ Mem. at 7.
- She drafted the form mail solicitation (Appx. 334, 578) — which included a number of explicit references to the Republican Party — that was used to make the solicitations. FEC SJ Mem. at 7-8.
- The Republican Victory Committee ("RVC") raised more than $75,000 as a result of Novacek's solicitations, including $50,292 she received as a result of the solicitations made by vendor Apex CoVantage, L.L.C. ("Apex"), an additional $14,869 Apex raised for the RVC that is still in Apex's possession, and $10,063 in credit card transactions as a result of the calls made by Advantage LP ("Advantage"). FEC SJ Mem. at 19.
- The second set of solicitations through the vendor Advantage occurred as the Commission has established: After Novacek had received a cease-and-desist letter from the RNC, she again solicited people who had received earlier solicitations made through Apex and who had given money in response. FEC SJ Mem. at 9-10.
- Defendants' enterprise yielded nearly 100 checks made payable to the RNC, the Republican Party, or the Bush-Cheney campaign that were deposited by Novacek into her corporate bank accounts for her own use. Appx. 441-472, 639-759; FEC SJ Mem. at 8.

This evidence establishes the details of an operation that fraudulently misrepresented that it was acting on behalf of the Republican Party and/or the RNC.[2] Novacek focuses largely on only portions of a single affidavit (*see infra* Sec. III) and leaves undisputed almost all of the evidence in this case. The nearly 100 checks with incorrect payee information that Novacek has admitted to depositing illustrate at a glance the fraudulent nature of the scheme, as can be seen from a few examples from the Appendix:



Appx. 709.

[2] Novacek is not permitted to attempt to raise new factual disputes regarding the Commission's summary judgment motion in her upcoming January 19 response to the Commission's motion to dismiss. That filing is limited to addressing the legal arguments in the Commission's motion to dismiss — which assumes that the allegations in the complaint are true — and may not be used to raise new arguments regarding the summary judgment motion after the Commission has filed its reply brief.


CATHERINE B. PROIETTO
1853 WEXFORD RD.
PALMYRA, PA 17078

162

2/22/04 DATE

PAY TO THE ORDER OF RNC $ 60.00

Sixty and 00/100 DOLLARS

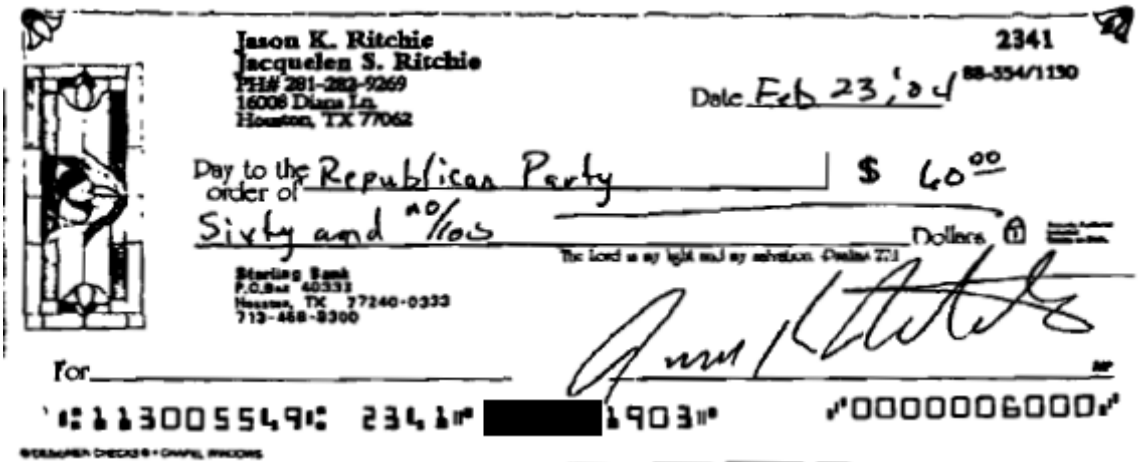
PSECU
HARRISBURG, PA 17110-9990

FOR 182964475

Catherine B Proietto

:011381116:0162 [redacted] 2462 "0000006000"

Appx. 469.


Jason K. Ritchie
Jacquelen S. Ritchie
PH# 281-282-9269
16008 Diana Ln.
Houston, TX 77062

2341

88-354/1130

Date Feb 23, '04

Pay to the order of Republican Party $ 60.00

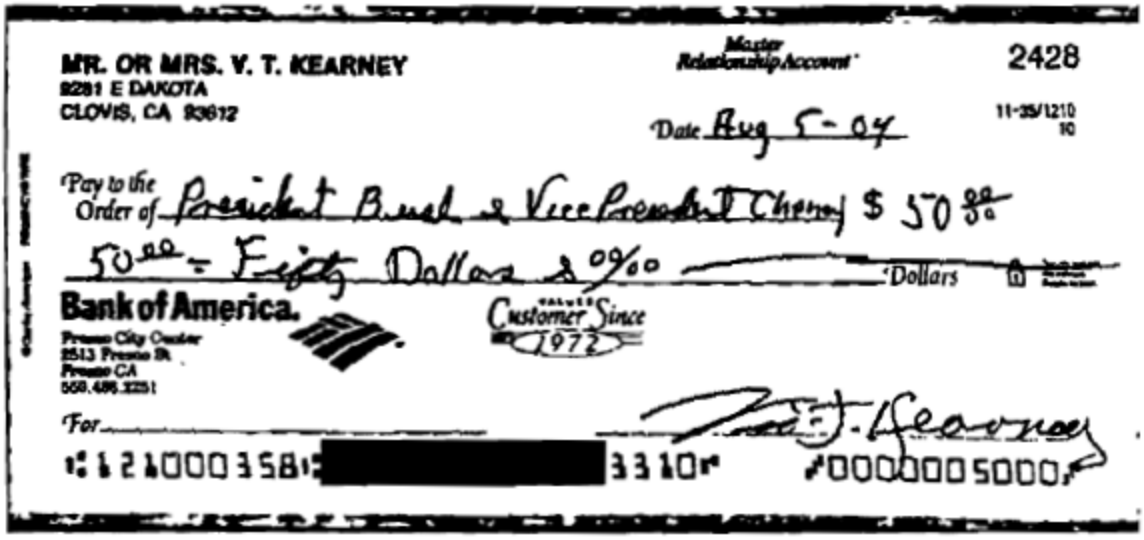
Sixty and 00/100 Dollars

Sterling Bank
P.O. Box 40333
Houston, TX 77240-0333
713-468-8300

For

:113005549: 2341 [redacted] 1903 "0000006000"

Appx. 470.


MR. OR MRS. V. T. KEARNEY
8281 E DAKOTA
CLOVIS, CA 93612

Master Relationship Account

2428

11-35/1210
10

Date Aug 5-04

Pay to the Order of President Bush & Vice President Cheney $ 50.00

50.00 - Fifty Dollars & 0/00 Dollars

Bank of America.
Fresno City Center
2513 Fresno St.
Fresno CA
559.486.2251

Customer Since 1972

For

V. T. Kearney

:121000358: [redacted] 3310 "0000005000"

Appx. 738.

Novacek attempts to draw a distinction between the RNC and the Republican Party, claiming that she was simply mistaken in not understanding that purporting to act on behalf of the Republican Party was equivalent to acting on behalf of the RNC. Def. SJ Resp. at 12. For purposes of determining a violation of 2 U.S.C. § 441h, there is no such distinction. The Republican Party is an unincorporated association that is under the general management of the Republican National Committee. *See* Republican Party, *The Rules of the Republican Party*, at 1 Sept. 1, 2008, http://www.gop.com/images/legal/2008_RULES_Adopted.pdf. The fraudulent misrepresentation provision Novacek violated specifically addresses political parties: it is unlawful to "fraudulently misrepresent the person as speaking, writing, or otherwise acting for or on behalf of any . . . political party . . . for the purpose of soliciting contributions or donations." 2 U.S.C. § 441h. Section 441h was designed to prevent misrepresentations precisely like the ones Novacek made. In any event, her assertion — even if sworn — would nevertheless fail to create a triable issue of fact in light of, *inter alia*, her long experience with political fundraising, her admitted awareness that the RNC did not wish to be associated with "off-shore" call centers, her failure to forward any money to Republican Party candidates, and her receipt and deposit of checks payable to the RNC and Republican Party. FEC SJ Mem. at 3-8.[3]

Additionally, Novacek does not contest — or address in any way — the Commission's showing that she and the RVC violated 2 U.S.C. § 441d(a),(c), by failing to include some of the required disclaimer information in the solicitations. FEC SJ Mem. at 14-15. This disclaimer information, required by statute, would have provided the recipient of the call or the mailer with

[3] The Commission is entitled to summary judgment against the corporate alter ego defendants for the additional reason that an attorney has not entered an appearance on their behalf. Novacek may appear *pro se*, but may not represent RVC; BPO, Inc; or BPO Advantage LP before this Court. *See* FEC SJ Mem. at 16.

specific identifying information and would have made clear the calls were not authorized by a candidate or a candidate committee. If this disclaimer information had been included, Novacek would have been less likely to be able to deceive the recipients of the calls and mailers into believing they were contributing to the Republican Party. Accordingly, this Court should enter summary judgment in the Commission's favor on this uncontested count, as well as the fraudulent misrepresentation count.

III. Novacek Only Speculates About Portions of One Affidavit and Fails to Create a Genuine Issue Regarding Any Material Facts

Novacek argues in her unsworn response that the affidavit from an Apex employee, Tom Maddux, is flawed, and she speculates that it might have been executed under duress or that the signature may not be authentic. Novacek's bald speculation warrants no weight. *Tyler v. Runyon*, 70 F.3d 458, 469 (7th Cir. 1995) ("[S]peculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment.") (citations and internal quotation marks omitted). Even affidavits submitted by *pro se* litigants "must affirmatively show the affiants' competence to testify as to the matters stated therein and that the facts stated in the affidavits are based on the affiants' personal knowledge." *Barker*, 651 F.2d at 1123 (citing Fed. R. Civ. P. 56(e)).

The assertions in Novacek's response, however, are largely based on speculation. She opines that "[t]he only conceivable circumstance that Ms. Novacek could imagine [Maddux] lying was to protect his family" and speculates that he was lying to protect against some unspecified threat. Def. SJ Resp. at 2-3. Novacek states at length that she "thinks she knows where th[e] 'storyline' came from" regarding her acting on behalf of the RNC. Def. SJ Resp. at 5. These unsworn statements are entirely speculative, devoid of firsthand knowledge that would render them admissible evidence that could be considered at summary judgment.

"Disputes about material facts are genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Cantu v. Jackson Nat'l Life Ins. Co.*, 579 F.3d 434, 438 (5th Cir. 2009) (quoting *Anderson*, 477 U.S. at 248). Vague and speculative statements regarding the state of mind of another affiant do not raise a genuine factual dispute.

Moreover, only disputes over facts that might affect the outcome of the suit could properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not defeat such judgment. *Anderson*, 477 U.S. at 248. Here, Novacek has not disputed any facts that would necessitate a trial, but instead quarrels about immaterial details in the Maddux Affidavit. For example, she disputes the details of her long professional relationship with Maddux, suggesting that the affidavit's claim that Maddux knew Novacek "'for more than ten years'" was "questionable" because that relationship may have been fewer than ten years. Def. SJ Resp. at 7.

Novacek also disagrees with Maddux's testimony that she had indicated to Apex personnel that the calls were being made on behalf of the RNC. Def. SJ Resp. at 2. But the undisputed facts show that the solicitations overseen by Novacek unlawfully misrepresented the recipient to be the Republican Party. Novacek's representations to Apex are thus primarily relevant to whether *Apex* (which is not a defendant here) was also complicit in the scheme, not whether the solicitations themselves were fraudulent; regardless of the state of mind of Apex's personnel, Novacek violated 2 U.S.C. § 441h. While Maddux's testimony indeed provides compelling additional evidence of Novacek's violation, summary judgment is appropriate even if the Court were to treat Novacek's brief as testimony and draw inferences in her favor. In other words, even if Novacek had not represented to Apex personnel that the funds were being raised for the RNC, the undisputed, material facts demonstrate that the fundraising calls and letters

Apex sent out at her direction fraudulently misrepresented that they were on behalf of the Republican Party.

Finally, Novacek also complains that the FEC should have investigated "her side of the story," Def. SJ Resp. at 4, but Commission staff did precisely that in taking her administrative deposition. In any event, Novacek has had a full opportunity to present any material evidence she wishes to the Court in this *de novo* proceeding. There is no legal basis for defeating the Commission's summary judgment motion by arguing that the Commission failed to conduct a more extensive investigation; instead, Novacek must defend herself on the merits in this action by disputing the Commission's factual showing with admissible evidence — an effort she has failed to make. *See* FEC's Mot. to Dismiss Counterclaims, Nov. 30, 2009 at 3-4.

IV. The Court Should Issue a Declaratory Judgment, Impose a Substantial Civil Penalty, and Enter an Injunction

As the Commission has explained (*see* FEC SJ Mem. at 17-20), the Court should enter a declaratory judgment, a substantial civil penalty, and an injunction to remedy Novacek's violation of a statute "enacted to safeguard the integrity of the electoral process." *FEC v. Odzer*, Civ. No. 05-3101, 2006 WL 898049, at *4 (E.D.N.Y. 2006) (imposing a $12,000 civil penalty as part of a default judgment for $6,000 in unlawful contributions made in the name of another in a knowing and willful violation of the Act). The *Odzer* court imposed a penalty that represented 200% of the total amount of illegal funds at issue, which at that time was the maximum amount for the provision of FECA at issue in that case. *See* 2 U.S.C. § 437g(a)(6) (2000). Two hundred percent of the amount in violation continues to be the maximum amount that the Court can impose if calculating the civil penalty through the amount in violation. *See* 2 U.S.C. § 437g(a)(6) (2009); FEC SJ Mem. at 19 & n.6. Such a penalty is "necessary to deter future

violations and to vindicate the Commission's authority." *Odzer*, 2006 WL 898049, at *4 (citing *FEC v. Committee of 100 Democrats*, 844 F. Supp. 1, 7 (D.D.C.1993)).

As with most violations of FECA, violations similar to Novacek's have typically been resolved through conciliation agreements under 2 U.S.C. § 437g(a)(4) before matters reach litigation. *See FEC v. National Rifle Ass'n*, 553 F. Supp. 1331, 1338 (D.D.C. 1983) ("conciliation is the preferred method of dispute resolution under FECA"). Violators in such cases have paid substantial civil penalties in conciliation agreements with the Commission.[4] For example, in the *Matter of Adrian Plesha*, the Commission and Plesha entered into a conciliation agreement for a knowing and willful violation of the fraudulent misrepresentation provision in 2 U.S.C. § 441h. This conciliation agreement provided for, *inter alia*, a civil penalty payment by Plesha of $60,000 which constituted 156% of the amount of the violation (the total cost of the mailing and phone calls that were the basis of the violation was $38,500). *See* FEC, Conciliation Agreement, *Matter of Adrian Plesha*, Matter Under Review ("MUR") 4919 at 4 (Mar. 20, 2004) http://eqs.nictusa.com/eqsdocsMUR/000012C1.pdf; FEC. General Counsel's Rept. No. 11, *Matter of Adrian Plesha*, MUR 4919, at 31 n.29 (June 10, 2002), http://eqs.nictusa.com/eqsdocsMUR/00001172.pdf . A penalty of similar proportion to the amount in violation is appropriate here.

[4] The Act requires that the Commission attempt for at least thirty but not more than ninety days to enter into a conciliation agreement with respondents in order to correct violations of the Act. 2 U.S.C. § 437g(a)(4)(A). All conciliation agreements must be approved by at least four members of the Commission. *Id.*

CONCLUSION

For the foregoing reasons, and the reasons stated in the Commission's opening brief, the Court should grant the Commission's motion for summary judgment and the requested relief.

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January 7, 2010

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

FEDERAL ELECTION COMMISSION, Plaintiff, v. JODY L. NOVACEK, et al., Defendants.	Civ. No. 09-CV-00444 Certificate of Service

CERTIFICATE OF SERVICE

I hereby certify that, on January 7, 2010, I caused Plaintiff Federal Election Commission's Reply in Support of its Motion for Summary Judgment by email (pursuant to the stipulation of the parties under Fed. R. Civ. P. 5(b)((2)(E)) upon:

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January 7, 2010