



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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BY E-MAIL (Paul@SullivanLaw.com) and FIRST CLASS MAIL

Paul E. Sullivan, Esq.
Paul E. Sullivan & Associates, PLLC
601 Pennsylvania Ave. NW
Suite 900, South Building
Washington, DC 20004

RE: MURs 6289, 6362
Representative Jeff Denham
Denham for Congress
and David Bauer,
in his official capacity as treasurer
Jeff Denham for State Senate
and David Bauer,
in his official capacity as treasurer

Dear Mr. Sullivan:

On May 17, 2010, the Federal Election Commission notified your clients, Representative Jeff Denham and Denham for Congress and David Bauer, in his official capacity as treasurer, ("Denham Federal Committee") of a complaint designated as MUR 6289, alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On September 1, 2010, the Commission notified your clients, Representative Denham, the Denham Federal Committee, and Jeff Denham for State Senate and David Bauer, in his official capacity as treasurer, ("Denham State Committee") of a second complaint designated as MUR 6362, alleging violations of certain sections of the Act. On August 2, 2011, the Commission merged MUR 6289 into MUR 6362 and found, on the basis of the information in the complaints, and information provided by you, that there is no reason to believe Representative Denham violated 2 U.S.C. § 441b(a) and no reason to believe the Denham Federal Committee violated 2 U.S.C. §§ 434(b) and 441b(a). The Commission also considered other allegations, but was equally divided on whether to find reason to believe that Representative Denham and the Denham Federal and State Committees violated 2 U.S.C. § 441(e)(1)(A) and 11 C.F.R. § 110.3(d). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days.
See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files,

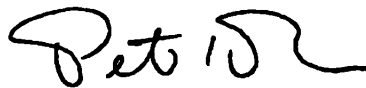
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68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's no reason to believe findings, is enclosed for your information. One or more Statements of Reasons further explaining the basis for the Commission's decisions regarding the other allegations will follow.

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

Sincerely,



Peter G. Blumberg
Assistant General Counsel

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Jeff Denham **MUR:** 6362

Denham for Congress
and David Bauer, in his official capacity as treasurer

I. INTRODUCTION

This matter was generated by two complaints filed with the Federal Election Commission (“the Commission”), one by Sean Fox and another by Tal Cloud and Mike Der Manouel, Jr., which were designated as MURs 6289 and 6362, respectively. See 2 U.S.C. § 437(g)(a)(1). The complaints concern ads broadcast by Remembering the Brave Foundation (“RB”), a section 501(c)(3) charitable organization, to promote a May 28, 2010, benefit concert in support of a program in California to create specialized license plates for families of military personnel killed on active duty. The ads featured Jeff Denham, a California State Senator and a candidate in the primary election for the 19th Congressional District in California, and were disseminated within 30 days of the California Congressional primary election on June 8, 2010. The concert was held at the Chukchansi Gold Resort & Casino.

The complaints in these two matters involve allegations that the radio and television advertisements promoting the concert were electioneering communications that were coordinated with Denham for Congress and David Bauer, in his official capacity as treasurer (“Federal Committee”) and were not disclosed to the Federal Election Commission (“the Commission”), in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). Complainants in MUR 6362 also alleged that the advertisements were financed from funds Denham transferred from Jeff Denham for State Senate (“State Committee”) to RB.

1 Respondents stated that RB, not the Tribe, paid for the advertisements and asserted that
2 no violations of the Act occurred because the advertisements do not contain express advocacy or
3 its functional equivalent.

4 It appears that the radio and television ads at issue meet the definition of "coordinated
5 communications," but qualify for the safe harbor for candidate charitable solicitations under
6 11 C.F.R. § 109.21(g) because: (1) the ads do not promote, support, attack, or oppose ("PASO")
7 Denham or any other Federal candidate(s); (2) RB, the organization for which the funds were
8 solicited, is a 501(c)(3) tax-exempt organization as described at 11 C.F.R. § 300.65; and (3) the
9 funds appeared to have been raised solely for charitable purposes, *i.e.*, donations to RB, a
10 501(c)(3) organization, to benefit the Gold Star Project. Accordingly, the Commission found no
11 reason to believe that Jeff Denham and Denham for Congress and David Bauer, in his official
12 capacity as treasurer, accepted and received prohibited in-kind corporate contributions resulting
13 from coordinated communications in violation of 2 U.S.C. § 441b(a); and no reason to believe
14 that Denham for Congress and David Bauer, in his official capacity as treasurer, failed to report
15 such contributions in violation of 2 U.S.C. § 434(b).

16 The Commission considered the allegations that the advertisements were financed from
17 funds Denham transferred from his State Committee to RB, but was equally divided on whether
18 to find reason to believe that Jeff Denham and Denham for Congress and David Bauer, in his
19 official capacity as Treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d) in
20 connection with the transfer of non-federal funds to finance electioneering communications.
21 The Commission will issue one or more Statements of Reasons setting forth the basis for the
22 decision as to these allegations.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2
3 **A. Factual Background**

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5 In 2010, Jeff Denham was both a California State Senator, representing the 12th District,
6 and a candidate for the U.S. House of Representatives for California's 19th Congressional
7 District. Denham did not run for re-election to the State Senate. Denham won the June 8, 2010,
8 Republican primary and the November 2, 2010, general election.

9 In the two months before the June 8 primary, Denham's State Committee made transfers
10 totaling \$225,000 to RB, an entity organized under Section 501(c)(3) of the Internal Revenue
11 Code (26 U.S.C. § 501(c)(3)). RB honors veterans killed in action, and it organizes ceremonies
12 and events to honor deceased servicemembers and their families. *See*
13 <http://www.rememberingthebrave.org>. The transfers included a \$25,000 donation made on April
14 12, 2010, and three loans, which the Committee forgave: a \$100,000 loan made on April 19,
15 2010, a \$50,000 loan made on May 12, 2010, and a \$50,000 loan on May 25, 2010.¹

16 Eleven days before the June 8 primary, a benefit concert was held at the Chukchansi Gold
17 Resort & Casino, in Coarsegold, California, which is in the 19th Congressional District. The
18 concert, sponsored by RB and featuring country and western music performer Phil Vassar, was
19 advertised on radio, television, and the internet as a benefit concert to raise donations for Project
20 Gold Star—a program administered by the California Department of Veteran Affairs to raise
21 private donations to pay the costs of a specialized license plate program for the families of U.S.
22 military personnel killed while serving on active duty. Several of the advertisements promoting
23 the concert featured Denham. RB asked Denham to act as spokesperson and to appear in the ads

¹ See <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prg?filingid=1521503&amendid=0> and <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prg?filingid=1568050&amendid=0>.

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1 because of his "long-standing association with veterans' issues and the Gold Star Project
2 legislation." Denham Response at 2. Denham, an Air Force veteran, was Chairman of the
3 Veterans' Affairs Committee while he was a California State Senator and was a coauthor of
4 Senate Bill 1455, the California Gold Star Family License Plate bill. Project Gold Star was
5 signed into law in September 2008.

6 Complainant in MUR 6289 provided a "Transcript of Coordinated Ads," which contains
7 a link to the television ad as posted on the internet at <http://www.rememberthebrave.com/>, a
8 transcript of the radio ad, and a list of seven TV and radio stations that aired the ads. The ads
9 aired in May 2010, up to the date of the event.

10 **TRANSCRIPT OF RADIO AD:**

11 **ANNOUNCER:** Join country superstar Phil Vassar for a one-night Remember
12 the Brave benefit concert, Friday May 28th Memorial weekend at Chukchansi
13 Gold Resort and Casino. Veteran Affairs Committee Chairman Senator Jeff
14 Denham.

15
16 **JEFF DENHAM:** As a veteran, I know the sacrifices of our servicemen and
17 women, and the sacrifice shared by their loved ones who pray for their safe return.
18 But some of them don't make it, their families then become Gold Star families.
19 This event will raise funds for Gold Star families and the Gold Star project as
20 recognition for their ultimate sacrifice. Please join us at our benefit concert on
21 May 28th Memorial weekend. If you can't make it, go to Remember the Brave
22 dot com to learn more and to make your tax-deductible donations. Remember,
23 every dollar counts.

24
25 I'm Senator Jeff Denham.

26
27 **ANNOUNCER:** Join Phil Vassar and Jeff Denham at the Remember the Brave
28 benefit concert. For tickets go to Chukchansi Gold Resort and Casino or visit
29 Ticketmaster dot com.
30

1 **TRANSCRIPT OF TELEVISION AD (as posted on the internet) :**

2 <http://www.rememberthebrave.com/>

3
4 PAGE 1: At top of page is the logo of Remembering the Brave, followed by
5 Benefit Concert. Underneath it is "Phil Vassar" followed by the date (May 28th)
6 and location of the event (Chukchansi Gold Resort & Casino), a photo of a
7 sample specialized license plate next to a statement: "Proceeds benefit the
8 California Department of Veteran Affairs Project Gold Star, a link to the
9 California Department of Veteran Affairs website, and two buttons: "Buy
10 Tickets" and "Donate."

11
12 PAGE 2: (Video)(30 seconds):

- 13 • **First clip:** Phil Vassar live concert and a voiceover "Join country
14 superstar Phil Vassar for a one night benefit concert" while the following
15 words flash on the screen "Remember the Brave" "Chukchansi Gold
16 Resort and Casino" and "May 28th".
- 17 • **Second clip:** Denham with 3 other individuals, two of whom appear to be
18 veterans. Denham is standing in the middle of the group while the words
19 "Senator Jeff Denham, Chairman, Veterans Affairs" flash on the screen.
20 Denham then says "As a veteran, I know the sacrifices of our service men
21 and women. A sacrifice shared by their loved ones who pray for their safe
22 return. But some don't make it. Their families then become Gold Star
23 Families."
- 24 • **Third clip:** Phil Vassar concert and a voiceover "Join Phil Vassar at the
25 Remember the Brave benefit concert. Visit Ticketmaster dot com for your
26 tickets today" while the words "May 28th" "Chukchansi Gold Resort and
27 Casino" and "Ticketmaster.com" flash on the screen.
- 28 • **Fourth clip:** same shot of Denham with the veterans and Denham saying
29 "If you can't make it, go to Rememberthebrave.com to learn more" while
30 the words "Rememberthebrave.com" flash on the screen.

31
32 **TRANSCRIPT OF INTERNET AD:**

- 33 • **Left side of screen:** Photo of Denham and the words "State Senator Jeff Denham,
34 Veterans' Affairs Committee" under the photo.
- 35 • **Right Side of screen:** Message "As a veteran, I know the sacrifices of our
36 service men and women. A sacrifice shared by their loved ones who pray for
37 their safe return. But some don't make it. Their families then become Gold Star
38 Families. We're raising funds to make available commemorative license plates
39 for these families as recognition for their sacrifice. Please join us at our benefit
40 concert on May 28th. If you can't attend, I urge you to learn more [link] about
41 these families and make a tax-deductible contribution [link]. Remember, every
42 dollar counts. Learn More: California Department of Veteran Affairs – Project
43 Gold Star [link].
- 44 • **Bottom of screen:** rememberthebrave.com is a project of Remembering The
45 Brave Foundation, a 501(c)(3) not-for-profit organization. For more information,

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1 please visit www.RememberingTheBrave.org. Contributions and donations are
2 tax deductible and directly benefit the Remembering the Brave Foundation.
3

4 RB sponsored the benefit concert, the proceeds of which were donated to Project Gold
5 Star. Denham Response at 2. It also appears that RB, not the Tribe, produced, aired, and paid
6 for the radio, television, and internet ads. *Id.* Documentation submitted with the complaint in
7 MUR 6362 indicates that Gilliard, Blanning & Associates (“GBA”) and Alamance Advisors
8 handled the media buy for the concert on behalf of its client, RB. *See* Emails between Genet
9 Slagle (media buyer with GBA) to Matt Rosenfeld (President/General Manager for KSEE-
10 NBC24, KSEE Weather Plus, and LATV la alternativo), dated April 29, 2010, regarding Gold
11 Star Families Proposal. It also appears that GBA and Alamance Advisors handled the media
12 buys for the Denham for Congress campaign in 2010.² *See* Emails from Genet Slagle to Donald
13 Osika, dated January 29, 2010. The Denham response did not specify how much was spent on
14 the ads, but does not dispute the \$100,000-\$200,000 amount mentioned in the complaint. It
15 appears that RB raised a total of \$105,440.24, about a third of the total amount raised (\$300,000)
16 for Project Gold Star.³

17 The response indicates that the ads aired during May 2010, up until the May 28th date of
18 the benefit concert, which was within thirty (30) days of the California Congressional primary
19 election in which Denham appeared as a candidate. *Id.* at 4. However, the response argued the

² The Denham Federal Committee’s 2010 April Quarterly Report reflects disbursements to GBA and to Alamance for broadcast advertising.

³ The California Department of Veteran Affairs announced that Project Gold Star had met its fundraising goal. *See* <http://www.cdva.ca.gov/newhome.aspx>. RB posted a letter from the Department of Veteran Affairs thanking it for its \$105,440.24 donation in support of Project Gold Star. *See* <http://www.rememberingthebrave.org/news/>. On the letter is a handwritten note, indicating that this was the single largest donation received. *Id.* In a news release announcing that the Gold Star Project had raised \$300,000 and that the Gold Star plate initiative had passed, RB acknowledges that it “together with Senator Denham, his supporters, and other contributors ... raised approximately one-third of the funds needed to get the license plate initiative passed.” *Id.*

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1 concert was scheduled for May 28th because it was close to Memorial Day, an appropriate date
2 on which to hold an event related to veteran/military issues and causes, and not because May 28
3 was close to the primary. *Id.* at 6. The response also stated that the ads aired over a geographic
4 area around the Casino where the concert was held and included Denham's State Senate district,
5 the 19th Congressional District, and areas beyond. *Id.* at 4. Finally, the response acknowledged
6 that the ads could be received by more than 50,000 people within the 19th Congressional District.
7 *Id.*

8 **B. Coordinated Communications**

9
10 The Act subjects contributions and expenditures to certain restrictions, limitations, and
11 reporting requirements. *See generally* 2 U.S.C. §§ 441a, 434b. Contributions can be monetary
12 or "in-kind." In-kind contributions include an expenditure made by any person "in cooperation,
13 consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized
14 political committees, or their agents," and are subject to the same restrictions and reporting
15 requirements as other contributions. 2 U.S.C. § 441a(a)(7)(A) and (B)(i); 11 C.F.R.
16 §§ 100.52(d)(1), 109.21(b). The Commission's regulations at 11 C.F.R. § 109.21 provide that
17 coordinated communications constitute in-kind contributions from the party paying for such
18 communication to the candidate, the candidate's authorized committee, or the political party
19 committee which coordinates the communication. A corporation is prohibited from making any
20 contribution in connection with a Federal election. 2 U.S.C. § 441b(a).

21 A communication is coordinated if it is paid for by someone other than the candidate or
22 the candidate's authorized committee (or the political party committee, where applicable); it
23 satisfies one or more content standards; and it satisfies one or more conduct standards. All three
24 prongs must be met for a communication to be considered coordinated. 11 C.F.R. § 109.21. The

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1 Commission's regulations exempt from the definition of "coordinated communication" a public
2 communication in which a Federal candidate solicits funds for organizations as permitted by
3 11 C.F.R. § 300.65, provided that the public communication does not PASO the soliciting
4 candidate or that candidate's opponent(s) in the election. *See* 11 C.F.R § 109.21(g)(2). Federal
5 candidates and officeholders may solicit funds for tax-exempt organizations as described in
6 26 U.S.C. § 501(c). 11 C.F.R. § 300.65.

7 The radio and television ads at issue meet all three prongs of the coordination test. The
8 payment prong is satisfied because there is information that the ads were paid for by RB,
9 someone other than the candidate, his authorized committee, or political party committee.
10 11 C.F.R. § 109.21(a)(1). The content prong is satisfied because the communications qualify as
11 public communications which "refer[] to a clearly identified House or Senate candidate that
12 [are] publicly distributed or otherwise publicly disseminated in the clearly identified candidate's
13 jurisdiction 90 days or fewer before the ... primary or preference election."⁴ 11 C.F.R.
14 § 109.21(c)(4)(i). The content prong is also satisfied because the ads meet the definition of
15 electioneering communications. 11 C.F.R. § 109.21(c)(1). The ads are electioneering
16 communications because they were publicly distributed on radio and television, refer to a clearly
17 identified candidate for Federal office, were publicly distributed within 30 days before the
18 primary election, and were targeted to the relevant electorate (the ads could be received by

⁴ A public communication includes broadcast communications. 2 U.S.C. § 431(22). It does not include internet communications, except for communications placed for a fee on another's Web site. 11 C.F.R. § 100.26. "Clearly identified" means the candidate's name or photograph appears, or "the identity of the candidate is otherwise apparent through an unambiguous reference." 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.

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1 50,000 or more persons in the district that Denham sought to represent (19th Congressional
2 District)).⁵ 11 C.F.R. § 100.29.

3 The conduct prong is satisfied if a candidate or candidate's committee assents to a request
4 or suggestion that the public communication be created, produced, or distributed, and that
5 request or suggestion came from the person paying for the communication. 11 C.F.R.
6 § 109.21(d)(1)(ii). The response acknowledged that RB requested that Denham act as the
7 spokesperson and to appear in the ads, which he did. Denham Response at 2. Because Denham
8 is an agent of his Committee, his actions are also imputed to his Committee. 11 C.F.R.
9 §§ 109.3(b)(1), (2); 109.21(a), (d)(1)(ii).

10 Though the television and radio ads meet the definition of "coordinated
11 communications," they qualify for the safe harbor for candidate charitable solicitations in
12 11 C.F.R. § 109.21(g)(2). This provision exempts from the definition of "coordinated
13 communications" public communications in which a Federal candidate solicits funds for certain
14 tax-exempt organizations as permitted by 11 C.F.R. § 300.65, provided that the public
15 communications do not PASO the soliciting candidate or that candidate's opponents in that
16 election. In this matter, Denham, a Federal candidate, appeared and/or spoke in broadcast radio
17 and television ads to solicit funds for RB, a 501(c)(3) organization, in support of Project Gold
18 Star. The available information indicates that RB is an organization described in 11 C.F.R.
19 § 300.65, and the solicitations for donations to RB complied with the requirements of 11 C.F.R.
20 § 300.65 because they appeared to have been for the purpose of raising funds for RB in support
21 of Project Gold Star. Thus, it appears that these communications are exempt from the definition

⁵ RB's internet ad is not included in this analysis because it is exempt from the definition of electioneering communications. 11 C.F.R. § 100.29(c)(1).

1 of “coordinated communications” if they did not promote or support Denham and did not attack
2 or oppose his opponent.

3 It does not appear that the ads at issue promote or support Denham or attack or oppose
4 any of his opponents. Although the Commission has not defined the term “promote, support,
5 attack, or oppose,” it has provided some guidance in advisory opinions as to what might
6 constitute PASO of a candidate. See AO 2009-26 (Coulson) (concluding that a state officeholder
7 could use non-federal funds to pay for communication that did not PASO a candidate for Federal
8 office because the communication was solely part of the State officeholder’s duties, did not
9 solicit donations, nor did it expressly advocate the candidate’s election or the defeat of her
10 opponents); see also AOs 2007-34 (Jackson), 2007-21 (Holt), 2006-10 (Echostar) and 2003-25
11 (Weinzapfel) (holding that the mere identification of an individual who is a Federal candidate
12 does not, in itself, promote, support, attack or oppose that candidate).

13 The only clearly identified candidate in the ads is Denham, who is identified as a veteran,
14 a State Senator, and as Chairman of the Veterans’ Affairs Committee, not as a candidate for
15 Federal office. The ads do not contain express advocacy or its functional equivalent, and do not
16 contain references to any election or political party. Given the above, it does not appear that the
17 ads PASO’d Denham or any of his opponents.

18 Neither the timing of the benefit concert nor the involvement of the Denham campaign
19 consultants/media buyer/supporters in the planning of the benefit concert and ads would appear
20 to prevent the application of the safe harbor for charitable solicitations. See Explanation and
21 Justification for Final Rules for Safe Harbor for Endorsements and Solicitations by Federal
22 Candidates (11 C.F.R. § 109.21(g)) 71 Fed. Reg. 33201-33202 (Jun. 8, 2006) (stating that the
23 “safe harbor applies regardless of the timing and proximity to an election ... of the solicitation

1 and [w]hen the safe harbor is applicable, the . . . soliciting candidate (and the candidate's agents)
2 may be involved in the development of the communication, in determining the content of the
3 communication, as well as determining the means or mode and timing or frequency of the
4 communication.""); *See also*, AO 2006-10 (Echostar).

5 Based on the above, the ads at issue were not coordinated communications. Accordingly,
6 the Commission found no reason to believe that Jeff Denham and Denham for Congress and
7 David Bauer, in his official capacity as treasurer, accepted and received prohibited in-kind
8 corporate contributions resulting from coordinated communications in violation of 2 U.S.C.
9 § 441b(a); and no reason to believe that Denham for Congress and David Bauer, in his official
10 capacity as treasurer, failed to report such contributions in violation of 2 U.S.C. § 434(b).

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