BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Matter of Complaint of MacLaren vs Montana Conservative Coalition No. COPP 2013-CFP-0027	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act

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Gary MacLaren was a candidate in the 2012 Republican primary for Montana Senate District 45 (SD 45). Mr. MacLaren was opposed in the Republican primary by Fred Thomas. The primary election was held on June 5, 2012. The Montana Conservative Coalition was registered as an independent political committee in regard to participation in 2012 candidate elections for public office in Montana.

On September 17, 2012 Mr. MacLaren filed a complaint against the Montana Conservative Coalition alleging that it acted in violation of Montana's campaign practices law through its expenditures in the SD 45 Republican primary election. On May 20, 2013 Mr. MacLaren sent a letter asking that the Commissioner also examine the disclosure information in the reports filed by the Montana Conservative Coalition.

INTRODUCTION

Mr. MacLaren complains that an independent committee (the Montana Conservative Coalition) made an independent expenditure of money in a Montana election (the Montana Senate District 45 Republican primary election) without properly or timely reporting or disclosing the source of funds, amounts spent or the independent nature of the expenditure. Mr. MacLaren's complaint implicates several of the recurring issues concerning campaign expenditures by independent committees that have confronted and confounded candidates, Montanans and this Office in the last two election cycles. Pending before this Commissioner are a dozen additional complaints, many from the 2010 election cycle, that also make claims of undisclosed and unreported independent expenditures comparable to those raised by this MacLaren complaint.

To a degree, effective governance requires a cooperative society. In turn, the cooperation of society requires that most people accept that an election seating a public official was "fair" and that the public official won "fairly." The independent expenditure part of that fairness calculation is complicated. The US Supreme Court in *Citizens United* determined that independent campaign expenditures are protected election speech and cannot be limited or prohibited in amount. This leaves disclosure and reporting of the sources and amounts as allowable regulation of independent expenditures in Montana and elsewhere. Fairness, then, of independent expenditures is judged by the law and this Office as to whether or not the independent expenditure was timely

and fully reported and disclosed. Through this disclosure and reporting the opposing candidate and the public are better informed as to who is making the independent expenditure in the campaign.

Montana's people have repeatedly determined that such disclosure and reporting of campaign expenditures, including independent expenditures, is essential to the integrity of Montana's political system. Others, however, see it differently as they wish to make such independent campaign expenditures but avoid reporting and disclosure. This clash of approaches has led to the complaints, including the MacLaren complaint, filed with this office concerning instances of unreported and undisclosed independent expenditure activity.

The MacLaren complaint involves the three elements common to all of these complaints. First, there is an independent committee. An independent committee is an entity operating separately from [or "independently" of] the candidate's campaign. In the MacLaren Matter the independent committee was a political action committee that drew its legal existence from registration at the Comissioner's office. In the remaining Matters the independent committee most often existed as a public benefit ["non-profit"] corporation.

Second, there was a significant independent campaign expenditure made by the independent committee within a few days of an election. The Maclaren Matter involved such an expenditure by the Montana Conservative Coalition in the Republican primary race in Senate District 45.

Third, the expenditure by the independent committee was neither timely or properly reported or disclosed. Disclosure and reporting are not required

unless the expenditure is determined to be an election expenditure. The determination of election expenditure requires a detailed review of the facts of the expenditure so that it can be measured against the requirements of law. The MacLaren Matter presents straightforward facts that lead to a relatively easy conclusion. The future Matters are more factually complicated but the analysis and approach will be the same.

There is much of Montana's election and candidate culture at stake in these decisions. Montanans have long expressed their majoritarian view for open and fair elections with maximum reporting and disclosure of money spent in elections. Candidates run with the expectation that they will not be bushwacked by late, undisclosed and unreported expenditures. Hence, the majority of Montanans have set law requiring full and timely reporting and disclosure of campaign expenditures, including independent expenditures.

But, as is the case with any majoritarian view, the majority cannot pass laws that trample on the rights of the minority, including speech rights. In future Matters an independent committee minority will claim its speech rights include the right to spend whatever it wishes in an election (and that right is assured by the US Supreme Court *Citizens United* decision) **and** the right to make these election expenditures with minimum or no reporting and disclosure. This reporting and disclosure issue, of course, is nuanced with foundation determinations required of whether the election expenditure was "coordinated" or "express advocacy." This MacLaren decision is the start of this Commissioner's review, discussion and determination of these issues. It

is expected that when this Office finishes the Courts will also review, discuss and determine some of these Matters.

We are a nation of laws. This process is the way we progress and change when determining a just response to a challenge to the culture set by existing law. This Commissioner intends to have this Office's part of this review completed early enough to serve as a guide to candidates and the public during the 2014 election cycle.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Determining an independent committee status; 2) Whether an independent committee needs to report/disclose independent expenditures; 3) Inclusive scope of all violations shown by an investigation of the complaint; 4) Failure to timely report election expenditures/debt by an independent committee; 5) Failure by an independent committee to report within 24 hours after incurring a debt or making an expenditure greater than $500 within 17 days of an election; and, 6) Failure to disclose, including failure to disclose the name of the candidate served by independent committee expenditure.

FINDING OF FACTS

The relevant foundational facts necessary for the analysis are determined and set out below.

1. The Montana Conservative Coalition filed its statement of organization as a Political Action Committee with this Office on June 1, 2009. The MCC treasurer was listed as Lorna Kuney of Helena, Montana. Ms. Kuney remained

as treasurer until May of 2013 when she was replaced by Wendy Smith of Billings, Montana. [Commissioner's records.]

2. The Montana Conservative Coalition registered as a political action committee, both in the June 1, 2009 original filing and in the May 14, 2013 filing substituting Ms. Smith as treasurer in place of Ms. Kuney. [Commissioner's records.]

3. The Montana Conservative Coalition filed 12 periodic reports with the Commissioner's office since 2009. During that time it reported that it has taken in $24,917.75 and spent $21,505.80. [Commissioner's records.]

4. The principal election activity of the Montana Conservative Coalition took place in the 2012 elections when it reported taking in over $18,000 and spending over $15,000. [Commissioner's records.]

5. The Montana Conservative Coalition apparently intends an active future as on April 19, 2013 it sent a fund raising letter, under the signature of Montana Senator Jason Priest, soliciting funding for the 2014 elections. [Priest letter, Commissioner's records.]

6. The Montana Conservative Coalition engaged in election expenditures connected with the June 5, 2012 primary elections in Montana as follows:

a. Gary MacLaren was a candidate in the 2012 Republican primary for SD 45. Mr. MacLaren was opposed in the primary by Fred Thomas. The primary election was held on June 5, 2012. [Secretary of State (SOS) Website.]

b. The Montana Secretary of State's website shows that SD 45 was an open seat at the time of the 2012 primary election. Both Mr. MacLaren

(Montana House) and Mr. Thomas (Montana House and Senate) had before been elected as Republicans to legislative positions from the geographic area served by SD 45. Neither was an incumbent in SD 45 at the time of the primary election held on June 5, 2012. [SOS Website.]

c. Mr. Thomas prevailed in the Republican primary election by a vote of 2310 (Thomas) to 1656 (MacLaren). [SOS Website.]

d. The Montana Conservative Coalition campaigned in the SD 45 Republican primary by preparing and mailing an oversize, post-card stock, glossy election flyer (hereinafter Flyer). [See Ex. 1, this Decision.]

e. The Montana Conservative Coalition Flyer urged a "vote for" one candidate in the Republican primary (Mr. Thomas) and attacked the other candidate (Mr. MacLaren). [Ex. 1.]

f. Investigators from the Commissioner's office confirmed that the Montana Conservative Coalition Flyer in the MacLaren-Thomas primary election was completed and mailed no later than June 2, 2012. These investigators further confirmed that the Montana Conservative Coalition Flyer was sent to 2,200 voters who were thought likely to vote in SB 45 Republican primary election. The cost of the design, printing and mailing of the Montana Conservative Coalition Flyer was reported to the Commissioner's investigators at $.75 each or $1650 for the 2,200 flyers. The cost of $1650 was first reported by the Montana Conservative Coalition on its post general election report filed November 26, 2012. [Investigators file, Commissioner's records]

7. The Montana Conservative Coalition reported or disclosed

contributions received and expenses made in connection with its June 5 primary election activity as follows:

a. The 1/01 to 5/19/2012 pre-primary political committee report filed by the Montana Conservative Coalition lists receipts of $525 (from 4 individuals) and expenses of $463.45, including a $100 contribution to the campaign of Austin Knudsen for HD 36. [Commissioner's records.]

b. The 5/20 to 6/20/2012 post-primary political committee report filed by the Montana Conservative Coalition lists receipts of $100 (from 1 individual) and expenses of $57.58. [Commissioner's records.]

c. The Montana Conservative Coalition did not file any 24 hour reports of expenditures prior to the June 5 primary election. [Commissioner's records.]

d. The Montana Conservative Coalition did not file any disclosure reports with the Ravalli County Clerk and Recorder before or during June of 2012. [Investigator's records.]

8. The Commissioner finds as fact that the Montana Conservative Coalition acted contrary to Montana campaign practices requirements in its June 5 primary election activity as follows:

a. The Montana Conservative Coalition failed to timely report $1650 in expenditures (or the source of those funds) in the MacLaren-Thomas primary election. This failure to report included pre-primary or post-primary reports. [Overall finding based on FOF 1-7].

b. The Flyer lists the name and address of the Montana Conservative Coalition PAC but does not attribute "paid for by". [Ex. 1].

c. There are no pre-primary election or post-primary election report that identifies or lists the candidate for whom the expenditure was made. The Commissioner determined this information privately by investigation.[Commissioner's records.]

9. The Montana Conservative Coalition engaged in election expenditures in connection with the November 5, 2012 general elections in Montana as follows:

a. The pre-general Montana Conservative Coalition political committee report ending 10-20-2012 lists $1464 spent paying for "voter phone calls Mike Fasbender." Mr. Fasbender was the Republican nominee for the Lewis and Clark County Commission. According to the Secretary of State website, Mr. Fasbender lost to the Democractic nominee in the 2012 general election by a vote of 14,586 to 17,905. [Commissioner's records and SOS Website.]

b. The Montana Conservative Coalition filed a "Form C-7E" on November 27, 2012 listing 5 separate pre-general election expenditures (incurred between 10-23 to 11-04-2012) totaling $7,181.35. The $1650 cost of the Flyer used in the MacLaren-Thomas primary election was included among the 5 expenditures. [Commissioner's records.]

c. The Comissioner's investigator was told that the $2,520 EGS direct mailing expense listed in the Montana Conservative Coalition's C-7 report was expended in support of Fasbender. [Investigator's records.]

10. The Montana Conservative Coalition reported or disclosed contributions received and expenses made in connection with the November 5,

2012 general election as follows:

a. The 6/21 to 10/20/2012 pre-general political committee report filed on October 25, 2012 by the Montana Conservative Coalition lists receipts of $10,602.75 ($10,000 came from the Helena Building Association) and expenses of $1580.13, consisting primarily of the $1464 spent paying for "voter phone calls Mike Fasbender." [Commissioner's records.]

b. There were no timely pre-election 24 hour notice of expenditure reports [Form C-7E] filed by the Montana Conservative Coalition. There was an untimely Form C-7E filed on November 27, 2012. The expenditures reported on the Form C-7E were made on October 23, 2012. [Commissioner's records.]

c. There were no pre-election or post-election disclosures or reports filed with the election administrator of Lewis and Clark County. [Investigator's records.]

d. The 10/21 to 11/21/2012 post-general report filed on November 26, 2012 by the Montana Conservative Coalition lists receipts of $8,200 ($5,000 from BootPAC along with contributions from 5 individuals). The report lists expenses of $10,976.18, consisting of costs for "design and printing", "signature gathering", "direct mailing", "campaign door to door and sign holder", "campaign literature delivery", and "sign hanging". [Commissioner's records.]

e. On November 27, 2012 the Montana Conservative Coalition late filed a Form C-7E listing 5 pre-general election expenses made within 17 days of the

date of election totaling $7,181.35. [Commissioner's records.]

f. The 5 expenses constituting the $7,181.35 includes the $1650 in pre-primary expenses for the Flyer. Accordingly, by its late filed Form C-7E the Montana Conservative Coalition admits it spent $5531.35 ($7,181.35 less $1650) in the general election without timely reporting or disclosing the expenditure of those funds in any pre-general report. [Commissioner's records.]

g. A comparison of the report forms filed by the Montana Conservative Coalition on November 26, 2012 (this is the required post-election report) and November 27, 2012 (this is the late filed pre-election Form C-7E) shows that the $1464 reported on the regular pre-election report [FF No. 10(a)] was not included in the $5,531.35. Instead, the four expenditures making up the $5,531.35 consist of $568.41 for signature gathering, $2,520 for direct mailing, $568.68 for campaign literature delivery, and $1894.26 for campaign door to door and sign holder. These four expenses are listed on both the November 26 and 27 reports and they total $5531.35. [Commissioner's records.]

h. In addition to the 4 expenditures totaling $5,531.35 the November 26 report includes $3,285.37 for "campaign door to door sign hanging" that was not included on the November 27 report.

11. The Commissioner finds as fact that the Montana Conservative Coalition admits by its late filed Form C-7E that it failed to file pre-general election reports for four expenditures totaling $5,531.35. [**See** FF No. 10]. The Commissioner further finds that an additional $3,285.37 in expenses [FF

No. 10(h)] was incurred as debt prior to the election and should have also been reported on a pre-general election Form C-7E. [Deductive Finding based on FF No. 10. In total the Commissioner finds that $8,816.72 in five campaign expenses were late reported.

12. In addition to general election reporting violations listed above, the Commissioner finds as fact that the Montana Conservative Coalition made (or failed to make) the following disclosures related to the general election:

a. The report for the time period of 10-21 to 11-21-2012 lists 5 individual donors. The occupation and employer is not listed for any of the donors. The Montana Conservative Coalition failed to respond to a follow up request from the Commissioner to supply this information [Commissioner's records.]

b. The Form C-7E does not identify or list the candidate for whom the expenditure was made. [Commissioner's records.]

c. The Form C-7E was filed 35 days late. More importantly, the Form was filed after the election therefore defeating the purpose of pre-election notice. [Commissioner's records.]

d. The periodic reports do not list or identify the candidate for whom the expenditure was made for five expenditures totaling $8,816.72. [Commissioner's records.]

DISCUSSION

The Montana Conservative Coalition was registered as a political action committee in Montana during the 2012 elections [**See** FF No. 4, **See**

44.10.327(2)(b)]. The Montana Conservative Coalition accepted contributions and made expenditures in at least two 2012 candidate elections [see FF Nos. 7-10]. This Commissioner finds that the Montana Conservative Coalition is an independent committee as defined by §13-37-226(5) and 44.10.327(1)(b), (2)(b) ARM. Accordingly, this Commissioner determines that this Matter concerns the application of Montana's Campaign Practices law to the actions of an independent political committee.

I. Campaign Practices Law Applies to the Montana Conservative Coalition

Montana's campaign Practices law has provisions applying to the election expenditure activity of an independent committee. Providing the Montana Conservative Coalition election activity qualifies as election expenditures (see below), as an independent committee the Montana Conservative Coalition is required to file a report:

> (a) ...on the 12th day preceding the date of an election in which it participates by making an expenditure
>
> (b) ...within 24 hours of making an expenditure or incurring a debt or obligation of $500 or more...if made within 17 days of an election
>
> (c) ...not more than 20 days after an election in which it participates by making an expenditure

See §13-37-226(5) MCA.

On occasion facts are alleged that show a political committee, while separately registered from the candidate's campaign with the Commissioner's office, is so interlinked or "coordinated" to a candidate's campaign that the committee is deemed not to be independent but is instead "...considered to be

organized on a candidate's behalf." §13-37-216(2)(a) MCA. On those occasions the Commissioner has deemed that the coordinated contributions and expenditures are subjected to the contribution limits and reporting law applicable to candidates. **See** *Matter of Little v Progressive Missoula and Handler* decided July 22, 2004.

In this Matter no facts are alleged showing coordination between the Montana Conservative Coalition and any candidate. Therefore the expenditure law applicable in this Matter is that law applicable to an independent expenditure. There has been considerable past analysis by this Office as to whether an expenditure made during the time of an election rises to the level of an independent expenditure. To date the Commissioner's analysis on this issue has been subjected to only one judicial review, that being by a state district court in *Western Traditional Partnership v Gallik* 1st Judicial District, Lewis and Clark County, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83.

Sixteen years ago this Office, through Commissioner Argenbright, first discussed the differing constitutional standards measuring campaign practices law applicable to expenditures of candidates versus expenditures of independent committees. **See** *Matter of Harmon vs Citizens for Common Sense Government* decided December 31, 1997. This issue has been revisited by succeeding Commissioners as applied to decisions including: *Matter of Michels v Nelson* decided July 31, 2001 [Commissioner Vaughey]; *Matter of Little v Progressive Missoula and Handler* decided July 22, 2004 [Commissioner Vaughey]; *Matter of Close v People for Responsible Government* decided

December 12, 2005 [Commissioner Higgins]; *Matter of Keane v Montanans for True Democrat* decided April 2, 2008; [Commissioner Unsworth] *Matter of Erickson v PRIDE, Inc.* decided July 22, 2008 [Commissioner Unsworth]; *Roberts v Griffin* decided November 19, 2009 [Commissioner Unsworth]; *Matter of Graybill v Western Traditional Partnership* COPP-2010-CFP-16 [Commissioner Unsworth]; and, *Wittich v Main Street Advocacy Fund* COPP-2010-CFP-18 [Deputy Commissioner Dufrechou].

It is noted that the holding of *Citizens United v F.E.C.* 130 S. Ct 876, 175 L. Ed. 2d 753 (2010) now affects the analysis of Montana's independent expenditure law. Montana's independent expenditure law was written to a prohibition standard imposed for 100 years by §13-35-227. Accordingly, Montana law, written to prohibit corporate independent expenditures, defined independent expenditures as: "...communications <u>expressly advocating</u> the success or defeat of a candidate or ballot issue..." ARM 44.10.323(3). The holding of *Citizens United* was applied to strike down the part of §13-35-227 prohibiting corporate independent expenditures. See *American Traditional Partnership v Bullock* 132 S. Ct. 1307, 181 L. Ed. 2d 1036 (2012).

With the demise of the corporate independent expenditure prohibitions set out in §13-35-227 MCA, the only remaining Montana campaign practices regulations applicable to independent expenditures are reporting and disclosure requirements. As the district court pointed out [citing to a 9th circuit case] in the appeal of the *Matter of Graybill v Western Traditional Partnership, of the* COPP-2010-CFP-16 "disclosure is a less restrictive

alternative to more comprehensive regulations of speech" ***See*** *Western Traditional Partnership v Gallik* 1st Judicial District, Lewis and Clark County, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83, ¶17. Accordingly, the district court, for summary judgment purposes did not confine itself to the higher bar of "express advocacy" when it measured the constitutionality of applying disclosure requirements to independent expenditures. Instead, the district court also used the Title 13 definition of "expenditure" that includes "...anything of value made for the purpose of influencing the results of an election." §13-1-101(11((a) MCA

The district court's approach notwithstanding, the applicable Montana regulation defines independent expenditure as: "...communications <u>expressly advocating</u> the success or defeat of a candidate or ballot issue..." ARM 44.10.323(3). Emphasis added. The last Decisions issued by a Commissioner involving this issue were those of Commissioner Unsworth in the *Matter of Graybill* and Deputy Commissioner Dufrechou in *Main Street Advocacy Fund.* Both Decisions were made in the midst of or shortly after the litigation concerning §13-35-227 MCA. *Graybill* and *Main Street Advocacy Fund* analyzed and applied the express advocacy standard of ARM 44.10.323(3) without consideration of the lesser "anything of value" standard of §13-1-101(11)(a) MCA that would be applicable now that independent expenditures are only subject to a reporting requirement.

This Commissioner is considering several additional independent expenditure complaints, the resolution of which may require a reconciliation of

the express advocacy standard of ARM 44.10.323(3) with the "anything of value" standard of §13-1-101(11((a) MCA. This Matter, however, requires no such resolution as the Montana Conservative Coalition independent expenditures meet even the strictest standard of express advocacy.

The Montana Conservative Coalition Flyer says "Vote for Fred Thomas on June 5th". **See** Ex. 1, this Decision. With this language the Flyer meets even the strictest independent expenditure measure possible, that being original "magic words" express advocacy requirement of *Buckley v Valeo* 424 U.S. 1 (1976). ***See*** discussion in *Matters of Graybill and Main Street Advocacy Fund.* Further, the Montana Conservative Coalition admitted, through a late filed form C-7E, to $7,181.35 in election expenditures, including the $1650 spent on the Flyer [See FF No. 10(f)]. This Commissioner determines that the expenditures in this Matter are independent expenditures under any measure of law and therefore are subject to the reporting and disclosure requirements of Montana's campaign practices law, including §13-37-226(5) MCA.

II. Scope of Violations

The MacLaren complaint alleges reporting and disclosure violations related to the $1650 independent expenditure made in the MacLaren vs Thomas 2012 Republican primary election. In carrying out the investigation of the MacLaren complaint facts were observed indicating additional violations connected with another candidate campaign. Accordingly, this Decision also considers and addresses violations in connection with the expenditure of money by the Montana Conservative Coalition in the 2012 Fasbender

campaign for Lewis and Clark County Commissioner.

III. Failure to Timely Report and To Disclose

Montana's campaign related laws require full and timely reporting and disclosure of campaign contributions and expenditures. All election materials used in Montana must be properly attributed to the party paying for the communication. [§13-35-225 MCA]. The Montana Conservative Coalition political committee is required to timely file a certification [§13-37-201 MCA], timely keep and maintain accounts of contributions and expenditures [§13-37-208 MCA] and timely file reports to the Commissioner's office of such contributions and expenditures [§13-37-226]. The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information.

A. The SD 45 Primary Election

This Commissioner has determined that the Montana Conservative Coalition incurred a $1650 election debt for the Flyer used in the SD 45 primary race on or before June 2, 2012 [FF No. 6(f)]. Any such debt is considered to exist as of the date it is incurred ***See*** *Hardin v Skinner* COPP-2012-CFP-51. Once incurred the debt must be reported: "each report required by Section 13-37-226 MCA shall disclose all debts and obligations owed by a candidate or political committee." 44.10.535 ARM.

The Montana Conservative Coalition was required to make a pre-election report and disclosure of the $1650 Flyer debt to the opposing

candidate and the public no later than June 3, 2012. This report and disclosure should have been accomplished by filling out and filing a form [Form C-7E] with the offices of the Commissioner and the Ravailli County election officer. Montana law requires this 24 hour reporting of any election expenditure over $500 made within 17 days of an election ***See*** §13-37-226(5)(b) MCA. The $1650 Flyer debt also should have been reported by the Montana Conservative Coalition on the report due through the 20th day following the election [§13-37-226(5)(c) MCA].

The Montana Conservative Coalition did not disclose or list the $1650 Flyer expenditure on a pre-election 24 hour report. The Montana Conservative Coalition did not disclose or list the $1650 Flyer in its post-primary election report. [FF No. 8]. The Montana Conservative Coalition did not identify or list any source of funds for the cost of the Flyer in these reports. [FF No. 8]. The Montana Conservative Coalition did not disclose any $1650 expenditure or the source of funds for the expenditure, made before and for the June 5 primary election, until 5 months later when it filed its post-general election report.[1]

Public access to the information in the reports is enhanced by the requirement of in-district filing. Montana law requires that reports required by §13-37-226 MCA also be filed with the appropriate County election administrator. **See**, §13-37-225(1) MCA. In this case the

[1] Even when reported the amount of $1650 was not disclosed as to candidate or election. [Commissioner's records.]

appropriate county was Ravalli County. The Montana Conservative Coalition did not disclose or list the $1650 Flyer expenditure by a pre-election 24 hour report filed with Ravalli County. The Montana Conservative Coalition did not disclose or list the $1650 Flyer by a post-primary election report filed with Ravalli County. [FF No. 7(d)].

In addition to reporting the expenditure the Montana Conservative Coalition was required to make certain disclosers in its reports or in the communication [the Flyer] purchased by the $1650. The Flyer must include the attribution "paid for by" [§13-35-225(1) MCA].[2] The Flyer lacked this attribution [see Ex. 1, FF No. 8(b)].

The reports made to the Commissioner "shall report the name of the candidate ...the independent expenditure was intended to benefit and the fact that the expenditure was independent" 44.10.531ARM. Even the late filed reports lacked this disclosure. [FF No. 12(d)]. Finally, the Montana Conservative Coalition reports do not list the occupation and employer for any of the 5 individual contributors, as required by 13-37-229(2) MCA.

Based on the above findings and analysis the Commissioner finds that the Montana Conservative Coalition made a $1650 election expenditure in the SD 45 2012 primary election. The expenditure was used to produce and mail a carefully timed and prepared election Flyer to a select group of people likely to vote in the 2012 Republican primary in SD 45.

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[2] The Flyer lists the Montana Conservative Coalition PAC in the return address spot but it does not state "paid for by" and the address is built within a larger Fred Thomas campaign piece such that it is not apparent what entity was actually paying for the Flyer. See Ex. 1.

Based on the above findings and analysis the Commissioner finds that the Montana Conservative Coalition made the expenditure without reporting the $1650 election expenditure on the required pre-election or post-election reports. Further, the Commissioner finds that disclosure, even when made, were inadequate or untimely so as to fail to provide fair and open notice to the public or opposing candidate. The Commissioner finds that, as to the Flyer, the amount of money which the Montana Conservative Coalition made multiple failures to report or disclose is $1650.

B. The Fasbender General Election

The Montana Conservative Coalition filed a form C-7E on November 27, 2012, listing 5 separate pre-election expenditures totaling $7,181.35. [FF No. 9(b).] The MacLaren Flyer cost of $1,650 was included, leaving $5,531.35 in additional election expenditures listed on the late filed form C-7E [FF No. 10(f)]. The Commissioner has determined that an additional amount of $3,285.37 was not timely reported on a Form C-7E. [FF No. 11]. The same legal reasoning set out above in regard to the Flyer applies to these expenses. The Commissioner finds that the Montana Conservative Coalition failed to comply with Montana law in failing to timely report $8,816.72 .[3]

The Comissioner notes that his investigator was told that the $2,520 EGS direct mailing expense listed in the Montana Conservative Coalition's C-7E reports for 10-23-12 was expended in support of Fasbender. In addition the

[3] The October 25, 2012 Montana Conservative Coalition regular report lists $1464 spent on "voter phone calls Mike Fasbender." This expense was timely reported and disclosed.

Commissioner determined that the expenses, regardless of candidate, were election expenses that should have been reported on a Form C-7E. **See** FF No. 11.

FINDINGS OF CAMPAIGN PRACTICE VIOLATION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision as the law mandates that the Commissioner ["shall investigate," See, §13-37-111(2)(a) MCA] investigate any alleged violation of campaign practices law . The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ["shall notify", See §13-37-124 MCA] initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. In this Matter Montana's campaign finance report filing requirements are mandatory: "shall file" [**See** §13-37-226 MCA]. The filing date requirements are date certain. Therefore, any failure to meet a mandatory, date-certain filing date is a violation of §13-37-226 MCA. Likewise, the disclosure requirements for independent committee election expenditures is mandatory: "...shall report..." 44.10.531(4) ARM.

This Commissioner, having been charged to investigate and decide, hereby determines that the Montana Conservation Coalition has, as a matter of law, committed multiple violations of Montana's campaign practice laws, including

§§13-37-225, 226 MCA and ARM44.10.531. Having determined that a campaign practice violation has occurred, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The Montana Conservative Coalition is political committee with several years of campaign existence. Its treasurer, Lorna Kuney, serves as treasurer for multiple candidates and political committees, being currently listed on the Federal Election Commission web site as current or past treasurer for three PACS, 10 candidate committees and 1 leadership committee. Excusable neglect cannot be applied to the failures of the Montana Conservative Coalition. **See** discussion of excusable neglect principles in *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009.

The Commissioner recognizes that *de minimis* application is separately measured when dealing with an incidental committee. *Canyon Ferry Road Baptist Church v Unsworth* 556 F3d 1021 (9th Cir. 2009), The Commissioner has applied *de minimis* to an expenditure of up to $428 by an incidental committee. *Raffiani v Montana Shrugged* COPP- 2010- CFP 17. Assuming *arguendo* that in some situations the incidental committee *de minimis* standards apply to candidate election expenditures of an independent committee, this Matter does not qualify for *de minimis* treatment. The amounts of money and the nature of the violation are too significant to be excused as *de minimis*.

Because there is a finding of violation and a determination that *de minimis*

and excusable neglect theories are not applicable, civil prosecution and/or a civil fine is justified [**See** §13-37-124 MCA]. This Commissioner hereby, through this decision, issues a "sufficient evidence" Finding and Decision justifying civil prosecution under §13-37-124 MCA. This matter will now be submitted to [or "noticed to"] the Lewis and Clark County attorney for his review for appropriate civil action. **See** §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [§13-37-124(2) MCA] or fail to prosecute within 30 days [§13-37-124(1) MCA] this Matter returns to this Commissioner for possible prosecution. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil prosecution as the Commissioner has discretion ["may then initiate" **See** §13-37-124(1) MCA] in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of Chapter 37, including those of §13-37-226. [**See** 13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

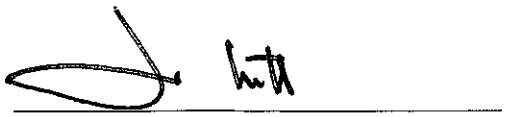
In regard to any such a fine the Commissioner has discretion to determine

if mitigation is appropriate to reduce a fine based on the explanation of why a violation occurred or circumstances of payment. **See** *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009. Mitigation means "abatement or diminution of a penalty or punishment imposed by law." *Black's Law Dictionary, Revised 4th Addition.* Again, the nature or the violation and the amount of money determines that mitigation is not appropriate here. This Commissioner intends to enforce this violation to the full extent of law.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that the Montana Conservative Coalition violated Montana's campaign practices laws, including §§13-37-225, 226 MCA and ARM44.10.531, and that a civil penalty action under § 13-37-128, MCA is warranted. This matter is hereby submitted to [or "noticed to"] the Lewis and Clark County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney this Commissioner will proceed with appropriate action.

ISSUED this 9th day of July, 2013.



Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
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- 8 years of service in Montana State House of Representatives
- 8 years in Montana State Senate

RECORD

A True Fiscal Conservative Who Cuts Taxes:

- Cut income taxes by 40%
- Cut capital gains taxes by 60%
- Cut vehicle taxes
- Cut business property taxes
- Eliminated the livestock tax

Strong Supporter of 2nd Amendment:

- Endorsed by NRA 8 times

ENDORSEMENTS

- ***National Rifle Association (NRA)***
- Montana Shooting Sports Association
- Conservatives United

- Santa Ana, California

- Mayor of Fullerton, California (Orange County)
- 2 terms in Montana State House of Representatives

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