

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Luckey v. Advanced Micro Targeting No. COPP 2020-CFP-004	ADDENDUM ADDITIONAL FINDINGS OF FACT; FINDING OF SUFFICIENCY FACTS TO SUPPORT A CAMPAIGN PRACTICE VIOLATION AS TO THE MONTANA REPUBLICAN PARTY
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On July 1, 2020, Spenser Merwin, Executive Director of the Montana Republican Party (MRP), hand delivered a response to the sufficiency decision in *Luckey v. Advanced Micro Targeting*, COPP-2020-CFP-004, asking the Commissioner to issue an amended decision consistent with his response and to dismiss the MRP from the Matter.

SUBSTANTIVE ISSUES ADDRESSED

Filing as a Minor Party Qualification Committee.

ADDITIONAL FINDINGS OF FACT

The additional foundational facts necessary for this Addendum are as follows:

Finding of Fact No. 19: Commissioner Mangan issued *Luckey v. Advanced Micro Targeting*, COPP-2020-CFP-004 on June 25, 2020, finding sufficient facts to support a campaign practice violation as to the Republican Party, Montanans for Conservation, and Club for Growth Action. The Commissioner dismissed the Matter as to Advanced Micro Targeting. (Commissioner's Records).

Finding of Fact No. 20: Spenser Merwin, Executive Director of the Montana Republican Party (MRP), hand delivered a response to *Luckey v. Advanced Micro Targeting*, COPP-2020-CFP-004 on July 1, 2020. Mr. Merwin requested the Commissioner issue an amended decision in the Matter (Exhibit 1). (Commissioner's Records).

Finding of Fact No. 21: The Montana Republican Party made a payment to Advanced Micro Targeting in the amount of \$50,000.00 on January 21, 2020, and a payment on February 6, 2020 of an undisclosed amount. (Spenser Merwin's response, Exhibit 1).

Finding of Fact No. 22: Advanced Micro Targeting refunded the February 6, 2020 payment of an undisclosed amount to the Montana Republican Party during the same period. (Spenser Merwin's response, Exhibit 1).

Finding of Fact No. 23: A refund of a "January 24th payment from the MTGOP, through its Federal account ... reported on its March 20, 2020 Monthly FEC report as a refund". The March 2020 MTGOP FEC report includes a \$50,000.00 refund from AMT (Spenser Merwin's response, Exhibit 1).

Finding of Fact No. 24: The March 2020 MTGOP FEC report includes a \$50,000.00 refund from AMT dated 2/20/2020. (MTGOP FEC Record, Schedule A).

ADDITIONAL DISCUSSION

Original Decision June 25, 2020

The Commissioner issued *Luckey v. Advanced Micro Targeting*, COPP-2020-CFP-004 on June 25, 2020 (FOF No. 19). In summary, The Commissioner found the Montana Republican Party violated Montana's campaign finance law as it did not *timely* report its expenditure of \$50,000.00 to Advanced Micro Targeting in January of 2020, rather reporting an in-kind contribution of \$100,000.00 to an independent political committee, Montanans

for Conservation¹, on February 20, 2020. Montanans for Conservation reported an in-kind contribution of \$100,000.00 on February 20, 2020 from the Montana Republican Party (FOF No. 13), and responded to an inquiry from the COPP that “Advanced Micro Targeting did not contract with Montanans for Conservation; its contract was with the Montana Republican Party... related to payments made to Advanced Micro Targeting for signature gathering efforts from January to February” (FOF No. 9).

Request for Amended Filing, July 1, 2020

Mr. Merwin makes several contentions the Commissioner finds necessary to address.

COPP interest in MRP's Federal Reporting Obligations

A majority of Mr. Merwin's response appears to be his contention the COPP asserted its authority in the MRP Federal reporting obligations. The Commissioner understands the extent of COPP authority under Montana law, only referencing the MRP federal reporting as it relates to the COPP's obligation to the citizens of Montana in investigating potential violations of Montana campaign finance and practice law. Referencing a Finding of Fact that the MRP reported (or did not report) an expenditure, as an example, is just that, a fact. Facts that are an essential element in this Matter. At no time did the COPP declare or otherwise extend any authority as to the veracity of the MRP's federal reporting. Indeed, that is the jurisdiction of the Federal Election

¹ Montanans for Conservation later amended its status from an Independent committee to a Minor Party Qualification committee on March 23, 2020 (FOF No 8).

Commission (FEC). The Commissioner in this decision references only the Montana Republican Party's reporting obligations under Montana law.

MRP Reporting Details and Declarations in its Response

Mr. Merwin's response on behalf of the Montana Republican Party included specific reporting details and declarations in defense of the MRP in this Matter. Those specific reporting details and declarations also provided new facts essential to the findings in this Matter:

1. The MRP made a payment to Advanced Micro Targeting (AMT) on January 21, 2020 in the amount of \$50,000.00 and a subsequent payment of an undisclosed amount on February 6, 2020 (FOF No. 21).
2. AMT refunded the January 21, 2020² payment of \$50,000.00 and refunded the February 6, 2020 undisclosed amount to the MRP (FOF Nos. 22 - 24).
3. The MRP reported an expenditure to AMT on February 20, 2020, to the COPP in the amount of \$100,000.00 (FOF No. 11) described by Mr. Merwin as "the only disbursement from the MTGOP state account to AMT was made on February 20, 2020, in the amount of \$100,000.00". For emphasis, Mr. Merwin reiterated later "there was only *one* disbursement (February 20th) for the MTGOP, through its State Account, to report on this matter" (Exhibit 1).

² Merwin's response included two January 2020 dates, the 21st and 24th. MTGOP FEC paperwork references January 21, 2020.

ADDITIONAL FINDINGS

Based on the unequivocal statements as provided by Mr. Merwin in his response on behalf of the Montana Republican Party, the Commissioner amends *Luckey v. Advanced Micro Targeting*, COPP-2020-CFP-004 to include the following:

Both the Montana Republican Party and Montanans for Conservation reported an in-kind contribution of \$100,000.00 made on February 20, 2020. However, the Montana Republican Party provided a payment of \$50,000 to Advanced Micro Targeting on January 21, 2020 and an undisclosed amount on February 6, 2020, (FOF No. 21), originally contracting with AMT for its services in January 2020 (FOF No. 9). The Montana Republican Party failed to file as a Minor Party Qualification Committee, Mont. Code Ann. §13-37-602, within 5 days of becoming a reporting entity³ in January 2020. Stated another way, the people of Montana were deprived of the information that the MRP had funded the signature gathering efforts for almost a month before the MRP made an in-kind contribution to the Montanans for Conservation committee, and another month into March 2020 before the MRP announced to the media that they had funded the effort. The Commissioner finds Montana Republican Party violated Montana Minor Party Qualification Committee law.

Sufficiency Finding No. 5: The Montana Republican Party failed to file as a Minor Party Qualification Committee with the COPP within 5 days of January 21, 2020 (by January 27, 2020).

³ 13-37-601(7)(a), MCA "Reporting entity" means the following entities that receive at least \$500 in aggregate contributions in a calendar year or make at least \$500 in aggregate expenditures in a calendar year"; see pages 7, 8 *Luckey v. AMT*, COPP-2020-004.

Montana law requires minor party qualification committees “shall file reports quarterly, due on the 15th day of January, April, July, and October, beginning in the quarter in which the individual or minor party qualification committee becomes a reporting entity” Mont. Code Ann. § 13-37-604. The Montana Republican Party failed to organize as a Minor Party Qualification Committee (SF No. 5) and would have had to file committee finance reports. The Commissioner finds Montana Republican Party violated Montana campaign finance law.

Sufficiency Finding No. 6: The Montana Republican Party failed to file Minor Party Qualification Committee finance reports with the COPP.

The citizens of the State of Montana are due full transparency for all transactions in January and prior to February 20, 2020 of reporting entities in this Matter. By failure to both organize and report as a Minor Party Qualification Committee, the Montana Republican Party deprived Montanans of access to information required by Montana law.

DECISION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner “shall investigate” any alleged violation of campaign practices law. Mont. Code Ann. § 13-37-111(2)(a). The mandate to investigate is followed by a mandate to take action; where there is “sufficient evidence” of a violation the Commissioner must (“shall notify,” *see id.*, at § 13-37-124) 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. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence to show that the Montana Republican Party violated Montana's campaign practice laws, including, but not limited to the laws set out in the Decision. Having determined that sufficient evidence of a campaign practice violation exists, 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 failure to fully and timely report and disclose cannot generally be excused by oversight or ignorance. Excusable neglect cannot be applied to oversight or ignorance of the law as it relates to failures to file and report. See *Matters of Vincent*, Nos. COPP-2013-CFP-006, 009 (discussing excusable neglect principles). Likewise, the Commissioner does not normally accept that failures to file or report be excused as *de minimis*. *Id.* (discussing *de minimis* principles).


Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable to the above Sufficiency Findings, a civil fine is justified. Mont. Code Ann. § 13-37-124. The Commissioner hereby issues a "sufficient evidence" Finding and Decision justifying a civil fine or civil prosecution of the Montana Republican Party. Because of the nature of the violation, this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution.

Id., at (1). Should the County Attorney waive the right to prosecute (*id.*, at (2)) or fail to prosecute within 30 days (*id.*, at (1)) this Matter returns to this Commissioner for possible prosecution.

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 the Matter is waived back, this Finding and Decision does not necessarily lead to civil prosecution as the Commissioner has discretion (“may then initiate” *see id.*) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In setting that fine the Commissioner will consider matters affecting mitigation, including the cooperation in correcting the issue when the matter was raised in the Complaint.

While it is expected that a fine amount can be negotiated and paid, 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 campaign practice law, including those of Mont. Code Ann. § 13-37-602, 603. *See id.*, at § 13-37-128. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

DATED this 29th day of July 2020.



Jeffrey A. Mangan
Commissioner of Political Practices
Of the State of Montana
P.O. Box 202401
1209 8th Avenue
Helena, MT 59620
Phone: (406)-444-3919

VIA HAND DELIVERY

The Honorable Jeffrey A. Mangan
Commissioner of Political Practices
P.O. Box 202401
1209 8th Avenue
Helena, MT 59620

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COMMISSIONER OF
POLITICAL PRACTICES

HAND DELIVERED

Dear Commissioner Mangan:

As the Executive Director of the Montana Republican Party ("MTGOP") at all times during the period at issue in *Luckey v. Advanced Micro Targeting*, No. COPP 2020-CFP-004 ("the Complaint" or "the Matter"), I am providing you with the following information in an effort to quickly resolve and dismiss the alleged violation against the Montana Republican Party. Respectfully, the COPP's June 25, 2020, "sufficiency finding" against the MTGOP is mistaken. As the MTGOP had no prior notice or opportunity to respond, please accept the following as MTGOP's response to the allegations levied by the COPP.

Montana Republican Party Response to "Sufficiency Finding" in *Luckey v. Advanced Micro Targeting* No. COPP 2020-CFP-004, *Finding of Sufficient Facts To Support a Campaign Practice Violation as to the Montana Republican Party, et al.*, dated June 25, 2020

MTGOP hereby files this Response to the "Sufficiency Finding" issued by the Commissioner of Political Practices ("COPP") in its decision styled *Finding of Sufficient Facts to Support a Campaign Practice Violation as to the Montana Republican Party, et al.*, dated June 25, 2020 (the "Findings").

As a preliminary matter, the MTGOP was not named as a party in the Complaint which precipitated the COPP's Findings. Further, the COPP did not contact anyone associated with the MTGOP concerning the allegations and purported "facts" in the COPP's Findings. In other words, the MTGOP was not provided with notice or an opportunity to respond such that fundamental due process considerations have been violated. *Gazette v. State ex rel. Com'n on Practice*, 2008 MT 287, ¶ 12, 345 Mont. 385, 190 P.3d 1126 (holding that due process requires fundamental fairness of procedure which includes notice and an opportunity to respond); *In re Best*, 2010 MT 59, ¶ 25, 355 Mont. 365, 229 P.3d 1201 (due process requires notice of the alleged misconduct charged and an opportunity to respond).

The MTGOP states unequivocally that it has properly, timely, fully, and accurately reported all expenditures related to this Matter to the appropriate government agency where the MTGOP's expenditures are required by federal or state law to be filed and disclosed.

Accordingly, the MTGOP has *not* violated any Federal or State campaign finance laws [Mont. Code Ann. § 13-37-229(2)] and the conclusion(s) of the COPP in its Findings are inaccurate. Consequently, this issue should be quickly resolved and the Findings against the MTGOP dismissed.



Statutory Federal Reporting Obligations Applicable to MTGOP's Federal Account

The MTGOP is not a single entity. Rather, the MTGOP is a “moniker” referring to two, distinctly separate legal entities, one established and governed under federal law and the other established and governed under Montana state law.

The essential error in the COPP’s Findings is the agency’s failure to recognize the existence of the Montana Republican Party, through its Federal Account, as a ‘Federal Party Committee’, as those terms are defined by federal law.

Federal law defines ‘political party’ for purposes of ensuring that a political party involved in the election of federal candidates is subject to and governed by federal law. See 52 U.S.C. 30101(16)). A state political party committee is one of several types of ‘political committees’ required to register with the Federal Election Commission (“the FEC” or “the Commission”). (52 U.S.C. 30101(4), (5), and (6)).

Federal law further defines “Party Committee” as “a political committee which represents a political party and is part of the official party structure at the national, State, or local level.” 11 C.F.R. §100.5(e)(4).

Further, “...political party means an association, committee, or organization which nominates or selects a candidate for election to any Federal office, whose name appears on an election ballot as the candidate of the association, committee, or organization.” (11 C.F.R. §100.15)

The MTGOP, through its Federal Account is registered with the FEC as the Montana Republican State Central Committee, with federal political committee ID # C00008086 (“MTGOP, through its Federal Account”). The MTGOP, through its Federal Account, has been reporting to the FEC in accordance with federal law since 1981. See <https://www.fec.gov/data/committee/C00008086/?tab=filings&cycle=1978#other>.

The MTGOP, through its Federal Account is recognized by the FEC as a “State Committee” under the Federal Election Campaign Laws and the FEC regulations that “...by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, including an entity that is directly or indirectly established, financed, maintained, or controlled by that organization, as determined by the Commission.” See 52 U.S.C. § 30101(15); 11 CFR §100.14(a).

State committees, registered with the FEC, as is the case with the MTGOP, through its Federal Account, must conduct their operations in accordance with federal law – *not* state law.

Federal law governs (among other things) the MTGOP’s Federal Account’s administrative operations (11 CFR §102.7), recordkeeping (11 CFR §102.1 *et seq*), contributions (11 CFR §102.8, 102.9), contribution limits (11 CFR §110.1(c)(5)), disbursements (11 CFR §102.9), and reporting (11 CFR §104.1 through 104.3, 104.5, 104.8 and 104.9).

On January 21, 2020, the MTGOP, through its Federal Account, made a payment to American Micro Targeting (“AMT”) from its federal committee account in the amount of \$50,000.00. That disbursement was required under federal law to be reported by the MTGOP, through its Federal Account, on its February 2020 Monthly FEC report, filed on February 20, 2020, covering the reporting period from January 1 through January 31, 2020. The disbursement was timely, accurately, and properly reported to the Federal Election Commission by the Montana Republican Party. See <https://docquery.fec.gov/cgi-bin/forms/C00008086/1385189/sb/29>.

In the COPP Findings, the Commission stated that “[t]he Montana Republican Party did not report any expenditures to AMT on Federal finance reports filed with the FEC for the months of February, March or April, 2020 (FOF No. 18).”

That is an accurate statement. The MTGOP, through its Federal Account, made only one reportable payment to AMT, which was the January 21, 2020 payment reported on MTGOP’s, February 2020 Monthly FEC Report¹. No other payments by MTGOP, through its Federal Account were reported because no other disbursements to AMT were either made or required under federal law to be reported by the MTGOP, through its Federal Account.

Any failure by MTGOP, through its Federal Account, to comply with its reporting obligations to the FEC are subject to review and enforcement by the FEC, not the COPP. Respectfully, the COPP has no jurisdiction with regard to the MTGOP, through its Federal Account, and its compliance with federal law. When the Federal Election Campaign Act of 1971, as amended (now recodified as the Federal Election Campaign Laws, Title 52 United States Code, Subtitle III, Chapter 301, Subchapter I (“the Act”)) was enacted by Congress, it was clear from the legislative history and reinforced through multiple advisory opinions from the Federal Election Commission (“FEC” or “the Commission”) that federal law preempts state law regarding the activities and operations of political committees registered with the Federal Election Commission.

As the FEC has opined on many occasions beginning in 1978, federal law preempts and supersedes state law with respect to all matters related to the operations of a federal political committee. The Commission since 1978 has issued many advisory opinions regarding the preemption of federal law over state law insofar as the conduct of federal campaigns and federally registered political committees, to-wit: federal candidates’ use of campaign funds to provide ‘compensation and expenses to campaign workers engaged in distributing campaign literature, sample ballots, or other campaign material; transporting voters to the polls; manning phone banks; serving as poll watchers; and other legitimate campaign functions’, all of which were prohibited under Maryland state law (FEC Advisory Opinion 1980-47), warnings on campaign materials with respect to placement of signs and other campaign advertising (FEC Advisory Opinion 1981-27), use of payroll deductions by political action committee contributing

¹ A second payment to AMT by MTGOP, through its Federal Account, was made on February 6th, 2020, but that was refunded during the same reporting period in February and was not required to be reported to the FEC. The refund by AMT of the January 24th payment from MTGOP, through its Federal Account, was received back into the Federal Account in February and reported to the FEC on its March 2020 Monthly FEC report as a refund. <https://docquery.fec.gov/cgi-bin/forms/C00008086/1391652/sa/16>

to federal candidates, where state law prohibits payroll deductions (FEC Advisory Opinion 1982-29); reporting of polling expenditures and disclosure of polling results for polls paid by campaign committees (FEC Advisory Opinion 1995-41); restrictions on polling expenses by candidates (FEC Advisory Opinion 2009-21), and myriad other state laws governing federal political committee operations, fundraising and expenditures.

In summary, federal law preempts state law insofar as the MTGOP, through its Federal Account, is concerned. There is no authority vested in the COPP to determine whether the MTGOP, through its Federal Account, has or has not complied with federal law governing its disbursements, nor does the COPP have legal authority to find that disbursements from the MTGOP, through its Federal Account, were or were not in compliance with Montana state law.

The Montana Republican Party, through its State Account, has properly and timely reported all payments to COPP.

There was a disbursement from the state account of the MTGOP to AMT during February of 2020. That disbursement was timely and accurately reported by the MTGOP in its reports to the COPP, in compliance with the Montana state campaign finance laws. It is *state* law, not federal, that governs receipts, disbursements, and reporting by the MTGOP from its *state* account.

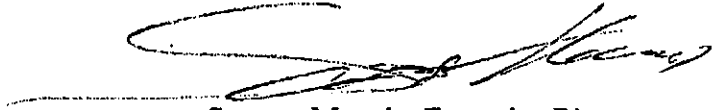
The only disbursement from the MTGOP state account to AMT was made on February 20, 2020, in the amount of \$100,000. As the COPP noted in its “Findings,” the MTGOP disclosed this expenditure in a timely manner. However, the COPP’s “Findings” mistakenly suggest that the MTGOP somehow failed to accurately report the *date* and the purpose of *each* distribution to AMT. Respectfully, the MTGOP could not report this single expenditure in any other way. In other words, the COPP’s “sufficiency finding” against the MTGOP is patently false.

The COPP purported to find that the “Montana Republican Party failed to accurately report the date and distribution of its \$100,000 expenditure to AMT on its March 30, 2020 committee finance report.” To the contrary, the February 20, 2020, date of distribution to AMT is accurately reflected on the MTGOP’s March 30, 2020 report. No other distributions were made from the MTGOP *state* account, and the COPP’s “sufficiency finding” has no factual support.

Conclusion: It is not a violation of Montana campaign finance laws for the MTGOP, through its Federal Account, to fully comply with federal law and regulations. And there is no basis that the MTGOP failed to timely and accurately report the payments from the State Account on the State Party’s filings with the COPP because there was only *one* disbursement (February 20th) for the MTGOP, through its State Account, to report on this matter, which was reported at the March 30th deadline. As the COPP has no jurisdiction over the actions or reporting of the Federal Account, and the only reportable disbursement made by the State Account was reported accurately, the Finding by the COPP of a violation by the MTGOP must be reversed.

The MTGOP respectfully requests that the COPP issue an Amended Finding consistent with the foregoing, and further, that the MTGOP be dismissed from this Matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Spenser Merwin", written over a horizontal line.

Spenser Merwin, Executive Director
Montana State Republican Party