

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES

Hamlett v. Montana Growth Network No. COPP-2012-CFP-053	Summary of Facts and Statement of Findings of Sufficient Evidence to Show a Violation of Title 13, Chapters 35 or 37
Van Hyning v. Montana Growth Network No. COPP-2013-CFP-005	
Driscoll v. Montana Growth Network No. COPP-2013-CFP-011	

On January 11, 2013, Brad Hamlett, a resident of Cascade, Montana, and a 2012 candidate for Senate District 10, Cascade County, filed a complaint against Montana Growth Network (MGN), a 2012 political committee.¹ On January 30, 2013, Dyrck Van Hyning, a resident of Great Falls, Montana filed a complaint against MGN. On March 12, 2013, Robyn Driscoll, a resident of Billings, Montana, and a 2012 candidate for Senate District 26, Yellowstone County, also filed a complaint against MGN. All three complaints allege that MGN engaged in unreported, undisclosed and/or unattributed campaign activity during the 2012 Montana election cycle. These three complaints are combined for decision.

¹ The COPP first began numbering campaign finance complaints in July of 2013. The Hamlett complaint was inadvertently assigned a 2012 complaint number rather than the 2013 number it should have been assigned. The number assigned has no effect on the discussion or findings set out in this Decision.

I. FOUNDATIONAL FINDING OF FACTS AND INTRODUCTION

The following are the foundational facts for a Decision in this Matter:

Finding of Fact No. 1: Montana's 2012 elections took place on June 5, 2012 (primary election) and November 6, 2012 (general election). (Montana Secretary of State (SOS) website).

Finding of Fact No. 2: All candidates addressed in this Decision were on the ballot for election to office at 2012 Montana general and/or primary elections. (SOS website).

Finding of Fact No. 3: MGN was organized as a private non-profit corporation at all times during the 2012 Montana elections addressed in this Decision. (Commissioner's records).

MGN filed campaign finance reports (FOF Nos. 5 and 6, below) disclosing certain independent expenditures in Montana's 2012 elections.² The three Complaints allege that MGN engaged in independent expenditures in Montana's 2012 elections that were not timely reported, attributed and disclosed, as required by Montana law.

MGN responded, through counsel, that it timely filed as a political committee and properly reported those independent expenditures that it was required to report under Montana law.³ The MGN response further asserted that the bulk of its 2012 campaign related activity were issue focused⁴ and therefore did not need to be reported or disclosed under Montana's 2012

² An independent expenditure is that of a third party entity, in this Matter MGN, independent of a candidate, but focused on a candidate in the election. An "independent expenditure" that expressly advocates for or against a candidate must be disclosed, reported, and attributed, albeit by the third party rather than the candidate (44.10.323(3) ARM). An independent expenditure is not subject to contribution limits or to reporting by a candidate.

³ Coordination is not an issue in this Matter. There is no allegation that the MGN expenditures were coordinated with (and therefore attributable as contributions) any candidate.

⁴ An "issue advocacy" election expense is also made by a third party entity independent of a candidate. An issue advocacy use of the money is focused on an issue and not on a candidate.

campaign practice law.⁵

An independent expenditure made by a corporate entity such as MGN may be made in any amount in any Montana election, including the 2012 Montana elections addressed in this Matter.⁶ *Citizens United v. F.E.C.*, 130 S. Ct 876, 175 L.Ed.2d 753 (2010); *American Tradition Partnership v. Bullock*, 132 S. Ct. 1307, 181 L.Ed.2d 1036 (2012). Any independent expenditure made as express advocacy (as contrasted to an issue advocacy expenditure), in a 2012 Montana election must be attributed, disclosed and reported as an election expense. *See* FN 2.

II. DISCUSSION

The three Complaints allege that MGN late filed as a political committee, failed to attribute independent expenditures properly and failed to report all of its independent expenditures.

A. MGN Did Not Timely Register As a Political Committee

MGN is a corporate entity (FOF No. 3). In 2012 Montana law mandated that MGN file as a political committee (“shall file”) and report its express advocacy independent election expenditures, §13-37-226(5) MCA.

⁵ An “issue advocacy” independent expenditure made in the 2012 Montana elections did need not be reported or disclosed. Issue advocacy expenditures will, however, need to be reported and disclosed in Montana’s 2016 elections. The 2015 Montana Legislative session passed a new law (now codified into Title 13) that requires reporting and disclosure of any election expense, including issue advocacy, made within 60 days of the start date of voting in an election.

⁶ This notation is necessary because Montana law has historically banned candidate election expenditures, including independent expenditures, by a group operating as a corporation, such as MGN. *See* §13-35-227 MCA and *see also* the history of this law set out in *Western Tradition Partnership, Inc. v. State of Montana*, 2011 MT 328, 363 Mont. 220, 271 P.3d 1.

Finding of Fact No. 4: On May 17, 2012 MGN registered with the COPP, becoming a political committee by filing a C-2 form. MGN's filing disclosed (or did not disclose) the following information:

- a. Jason Priest was listed as the MGN treasurer.
 - b. MGN was listed as an incidental political committee.
 - c. No candidate was disclosed as supported or opposed.
- (Commissioner's records).

Montana law required that MGN file as a political committee within 5 days of making its first express advocacy independent expenditure and report independent expenditures thereafter, 13-37-201 MCA.⁷ In order for its registration to be timely, MGN's May 17, 2012 date of registration implicitly asserts a first express advocacy independent expenditure date of May 12, 2012. Both the May 16, 2012 MGN email (from Counsel Gallus) and its February 22, 2013 response to the Hamlett Complaint argue that MGN executed a planned and controlled registration date based on the first date of express advocacy expenditure, claimed to be either May 11 (Gallus emails) or May 19 (MGN response).⁸

The Commissioner determines that the circumstances and facts do not support MGN's arguments. On May 15, 2012, COPP staffer Mary Baker called Jason Priest, the person she thought most likely to be responsible for MGN activity (COPP records, Baker notes).⁹ Baker advised Mr. Priest that

⁷ Under Montana law independent expenditures "must be reported in accordance with the procedure for reporting other expenditures". *Hanes v. Bianco*, ARM 44.10.323(3) and ARM 44.10.531(4).

⁸ The MGN response is signed by Chris Gallus and Chris Gober, an Austin, Texas attorney retained by MGN.

⁹ Mary Baker routinely contacts candidates and committees to informally notify them that they may be missing reporting or disclosure obligations. Baker does this because Montana law and COPP policy is designed to assist candidates and committees to report and disclose properly. Baker, as the COPP's Director of Candidate and Committee Services, assists candidates and

information received by the COPP indicated that MGN had carried out 2012 election activity such that it needed to register “ASAP” with the COPP. Over the next two days MGN appeared through counsel¹⁰ who sent emails with backdated dates¹¹ and faxed registration forms.¹² The Commissioner determines that MGN’s May 17, 2012 political committee registration was not planned but was instead an unorganized, reactive response to contact by the COPP.

The facts set out in MGN’s own campaign reports refute MGN’s claim of timely registration. MGN’s campaign finance report discloses an April 4, 2012 date for the start of reportable independent expenditures and a May 9, 2012 date of expense for an admitted express advocacy independent expenditure. Both the April 4 and the May 9 date contradict the May 11, 2012 first expenditure date claimed in the email from counsel. Further, even the May 11 date would leave MGN one day late in registration as a political committee.

Sufficiency Finding No. 1. The Commissioner determines that there are sufficient facts to show that MGN did not timely register as a political committee, as required by Montana law.

MGN had a right to spend independently in Montana’s 2012 elections. But Montana law tied MGN’s right to spend independently with an accompanying responsibility to report and disclose the express advocacy portion of those

committees to fully and timely report and disclose.

¹⁰ The name of Chris Gallus, a Helena attorney, appeared on all MGN communications.

¹¹ An email received by the COPP on May 16 was dated May 11 in the body of the email.

¹² The original C-2 form was promised but never received by the COPP. The C-2 form on file with the COPP is the faxed copy received on May 17, 2012.

independent expenditures. That reporting and disclosure began with MGN's obligation to timely register as a political committee.¹³

B. MGN Failed to Properly Attribute

The Complaints further allege that MGN published certain express advocacy campaign documents without properly "attributing" the publication by listing the information identifying the entity paying for the publication. Montana law requires attribution on any express advocacy communication ("must clearly and conspicuously include the attribution...") (§13-35-225(1) MCA).

Finding of Fact No. 5: MGN filed its first campaign finance report on May 21, 2012. The report listed expenses for the time period of April 4, 2012 to May 14, 2012 with those expenses being \$19,000 for mailers paid to Desumo Strategies LLC in Richmond, Virginia and \$22,865.28 paid to Direct Mail Advertising Services of Billings, Montana. The \$19,000 to Desumo Strategies was listed as being paid on May 9, 2012. (Commissioner's records).

Finding of Fact No. 6: MGN disclosed the \$41,865.28 discussed in FOF No. 5 as an independent express advocacy election expenditure. MGN later identified that expenditure as the cost of a Flyer supporting the 2012 candidacy of Laurie McKinnon for Justice of the Montana Supreme Court and opposing the competing candidacy of Ed Sheehy and Elizabeth Best. (Commissioner's records).

Finding of Fact No. 7: The McKinnon flyer was attributed as "Paid for Montana Growth Network, Inc." The flyer did not list or disclose the name of the MGN treasurer. (Commissioner's records).

Under Montana law MGN was required to provide certain information (or attribute) on the McKinnon Flyer, including "for election material financed by a

¹³ The COPP posted MGN's registration form to a database accessible on its website. Any delay in registration caused a concomitant delay in making the information available to the public.

political committee...the name of the committee treasurer...” (13-35-225(1)(b) MCA).

MGN registered as a political committee (FOF No. 3) and it made express advocacy independent expenditures without listing the name of its treasurer (FOF Nos. 6 & 7). It is difficult to imagine how this could not be a violation of law. MGN counsel argued, however, that MGN did not need to list the name of its treasurer because it did not become a political committee until after the date of publication of the McKinnon Flyer.

The Commissioner rejects the argument that for attribution purposes an expense can somehow be triggered after publication of the document that needed attribution. In particular, MGN based its argument on an assumption that the “expense” associated with the McKinnon flyer occurred on the date of publication. A particular date, such as one fixed by payment or publication, is not determinative of the date of reporting obligations. If such a date could be self-determined, candidates and political committees would have incentive to create delayed dates and disclose activity after the fact, thereby depriving the opposing candidate and the public of the transparency that is required by reporting and disclosure laws.

Instead, 2012 Montana statutes (§13-37-230(1)(f) MCA and Montana regulations (44.10.535 ARM) require the timely reporting and disclosure based on the date of the underlying obligation: “the amount, date contracted and nature of each debt and obligation owed...[i]f the exact amount of a debt or obligation is not known, the estimated amount owed shall be reported.” Past

Commissioners have rigorously applied these laws and required that campaigns report and disclose based on an “estimate [of] their debts when they are incurred” *Akey v. Clark*, March 26, 1999 (Commissioner Vaughey); because “the public has a right to full disclosure of all debts and estimated debts incurred by a candidate during the appropriate reporting periods,” *Ream v. Bankhead*, September 10, 1999 (Commissioner Vaughey). This reporting of debt covers services, advertisements and campaign expenses in general, *Wilcox v. Raser*, May 26, 2010 (Commissioner Unsworth), and even the expenses owed musicians, *Hardin v. Ringling* 5, December 17, 2012, (Commissioner Murry).

This Commissioner has likewise required reporting and disclosure based on the date of the actual or estimated amount of the obligation incurred. *Yancey v. All Helena Kids Matter*, COPP-2015-CFP-009; *Graybill v. Parent Coalition for Accountability in Schools*, COPP-2014-CFP-018.

Sufficiency Finding No. 2. The Commissioner determines that there are sufficient facts to show that MGN did not properly attribute its campaign publications, as required by Montana law.

The omission of required attribution information by MGN is functionally the same as deficient campaign finance reporting. Either action is contrary to law because it withholds campaign information from the people of Montana.

C. MGN Failed to File Proper Campaign Finance Reports

MGN registered as a political committee on May 17, 2012 (FOF No. 4). A political committee, including MGN, must file a campaign finance report “on the 12th day preceding and the 20th day following the date on which an election

is held...” with all expenses reported to the 5th day before filing, §13-37-225(3) MCA. In 2012 the 12th day preceding the primary election was May 24, 2012, reporting through May 19.

Finding of Fact No. 8: MGN filed its campaign finance report on May 23, 2012 listing the reporting period as “April 4, 2012 to May 14, 2012”. (Commissioner’s records).

The Commissioner notes that the MGN campaign finance report disclosed its failure to report to the full reporting date by reporting through May 14 rather than the required date of May 19.

Montana law also required that MGN, as a political committee, “...shall report the name of the candidate ... the independent expenditure as intended to benefit...” 44.10.531(4)ARM. ¹⁴

Finding of Fact No. 9: MGN’s May 23, 2012 campaign finance report (see FOF No. 8) listed “mailer” and “Postage for Mailer” under the purpose section of the report. (Commissioner’s records).

The May 23, 2012 campaign finance report filed by MGN did not disclose the name of the candidate benefited by the mailer. (FOF No. 9). On May 23, 2012 Mary Baker, on behalf of the COPP, contacted MGN and requested the missing information. Attorney Gallus emailed back, also on May 23, 2012, specifying that the independent expenditure was related “...to a single mailer which opposes Elizabeth Best and Ed Sheehy for the Montana Supreme Court and supports Laurie McKinnon.” (Commissioner’s records). The COPP added this information to the MGN campaign finance report. The Commissioner does not

¹⁴ The campaign finance (C-4) form MGN used to report further directed MGN to “provide the name of the candidate or committee the expenditure was made on behalf of and what the expenditure was...”

cite MGN for its failure to initially list this particular required information on its campaign finance report because the information was later provided on the same day the report was due.

MGN, however, made other uncorrected errors in disclosure. Under Montana law MGN was required to report the “amount, date and purpose” of each expenditure it made and the “full name and mailing address” of any vendor. §13-37-230(1)(a)(b) MCA. On October 19, 2012 (supplemented by a November 26, 2012 report), MGN filed a third campaign finance report disclosing \$7,500 of independent expenditures in the Montana 2012 general election.

Finding of Fact No. 10: The October 19 MGN report disclosed \$1,500 of expenditures for each of the 5 listed candidates for the Montana legislature. The report did not list the name of the vendor, nor did it describe the purpose of the independent expenditure. The November 26, 2012 supplemental report added the vendor name (47 North, Billings, Montana) but did not describe how the expenditure was used. (Commissioner’s records).

The Commissioner notes an uncorrected deficiency and late correction as to this failure to properly and timely disclose.

MGN followed its initial May 23, 2012 campaign finance report with a June 2012 closing report thereby terminating or “closing” its existence as a political committee. MGN later reopened its existence as a political committee so that it could report additional campaign expenditures.

Finding of Fact No. 11: On October 19, 2012 MGN filed a “reopened” registration as a political committee. The new C-2 form continued to list Jason Priest as “treasurer” and listed “none” under the deputy treasurer box. The C-2 form was signed by “Chris Gallus, Esq., Deputy Treasurer.” The October 19 and November 26, 2012 campaign finance reports were

similarly signed by “Chris Gallus, Esq., Deputy Treasurer”.
(Commissioner’s records).

Finding of Fact No. 12: On March 22, 2013 MGN filed a letter (backdated to October 20, 2012) appointing Chris Gallus as deputy treasurer.
(Commissioner’s Records.)

A political committee is an artificial entity created and allowed by Montana law. Montana law provides that a political committee certification must name a treasurer (§13-37-201 MCA) and further provides that any deputy treasurer be named or “certified” with the COPP (§13-37-202 MCA). Mr. Gallus was not appointed deputy treasurer at the time he signed campaign finance reports. The appointment letter filed by MGN (FOF No. 12) came far after Mr. Gallus exercised authority as deputy treasurer (FOF No. 11). Mr. Gallus lacked authority to sign on behalf of MGN.¹⁵

MGN was a significant player in Montana’s 2012 elections. MGN admits to about \$49,000 in express advocacy independent election expenditures, and self-determined substantial additional expenditures as unreported issue advocacy costs. MGN filed two forms registering itself as a political committee and filed two additional campaign finance reports disclosing its admitted express advocacy independent expenditures. In filing those two forms and two reports MGN ignored several of Montana’s reporting and disclosure requirements: First, MGN filed reports signed by a “deputy treasurer” who was not named as such on MGN’s C-2 registration forms (FOF Nos. 11 & 12); second, MGN filed campaign finance statements or reports lacking either vendor or “purpose” information (FOF Nos. 4 and 10); and third, MGN filed a

¹⁵ See *Connell v. Boulanger*, COPP-2014-CFP-036.

campaign finance report that disclosed expenses four days short of the required reporting period (FOF No. 8).

Sufficiency Finding No. 3. The Commissioner determines that there are sufficient facts to show that MGM did not properly report and disclose through the treasurer and in the manner required by Montana law.

Montana's reporting and disclosure requirements are standards of long tenure that have been consistently enforced by successive Commissioners. As set out below, MGN spent considerable funds paying lawyers for legal advice and others for consulting advice. There can be no reasonable claim of accident or ignorance by MGN as to its failure to properly, and timely, report and disclose.

D. MGN Failed to Fully Disclose Independent Expenditures

MGN disclosed independent expenditures for the particular election use of the McKinnon Flyer (FOF No. 4) and for an undescribed expenditure on behalf of 5 legislative candidates (FOF No. 7). The three complaints filed in this matter allege a far more extensive reach of express advocacy election related activity. An analysis of MGN's bank records for the 2012 election period shows the following expenditures by MGN.¹⁶

Finding of Fact No. 13: The MGN bank records show that in 2012 MGN spent sums paying vendors, consultants and law firms as follows:

Vendors -- \$476,144

1. American Tradition Partnership: \$25,000 (6/17/2012).
2. Desumo Strategies, LLC: \$19,000 (5/17/12).

¹⁶ The COPP issued a subpoena to the bank serving as to the repository for MGN's bank records. The subpoena was issued on June 18, 2015 and the bank supplied records in response to the subpoena on November 30, 2015. An objection to the subpoena was received on December 5, 2015, after the MGN bank records were in the possession of the COPP.

3. Persuasion Innovation: (total \$240,777) \$53,000 (2/24/12); \$4,425.84 (4/10/12); \$31,000, (4/10/12); \$18,151 (8/13/12); \$40,000 (8/13/12); \$14,200 (12/16/12); \$80,000 (January 8, 2013 invoice).
4. 47 North Communications: (total \$158,762) \$34,875 (10/20/12); \$22,175.50, (10/20/12); \$24,750 (10/19/12); \$30,996 (10/26/12); \$15,900 (10/26/12); \$19,589.79 (10/31/12); \$5,238 (10/31/12); and \$5,238 (11/25/12).
5. Direct Mail Advertising Services: \$22,865 (5/11/12).
6. Pleiades Publishing Svc. Co.: \$2,240 (5/17/12).
7. Red Print Strategy: \$7,500 (11/25/12).

Consultants and Law Firms -- \$174,406

1. Jason Priest: (Total \$38,994) \$25,000 (5/22/12); \$233 (10/8/12); \$7,337.68 (10/8/12); \$4,627 (11/20/12), \$1,796 (12/23/12).
2. Tyler Schott: (Total \$44,860) \$8,000 (2/29/12); \$4,000 (4/10/12); \$4,000; (5/17/12); \$4,000 (6/8/12) \$4,000 (6/12/12); \$8,000 (7/27/12); \$12,860; (10/29/12).
3. Gober Hilgers PLLC: (Total \$49,472): \$21,482 (3/7/12); \$6,675 (5/17/12); \$4,658 (8/14/12); \$592.50 (9/18/12); \$4,756 (10/17/12); \$10,453 (11/17/12); \$567 (11/17/12); and \$289 (12/28/12).
4. Wittich Law Firm: (Total \$22,497) \$16,560 (3/15/12); and \$5,937 (5/17/12).
5. Chris Gallus: (Total \$12,838) 4,312.50 (4/10/12); \$1,425 (7/30/12); \$5,000, (8/17/12); \$2,100 (12/6/12).
6. Brent Mead: \$3,945 (7/20/12).
7. Ed Walker: \$1,800 (11/28/12).

The above listed expenditures show that in 2012 alone MGN paid over \$476,000 to vendors and \$174,000 for legal/consulting advice related to activity carried out in the timeframe of Montana's 2012 primary and general elections.¹⁷ MGN campaign finance reports disclose that \$49,000 of the amount paid to vendors was paid for express advocacy campaign expenses. The MGN response impliedly argues that the remaining amounts were used for

¹⁷ MGN continued to receive contributions and make expenditures in 2013 (Commissioner's records).

issue advocacy and therefore need not be reported or disclosed to the people of Montana.

The Commissioner rejects the MGN argument. The Commissioner notes that MGN's McKinnon Flyer expense was reported only as to the amount paid to vendors. MGN reported no part of the \$174,000 cost of lawyers and consultants.

The COPP has a 20 year-plus history of interpreting Montana's contribution law (§13-1-101(7)(a)(iii) MCA) to require reporting and disclosure of the in-kind value of express advocacy use of paid staff by any entity involved in a campaign. *Daubert v. Montanans for Clean Water*, February 27, 1997 (Commissioner Argenbright).¹⁸ *Montanans for Clean Water* determined that: "Respondent (Orvis Company Inc.)¹⁹ under-estimated the value of the in-kind contribution. Orvis' staff time to draft the letter was not included in the value of the in-kind contribution." *Id.* at 6. In June of 2000 Commissioner Vaughey similarly required seven Montana business groups to make "full disclosure of the value of such (paid personal staff) services, the value must include total compensation paid, including benefits, travel expenses, bonuses or other supplemental payments." *Heffernan v. Montana Chamber of Commerce*, June 2000 (Commissioner Argenbright); see also *Harrington v. Cap the Rate*, July 3,

¹⁸ At the time of the Decisions the correct citation was §13-1-101(6)(a)(iii) MCA. The COPP earlier applied §13-1-101(6)(a)(iii) MCA to require paid staff time be reported as an in-kind contribution by ballot committees in Decisions applying to the 1988 bottle bill campaign. The *Montanans for Clean Water* Decision first addressed reporting of paid in-kind third party staff engaged in express advocacy work. The Decision is posted to the Commissioner's website and therefore available for public review.

¹⁹ For the purpose of the Decision, Orvis Company Inc. was a "ballot issue committee supporting Initiative 122." *Id.* p. 1.

2012 (Commissioner Murry).

Consistent with prior determinations, this Commissioner determines that MGN incurred some of the \$174,000 of consulting/lawyer fees as costs related to the McKinnon Flyer. Accordingly, MGN failed to report and disclose those in-kind costs as required by law.

Further, the Commissioner determines that in 2012 MGN failed to correctly parse its independent expenditure election activity between express advocacy (which requires reporting and disclosure) and issue advocacy (which does not require reporting and disclosure). The findings of fact establish that MGN did not report and disclose any express advocacy independent expenditures for radio ads in the 2012 primary and general Montana Supreme Court elections.

A MGN memo to broadcasters, however, identifies such a radio ad.²⁰ In turn, the MGN memo claims the language of the radio ad is issue advocacy, citing to the U. S. Supreme Court case of *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) (WRTL). The operative language used in the MGN radio ad was as follows:

Finding of Fact No. 14: “Sign our petition at Montana Growth Network.org and tell activists like Ed Sheehy that you want a fair and impartial Supreme Court that will apply our laws. Because our judges need to leave their activist agendas at the door.”

The Commissioner now measures the MGN radio language against the

²⁰ An MGN representative provided the COPP with a copy of a memo sent to “interested Parties” justifying the lack of a “disclaimer” (the correct term in Montana’s language is “attribution”) on a radio ad that MGN was running concerning the 2012 Montana Supreme Court elections. The ad was entitled “unspeakable.”

standards of express advocacy.²¹ In order to constitute express advocacy the language would need to meet the “functional equivalent of express advocacy” test set out in *McConnell v. FEC*, 540 U.S. 93 (2003) and refined in *WRTL*. This “functional equivalent of express advocacy” standard has been discussed and applied by the COPP in a series of sufficiency Decisions.²² The functional equivalent test, while measured by specific application, begins with the directive that the complained of language must “be susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate” before it constitutes express advocacy. *WRTL* at 469-470.²³

The U.S. Supreme Court explained its application of the *WRTL* functional equivalent test to ads as follows:

Under this test, *WRTL*’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: The ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: The ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office. (*WRTL*, at 470).

The Commissioner applies the “focus” “position” “exhort” and “urge contact” standards of issue ads to the MGN ad content set out in FOF No. 14. The Commissioner determines that the MGN radio ad language does not meet these

²¹ The Commissioner recognizes that there may be other express advocacy communications that have been self-determined by MGN to be issue advocacy. With that in mind the Commissioner has served notices on the several vendors in this Matter informing them that they need to segregate and retain all MGN communications for further examination as this Matter proceeds through discovery associated with enforcement through litigation.

²² See *Roberts v. Griffin*, November 19, 2009; see also *Bonogofsky v. NGOA*, COPP-2010-CFP-008, and the Decisions cited therein.

²³ Please see *Bonogofsky v. NGOA*, at 8-9, for a detailed discussion of this requirement.

standards. Both the focus and position standards are not met because Ed Sheehy (and his character) was the focus instead of the necessary issue of public policy. The “exhort” and “urge contact” standards also are not met because Ed Sheehy was not a public official, but a private practice attorney and a candidate for the Montana Supreme Court, at the time that the ad was running. Accordingly, the Commissioner determines that the ad language fails the issue advocacy standards of *WRTL*.

The Commissioner further determines the advocacy status of the MGN ad by applying the express advocacy standards. These standards measure whether the language of the ads addressed: “an election, candidacy, political party, or challenger; and [whether] they ... take a position on a candidate’s character, qualifications, or fitness for office.” *WRTL* at 470. The Commissioner determines that the language of the MGN radio ad (*See* FOF No. 14) mentions an election and candidate, as well as takes a position on a candidate’s character, qualifications or fitness for office.²⁴

Sufficiency Finding No. 4. The Commissioner determines that MGN has failed to fully report and disclose costs associated with express advocacy expenditures, including consulting fees, the “unspeakable” radio ad and any other express advocacy expenditures revealed during discovery in any enforcement action concerning this matter.

E. MGN Status As a Political Committee Should be Further Reviewed

MGN filed as an “incidental” political committee, FOF No. 4. Montana’s

²⁴ The Commissioner notes that Ed Sheehy was one of two candidates competing for a general election justice position on the Montana Supreme Court at the time that ads were aired. The MGN “unspeakable” ad was clearly designed with content intended to ride the margins of issue advocacy/express advocacy in order to avoid reporting. It falls off the margin into express advocacy, as explained above.

approach to, and definition of, a political committee was substantially changed by a law passed by the 2015 Montana legislature and subsequent regulations adopted by the COPP. An examination of MGN shows why these new laws were needed.

Under the regulations in place in 2012 an incidental political committee was a political committee “that was not specifically organized or maintained for the primary purpose of influencing elections but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue.” 44.10.327(2)(c) ARM. MGN claims to fit under this incidental committee definition because it “is a Montana-based 501(c)(4) organization established primarily to improve prosperity in the state by educating Montanans about legal and regulatory reform, legislation, and other issues critical to our citizens’ well-being.”²⁵ MGN points to its Articles of Incorporation as proof of this assertion. Indeed, the Articles of Incorporation reflect such a broad scope of MGN activity.²⁶

MGN’s self-assertion of its incidental committee status demonstrates the limits of the effectiveness of the reporting and disclosure approach to campaign finance regulation. Reporting and disclosure is the principal form of campaign practice control left for Montanans by *Citizens United*. Montana has long recognized that an established corporate entity, with a non-campaign oriented

²⁵ MGN response to complaints, dated February 22, 2013.

²⁶ The tax status of an organization does not shield it from its campaign finance responsibilities as a non-profit corporation. The 2015 Montana legislature clarified that entities “shall file reports required by this chapter [Title 13, Chapter 37] regardless of the person’s status under state or federal law.” §13-37-228 MCA (2015).

source of funds, can contribute to a political campaign out of its corporate treasury and simply report its own funds as the source of the corporate expenditure.²⁷ MGN's campaign finance reports list only expenditures and disclose no contributions of any sort to the MGN political committee. MGN is therefore claiming that the funds it spent in the 2012 Montana elections were regular corporate funds received in the course of its otherwise normal corporate activity, a portion of which were spent "incidentally" on the election activity.

MGN presents for the 2012 elections as a recently formed non-profit corporation that almost immediately became heavily involved in Montana's 2012 elections, particularly the election for the open seat as a Justice of the Montana Supreme Court. MGN, however, claimed incidental committee status and reported no contributors for MGN's election expenditures.

MGN's financial data does not support MGN's claim of incidental committee status. Unlike Orvis (which had regular income from fishing gear sales), MGN's income came in the form of donations made in or around the time of the 2012 elections. MGN started 2011 with \$828. It had minimal prior activity, as indicated by the check numbers and purposes of the first checks issued in late 2011 and early 2012.²⁸ Beginning in late 2011 and throughout 2012 MGN took in \$878,000 from 13 individual and corporate donors in

²⁷ See, *Montanans for Clean Water* detailing that Orvis used corporate funds to advocate a position in regard to a ballot issue.

²⁸ MGN check no. 1012 was to the Montana Secretary of State for incorporation fees.

amounts ranging from \$8,000 to \$200,000 per donor.²⁹ (Commissioner's records).

The Commissioner determines that the donations to MGN are so few in number and of such large amounts that they are deemed to be given in support the advocacy efforts, including election efforts, engaged in by MGN.³⁰ At this point, however, the Commissioner has not determined the breakdown of express advocacy vs. issue advocacy expenditures, as associated with the expenditures listed in FOF No. 10. The Commissioner reserves the incidental committee issue for further determination in the event that this Matter does not settle and litigation ensues, allowing further discovery as part of the litigation process.

In reaching this Decision the Commissioner considered whether the findings create a constitutionally impermissible burden on MGN. The U.S. Supreme Court determined (in *Citizens United*) that independent campaign expenditures, including those of a corporation, are protected election speech and cannot be limited or prohibited in amount. Disclosure and reporting of independent expenditures, however, do not limit such speech but instead keep elections fairer by informing the opposing candidate and the public as to who is making an election expenditure. *McCutcheon v. FEC* ___ U.S. ___, 134 S. Ct. 1434 (2014).

²⁹ The Great Falls Tribune (January 16, 2013) reported Mr. Priest stating that "Why did I raise \$200K for legislative races to piss it away?" The Commissioner determines this statement by Mr. Priest was made in regard to funds he raised from contributors through MGN. There were an additional five small donors who gave \$3,750 collectively.

³⁰ Simply put, MGN sold no products and engaged in no meaningful activity other than 2012 election activity such that the only reasonable interpretation of such contributions is that the funds had to be directed to MGN's election activity.

Consistent with the above reasoning, Montana courts have ruled that the filing and reporting requirements imposed by Montana law on incidental committees are constitutionally permissible as they do not create such a heavy burden that they interfere with the First Amendment political speech rights of the speaker. *National Association for Gun Rights, Inc. v. James Murry, et. al.*, CV-12-95-H-DLC (D. Mont., Sept. 17, 2013.)

III. ADJUDICATION

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act, 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 adjudication.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that MGN violated Montana’s campaign practice laws as detailed in this Decision. Having determined there is sufficient evidence to show a campaign practice violation has occurred, the next step is to determine whether there are circumstances or explanations that may affect adjudication of the violation and/or the amount of the fine.

MGN’s actions as detailed in this Decision were by choice and deliberate.

Excusable neglect cannot be applied to the failures of MGN in this Matter. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-0007 and 0011. Montana has determined that political discourse is more fairly advanced when, through disclosure, the public is informed as to the identity of those who seek to influence elections.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. CPP-2013-CFP-0007 and 0011. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

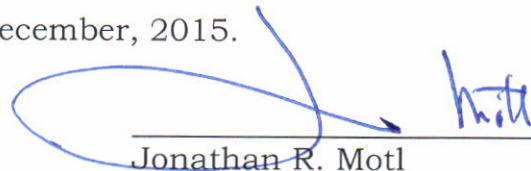
Because there is a sufficiency finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (see §13-37-124 MCA). This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil adjudication 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.³¹ Should the County Attorney waive the right to adjudicate (§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 adjudication. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further

³¹ Notification is to “the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. Any failure to attribute occurred in Yellowstone County and the failure to report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil adjudication 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*.

Dated this 17th day of December, 2015.



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