BEFORE THE COMMISSIONER OF POLITICAL PRACTICES STATE OF MONTANA

In the Matter of the Complaint Against American Dream Montana	))))	**SUMMARY OF FACTS, and STATEMENT OF FINDINGS**

On October 12, 2010, Joseph D. Brenneman filed a complaint with the Commissioner of Political Practices alleging violations of campaign practices law by American Dream Montana. That complaint conforms to the requirements of 44.10.307(2), ARM, the administrative rule regarding campaign complaints. Russell Crowder filed a response to this complaint on January 10, 2010, on behalf of American Dream Montana.

SUMMARY OF FACTS

At all times relevant hereto American Dream Montana was a Montana Public Benefit Corporation, having registered with the Montana Secretary of State and was in good standing.

Russell Crowder is listed with the Montana Secretary of State as a Director and the President of American Dream Montana. Russell Crowder filed a response with this agency, to Mr. Brenneman's complaint, on January 10, 2011, on behalf of American Dream Montana.

At the time of his complaint, Mr. Brenneman was a Flathead County Commissioner and was seeking reelection to that post. Mr. Brenneman was not successful in his reelection bid.

Mr. Brennenman's complaint alleges that American Dream Montana violated § 13-37-131, MCA, when it ran an advertisement in the Kalispell Daily Interlake on September 28, 2010, that stated, in pertinent part:

> COUNTY COMMISSIONER JOE BRENNEMAN
> PROPERTY RIGHTS ARE: "SILLY"

Such advertisement further indicated; "Said before the Montana Senate Local Government Committee 3/29/07." A true copy of the advertisement is attached hereto as **Exhibit 1.**

Brenneman's complaint indicates, "It is obvious my testimony was aimed specifically at the merits of passing HB-590, which I felt was silly and unnecessary."

In addition, Mr. Brenneman's complaint alleges American Dream Montana has not filed with this agency as a PAC (Political Action Committee), nor does the above referenced advertisement list American Dream Montana's treasurer.

In its response to the complaint, American Dream Montana stated it is not a Political Action Committee and denies the allegations of Mr. Brenneman's complaint. Additionally, American Dream Montana indicated it attempted to stop publication of the advertisement in question, but was unsuccessful in doing so. Noteworthy is the fact that American Dream's response states its attempt to stop publication of the advertisement "for reasons totally unrelated to Mr. Brennenman's complaint."

American Dream's response included a copy of a letter to the editor written by the sponsor of HB 590, State Representative George Everett, that stated:

> This is the definition of Private Property Rights that Brenneman found so objectionable: "Property Rights: Protected individual Rights that guarantee a property owner's right to use his property as he wishes, as long as he causes no harm."

STATEMENT OF FINDINGS

Mr. Brennenman has alleged violations of §§ 13-37-131(1), (2) and (3), MCA, which states:

(1) It is unlawful for a person to misrepresent a candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

(2) It is unlawful for a person to misrepresent to a candidate another candidate's public voting record or any other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.

(3) For the purposes of this section, the public voting record of a candidate who was previously a member of the legislature includes a vote of that candidate recorded in committee minutes or in journals of the senate or the house of representatives. Failure of a person to verify a public voting record is evidence of the person's reckless disregard if the statement made by the person or the information provided to the candidate is false.

There is no reference to Brenneman's voting record regarding bills that pertain to property rights. For this reason, the complaint does not state a potential violation of the portion of §13-37-131, MCA, prohibiting misrepresentation of a candidate's public voting record.

That statute, however, also prohibits misrepresentation of '(a)ny other matter that is relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether or not the assertion is false.' To the extent the complaint alleges Brenneman's public statements were misrepresented in violation of § 13-37-131, MCA, the Commissioner of Political Practices has jurisdiction over that limited allegation.

The attribution in the ad regarding Mr. Brenneman's alleged statement was that it was "Said before the Montana Senate Local Government Committee 3/29/07". Brenneman's

complaint indicates that he did testify on HB 590 before that committee on that date. His testimony to the committee was:

> This bill is a silly bill, ill conceived, poorly written, and is looking for a solution... it's a fix looking for a ... there's no problem that needs to be fixed. We have in the Montana Constitution all we need to protect property rights.

The Commissioner has addressed alleged violations of this statute on numerous occasions. *See* Koopman v. Vincent (2008); Degroot v. Harris (2006); Harris v. Fox, (2003). As discussed below, when construing statutes similar to § 13-37-131, MCA, the courts have consistently afforded a high degree of First Amendment protection to campaign statements made by candidates for public office.

The mental state requirement in the statute is derived from the seminal case of New York Times v. Sullivan, 376 U.S. 254(1964). In that case, the United States Supreme Court held that a public official could not recover on a claim for defamation brought against a newspaper unless he proved "actual malice," which the Court defined as "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." Id., 376 U.S. at 279-80. The Court based its decision on the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." Id., 376 U.S. at 270. The high degree of First Amendment protection afforded by the New York Times rule is underscored by the requirement that actual malice must be proven with "convincing clarity." Id., 376 U.S. at 285-86.[1]

In several later opinions, the Court applied the New York Times standard in libel actions brought by two candidates against newspapers that had printed allegedly defamatory statements about them. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). In Monitor Patriot Co. the Supreme Court stated:

> And if it be conceded that the First Amendment was "fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," [citation omitted], then it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.

Monitor Patriot Co., 401 U.S. at 271-72.

It is important to note that the "clear and convincing" standard of proof is a "more exacting measure of persuasion" than the standard burden of proof by a preponderance of the evidence in typical civil actions. John W. Strong, et al., *McCormick on Evidence* § 340 at 575 (4th Ed. 1992). Moreover, the "actual malice" standard requires application of a subjective, rather than an objective test. In St. Amant v. Thompson 390 U.S. 727 (1968), the Supreme Court considered a case where a political candidate (St. Amant) made allegedly defamatory statements

[1] In Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974), the Supreme Court noted that the New York Times rule calls for "clear and convincing proof that the defamatory falsehood was made with knowledge of a falsity or with reckless disregard for the truth."

about his opponent. The Louisiana Supreme Court applied an objective test of recklessness in finding that St. Amant had violated the "reckless disregard of the truth" standard when making his statements. Rejecting this analysis, the United States Supreme Court held that proof of actual malice requires proof of "an awareness . . of the probable falsity" of the statement. St. Amant, 390 U.S. at 732. As the Court explained, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id., 390 U.S. at 731. See also Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974).

Of course, the New York Times standard itself reflects the principle that not all speech made during the course of a political campaign is protected by the First Amendment. The Supreme Court made this clear in Garrison v. Louisiana, 379 U.S. 64, 75 (1964), when it stated:

> The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

Thus, while there is no question that speech uttered during political campaigns is entitled to considerable protection under the First Amendment, it is equally clear that candidates are not entitled to deliberately lie, or use "calculated falsehoods" in their campaigns.

Although the ad herein may have left some with the impression that County Commissioner Brenneman did not support property rights, a violation of the statute must be based on false statements, rather than on statements that merely suggest or imply matters. Furthermore, even if the statements made by American Dream were to be construed as a false statement, there is no clear and convincing proof that American Dream "subjectively entertained serious doubts" as to the truth of the statements.

Given the high bar established by the United States Supreme Court in New York Times and subsequent decisions, and the Court's consistent recognition that First Amendment free speech rights are paramount in political campaigns, there is insufficient evidence in this case to prove a violation of Montana Code Annotated Section 13-37-131(1).

Mr. Brenneman's complaint alleges that American Dream Montana is a Political Action committee (PAC) and has not registered as such with this agency. Brenneman further alleges that the September 28, 2010 Daily Interlake advertisement at issue does not list its treasurer.

44.10.327(2)(b)(i) Admin. R. Mont., states:

> "A political action committee ("PAC") is a committee composed of individuals who contribute their money for the purpose of supporting or opposing candidates or issues upon which the committee agrees."

American Dream's response indicates it is not a political action committee because it does not endorse candidates for public office. However, a political action committee also encompasses "supporting or opposing ... issues upon which the committee agrees." In the advertisement at issue here, American Dream is clearly supporting property rights, and to a lesser degree, appears to be opposing then County Commissioner Brenneman's reelection bid.

Based upon the contents of the September 28, 2010 Daily Interlake advertisement, American Dream Montana could potentially meet the definition of an incidental committee under 44.10.327(2)(c) Admin. R. Mont., which states;

> "An incidental committee is a political committee that is 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."

Russ Crowder, president of ADM, placed the ad with the Daily Interlake and then, the day before it was published, withdrew the ad and instructed it not be published.

The Daily Interlake admitted it made a mistake when it published the ad after Mr. Crowder withdrew it. The Daily Interlake policy on political ads is to require prepayment. Mr. Crowder paid for the ad when he initially requested publication. When Mr. Crowder withdrew the advertisement, the cost of the advertisement should have been refunded. Initially, Daily Interlake did not realize it failed to refund the money to American Dream Montana. After this agency's investigator contacted the Daily Interlake, the cost of the advertisement was refunded to American Dream Montana.

As American Dream Montana withdrew the advertisement prior to its intended publication date, and has had its money for the cost of the advertisement refunded, it did not "make a contribution or expenditure to support or oppose a candidate and/or issue."

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings there is insufficient evidence to find that American Dream Montana violated § 13-37-131, MCA, as alleged in the complaint.

In addition, also based upon the preceding Summary of Facts and Statement of Findings, American Dream Montana was not a political action committee pursuant to 44.10.327(2)(b)(i) Admin. R. Mont., nor was it an incidental committee pursuant to 44.10.327(2)(c), Admin. R. Mont.

The complaint by Joe Brenneman against American Dream Montana is hereby dismissed.

DATED this 6th day of July, 2011.

David B. Gallik
Commissioner of Political Practices

EXHIBIT 1

TAKE YOUR PROPERTY RIGHTS BACK?

COUNTY COMMISSIONER
JOE BRENNEMAN

PROPERTY RIGHTS ARE: "SILLY"

Said before the Montana Senate Local Government Committee 3/29/07

" THERE IS NO ACTIONABLE DUTY OWED BY (COUNTY PLANNING DIRECTOR) HARRIS, OR OTHER PUBLIC EMPLOYEES TO PROVIDE HONEST GOVERNMENT SERVICES."

Legal brief filed in the 11th Judicial court 9/17/09, cause number DV-09-843C
FILED BY THE OFFICE OF THE FLATHEAD COUNTY ATTORNEY

PROPERTY OWNERS AND TAXPAYERS: IT'S YOUR PROPERTY!

- County officials proclaim your Property Rights as "Silly," and themselves above the law.
- Thousands disenfranchised near Whitefish at the stroke of a pen by county Commissioners Joe Brenneman and Gary Hall.
- Taxpayers now required to pay millions because of the "Culture Of Corruption" called "county planning" when these same two county commissioners apparently did not follow the law.
- Dozen of lawsuits filed in defense of property rights.

PROPERTY OWNERS — IT IS TIME

CONTACT ME AT THE POLLS IN NOVEMBER:
"I WANT TO BE A PROPERTY RIGHTS VOLUNTEER"

AMERICAN DREAM MONTANA
P.O. Box 8061
Kalispell, Montana 59904 Or
Email: americandreammt@yahoo.com

Paid for by American Dream Montana P.O. Box 8061, Kalispell, MT. 59904