



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Maisie Rodolico
Mike Montandon for Governor
3575 West Cheyenne Avenue
Suite 109
North Las Vegas, NV 89106

OCT 8 2010

RE: MUR 6269

Dear Ms. Rodolico:

On April 13, 2010, the Federal Election Commission (the "Commission") notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On October 5, 2010, the Commission found, on the basis of the information in the complaint, and information provided by other respondents and Mike Montandon, that there is no reason to believe that Mike Montandon for Governor violated 2 U.S.C. §§ 441a and 441b. In addition, the Commission voted to dismiss the allegations that Mike Montandon for Governor violated 2 U.S.C. §§ 441i(f)(1) and 434(c). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

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

Sincerely,

Rby Q. Lockett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Mike Montandon for Governor

MUR: 6269

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Sam Lieberman, alleging violations of the Federal Election Campaign Act of 1971 ("the Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), by Mike Montandon for Governor.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

The complaint alleges that on or about March 18, 2010, Mike Montandon for Governor violated 2 U.S.C. § 441i(f)(1) by running an Internet advertisement opposing a federal candidate. Complaint, pp. 2-3. The advertisement includes a picture of Senator Harry Reid, an incumbent candidate for the United State Senate from Nevada, along with his son, a Nevada gubernatorial candidate, and the following sentence: "Put an end to the Reid dynasty." Complaint, Attachment A. Below the sentence is a "Donate Now" button, followed by the disclaimer: Paid for by Montandon for Governor. *See Id.*

The complaint asserts that the Internet advertisement violated 2 U.S.C. § 441i(f)(1) because it was a public communication, referred to Senator Reid and clearly opposed his re-election, and may have been paid for with funds that were not subject to the limitations and prohibitions of the Act. Complaint, p. 3. The complaint notes that Nevada state law permits corporate and labor unions to make contributions to candidates, and permits individual contributions of up to \$5,000 per election. *Id.*

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The complaint further alleges that Mike Montandon for Governor made an in-kind contribution that may have been paid for with funds that were not subject to the limitations and prohibitions of the Act because the advertisement was coordinated through the use of a common vendor. Complaint, p. 4. Specifically, the complaint asserts that an individual named Steve Wark, political consultant and president of Image and Design, works for both the Tarkanian and the Montandon campaigns, and that "it is likely that even if [Wark] did not help create this ad personally, he has conveyed material 'plans, projects, activities, or needs' of Tarkanian to the Montandon campaign." Complaint, p. 4-5. Finally, the complaint alleges that even if the advertisement was not coordinated with a candidate or a political party, Montandon for Governor should have filed an independent expenditure report with the Commission, but failed to do so, in violation of 2 U.S.C. § 434(c).

In his response, Mike Montandon states that he ran an advertisement that indicated that Rory Reid, one of his opponents in the race for governor of Nevada, was part of a "dynasty," in that his father is incumbent Senate Majority Leader Harry Reid. The reference to a "dynasty," he says, was obviously a reference to a son of Harry Reid. He states that his new media advisors, Harris and Associates, created the advertisement and did not coordinate the ad with anyone other than himself and his campaign manager. Montandon further states that Steve Wark knew nothing of the ad and was not employed by his campaign after November 2009.

In his response, Steve Wark states that he ceased working for the Montandon campaign in November of 2009, and that the advertisement at issue was apparently created, paid for, and placed at least 120 days after he ceased working for the campaign. He further states that he had no prior knowledge of the content, or the placement, of the advertisement, and that he has never seen the advertisement in any form or medium, with the exception of the copy attached to the

complaint. In addition, he asserts that he never shared any of the plans, projects, activities, or needs of Tarkanian for Senate with the Montandon campaign.

B. Analysis

1. Allegation that Mike Montandon for Governor Used Soft Money to Oppose a Federal Candidate

Section 441i(f)(1) of the Act prohibits a candidate for State or local office, an individual holding State or local office, or an agent of such a candidate or individual from spending any funds for a communication described in 2 U.S.C. § 431(20)(A)(iii) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act. Section 431(20)(A)(iii) defines the term 'Federal election activity' to mean, among other things, "a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also mentioned or identified) and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate)."

The term "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, or any outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. 11 C.F.R. § 100.26. The term "general public political advertising" shall not include communications over the Internet, except for communications placed for a fee on another person's Web site. *Id.*

Here, the available information reflects that the advertisement at issue was placed on The Drudge Report at <http://www.drudge.com> on March 18, 2010, and ran for two days. *See* <http://www.nevadanews bureau.com/2010/04/10/tarkanian-montandon-campaigns-named-in-nevada-state-democratic-party-fecomplaint>. Available information also reflects that The Drudge

Report charges for advertising.¹ See <http://www.intermarkets.net>. Thus, it appears that the advertisement at issue was a public communication. The advertisement also refers to a clearly identified candidate for Federal office (Senator Reid) and arguably could be read to attack or oppose him by stating, "Put an end to the Reid dynasty," making Montandon's payment for the advertisement subject to the prohibition of Section 441i(f)(1) of the Act.

Neither the complaint nor the responses contain information regarding any specific costs associated with the advertisement at issue. Montandon's 2009 Annual Report, filed with the Nevada Secretary of State's Office and covering the period from January 1, 2009 through December 31, 2009, and its Contributions and Expenditures Report #1, covering the period from January 1, 2010 through May 27, 2010, do not reveal any payments to The Drudge Report or affiliated agencies for Internet advertising. The disclosure reports do, however, show payments to Montandon's media vendor, Harris Media LLC, in the amount of \$1,800 for advertising and \$2,200 for consulting fees that are contemporaneous with the airing of the advertisement at issue. See Nevada Contributions & Expenditures Report for Michael Montandon, Report #1 (2010), dated May 30, 2010.² Even if that full amount were attributable to the "Dynasty" advertisement, the relatively low dollar amount at issue does not justify the use of the Commission's resources to pursue. Accordingly, the Commission has determined to exercise its prosecutorial discretion and dismiss the allegation that Mike Montandon for Governor violated 2 U.S.C. § 441i(f)(1). See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

¹ The current rates for advertising on The Drudge Report are not publicly available. The last published rates are seven years old, and, given the explosion in Internet advertising since then, are likely not reliable.

² Available at: http://nvsos.gov/cefd/docs/0002010_Reports%2f000Candidate-incumbent_C_and_E_Reports_and_Financial_Disclosures%2f000Montandon%2c_Michael_%2f000CE_Report_1.pdf.

**2. Allegation That Mike Montandon for Governor Made
a Coordinated Contribution**

Under the Act, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate constitutes an in-kind contribution.

See 2 U.S.C. § 441a(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a). Commission regulations set forth a three-prong test to define when a communication is coordinated with a candidate.

A communication is coordinated with a candidate or candidate committee when: (1) the communication is paid for by a person other than that candidate, authorized committee or agent thereof; (2) the communication satisfies at least one of the four "content" standards described in 11 C.F.R. § 109.21(c);³ and (3) the communication satisfies at least one of the six "conduct" standards described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a).⁴

Here, the complaint alleges that the conduct prong for coordination is satisfied based on a common vendor theory. The Commission's regulations provide that the conduct prong may be satisfied if the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects or activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the

³ The "content" standard includes: (1) an "electioneering communication" defined at 11 C.F.R. § 100.29(a) as a broadcast, cable, or satellite communication that refers to a clearly identified federal candidate, is publicly distributed within a specific time frame, and is targeted to the relevant electorate; (2) a "public communication" that disseminates campaign materials prepared by a candidate; (3) a communication that "expressly advocates" the election or defeat of a clearly identified federal candidate; and (4) a "public communication" that refers to a clearly identified candidate, is distributed 120 days or fewer before an election and is directed to a targeted audience. 11 C.F.R. § 109.21(c).

⁴ The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the person paying for the communication employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the person paying for the communication republished campaign material. *See* 11 C.F.R. § 109.21(d).

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communication. 11 C.F.R. § 109.21(d)(4). The complaint, however, provides no specific information indicating that conduct showing coordination based on a common vendor theory occurred, and only speculates that the common vendor, Steve Wark, "very likely" used or conveyed to the payor information about the Tarkanian campaign's plans, projects, activities, or needs. See Complaint, p. 4-5. In contrast, available information unequivocally refutes the complaint's unsupported allegations. In particular, Wark states that he left the campaign in November 2009, more than 120 days before the advertisement appeared, and had no prior knowledge of the content, or the placement, of the ad, had never seen the advertisement in any form or medium with the exception of the copy attached to the complaint, and never shared any of the plans, projects, activities, or needs of Tarkanian for Senate with the Montandon campaign. Similarly, Montandon for Governor states that Steve Wark knew nothing of the ad and was not employed by his campaign after November 2009. Thus, there appears to be no basis for concluding that Mike Montandon for Governor coordinated the Internet advertisement with Tarkanian for Senate through a common vendor, or otherwise.⁵ Because the conduct prong has not been met, there is no reason to believe Mike Montandon for Governor violated 2 U.S.C. §§ 441a or 441b.

3. Allegation that Montandon for Governor Violated the Act by Failing To File an Independent Expenditure Report

The complaint alleges that even if the advertisement was not coordinated, Montandon for Governor should have filed an independent expenditure report with the Commission, but failed to do so, in violation of 2 U.S.C. § 434(c). The term "independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at

⁵ Mike Montandon states that media advisors Harris and Associates created the advertisement and communicated only with Montandon and his campaign manager.

the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. 11 C.F.R. § 100.16.

The Act requires persons (other than political committees) who make independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year to file disclosure statements. 2 U.S.C. § 434(c). As discussed above, neither the complaint nor the responses contain information regarding any specific costs associated with the advertisement at issue, and the committee's state disclosure reports suggest that the cost of the advertisement was, at most, \$4,000. In the absence of more specific information, and given the relatively low dollar amount associated with the advertisement, the Commission has determined to exercise its prosecutorial discretion and dismiss the allegation that Mike Montandon for Governor violated 2 U.S.C. § 434(c). *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985).