IN THE FIRST JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR CARSON CITY

STATE OF NEVADA, by and through ROSS MILLER, its SECRETARY OF STATE,

Plaintiff,

vs.

ALLIANCE FOR AMERICA'S FUTURE, a Virginia non-profit corporation, PATTI HECK, an individual, KARA AHERN, an individual, BARRY BENNETT, JEFF LIVINGSTON, MICHAEL MYERS,

Defendants.

CASE NO. 10 OC 00208 1B

DEPT. NO. II

ORDER GRANTING AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND

GRANTING IN PART AND DENYING IN PART DEFENDANTS' COUNTERMOTION FOR SUMMARY JUDGMENT

The Court, has reviewed the Plaintiff's Motion for Summary Judgment, Defendants' Opposition and Countermotion for Summary Judgment, and all related briefing, and heard arguments on the motions on October 16, 2013. Being fully apprised of the matters therein, both motions are hereby granted in part and denied in part as discussed below.

PROCEDURAL HISTORY

This case was commenced on May 25, 2010, when the Plaintiff Secretary of State filed a Complaint and Application for Temporary Restraining Order and Preliminary Injunction. On June 2, 2010, the Court granted the Preliminary Injunction.

On June 23, 2010, Defendants took an appeal of the order granting the Preliminary Injunction. On February 24, 2012, after full briefing and argument, the Nevada Supreme Court reversed and vacated the preliminary injunction on the grounds that the appeal was moot because the 2010 election had concluded, and it did not appear that the controversy was likely to recur. The Nevada Supreme Court remanded the case to this Court.

On March 15, 2012, following the remand, this Court granted the Secretary's motion to file the First Amended and Supplemental Complaint, which added named defendants in place of "Doe" defendants and alleged new claims for Defendants' failure to file Contribution *and* Expenditure (C&E) Reports, which had become due while the appeal was pending.

On April 13, 2012, Defendants answered the First Amended and Supplemental Complaint. On May 4, 2012, by stipulation, the Secretary filed a Second Amended Complaint to correct a clerical error in the caption. The stipulation further stated that the Defendants' Answer to the First Amended and Supplemental Complaint would serve as the Answer to the Second Amended Complaint.

On June 21, 2012, Defendants filed a motion for summary judgment, focused primarily on the issue of whether the Advertisement constitutes "express advocacy." The Secretary opposed the motion and counter-moved for partial summary judgment, arguing that the Advertisement does constitute express advocacy.

By order dated October 29, 2012, this Court denied Defendant's motion for summary judgment and granted the Secretary's countermotion for partial summary judgment, finding that the Advertisement constitutes express advocacy.

On March 29, 2013, the Secretary filed a Motion for Summary Judgment on the remaining issues in the case: principally the amount of civil penalties for Defendants' failure to register as a political action committee and failure to file its C&E Reports.

Defendants filed an Opposition and Countermotion for Summary Judgment, in which they appear to accept that there are no genuine issues of material fact, but argue that Nevada's PAC and C&E Reporting statutes are unconstitutional, both facially and as applied to Defendants.

UNDISPUTED MATERIAL FACTS

Alliance for America's Future (AAF) is, and at all times relevant to this action was, a Virginia non-stock corporation. Answer to First Amended and Supplemental Complaint ("Answer"), ¶ 2.

In May, 2010, AAF ran a television advertisement regarding Brian Sandoval, who was then a candidate for the office of Governor ("Advertisement"). That Advertisement is the same advertisement provided to this Court on a CD attached to Plaintiff's Application for Temporary Restraining Order and labeled "AAF Advert: Exhibit A." It is the same advertisement available as on YouTube.com at: http://www.youtube.com/watch?v=1X7GrtKjxoE (last visited 7/31/13).

The advertisement was run 320 times on major television stations in both northern and southern Nevada. AAF spent $189,223.50 airing the Advertisement. *See* KRNV order, Exhibit 1; KTVN order, Exhibit 2; KOLO order, Exhibit 3, KRXI order, Exhibit 4, KLAS order, Exhibit 5, KVBC order, Exhibit 6, KVVU order, Exhibit 7; *see also* Declaration of Matt Griffin, attached hereto as Exhibit 8, to Plaintiff's Motion for Summary Judgment.

Defendant Kara Ahern was a member of the board of directors of AAF at the time, and was also its treasurer. Answer, ¶ 4.

AAF paid more than $100 to various television stations to air the Advertisement. Answer, ¶ 17.

On May 19th and 20th, 2010, Matthew Griffin, then the Deputy Secretary of State for Elections, sent a notice to Patti Heck and Ms. Ahern that AAF violated NRS Chapter 294A by running the Advertisement without being registered as a political action committee with the Secretary of State. Answer, ¶ 20.

On December 21, 2011, the Plaintiff, through counsel, notified Defendants that AAF had failed to file its C&E as required by NRS 294A.140 and 294A.210.

According to its Return of Organization Exempt from Income Tax, Form 990 (2010), AAF has received money from at least one other person, individual, or entity. It shows a total of approximately $7.8 million in contributions in 2010.

AAF is not now, and never has been, qualified to do business in Nevada as a foreign corporation.

AAF is not now, and never has been, registered with the Nevada Secretary of State as a political action committee. Answer, ¶ 13.

Defendants have never filed any campaign C&E Reports with the Secretary of State. Answer, ¶ 21.

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DISCUSSION

A. Standard for Summary Judgment

"Summary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1031 (Nev. 2005).

B. The Secretary's Motion for Summary Judgment

1. Defendants failed to register as a political action committee in violation of NRS 294A.230.

The Secretary argues that Defendants constitute a Political Action Committee as defined in NRS 294A.0055. Defendants' Opposition does not dispute the Secretary's arguments that they fit the statutory definition of a PAC. Instead, they chiefly argue that the definition is unconstitutional, both facially and as applied to them. Those arguments will be addressed below. On the statutory issue, the Court finds that Defendants are a political action committee as defined by NRS 294A.0055 (2009).

Defendants constitute a political action committee since they are a group of natural persons or entities, they have received contributions from another person, group, or entity, and they have made an expenditure. *See* Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Countermotion for Partial Summary Judgment, p. 6 (Oct. 29, 2012). Since the Court has already found that the Advertisement is express advocacy, it necessarily means that the Advertisement was "designed to affect the outcome of an election." Accordingly, the Defendants are a political action committee under NRS 294A.0055.

NRS 294A.230(1) provides: "Each committee for political action shall, before it engages in any activity in this State, register with the Secretary of State on forms supplied by the Secretary of State."

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It is undisputed that the Defendants have never registered with the Secretary of State as a political action committee. Answer, ¶ 21. As discussed above, Defendants constitute a political action committee. By running the Advertisement, Defendants engaged in political activity in this State without registering as a PAC, and thereby violated NRS 294A.230. The Court therefore finds that there are no genuine issues of material fact, and the Secretary is entitled to judgment as a matter of law on his First Claim for Relief.[1]

2. Defendants failed to file their required C&E Reports.

The Secretary's Third, Fourth, and Fifth Claims for Relief allege that Defendants failed to file C&E Reports #1, #2, and #3 for the 2010 election cycle, as required by NRS 294A.140 (2009) and 294A.210 (2009).

These statutes require every person, political action committee, party, etc., who makes an expenditure to file a report of its contributions (NRS 294A.140) and expenditures (NRS 294A.210). Report #1 is due a week before the primary election, and Report #2 is due a week before the general election. NRS 294A.140(4)(a),(b); 294A.210(3)(a),(b). Report #3 is due on the January 15 following the general election, in this case, January 15, 2011. NRS 294A.140(1); 294A.210(1). The reports must contain a list of all contributors who gave more than $100 and each expenditure of more than $100. NRS 294A.140; 294A.210.

It is undisputed that Defendants have never filed any C&E Reports with the Secretary. Once again, Defendants chiefly contend that the statutes are unconstitutional. On the statutes, the Court agrees with the Secretary that, because Defendants made expenditures before the 2010 primary election, they were required to file the three C&E Reports. Since they failed to do so, the Court finds that there are no genuine issues of fact and the Secretary is entitled to judgment as a matter of law on his Third, Fourth, and Fifth Claims for Relief.

C. The Defendants' Countermotion for Summary Judgment

Defendants' countermotion for summary judgment is chiefly based on the argument that Nevada's campaign finance laws are unconstitutional, both facially and as applied to

[1] The Secretary's Second Claim for Relief was made in the alternative to the First Claim. Because the Court finds in the Secretary's favor on the First Claim, the Secretary's Motion is denied as moot as to the Second Claim.

them. This is an affirmative defense which the Defendants bear the burden of proving. *Schwartz v. Schwartz*, 95 Nev. 202, 206, 591 P.2d 1137, 1140, n. 2 (1979).

Furthermore, statutes are presumed to be constitutional. *Universal Electric v. Labor Comm'r*, 109 Nev. 127, 129, 847 P.2d 1372, 1373–74 (1993). A party challenging the constitutionality of a statute bears the "formidable burden" to make "a clear showing of invalidity." *Id.*; *Zamora v. Price*, 125 Nev. 388, 392, 213 P.3d 490, 493 (2009) (quoting *Moldon v. County of Clark*, 124 Nev. 507, 511, 188 P.3d 76, 79 (2008)).

1. The facial challenge to Nevada's campaign finance statutes is moot.

Defendants first assert that the 2009 version of NRS 294A.0055 (defining a PAC) is facially unconstitutional because it lacks any explicit requirement that such a group must have "*the* major purpose" of influencing elections. *See* Opposition, pp. 6-25. They also argue that Nevada's monetary thresholds for triggering PAC registration and reporting (receipt or expenditure of $100) are unconstitutionality low.

Defendants are mounting an overbreadth challenge. "The overbreadth claimant bears the burden of demonstrating, 'from the text of [the law] and from actual fact,' that substantial overbreadth exists." *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (quoting *New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988)). To be considered overbroad, the law in question must "punish[] a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* at 118-19 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 615 (1973)).

The Secretary argues that the facial challenge is moot because the 2009 versions of the law have been materially amended. Specifically, Senate Bill 246 of the 2013 session changed the definition of a PAC so that an entity is considered a PAC only if it meets one of the following tests: (1) it has contributions or expenditures over $1,500 and has the primary purpose of influencing elections; or, (2) if it has contributions or expenditures over $5,000 but does not have the major purpose of influencing elections. Additionally, Assembly Bill 48 increased the threshold for "itemized" disclosures from $100 to $1000 for groups or persons making independent expenditures. Thus a person or group that is required to file reports of its

contributions and expenses under NRS 294A.140 and 294A.210 will only have to list the name, address, amount and category for each contribution or expenditure that exceeds $1,000, instead of the current $100.

Defendants respond that the facial challenge is not moot because it is capable of repetition and the Secretary has not carried the "formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." Defs. Reply, pp. 5-6 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189-90 (2000)). The Court is not persuaded by Defendants' arguments. The "formidable burden" Defendants reference is applicable to situations of "voluntary compliance," typically where the defendant, entirely of its own will, stops the allegedly unlawful acts. *Friends of the Earth*, 528 U.S. at 190. Here, however, the Secretary has not simply declared that he will act a certain way in the future. Instead, the statutes were changed. A change in the statute is the type of event that ordinarily *does* moot a case. "Constitutional challenges to statutes are routinely found moot when a statute is amended or repealed." *Seay Outdoor Adver., Inc. v. City of Mary Esther, Fla.*, 397 F.3d 943, 947 (11th Cir. 2005) (citing *Massachusetts v. Oakes*, 491 U.S. 576, 582 (1989)). Accordingly, the Court finds that Defendants' facial overbreadth challenge is moot.

3. The campaign finance laws are not unconstitutional as applied to Defendants.

Defendants argue that the expenditure of $189,225 in Nevada was only approximately 2.4% of AAF's total budget for 2010, and therefore it cannot possibly have even "a" primary purpose, let alone "the major purpose" of influencing elections in Nevada. They also argue that Nevada has no legitimate state interest in disclosure of donors to AAF whose money was not used from the Nevada Advertisement. Therefore they assert that it is unconstitutional to apply the disclosure and PAC registration laws against it. *See* Defs. Opps., pp. 28-29.

Campaign finance disclosure statutes are reviewed using "exacting scrutiny." *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 366-67 (2010). Exacting scrutiny "requires a 'substantial relation' between the disclosure and a 'sufficiently important' governmental interest." *Id.* It does not require the "least restrictive" means to be employed. *See id.*

The Supreme Court and numerous other courts have recognized that the interest in informing the electorate about the sources of money in politics is at least an "important" government interest, if not a compelling one. *Citizens United*, 558 U.S. at 368; *Buckley*, 424 U.S. at 6; *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1007-08 (9th Cir. 2010); *see also Family PAC v. McKenna*, 685 F.3d 800, 806 (9th Cir. 2012) (noting that some courts have considered this interest a compelling one).

Thus Nevada's statutes are constitutional if they are there is a "substantial relation" or "relevant correlation" between the burdens imposed by the laws to achieve these goals. *Brumsickle*, 624 F.3d at 1003.

a. AAF spent substantial sums to influence Nevada's elections, therefore whether it has a "major purpose" of influencing Nevada elections is immaterial.

As various other courts have held, *Buckley's* so-called "major purpose test" was a product of statutory construction of that particular federal statute; it was not a pronouncement of a constitutional bright-line mandate. *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990, 1009-10 (9th Cir. 2010); *Center for Individual Freedom v. Madigan*, 697 F.3d 464, 487 (7th Cir. 2012); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011).

Other courts have upheld statutes that require disclosure from groups that do not have "the" major purpose of influencing elections, but yet which receive or spend a sufficiently large amount of money on politics that they come within the legitimate sweep of disclosure requirements. For example, the Seventh Circuit upheld an Illinois statute that required disclosure from groups that either raise or spend $3,000 or more to influence elections, even though the statute does not contain a "major purpose" requirement. *See e.g., Madigan*, 697 F.3d 464, 470, 487-90 (7th Cir. 2012) (upholding $3,000 trigger); *see also National Organization for Marriage v. McKee*, 649 F.3d 34, 59 (1st Cir. 2011) (upholding $5,000 trigger).

Defendants argue that the fact that they spent only 2.4% of their total budget on political advocacy in Nevada means that Nevada's disclosure laws are unconstitutional as applied to them. While Defendants attempt to characterize this 2.4% figure as "incidental"

political advocacy, they ignore the fact that, because AAF has such a large budget, this "incidental" spending is over $189,000 - an amount more than 37 times the threshold amount for disclosure upheld by the First Circuit, Seventh Circuit, Eleventh Circuit and other courts, even as applied to groups that do not have "the major purpose" of influencing elections.

The Court rejects Defendants' argument, because it would produce absurd results. Here, according to Defendants, because 2.4% of $7.8 million cannot possibly represent even "a" major purpose of influencing elections *in Nevada*, it is unconstitutional to require them to register as a PAC in Nevada. *See* Opps., pp. 30-31. Adopting such a rule would mean that AAF could have *the* major purpose of influencing the election or defeat of candidates generally (i.e., not only in Nevada), and spend 100% of all its funds for that purpose, and yet *no state* could ever constitutionally require disclosure from AAF, as long as it doesn't spend more than 50% of its money in any one state. *See Vermont Right to Life Committee, Inc. v. Sorrell*, 875 F.Supp.2d 376, 395 (D.Vt. 2012) (noting that such a rule creates absurd results by allowing large groups to avoid disclosure requirements, whereas small groups that spent significantly less money cannot); *see also McKee*, 649 F.3d at 59 (same); *Madigan*, 697 F.3d at 489 (same); *Brumsickle*, 624 F.3d at 1011 (same).

Although some courts have found campaign finance laws unconstitutional as applied to certain groups, these cases generally deal with triggers that are substantially lower, and as applied to groups that have spent only nominal sums, and whose engagement in politics is truly *de minimus*, sporadic, and incidental. *See e.g.*, *Sampson v. Buescher*, 625 F.3d 1247, 1260 (10th Cir. 2010) (finding Colorado's disclosure requirements unconstitutional as applied to a ballot issue committee that had only $782.02 in in-kind contributions and expenditures); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (finding Montana's disclosure laws unconstitutional as applied to a church group whose activities it described as: "[e]xpending a few moments of a pastor's time... marginal additional space in the Church for petitions" and "permit[ing] a single likeminded person to use its copy machine on a single occasion to make a few dozen copies on her own paper.")

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Although it found the application in that case to be unconstitutional, the court in *Canyon Ferry* recognized that judging the "fit" between Montana's informational interest and its disclosure requirements is a question of degree, rather than type, because "it is well established that, in the ordinary case, a state informational interest is sufficient to justify the mandatory reporting of expenditures and contributions..." *Id.* at 1033.

In this case, however, Defendants engaged in political activity in Nevada that cannot be fairly considered *de minimus* or incidental, even if it expended relatively little of its sizeable budget. Thus there is a much better "fit" between Nevada's informational interests, and requiring disclosure from Defendants than in *Canyon Ferry* or *Sampson*.

Considering this authority and that from the First, Seventh, and Eleventh Circuits upholding monetary thresholds of $5,000, $3,000, and even $500, the Court finds that Nevada has an important informational in requiring disclosure from a group that spends nearly $200,000 to expressly advocate the election or defeat of a state candidate.

b. The burdens of Nevada's laws vs. the State's interest.

As the Seventh Circuit stated: "there is nothing constitutionally magical about being labeled as a political committee; what matters are the burdens that attend the classification." *Madigan*, 697 F.3d at 488; *see also McKee*, 649 F.3d at 56 (refusing "to ascribe a free-standing significance to the PAC label" and instead examining the actual requirements of being a PAC).

PACs are required to register with the Secretary of State before engaging in any activity in the state. NRS 294A.230. The registration form is a two-page form that requests basic information such as: the name of the PAC, its officers, its purpose, and its registered agent. *Id.* PACs must file an updated registration within 30 days of a change in any of this information. NRS 294A.230(3). Nothing in NRS 294A.230 or other Nevada law requires AAF to create a PAC that is separate from itself. *Cf. Citizens United v. Federal Election Com'n*, 558 U.S. 310, 337-38 (2010) (finding the federal requirement of a "separate segregated fund" and attendant administrative requirements to be burdensome).

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Nevada's PAC registration requirement therefore is not unduly burdensome. *See McKee*, 649 F.3d at 56 (upholding Maine's PAC definition and registration requirement an noting that it differed from the federal PAC requirement in *Citizens United* in that, among other things, it did not require creation of a separate entity).

Under the 2009 version of the laws, simply registering as a PAC does not itself trigger the requirement to file any reports. Reporting is triggered only when a PAC makes an expenditure exceeding $100. *See* NRS 294A.140; 294A.210 (2009).[2] Depending on the timing of the expenditure, the PAC must file at most three C&E Reports: one before the primary election, one before the general election, and one on the January 15 following the general election. *Id.* Each of the reports must state each contribution and expenditure over $100. *Id.*

Like the Maine statutes at issue in *McKee*, Nevada's laws are "pure disclosure" statutes. *See McKee*, 649 F.3d at 41. There are no restrictions on how much money a PAC can raise or spend. The only limitation is that a PAC is subject to the same contribution limit for contributions directly to candidates as any other donor. NRS 294A.100; *compare McKee*, 649 F.3d at 41-42. As the Eleventh Circuit explained in *Worley*, disclosure requirements that were considerably more onerous than Nevada's do not impose any burdens beyond what ordinarily prudent persons would be expected to do under similar circumstances. 717 F.3d at 1250.

Defendants argue that, even if Nevada has an important state interest in disclosure, and even if Nevada laws are not unduly burdensome *generally*, the State nevertheless does not have the same level of interest in disclosure of *all* of AAF's donors, including those whose money was not spent on political activity in Nevada. Defendants point out that the Maine statute at issue in *McKee*, for example, did not require disclosure of *all* donors to a "non-major purpose group," but instead only required disclosure of "only those expenditures made for the

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[2] Although there is no explicit dollar threshold for registration of a PAC in NRS 294A.230, under the law as it existed in 2010, just registering as a PAC did not actually trigger any reporting requirements. NRS 294A.140 and 294A.210 (2009) require reporting from a PAC "which makes an expenditure..." What must be reported are contributions and expenditures that exceed $100. Thus as a practical matter, until a PAC spends over $100, it is not required to report any contributions or expenditures.

purpose of promoting, defeating or influencing a ballot question or the nomination or election of a candidate to political office." *See McKee*, 649 F.3d at 42.

While the statute is not explicitly limited to contributions for the purpose of influencing *Maine* elections, that appears to be a fair reading. Similarly, Nevada's could be so construed. Also similar to the Maine statute, S.B. 246 (2013) amended the definition of a PAC to apply to groups that make more than $5,000 in expenditures, irrespective of their major purpose, but requires disclosure "only those contributions received for the purpose of affecting the outcome of any primary election, general election, special election or any question on the ballot."

During the hearing on October 16, 2013, Defendants indicated they would be willing to file a C&E Report disclosing only their donors whose money was used for the Nevada Advertisement. Defendants' counsel represented that there is only one such donor, and that Defendants' other donors have no connection whatsoever with Nevada. Defendants bear the burden of proof on their affirmative defense. Other than counsel's representations at argument and in the briefs, there is no actual evidence in the record indicating that there is only one donor responsible for the Nevada Advertisement, and that no other donors have any connection with Nevada. Ordinarily, this would be insufficient. Nevertheless, in light of the certification requirements discussed in this Order, the Court will require Defendants to disclose only those donor(s) who were in any way responsible for, or whose money was used for, the Advertisement at issue in this case. Additionally, Defendants must disclose all amount over $100 spent, whether spent in Nevada or outside this State, in connection with creating or disseminating the Advertisement, including, without limitation, expenditures for production costs, air time, etc. Defendants need not disclose expenses related to overhead or other operations. *See* NRS 294A.210(3) (2009) (PACs shall "report each *expenditure* made..."); NRS 294A.004 (defining "expenditures" as money spent for express advocacy).

Defendants were obligated to at least report those contributions and expenditures made in connection with their Nevada activity. It is undisputed that Defendants have never filed any C&E Reports. Therefore, the Secretary's Motion is granted in part and denied in part as to counts III, IV, and V, as discussed above.

D. **Civil Penalties**

1. The Secretary is entitled to civil penalties of $15,000 for Defendants' failure to file its C&E Reports.

It is undisputed that Defendants failed to file each of the three C&E Reports required by NRS 294A.140 and 294A.210. For periods in which Defendants did not make expenditures or receive contributions in connection with their activity in Nevada, the reports must be filled in with zeros and signed under penalty of perjury. This is a minimally burdensome requirement, which directly furthers the State's important informational interest by covering the entire election period, and clearly conveying the timing and extent of Defendants' activity. This is particularly so because the Advertisement in this case was run close to the primary election, but Report #1 only contains information up to the 12 days before the primary. NRS 294A.140(4)(a). Report #2 will cover the time from 11 days before the primary to 12 days before the general election. NRS 294A.140(4)(b). The third report covers the entire year (NRS 294A.140(1); 294A.210(1)), but if all other reports are filed, it need only contain information not contained on those reports. *See* Supplemental Exhibit #12 to Plaintiff's Motion for Summary Judgment (submitted following the hearing on October 16, 2013).

The amount of civil penalties for the failure to file C&E Reports is fixed by statute, NRS 294A.420(3). The penalty schedule is based on how many days late the report is filed, beginning with $25 per day for the first week, and up to $100 per day if it is more than 15 days late, up to a maximum of $5,000. *Id.*

In this case, the reports are well past 60 days late, and therefore the maximum penalty of $5,000 attaches for each report, pursuant to NRS 294A.420(3). Since this penalty is set forth in statute, it is not subject to reduction by this Court.[3] Therefore the Secretary is entitled to civil penalties of $15,000 for counts III, IV, and V.

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[3] NRS 294A.420(4) permits the Secretary of State to waive a civil penalty under that section for good cause shown. NAC 294A.091 sets forth what constitutes "good cause," and is limited to circumstances such as extreme financial hardship, hospitalization or death, active military duty, and similar situations. No such circumstances exist in this case.

2. The amount of civil penalties for failure register as a PAC in violation of NRS 294A.230.

Defendants argue that they cannot be penalized for more than one violation of NRS 294A.230, because failing to register as a PAC is only a single event. The Secretary argues that each time the Advertisement was aired, this constituted a separate violation of NRS 294A.230, which requires a PAC to register before engaging in activity in the State.

The Secretary is relying on the 2009 version of NRS 294A.420, which states in part:

> Except as otherwise provided in this section, a person or entity that violates an applicable provision of NRS ... 294A.230... is subject to a civil penalty of not more than $5,000 *for each violation* and payment of court costs and attorney's fees.

NRS 294A.420(2) (2009) (emphasis added).

Thus even the 2009 version of the statutes contemplates that a group can violate NRS 294A.230 multiple times, and doing so subjects the group to a $5,000 maximum penalty for each violation. According to the plain language of NRS 294A.230 (2009) and NRS 294A.420(2) (2009), the "violation" of NRS 294A.230 is not the single instance of failing to register; instead, the violation(s) is engaging in political activity without being registered.

The Secretary asserts that in this case, each time the Advertisement was aired constitutes a separate violation. This, he argues, is the closest measure of determining the level of activity that Defendants engaged in this case. Defendants argue that they did not decide to purchase air time based on any particular number of times the ad would run. Instead, they assert that they simply paid a certain amount to Crossroads Media, which itself decided on which TV stations to air the Advertisement, and how many slots to buy, etc. The evidence in the record does indicate that Crossroads Media was the buyer, as AAF's agent, on most, if not all, of the media buys. *See* Exhibits 1-7 to Plaintiff's Motion.

But there is no other evidence in the record regarding how Defendants arranged the media buys through Crossroads. In any event, even if Defendants wrote only a single check to Crossroads Media, that does not mean that there was only one violation of NRS 294A.230. Crossroads was acting as Defendants' agent when it bought advertising time at various different television stations, in varying amounts, to run on several different days. How it is

paid, whether in one lump sum, or in multiple installments from the Defendants, is irrelevant to Defendants' activity in Nevada, because it would be quite possible for a group to write a single, large check to a media company, and direct it to engage in all manner of activities, such as airing commercials, buying Facebook ads, setting up billboards, or mailing flyers. In any event, there is no evidence in the record regarding the arrangement between Crossroads and AAF.

In this case, each time the Advertisement aired is the activity in violation of NRS 294A.230. This is the most appropriate measure of activity in this case, because it is a measure of the actual dissemination of material to the voters – it is the event that will trigger the purpose of disclosure: when a voter sees the Advertisement, if he or she wants to find more information about the speaker, the voter will hit a brick wall because the Defendants had not registered pursuant to NRS 294A.230. Thus the Court finds 320 violations of NRS 294A.230.

The Secretary requests a civil penalty of $550 for each of the 320 violations, or a total of $176,000 in civil penalties for violations of NRS 294A.230. The Secretary asserts that this amount is justified in light of the amount of money Defendants spent in Nevada, that Defendants had a budget of nearly $8 million, and their continued refusal to disclose.

Defendants argue that this amount is unreasonably high and unfair. They argue that, at the time they ran the Advertisement, they believed it did not constitute express advocacy, and no disclosure would be required. Their counsel indicated at argument that they would be willing to disclose the one donor who they assert contributed for the Advertisement.

Of course, at this point in time, Defendants' apparent willingness to disclose that donor has substantially less value to voters than it would have had if Defendants had promptly registered and disclosed during the 2010 elections. If Defendants had in fact disclosed that donor when their C&E Reports were due, this would be a very different case, or perhaps there would be no case at all.

In short, it is one thing to disclose promptly, when voters can use that information, it is another to disclose years after the election. If a group could hide its donors during the heat of

the election, which undoubtedly is the time when the interest in disclosure is at its peak – and some groups' interest in preventing disclosure for various political reasons is also at its peak – only to disclose long after the fact, this would encourage groups to resist and evade the law, rather than to promptly disclose. Thus the Court finds that a penalty is warranted that is based upon both the level of activity engaged in while in violation of NRS 294A.230, as well as the tardiness of disclosure. The Court also considers factors, such as the total amount of money spent, the financial position of the defendant, and any other relevant evidence in the record that bears on the appropriateness of the penalty.

The evidence in the record, which is not disputed, shows that Defendants spent $189,223.50 to air the Advertisement 320 times. Thus Defendants spent approximately $591 per spot on average, which is more than the $550 per violation that the Secretary requests. Although the registration is substantially tardy in this case, the case has also been in active litigation since May, 2010, so that entire time period should not count against Defendants. The Court finds that a penalty of $295.50 per violation, or half the average cost of a spot, is more appropriate in this case.

This amount is substantially less than the maximum authorized by law. It is also reasonable in this case, judged in relation to the fact that AAF spent nearly $200,000 in Nevada's 2010 election, and reported assets of nearly $7.8 million in that year.

2. Civil penalties against individual defendants.

The defendants in this case who have submitted to the personal jurisdiction of this Court are: AAF, Patti Heck, and Kara Ahern. Ms. Ahern is AAF's treasurer. Ms. Heck is not an officer of AAF. She is the President of Crossroads Media, LLC, which acted as AAF's agent in producing and disseminating the Advertisement.

It does not appear that Ms. Ahern or Ms. Heck have acted in their personal capacities in this case. Therefore the Court finds that the civil penalties are appropriately awarded against AAF only.

E. Injunctive Relief

Finally, the Secretary requests an injunction requiring Defendants to file the delinquent

registration and C&E Reports. NRS 33.010(1) provides that an injunction may issue: "When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually."

In this case, the Court finds that Defendants have violated and continue to violate Chapter 294A by refusing to register as a PAC and refusing to file their C&E Reports. No amount of civil penalties can redress the injury to Nevada voters caused by refusal to timely provide them with the information to which they are entitled, thus there is no adequate remedy at law. *See Chateau Vegas Wine, Inc. v. Southern Wine and Spirits of America, Inc.*, 265 P.3d 680, 684 (Nev. 2011).

For these reasons, the Secretary is entitled to an injunction against Defendants requiring AAF to register as a PAC pursuant to NRS 294A.230 and to file its C&E Reports for the 2010 election cycle pursuant to NRS 294A.140 and 294A.210.

CONCLUSION AND ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Secretary's Motion for Summary Judgment is GRANTED in part and DENIED in part and the Defendants' Countermotion for Summary Judgment is GRANTED in part and DENIED in part as follows:

1. The Secretary's Motion is granted as to Count One;
2. The Secretary's Motion is denied as moot as to Count Two;
3. The Secretary's Motion is granted in part on Counts Three, Four, and Five to the extent that Defendants' C&E Reports shall report all expenditures in excess of $100 made in connection with the Nevada Advertisement and all contributions in excess of $100 made in connection with the Nevada Advertisement;
4. Defendants' Countermotion is granted in part to the extent that they need not report other contributions and expenditures;
5. The Defendants' Countermotion is granted in part to the extent that civil penalties are not imposed against Defendants Ahern or Heck personally;
6. The Defendants' Countermotion is denied in all other respects.

IT IS HEREBY FURTHER ORDERED that, within 30 days of the date of this order, Defendant AAF shall pay to the Plaintiff a principal sum of $109,560 in civil penalties for violations of NRS Chapter 294A, plus interest accruing at the statutory rate set forth in NRS 17.130 from May 27, 2010, until paid in full;

IT IS HEREBY FURTHER ORDERED that, within 30 days of the date of this order, Defendants (including AAF and its officers, directors, and agents, including Ms. Ahern and Ms. Heck), shall cause AAF to register as a PAC as required by NRS 294A.230 and file its C&E Reports in compliance with NRS 294A.140 and 294A.210. With regard to the C&E Reports, Defendants must disclose any and all donor(s) who contributed more than $100 (including any in-kind contributions) and whose contributions were used in or traceable to the creation or dissemination of the Advertisement. Defendants must also report all expenditures over $100 made in connection with the Advertisement, including for air time, production, and other amounts spent in the creation and dissemination of the Advertisement.

IT IS HEREBY FURTHER ORDERED that the Secretary of State is deemed the prevailing party and may file a motion to recover attorneys' fees and costs as provided by law.

DATED: November 13, 2013

DISTRICT COURT JUDGE

Submitted by:

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