



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA FIRST CLASS MAIL

Cleta Mitchell, Esq.
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3000 K Street, N.W.
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Washington, D.C. 20007 5109

SEP -7 2011

RE: MUR 6430
Steven Daines

Dear Ms Mitchell:

On November 17, 2010, the Federal Election Commission notified your client, Steven Daines, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 30, 2011, the Commission found, on the basis of the information in the complaint, and information provided by your client, that there is no reason to believe Steven Daines violated 2 U.S.C. §§ 431(2), 432(e), 441b, and 441i(e). 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 William Powers, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3
4 **RESPONDENT: Steven Daines**

MUR: 6430

5
6 **I. INTRODUCTION**

7 This matter was generated by a complaint filed with the Federal Election
8 Commission by the Montana Democratic Party. See 2 U.S.C. § 437g(a)(1).

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. BACKGROUND**

11 Common Sense Issues, Inc. ("CSI") is a Cincinnati, Ohio based social welfare
12 organization established under section 501(c)(4) of the Internal Revenue Code. See
13 Common Sense Issues website, "About Us", <http://commonsenseissues.com> (last visited
14 May 4, 2011). According to its website, CSI desires "to advance awareness,
15 involvement, and citizen action" on a number of issues including life (defending the
16 whole life from conception to natural death), liberty (protecting individual and corporate
17 rights), natural family (defending the value and practicality of traditional marriage),
18 economic freedom (taxation, spending, and limited government), *etc. id.* On its website,
19 CSI lists Colorado, Montana, South Dakota, and North Dakota as "priority states." See
20 Common Sense Issues website, available at <http://commonsenseissues.com> (last visited
21 May 4, 2011). The CSI website links to its state-affiliated websites, including one known
22 as Common Sense Montana. See *id.*, linking to www.commonensemontana.com.

23 During the 2008 election, CSI reported making both independent expenditures
24 and electioneering communications and indicated that it was reporting these activities as

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1 a qualified nonprofit corporation ("QNC"). For 2010, CSI reported making independent
2 expenditures in the amount of approximately \$130,000 for races in the 4th Congressional
3 District of Kansas and for the U.S. Senate races of Alaska and Utah. See Common Sense
4 Issues, Inc. (C90009739) Forms 5, available at [http://query.nictusa.com/cgi-](http://query.nictusa.com/cgi-bin/fecimg/?C90009739)
5 [bin/fecimg/?C90009739](http://query.nictusa.com/cgi-bin/fecimg/?C90009739) (last visited May 4, 2011). CSI also made approximately
6 \$30,000 in electioneering communications for races in the South Dakota District for the
7 House of Representatives in 2010. See Common Sense Issues, Inc. (C30001457) Forms
8 9, available at <http://query.nictusa.com/cgi-bin/fecimg/?C30001457> (last visited May 4,
9 2011). CSI did not report any independent expenditures or electioneering
10 communications for federal races in Montana.

11 Steven Daines, who was the 2008 Republican nominee for Lieutenant Governor
12 in Montana never declared his candidacy for any federal office on the ballot in 2009 or
13 2010. Mr. Daines, however, is currently a candidate for the House of Representatives
14 from Montana for the 2012 election. See Steven Daines' Statement of Candidacy,
15 Amended February 9, 2011. Before becoming a candidate for the House of
16 Representatives, Daines was briefly a 2012 candidate for the U.S. Senate from Montana.
17 See Daines' Response at 1; Steven Daines' Statement of Candidacy, Filed November 12,
18 2010. Daines has been actively engaged in public life in Montana since 2007, and
19 became a recognized leader of "the fight to return Montana's surplus funds to the
20 taxpayers" through www.GiveItBack.com, as well as speaking at local tea party rallies
21 and GOP events. See *id.*

22 Starting in late 2009 and ending in February 2010, Daines was featured in a radio
23 advertisement run by CSI in Montana. See Daines' Reponse at 3. The advertisement,

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1 entitled "Montana sends an Ear Doctor" ("Ear Doctor"), can be heard at
 2 <http://www.youtube.com/watch?v=JZlXhLKIHvk>. The ad criticizes Montana's current
 3 U.S. Senators, Jon Tester and Max Baucus, for supporting federal health care legislation
 4 passed in 2009. Senators Tester and Baucus are eligible to run for reelection in 2012 and
 5 2014, respectively. At the time the ad was run, there were ongoing public discussions
 6 about possible revisions to, or even the possible repeal of, the health care reform
 7 legislation.

"MONTANA SENDS AN EAR DOCTOR"

<u>Voice</u>	<u>Statements</u>
Male voice:	Is this where I can find Montana Senators?
Female voice:	Max Baucus and Jon Tester, yes sir, this is the U.S. Capitol.
Male voice:	I'm an ear doctor for Montana; I need to give them a hearing test.
Female Voice:	But sir, they have doctors.
Male voice:	Tax payers back home sent me.
Female Voice:	Oh?
Male voice:	It's about health care, our senators don't hear us anymore.
Female Voice:	Why do you have that mega phone?
Male voice:	It's what we call a hearing aid.
Daines:	I'm Steve Daines, a fifth-generation Montanan, and like you, I'm disappointed with just how out of touch Max Baucus and Jon Tester are with Montana's taxpayers. They've turned a deaf ear to us on health care, creating a bill forcing every one of us to buy insurance or face fines, and also forcing us to fund abortion on demand. That's just wrong, and we need to let them know it.
Female Voice:	Shhhh, they've just gone into another secret meeting.
Male voice:	Oh, so they can hear?
Female Voice:	Yes sir, they're just ignoring you.
Announcer:	Go to CommonSenseMontana.com today and tell your senators to listen to you and vote no on Obamacare. That's "w-w-w-dnt-CommonSenseMontana-dot-com." Paid for by Common Sense Issues.

8
 9 In addition to appearing in this radio advertisement for Common Sense Issues,
 10 Daines states that he "was an active spokesperson with and on behalf of several groups in
 11 opposition to Obamacare during 2009 and 2010." Daines' Response, Exhibit 3, Affidavit

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1 of Steve Daines, ¶14. In particular, Daines worked with Common Sense Montana and
2 Americans for Prosperity, "with whom [he] participated in events in the summer of 2009
3 during their 'Hands off My Healthcare' tour." *Id.* Additionally, Daines was a keynote
4 speaker at rallies sponsored by these organizations and has been a speaker at tea party
5 events in Montana during 2010. *Id.*

6 **B. LEGAL ANALYSIS**

7 The issue in this matter is whether the CSI advertisement attacking Senators
8 Baucus' and Tester's position on health care reform was a coordinated communication
9 benefitting Steven Daines' subsequent federal candidacy. Although the complaint asserts
10 that Daines "produced and aired" the advertisement, that "he [Daines] is using soft
11 money," and that "Daines has spent soft money," *see* Complaint 1-3, the available
12 information indicates that it was CSI, and not Daines, who produced, aired, and paid for
13 the advertisement. While Daines served as CSI's spokesperson in the ad, there is no
14 evidence that Daines was an officer of CSI, or that he established, financed, or controlled
15 CSI.

16 **1. Prohibited Corporate Contribution**

17 Under the Act, a corporation is prohibited from making any payment for a
18 coordinated communication, *see* 11 C.F.R. § 109.21(b)(1),¹ because that would constitute
19 an in-kind contribution to the candidate or his or her authorized committee with whom it

¹ The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit's decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. *See Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (Sept. 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. The new standard would not change the analysis in this Report.

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1 was coordinated. See 2 U.S.C. § 441b.² Corporations may make independent
2 expenditures and electioneering communications, see *Citizens United v. FEC.* 130 S. Ct.
3 876, 913 (2010); however, they must comply with the Act's applicable reporting
4 requirements. *Id.*; 2 U.S.C. §§ 434(c) and 434(f). During the 2010 election cycle,
5 individuals were prohibited from contributing over \$2,400 per election to a candidate's
6 authorized political committee and authorized committees were prohibited from
7 accepting contributions from individuals in excess of \$2,400. 2 U.S.C. §§ 441a(a) and
8 441a(f). Steven Daines did not violate section 441b(a)'s prohibition on receiving
9 corporate contributions because the "Ear Doctor" advertisement was not a coordinated
10 communication or other type of in-kind contribution.

11 An expenditure made by any person "in cooperation, consultation, or concert,
12 with, or at the request or suggestion of, a candidate, his authorized political committees
13 or their agents" constitutes an in-kind contribution to the candidate's authorized
14 committee. 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a
15 candidate, a candidate's authorized committee, or agent of the candidate or committee
16 when the communication satisfies the three-pronged test set forth in 11 C.F.R.
17 § 109.21(a): (1) the communication is paid for by a person other than that candidate or
18 authorized committee; (2) the communication satisfies at least one of the content

² The Ninth Circuit Court of Appeals recently found a challenge to a similar city-level prohibition is unlikely to prevail. See *Thalheimer v. San Diego*, No. 10-55322 at 30-35 (9th Cir. June 9, 2011) ("[T]here is nothing in the explicit holdings or broad reasoning of *Citizens United* that invalidates the anti-circumvention intent in the context of limitations on direct candidate contributions."). A variety of courts in other Circuits have also addressed the constitutionality of bans on corporate contributions after *Citizens United*. See, e.g., *U.S. v. Danielczyk*, No. 1:11cr85 at 15 (E.D. Va. June 7, 2011) ("[I]f corporations and individuals have equal political speech rights, then they must have equal direct donation rights."); *Green Party of Conn. v. Gasfield*, 616 F.3d 189, 199 (2d Cir. 2010) ("Beaumont and other cases applying the closely drawn standard to contribution limits remain good law."); *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304, (8th Cir. 2011) ("[W]e find that Minnesota Citizens is unlikely to prevail on its challenge to Minnesota's ban on direct corporate contributions."), *rehearing granted en banc and opinion vacated*, No. 10-3126 (8th Cir., Jul. 12, 2011) (*en banc*).

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1 standards set forth in 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least
2 one of the conduct standards set forth in 11 C.F.R. § 109.21(d). Here, Daines was never a
3 federal candidate during the election cycle in which the communication was aired.
4 Daines was not testing the waters (*see* Part II.B.2. below). As coordination can only
5 occur between the payor and either a party committee or a federal candidate, candidate's
6 authorized committee, or an agent of the candidate or committee, no coordination could
7 have occurred here. Similarly, without a reference to a federal candidate or the
8 republication of a federal candidate's campaign materials, the content prong of the
9 coordinated communications definition cannot be satisfied. 11 C.F.R. 109.21(c). Daines
10 only became a federal candidate in the following election cycle, more than nine months
11 after the ads had run.

12 The content prong can be satisfied by any one of the following types of content:

- 13 • A communication that constitutes an electioneering communication
14 pursuant to 11 C.F.R. § 100.29. 11 C.F.R. § 109.21(c)(1).
15
- 16 • A public communication that disseminates, distributes, or republishes, in
17 whole or in part, campaign materials prepared by a candidate or the
18 candidate's authorized committee. 11 C.F.R. § 109.21(c)(2).
19
- 20 • A public communication that expressly advocates, as defined by 11 C.F.R.
21 § 100.22, the election or defeat of a clearly identified federal candidate.
22 11 C.F.R. § 109.21(c)(3).
23
- 24 • A public communication that satisfies paragraph (c)(4)(i), (ii), (iii), or (iv)
25 of this section pertaining to references to Presidential, Vice-Presidential,
26 House, Senate, or political parties. 11 C.F.R. § 109.21(c)(4).
27

28 First, the "Ear Doctor" advertisement does not appear to meet the first standard
29 established by the content prong because it is not an electioneering communication. *See*
30 11 C.F.R. § 109.21(c)(1). The next election in which either of Montana's senators would

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1 appear on the ballot is in November 2012, more than two years from the time the radio
2 advertisement was apparently last aired. Thus, the advertisement would not be
3 considered an electioneering communication because it was aired more than two years
4 before any federal election any of the mentioned potential candidates, including Daines,
5 well in advance of any applicable time period for electioneering communications. See
6 2 U.S.C. § 434(f)(3); 11 C.F.R. 100.29(a)(2) (defining electioneering communications as
7 public communications aired within 30 days of a primary election or 60 days of a general
8 election). For similar reasons, the "Ear Doctor" advertisement also does not meet the
9 other time-based standard of the content prong that applies to communications
10 referencing a House or Senate candidate within 90 days of an election because the
11 advertisement was aired more than two years before any relevant election. See 11 C.F.R.
12 § 109.21(c)(4)(i). Additionally, there is no information suggesting that CSI used the "Ear
13 Doctor" advertisement to disseminate, distribute, or republish campaign material under
14 11 C.F.R. § 109.21(c)(2).

15 Finally, the "Ear Doctor" advertisement does not appear to meet the content
16 standard for a coordinated communication because it does not contain express advocacy.
17 See 11 C.F.R. § 109.21(c)(3). The "Ear Doctor" advertisement does not contain express
18 advocacy because it does not include specific words or phrases of express advocacy
19 pursuant to 11 C.F.R. § 100.22(a). The advertisement also cannot be considered express
20 advocacy under 11 C.F.R. § 100.22(b) because it could not only be interpreted by a
21 reasonable person as containing advocacy for the election or defeat of a clearly identified
22 federal candidate. The "Ear Doctor" advertisement appears to be an issue advertisement
23 focused on health care reform, and not an advertisement containing express advocacy,

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1 because it does not contain an unambiguous electoral portion. *See* 11 C.F.R. § 100.22(b).
2 Despite contrasting Daines' views on health care reform with those held by the Senators
3 from Montana, the advertisement is not express advocacy under 11 C.F.R. § 100.22(b)
4 because it focuses on the apparent divergence of opinion between Montana's citizens and
5 their senators and it also does not use Daines' position on health care reform to comment
6 on his character, qualifications, or accomplishments. *See Express Advocacy;*
7 *Independent Expenditures; Corporate and Labor Organization Expenditures: Explanation*
8 *and Justification*, 60 Fed. Reg. 35292, 35295 (July 6, 1995).

9 An advertisement must satisfy all three elements of the three-pronged test set
10 forth in 11 C.F.R. § 109.21(a) to be a coordinated communication. Because Daines was
11 not and never became a federal candidate in the election cycle during which the
12 communication was aired and moreover, the advertisement did not satisfy the content
13 prong of the three-pronged test, the advertisement was not a coordinated communication,
14 as defined in 11 C.F.R. § 109.21(a).

15 Accordingly, the Commission finds no reason to believe that Steven Daines
16 violated 2 U.S.C. § 441b by receiving an in-kind contribution.

17 **2. "Testing the waters" and candidate status**

18 The complaint alleges that once Steven Daines appeared in the "Ear Doctor"
19 advertisement he was "no longer eligible for the 'testing the waters' exemption" and that
20 he should have filed his Statement of Candidacy. Complaint at 2. The complaint also
21 alleges that Daines used "soft money to promote his campaign" in violation of 2 U.S.C.
22 § 441i(e). Daines appearance in the "Ear Doctor" advertisement, however, appears to

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1 relate solely to the issue of federal health care reform and therefore did not trigger the
2 candidate registration or “soft money” provisions of the Act.

3 Under the Act, an individual becomes a candidate for federal office when the
4 individual has received or made contributions or expenditures in excess of \$5,000,
5 2 U.S.C. § 431(2), and then has fifteen days to file a Statement of Candidacy with the
6 Commission, 2 U.S.C. § 432(e)(1). An individual who has not yet decided to run as a
7 federal candidate may “test the waters” prior to declaring candidacy. 11 C.F.R.
8 §§ 100.72 and 100.131. While testing the waters, the individual need not file reports with
9 the Commission disclosing money received and spent, although all such activity is
10 subject to the Act's limits and prohibitions. *Id.* If the individual becomes a candidate, all
11 such financial activity must be reported. *Id.*

12 There is no information suggesting that Steven Daines became a federal candidate
13 under the Act before November 12, 2010, the same day that he filed his Statement of
14 Candidacy (FEC Form 2). Despite the allegations in the complaint, there is no basis for
15 concluding that Daines' appearance in the “Ear Doctor” radio advertisement caused him
16 to become a candidate. “Ear Doctor” was not an expenditure that triggered Daines' status
17 as a candidate because the advertisement does not contain express advocacy and thus was
18 not an “expenditure.” *See* 2 U.S.C. § 431(8); 11 C.F.R. § 100.22; *see also* Part II.B.1.,
19 *supra*. “Ear Doctor” was also not a contribution that triggered Daines' status as a
20 candidate; it cannot be considered a “contribution” by virtue of being a coordinated
21 communication pursuant to 11 C.F.R. § 109.21, because the content prong was not met.
22 *See* 2 U.S.C. § 431(9); *see also* Part II.B.1., *supra*.

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1 Daines' appearance in "Ear Doctor" also does not qualify as "testing the waters"
2 activity under Commission regulations. See 11 C.F.R. §§ 100.72 and 100.31. Although
3 the complaint alleges that the advertisement could be considered "general public political
4 advertising to publicize his or her intention to campaign for Federal office" as a type of
5 "testing the waters" activity, the advertisement does not indicate Daines' "intention to
6 campaign for Federal office." See 11 C.F.R. §§ 100.72 and 100.31. Except for the "Ear
7 Doctor" advertisement, the complaint does not identify any other conduct by Daines that
8 is alleged to be "testing the waters" activities.³ Moreover, the "Ear Doctor"
9 advertisement last aired approximately nine months before Daines declared his candidacy
10 for federal office in another election cycle. See CSI Response at 1; Daines' Response at
11 3.

12 In past matters, the Commission has concluded that a comparison between a
13 potential candidate and the incumbent could trigger candidate status, but in those matters
14 such a comparison was accompanied by specific references to an actual election or race.
15 See MUR 5693 (Arohson) (specific reference to "[d]efeating an incumbent," "win[ning]
16 the race," and representing the specific congressional district in Washington, D.C.); see
17 also MUR 5251 (Friends of Joe Rogers) (specific reference to candidate "immediately
18 work[ing] for the benefit of Colorado" and "looking forward to serving you in the next
19 United States Congress"). In this matter, however, the "Ear Doctor" advertisement did
20 not even indirectly refer to an election or the possible candidacy of Daines.

21 Finally, Daines' disclosure reports filed with the Commission indicate that Daines
22 did not receive any contributions or make any expenditures before November 12, 2010,

³ The Response has also specifically denied that Daines engaged in any "testing the waters" activities or received any funds for the purposes of "testing the waters." Daines' Response at 1.

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1 the day he declared his candidacy. Therefore, it appears that Daines did not cross the
2 \$5,000 statutory candidate threshold before filing his Statement of Candidacy with the
3 Commission. Based on the apparent lack of “testing the waters” or campaign activity
4 before November 12, 2010, it appears that Daines timely filed his Statement of
5 Candidacy in compliance with the Act.

6 Accordingly, the Commission finds no reason to believe that Steven Daines
7 violated 2 U.S.C §§ 431(2) and 432(e).

8 **3. Use of “soft money” by a candidate**

9 Federal candidates and officeholders, or entities directly or indirectly established,
10 financed, maintained or controlled by them, are restricted from soliciting, receiving,
11 directing, transferring, or spending nonfederal funds. See 2 U.S.C. § 441i(e)(1)(A).

12 Although the complaint alleges that Daines received nonfederal funds through CSI's
13 airing of “Ear Doctor,” section 441i(e) only applies to federal candidates. As discussed
14 above, Daines was not a federal candidate at the time that “Ear Doctor” aired.

15 Accordingly, the Commission finds no reason to believe that Steven Daines
16 violated 2 U.S.C. § 441i(e)(1)(A) in connection with the “Ear Doctor” advertisement.

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