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FIRST GENERAL COUNSEL'S REPORT
CELA

MUR: 6678
DATE COMPLAINT FILED: 10/31/2012¹
DATE OF NOTIFICATION: 11/7/2012
DATE SUPPLEMENT FILED: 1/15/2013
DATE OF NOTIFICATION: 1/18/2013
LAST RESPONSE RECEIVED: 4/30/2013
DATE ACTIVATED: 6/18/2013

ELECTION CYCLE: 2012
EXPIRATION OF SOL: 9/13/2017 to 11/5/2017

COMPLAINANT: Michael Weinstein

RESPONDENTS: MindGeek S.A.R.L. f.k.a.
Manwin Licensing International S.A.R.L.
MindGeek USA Incorporated f.k.a. Manwin USA,
Inc.
Fabian Thylmann
Andrew Link
Froytal Services Limited
No on Government Waste/No on Measure B
– Major Funding by Manwin USA²

RELEVANT STATUTE
AND REGULATION: 2 U.S.C. § 441e
11 C.F.R. § 110.20

INTERNAL REPORTS CHECKED: Disclosure Reports

OTHER AGENCIES CHECKED: California State Disclosure Reports

¹ Complainant filed an original "Complaint" dated October 26, 2012, and an "addendum" dated October 30, 2012. The Commission received both documents on October 31, 2012 and we refer to them collectively as the "Complaint." We have reproduced the documents together in a single pdf document labeled "Complaint" in the Commission's Voting Ballot Matters folder ("VBM"). Complainant subsequently filed a Supplement on January 15, 2013, which is contained in a separate pdf in VBM labeled "Supplement."

² CELA notified No on Government Waste and No on Measure B Committee separately, but the information developed since that time indicates that they are a single entity. See Resp. at 1 (Feb. 28, 2013).

1 **I. INTRODUCTION**

2 The Complaint alleges that Manwin Licensing International S.A.R.L. ("Manwin
3 International"), its subsidiary Manwin USA, Inc. ("Manwin USA"),³ and Manwin USA's
4 corporate officers, Fabian Thylmann and Andrew Link, violated the Federal Election Campaign
5 Act of 1971, as amended (the "Act"), by making a \$150,000 foreign national donation to a
6 California local ballot measure committee, No on Government Waste/No on Measure B – Major
7 Funding by Manwin USA ("Ballot Measure Committee").⁴ The Complaint also alleges that
8 Froytal Services Limited ("Froytal") is a foreign national that impermissibly donated \$75,000 to
9 the Ballot Measure Committee. Respondents assert that the Act's prohibition on foreign national
10 donations does not apply to ballot measure committees. For the reasons discussed below, we
11 recommend that the Commission dismiss the allegations in this Complaint and close the file in
12 this matter.

13 **II. FACTUAL BACKGROUND**

14 On November 6, 2012, the State of California held its general election for federal, state,
15 and local offices. Also included on the ballot in Los Angeles County was Measure B, "Safer Sex
16 in the Adult Film Industry Act," which qualified for the ballot on approximately July 5,

³ In October 2013, after the Complaint and Responses were filed, Manwin International and Manwin USA changed their names to MindGeek S.A.R.L. and MindGeek USA Incorporated, respectively; because the Complaint and Responses refer to the entities as Manwin, we continue to use the name Manwin in this report. See Rhett Pardon, *Manwin Changes Name to MindGeek*, Oct. 28, 2013, <http://www.xbiz.com/news/170554>; Luxembourg Business Registry (Registre de Commerce et des Sociétés), https://www.rcsl.lu/mjracs/jsp/DisplayConsultDetailCompanyActionNotSecured.action?time=1406837079417&CURRENT_TIMESTAMP_ID=1406837069031; Delaware Department of State, Division of Corporations, <https://delecorp.delaware.gov/tin/GINameSearch.jsp>; see also www.manwin.com (website redirects to www.mindgeek.com).

⁴ We use the terms "ballot measure," "ballot referenda," and "ballot initiative" interchangeably in this Report.

1 2012.⁵ Complainant identifies the Ballot Measure Committee as “a local ballot measure
2 committee formed to oppose the passage of Measure B” and alleges that Manwin USA is its
3 largest donor and a “sponsor” under California campaign finance law.⁶

4 Manwin USA is incorporated under Delaware law and has registered in California as a
5 foreign (*i.e.*, out of state) corporation.⁷ Manwin USA is a subsidiary of Manwin International, an
6 information technology firm headquartered in Luxembourg with offices worldwide, including in
7 Hamburg, London, Los Angeles, Nicosia (Cyprus), and Montreal.⁸ At the time of the activity in
8 this matter, Fabian Thylmann was Manwin USA’s chief executive officer with an address in
9 Belgium;⁹ Andrew Link was its secretary and chief financial officer with an address in Canada.¹⁰
10 According to a press article, the director of communications for Manwin’s North American

⁵ See Rong-Gong Lin II, *Porn Condom Measure Qualifies for Los Angeles County Ballot*, L.A. TIMES (July 5, 2012), available at <http://articles.latimes.com/2012/jul/05/local/la-me-porn-condoms-20120705>. Measure B was approved with 57% of the vote. See <http://rcc.co.la.ca.us/elect/12110012/r0012ph.html-ssi>. Complainant Michael Weinstein, president of AIDS Healthcare Foundation, was a proponent of Measure B. Compl. at 1, 4 (Oct. 31, 2012).

⁶ Compl. at 1-2. Under California law, a “sponsored committee” is “a committee, other than a candidate controlled committee, which has one or more sponsors.” CAL. GOV. CODE § 82048.7 (2012). And a person sponsors a committee if any of the following conditions apply: (1) the committee receives 80% or more of its donations from the persons or its members, officers, employees or shareholders; (2) the person collects donations for the committee through payroll deductions or member dues; (3) the person, alone or in combination with other organizations, provides all or nearly all of the administrative services for the committee; or (4) the person, alone or in combination with other organizations, sets the policies for soliciting donations or making disbursements of committee funds. *Id.* Information submitted by the Complainant indicates that the Ballot Measure Committee was not registered in California as a “sponsored committee.” See Compl. at 40, 68, 80 (Ballot Measure Committee representing itself on its state disclosure forms as a “Primarily Formed Ballot Measure Committee” that is not a “sponsored committee”). Further, as detailed below, *supra* p. 4-5, Manwin USA and Froytal accounted for 47% of the Ballot Measure Committee’s total receipts in 2012. And we have no information indicating that the Respondents collected donations, provided administrative services, or set policies on donations and disbursements for the Ballot Measure Committee.

⁷ Compl. at 18-20 (Manwin USA’s corporate registration in California and certification of good standing and legal corporate existence in Delaware). The Complaint alleges that Manwin USA’s California office is vacant. Compl. at 2 n.1, 18.

⁸ See <http://www.mindgeek.com>.

⁹ Compl. at 18.

¹⁰ *Id.*

1 operations said Thylmann runs the global company and that he “absolutely” personally approved
2 funding the opposition to Measure B.¹¹

3 Froytal is incorporated under Cyprus law and its principal place of business is in that
4 country.¹² Froytal shared an office address with Manwin International in Nicosia, Cyprus,¹³ and
5 Froytal, like Manwin USA, listed Thylmann as a corporate officer.¹⁴

6 The Ballot Measure Committee disclosed to the Los Angeles County Registrar that it
7 received \$693,948 in 2012. As detailed in the chart below, Manwin USA donated \$252,000 to
8 the Ballot Measure Committee in 2012, and Froytal donated \$75,000 over the same period.¹⁵
9 Together those donations comprised 47% of the Ballot Measure Committee’s total reported
10 receipts.

¹¹ See Mark Cromer, *Behind the Latex Curtain of L.A.'s Condom War*, NOOZHAWK (SANTA BARBARA) (Nov. 2, 2012), available at http://www.noozhawk.com/article/110212_mark_cromer_behind_the_latex_curtain.

¹² See Compl. at 37.

¹³ The Ballot Measure Committee’s state disclosure reports show that Froytal shared an address with Manwin International in Nicosia, Cyprus at the time of Froytal’s donation. See Compl. at 44; <http://web.archive.org/web/20120913022838/http://www.manwin.com/contact.php>.

¹⁴ See Compl. at 18. Froytal is also registered in Quebec and lists Thylmann as an “administrateur.” See http://opencorporates.com/companies/ca_qc/1167412353. Further, Froytal is represented in this matter by the same counsel as Manwin International, Manwin USA, Thylmann, and Link. See Designations of Counsel (Apr. 30, 2013).

¹⁵ The Complaint includes the Ballot Measure Committee’s 2012 disclosure reports covering the period from January 1, 2012 to October 20, 2012, and these reports are also publicly available on the Los Angeles County Registrar’s website. See Compl. at 21-31 (from Jan. 1, 2012 to Sept. 30, 2012); Compl. at 40-51 (from Jan. 1, 2012 to Sept. 30, 2012, as amended); Compl. at 52-62 (from Oct. 1, 2012 to Oct. 20, 2012); <http://www.lavote.net/camp/measure.cfm>. Neither the Complaint nor the Supplement includes the Ballot Measure Committee’s late October and early November 2012 donations from Manwin USA, but these donations can be found in the Ballot Measure Committee’s publicly available disclosure report covering October 21, 2012 to December 31, 2012, at pages 13 and 14. See http://www.lavote.net/camp/PDFS/2012_general_no_on_measure_B_460_10_21_12_to_12_31_12.pdf.

Entity	Donation	Date
Froytal Services ¹⁶	\$ 75,000.00	09/13/2012
Manwin USA	\$150,000.00	10/16/2012
Manwin USA	\$ 30,000.00	10/30/2012
Manwin USA	\$ 50,000.00	10/31/2012
Manwin USA	\$ 22,000.00	11/05/2012

1
2 The Ballot Measure Committee also disclosed that it disbursed a total of \$109,178 to ten
3 different slate mailer organizations for "campaign literature and mailings."¹⁷ Under California
4 law, a "slate mailer organization" is any person who "directly or indirectly" is involved in the
5 production of slate mailers, exercises control over the selection of the candidates and measures to
6 be supported or opposed in the slate mailers, and receives or is promised \$500 or more in a
7 calendar year for the production of slate mailers.¹⁸ California law defines a "slate mailer" as a
8 mass mailing that "supports or opposes a total of four or more candidates or ballot measures."¹⁹
9 We do not, however, have any information about any specific "campaign literature and mailings"
10 funded by the Ballot Measure Committee with its payments to the slate mailer organizations.
11 Voter Guide Slate Cards, one of the ten slate mailer organizations that received funds from the
12 Ballot Measure Committee, explains generally on its website that "candidates and ballot
13 measures only pay a fraction of the total cost to produce and mail the guides[,] but the website

¹⁶ The Ballot Measure Committee initially disclosed receiving a \$75,000 donation from Manwin USA on September 13, 2012, but later amended the donation to a receipt from Froytal Services. See Compl. at 24, 44. It disclosed a \$75,000 refund to Froytal on its disclosure report covering October 1 to October 20, 2012. See *id.* at 58.

¹⁷ The reported disbursements ranged from \$3,836 (to LA County RLVG) to \$20,765 (to Educate Your Vote). The California Campaign Disclosure Statements filed by the Ballot Measure Committee identify these disbursements as "LIT," the code for "campaign literature and mailings" on Schedule E (Payments Made). See, e.g., Compl. at 27. Although the Ballot Measure Committee's reports do not disclose the dates of disbursements, these ten slate mailer organizations reported receiving funds from the Ballot Measure Committee between September 14, 2012 and October 25, 2012. Slate mailer organizations disclose their activity to the State of California's Fair Political Practices Commission and these reports are available at <http://cal-access.sos.ca.gov/Campaign/Committees/list.aspx?view=slateMailers&session=2011>.

¹⁸ CAL. GOV. CODE § 82048.4 (2012).

¹⁹ *Id.* § 82048.3 (2012).

1 has no examples of Los Angeles County slate cards from the 2012 election cycle at issue in this
2 matter.²⁰

3 The Complaint alleges that Manwin USA and Froytal impermissibly donated foreign
4 national funds to the Ballot Measure Committee.²¹ According to the Complaint, Manwin USA
5 derives some or all of its profits from Manwin International, and thus, Manwin International is
6 indirectly funding the Ballot Measure Committee in violation of the Act.²² Moreover, the
7 Complaint alleges that Thylmann and Link, both foreign nationals, are the only decision makers
8 for Manwin USA, and because Manwin USA has made substantial donations to the Ballot
9 Measure Committee, Thylmann and Link also violated the Act and Commission regulations.²³
10 The Complaint also alleges that Thylmann, Link, Manwin USA, Manwin International, and the
11 Ballot Measure Committee knowingly provided substantial assistance in the solicitation, making,
12 acceptance, or receipt of a prohibited donation in violation of Commission regulations.²⁴ Finally,
13 the Complaint alleges that Froytal is a foreign national that violated the Act by donating \$75,000
14 to the Ballot Measure Committee.²⁵

²⁰ See <http://www.voterguideslatecards.com>. Voter Guide Slate Cards disclosed the receipt, on September 19, 2012, of \$12,500 from the Ballot Measure Committee. See <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prg?filingid=1693901&amendid=0>. It includes on its website copies of slate cards it produced in Los Angeles County during California's previous election cycle — the slate cards advocate the election of state and local candidates and the approval or defeat of ballot measures, and state "Take this card to the polls." See http://www.voterguideslatecards.com/PDFs/nov2010_LA.pdf.

²¹ See Compl. at 2, 36-37.

²² *Id.* at 3.

²³ *Id.* at 3-4.

²⁴ *Id.* at 4.

²⁵ *Id.* at 36-37. The Complainant provided information indicating that Thylmann is a German citizen. See Supp. Compl. at 1 (Jan. 15, 2013).

1 Respondents contend that they did not violate the Act and ask the Commission to dismiss
2 this matter. Thylmann responds that Measure B is not an "election" and thus the Act's
3 prohibition on participation by foreign nationals does not apply.²⁶ The Ballot Measure
4 Committee similarly argues that the Act's prohibition on foreign national donations does not
5 apply to state and local ballot measure committees.²⁷ According to the Ballot Measure
6 Committee, the scope of the activity in this matter relates solely to a Los Angeles County ballot
7 initiative and the record in no way demonstrates that the Ballot Measure Committee was either
8 formed to conduct activity supporting or opposing candidates for public office or that it did, in
9 fact, support or oppose any candidate for public office.²⁸ The Ballot Measure Committee asserts
10 that, under Commission precedent, the Act does not reach state and local ballot initiative activity
11 and that applying the prohibition on foreign national donations to Respondents would violate
12 their right to due process of law.²⁹

13 III. LEGAL ANALYSIS

14 A "foreign national" is an individual who is not a citizen of the United States or a
15 national of the United States and who is not lawfully admitted for permanent residence.³⁰ The
16 term also includes a partnership, association, corporation, organization, or other combination of
17 persons organized under the laws of or having its principal place of business in a foreign

²⁶ Thylmann Resp. at 2-3 (Jan. 7, 2013). Manwin International, Manwin USA, Link and Froytal adopted Thylmann's response by letter dated April 30, 2013.

²⁷ Ballot Measure Committee Resp. at 1, 3-4 (Mar. 1, 2013).

²⁸ *Id.* at 3.

²⁹ *Id.* at 4.

³⁰ 2 U.S.C. § 441e(b)(2); 11 C.F.R. § 110.20(a)(3)(ii).

1 country.³¹ Under the Act, it is unlawful for a foreign national, directly or indirectly, to make a
2 contribution or donation of money or other thing of value "in connection with a Federal, State, or
3 local election."³² In addition, no person may solicit, accept, or receive a foreign national
4 contribution or donation.³³

5 Additionally, foreign nationals may not, directly or indirectly, make an expenditure,
6 independent expenditure, or disbursement in connection with a federal, state, or local election.³⁴

7 Nor may foreign nationals direct, dictate, control, or directly or indirectly participate in the
8 decision-making process of any person, such as a corporation, with regard to such person's
9 federal or nonfederal election-related activities, including decisions concerning the making of
10 contributions or donations in connection with elections for any federal, state, or local office.³⁵

11 And no person may knowingly provide substantial assistance in the solicitation, making,
12 acceptance, or receipt of a prohibited foreign national contribution or donation.³⁶

13 The Commission has concluded, however, that, where permitted by state law, a U.S.
14 subsidiary of a foreign national corporation may donate funds for state and local elections if
15 (1) the donations derive entirely from funds generated by the subsidiaries' U.S. operations, and

³¹ 2 U.S.C. § 441e(b)(1) (citing 22 U.S.C. § 611(b)); 11 C.F.R. § 110.20(a)(3)(i) (same).

³² 2 U.S.C. § 441e(a)(1)(A); 11 C.F.R. § 110.20(b).

³³ 2 U.S.C. § 441e(a)(2). The Commission's regulations employ a "knowingly" standard here. 11 C.F.R. § 110.20(g). A person knowingly accepts a prohibited foreign national contribution or donation if that person has actual knowledge that funds originated from a foreign national, is aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the funds originated from a foreign national, or is aware of facts that would lead a reasonable person to inquire whether the funds originated from a foreign national but failed to conduct a reasonable inquiry. *Id.* § 110.20(a)(4).

³⁴ 2 U.S.C. § 441e(a)(1)(C); 11 C.F.R. § 110.20(f).

³⁵ *Id.* § 110.20(i).

³⁶ *Id.* § 110.20(h).

1 (2) all decisions concerning the donations, except those setting overall budget amounts, are made
2 by individuals who are U.S. citizens or permanent residents.³⁷

3 **A. Foreign National Donations to the Ballot Measure Committee**

4
5 Manwin USA apparently donated \$252,000 to the Ballot Measure Committee, and
6 Froytal donated \$75,000.³⁸ Manwin USA is a domestic subsidiary of Manwin International.
7 Manwin International is incorporated in Luxembourg and thus is a foreign national.³⁹ It is
8 unclear whether Manwin USA donated domestically-generated funds or whether it used funds
9 derived from Manwin International to make its donations. But at least one alleged foreign
10 national — Chief Executive Officer Thylmann — appears to have participated in making
11 Manwin USA's decision to donate to the Ballot Measure Committee.⁴⁰ The available
12 information shows that Thylmann has foreign addresses, and information submitted by the
13 Complainant identifies him as a German citizen.

14 Thylmann does not refute that he is a foreign national, or that he was involved in Manwin
15 USA's decision to donate funds to the Ballot Measure Committee.⁴¹ And none of the other

³⁷ See Advisory Op. 2006-15 (TransCanada Corp.); see also Contribution, Limitations and Prohibitions, 67 Fed. Reg. 69,928, 69,943-44 (Nov. 19, 2002) (explanation and justification ("E&J")) (explaining that the statutory term "indirectly" does not cover U.S. subsidiaries of foreign corporations). In Advisory Opinion 2006-15 (TransCanada Corp.), the subsidiaries' board of directors, which included foreign nationals, set an overall, annual budget for political donations and disbursements. The board, however, delegated the decision-making authority to a group of individuals comprised exclusively of U.S. citizens or permanent residents. See AO 2006-15 at 5-6.

³⁸ See *supra* p. 4.

³⁹ See 2 U.S.C. § 441e(b)(1) (citing 22 U.S.C. § 611(b)); 11 C.F.R. § 110.20(a)(3)(i) (same).

⁴⁰ See *supra* p. 3-4 (Manwin official reportedly stating Thylmann runs the global company and personally approved the funding of opposition to Measure B). Further, Manwin USA's secretary and chief financial officer, Link, also has a foreign address and is alleged to have participated in Manwin USA's decision to donate funds to the Ballot Measure Committee. But we know less about his participation than Thylmann's.

⁴¹ See Thylmann Resp. We note, however, that Thylmann's Response states generally that "[g]iven the fundamental jurisdiction flaws in the Complaint, Respondent does not challenge the Complaint's factual allegations, solely for the purpose of this response. Respondent, however, does not accept that these factual allegations are accurate and reserves his right to challenge such allegations in this or any other proceeding." Thylmann Resp. at 2.

1 Respondents dispute the Complaint's allegations that foreign nationals were involved in making
2 the donations at issue.⁴² Further, Froytal is a foreign national because it is incorporated and has
3 its principal place of business in Cyprus. Thus, the record establishes that there is reason to
4 believe foreign nationals donated to the Ballot Measure Committee.

5 **B. Section 441e and Ballot Initiative Funding**

6 We next must consider whether Froytal's and Manwin USA's donations to the Ballot
7 Measure Committee were made "in connection with a Federal, State, or local election."⁴³ The
8 Act defines "election" to mean general, special, primary, runoff, convention, or caucus
9 election.⁴⁴ Commission regulations further explain that "[e]lection means the process by which
10 individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal
11 office."⁴⁵ These general definitions of "election," however, do not resolve whether a ballot
12 measure is an election under section 441e, which expressly applies beyond federal elections to
13 state and local elections as well.

14 Before the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Act prohibited
15 foreign national contributions or donations "in connection with an election to any political
16 office."⁴⁶ At that time, the Commission treated foreign national donations relating only to ballot
17 referenda issues as outside the purview of the Act.⁴⁷ But where candidates were "inextricably

⁴² Manwin International, Manwin USA, Link, and Froytal adopted Thylmann's Response. *See supra* note 26.

⁴³ *See* 2 U.S.C. § 441e(a)(1)(A); 11 C.F.R. § 110.20(b).

⁴⁴ 2 U.S.C. § 431(1).

⁴⁵ 11 C.F.R. § 100.2(a).

⁴⁶ *See* 2 U.S.C. § 441e(a) (2000).

⁴⁷ *See* Advisory Op. 1989-32 (McCarthy).

1 linked" with a ballot measure committee, the Commission found that section 441e applied.⁴⁸ In
2 Advisory Opinion 1989-32 (McCarthy), a state candidate organized and controlled a committee
3 that sought to qualify and pass a state ballot measure sponsored and promoted by the candidate.
4 Both the ballot measure and the state candidate would be on the ballot in November 1990. The
5 Commission found that the activities of the ballot initiative committee should be viewed as
6 campaign-related, and therefore the committee was prohibited from accepting contributions from
7 a foreign national.⁴⁹

8 The Commission also, in a pre-BCRA enforcement matter MUR 1859 (Community
9 Campaign Committee), found reason to believe that foreign and domestic corporations violated
10 sections 441e and 441b by creating and funding a ballot measure committee that in turn paid a
11 slate mailer organization to disseminate a mailer promoting the passage of the ballot measure
12 along with a slate of federal, state, and local candidates and other ballot measures.⁵⁰ The First
13 General Counsel's Report noted that if the corporations made the donations solely to support the
14 ballot measure at issue then no violation of the statute would have occurred.⁵¹ But the
15 circumstances indicated that the foreign national and other respondents were responsible for the
16 entire slate mailer which included advocacy for the election of federal candidates, and thus, the
17 donations appeared to have been made in connection with a federal election.⁵² After an
18 investigation and probable cause briefing, the Commission determined to "[l]eave the reason to

⁴⁸ *Id.* at 6.

⁴⁹ *Id.*

⁵⁰ *See* Gen. Counsel's Rpt., MUR 1859 (Mar. 12, 1985); Commission Cert., MUR 1859 (Mar. 27, 1985).

⁵¹ *See* First GCR at 14, MUR 1859.

⁵² *Id.* at 15-16. Specifically, the ballot measure committee was created by the foreign national and other corporate respondents, which implied that all of the committee's efforts were "at the behest of the committee's corporate backers," and the slate mailer organization was funded entirely by the ballot measure committee. *Id.* at 10, 14.

1 believe findings with respect to” the foreign corporation on the record but take no further action;
2 five Commissioners explained that “there was insufficient evidence to indicate that the officers
3 of” the foreign corporation “were aware, prior to approving participation in funding the mailers,
4 that the slate mailers at issue advocated the election of candidates for federal office,” and that
5 only a small amount of money was involved.⁵³

6 In 2002, BCRA amended section 441e to prohibit foreign national contributions or
7 donations “in connection with a Federal, State, or local election.”⁵⁴ The legislative history
8 indicates that Congress amended the provision to clarify “that the ban on contributions [by]
9 foreign nationals applies to soft money donations.”⁵⁵ While implementing regulations to
10 correspond with revised section 441e, the Commission concluded that the deletion of the term
11 “election to any public office” and the use of the “broader phrase ‘Federal, State, or local
12 election’” was meant to clarify congressional intent “to prohibit foreign national support of
13 candidates and their committees and political organizations and foreign national activities in
14 connection with all Federal, State, and local elections.”⁵⁶ But neither the legislative history nor
15 the Commission’s Explanation and Justification provide guidance on whether Congress intended
16 the phrase “Federal, State, or local election” to include ballot initiatives.

17 Further, no court has directly addressed whether section 441e applies to ballot initiatives,
18 though in a recent opinion in a lawsuit challenging the constitutionality of section 441e, the U.S.

⁵³ Commission Cert., MUR 1859 (Feb. 20, 1987); Statement of Reasons, Comm’rs Aikens, Elliott, Josefiak, McGarry & Thomas, MUR 1859.

⁵⁴ Compare 2 U.S.C. § 441e(a) (2000), with 2 U.S.C. § 441e(a)(1)(A) (2004).

⁵⁵ *Id.* (citing Statement of Sen. Feingold, 148 Cong. Rec. S1991-1997 (daily ed. Mar. 18, 2002)); see Statement of Sen. Lieberman, 148 Cong. Rec. S2774 (daily ed. Mar. 22, 2002).

⁵⁶ E&J at 69,444.

1 District Court for the District of Columbia appears to have assumed that it does not.⁵⁷ In
2 upholding the statutory ban on foreign national contributions, the *Bluman* court explained that
3 the ban is not constitutionally underinclusive even though foreign nationals may make
4 contributions and expenditures related to ballot initiatives. The court reasoned:

5 Congress could reasonably conclude that the risk of undue foreign influence is
6 greater in the context of candidate elections than it is in the case of ballot
7 initiatives. *Cf. Citizens Against Rent Control/Coalition for Fair Housing v. City*
8 *of Berkeley*, 454 U.S. 290, 299 (1981). Congress's determination that foreign
9 contributions and expenditures pose a greater risk in relation to candidate
10 elections than such activities pose in relation to ballot initiatives is a sensible one
11 and, in our view, does not undermine the validity of the statutory ban on
12 contributions and expenditures.⁵⁸

13
14 The court further explained that the section 441e ban is closely tied to candidate
15 advocacy and does not ban foreign nationals from engaging in issue advocacy: "§ 441e as
16 we interpret it . . . does not restrain foreign nationals from speaking out about issues or
17 spending money to advocate their views about issues. It restrains them only from a
18 certain form of expressive activity closely tied to the voting process — providing money

⁵⁷ See *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012) (Mem.).

⁵⁸ *Bluman*, 800 F. Supp. 2d at 291. The court addressed ballot initiatives in response to plaintiffs' contention "that the statute is underinclusive and not narrowly tailored because it permits foreign nationals to make contributions and expenditures related to ballot initiatives." See *id*; see also Plaintiffs' Motion for Summary Judgment and in Opposition to FEC Motion to Dismiss at 25, *Bluman*, 800 F. Supp. 2d 281 (D.D.C. 2011) (No. 10-1766). In a response filed on behalf of the Commission, this Office acknowledged that Commission advisory opinions had indirectly indicated how the Commission might interpret section 441e, stating:

In an advisory opinion issued shortly after BCRA was enacted, the Commission indirectly indicated that it might interpret revised section 441e to apply to ballot initiatives. See FEC Advisory Op. 2003-12 at 5-6, <http://saos.nictusa.com/aodocs/2003-12.pdf>. The Commission has since suggested that it does not. See FEC Advisory Op. 2005-10, <http://saos.nictusa.com/aodocs/2005-10.pdf> (finding fundraising for ballot measures to not be in connection with an "election" under FECA).

1 for a candidate or political party or spending money in order to expressly advocate for or
2 against the election of a candidate.”⁵⁹

3 But the *Bluman* court ultimately did “not decide whether Congress could prohibit foreign
4 nationals from engaging in speech other than contributions to candidates and parties, express-
5 advocacy expenditures, and donations to outside groups to be used for contributions to
6 candidates and parties and express-advocacy.”⁶⁰ And the same broad constitutional authority for
7 excluding foreign nationals from making contributions connected to candidate elections that the
8 *Bluman* court relied upon in upholding section 441e would arguably justify Congress, if it so
9 chose, in excluding foreign nationals from donating or disbursing funds for activities connected
10 to voting on ballot measures as well. The Supreme Court has historically upheld exclusions of
11 foreign nationals from activities “intimately related to the process of democratic self-
12 government.”⁶¹ As the Court has written, “a State’s historical power to exclude aliens from
13 participation in its democratic political institutions [is] part of the sovereign’s obligation to
14 preserve the basic conception of a political community,” and the government may reserve
15 “participation in its democratic political institutions” for citizens of this country.⁶² No court,
16 however, has ruled on this issue.

⁵⁹ *Id.* at 290 (citing *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 n.26 (1978)). Consistent with this interpretation of section 441e in *Bluman*, the Commission has previously concluded that foreign nationals may finance issue ads. See Advisory Op. 1984-41 (National Conservative Fund) (foreign national donated funds to a nonprofit organization for ads dealing with alleged “liberal bias” among the media).

⁶⁰ *Bluman*, 800 F. Supp. 2d at 291. Later, in a brief filed on behalf of the Commission with the Supreme Court, in further addressing plaintiffs’ underinclusivity argument, this Office and the U.S. Solicitor General jointly stated: “[b]y regulating only campaign-related spending, Congress has tailored section 441e to address the financial activity most likely to influence elections.” FEC Motion to Dismiss or Affirm at 23, *Bluman*, 132 S. Ct. 1087 (2012) (No. 11-275). The Ballot Measure Committee cites this statement in its Response to the Complaint. See Ballot Measure Committee Resp. at 2, 4-5.

⁶¹ *Bluman*, 800 F. Supp. 2d at 287 (quoting *Bernal v. Fainter*, 467 U.S. 216, 220 (1984)).

⁶² *Id.* (quoting *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) (internal quotation marks and citation omitted)). Although the Supreme Court afforded greater First Amendment protection to spending associated with

1 Since the passage of BCRA, the Commission has considered through advisory opinions
2 whether ballot initiative activities are “in connection” with an election in the context of another
3 BCRA provision — section 441i(e), which prohibits federal candidates and officeholders, their
4 agents, and entities directly or indirectly established, financed, maintained, or controlled by, or
5 acting on their behalf, from raising or spending nonfederal funds “in connection with an election
6 for Federal office” and “in connection with any election other than an election for Federal
7 office.”⁶³ Advisory Opinion 2003-12 (Flake) concerned a federal candidate who was closely
8 involved with a state ballot measure organization attempting to qualify a state ballot measure for
9 the 2004 general election. There, the Commission determined that all activities of a ballot
10 measure committee established, financed, maintained or controlled by a federal candidate are “in
11 connection with an[] election . . .”⁶⁴ The Commission also concluded that the activities of a
12 ballot measure committee that is not “‘established, financed, maintained or controlled’ by a
13 Federal candidate . . . are not ‘in connection with an[] election’ . . . prior to the committee
14 qualifying an initiative or ballot measure for the ballot, but are ‘in connection with an[] election’
15 . . . after the committee qualifies an initiative or ballot measure for the ballot.”⁶⁵

referenda than for that associated with candidate elections in *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) and *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), those cases did not involve foreign nationals. As for the Court’s statement in *McIntyre* that the FECA “regulates only candidate elections, not referenda or other issue-based ballot measures,” 514 U.S. at 356, it pre-dated the BCRA amendment to section 441e, which applies to ballot measure activity if the activity constitutes a “contribution or donation of money or other thing of value in connection with a Federal, State, or local election.” 2 U.S.C. § 441e(a)(1)(A). And as noted, even pre-BCRA, where a candidate was closely associated with a ballot initiative campaign, the Commission found that section 441e applied. See Advisory Op. 1989-32 (McCarthy); see also MUR 1859 (finding reason to believe a foreign corporation violated sections 441e and 441b because it funded a ballot measure committee that paid for a slate mailer advocating the election of federal candidates).

⁶³ 2 U.S.C. § 441i(e)(1)(A), (B).

⁶⁴ AO 2003-12 at 6.

⁶⁵ *Id.*

1 Two years later, in Advisory Opinion 2005-10 (Berman/Doolittle), the Commission
2 concluded that section 441i(e) does not prohibit federal candidates and officeholders from raising
3 funds for ballot measure committees formed solely to support or oppose ballot initiatives where
4 the ballot initiative committees were not established, financed, maintained, or controlled by a
5 federal candidate and there were no federal candidates appearing on the same ballot.⁶⁶ The
6 Commission issued the advisory opinion without analysis, but four Commissioners who voted to
7 approve the opinion explained in their concurring statements that they agreed a ballot initiative is
8 not "in connection with" an election under section 441i(e) if neither of these facts is present.⁶⁷

9 In this matter, we recommend that the Commission dismiss the allegation that the
10 Respondents violated the prohibition on foreign national donations. While the record reflects

⁶⁶ See AO 2005-10 at 2. The impact of Advisory Opinion 2005-10 (Berman/Doolittle) and Advisory Opinion 2003-12 (Flake) played out in MUR 5367 (Issa), involving Rep. Darrell Issa's alleged violation of section 441i(e)(1)(B) for his involvement with a ballot measure committee advocating in favor of the recall of California Governor Gray Davis in 2003. Based on Advisory Opinion 2003-12 (Flake), the Commission found reason to believe that the "recall election" was an election "other than an election for Federal office" and that the ballot measure committee was established, financed, maintained, or controlled by a federal officeholder. See Factual & Legal Analysis at 2, MUR 5367. The Commission issued Advisory Opinion 2005-10 (Berman/Doolittle) after finding reason to believe in MUR 5367, but while the MUR was still pending. After the Commission issued Advisory Opinion 2005-10 (Berman/Doolittle), OGC recommended that the Commission take no further action and close the file, based on "our understanding that the Commission would not find that the recall ballot measure was an 'election other than an election to Federal office' within the meaning of 2 U.S.C. § 441i(e)(1)(B)." See Second Gen. Counsel's Rpt. at 2-3, MUR 5367; Certification, MUR 5367 (Nov. 3, 2005) (taking no further action and closing the file). As further justification for its recommendation, OGC also noted that Issa donated his personal funds to the ballot measure committee. See Second Gen. Counsel's Rpt. at 3-4, MUR 5367.

⁶⁷ See Concurring Opinion of Comm'rs Mason & Toner at 1-2, AO 2005-10 (Berman/Doolittle) (concluding section 441i(e) applies to elections for public office but not to "non-candidate political activity, such as ballot initiatives and referenda"); Concurring Statement of Comm'rs McDonald & Weintraub at 3-4, AO 2005-10 (Berman/Doolittle) (concluding ballot initiatives have "no nexus to an 'election' as historically and currently defined under FECA" where the ballot initiative committee is not established, financed, maintained, or controlled by a federal candidate or officeholder and no federal candidate appears on the same ballot; whether section 441i(e) applies thus depends if the ballot initiative activity is in connection with the candidate's own election). In Advisory Op. 2007-28 (McCarthy/Nunes), the Commission also concluded without analysis that federal candidates may raise up to \$20,000 in any calendar year for ballot initiative committees not established, financed, maintained, or controlled by federal candidates or officeholders. Under the facts presented in Advisory Opinion 2007-28 (McCarthy/Nunes), a federal candidate would have been on the same ballot as the initiative. In one other Advisory Opinion, the Commission concluded without analysis that Members of Congress may raise up to \$20,000 from individuals on behalf of a ballot measure committee after the initiative qualifies for the ballot. See Advisory Op. 2010-07 (Yes on FAIR).

1 that the donations were made after the measure qualified for the ballot and the ballot measure
2 appeared on the same election ballot that included federal, state, and local candidates, we have
3 no information to suggest that any of those candidates were "inextricably linked" with the Ballot
4 Measure Committee, or indeed, were involved in any way whatsoever with the Ballot Measure
5 Committee or Measure B.⁶⁸ The Ballot Measure Committee paid \$109,178 to slate mailer
6 organizations that create and distribute slate mailers that may advocate the election of candidates
7 as well as promote or oppose ballot measures.⁶⁹ But we have no information about the specific
8 slate mailers funded by the disbursements or the circumstances surrounding the disbursements,
9 including any connection to candidate advocacy that may have been included in the mailers.⁷⁰ In
10 fact, the limited information we have indicates that slate mailer organizations' funders generally
11 pay only for a discrete portion of the mailer and exercise no control over the content of other
12 portions, suggesting that there is no interaction between the different funders who pay for
13 discrete pieces of a slate mailer.⁷¹ Further, the Ballot Measure Committee specifically denies
14 that it engaged in any activity related to candidate elections. The Ballot Measure Committee

⁶⁸ See *supra* p. 11, Advisory Op. 1989-32 (McCarthy).

⁶⁹ See *supra* p. 5.

⁷⁰ See AO 1989-32 (McCarthy) (concluding pre-BCRA ballot measure activity was campaign related where the committee was "inextricably linked" to a candidate running on the same ballot); see also MUR 1859 (finding reason to believe a foreign corporation violated section 441e by funding a ballot measure committee that paid a slate mailer organization to disseminate a mailer promoting the passage of the measure and a slate of candidates). Although MUR 1859 was decided before BCRA, it remains instructive here as it was decided under the narrower statutory language "in connection with an election to any political office." But MUR 1859 is distinguishable from this case in some important respects. Unlike in MUR 1859, the Ballot Measure Committee apparently only paid for slate mailer advocacy against Measure B, and not for the advocacy of candidates. The ballot measure committee in MUR 1859 also was created by the foreign corporation and other respondents, and the committee appeared to have had close ties to the slate mailer organization that disseminated mailers advocating for federal candidates. See Gen. Counsel's Rpt. at 3, 10, 14, MUR 1859. In this case, although Manwin USA and Froytal were significant donors, we have no information to indicate that these entities or their officers had any ties to either the Ballot Measure Committee or the slate mailer organizations.

⁷¹ Further, California law does not appear to require that slate mailers include candidates. See CAL. GOV. CODE § 82048.3 (2012) (defining "slate mailer" to include mass mailings supporting or opposing four or more candidates or ballot measures). Thus we do not know whether the slate mailers paid for by the Ballot Measure Committee even included any candidates.

1 asserts that the scope of the activity in this matter relates solely to a Los Angeles County ballot
2 initiative and the record in no way demonstrates that the Ballot Measure Committee was either
3 formed to conduct activity supporting or opposing candidates for public office or that it did, in
4 fact, support or oppose any candidate for public office.⁷² Thus, because we do not have
5 sufficient information “inextricably linking” the Ballot Measure Committee to any candidates, or
6 showing any connection whatsoever, there is no reason to believe that the activities of the Ballot
7 Measure Committee were campaign related.

8 Further, the Commission has not addressed whether section 441e applies to activity
9 solely related to ballot initiatives (*i.e.*, activity not linked with any candidates) since BCRA was
10 enacted. And Commission advisory opinions applying another BCRA provision — section
11 441i(e) — to ballot initiatives do not provide clear guidance on how the Commission would
12 address this issue in the context of the current scope of section 441e. Although in one advisory
13 opinion the Commission has indicated that ballot initiative activity after the measure qualified
14 for the ballot was conducted in connection with an election under section 441i(e), *see* AO 2003-
15 12 (Flake), in a later advisory opinion it indicated that it was not, *see* AO 2005-10
16 (Berman/Doolittle). And, both advisory opinions are factually distinguishable from this case.
17 Advisory Opinion 2003-12 (Flake) involved a ballot measure committee established, financed,
18 maintained, or controlled by a federal candidate, while Advisory Opinion 2005-10
19 (Berman/Doolittle) involved ballot measures that were to appear on a ballot without any federal
20 candidates.

21 Moreover, it may not be appropriate to extrapolate Commission analysis under section
22 441i(e) to this matter, given that a different statute containing different terms is at issue: section

⁷² Ballot Measure Committee Resp. at 3.

1 441i(e) addresses funds “in connection with any election other than an election for Federal
2 office,” while section 441e focuses on foreign national contributions and donations “in
3 connection with a Federal, State, or local election.” In the absence of any Commission or
4 legislative guidance, we would hesitate to assume there is no legally significant difference
5 between a “Federal, State, or local election” as used in section 441e and “any election other than
6 an election for Federal office” in section 441i(e). And applying Commission precedent under
7 section 441i(e) to discern the reach of 441e may be ill-advised where no clear Commission
8 precedent identifies the circumstances under which current section 441e may be appropriately
9 applied to ballot initiative activity.

10 The lack of information in the current record suggesting that the Ballot Measure
11 Committee’s activity was inextricably linked with the election of any candidate and the lack of
12 clear legal guidance on whether the foreign national prohibition extends to pure ballot initiative
13 activity cautions against pursuing further enforcement action under section 441e in this matter.
14 That there is no meaningful legislative history to help guide the Commission’s understanding,
15 and that the *Bluman* decision has cast doubt on the application of section 441e to ballot
16 initiatives as a general matter, albeit in *dicta*,⁷³ further support declining to pursue this matter
17 through additional administrative proceedings.⁷⁴ At this time, accordingly, we recommend that

⁷³ See also *supra* notes 58, 60 (addressing OGC filings in the *Bluman* litigation suggesting that section 441e did not apply to ballot initiatives, noted by the Ballot Measure Committee in its Response at 2, 4-5).

⁷⁴ Despite the recommendation not to proceed with an enforcement action on these facts, the Commission may still, if it so chooses, use the enforcement matter as a vehicle to provide further public guidance on the underlying legal issue through issuance of a clarifying Factual & Legal Analysis or a unified Statement of Reasons. The Commission may also wish to address the issue of section 441e’s application to ballot measure activity by regulation or other advance notice. Cf. 2 U.S.C. § 441c; 11 C.F.R. § 115.2 (statute prohibits contributions by federal contractors “to any political party, committee, or candidate for public office or to any person for any political purpose or use,” where the Commission determined to limit the application to federal elections via regulation based on Advisory Opinion 1975-99 (San Francisco Republican County Central Committee)).

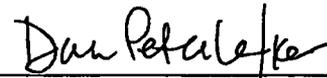
1 the Commission exercise its prosecutorial discretion to dismiss the allegation that Respondents
2 violated 2 U.S.C. § 441e and close the file.

3 **IV. RECOMMENDATIONS**

- 4 1. Dismiss the allegation that MindGeek S.A.R.L. f.k.a. Manwin Licensing
5 International S.A.R.L., MindGeek USA Incorporated f.k.a. Manwin USA, Inc.,
6 Fabian Thylmann, Andrew Link, Froytal Services Limited, and No on
7 Government Waste/No on Measure B – Major Funding by Manwin USA violated
8 2 U.S.C. § 441e.
9
10 2. Approve the attached Factual and Legal Analysis.
11
12 3. Approve the appropriate letters.
13
14 4. Close the file.

15
16 8-15-14

17 Date



Daniel Petalas
Associate General Counsel



Kathleen M. Guith
Deputy Associate General Counsel
for Enforcement



Peter G. Blumberg
Assistant General Counsel



Neven F. Stipanovic
Attorney

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