

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**Findings, Order, and Memorandum in the Matter of the Investigation of Expenditures
Made by the Minnesota DFL Senate Caucus Party Unit**

I. Background

This matter originated with the filing of a series of complaints by the Republican Party of Minnesota (RPM) alleging that the Minnesota Democratic Farmer Labor (DFL) State Central Committee (the Central Committee Party Unit), the Minnesota DFL Senate Caucus party unit (the Senate Caucus Party Unit), and various DFL Senate candidates violated Minnesota Statutes Chapter 10A as a result of classifying printed communications as independent expenditures when the communications were not, in fact, independent of the affected candidates.

On October 11, 2012, the Board received the first complaints in this series, relating to communications advocating the elections of Alice Johnson, Jim Carlson, Julie Bunn, Melisa Franzen, and Vicki Jensen. On October 18, 2012, the RPM filed an additional complaint regarding communications advocating the election of Alan Oberloh.

On November 2, 2012, the RPM filed three additional complaints alleging the same conduct and violations relating to communications advocating the elections of Laurie McKendry, Matt Schmit, and Tom Saxhaug.

All of the complaints alleged that printed campaign communications paid for by the DFL and identified by the DFL as independent expenditures were made with the "active participation" of the candidates, and therefore were not independent expenditures. The allegations were based on the photographs used in the mailings. The RPM claimed the photographs were not available on any candidate committee website and could not be found as publicly available images on the internet. Because the photos were not available in the public domain and appeared to be "staged," the complaints concluded that the images were evidence of cooperation between the candidates and the DFL in producing the communications.

According to the complaints, if the allegations were found to be true, the cost of the communications that were reported as independent expenditures would, instead, constitute approved expenditures and count against the aggregate limit on contributions that a candidate may accept from party units and terminating principal campaign committees, putting each of the candidates over this limit. The costs would also constitute in-kind expenditures by the candidates and could result in candidates who agreed to a campaign spending limit exceeding that limit.

Board staff reviewed the allegations of the complaints and determined that the photographs used in the communications related to Julie Bunn were publicly available on the internet. On the basis of that finding, the Executive Director, acting under authority delegated by the Board, declined to accept for investigation the complaint related to communications advocating the Julie Bunn election.

Minnesota Statutes section 10A.02, subdivision 11, provides that "the Board must investigate any violation that is alleged in a written complaint filed with the Board." Minnesota Rules part 4525.0200, subpart 2, however, establishes a low burden for the filer of a complaint, releasing

the Board from its obligation to investigate a signed complaint only if the complaint "is frivolous on its face."

Based on the allegations of the complaints and on the fact that, other than for Julie Bunn, Board staff could not locate public copies of the images used in the communications, the Executive Director, under authority delegated by the Board, concluded that the allegations of the complaints met the threshold of not being frivolous and, thus, that an investigation was mandated by section 10A.02, subdivision 11.

The Central Committee Party Unit, the Senate Caucus Party Unit, and the candidates named in the complaints were notified of the filing of the complaints. Charles N. Nauen of the law firm of Lockridge Grindal Nauen P.L.L.P. informed the Board that he would be representing the Central Committee Part Unit, the Senate Caucus Party Unit, and the candidates.

In a letter dated October 26, 2012, Mr. Nauen, addressed the question of the subject photographs and indicated that some of the photographs were publicly available and that others were taken at public events without consulting the candidate or the candidate's principal campaign committee or agent. With regard to the remaining photographs, Mr. Nauen stated:

The remaining photos were taken by photographers hired by the DFL Party's media consultants. The photos were taken at photo shoots scheduled by staff who were not involved in any decisions regarding independent expenditures. The candidates who appeared for photo shoots did not know that the photos would be used in independent expenditures supporting their candidacy.

...

In all cases, the candidates, their principal campaign committees, and agents had no prior knowledge of, did not consent to, and did not request or cooperate in the preparation of the independent expenditures.

In a letter dated November 27, 2012, Mr. Nauen further explained:

The decision to make independent expenditures on behalf of the candidates was made by Mike Kennedy, Campaign Director for the Senate DFL Caucus. Mike Kennedy instructed the consultants, Lit Happens, Pivot, and Compass Media Group, Inc. ("Compass") to prepare the independent expenditures and oversaw development of the mailings referenced in the complaints.

Board staff interviewed representatives of The Pivot Group, Inc. (Pivot), one of the consultants who developed the subject communications. In the course of those interviews, staff learned that photographs used in communications for four of the candidates were taken by a professional photographer hired by Pivot in a series of photo shoots arranged by Senate Caucus Party Unit staff. Staff also learned that photos from these shoots were used in multiple independent expenditure communications; not just the single piece per candidate that was the subject of the complaints. Staff also learned that two additional DFL Senate candidates, not named in any complaint, each participated in a photo shoot with Pivot.

When the Board accepts a complaint, it exercises its authority to investigate all violations of Chapter 10A that might arise from the conduct alleged in the complaint or from the reports under review regardless of whether the complainant clearly and specifically raised those violations in the complaint. Based on the information discovered about additional candidates and additional communications, the Board, by formal vote in executive session at its meeting of June 10, 2013, expanded its investigation to include the two additional candidates who participated in Pivot photo shoots, Kent Eken and Kevin Dahle, and to expand the investigation to include all literature distributed by the DFL that used images from the photo shoots.

Subsequently staff interviewed representatives of another consultant, Compass Media Group, Inc. (Compass). During those interviews staff learned that Compass had also hired a professional photographer to conduct photo shoots of DFL Senate candidates, not all of whom were the subjects of RPM complaints. At its meeting of August 6, 2013, by formal vote in executive session, the Board expanded its investigation to include Lyle Koenen, Susan Kent, and Greg Clausen, the additional candidates who participated in the Compass photo shoots.

If the investigation was not extended to include these additional candidates and communications, the door would be left open to additional future complaints about independent expenditures affecting the elections of other candidates who participated in the photo shoots, but who were not specifically named in the RPM complaints.

With the addition of these candidates, the Board's investigation involved communications by the Senate Caucus Party Unit relative to the elections of thirteen of its candidates. The Senate Caucus Party Unit, the Central Committee Party Unit, and the subject candidates are collectively referred to hereinafter as "Respondents."

II. The Stipulation of Facts

Board staff interviewed more than twenty Senate Caucus Party Unit staff, senate candidates, vendor representatives, and others under oath. The Senate Caucus Party Unit and the candidates cooperated fully throughout this process. The Senate Caucus Party Unit made staff available for interviews as requested by the Board and responded to requests for documentary evidence such as email correspondence. Candidates and members of their staffs appeared for Board interviews as requested.

As the investigation developed, it became clear that the communications that were reported as independent expenditures involved active candidate participation in the process of arranging for and conducting the photo shoots that provided images for the communications.

As the investigation progressed, Mr. Nauen and Board staff considered whether the Board might wish to consider resolving this matter through a stipulation of facts and a settlement agreement. The Board discussed this approach in executive session and directed staff to work with Mr. Nauen to determine whether resolution might be possible without compromising the investigation or the result.

As part of this process, Board staff and Mr. Nauen developed a Stipulation of Facts, which was presented to the Board in executive session at its meeting of December 17, 2013. The Executive Director and Mr. Nauen each presented a statement to the Board regarding the development of the Stipulation of Facts. After considering the matter, the Board voted to accept the Stipulation of Facts as presented.

The Stipulation of Facts achieves two purposes. First, Exhibit 1 to the Stipulation of Facts is a spreadsheet that lists the communications that are the subject of this investigation. Exhibit 1 also lists the cost of each communication as well as other information. Through Exhibit 1 to the Stipulation of Facts, the Board and Respondents agree to the list of specific communications that are included in the scope of this investigation.

Second, through the remaining stipulated facts, the Respondents have agreed to facts about candidates who have not yet been interviewed by the Board. The stipulated facts state what the Board expected to find through those further interviews. By agreeing that these facts may be assumed to be true for the purpose of this investigation, Respondents eliminate the need for the Board to conduct further investigatory interviews and to obtain and review additional documents.

Exhibit 1 to the Stipulation of Facts is made a part of this document and is attached hereto. The specific communications listed in Exhibit 1 are a part of the record of this matter.

III. The Association Responsible for the Communications

The Board concludes that the association responsible for the development and publication of the communications that are the subject of this investigation is the Senate Caucus Party Unit, acting primarily through its Campaign Director, Mike Kennedy.¹

The activities to create and publish the expenditures (and the activities that defeated their classification as independent expenditures) were undertaken completely by the Senate Caucus Party Unit. There is no evidence that the Central Committee Party Unit or its separate staff communicated with any candidate regarding the subject photo shoots.

The Board recognizes that the Central Committee Party Unit reported the costs of the communications on its report and that the disclaimers on the communications referred to the Central Committee Party Unit. However, Mike Kennedy testified that he was given a budget by the Central Committee Party Unit and that, although the Central Committee Party Unit wrote checks for the invoices he submitted, it was not otherwise involved in the design, development, or decision-making regarding the Senate Caucus Party Unit's independent expenditure efforts.

Rather than making vendor payments on behalf of the Senate Caucus Party Unit, an approach that would have provided greater clarity of disclosure would have been for the Central Committee Party Unit to contribute cash to the Senate Caucus Party Unit which could have then paid the vendors directly. Although the practice implemented by the Central Committee Party Unit and the Senate Caucus Party Unit is not prohibited by statute, the transactions were not properly reported so as to inform the public as to which party unit was responsible for the expenditures.

Because the Central Committee Party Unit was paying obligations incurred by the Senate Caucus Party Unit, those payments constituted contributions to the Senate Caucus Party Unit. The Central Committee Party Unit should have reported the payments to vendors to produce the subject communications as general expenditures. Then it should have reported as in-kind contributions to the Senate Caucus Party Unit the goods and services purchased from the vendors in the same amounts and on the same dates. The Senate Caucus Party Unit, in turn,

¹ The Board reaches this conclusion independently of the Stipulation of Facts and Settlement Agreement to which it is a party.

should have reported the receipt of the in-kind contributions for the vendor goods and services and the use of those goods and services for its independent expenditures.²

Mr. Kennedy also indicated that the mailings were done in the name of the Central Committee Party Unit as a matter of convenience so that the Central Committee Party Unit bulk mailing permit could be used. The Board notes that each communication included a statement of attribution indicating that it was prepared and paid for by the "Minnesota DFL Party".

Minnesota Statutes section 211B.04 requires that an association provide on its literature a statement indicating who prepared and paid for the literature. Although the statement should have indicated that the communications were prepared and paid for by the Senate Caucus Party Unit, the Board will take no action with respect to this issue because at the time of the violation section 211B.04 was not under the Board's jurisdiction.

IV. The Communications that are the Subjects of this Investigation Were not Properly Classified as Independent Expenditures.

An "expenditure" in Minnesota campaign finance law is a "purchase or payment . . . for the purpose of influencing the nomination or election of a candidate. . ." Minn. Stat. § 10A.01, subd. 9.

An independent expenditure is a form of expenditure that is defined in terms of conduct that is not associated with the expenditure. The definition is as follows:

"Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.

Minn. Stat. § 10A.01, subd. 18

An expenditure to a third party that is not an independent expenditure is typically an approved expenditure, which is defined as:

an expenditure made on behalf of a candidate by an entity other than the principal campaign committee of the candidate, if the expenditure is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of the candidate, the candidate's principal campaign committee, or the candidate's agent. An approved expenditure is a contribution to that candidate.

² This description reflects how the transactions should have been reported under the assumption that the communications constituted independent expenditures. Section V of this document explains the consequences of the fact that the Board has determined that the communications constitute approved expenditures, which are a form of contribution to the subject candidates.

Minn. Stat. § 10A.01, subd. 4

The definition of independent expenditure seems straightforward at first: it is a "purchase or payment." However, the definition of independent expenditure also says that the purchase or payment must "expressly advocat[e] the election or defeat of a clearly identified candidate." This means that an independent expenditure must be more than a purchase or payment; it must be a form of communication.

The act of making a purchase or payment, in its most reduced form, is a financial transaction, not a communication. The purchase or payment transaction, itself, cannot advocate for or against anything. Thus, under the statute, an independent expenditure must be the communication that results from the payment or purchase because only the resulting communication can meet the advocacy requirement.

This interpretation is supported by section 10A.17, subdivision 4, which provides for a disclaimer by an association that makes independent expenditures. The disclaimer must be included on all communications, including literature, and must say that "the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it."

The definition of independent expenditure and the independent expenditure disclaimer requirement lead to the conclusion that an independent expenditure is not merely a spending decision or a payment transaction, but includes all of the steps needed to make the communication. Creating that communication includes budgeting decisions, media design, acquisition of graphics and text, production, distribution of the final product, and other associated processes.

To be an independent expenditure, a communication and all of the processes leading to its eventual publication must meet the requirements of the independent expenditure definition cited above.

The independent expenditure definition includes seven types of activities, communications, or relationships that will defeat the independence of an expenditure. Examined from the other perspective, the statute says that an expenditure is not an independent expenditure if any one of the following is true:

- the expenditure is made with the express consent of the candidate,
- the expenditure is made with the implied consent of the candidate,
- the expenditure is made with the authorization of the candidate,
- the expenditure is made with the cooperation of the candidate,
- the expenditure is made in concert with the candidate,
- the expenditure is made at the request of the candidate, or
- the expenditure is made at the suggestion of the candidate.

By using a comprehensive list of activities, communications, or relationships that will defeat the independence of an expenditure, the legislature has conveyed its intention to require that an association intending to make an independent expenditure must maintain a high degree of separation between the activities related to the independent expenditure and the candidate supported by the expenditure.

Because each of the activities, communications, or relationships listed in the statute is prohibited if the expenditure is to be classified as an independent expenditure, the existence of

any one will defeat the independence of the expenditure. For that reason, it is not necessary in the present matter that the Board examines each of the seven factors.

In this matter, the Board focuses on the question of whether the communications were made "without the . . . cooperation of" the candidate or any agent of the candidate or the candidate's principal campaign committee. The issue of agency itself is not in question because in each case the candidate directly and actively participated in the photo shoots. Additionally any communications by or on behalf of the Senate Caucus Party Unit to arrange for the photo shoots took place either directly with the candidate or with a person in a position such as campaign manager who would clearly be an agent of the candidate.

The issue before the Board, therefore, is whether the type of participation disclosed in the Board's investigation and through the stipulated facts constitutes "cooperation" in the resulting independent expenditures.³

Acting in cooperation with an association developing independent expenditure communications does not require coordination of efforts to reach an end result as acting "in concert with" or "in coordination with" the association might require. A candidate may be found to have cooperated with an association in the development of communications intended to be independent expenditures even if the candidate has not coordinated the candidate's efforts with those of the association to reach a particular mutually beneficial result. Acting in cooperation is established if it is shown that there was a significant level of participation by the candidate in at least one of the various processes or decisions that are undertaken to make an expenditure.

The question of whether a candidate has actually acted in cooperation with an association in the association's independent expenditure communications is a question of fact that will usually require a case-by-case analysis. Such an analysis was undertaken with respect to some of the candidates listed on Exhibit 1. After significant parts of the investigation were complete, the parties agreed to the attached Stipulation of Facts. This Stipulation provides the basis for the Board's findings with respect to the remaining candidates' cooperation with the Senate Caucus Party Unit in its independent expenditures listed in Exhibit 1. The Board's own investigation provides additional support with respect to those candidates about whose participation a complete or partial investigation was undertaken.

To determine whether there was cooperation, the Board considered whether each candidate participated in a significant way in some part of the processes required for the creation and development of the subject communications.

The facts established by the Board's investigation and supplemented by the Stipulation of Facts show that each candidate's involvement consisted, at a minimum, of actively participating in a photo shoot. In each case the candidate was advised of the starting time and location for the

³ The Board recognizes that the Federal Election Commission has reviewed a definition of independent expenditures that is similar to Minnesota's definition and has reduced the definition to an administrative rule that requires that there be no "coordination" between the candidate and the association making the expenditure if the expenditure is to be an independent expenditure. However, the word "coordination" does not appear in Minnesota's statute and the Board declines to substitute its choice of words for those enacted by the legislature. Further, the Board is concerned that reducing the seven factors that would defeat the independence of an expenditure to a single concept, designated as "coordination," would result in a narrowing of the scope of the legislative language and defeat the legislative intent.

photo shoot and arrived as required. In each case the candidate fully cooperated in the photo shoot itself, posing and taking direction as instructed by the photographer.

In most cases the candidates' involvement also involved selecting and arranging for locations for the photo shoot, arranging for volunteers to participate in the photo shoot, directing or leading the consultants and others to the various photo shoot locations, and bringing changes of wardrobe to provide a variety of looks for the various scenarios used in the photo shoots.

In each case, the photo shoot was conducted solely for the purpose of acquiring images that the Senate Caucus Party Unit intended to use in independent expenditure communications. The candidates' participation not only directly supported, but was a prerequisite to the ability of the Senate Caucus Party Unit to make those communications in the form ultimately distributed. The Senate Caucus Party Unit acknowledges that it could not locate publicly available quality images that would provide the visual messages that it wished to convey. The use of high-quality images of the candidates interacting with business persons, children, and constituents, often in recognizable locations within the candidate's district, made it possible to create more effective communications than could have been created without the images.

The candidates knew that the photo shoots were not projects of their own committees and that the photo shoots were being conducted by the Senate Caucus Party Unit for use in the party unit's 2012 election efforts. Board records indicate that no candidate reported any approved expenditure related to the photo shoots, so it is apparent that each candidate considered the photo shoots to be an independent activity of the Senate Caucus Party Unit. Some candidates acknowledged that they suspected that the photo shoots were for the purpose of developing independent expenditures and believed inquiring further regarding the purpose of the photo shoots could destroy the independence of those expenditures.

The Board concludes that it is not necessary to establish the candidates knew or should have known that the photo shoots were intended for Senate Caucus Party Unit independent expenditures or that their participation would destroy the independence of those expenditures. The independence of the activity was destroyed by the candidates' active cooperation and full participation in the photo shoots, which were conducted solely for the purpose of developing independent expenditure communications for the Senate Caucus Party Unit. The acts of the Senate Caucus Party Unit in securing the cooperation and full participation of candidates in a key part of the process of creating its communications destroyed the independence of the resulting communications regardless of whether the candidates or the Senate Caucus Party Unit recognized that at the time.

Nevertheless, the Board recognizes that the candidates believed they could rely on the Senate Caucus Party Unit's decision to ask them to participate in the photo shoots, and that the candidates assumed that the Senate Caucus Party Unit would not request something that would lead to contribution and spending limits violations. While this reliance was misplaced and does not affect the conclusion regarding whether the conduct results in violations of contribution and spending limits for the candidates, it is an appropriate factor to consider in assessing civil penalties in this matter.

In a sworn interview, Mike Kennedy stated that at the time he decided to involve the candidates in photo shoots, he believed that such involvement would not affect the independence of the resulting expenditures. This matter represents the first time the Board has addressed the concept of cooperation in the making of expenditures. Thus, at the time of Mike Kennedy's decisions, there was no guidance on the subject at the state level other than the language of the

statute itself.⁴ The Board's investigation did not disclose any evidence to suggest that Mike Kennedy knew or understood that securing the candidates' participation in the photo shoots would be a prohibited type of cooperation for independent expenditures.

V. The Result of the Reclassification of the Expenditures as Approved Expenditures

If an expenditure that pays a third-party vendor is made with the cooperation of the affected candidate, the expenditure is an approved expenditure, which constitutes a form of in-kind contribution to the candidate. An in-kind contribution generates an equal in-kind expenditure on the same date as the contribution.

All candidates are subject to limits on the aggregate amount of contributions that they may accept from the combination of all party units and all terminating principal campaign committees together. For senate candidates in 2012, this limit was \$5,000. Each party unit is also subject to a requirement that it not donate to a candidate more than the candidate would be permitted to accept.

The Board's conclusion that the items shown on Exhibit 1 were improperly classified as independent expenditures means that the expenditures for each candidate should have been reported as in-kind contributions to the various candidates in the form of approved expenditures.

For the Senate Caucus Party Unit, this reclassification results in excessive contributions to each candidate, even if all other contributions from party units and terminating principal campaign committees are excluded.⁵ Each of the candidates was at or very close to the candidate's limit on party unit and terminating principal campaign committee contributions before counting the Senate Caucus Party Unit's approved expenditures. As a result, the amount by which each candidate is now considered over the limit is approximately equal to the total approved expenditures made on behalf of that candidate. More specifically, the total approved expenditures attributable to communications that are the subject of this matter is \$315,347.19 and the resulting amount by which the candidates, in aggregate, are deemed to have exceeded the contribution limit is \$312,641.19. The small difference is attributable to the amounts by which some candidates were under their limit on party unit contributions.

⁴ The Board also notes that the guidance at the federal level, in the form of FEC rules, could reasonably lead a person to conclude that under federal law a candidate's participation in a photo shoot would not affect the independence of the resulting expenditures; a result opposite to the one the Board reaches under state law. The Board also notes that Mr. Kennedy did not contact Board staff or request an advisory opinion to obtain guidance in the decisions he made leading to this investigation.

⁵ Minnesota Statutes section 10A.27, subdivision 1(c) states in the relevant part that a party unit may not contribute more to a candidate than the candidate may accept. When determining whether a party unit has violated this provision, the Board does not hold the donor party unit responsible for knowing how much the candidate has received from other party units and terminating principal campaign committees. Rather, the Board finds a violation if the donor party unit exceeds the applicable limit counting only its own contributions. In this matter, the Senate Caucus Party Unit exceeded its limit for each candidate even ignoring contributions from other associations that are included in the aggregate amount that a candidate may accept.

Chapter 10A requires that the use of each in-kind contribution be recorded as a corresponding in-kind expenditure in the amount of the in-kind contribution. Because the communications involved constitute communications to influence the election of candidates, the corresponding in-kind expenditures would be campaign expenditures, subject to the limit on such expenditures if the subject candidate signed a public subsidy agreement.

In this matter, each of the candidates signed a public subsidy agreement. However, Melisa Franzen was released from her public subsidy agreement because her opponent did not agree to campaign expenditure limits and spent enough money to meet the threshold for release of one's opponent. Therefore, Melisa Franzen was not subject to spending limits and could not have a campaign expenditure limits violation.

Several of the candidates were first-time candidates and were entitled to an increase in their spending limit. When the candidate's own campaign expenditures are added to the campaign expenditures attributed to the candidates as a result of this investigation, seven of the twelve candidates exceed the spending limit. The aggregate amount by which the seven candidates are deemed to have exceeded their spending limits is \$133,557.13.

VI. The Settlement Agreement

The Board and Respondents entered into a Settlement Agreement and agreed to a Stipulation of Facts which, together with the investigation completed to date, eliminated the need to complete a full investigation of the communications related to each candidate listed in Exhibit 1. Through the Stipulation of Facts the Respondents have agreed that the key facts that the Board believes would have been proven by a full investigation may be assumed to be true for the purpose of this matter. The Settlement Agreement and Stipulation of Facts avoid the need to complete between fifteen and eighteen additional sworn interviews which Board staff estimated would have been required to complete a full investigation and, thus, avoided significant costs in Board staff and financial resources. The Settlement Agreement and Stipulation of Facts are a part of the record in this matter.

VII. The Civil Penalty

Most campaign finance violations result from simple mistakes or failure to comply with a clear statutory requirement. In those cases, the assessment of civil penalties is typically based on previous Board actions related to similar matters. The present matter differs from the typical case because it involves a party unit's interpretation of a statute under circumstances not previously addressed by the Board. It also involves questions of fact relating to the actions of both the Senate Caucus Party Unit, the candidates, and others. Matters such as this require a case-by-case investigation and analysis both with respect to the facts and with respect to the appropriate remedies to be imposed.

A complete investigation was initiated by the Board. However, it was not necessary that the full investigation be brought to its conclusion because the Senate Caucus Party Unit and the candidates agreed to stipulate to facts that the Board believed would be proven through a full investigation.

In this matter, the Board concludes that the Senate Caucus Party Unit did not maintain the independence of its expenditures. However, the investigation did not disclose evidence that Mike Kennedy or anyone representing the Senate Caucus Party Unit understood that its actions

in securing the candidates' participation and cooperation in the subject photo shoots would result in the costs of the resulting communications being contributions to the candidates.

Similarly there is no evidence that any candidate understood or believed that the candidate's cooperation with the photo shoots would result in contributions and expenditures that would count against the candidate's limits and that could result in violations of the statutes that establish those limits.

In ordering the various remedies included in the Order that follows, the Board has taken into consideration the evidence related to the parties' conduct, the amount of the resulting violations, the parties' agreement to stipulate to facts that permit the resolution of this matter, and the parties' agreement that these Findings, Conclusions, and Order will constitute the final disposition of this matter, not subject to review in the Office of Administrative Hearings or the courts. With respect to the candidates, the Board also considers the fact that they relied on the Senate Caucus Party Unit's interpretation of the law in agreeing to participate in the photo shoots.

Although the Board recognizes that it agreed to a limit on any civil penalty imposed, the Board negotiated that limit in view of all of the relevant factors to ensure that the limit allow it to impose a penalty at an appropriate level to be a meaningful component of the resolution of this matter and to be a deterrent to future violations by others.

The Board has twice previously made findings in which transactions characterized as independent expenditures by associations were deemed by the Board to constitute approved expenditures. In each matter, the amount of the civil penalty imposed resulted from negotiation between the Board and the parties.⁶ This Board continues that approach with this matter.

**Based on the Board's investigation and the Stipulation of Facts,
the Board makes the following:**

Findings of Fact

1. During the 2012 elections, the DFL Senate Caucus Party Unit made expenditures that were reported as independent expenditures for the development, production, and mailing of printed literature mailed to voters in the districts of the candidates listed in Exhibit 1. Each piece of literature urged voters to vote for the subject candidate or against the candidate's opponent.
2. The cost of these communications was reported as independent expenditures by the DFL Central Committee Party Unit although the expenditures were made by the Senate Caucus

⁶ In one such matter, the Board investigated independent spending by the Republican Party of Minnesota in 2002. In that matter, the Board reclassified \$500,000 in RPM independent expenditures as approved expenditures. Because the reclassification took place early in the election year, the candidate was able to avoid campaign spending limits violations by reducing subsequent spending. However, the party unit and the candidate would both have exceeded the limit on the amount that a party unit may contribute to a candidate by nearly the full \$500,000. The total civil penalty imposed was \$100,000 and the full amount was imposed on the candidate's principal campaign committee.

Party Unit and paid by the Central Committee Party Unit as an accommodation to the Senate Caucus Party Unit.

3. The decision to make an independent expenditure supporting each of the referenced candidates was made by the Senate Caucus Party Unit's Political Director Mike Kennedy. Mike Kennedy approved each of the pieces of literature that are the subjects of this investigation.
4. The pieces of literature that are the subject of this investigation are identified in Exhibit 1. The cost of each piece of literature as well as the total cost for all of the subject literature is listed on Exhibit 1. Two payments to Pivot for the photo shoots were not allocated to the specific candidates by the Senate Caucus Party Unit. The correct allocations for these payments are shown in Exhibit 1.
5. Each of the subject pieces of literature was designed, produced, and distributed by a professional media company selected by Mike Kennedy and retained by the Senate Caucus Party Unit for the purpose of designing, producing, and distributing the literature. The specific media company responsible for the literature prepared for each candidate is identified on Exhibit 1.
6. Lit Happens is a political media consulting company based in Minneapolis, MN operating as a sole proprietorship of Vic Thorstenson. Lit Happens was retained by the Senate Caucus Party Unit to design, produce, and distribute communications advocating the elections of Vicki Jensen, Alan Oberloh, and Tom Saxhaug.
7. The Pivot Group, Inc. (Pivot) is a political media consulting company based in Arlington, VA. Pivot was retained by the Senate Caucus Party Unit to design, produce, and distribute communications advocating for the elections of Jim Carlson, Kevin Dahle, Kent Eken, Melisa Franzen, Laurie McKendry, and Matt Schmit.
8. Compass Media Group, Inc. (Compass) is a political media consulting company based in Chicago, IL. Compass was retained by the Senate Caucus Party Unit to design, produce, and distribute communications advocating for the election of Greg Clausen, Alice Johnson, Susan Kent, and Lyle Koenen or the defeat of their opponents.
9. The Senate Caucus Party Unit and its media consultants desired to include, in each piece of literature, quality high resolution images of the candidates alone and interacting with families, businesses owners, and various other constituencies in recognizable local venues. The Senate Caucus Party Unit and its media consultants were not able to obtain satisfactory images for use in the literature from publicly available sources or from their archival files. As a result, the Senate Caucus Party Unit and its media consultants decided to take photographs specifically for use in the literature pieces that are the subjects of this investigation.
10. At the time Mike Kennedy made the decision to use photo shoots to obtain images for the Senate Caucus Party Unit's independent expenditures, he did not know and did not believe that involving the candidates in this way would affect the characterization of the resulting expenditures as independent expenditures.
11. The Senate Caucus Party Unit arranged for each of its media consultants to have professional photographers take photos of its candidates. In each case, Senate Caucus

Party Unit campaign staff who had been assigned to work in the candidate's Senate District, or who supervised the campaign staff working in the Senate Districts, or another individual acting on behalf of the Senate Caucus Party Unit, served as the intermediary between the candidate or the candidate's representative and the media consultant and its photographer to schedule photo shoots on location in Minnesota.

12. In the case of Lit Happens, the photographer was Vic Thorstenson, owner of the company, who was also the primary contact with the Senate Caucus Party Unit. In the case of Pivot and Compass, each media company hired a photographer to obtain the required photographs and the photographer and the media company's primary contact for the Senate Caucus Party Unit projects both traveled to Minnesota for each photo shoot.
13. Lit Happens either took photos during the candidate's door knocking event with the Senate Caucus Party Unit or when the candidate was in St. Paul on other business. In each case, someone acting on behalf of the Senate Caucus Party Unit contacted the candidate or a representative of the candidate to arrange for the candidate to be at a location where Vic Thorstenson would take the photographs. The candidates followed all direction, if any, provided by the photographer.
14. In the cases of those candidates about whom literature pieces were prepared by Compass and Pivot, Mike Kennedy requested, through the Senate Caucus Party Unit's Field Director, that the campaign staff who had been assigned to work in the candidate's Senate District, or who supervised the campaign staff working in the Senate Districts, work with the candidates to schedule photo shoots. The Field Director was responsible for managing and implementing the Senate Caucus Party Unit's field program, which consisted primarily of voter contact efforts in the Senate Districts and for managing campaign staff who worked in the Senate Districts. Although he would confer with the Field Director regarding the 2012 campaign, Mike Kennedy did not communicate with the Field Director or other Senate Caucus Party Unit campaign staff who worked with candidates about decisions concerning whether to make independent expenditures for any particular candidate, or about the timing, substance or form of any such independent expenditure.
15. In the cases of those candidates about whom literature pieces were prepared by Compass and Pivot, Senate Caucus Party Unit campaign staff contacted the candidates or the candidates' campaign managers or other representatives to arrange schedules for the photo shoots with the photographers. Each candidate agreed to a schedule involving multiple locations for the photo shoots and arrived at the specified starting location at the scheduled time.
16. In connection with the photo shoots taken by Compass and Pivot, the candidates were asked to bring wardrobe changes so that different looks could be obtained in different settings. Each candidate who was asked to bring wardrobe changes did so. All candidates followed the photographers' directions regarding wardrobe changes and other matters relating to the photo shoots and fully participated in the photo shoots.
17. In most cases of those candidates about whom literature pieces were developed by Compass and Pivot, the candidate or a member of the candidate's principal campaign committee, acting at the request of Senate Caucus Party Unit campaign staff, selected or recommended locations for the photo shoot in which the candidate would participate. In most cases, the candidate or a member of the candidate's principal campaign committee led the photographer and the media representative to the selected locations.

18. In most cases of those candidates about whom literature pieces were developed by Compass and Pivot, the candidate or a member of their principal campaign committee, arranged for volunteers to participate in the photo shoots. Volunteers included campaign volunteers, relatives, friends, and children. In each case where volunteers were used, they showed up at the time and location scheduled and fully participated in the photo shoot, as the candidate or the member of their principal campaign committee had requested.
19. In all cases, regardless of which media company was used, each candidate understood that the photo shoot was an activity undertaken by the Senate Caucus Party Unit in connection with the 2012 general election and was not an activity of the candidate's principal campaign committee. However, no candidate understood that their cooperation in the photo shoots was a prohibited activity when related to independent expenditures.
20. The candidates had no involvement in decisions or discussions regarding whether the Senate Caucus Party Unit would make independent expenditures on their behalf. The candidates also did not have any involvement in decisions or discussions regarding the timing, substance, or form of independent expenditures by the Senate Caucus Party Unit.
21. The total cost reported by the Senate Caucus Party Unit as independent expenditures is \$315,347.19. Based on each candidate's other contributions from party units and terminating principal campaign committees, the amount by which these approved expenditures exceeded the limits that the candidates were permitted to accept is \$312,641.19.
22. The in-kind approved expenditures constituted corresponding in-kind expenditures by the candidates in the aggregate amount of \$315,347.19. When added to the candidates' other campaign expenditures, these independent expenditures result in total candidate expenditures that exceed the applicable limits by \$133,557.13.
23. Exhibit 2, which is attached to and made a part of this document, constitutes additional findings specifying the detail of each candidate's contribution and spending amounts and the amounts, if any, by which each candidate is deemed to have exceeded the candidate's contribution and expenditure limits.

Based on the Findings of Fact and the provisions of Minnesota Statutes Chapter 10A, the Board makes the following:

Conclusions of Law

1. The reporting by the DFL Central Committee Party Unit of independent expenditures related to the subject communications was in error. The best practice would have been for the Central Committee Party Unit to transfer funds to the Senate Caucus Party Unit and to record the transfer as a contribution to the Senate Caucus Party Unit. In that case, the Senate Caucus Party Unit would have reported the transactions as independent expenditures on its own report. Alternatively, the Central Committee Party Unit could have paid the vendors, reported the transactions as general expenditures and separately reported in-kind contributions to the Senate Caucus Party Unit for the value of the purchased services. The Senate Caucus Party Unit would then have reported the in-kind contributions

received and use of those in-kind services as independent expenditures for its various candidates.⁷

2. The communications and interactions between the Senate Caucus Party Unit and each candidate, including each candidate's assistance and full cooperation in arranging and completing photo shoots, the sole purpose of which was to obtain images for use in the subject communications, constitutes cooperation between the candidates and the Senate Caucus Party Unit within the meaning of Minnesota Statutes section 10A.02, subdivision 18, so as to disqualify the cost of the communications from being classified as independent expenditures.
3. When the independence of an expenditure is destroyed through cooperation, the expenditure becomes an approved expenditure as defined in Minnesota Statutes section 10A.01, subdivision 4.
4. In this matter, the expenditures listed in Exhibit 1 were made with the cooperation of the various candidates and, thus, are approved expenditures on behalf of those candidates. An approved expenditure is a form of contribution to the candidate who is the subject of the expenditure.
5. As a result of the reclassification of the subject expenditures from independent expenditures to approved expenditures, the Senate Caucus Party Unit has violated Minnesota Statutes section 10A.27 by exceeding the limit on contributions it may make to each individual candidate. The total by which the Senate Caucus Party Unit exceeded its contribution limit to all candidates is \$250,347.19.⁸ The amount by which the Senate Caucus Party Unit exceeded its limit to each individual candidate is shown on Exhibit 2.
6. As a result of the reclassification of the subject expenditures from independent expenditures to approved expenditures, each of the candidates is deemed to have accepted contributions in excess of the limit on the aggregate amount that a candidate may accept from all party units and terminating candidate principal campaign committees combined in violation of Minnesota Statutes Section 10A.27. The total by which the candidates exceeded this aggregate contribution limit is \$312,641.19.⁹ The amount, if any, by which each individual candidate exceeded the candidate's limit is shown on Exhibit 2.

⁷ This reporting would have correctly represented the transactions as the Senate Caucus Party Unit understood them to be; that is, as independent expenditures. These conclusions and order result in the reclassification of these transactions from independent expenditures to approved expenditures.

⁸ As previously noted, when determining the amount of a party unit's contribution limit violation, the Board does not count contributions from other party units or terminating principal campaign committees. The individual party unit contribution limit for a senate candidate in 2012 was \$5,000. Thus, the first \$5,000 of the converted independent expenditures for each candidate would not constitute an excess contribution.

⁹ The candidates' total contribution limits violation amount is higher than the party unit's violation amount because for candidates, who are assumed to be aware of other contributions, all party unit and terminating principal campaign committee contributions are included in the limit.

7. The in-kind approved expenditures also constitute corresponding in-kind expenditures for the subject candidates and count toward any campaign expenditure limit applicable to the candidate. As a result of the additional in-kind expenditures, some of the candidates have exceeded the limit on campaign expenditures that they agreed to when they signed public subsidy agreements. One candidate was not bound by a campaign expenditure limit agreement and several candidates do not exceed the limit even with the attributed in-kind expenditures. The aggregate amount by which the candidates exceeded their campaign expenditure limits is \$133,557.13. The amount by which specific candidates exceeded their limits is shown on Exhibit 2.
8. The Senate Caucus Party Unit and the candidates had no knowledge or understanding that their actions and decisions resulting in candidate participation in the subject photo shoots would constitute cooperation that would defeat the independence of the resulting expenditures.

**Based on the preceding Findings of Fact and Conclusions of Law,
the Board issues the following:**

Order

1. The independent expenditures reported by the Central Committee Party Unit are reclassified as general expenditures. The conversion of those expenditures to use by the Senate Caucus Party Unit constitutes in-kind contributions by the Central Committee Party Unit to the Senate Caucus Party Unit.
2. The Senate Caucus Party Unit is deemed to have received the in-kind contributions described in the above paragraph. The in-kind contributions constitute corresponding and equal in-kind expenditures for approved expenditures on behalf of the candidates and in the amounts listed on Exhibit 1.
3. Counsel for Respondents will provide, by December 31, 2013, a letter referencing the changes ordered in paragraphs 1 and 2 of this Order and including Exhibit 1. This letter will constitute an amendment to the 2012 year-end reports of the Central Committee Party Unit, the Senate Caucus Party Unit, and each of the candidates.
4. The Executive Director is directed to enter into the Board's campaign finance database the changes made by paragraphs 1 and 2 of this order.
5. With respect to images taken at a photo shoot that is the subject of this matter, the Central Committee Party Unit, the Senate Caucus Party Unit, and the candidates
 - a. may not use any such image, whether in the original form or in a form obtained from a piece of literature or from a website, in any future communication;
 - b. may not make available to any other association or individual a copy, electronic or otherwise, of any such image and will not grant permission to any other association or individual to use such images; and
 - c. must destroy each electronic copy of any such image and must direct any media consultant hired by them to do the same.

The purpose this clause is to prevent further benefit to the Central Committee Party Unit, the Senate Caucus Party Unit, or the candidates, whether direct or indirect, from the use of images obtained during the subject photo shoots. This clause is to be broadly interpreted to achieve that purpose.¹⁰

6. No civil penalty is assessed against the candidates.
7. A civil penalty in the amount of \$100,000 is assessed against the Senate Caucus Party Unit for its violations of the limit on contributions that it may make to individual candidates.
8. The penalty assessed in clause 7 may be paid in two installments. The first installment of \$50,000 must be paid within 30 days of the date of this order by submitting to the Board a check in the amount of \$50,000 payable to the State of Minnesota to be deposited into the general fund of the State. The second installment must be paid within 90 days of the date of this order under the same terms.
9. The Board investigation of this matter is hereby made a part of the public records of the Board pursuant to Minnesota Statutes section 10A.02, subdivision 11, and upon payment of the civil penalty imposed herein, this matter is concluded.

Dated: December 17, 2013

/s/ Deanna Wiener

Deanna Wiener, Chair
Minnesota Campaign Finance
and Public Disclosure Board

¹⁰ The Board recognizes that some use by third parties of these images may occur due to the fact that the images have been widely distributed in printed materials and that such use may be beyond the control of the parties.

EXHIBIT 1

Alan Oberloh (Lit Happens)

Piece	Inv. #	Inv. Date	Amount
Oberloh Bio Piece	553	10/5/2012	7,611.12
Subtotal			7,611.12

Vicki Jensen (Lit Happens)

Piece	Inv. #	Inv. Date	Amount
Jensen Bio Piece	551	9/20/2012	8,800.00
Subtotal			8,800.00

Tom Saxhaug (Lit Happens)

Piece	Inv. #	Inv. Date	Amount
Saxhaug Bio Piece	552	10/4/2012	6,200.48
Subtotal			6,200.48

Jim Carlson (Pivot)

Piece	Inv. #	Inv. Date	Amount
CRL12-001	1005	9/13/2012	10,111.92
CRL12-002	1007	9/13/2012	10,292.49
CRL12-003	1007	9/13/2012	10,292.49
Aug. Photo Shoot			1,220.33
Subtotal			31,917.23

Kevin Dahle (Pivot)

Piece	Inv. #	Inv. Date	Amount
KDL12_003	1007	9/13/2012	9,112.02
KDL12_004	1069	9/23/2012	9,112.02
Aug. Photo Shoot			1,220.33
Subtotal			19,444.37

Kent Eken (Pivot)

Piece	Inv. #	Inv. Date	Amount
EKE12_001	1006	9/13/2012	9,400.16
EKE12_003	1007	9/13/2012	9,568.02
EKE12_004	1069	9/23/2012	9,568.02
Sept. Photo Shoot			2,463.78
Subtotal			30,999.98

Melisa Franzen (Pivot)

Piece	Inv. #	Inv. Date	Amount
MFZ12_001	1005	9/13/2012	11,024.00
MFZ12_002	1007	9/13/2012	10,816.00
MFZ12_003	1007	9/13/2012	10,816.00
Aug. Photo Shoot			1,220.33
Subtotal			33,876.33

McKendry (Pivot)

Piece	Inv. #	Inv. Date	Amount
MKY12_001	1005	9/13/2012	10,132.64
MKY12_002	1007	9/13/2012	10,313.58
MKY12_003	1007	9/13/2012	10,313.58
MKY12_004	1069	9/23/2012	10,313.58
Aug. Photo Shoot			1,220.33
Subtotal			42,293.71

Matt Schmit (Pivot)

Piece	Inv. #	Inv. Date	Amount
MSH12_001	1006	9/13/2012	10,055.36
MSH12_002	1007	9/13/2012	10,234.92
MSH12_003	1007	9/13/2012	10,234.92
MSH12_004	1069	9/23/2012	10,234.92
Sept. Photo Shoot			2,463.78
Subtotal			43,223.90

Greg Clausen (Compass)

Piece	Inv. #	Inv. Date	Amount
Priority	12-1129	9/27/2012	7,103.18
Time to Teach	12-1130	9/27/2012	6,787.16
Upgrade	12-1162	10/9/2013	5,863.81
Subtotal			19,754.15

Alice Johnson (Compass)

Piece	Inv. #	Inv. Date	Amount
Kids/Corps	12-1169	10/9/2012	7,085.21
Fewer	12-1171	10/9/2012	6,022.33
Slid	12-1136	9/27/2012	6,763.11
Unlock	12-1137	9/27/2012	7,303.11
Dirty Word	12-1135	9/27/2012	7,423.11
Subtotal			34,596.87

Susan Kent (Compass)

Piece	Inv. #	Inv. Date	Amount
Crime	12-1161	10/9/2012	6,480.12
Hit	12-1159	10/9/2012	6,580.12
Subtotal			13,060.24

Lyle Koenen (Compass)

Piece	Inv. #	Inv. Date	Amount
Build	12-1125	9/27/2012	7,636.27
Gear	12-1126	9/27/2012	7,636.27
Land	12-1127	9/27/2012	8,296.27
Subtotal			23,568.81

TOTAL 315,347.19

EXHIBIT 2

Candidate	Total Invoices	Party Unit/Terminating Campaign Committee Contributions	Excess Contributions (Received by Candidate)	Excess Contributions (by Senate Caucus)	Candidate Expenditures	Excess Expenditures
Oblerloh*	7,611.12	4,995.00	7,606.12	2,611.12	39,807.17	0.00
Jensen	8,800.00	5,000.00	8,800.00	3,800.00	35,938.47	0.00
Saxhaug	6,200.48	4,550.00	5,750.48	1,200.48	65,408.48	3,508.96
Carlson	31,917.23	4,999.00	31,916.23	26,917.23	56,012.00	19,829.23
Dahle	19,444.37	4,700.00	19,144.37	14,444.37	51,151.95	2,496.32
Eken	30,999.98	5,000.00	30,999.98	25,999.98	71,056.11	33,956.09
Franzen	33,876.33	5,000.00	33,876.33	28,876.33	N/A	N/A
McKendry*	42,293.71	5,000.00	42,293.71	37,293.71	55,484.52	22,778.23
Schmit*	43,223.90	5,025.00	43,248.90	38,223.90	55,514.01	23,737.91
Clausen*	19,754.15	4,975.00	19,729.15	14,754.15	43,486.26	0.00
Johnson	34,596.87	5,000.00	34,596.87	29,596.87	60,753.49	27,250.36
Kent*	13,060.24	2,750.00	10,810.24	8,060.24	50,574.01	0.00
Koenen	23,568.81	5,300.00	23,868.81	18,568.81	32,666.19	0.00
	315,347.19		312,641.19	250,347.19		133,557.13

*First time candidate subject to \$75,000 spending limit.

Other candidates subject to \$68,100 spending limit