IN THE SUPREME COURT OF THE STATE OF NEVADA

CITIZEN OUTREACH, INC.,

Appellant,

vs.

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

Respondent.

Supreme Court No.: 63784

District Court Case No.: 14OC00361B

OPPOSITION TO MOTION TO DISMISS APPEAL

Appellant Citizen Outreach, Inc., by and through its counsel, Mueller, Hinds & Associates, Allen Dickerson, and Anne Marie Mackin, respectfully files this Opposition to Respondent's Motion to Dismiss.

PROCEDURAL HISTORY

The timeline set forth in Respondent's Motion to Dismiss, under the heading "Relevant Procedural History," is correct as modified in the Errata to Motion to Dismiss. Citizen Outreach's Notice of Appeal was submitted by mail on August 6, 2013, and filed on August 8, 2013.

ARGUMENT

I. IT WAS NOT UNTIL THE JUDGMENT NOTICED ON JULY 12 THAT ALL OF THE CLAIMS BELOW WERE ADJUDICATED.

The question before this Court is which of two district court orders constituted a final judgment for the purposes of appeal under NRAP(4)(a). The Secretary correctly

identified the standard for a "final judgment"—one that "resolves all of the issues that the case presents." R. Mot. To D. at 4 (quoting *Frank Settelmeyer & Sons, Inc., v. Smith & Harmer, Ltd.,* 124 Nev. 1206, 1213, 197 P.3d 1051, 1055 (2008)). Citizen Outreach's Notice of Appeal was timely filed on August 8, 2013, because material issues in this case remained unresolved until July 12, 2013. That is, two primary disputes form the merits of this case: what express advocacy meant under 2010 Nevada law, and what information Citizen Outreach must report to the Respondent in connection with its 2010 activities (a question briefed extensively in Appellant's Opening Brief).

The Order noticed on January 25, 2013 ("January Order")—which Respondent characterizes as a final judgment resolving "all of the issues that the case presents"—provides:

> The Court finds that both the Nice Work Flyer and the Fiddling Flyer constitute express advocacy. Accordingly, Defendant made an 'expenditure' which should have been reported pursuant to NRS 294A.140 and 294A.210. Therefore, good cause appearing, IT IS HEREBY ORDERED that the Secretary's Motion for Summary Judgment is GRANTED. IT IS HEREBY FURTHER ORDERED that Plaintiff is deemed the prevailing party for all purposes and as to all subsequent matters. IT IS HEREBY FURTHER ORDERED that Plaintiff may file supporting cost bills and affidavits to recover attorneys' fees and costs of suit pursuant to NRS 294A.420(2).

Thus, in the context of that Order, the court made a determination concerning the scope of express advocacy under Nevada law in 2010. There is not,

however, any language in the January Order compelling Citizen Outreach to disclose the donor information it is before this Court seeking to protect. It was not until the Judgment noticed on July 12, 2013 ("July Judgment") that Citizen Outreach was compelled to actually disclose any information in connection with the district court's January finding regarding express advocacy. The July Judgment assess attorney's fees, and orders disclosure as specified below:

> IT IS HEREBY FURTHER ORDERED, DECLARED AND DECREED: that Defendant shall file its Campaign Contribution and Expense Report Nos. 2 and 3 in compliance with NRS 294A.140 and 294A.210 for the 2010 election within 30 days of the date of this Judgment.

This text was originally drafted by the Respondent, submitted to the Court, signed by the Judge, and then served upon the Appellant. It was the Respondent who decided upon the final language of the Judgment, selecting the exact verbiage thereof. Such language unmistakably adjudicates the remaining contention of the case—not only did Appellant engage in express advocacy in 2010, it must wholly complete the reports provided for under NRS 294A.140 and 294A.210 in connection with that express advocacy, including the disclosure of its financial supports. With this statement, the Court finally adjudicated the remaining material issue in the case: what information Citizen Outreach had to disclose, and when. Moreover, the fact that the July Judgment provides 30 days—the exact time allowed before filing a Notice of Appeal—for

completing these reports evidences a recognition that finality had been achieved, and an appeal might be forthcoming.

The Secretary relies heavily upon *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000), to support his argument that the January Order constituted a final judgment. This is a red herring. According to the annotations to NRAP 4, *Lee* stands for the proposition that "an order granting summary judgment which disposes of all claims and parties before the court except for post-judgment issues such as attorney's fees and costs is final and appealable despite not being labelled a 'judgment.'" But Citizen Outreach does not argue this point. Here, it is the July Judgment's requirement that Citizen Outreach file particular reports disclosing particular information within a particular time frame that rendered it final, not the presence of the word "Judgment" in its caption.

This Court has drawn the distinction between the resolution of a legal issue and a final, actionable command at least once before, in *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 247 P.3d 1107, 1108 (Nev. 2011). In the context of mechanics lien enforcement, this Court considered whether an order constitutes a final judgment "when that order implicitly determines the liens' validity and enters judgment on the lienable amounts, but fails to direct the subject property's sale." The Court considered that "'a judgment . . . must confer some right that may be enforced without further orders of the

court and which puts an end to the litigation.'" *Id.* (citation omitted). "[W]ith a view toward the final judgment rule's goal of promoting efficiency," this Court concluded that "the final judgment in a mechanic's lien enforcement action cannot only enter judgment on the lienable amount, but must also determine whether the property's sale is to proceed." *Id.* at 1109. Thus, it was this performance requirement which rendered the judgment final. And here, such an overt command is present in the July Judgment ordering Citizen Outreach to file particular reports containing specific information. The January Order, however, lacks such a performance requirement.

II. THE SECRETARY CANNOT, CONSISTENT WITH PRINCIPLES OF DUE PROCESS AND SUBSTANTIAL JUSTICE, BENEFIT FROM CONFUSION THAT HIS ACTIONS CREATED.

The Secretary has served Citizen Outreach with multiple notices as issues in this case, one by one, have been resolved. Among these are the January Order and Notice, and the July Judgment and Notice. Even assuming the January Order constituted an appealable judgment, the Secretary re-started the time for filing a Notice of Appeal when it served the second Notice, commanding Citizen Outreach to file reports within 30 days. In *Ross v. Giacomo*, 97 Nev. 550, 635 P.2d 298 (1981), the respondent similarly served two separate Notices of Entry of Judgment on appellant on different dates, thereby creating a confusing situation. This Court stated:

> Under our rules, the respondent starts the appeal time running by serving notice of entry of judgment on the potential appellant. Here, by sending two separate notices on different dates, respondent created a confusing situation. While there is no indication that respondent intended to deceive appellant, we do not believe it would be in accord with principles of due process of law to allow respondent to benefit by the confusion he created, albeit inadvertently. *Cf. Kotecki v. Augusztiny*, 87 Nev. 393, 487 P.2d 925 (1971). **By sending the second notice, we believe respondent was, in effect, admitting that something was wrong with the first notice and that it was, in fact, no notice at all.** We, therefore, hold that the second notice vitiated the first notice, thus rendering it nugatory. *See Storey v. Castner*, 306 A.2d 732 (Del. 1973). We conclude that the motion for judgment n.o.v. or for a new trial was timely, and we decline to dismiss this appeal.

(Emphasis added).

This is similar to the factual landscape here: Secretary Miller served two separate Notices—each adjudicating primary issues in the case—upon the Appellant, thereby creating confusion. Appellant has no reason to believe this was done with the intent to deceive or unfairly impact the outcome of this litigation. Nevertheless, it would be inconsistent with principles of due process to allow Respondent to benefit from the confusion this action created.

Moreover, the July Judgment provides for more than the post-judgment matters such as attorney's fees and costs described in *Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416. It further orders Citizen Outreach to perform an act at the heart of this litigation—file specific disclosure forms disclosing contributor information. It also

imposes a deadline on the performance of this act. Indeed, in Noticing the July Judgment, the Secretary recognized that such a performance requirement was lacking in the January Order. Thus, it would be inequitable to allow the Secretary to have the benefit of the July Judgment without recognizing that notice thereof started the clock for appeal purposes.

The *Ross* Court also sought guidance from a Delaware case, *Storey v. Castner*, 306 A.2d 732 (Del. 1973), noting:

> In Delaware, the court clerk apparently has the duty of sending notice to the parties of entry of judgment. In *Storey*, the judge filed with the clerk a copy of a letter opinion and order denying a motion for remittitur or new trial. For some reason, unclear in the opinion, the parties never received the notice. Later, the judge substituted a second letter opinion and order. In holding that the second letter opinion superseded the first, the Delaware Supreme Court stated: It is manifest that the Trial Judge, in substituting the second opinion and order for the first, was attempting to rectify some clerical mistake, oversight, or omission which resulted in the failure of counsel to receive the first. . . . [W]e conclude on the basis of Rule 60(a) that the Trial Judge, in effect, vacated his first opinion and order (although it was never actually withdrawn) and substituted the second for it, thus making the date of the second the effective date for appeal purposes.

Ross at n. 4 (internal citations and quotation marks omitted).

This, too, mirrors the facts of the instant case. Notice of Entry of Judgment adjudicating and resolving the final substantive issue in the case was served on July 12. This triggered Appellant's 30 days to file its Notice of Appeal pursuant to NRAP 4(a)(1). Appellant did file its Notice of Appeal within 30 days of that date. Since

Appellant properly appealed within the timeframe the rules and case law provide, Respondent's Motion to Dismiss this appeal as untimely should be denied.

III. RESPONDENT ACQUIESCED TO THIS APPEAL BY WAITING 205 DAYS TO FILE ITS MOTION TO DISMISS, AND FURTHER WAIVED ANY DEFECTS WHEN IT PARTICIPATED IN THE SETTLEMENT CONFERENCE.

Respondent waived any right to contest Appellant's Notice of Appeal by allowing 205 days to pass between entry of the judgment below and filing a Motion to Dismiss this appeal as untimely. If the Motion to Dismiss is granted, not only will Appellant be denied the opportunity to vindicate its First Amendment rights against an overzealous government, it also will have expended scarce time and resources in reliance upon Respondent's failure to object until now. This undermines principles of equity, and will further allow the government to benefit from confusion its behavior—even assuming such behavior was undertaken in good faith—has demonstrably created.

Indeed, over the course of 205 days, Appellant retained Craig A. Mueller from Mueller, Hinds & Associates to handle this appeal. Mr. Mueller had to purchase airfare to Carson City, Nevada in November, 2013, and attend a Settlement Conference with Chuck Muth from Citizen Outreach, Inc., who made the eight hour drive from Las Vegas independently. That settlement conference was ultimately unproductive, as the Respondent proved unwilling to negotiate over even the scope of the disclosure it

demanded from the Appellant—the issue that remained unresolved with finality until the July Judgment. This Court then issued its Order Reinstating Briefing, again to no objection by the Secretary. Pursuant to the terms of this Order, Appellant began the work of filing its Opening Brief and a Joint Appendix.

To that end, Appellant retained the Center for Competitive Politics to assist with the case. Once members of the Center's legal staff were apprised of the facts and procedural history, Allen Dickerson, Esq., and Anne Marie Mackin, Esq., expended time and resources drafting the extensive Opening Brief in this Appeal. Mueller, Hinds & Associates also filed for *pro hac vice* admission on behalf of Mr. Dickerson and Ms. Mackin, and counsel paid for compellation and filing of the Joint Appendix. These not insubstantial activities certainly would have ceased but for the Secretary's acquiescence to the continued progress of this litigation, despite his numerous opportunities to object.

In *State v. Shade*, 111 Nev. 887, 900 P.2d 327 (1995), the Honorable Justice Young in his dissenting opinion wrote:

> The State's appeal rights are created by statute. See *State v. Shade*, 110 Nev. 57, 63, 867 P.2d 393, 396 (1994). The State may waive this statutory right by voluntary acts or conduct, such as causing judgment to be entered against it. See 4 Am. Jur. 2d Appeal and Error §§ 235, 242-43 (1962); *Deason v. Lewis*, 706 P.2d 1283, 1286 (Colo. Ct. App. 1985) (noting that consent to dismissal prevented plaintiff from appealing); *State v. Harmon*, 243 S.W.2d 326, 328 (Mo. 1951) (holding that a criminal defendant may waive his right to appeal); *Trees v. Lewis*, 738 P.2d 612, 613 (Utah 1987) (citing the general rule that one who acquiesces in judgment cannot later

> appeal the judgment). As a general rule, "[a] party who abandons an action thereby waives his right to appellate review of the judgment rendered therein." 4 Am. Jur. 2d Appeal and Error § 235 (1962).

Moreover, at least one other state appellate court has recognized—in the notice of claim context—that "waiver may be found when a governmental entity has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense." *Jones v. Cochise County*, 187 P.3d 97, 105 (Ariz. Ct. App. 2008).

Here, Respondent has allowed this litigation to continue without promptly raising its untimeliness argument. Thus, it waived any right to contest the timeliness of the appeal, and cannot now cry foul. 106 days passed between Citizen Outreach's filing of its Notice of Appeal and the mandatory Settlement Conference. After that, 99 additional days passed prior to Respondent filing its Motion to Dismiss. By participating in the settlement conference, remaining silent at this Court's entry of the Order Reinstating Briefing, and allowing substantial time to pass before filing its Motion to Dismiss, Respondent waived any defect which had not been brought, but could have.

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IV. CONCLUSION

For the forgoing reasons, Respondent's Motion to Dismiss this appeal as untimely filed should be denied.

DATED this 17th day of March, 2014

MUELLER, HINDS & ASSOCIATES, CHTD.

By_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of March, 2014, I deposited a true and correct copy of **CASE APPEAL STATEMENT**, U.S. Mail, postage fully pre-paid, and via e-mail addressed to the following:

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