IN THE ADMINISTRATIVE HEARING COMMISSION

RON CALZONE,	)	
Petitioner,	)	
vs.	)	Case No. 15-1450
	)	
MISSOURI ETHICS COMMISSION,	)	
Respondent.	)	
	)	

PETITIONER'S SUGGESTIONS IN OPPOSITION TO RESPONDENT'S MOTION TO COMPEL

Petitioner Ron Calzone provides the following suggestions in opposition to the Missouri Ethics Commission's ("MEC" or "Ethics Commission") Motion to Compel Discovery Response from Petitioner Calzone and Motion to Compel Deposition and Subpoena *Dues Tecum* of Missouri First, Inc. (Response to Petitioner's Motion for Protective Order) ("Mot. to Compel").

I. The Ethics Commission's Motion To Compel Should Be Denied.

The MEC's motion is boilerplate that fails to meaningfully respond to Mr. Calzone's Motion for a Protective Order. This would be troubling enough in a commercial dispute or other, run-of-the-mill civil case. But the MEC regulates core political activity specifically protected by the First Amendment, and it is pursuing a case over which it has no jurisdiction, based upon a clearly-flawed legal rationale. In that context, its dragnet demand for far-reaching discovery, late in these appellate proceedings, and after it already developed a record it considered adequate to find probable cause, is an independent harm of constitutional dimension. While this Commission lacks jurisdiction to rule upon the

underlying constitutional issues in this case, it has full authority to prevent these procedural abuses. For the reasons already provided,[1] and for those below, it should exercise that authority.

A. The MEC has no answer to Petitioner's contention that subject-matter jurisdiction must be positively determined before discovery may commence.

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Pointedly, the Ethics Commission has provided no counter to Mr. Calzone's argument that this body ought to resolve the question of subject-matter jurisdiction before permitting any discovery. Pet. Mot. for Protective Order ("MPO") at 5-8. This omission is fatal to its Motion, and counsels strongly in favor of a protective order.

If the MEC cannot summon any authority permitting discovery absent a jurisdictional finding, the proper approach would have been to agree to stay discovery, follow this Commission's briefing order, and then move to compel only *if* jurisdiction were established. *U.S. Catholic Conf. v. Abortion Rights Mobilization*, 487 U.S. 72, 76-77 (1988). Instead, the MEC has chosen to burden this Commission and the Parties with substantial, premature briefing.

B. Discovery is not necessary to brief summary decision as ordered by this Commission.

The MEC has requested a continuance of this Commission's scheduling order. In particular, it requests a delay of "briefing on the question of whether Missouri First, Inc., designated Petitioner Calzone as a lobbyist until Petitioner Calzone and Missouri First,

[1] Mr. Calzone specifically incorporates herein his arguments raised in the Motion for a Protective Order, and his Responses and Objections filed with the MEC in January of 2016 and attached as the MEC's Motion as Exhibit 3.

Inc., comply with the above discovery requests…" Mot. to Compel at 1-2. This request is problematic for three reasons.

First, if the MEC believes that it cannot even *explain* how Mr. Calzone was designated by Missouri First, Inc.—a required element of the offense with which Mr. Calzone is charged—without further discovery, it has essentially conceded that it lacked an evidentiary basis upon which to find probable cause below. The correct remedy is to find that the MEC abused its discretion, not to permit after-the-fact discovery.

Second, this Commission's scheduling order requests briefing on jurisdiction and two purely legal questions: whether Missouri law contemplates a lobbyist's "self-designation," and whether it permits the compulsory registration of uncompensated lobbyists. These questions of statutory construction, by their very nature, do not require discovery—let alone the aggressive discovery sought here. If the statute does not permit self-designation or the registration of uncompensated lobbyists then, as a matter of law, Mr. Calzone is entitled to summary decision, because these are the *legal* predicates upon which the MEC has staked its case. It does so precisely because the record below was barren of any evidence that Mr. Calzone was directly designated as a lobbyist or compensated in any way. No last-minute discovery requests can change the facts and legal theories the MEC *already* relied upon, or manufacture a new record to replace the one actually used below.

Third, the MEC's request would prejudice Mr. Calzone, who abided by this Commission's order and proceeded, in good faith, to spend the resources required to properly brief the merits of its appeal. The MEC has never so much as hinted, and certainly

not in advance of Mr. Calzone's brief, that it would seek a modification of this Commission's briefing order. Consequently, it should abide by that order just as Mr. Calzone has.

C. The MEC had ample opportunity for discovery, both below and here.

The MEC's Motion fails to explain why it demands discovery only *after* finding probable cause, *after* agreeing to stay discovery pending this Commission's ruling on jurisdiction, *after* briefing concerning judgment on the pleadings, and *after* Mr. Calzone has filed his brief in support of summary decision. Discovery at this point—after both parties have expended substantial resources based upon the record already developed below—is plainly prejudicial to Mr. Calzone.

The MEC had ample opportunity to conduct discovery below. § 105.961(3), RSMo (probable cause hearing subject to §§ 536.063 to 536.090 "and shall be considered to be a contested case for purposes of such sections"); § 536.073, RSMo (conduct of depositions); § 536.077, RSMo (rules regarding subpoenas). Moreover, it in fact *did* conduct a substantial investigation in advance of the probable cause hearing that is the subject of this appeal.

The Ethics Commission plainly conducted an extensive investigation, as it introduced no less than eight exhibits[2] and called four witnesses at the hearing. The MEC even freely spoke with the accused, before he acquired *pro bono* counsel in August of 2015, as well as an unknown number of other persons. Hearing Tr. at 86, *l* 11 ("Okay. You said

[2] A ninth exhibit, Mr. Dallmeyer's cover letter explaining that he filed on behalf of a corporate client, was introduced by Mr. Calzone, not the Ethics Commission.

you spoke with Mr. Calzone"). Sadly, we do not know precisely the contents of all investigatory interviews that the MEC conducted, because Special Investigator Della Luaders destroyed all of her notes and was unable to recollect the names of those she spoke with. Hearing Tr. at 110, *l* 9-12, 118, *l* 12-13[3] What is undisputed, though, is that the MEC considered its investigation sufficient to support probable cause, and that it made no effort to expand the record in advance of the probable cause hearing.

In any event, from the filing of the MEC's complaint on April 21, 2015 until the day of the probable cause hearing, the Ethics Commission failed to seek any discovery from either Mr. Calzone or Missouri First. The MEC nevertheless found probable cause of a violation. This finding of probable cause is what Petitioner seeks to reverse on appeal. Pet. for Admin. Review at 23, ¶ 173 (B): ("Reverse and vacate the Commission's finding of probable cause with instructions for the Commission to enter dismissal of all charges against Petitioner"). Aside from the weakness of its case, which is not a sufficient reason, there are no grounds upon which to reopen discovery that the MEC previously believed was unnecessary.

The Ethics Commission is transparently attempting to *retroactively expand* its theory away from the unsupportable "self-designation-by-an-uncompensated-person" interpretation it has posited thusfar, and to then seek enormously-broad discovery in the hope that it will unearth *some* basis for its pursuit of Mr. Calzone. Even if permitted, this

[3] Mr. Calzone, of course, was never presented with much of this. No witness list was provided in advance of the MEC's probable cause hearing. Hearing Tr. at 30, *l* 17-19 ("…well, first, I'd like to note that no request for witnesses were [*sic*] ever made…").

would not alter the fact that the Ethics Commission has already found probable cause on a record so devoid of factual support that it has been forced to manufacture novel theories of its own jurisdiction and governing statute. Nor would it change the fact that the MEC has already had ample opportunity to request discovery, and has chosen not to do so.

Allowing the MEC, late in this litigation and on appeal, to retrofit both its record and its theory of this case would plainly prejudice Mr. Calzone, who should not be asked to defend himself against an ever-shifting specter.

D. The Ethics Commission imposes a number of unjustifiable burdens upon Petitioner, his counsel, and a non-party.

The MEC's unjustified demands for discovery are not costless. They have already required Mr. Calzone to expend substantial efforts in response. And if permitted to go forward, they will impose still-greater costs. The MEC's motion to compel lacks any effort to engage with these burdens on both Petitioner and a non-party, Missouri First, Inc.

The Rules of Civil Procedure are clear. Protective orders may issue in the interest of justice to prevent a party "from annoyance, embarrassment, oppression, or undue burden or expense." Rule 56.01(c). Similarly, "[a] party issuing a subpoena 'shall take reasonable steps to avoid imposing undue burden or expense on a non-party subject to the subpoena.'" *State ex rel. Horenstein v. Eckelkamp*, 228 S.W.3d 56, 57 (Mo. App. E.D. 2007) (quoting Rule 57.09(b)(1)). The MEC is seeking an enormous range of materials, as Petitioner's Motion for Protective Order and Petitioner's objections in MEC Exhibit 3 amply demonstrate, and it has made no attempt to reasonably limit those requests so as to limit the resulting burdens.

1. General burdens against Petitioner, his counsel, and a non-party corporation.

Petitioner is being asked, *inter alia*, for "[a]ll communications" of a number of documents "without limitation"—documents which are undefined. This is a classic fishing expedition.[4] Mr. Calzone has already fully explained these burdens in his Motion for a Protective order and in its objections to the MEC's discovery requests, reproduced as Exhibit 3 to the MEC's motion. Mr. Calzone incorporates all of those arguments for purposes of this brief. Nevertheless, a few obvious examples will illustrate the whole.

The MEC's Request for Production 4 is emblematic. According to the MEC's own description, it seeks "[c]ommunications between Petitioner Calzone and members of Missouri First that relate to legislation." App. A at ii. But this has nothing to do with the charge against Mr. Calzone—that, pursuant to his designation by a corporation, he lobbied members of the *legislature*, as opposed to the general public. Membership in Missouri First is achieved by being a resident of Missouri and filling out a form on the Missouri First, Inc. website, as demonstrated by the MEC's own Findings of Fact, Conclusions of Law, and Order. App. 1 to Finding ("Join Missouri First!"). The burden of providing every communication Mr. Calzone has ever made to anyone who ever signed up on the Missouri First website is obvious.

The MEC's Request for Production 1 is similar. It requests communications between Ron Calzone and the Missouri Ethics Commission. Presumably, the MEC *already has those*. Oddly, in the MEC's Table of Discovery, it argues that it needs these documents

[4] These burdens are aside from the obvious Fifth Amendment implications of the MEC's discovery requests, as noted in Petitioner's Responses and Objections. Ex. 3 at 6.

to "demonstrate direct evidence that Petitioner Calzone never registered as a lobbyist with the Ethics Commission." App. A at ii. But for obvious reasons, Mr. Calzone has no interest in pleading the affirmative defense that he actually registered as a legislative lobbyist.

These and similar requests, directed toward a party, are bad enough. But a non-party, Missouri First, Inc.—a group which has stipulated that it has resources of fewer than $10 on hand—is asked to bring a functionally unlimited number of documents to Jefferson City, and face a deposition which MEC anticipates will "be continued from day to day at the same place and time until completed."[5] Ex. A to Subpoena *Duces Tecum* "Notice of Deposition" at 1. In response, after asking a volunteer to review an enormous range of documents, drive 475 miles, and submit to a limitless deposition, the MEC proffers "a $25 witness fee and $176… for mileage." Mot. to Compel at 3, n. 4. This, transparently, does nothing to offset the true burdens of the MEC's demand upon a non-party.

The MEC has attempted justifications for some of its demands, mostly in its Table of Discovery. It is true that the broader a universe of documents the government requests from private individuals and non-parties, the more likely it is to find something. But our Constitution has long prohibited general warrants, and the Rules of Civil Procedure exist

[5] The MEC makes no real attempt to justify these burdens on a non-party or to respond to Petitioners' arguments in that regard. Rather, it suggests that because Missouri First "is not a mere bystander," because it has some connection to Mr. Calzone, the usual protections for a non-party somehow do not apply. Mot. to Compel at 9. The Ethics Commission provides no support for this view, which flies in the face of the general practice of courts nationwide. Rather, the MEC gives away the game: because Mr. Calzone has asserted his constitutional rights, it has chosen to proceed against Missouri First as an "alternative source" of information. *Id*. at 10. Missouri First should not be penalized simply because one of its officers has chosen to invoke the protections of the federal Constitution.

precisely to prevent governments from using discovery as a proxy for such overbroad demands on a citizen's time, property, and person. Limits on overbroad, irrelevant, and unduly burdensome discovery exist to counter the impulse of governments to go on fishing expeditions based on speculation or activity outside the statute at issue.

In any event, the MEC's explanations are unavailing. The MEC's suggestion, for instance, that some of its demands are necessary to prove whether "Missouri First, Inc. acted on the intent stated in its Charter to 'lobby members of the Missouri General Assembly'" demonstrates just how far afield these demands are from the heart of this case. App. A at v. Missouri First, Inc. cannot become a legislative lobbyist because the statute states that only natural persons are lobbyists. Moreover, it is not a party to this matter, and the MEC's demand for text messages about legislation before the General Assembly between, *inter alia*, spouses and friends is plainly burdensome, and cannot be permitted on the pretext that it might turn up some relevant information. Ex. A to Subpoena *Duces Tecum*, Request #6.

The Ethics Commission's demands are all similarly burdensome. They seek a virtually unlimited range of documents, many of which are in the custody of private persons. The only substantive limit the MEC imposes upon its own demands is the statute of limitations, over which it has no control. The irrelevance and burden of the MEC's demands are fully listed in Petitioner's Motion for Protective Order—to which the Ethics Commission has chosen not to respond directly.

The burdens on Petitioner do not merely end there, of course. If granted, Petitioner's attorneys will have to deal with an enormously expanded record, further raising the costs

of defending against charges that should never have been brought. That is precisely why motions to dismiss exist: they forestall the additional costs of litigation where the state's legal theory or its jurisdiction are clearly flawed. *Neitzke v. Williams*, 490 U.S. 319, 326-27 (1989) (motions to dismiss serve to "streamline[] litigation by dispensing with needless discovery and factfinding").

Put simply, even at the probable cause stage below, the only factual questions were whether (1) Missouri First had designated Mr. Calzone as a lobbyist, and (2) whether Missouri First had ever compensated Mr. Calzone as a lobbyist. Minimal discovery would have revealed that the answer to both questions was "no," but the MEC chose not to take such discovery or introduce any evidence concerning either point. Instead it argued that such evidence was *irrelevant* because (1) Mr. Calzone "self-designated" as a lobbyist, obviating any need to determine the actions of Missouri First, and (2) compensation is irrelevant to lobbyist status. Now, the MEC realizes its mistake, and wishes to take discovery on both points. But the milk cannot be returned to its carton, and the Commission is stuck with its view of relevance. Especially where, as here, its attempt to relitigate its own errors would impose enormous burdens on Petitioner and a non-party.

2. <u>These burdens are of the Ethics Commission's creation.</u>

These burdens are only enhanced by the stage of the proceedings. And the timing of discovery, and thus of these motions, is entirely the MEC's choice. It refused to take any

discovery below—perhaps believing that it could easily proceed against a *pro se* defendant without notice of the witnesses and documents it intended to enter against him.[6]

But even after Mr. Calzone acquired counsel, lost before the MEC, and appealed, the Ethics Commission has been slow to seek discovery. On September 28, 2015, this Commission notified both parties of a scheduled hearing and stated that "[t]his notice should give the parties ample time to conduct discovery and prepare for hearing." The MEC chose to forego discovery until 91 days later, December 28, 2015, when it issued discovery requests directed against Mr. Calzone. On January 15, 2016, Petitioner timely objected.[7] The MEC never responded, nor indeed indicated any desire to move to compel that discovery until the filing of this Motion on March 14, 2016—three months after Petitioner lodged his objections with the Ethics Commission.

Indeed, after agreeing to stay discovery pending the resolution of Petitioner's motion for judgment on the pleadings, the Ethics Commission did not address the discovery question again with Petitioner's counsel until Friday, February 19, 2016, when the MEC left a message with the office manager of the Center for Competitive Politics indicating that the MEC intended to seek discovery. The Parties met and conferred the following Monday, at which point the Ethics Commission indicated it would seek non-party

[6] It bears some notice that the MEC's opening statement, as delivered by counsel, consisted of a number of displays which were struck as constituting inadmissible hearsay. Hearing Tr. at 16, *l* 11-13.

[7] The Ethics Commission has observed that the electronic copy filed with the MEC did not contain a sworn statement from Mr. Calzone. Mot. to Compel at 5, n.5. Petitioner apologizes for this error, which was never mentioned by MEC counsel in any of several meet-and-confers related to discovery that have been held since January 15, 2016.

discovery. All Parties acknowledged the existence of this Commission's scheduling order, and the Ethics Commission filed its non-party requests on February 24, 2016—just a week and a half before this Commission had ordered the filing of Petitioner's opening brief on summary decision. At that time, the MEC did not request a continuance.

None of this history suggests that the discovery requested here is urgent, especially when weighed against the cost and prejudice to Mr. Calzone.

3. The MEC's theory of the case is a moving target, a problem which will only be exacerbated by permitting it to expand the record on appeal.

Despite having run out the clock on this Commission's ordered time for discovery, MPO at 8-9, and despite the fact that its discovery requests do not go to jurisdiction, self-designation, or whether Mr. Calzone was paid to lobby for Missouri First, Inc., MPO at 10, the MEC seeks a suspension of briefing on summary decision to conduct discovery intended to procure some potential "facts" that are not relevant to its theory of the case. As stated above, this is unduly burdensome. But it is particularly inappropriate as the MEC appears to be abandoning core contentions put forward in its briefing. This is, sadly, not surprising, as the MEC has consistently altered its theory of this case midstream.

The MEC's initial complaint of April 21, 2015 alleged that "[s]ince 2013, Respondent Calzone has been designated by the actions of Missouri First, Inc. and its constituent members." MEC Complt. at 5, ¶ 18. It alleged, "[b]y way of example and not limitation," that Mr. Calzone's testimony before the Missouri House and Senate and his use of certain exhibits to his legislative testimony constituted lobbying. MEC Cmplt. at ¶ 19. It also averred that these "actions have been more than occasional, and are part of a

regular pattern of conduct." *Id*. at 6, ¶ 20. As evidence, the MEC noted five other times Mr. Calzone testified before the General Assembly.

At the probable cause hearing below, for the first time, the MEC's counsel advanced the theory that Mr. Calzone self-designated as a legislative lobbyist, without any input from Missouri First's board of directors, when testifying before committees of the General Assembly. Hearing Tr. at 18, *l* 15-16 ("We believe that act alone shows designation"). Mr. Calzone was never provided notice of this novel theory before MEC counsel proposed it in his opening statement.

The MEC's Findings of Fact, Conclusions of Law, and Order ("Findings"), issued on September 11, 2015, however, remained vague as to the theory under which the MEC believed Mr. Calzone was designated as a legislative lobbyist. The MEC relied extensively on evidence that "Respondent Calzone appeared before committees of the Missouri House and the Missouri Senate, identifying himself as appearing on behalf of Missouri First, Inc." Findings at 4, ¶ 15; *but see* § 105.470(5)(d)(d), RSMo (testimony before legislative committees is an exception to legislative lobbying). It also listed four such examples of Mr. Calzone's appearances, *id*. at 5, ¶¶ 17-20, and attached evidence that Mr. Calzone had so appeared as one of only two appendices to its order. Finding, Appendix 2. But, while the MEC proffered a definition of the word "designate" in the statute, pulling directly from Webster's Third International Dictionary, *id*. at 7, ¶ 30, the MEC's order did not explain the mechanism by which Mr. Calzone was designated—instead merely asserting probable cause because Mr. Calzone's "attempt[s] to influence official action…on behalf of Missouri First, Inc. and its members." *Id*. at 8, ¶ 33. This, of course, begged the question.

Before this body, however, the MEC has abandoned its reliance on Mr. Calzone's legislative testimony, which has not been heard of again, and instead chose to introduce a complaint filed by Mr. Calzone in a *pro se* case for the proposition that "Petitioner Calzone spends 'many hours…virtually every week of the legislative session,' speaking with Missouri legislators on behalf of Missouri First, Inc." Ans. at 2, ¶ 8. As discussed at great length—without apparent disagreement from the MEC—that *pro se* complaint merely states that Mr. Calzone spends time "in an effort to make legislation constitutional"—but does not mention that he does so pursuant to a designation by Missouri First, Inc., as the Ethics Commission charged. *See also* Mot. for Judgment on the Pleadings at 25 ("Nowhere in Mr. Calzone's state court complaint does he state that his uncompensated citizen activism is on behalf of Missouri First, Inc.")

Before this body, moreover, the MEC has heavily relied upon its contention that Mr. Calzone "designated himself as the lobbyist for Missouri First, Inc." Ans. at 2, ¶ 6; *also id*. at ¶ 7 ("Calzone…did, designate himself as the lobbyist for Missouri First, Inc."). It has declared that Mr. Calzone's "internal decision-making process" constituted designation, and that "[t]he Ethics Commission need not allege 'how' Calzone reached his decision because it has alleged evidence showing that Petitioner Calzone did, in fact, make the decision to designate himself as a lobbyist to attempt to influence legislation on behalf of Missouri First, Inc." MEC Opp'n to Mot. for Judgment on the Pleadings at 13. Apparently that is no longer the MEC's belief, given that it now seeks evidence concerning "any grant of authority to attempt to influence legislation" by Missouri First. App. A at ii.

In short, this case began as an accusation that Mr. Calzone's witness testimony before the General Assembly constituted legislative lobbying, and has now ended with a search for some scrap of information that might retroactively support the MEC's finding below. Perhaps it might come from communications between Petitioner and "members of Missouri First"—private citizens—that could be shorn of context to demonstrate "any grant of authority (whether affirmative *or by acquiescence*) to Petitioner Calzone by Missouri First." App. A at ii. (emphasis supplied). Maybe the Ethics Commission can find some document—even one considered but not adopted by the Missouri First, Inc. board of directors—indicative of "informal methods of operations," App. A at v, and it can then bootstrap a stray private communication between one director of Missouri First, Inc. and another director into an informal grant of formal authority by Missouri First, Inc., a nonprofit corporation operating under the Missouri Nonprofit Corporation Act, to permit Mr. Calzone's "internal decision-making process" to designate and undesignate himself as a legislative lobbyist for the corporation. Frankly, Mr. Calzone has no idea what the Ethics Commission is looking for, because its legal theories are never stated with precision and change with each new brief.

"The axiomatic requirement of due process…carries the practical consequence that a defendant charged under a valid statute will be in a position to understand with some specificity the legal basis of the charge against him." *Schad v. Arizona*, 501 U.S. 624, 632 (1991). The MEC's effort to alter its theory of the case to fit whatever facts it happens to have on hand—Senate meeting minutes, a *pro se* filing of Mr. Calzone's, whatever it may dredge in its fishing expedition here—is itself prejudicial. *See Bediako v. Stein Mart*, 354

F.3d 835, 841 (8th Cir. 2004) (denying leave to amend for new legal theory under Fed. R. Civ. P. 15(a) "[g]iven the advanced stage of the litigation process" and need for additional discovery). It bears repeating that there has already been a hearing in this case—and the MEC found probable cause. The Ethics Commission now asks Mr. Calzone to continue laboring under that formal sanction so that it may retroactively "fix" the flawed proceeding underlying its decision. This, in and of itself, is a violation of Mr. Calzone's rights.

4. The Ethics Commission's motion to compel contains a number of mischaracterizations masquerading as fact.

The MEC's errors are compounded by its liberal construction of the facts. Petitioner provides a non-exhaustive list of these errors:

- Page 7: "…yet when the Ethics Commission seeks discovery of just that (communications from Petitioner Calzone and Missouri First, Inc. directed to Missouri legislators, relating to Missouri legislation), Petitioner Calzone seeks a protective order on grounds that responding to such a request will result in an 'enormous number of documents.'(Mot. Prot. Order at 11)."

Turning to the MEC's citation one finds, in relevant part, the following:

"The Ethics Commission has issued six specific requests for documents. These requests are difficult to follow—they are extraordinarily vague, and the MEC has provided no definitions explaining what it is looking for with any precision. But to the extent the requests can be understood, they impose a tremendous burden upon an organization with no resources, particularly in light of the expedited deadline that the Ethics Commission has requested. Moreover, the harm to Mr. Calzone imposed by these requests is considerable,

given that—if permitted—Missouri First, Inc. will be providing *an enormous number of documents* to the MEC that his counsel will be forced to review, a review that must occur only after Mr. Calzone's opening brief on summary decision." MPO at 11. (emphasis supplied).

Obviously, page 11 of Petitioner's motion for protective order is referring to all six of the MEC's production requests attached to its subpoena *duces tecum*, which seek private communications between directors of Missouri First, all documents ever considered by the board of directors, postcards, fliers, etc. Petitioner's counsel believes that forcing Missouri First, Inc. to turn over the universe of documents sought would, indeed, be "enormous," although Petitioner's counsel has yet to review these documents. This cannot be considered an admission that a specific subset of those documents exist, or a characterization as to their number.

- Page 9: "Petitioner Calzone recommends no other means of discovery that would be less burdensome and to which he would not also object."

Petitioner Calzone has indicated that he "will timely respond" to the MEC's second production request directed toward him "by providing at each expert deposition any materials given to the expert", and that he will timely respond to the MEC's second interrogatory. Mr. Calzone has also invited proper discovery related to the fact "that, during the period for which the Ethics Commission seeks discovery and continuing until the present, Missouri First has never had more than ten dollars in its checking account," which could led to admissible evidence regarding Mr. Calzone's lack of compensation from Missouri First, Inc. MPO at 11, n.7.

- Page 10: “The only other alternative source of relevant information is Missouri First, Inc. itself.”

Petitioner once again observes that the Ethics Commission found probable cause against Mr. Calzone at the hearing below, at which nine exhibits were entered into the record and four witnesses were called by the Ethics Commission. It was able to do so without seeking any documents from Missouri First, Inc. or from Petitioner. If this information were “relevant,” it should have been obtained then.

To the extent that the Ethics Commission no longer believes that record is sufficient, it is tantamount to an admission that the probable cause finding was erroneous. Petitioner also observes that if Special Investigator Della Luaders did not make it a practice to destroy her own notes after typing up an investigatory report, the Ethics Commission would have admissible evidence related to a conversation between Mr. Calzone, without counsel, and an MEC investigator—as well as records of a number of other conversations with other persons, including members of the legislature and officers of the Missouri Society of Governmental Consultants. The MEC’s spoliation of evidence is its own affair, but should not be addressed by permitting nearly-unbounded, after-the-fact discovery.

- Page iii of MEC Appendix A (“Table of Discovery”): (“…to test Petitioner Calzone’s arguments that, contrary to normal corporate procedures, the ‘day-to-day’ operations of Missouri First, Inc. are governed by a board of directors (who are all located hundreds of miles apart from one another.”)

Petitioner is uncertain where the quotation of “day-to-day” comes from; there is no citation. The claim that “day-to-day” operations are handled by the board of directors is

not a quote from Petitioner's Motion to Dismiss below, his Petition for Administrative Review, his Motion for Judgment on the Pleadings, his Reply to Respondent's Suggestions in Opposition, his Motion for Summary Decision, or his Motion for Protective Order. As far as Petitioner is aware, the only two uses of that phrase in the entire record came from the MEC's subpoena *duces tecum* demanding Missouri First's corporate designee continue the deposition "from day to day at the same place and time until completed" and from the Ethics Commission's counsel at the probable cause hearing when he asked Randy Scherr, the secretary for the corporate complainant, to "give us an overview of what you do in your day-to-day activities both during the legislative session and outside of the legislative session." Hearing Tr. at 43, *l* 9-12.

Petitioner *has*, however, argued that pursuant to the same Charter attached to the Ethics Commission's Findings of Fact and Conclusions of Law and the MEC's Answer, that "Missouri First…[is] governed by the Board of Directors" and that "[n]ormal operational decisions will be decided upon by a simple majority vote." Such an operational decision would include the designation of a lobbyist. That is a normal corporate procedure—just as the Missouri Society of Governmental Consultants voted to file the complaint against Mr. Calzone that initiated this action.

Also, while not particularly relevant, Missouri First's directors are not "located hundreds of miles apart from one another." Ron Calzone and Anne Calzone are married and share a domicile in Dixon, Missouri.[8]

[8] In any event, the Ethics Commission's suggestion that Missouri First, Inc. is somehow illegitimate because its directors are "all located hundreds of miles from each other" is

- Page v of MEC Appendix A ("Table of Discovery"): "…(testing Petitioner Calzone's argument that if Missouri First, Inc., had designated a lobbyist, a written contract would have been entered into)."

The Ethics Commission is taking footnote 12 at page 26 of Petitioner's Motion for Judgment on the Pleadings out of context. In relevant part, that footnote states "[i]f the MEC could muster up actual evidence, such as a signed contract between Mr. Calzone and Missouri First, Inc. providing Mr. Calzone with consideration in exchange for lobbying members of the legislature, or a resolution of Missouri First Board of Directors designating him as a lobbyist, the mere fact that Mr. Calzone also testified in front of committees of the General Assembly would be irrelevant." MJP at 26, n. 12. The MEC is attempting to transmute that legal argument into a factual assertion, but the only factual assertion is that the MEC *does not have such evidence*, which is undisputed.

Moreover, there is obviously no need for the MEC to obtain all documents placed before the Missouri First board of directors to determine that non-party's "propensity to enter into written contracts in contrast to more informal methods of operation." App. A at v.

unsupportable. The American Civil Liberties Union Foundation, for instance, has a president that resides in New York, a general counsel that resides in Pennsylvania, a secretary that resides in Georgia, and directors in Nevada, Colorado, New Jersey, Maine, and California. Officers & Board of Directors, American Civil Liberties Union, https://www.aclu.org/officers-board-directors.

- Page v of MEC Appendix A ("Table of Discovery") characterizes the MEC's sixth request for production as being limited to "[c]ommunications from Missouri First, Inc., to the General Assembly."

There is no construction of the Ethics Commission's sixth request for production that could be read as being so limited.

II. The Ethics Commission's Motion For A Continuance Should Be Denied.

Until March 14, 2016, the Ethics Commission never questioned this body's February 3 scheduling order. As already discussed, delaying this case's resolution, and permitting the MEC to brief a narrower range of issues than Petitioner, is prejudicial to Mr. Calzone.

Moreover, there is no reason for delay. "Summary decision…is a procedure modeled on the summary judgment procedure at the circuit court level, [and it] is proper 'if a party establishes facts that entitle any party to a favorable decision and no party genuinely disputes such facts.'" *Krispy Kreme Doughnut Corp. v. Dir. of Revenue*, 358 S.W.3d 48, 51 (Mo. banc 2011) (footnote omitted) (quoting 1 CSR 15-3.446(6)(A) (2011)). Factual disputes at this stage of the proceedings must be genuine, not speculative. "An issue is genuine only if it is real and substantial; it may not consist of conjecture, theory and possibilities." *Hanson v. Union Elec. Co.*, 963 S.W.2d 2, 4 (Mo. App. E.D. 1998) (internal citation and quotation marks omitted). The Ethics Commission now seeks to use late discovery requests based on "conjecture, theory and possibilities" as a poison pill to avoid summary decision on questions of law. There is no genuine dispute

that the Ethics Commission cannot prove its theory of self-designation, nor that Mr. Calzone has never been compensated. This delay should not be permitted.

CONCLUSION

The Ethics Commission has made no serious attempt to defend the record that led it to find probable cause below, and instead has gone on the fishing expedition intended to find some new information upon which it may rest its case. But the record was set when the MEC found probable cause. Its efforts to delay judgment while drastically expanding the burdens upon Mr. Calzone and a non-party should be rebuffed.

Respectfully submitted,

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Dated: March 18, 2016

CERTIFICATE OF SERVICE

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