

**EX. 2**

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MAR 30 2022

KS Governmental Ethics Commission

BEFORE THE KANSAS GOVERNMENTAL ETHICS COMMISSION

MARK SKOGLUND, Executive Director	)	
Kansas Governmental Ethics Commission	)	
Complainant	)	
	)	
CHENGNY THAO	)	Complaint No. 715
	)	
JAMES MUIR	)	Complaint No. 716
	)	

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**MOTION TO DISMISS AND ALTERNATIVE MOTION FOR REHEARING**

COME NOW Respondents Chengny Thao and James Muir in the above-captioned combined actions, by and through Joshua A. Ney, Kriegshausner Ney LLC, and hereby move the Kansas Governmental Ethics Commission ("Commission") to dismiss Complaint 715 and Complaint 716 with prejudice for reasons stated below, or in the alternative, order a rehearing in the combined matters. In support thereof, Respondents state as follows:

**FACTUAL BACKGROUND**

- 1) On March 23, 2022, Respondents Chengny Thao and James Muir ("Respondents") appeared *pro se* in the combined administrative hearing ("Hearing") on Complaint 715 and Complaint 716 ("Complaints") before the Commission.
- 2) Mark Skoglund ("Skoglund"), Executive Director of the Commission, is the named Complainant on both Complaints.
- 3) Based on information and belief, Skoglund's Kansas law license has been suspended since 2015 and at all times during which he has served as the Executive Director for the Commission. *See* Attorney Registration Profile of Mark N. Skoglund (attached hereto as Exhibit A).
- 4) As a result of Skoglund's suspended law license, he is not in good standing as an

attorney in Kansas and has not been authorized to practice law in the state during the entire period of suspension.

- 5) At the Hearing, Skoglund appeared both personally as the Complainant and by and through Complainant attorney Brett Berry.
- 6) The Hearing was held on the record, and a video recording of the Hearing is available at <https://www.youtube.com/watch?v=4uXYXn4MCvE>. ("Hearing Recording," last accessed March 29, 2022).
- 7) At the Hearing, Skoglund was the only witness called on behalf of the Complainant (himself) by Complainant legal counsel Brett Berry.
- 8) At the Hearing, Commissioner John Solbach, serving as presiding officer, expressly stated that he would not require Skoglund to testify under oath because "[Skoglund is] an attorney [and] has an obligation to be candid with the tribunal."
- 9) However, Commissioner Solbach directed Commissioner Jerome Hellmer to administer witness oaths to the Respondents and the Respondents' witness, Gail Radke, requiring all three non-attorney witnesses to testify under penalty of perjury.
- 10) All unsworn oral statements supporting the Complainant's case in chief were provided by Skoglund.
- 11) No other witnesses besides Skoglund provided testimony as part of the Complainant's case in chief or in rebuttal.
- 12) All documentary evidence received at the Hearing supporting the allegations in the Complaints was improperly admitted because it was based on foundation established by Skoglund's unsworn oral statements.
- 13) All timestamps hereinafter cited are timestamps of the Hearing Recording.

- 14) At timestamp 22:30, Commissioner Solbach, as presiding officer, stated: "I might ask before we begin that the witnesses be sworn. I'm not going to ask that Mark Skoglund be sworn. He's an attorney. He has an obligation to be candid with the tribunal. We are a tribunal. But Ms. Thao and the others ..."
- 15) Commissioner Solbach expressly referenced Skoglund's status as a "licensed attorney" as justification for not putting Skoglund under oath or affirmation, as required by law and unlike the non-attorney witnesses.
- 16) At timestamp 22:55, *Pro Se* Respondent Thao interjected and asked Commissioner Solbach: "May I just ask, is Mr. Skoglund licensed to practice law in Kansas?" Commissioner Solbach replied: "He certainly is. He's a licensed attorney. He's subject to the jurisdiction of the disciplinary administrator, and he has an obligation to be candid with the Ethics Commission."
- 17) After making this statement, Commissioner Solbach asked Commissioner Hellmer to administer oaths only to the *pro se* Respondents and the additional non-attorney witness appearing on Respondent's behalf.
- 18) At no point during the Hearing did the presiding officer or any other commissioner administer an oath or affirmation to Skoglund prior to, during, or after his unsworn testimony.
- 19) This created material prejudice to the *pro se* clients, given that they were required to provide testimony under penalty of perjury in the hearing, while Skoglund, as the Complainant and sole agency witness was not so required due to his putative status as a "licensed attorney."
- 20) At timestamp 33:35, Brett Berry, legal counsel for Skoglund, stated: "At this time, the

Ethics Commission would call Mark Skoglund. Mr. Skoglund, you've already, as noted by the Hearing Officer, have an obligation to be forthright at this hearing. You weren't technically put under oath, but you do understand that?" Skoglund replied, "I do understand that."

21) At timestamp 48:36, Mr. Berry stated: "Given the statutes that are involved, and your education and experience as an attorney, as well as being the executive director of the Kansas Governmental Ethics Commission, have you reached an opinion as to whether Fresh Vision OP is a PAC?"

22) In response, Skoglund provided extensive unsworn opinion testimony, based putatively on his education and experience as an attorney, on the ultimate conclusions of law he believed the Commission should make, including discussions of statutory and regulatory language, and the legal implications for facts at issue pursuant to federal and state laws.

23) At timestamp 55:20, Mr. Berry asked: "Mr. Skoglund, is there anything that you would like to add to your testimony at this time that I may have neglected to ask?" Skoglund answered: "No."

### **MOTION TO DISMISS**

Respondents move to dismiss this action due to insufficient evidence, material prejudice, due process violations, and other reasons stated below. The Respondents are entitled to a fair hearing on the Complaints pursuant to K.S.A. 46-256, relevant regulations, and the due process clause of the United States and Kansas constitutions. *See Manzano v. Kansas Dept. of Revenue*, 324 P.3d 321, 327 (Kan. App. 2014) (articulating due process right of respondent in administrative hearing to be "provide[d] a meaningful opportunity to present evidence, develop

the issues, or identify the issues for a later hearing." ). In addition, K.S.A. 46-258 states in part:

At any hearing held by the commission:

- (a) Oral evidence shall be taken only on oath or affirmation.
- (b) Each party shall have these rights: To be represented by legal counsel; to call and examine witnesses; to introduce exhibits; and to cross-examine opposing witnesses.

K.A.R. 19-7-4 further states in part:

(b) Order of procedure. In hearings, the petitioner, complainant, or other party having the burden of proof, as the case may be, shall open and close, unless otherwise directed by the presiding member. In proceedings where the evidence is peculiarly within the knowledge or control of another participant, the order or presentation may be varied by the presiding member.

(c) Presentation by the petitioners or parties. Petitioners or parties shall have the right of presentation of evidence, cross-examination, objection and motion. The taking of evidence and subsequent proceedings shall proceed with all reasonable diligence and with the least practicable delay. When objections to the admission or exclusion of evidence before the presiding member are made, the grounds relied upon shall be stated briefly. Formal exceptions are unnecessary and shall not be taken to rulings thereon.

(d) Oral examination. Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

(f) Duties of the presiding member. Duties of the presiding member include, but are not limited to, the following:

- (1) administer the oath;
- (2) rule on proof;
- (3) regulate the hearing;
- (4) exclude people from the hearing;
- (5) hold conferences for simplification of issues;
- (6) dispose of procedural requests;

(7) authorize and set times for filing of briefs;

(8) grant continuances;

(9) and take any other action consistent with the purpose of relevant law administered by the commission and consistent with these rules.

(j) Burden of proof. Affirmative findings of fact by the commission shall be based on clear and convincing evidence.

***Complainant's Case-in-Chief Was Not Established by Testimony Under Oath or Affirmation***

The record does not establish by clear and convincing evidence the Commission's finding that Fresh Vision OP is a political committee for purposes of K.S.A. 25-4143(k)(1). No evidence was properly admitted as part of Complainant's case in chief. Skoglund was the only witness to provide oral statements as part of the Complainant's case in chief, and his testimony was not under oath or affirmation pursuant to K.S.A. 46-258 and K.S.A. 19-7-4. No oral or documentary evidence was admitted by stipulation or other means. As a result, at the close of the case in chief, there existed no evidence, let alone "clear and convincing evidence" on which the Commission could make the affirmative finding of fact that Fresh Vision OP was a "political committee." *See* K.S.A. 46-258 and 25-4143(k); *see also* K.A.R. 19-7-4.

***Skoglund's Material Omissions Violated Respondents' Due Process Rights***

Second, the conduct of the Hearing deprived Respondents of their due process rights. "Where [an] administrative hearing is a sham that does not provide a meaningful opportunity to present evidence, develop the issues, or identify the issues for a later hearing, [a Respondent's] due-process rights have been denied." *Manzano*, 324 P.3d at 327. The Due Process Clause does not require perfect procedures, but the fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Kempke v. Kansas Dept. of Revenue*, 133 P.3d 104, 109 (Kan. 2006), as corrected (May 18, 2006).

Skoglund's failure to disclose his "suspended" attorney license status or otherwise affirmatively correct the record at timestamps 22:30 and 22:55 when introduced as an "attorney" and later as a "licensed attorney" by the presiding officer deprived Respondents of their opportunity to effectively cross-examine Skoglund, develop the issues, and identify the issues for a later hearing. Skoglund's subsequent failure to correct the record at least three others compounded this deprivation of due process, especially given the Respondents' *pro se* capacities.

***"PAC" Finding Not Based on Clear and Convincing Evidence***

Further, based on Skoglund's own admission, he did not conduct any investigation of Fresh Vision OP's activities to determine the degree to which the alleged "express advocacy" of in one mailer and one statement on the website constituted a major or minor purpose of the organization. As admitted by Skoglund beginning at timestamp 53:71, he did not conduct any investigation into Fresh Vision OP's activities other than to review two mailers provided by Respondent Thao as well as a cache of Fresh Vision OP's website. Skoglund stated that he was "unaware of other conduct by Fresh Vision, other than the electoral activity and the second mailer."

[timestamp 58:17] Pro Se Respondent Muir: "So your entire investigation into Fresh Vision OP to determine whether they were a PAC or not was just a couple mailers that were given to you and a look at their website?"

Skoglund: "Yes. . . . we also received information from the website registrant regarding who registered the website. I don't believe that issue is . . . is not being discussed but I don't want to mislead you that we did not do other activity.

Even if Skoglund's unsworn oral statements could somehow be legally cured as admissible testimony, the statements and documents do not establish by "clear and convincing evidence" that a major purpose of Fresh Vision was to "expressly advocated the nomination, election or defeat of a clearly identified candidate for state or local office or make contributions to or



expenditures for the nomination, election or defeat of a clearly identified candidate for state or local office." In short, the Complainant's entire case and chief missed the forest of issue activity and community engagement for the tree of an isolated endorsement mailer.

### **ALTERNATIVE MOTION FOR REHEARING**

Defendant's alternative motion for rehearing is made solely in the event that Defendant's motion to dismiss is denied. K.A.R. 19-7-16 states:

Any petitioner or party alleging any error in the original proceedings or report shall request a rehearing. An application for rehearing shall be filed with the commission at its office within ten (10) days after service of a commission report. Such application shall be made by motion, stating specifically the grounds relied on. A copy of such application shall be served on all petitioners or parties in conformity with the service provisions of these rules, by the petitioner or party making such application. An application for rehearing shall contain:

(1) the docket number of the case for which such application is being made;

(2) the name of the petitioner or party making such application; and

(3) such application shall state concisely and specifically the alleged errors for which a rehearing is sought. If vacation, reversal or modification is sought by reason of matters which have arisen since the hearing and decision, the matters relied upon shall be identified in the application.

(b) Granting an application for rehearing. If the commission grants an application for rehearing, it shall so notify the petitioners or parties in writing. The date an application for rehearing is granted shall be the date on which the commission makes such decision. The rehearing shall follow the same procedural rules as a hearing, except to the extent otherwise directed by the commission or a presiding member.

(c) Effect of failure to allege specific error. Failure to request a rehearing on a specific allegation of error and provide reasons therefore shall constitute a waiver of all objection to any matters not specifically alleged as error.

#### ***Specific Allegations of Error in Support of Alternative Motion for Rehearing***

In the event Respondents' motion to dismiss is denied, Respondents specifically allege in support of their Alternative Motion for Rehearing pursuant to K.S.A. 19-7-16 that the following

errors occurred at the Hearing on March 23, 2022:

- 1) Oral statements at the Hearing provided by Skoglund were not sworn testimony made under oath or affirmation as required under K.S.A. 46-258 and K.A.R. 19-7-4;
- 2) Respondents were deprived of their statutory and constitutional due process rights to cross-examine the Skoglund and to further explore potential issues because Skoglund did not provide sworn oral testimony as required by K.S.A. 46-258 and K.A.R. 19-7-4;
- 3) Documentary evidence was improperly admitted at the Hearing because it was based on foundation established by Skoglund's unsworn oral statements;
- 4) Documentary evidence exhibits were not previously provided to Respondents and such documentary evidence was improperly admitted over objection of the *pro se* Respondent Muir (timestamp 37:18);
- 5) Manifest injustice against Respondents resulted because of specific misrepresentations and/or omissions by the Skoglund in the Hearing, including:
  - a. Skoglund's failure to disclose at any point prior to or during the Hearing that:
    - 1) he is not authorized to practice law in the state of Kansas; 2) he is not a "licensed attorney;" and 3) his license has been "suspended" since 2015.
  - b. Skoglund's failure to correct the record by making such disclosures or otherwise correct an inaccurate statement made by the presiding officer or the Commission's attorney, respectively, at the following moments in the Hearing:
    - i. Timestamp 22:30, Skoglund's failure to disclose his suspended license status after presiding officer's statement: "I might ask before we begin that the witnesses be sworn. I'm not going to ask that Mark Skoglund

be sworn. He's an attorney. He has an obligation to be candid with the tribunal. We are a tribunal. But Ms. Thao and the others..."

- ii. Timestamp 22:55, Skoglund's failure to disclose his suspended license status after presiding officer's statement (in response to Respondent's question as to whether Skoglund was licensed to practice law in Kansas): "He certainly is. He's a licensed attorney. He's subject to the jurisdiction of the disciplinary administrator, and he has an obligation to be candid with the Ethics Commission."
  - iii. Timestamp 33:35, Skoglund's failure to disclose his suspended license status after his own legal counsel's question regarding Skoglund's qualifications to provide expert legal opinion based on Skoglund's "education and experience as an attorney."
  - iv. Timestamp 55:20, Skoglund's failure to disclose his suspended license status after his own legal counsel's question: "Mr. Skoglund, is there anything that you would like to add to your testimony at this time that I may have neglected to ask?"
- c. Skoglund's failure to otherwise refrain from "hold[ing] out to the public or otherwise represent[ing], expressly or by implication, that [he] is admitted to practice law in this state." *See c.f.* K.S.A. 50-6,142.

WHEREFORE, Respondents respectfully request the Commission issue an order dismissing Complaints 715 and 716 with prejudice, or alternatively, an order for rehearing pursuant to K.A.R. 19-7-16, and for such other just and equitable relief as may be appropriate.

Respectfully submitted this 30<sup>th</sup> day of March, 2022, by:

KRIEGSHAUSER NEY LLC

By: /s/ Joshua A. Ney  
Joshua A. Ney, #24077  
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ATTORNEY FOR RESPONDENT

**Certificate of Service**

This is to certify that on this 30<sup>th</sup> day of March, 2022, the original of the above and foregoing **MOTION TO DISMISS AND ALTERNATIVE MOTION FOR REHEARING** was delivered via electronic mail delivery to Kansas Governmental Ethics Commission at KGEC\_Ethics@ks.gov, with a true and correct copy submitted via electronic mail to:

Mark Skoglund  
Kansas Governmental Ethics Commission  
mark.skoglund@ks.gov  
*Complainant*

Brett Berry  
Kansas Governmental Ethics Commission  
brett.berry@ks.gov  
*Attorney for Complainant*

/s/ Joshua A. Ney  
Joshua A. Ney, #24077

# Kansas Supreme Court Attorney Directory

The contact information found in this listing has been provided to the Office of Attorney Registration by the attorney. The directory lists an attorney's business contact information. If the attorney has not provided that information, those boxes will be blank.

<b>Attorney Name</b>	Skoglund, Mark Nathaniel
<b>Date Of Admission</b>	4/26/2013
<b>Registration Number</b>	25849
<b>Current Status</b>	Suspended
<b>Business Mailing Address</b>	Kansas Leg Research Dept 300 SW 10th Ave, Room 68w Topeka, KS 66612-1504
<b>Business Phone</b>	785-296-3181
<b>Business Fax</b>	

## License Status Definitions

### Active

Active attorneys are in good standing and authorized to practice law in Kansas.

### Inactive

Inactive attorneys are in good standing but not authorized to practice law or hold themselves out as authorized to practice law in Kansas except as permitted under Rule 712B.

### Retired

Retired attorneys are at least 66 years of age and retired from the practice of law. Attorneys on retired status are not allowed to practice law except as permitted under Rule 712B.

### Disabled

Attorneys on Disabled Status may not practice law in Kansas or hold themselves out as authorized to practice law in Kansas.

### Disbarred

Attorneys who are no longer licensed in Kansas.

### Removed

Attorneys who are no longer licensed in Kansas - voluntarily surrendered license.

### Terminated

Restricted license is no longer valid - not authorized to practice in Kansas.

### Suspended

Attorneys who have been suspended - not authorized to practice law in Kansas.

### Deceased

Deceased Attorneys.

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Kansas Supreme Court Attorney Registration  
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