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FILED

SEP 1 2021

ANGIE SPARKS, Clerk of District Court
By C POTUZAK Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY**

PURPLE SNOW PROMOTIONAL,
LLC; BACKSLOPE BREWING, LLC;
PINE STREET RENTALS, LLC;
ESSENTIAL MOUNTAIN
PRODUCTS, LLC; BLACK DOG
FARM, LLC; THE MENTAL HEALTH
UPDATE, LLC; and WICKED GOOD
HANDYMAN SERVICE, LLC,

Class Action Plaintiffs,

vs.

CHRISTI JACOBSEN, in her official
capacity as MONTANA SECRETARY
OF STATE,

Defendant.

Cause No.: CDV 2021-891

CLASS ACTION COMPLAINT

KATHY SEELEY
PRESIDING JUDGE

Plaintiffs, on behalf of themselves and all others similarly situated, allege:

INTRODUCTION

1. In Montana, the Secretary of State has a side hustle. When businesses and individuals log onto the Secretary of State's website to pay business licensing

fees or fees for services like a basic lien search, they are sometimes charged twice or more without their knowledge. While the overcharge itself is normally the result of a forgivable technical glitch, the Secretary of State's policy for handling the duplicate charges expressly violates Montana state law, not to mention basic principles of contract law. Despite having complete access to the information necessary to process refunds and reverse mistakes, Secretary Jacobsen has carried on her predecessor's policy: no refunds unless requested in writing.

2. This might sound like a simple enough policy, but it is nefarious. Businesses expect the state to charge them for what they actually owe. With no receipt documenting the excess, discovering a duplicate charge presents a challenge. Even when businesses detect it, they must submit a request for a refund not simply by calling, but in writing. Some businesses report chasing these refunds—often for \$20 or less—for weeks, even months. While businesses in Montana hung on by a thread as the COVID-19 pandemic raged, while other arms of government did all they could to route money to keep small businesses afloat, the Secretary of State's Office was skimming—to the tune of more than \$120,000 in fiscal year 2020. A lucrative side hustle, to say the least.
3. Montana law imposes a duty to restore that which is wrongfully acquired or retained. § 27-1-713, MCA. The Secretary of State knows that these overcharges have occurred. In some circumstances employees have compiled lists of affected Montanans. But the decision was made at the highest levels

not to return the money to its rightful owners. A diverse group of Plaintiff businesses now seek injunctive and declaratory relief to prevent this unlawful practice from continuing. Some have been overcharged, and all are tired of scrutinizing their books just to ensure their money isn't being skimmed by a state agency. Plaintiffs also seek refunds on behalf of all similarly situated businesses across Montana.

PARTIES

4. This is a class action lawsuit under Montana Rule of Civil Procedure Rule 23 through which Plaintiffs seek equitable relief and/or damages on behalf of themselves and all others similarly situated.
5. Class Representative Purple Snow Promotional, LLC, is a Montanan-owned promotional products supplier located in Billings, Montana. About 14 months after the fact, Purple Snow Promotional discovered that the Secretary of State overcharged it for business licensing fees in February 2020. Purple Snow Promotional was never notified of the overcharge.
6. Class Representative Backslope Brewing, LLC is a brewery and restaurant located in Columbia Falls, Montana. Backslope Brewing has been forced to monitor its accounts for overcharges by the Secretary.
7. Class Representative Pine Street Rentals, LLC is a rental property company located in Townsend, Montana. Pine Street Rentals has been forced to monitor its accounts for overcharges by the Secretary.

8. Class Representative Essential Mountain Products, LLC is a custom belt manufacturing company located in Helena, Montana. Essential Mountain Products has been forced to monitor its accounts for overcharges by the Secretary.
9. Class Representative Black Dog Farm, LLC is a pasture-based farm that raises pork, poultry, and eggs in Livingston, Montana. Black Dog Farm has been forced to monitor its accounts for overcharges by the Secretary.
10. Class Representative The Mental Health Update, LLC is an organization dedicated to providing accessible and meaningful mental health information located in Missoula, Montana. The Mental Health Update has been forced to monitor its accounts for overcharges by the Secretary.
11. Class Representative Wicked Good Handyman Service, LLC is a handyman services provider located in Helena, Montana. Wicked Good Handyman Service has been forced to monitor its accounts for overcharges by the Secretary.
12. Defendant Christi Jacobsen is the Secretary of State for the State of Montana. The Secretary of State is one of six elected Executive Branch officers designated in Article VI the Montana Constitution. Among the Secretary of State's duties are: "keep[ing] a fee book in which must be entered all fees, commissions, and compensation earned, collected, or charged, with the date, name of payer, paid or unpaid, and the nature of the service in each case, which must be verified annually by the secretary of state's affidavit entered in the fee

book charging fees as outlined by law,” § 2-15-401(h), MCA; imposing fees consistent with law, “commensurate with the overall costs of the office of the secretary of state,” and “reasonably reflect[ive] [of] the prevailing rates charged in the public and private sectors for similar purposes,” § 2-15-405(2); and “maintain[ing] records sufficient to support the fees,” § 2-15-405(3), MCA.

JURISDICTION & VENUE

13. The conduct at issue here occurred in Lewis & Clark County, Montana, where the Office of the Secretary of State is located.
14. This Court has jurisdiction under Article VII, § 4 of the Montana Constitution; §§ 3-5-302(1)(b), (c); 3-5-302(3)); and 27-8-201, MCA; and this Court’s inherent power to review state agency decisions and actions and to issue appropriate relief.
15. Venue is properly laid in Lewis & Clark County pursuant to §§ 25-2-125 and 25-2-126, MCA.

FACTUAL ALLEGATIONS

16. In 2019, the Secretary had a contract with technology firm Foster Moore for the implementation and maintenance of its Catalyst product.
17. Catalyst functioned as the platform through which users entered information and paid state-required fees on the Secretary’s website. Transactions were authorized through the payment portal on the Catalyst platform.
18. Catalyst stored information and generated receipts for transactions.

19. The payment portal was set up to communicate with two platforms—Transaction Express, also called TransFirst, and Catalyst, which in turn communicated with the Montana Statewide Accounting, Budgeting and Human Resources Systems (SABHRS). When functioning properly, the payment portal sent information that customers entered simultaneously to TransFirst to process the payment and to Catalyst to record the transaction receipt.
20. TransFirst was the corridor to credit card companies and served as the merchant servicer for credit card transactions. When the payment portal communicated customer information to TransFirst, the result was a real-time transaction—that is, the customer’s credit card was charged at the time the information was sent and received.
21. At the same moment the payment portal communicated with TransFirst, it was also supposed to create a record of the receipt in Catalyst. At the end of each day Catalyst automatically sent an interface file to SABHRS with the receipt data. Each night, SABHRS would sort and process records of all the day’s transactions.
22. When the Catalyst and TransFirst systems were in use, the duplicate charge issue could occur in one of two ways.
23. In the first scenario, a customer would enter their information and, without realizing that payment had been processed, press the “Submit” or “Pay” button more than once, resulting in multiple payments. Because of a glitch in

communication between the payment portal and Catalyst, sometimes Catalyst failed to record payments and thus failed to communicate certain transaction receipts to SABHRS, although the payments had occurred and therefore would appear in the TransFirst system and its records.

24. In the second scenario, a customer might submit their payment information into the system only once, but because of the same or a similar glitch, the record of payment wouldn't appear in Catalyst and therefore wouldn't be communicated to SABHRS. The customer would then receive a notification of nonpayment or late payment or even a dissolution notice and would pay again, not realizing that in fact they had already paid the fee in question. When this occurred, the customer may have been assessed a late fee, as well as a duplicate charge.
25. The Secretary could easily catch duplicate charges by consulting the TransFirst record regularly and comparing the TransFirst record to records within Catalyst to identify overcharged individuals or businesses.
26. The Secretary could likewise easily issue refunds shortly after overpayment occurred and without further information from the affected individuals and businesses.
27. The Secretary has since transitioned to a new technology firm. Tecuity replaced Foster Moore, Enterprise replaced Catalyst, and PayRoc replaced TransFirst.

28. Upon information and belief, duplicate charging problems have continued even after the platforms changed.
29. The Secretary has stated publicly that its digital payment system is error-free.
30. The duplicate charging problems are inconsistent with the Secretary's public statements that its digital payment system is error-free.
31. Customers have no alternative to using the error-ridden digital payment system.
32. Upon information and belief, an employee within the Secretary's office created a spreadsheet in or around October 2019 that showed duplicate charges associated with specific affected individuals and businesses.
33. Upon information and belief, the spreadsheet was shared in or around October 2019 with then-Secretary of State Corey Stapleton and then-Deputy Secretary of State Christi Jacobsen.
34. Upon information and belief, after learning of the spreadsheet, then-Secretary Stapleton informed agency personnel that the agency's policy was to issue refunds only in response to written requests.
35. Secretary Jacobsen continues to enforce her predecessor's policy of requiring customers to request refunds in writing.
36. Local news media reported on the duplicate charging issue in the fall of 2020.
37. In response to questions from reporters, a Secretary employee, writing on behalf of the agency, suggested that the duplicate charging issue occurred for

approximately one month in the spring of 2020 and was traceable to a specific version of Google Chrome.

38. The employee wrote: "From March 3 to April 5 of 2020, the Office became aware of a Google Chrome security update that was blocking cookies sent from the business registry to ... the payment vendor, causing a delay in transactions sent to the vendor.... On April 5, the vendor completed a software update to address the Chrome security issue."
39. In reality, the duplicate charging issues began prior to March 3, 2020 and continued past April 5, 2020.
40. Through its agent-employee, the Secretary wrote in response to questions from the media, "As the office became aware of the overpayments, customers were immediately refunded. Of the 45,000 transactions that occurred [from March 3, 2020 to April 5, 2020], there were approximately 1,200 transactions identified and refunded."
41. Even if, as the Secretary represented, duplicate charges made from March 3, 2020 to April 5, 2020 were automatically refunded, duplicate charges were not automatically refunded outside that time period.
42. Through its agent-employee, the Secretary informed the media that the Secretary's Office follows Generally Accepted Accounting Principles ("GAAP").
43. The Secretary does not, in fact, train its employees to follow GAAP.
44. The Secretary's refund policy is not informed by GAAP.

45. The Secretary's statement to the media was intended to persuade individuals and businesses that it would recognize and automatically refund duplicate charges.
46. The Secretary's statement to the media had the effect of persuading individuals and businesses that it would recognize and automatically refund duplicate charges.
47. In truth, many (if not all) affected individuals and businesses received refunds only if they identified the problem themselves and requested a refund in writing.
48. The cost to the affected individual or business to comply with the Secretary's onerous requirements for seeking a refund could be significant enough to outweigh the value of the wrongfully retained fee.
49. The Secretary also represented to the media and to the people of Montana that it did not send a blanket notification to all users of the Secretary's online payment portal because only "a very small percentage" of its customers were affected.
50. Regardless of the percentage of customers affected, the total number was substantial.
51. The Secretary not only refused to issue a blanket notification but also refused to issue targeted notifications to those individuals and businesses to whom the Secretary owed money.

52. In the fiscal year 2020, the Secretary wrongfully retained more than \$120,000 in duplicate charges.
53. Upon information and belief, the Secretary has continued to wrongfully retain overcharges from its customers through fiscal year 2021 and into fiscal year 2022.

CLASS ALLEGATIONS

54. Plaintiffs bring this action for themselves and for all similarly situated Montanans.
55. The Class of persons Plaintiffs seek to represent is defined as: all persons who, at any time during the applicable class period, paid fees to the Secretary through its website.
56. The class is so numerous that joinder of all members is impracticable. All Montana businesses must use the Secretary's online payment platform to pay fees.
57. The class members may be unable to locate or afford counsel, and they may be unaware that their legal rights have been violated. The amount of damages per consumer, while not insignificant, is relatively small, making individual adjudication infeasible.
58. Questions of law and fact are common to the class and predominate over any questions affecting only individual members.
59. The named Plaintiffs and their counsel will adequately and fairly represent the interests of the Class.

60. The Secretary has acted and refused to act on grounds that apply generally to the Class, so that final injunctive and declaratory relief is appropriate respecting the class as a whole.

COUNT ONE
(Constructive Fraud)

61. Plaintiffs reallege all prior allegations.
62. Constructive fraud is a breach of duty which, without fraudulent intent, creates an advantage for the breaching party by misleading another person to that person's prejudice.
63. The Secretary owed duties to disclose wrongfully collected fees and to refund money properly belonging to individuals and businesses.
64. The Secretary breached those duties.
65. The Secretary enjoyed the advantage of its breach when it retained money to which it was not lawfully entitled.
66. The Secretary's statements and conduct misled individuals and businesses to believe that: its online payment system would eliminate errors; its practices and policies would correct any errors created by its online payment system; and it was, in fact, refunding all erroneous duplicate charges.

COUNT TWO
(Breach of the Covenant of Good Faith & Fair Dealing)

67. Plaintiffs reallege all prior allegations.
68. The covenant of good faith and fair dealing requires honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

69. The Secretary's conduct was not honest in fact when the Secretary refused to provide the public with accurate information regarding the double-charging issue and misrepresented the scope of the problem and the sufficiency of the Secretary's response to the problem.
70. Reasonable commercial standards do not allow one party to a transaction to retain fees for services that were not provided.
71. Reasonable commercial standards require entities to balance their books and to return payments to which they are not entitled.

COUNT THREE
(Violation of § 27-1-713, MCA)

72. Plaintiffs reallege all prior allegations.
73. "One who obtains a thing without the consent of its owner, by a consent later rescinded, or by an unlawful exaction that the owner could not at the time prudently refuse shall restore the thing to the person from whom it was obtained unless the person has acquired a title to the thing superior to that of the other person or unless the transaction was corrupt and unlawful on both sides. The restoration required by this section must be made without demand except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until the party has notice of the mistake." § 27-1-713, MCA.
74. The Secretary obtained Plaintiffs' money without Plaintiffs' consent and through an unlawful exaction Plaintiffs had no opportunity to refuse.

75. The Secretary accordingly was obligated to return the wrongfully exacted money to Plaintiffs, the rightful owners, without demand from Plaintiffs.

COUNT FOUR
(Unjust Enrichment)

76. Plaintiffs reallege all prior allegations.
77. A claim for unjust enrichment includes three elements: (1) a benefit conferred upon the recipient by the claimant; (2) the recipient's knowledge of or appreciation of the benefit; and (3) the recipient's acceptance or retention of the benefit under circumstances rendering acceptance or retention inequitable.
78. Plaintiffs conferred pecuniary benefits upon the Secretary when they paid duplicate fees.
79. The Secretary knows that it has received these benefits and has appreciated the benefits by retaining the fees erroneously charged.
80. Because the Secretary is not entitled to fees for services that it does not provide and which are not authorized by law, its continued retention of the duplicate fees is inequitable.

COUNT FIVE
(Procedural Due Process)

81. The State may not deprive persons of property without due process of law. Mont. Const., art. II, § 17; U.S. Const. amend. XIV.
82. Due process requires the State to give persons notice and an opportunity to be heard before it may take their property.

83. Due process is violated by the Secretary's policy of not giving notice to affected individuals and businesses that it has collected and intends to retain their money.

COUNT SIX
(Declaratory & Injunctive Relief)

84. Plaintiffs reallege all prior allegations.
85. This Court has authority to render a declaratory judgment under Montana Code Annotated § 27-8-201 *et seq.* and authority to issue injunctive relief under Montana Code Annotated § 27-19-101 *et seq.*
86. Declaratory and/or injunctive relief is necessary to prevent ongoing and future harm to Plaintiffs and all members of the Class.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray that this Court enter:

1. An order certifying the Class and appointing Plaintiffs as Class Representatives and their counsel as Class Counsel;
2. A declaration that the Secretary's refund policy is unlawful;
3. An injunction barring the Secretary from continuing to enforce its unlawful refund policy;
4. An order requiring the Secretary to inform all potentially affected individuals of the double-charging issue and to return all wrongfully retained fees;
5. An award of costs and attorney's fees; and
6. Any other form of relief that the Court deems just and appropriate.

Respectfully submitted this 1st day of September, 2021.

/s/ 
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Constance Van Kley
Upper Seven Law