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MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY

STATE OF MONTANA, BY AND THROUGH ITS
ATTORNEY GENERAL, AUSTIN KNUDSEN,

Plaintiff,

v.

NATIONAL ASSOCIATION OF ATTORNEYS
GENERAL AND THERESIA HELLER, IN HER
OFFICIAL CAPACITY AS CHIEF FINANCIAL
OFFICER FOR THE NATIONAL ASSOCIATION OF
ATTORNEYS GENERAL,

Defendants.

Cause No. _____

**COMPLAINT FOR DECLARATORY
RELIEF AND ACCOUNTING**

The State of Montana brings this civil action against Defendants the National Association of Attorneys General and Theresia Heller, in her official capacity as the Chief Financial Officer for the National Association of Attorneys General, for declaratory relief and accounting, and alleges as follows:

INTRODUCTION

1. Montana’s Founders felt so strongly about protecting Montana’s public fisc that the Constitution they adopted requires “strict accountability” of all public funds. Mont. Const. art. 8, § 12. Buttressing the point, Montana’s Constitution further requires the Legislature to “provide for a unified investment program for public funds” and expressly limits how certain kinds of public money can be invested. Mont. Const. art. 8, § 13.

2. Defendant the National Association of Attorneys General, or NAAG, is a custodian of Montana’s public funds—so its deposits, investments, and reports of Montana’s public funds must comply with Montana’s constitutional and statutory mandates. NAAG holds public money from a series of legal settlements entered by Montana and other States who are (or were) NAAG members. In those settlements, the parties agreed to create special purpose funds—totaling over \$100 million—for the public’s benefit, and appointed NAAG to administer the funds. In fact, in a recent letter to Montana’s Attorney General, NAAG confirmed that assets in the funds belong to Montana and that NAAG is investing the funds on Montana’s behalf.

3. But NAAG does not comply with Montana law governing how public money must be deposited or invested. NAAG operates without oversight from the public officials and entities the Montana Legislature has created to safeguard Montana’s public funds. NAAG also deals with out-of-state and non-state-approved institutions and does not report to the state treasurer or the Board of Investments.

4. To address the inconsistency between NAAG’s actions and what Montana’s laws require, Montana brings this case seeking a declaratory judgment that

NAAG and its Chief Financial Officer are subject to the strict accountability requirement of the Montana Constitution and to the requirements of Title 17 of the Montana Code. Montana also seeks an accounting to determine what share of NAAG's assets are Montana's public funds.

PARTIES

5. Plaintiff is the State of Montana. Montana sues through the Montana Attorney General, who is the chief legal officer of the state. Mont. Const. art. 6 § 4. His duties include the responsibility to “prosecute or defend all causes ... in which the state has an interest.” Mont. Code Ann. § 2-15-501.

6. The Montana Department of Administration also has authority to bring an action when an entity “has money ... that belongs to the state ... and fails to render an account of the money or personal property to and make settlement with the department ... or fails to pay into the state treasury the money belonging to the state.” *Id.* § 17-4-103(2).

7. Defendant National Association of Attorneys General is an unincorporated association organized under the laws of Washington, D.C., and headquartered there. Under D.C. law, an unincorporated association is a legal entity distinct from its members that can hold property and be sued in its own name. *See* D.C. Code §§ 29-1105, -1106, -1109.

8. Defendant Theresia Heller is NAAG's Chief Financial Officer. She is responsible for financial planning, reporting, and administration of NAAG's assets. She is sued in her official capacity.

BACKGROUND

I. Laws Governing Montana Public Funds

9. The Montana Constitution requires “strict accountability of all revenue received and money spent by the state and counties, cities, towns, and all other local governmental entities.” Mont. Const. art VIII, § 12.

10. The Montana Constitution further requires the Legislature to “provide a unified investment program for public funds.” Mont. Const. art VIII, § 13(1). The Constitution also commands that, with certain exceptions not relevant here, “no public funds shall be invested in private corporate capital stock.” *Id.* And it requires the State’s “investment program” to be “audited at least annually and a report thereof submitted to the governor and legislature.” *Id.*

11. The Montana Legislature has implemented those constitutional mandates through statutory provisions, including specific requirements that govern how public money must be deposited and invested—and who has responsibility for those functions.

12. Start with the “who.” First, the Legislature created a Board of Investments within the Department of Commerce and vested it with authority “for direct investment” of Montana’s public money. Mont. Code Ann. § 2-15-1808(1)-(2).

13. Second, the Legislature created a Department of Administration, and provided that the director of this department serves as the ex officio state treasurer. *Id.* § 2-15-1002. In Montana, “[t]he state treasurer is designated the treasurer of every state agency and institution.” *Id.* § 17-6-105(1). The state treasurer also “is the

custodian of all money ... of the state unless otherwise expressly provided by law.”
Id. § 17-1-111(1).

14. Next, consider statutory requirements that govern how public money must be accounted for, deposited, and invested.

15. The state treasurer must “receive and account for all money belonging to the state, not expressly required by law to be received and kept by some other person.” *Id.* § 17-1-111(2)(a). The state treasurer also “must keep an account of all money received and disbursed,” *id.* § 17-1-111(d), and must “require all persons who have received money belonging to the state but who have not accounted for it to settle their accounts.” *Id.* § 17-1-111(2)(j).

16. What’s more, “[u]nder the direction of the board of investments, the state treasurer shall deposit public money in the treasurer’s possession and under the treasurer’s control in” certain financial institutions “located in the state, except as otherwise provided by law.” *Id.* § 17-6-101(1). Deposits of public money must be federally insured or be secured as the “board of investments may require,” *id.* § 17-6-102(1), by specified “kinds of securities” listed in the Montana code, *see id.* §§ 17-6-103(1)-(16).

17. State agencies must comply with similar depository requirements. “All state agencies shall deposit all money” either in certain kinds of financial institutions “in the city or town in which the agencies are situated” or “with the state treasurer.” *Id.* § 17-6-105(2). Those deposits “must be made in the name of the state treasurer, must be subject to withdrawal at the treasurer’s option, and must draw interest as

other state money.” *Id.* § 17-6-105(4). State law also specifies monetary thresholds that trigger an agency’s deposit requirements and specifies when agencies must make those deposits—unless the Board of Investments expressly approves an alternative deposit schedule. *Id.* § 17-6-105(6), (8). For the purposes of these deposit requirements, an “agency” means any “department[]” or “any other administrative unit[] of state government,” *id.* § 17-1-104(1), and “includes any contractor of an agency if the contractor collects at least \$50,000 annually on behalf of the state from all sources,” *id.* § 17-6-105(10).

18. Beyond that, Montana law does not permit certain public funds to reside with an agency itself absent express permission from the Department of Administration. For “[t]he department of administration *may, in its discretion,* permit any state agency to retain in its possession ... money that would otherwise be deposited in the custodial fund.” *Id.* § 17-2-202 (emphasis added). It does not appear that the Legislature has granted the Department of Administration similar discretionary authority to authorize agency money to reside with an entity such as NAAG.

19. And when the Legislature has been made aware of Montana’s receiving public money through multistate litigation settlements, it has created specific funds for holding that money. *See, e.g., id.* § 17-6-603 (establishing a trust fund for Montana’s funds resulting from the Tobacco Master Settlement Agreement).

20. Besides setting rules that govern deposits of public money, the Legislature has specified how Montana’s public money must be invested. “The unified investment program directed by Article VII, section 13, of the Montana constitution to

be provided for public funds must be administered by the board of investments in accordance with the prudent expert principle.” *Id.* § 17-6-201(1). Among other things, that principle requires managers of Montana’s public money to “discharge the duties solely in the interest of and for the benefit of the funds forming the unified investment program.” *Id.* §17-6-201(1)(c). The Legislature allows the state’s retirement funds to “be invested in common stocks of any corporation,” but “[o]ther public funds may not be invested in private corporate capital stock,” which “means only the common stock of a corporation.” *Id.* §17-6-201(2)(a)-(b).

21. Eliminating all doubt about who controls the investment of state funds, the Legislature specified that “[t]he board has the primary authority to invest state funds.” *Id.* §17-6-201(4). “The board shall direct the investment of state funds in accordance with the laws and constitution of this state.” *Id.* “Another agency may not invest state funds unless otherwise provided by law.” *Id.*

22. If agencies have “surplus cash” available for investment, the Board of Investments must help those agencies “determine if, when, and how much surplus cash is available for investment, determine the amount of surplus treasury cash to be invested,” and “determine the type of investment to be made.” *Id.* § 17-6-201(5)(a)-(c).

23. The Board of Investments can hire investment firms to help invest public funds, but the Legislature has directed the Board to use such firms as “maintain offices in the state and thereby make contributions to the state economy,” and to use

“out-of-state [investment] firms only when there is a distinct economic advantage to the state of Montana.” *Id.* §17-6-211(1).

24. These statutes help to ensure that Montana’s public money is held and invested in accordance with public policy. For example, earlier this year, Governor Gianforte and the Board of Investments announced that “the State of Montana has reaffirmed its commitment to maximizing returns on the over \$26 billion in investments of the state’s financial assets, not advancing a political agenda through Environmental, Social, and Governance (ESG) investing.” *Governor Gianforte, Board of Investments Block ESG Investing of State Funds* (Jan. 18, 2023), https://news.mt.gov/Governors-Office/Governor_Gianforte_Board_of_Investments_Block_ESG_Investing_of_State_Funds. “Late last year, the Board of Investments revoked the ability of the state’s investment managers to vote the state’s proxies which align with ESG investment decisions.” *Id.* “The use of ESG prioritizes environmental, social, and governance investment principles over traditional investment principles designed to maximize shareholder returns,” and the Board of Investments reaffirmed that it will seek to “grow Montana’s wealth without bias and based solely on what is in the best interest of the beneficiaries of the assets we invest.” *Id.*

II. The National Association of Attorneys General

25. The National Association of Attorneys General, or NAAG, is a professional membership organization that represents the chief legal officers of the states and of federal territories.

26. NAAG was founded in 1907 to coordinate multistate antitrust litigation, but its mission has since morphed. NAAG now provides its members with information, research, and support on a wide range of legal and policy issues.

27. NAAG's membership consists of the offices of the state and territorial attorneys general. Ex. A, *Constitution and Bylaws of the Nat'l Ass'n of Att'ys Gen.*, Art. II § 1.

28. Under the NAAG Constitution, NAAG acts exclusively as an agent of the member attorneys general and has no function "independent of the functions of its membership." *Id.* § 2.

29. NAAG "is an instrumentality of the States." Ex. B, *Classification Letter*, Internal Revenue Serv. (Jan. 16, 1985). This quasi-governmental status qualifies NAAG for tax exemption under the Internal Revenue Code. *Id.* But unlike private tax-exempt organizations, NAAG is not required to file financial reports with the Internal Revenue Service. See D. Fisher, *The House Tobacco Built*, Forbes (Aug. 14, 2008), <https://bit.ly/3Qv4nSw>.

30. NAAG employs a Chief Financial Officer who "oversees the financial transactions of NAAG" and "is responsible for financial planning and reporting, and administration of the Association's assets." See *Chief Financial Officer*, Nat'l Ass'n of Att'ys Gen., <https://bit.ly/3W0r02f>. NAAG's current Chief Financial Officer is Defendant Theresia Heller. *Id.*

III. NAAG holds and invests Montana’s public funds.

31. NAAG manages several public-interest funds on behalf of its member states, including Montana. Assets in the funds belong to the States, and NAAG holds them in restricted accounts separate from its operating accounts.

32. Funds under NAAG’s management include the Financial Services Fund and the VW Settlement Fund, among others that in sum total hold as much as \$100 million or more.

33. The Financial Services Fund was created in 2012 from a legal settlement by Montana and other states related to the then-recent mortgage and loan crisis. See D. Fisher, *NAAG Gets Its Slice of the Mortgage-Settlement Pie*, Forbes (Mar. 12, 2012), <https://bit.ly/3WY2Jv8>. The fund’s purpose is to aid “the investigation and prosecution of cases involving fraud, unfair and deceptive acts and practices, and other illegal conduct related to financial services or state consumer protection laws.” *Memorandum of Understanding Regarding the Rules and Regulations Governing the Financial Services and Consumer Protection Enforcement, Education, and Training Fund*, Nat’l Ass’n of Att’ys Gen. (Oct. 31, 2012) (“Financial Services Fund Rules”), at 1, <https://bit.ly/3CFa1M7>. The settling parties agreed to transfer \$15 million of the states’ proceeds to NAAG for the fund’s initial endowment. *Id.*

34. The VW Settlement Fund was created in 2016 from a legal settlement by Montana and other states related to Volkswagen’s vehicle emissions scandal. The fund’s purpose is to advance “consumer protection oversight, training and enforcement, including in the area of automobile-related fraud and deception.” *Rules and Regulations of the VW Settlement Fund*, Nat’l Ass’n of Att’ys Gen. (Aug. 2020) (“VW

Fund Rules”), at 1, <https://bit.ly/3QDh0en>. The settling parties agreed to transfer \$20 million of the states’ proceeds to NAAG for the fund’s initial endowment. *Id.*

35. A special committee of NAAG members oversees each fund. Committee members are appointed by NAAG’s president and approved by the executive committee. The special committee members make disbursements and develop the funds’ investment policy. *See* VW Fund Rules, *supra*, §§ B, C; Financial Services Fund Rules, *supra*, §§ B, C.

36. Investment returns on the funds have been modest. The Financial Services Fund has grown 4.3% since inception, while the VW Settlement Fund has grown 4.9%. Ex. C, *Executive Committee Meeting*, Nat’l Ass’n of Att’ys Gen. (Dec. 6, 2022), attachment B1 at 4.

37. Details of the funds’ investment history are currently unknown.

38. NAAG’s recent financial reports reveal how the assets are allocated.

39. Assets in the Financial Services Fund are held in domestic securities (34.6%), foreign securities (22.3%), “flexible capital” (9.6%), real estate (9.5%), and non-interest-bearing accounts (24%). *Id.*, attach. C, at 9.

40. Assets in the VW Settlement Fund are held in domestic securities (36.2%), foreign securities (23%), “flexible capital” (11.1%), real estate (9.9%), and non-interest-bearing accounts (19.8%). *Id.*

41. It is unclear whether NAAG distributes investment returns to its restricted accounts or instead diverts them to its operating accounts. But the organization’s website states that NAAG “funds its operations” in part using “proceeds from

investments originating from past court settlements.” *How is NAAG Funded?*, Nat’l Ass’n of Att’ys Gen., <https://bit.ly/3W4cc2C>.

IV. Beyond traditional investments, NAAG uses Montana’s public funds for litigation finance.

42. Besides traditional investments, NAAG grows the states’ funds by financing new lawsuits and retaining a share of the settlement proceeds.

43. Under NAAG’s litigation finance model, members apply for funding to initiate multistate civil actions. Funding comes from NAAG’s restricted accounts, and recipient states must reimburse NAAG if the lawsuit is successful.

44. In exchange for providing financial aid, NAAG receives a share of the judgment award or settlement proceeds.

45. A recent settlement reached by Montana and other member states illustrates the model.

46. In 2021, Montana and other states settled a lawsuit against the consulting firm McKinsey & Company for its role in the opioid crisis. *McKinsey & Company Consent Judgment* (Feb. 4, 2021), <https://bit.ly/3CHNU7R>. NAAG provided \$7 million to finance the lawsuit and received \$15 million from the settlement in return. *Id.* at 11. NAAG’s share of the settlement proceeds exceeds what Montana and other states received, and it more than doubled what NAAG provided in financial aid. NAAG was not a party to the lawsuit, and the settlement agreement makes clear that NAAG received its share from proceeds otherwise payable to the states. *Id.*

47. NAAG’s litigation finance model alienates control of public funds from the member states. Individual states have little say over how much NAAG receives

in cases for which it provided financing. And decisions to finance future litigation are made exclusively by NAAG's leadership and special committees.

48. Returns from NAAG's litigation finance model have far exceeded returns from traditional investments. In 2021 alone, assets in NAAG's restricted accounts swelled from \$133 million to \$158 million. *2021 Annual Report*, Nat'l Ass'n of Att'ys Gen. (Apr. 28, 2022), at 26, <https://bit.ly/3W6Nejg>. NAAG recently published a report emphasizing the need to "[e]ducate offices of attorneys general about the importance of directed unrestricted settlement funds to NAAG." *2019 Strategic Plan*, Nat'l Ass'n of Att'ys. Gen. (2019), at 13, <https://bit.ly/3X7kvfx>.

V. Controversy over NAAG's management of state funds

49. The extent of NAAG's litigation financing operations has only recently come to light.

50. The increased attention on NAAG's litigation financing operations has led to new disclosures and documents about NAAG's other financial operations.

51. With the new disclosures, several member attorneys general have started to raise concerns over how NAAG has been using money from public settlements.

52. In a letter to NAAG's executive director, the Attorney General of Kentucky demanded "greater transparency prior to NAAG receiving, holding, and expending" public funds. *Letter from Attorney General of Kentucky to NAAG's Executive Director* (May 24, 2022), at 1, <https://bit.ly/3Xd9LvQ>.

53. Alabama Attorney General Steve Marshall called attention to NAAG's increasingly ideological bent. S. Ross, *Alabama Becomes First State to Leave National*

Association of Attorneys General, Yellowhammer News (Apr. 26, 2021). Following these concerns, Attorney General Marshall withdrew Alabama’s membership from NAAG in April 2021. *Id.*

54. In May 2022, the attorneys general of Montana, Missouri, and Texas signed a joint letter withdrawing their states’ membership from NAAG. The signatories concluded that NAAG’s management of state funds was inconsistent with their duty to be “faithful stewards” of public money. Ex. D, *Letter from Attorneys General of Texas, Missouri, and Montana to NAAG’s President* (May 4, 2022), at 1.

55. Former Arizona Attorney General Mark Brnovich raised similar concerns. He criticized NAAG’s litigation finance model for undermining the priorities of the Arizona Attorney General’s Office, which have “always focused on making sure we get as much restitution back to consumers.” J. Dixon-Hamilton, *Exclusive—Arizona Joins Conservative States In Exiting ‘Left-Leaning’ National Association of Attorneys General*, Breitbart (May 9, 2022), <https://bit.ly/3W2R0tO>. Then-Attorney General Brnovich withdrew Arizona’s membership from NAAG in May 2022. *Id.*

56. In response to these concerns, NAAG’s executive director sent a letter to its members clarifying the organization’s role in managing state funds. Ex. E, *Letter from NAAG to Attorney General Austin Knudsen* (Feb. 8, 2022). The letter explains that NAAG “received [the funds] on behalf of your offices” and that NAAG “administers these funds on your behalf.” *Id.* The letter clarified that the “money in these accounts belongs to you, our members.” *Id.*

CLAIMS FOR RELIEF
COUNT I
(DECLARATORY RELIEF)

57. All allegations stated above are repeated and incorporated herein.

58. This Court has jurisdiction to issue a declaratory judgment under Montana Code Ann. § 27-8-201.

59. Montana’s “rights, status, or other legal relations” in its public money “are affected by a statute” and this Court may both “determine[] any question of construction or validity arising under” Montana law and declare “rights, status, or other legal relations” arising from this dispute. *Id.* § 27-8-202. A declaratory judgment “will terminate the controversy or remove an uncertainty.” *Id.* § 27-8-205.

60. Montana’s public funds must be deposited, invested, audited, and reported on in accordance with the requirements of the Montana Constitution and the sections of Title 17 of the Montana Code cited and discussed above.

61. NAAG is an instrumentality of the State of Montana and is responsible for depositing, safekeeping, and investing Montana’s public funds.

62. NAAG’s Chief Financial Officer is responsible, in her official capacity, for the deposit and investment of assets that NAAG manages. These assets consist in part of Montana’s public funds.

63. Neither NAAG nor its Chief Financial Officer have complied with the deposit, investment, auditing, or reporting requirements of the Montana Constitution and the requirements of Title 17 of the Montana Code. This non-compliance

disregards Montana law and threatens the safety of, and ability for the state to exercise appropriate oversight regarding, Montana’s public money.

64. This controversy over NAAG’s failure to comply with the Montana Constitution and Title 17 of the Montana Code raises a specific factual dispute in the context of an actual controversy directly involving the state’s rights in its public money that is subject to judicial resolution. *See, e.g., Friends of the Wild Swan v. Dep’t of Nat. Res. and Conserv.*, 2005 MT 351, ¶27, 330 Mont. 186, 127 P.3d 394 (noting that the “strict accountability” provision grants the Legislature “significant discretion in creating a statutory scheme”).

65. Therefore, Montana seeks a declaration that NAAG and its Chief Financial Officer are subject to the strict accountability requirement of the Montana Constitution and to the requirements of Title 17 of the Montana Code.

COUNT II (ACCOUNTING)

66. All allegations stated above are repeated and incorporated herein.

67. The share of assets under NAAG’s management that consist of Montana’s public funds subject to the requirements of Title 17 of the Montana Code is presently unknown to Montana and cannot be adequately ascertained without a full accounting.

68. Therefore, Montana seeks an accounting to determine the share of NAAG’s assets comprised of Montana’s public funds.

RELIEF REQUESTED

WHEREFORE, The State of Montana respectfully asks this Court to enter judgment as follows:

- a. Declare NAAG to be subject to the strict accountability requirement of the Montana Constitution and to the requirements of Title 17 of the Montana Code;
- b. Declare NAAG's Chief Financial Officer, in her official capacity, to be subject to the strict accountability requirement of the Montana Constitution and to the requirements of Title 17 of the Montana Code;
- c. Order an accounting of assets under NAAG's management to determine the amount of those funds that consist of Montana's public funds;
- d. Appoint a special master to perform the accounting; and
- e. Grant all other relief that this Court deems just and proper.

Respectfully submitted this 7th day of June, 2023.

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