

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Madin v. Kitts No. COPP 2013-CFP-001	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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On January 15, 2013, Bozeman resident Kent Madin filed a complaint with the Commissioner of Political Practices against Thomas Kitts, a Livingston resident, who ran as a candidate in the 2011 election for a position on the Livingston City Commission. The Madin complaint alleged that Candidate Kitts violated election law by improperly reporting expenditures, including expenditures coordinated with Western Tradition Partnership (WTP).

SUBSTANTIVE ISSUES ADDRESSED

The substantive area of campaign finance law addressed by this decision is that of campaign expense reporting, including coordination between a candidate and a third party entity.

FOUNDATION FACT

The foundation fact necessary for this Decision are as follows:

Finding of Fact 1: On November 8, 2011, a municipal election was held in Park County. Five candidates were on the ballot for two open seats on the city commission for the city of Livingston. The candidates were Mel Friedman, Adam Stern, Lisa Adams, Nancy Adkins and Tom Kitts. Mel Friedman and Adam Stern won the two available seats (Mr. Friedman with 984 votes and Adam Stern with 979 votes). Lisa Adams received 737 votes, Tom Kitts received 659 and Nancy Adkins received 270 votes. (Park County Elections Office).

INTRODUCTION

This Matter looks at issues concerning third party involvement in the campaign of a 2011 candidate for public office in Montana.¹ While this Matter first presents this third party involvement issue in a 2011 campaign, this Office has issued 12 recent such Decisions involving 2010 campaigns by candidates.² The Commissioner notes that the third party involved in this Matter was Western Tradition Partnership or WTP. The Commissioner further notes that WTP was extensively involved in candidate campaigns in the 2008, 2010 and 2012 elections, including 9 of the campaigns addressed by the Decisions listed in footnote 2. See, also FN 4.

With the above in mind, the Commissioner introduces and compares this Decision with the third party involvement Decisions involving 12 candidates in 2010 Montana election campaigns. The Commissioner found sufficient facts to

¹ In Montana odd year elections are held for local or municipal offices such as the Livingston City Commission.

² *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Madin v. Sales*, COPP-2010-CFP-029; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; *Bonogofsky v. Wagman*, COPP-2010-CFP-035; *Madin v. Burnett*, COPP-2012-CFP-052; *Ponte v. Buttrey*, COPP-2014-CFP-007; and *Miller v. Van Dyk*, COPP-2014-CFP-002.

show a violation of the Montana Campaign Practice Act (Sufficiency Decision) in nine of the Decisions listed in footnote 2. These nine Decisions involved extensive third party campaign practice actions by WTP.³ The Commissioner did not find sufficient facts in *Madin v. Burnett*, COPP- 2012-CFP-052, *Ponte v. Buttrey*, COPP-2014-CFP-007 and *Miller v. Van Dyk*, COPP-2014-CFP-002.⁴

Each of the 9 WTP-supported candidates who received Sufficiency Decisions were involved in a contested Republican Party primary election. A primary election race involves fewer voters than a general election and therefore relies more on use of documents targeting specific voters.⁵ While Candidate Kitts 2011 election was a general election, the election was an odd year election and also involved a limited number of voters. See FF No. 1.

Candidate Kitts, as a candidate for the 2011 Livingston City Commission primary was required by law to disclose, report, and attribute all contributions to, and expenses by, his campaign. The Commissioner notes that there are no offsetting constitutional speech issues to the reporting and disclosure requirements at issue in this Matter.⁶ The holding of public office in Montana

³ The WTP supported candidates created or allowed a campaign relationship with WTP by: entrusting WTP to carry out their most substantial campaign activity; doing so by giving WTP campaign authority over use of the candidate's signature on letters, making use of voter ID'd lists created by WTP, and allowing campaign letters signed by the candidate to be coordinated with third party Slicks.

⁴ *Madin v. Burnett* and *Miller v. Van Dyk* did not involve any action at all by a WTP entity while *Ponte v. Buttrey* had limited (vendor) WTP involvement. (See this Decision pages 10-11 for a further discussion). The COPP complaints are numbered according to the year the complaint is filed. The *Madin v. Burnett* and *Ponte v. Buttrey* complaints, filed in 2012 and 2014 respectively, raised 2010 primary election campaign practice complaints.

⁵ WTP's specialty was document campaigning through the mail. WTP self-described it's campaign method as a "shock and awe electoral bombing campaign." WTP's campaign was based on use of coordinated candidate and attack letters/Slicks directly mailed to primary voters.

⁶ *Citizens United v. Fed. Election Comm.*, 130 S. Ct. 876 (2010).

is a “public trust” (§ 2-2-103 MCA) and Montana’s interest in preventing corruption of this public trust allows it to impose campaign practice requirements on a candidate for public office.

DISCUSSION AND FINDINGS

The following discussion addresses the issues involved in this Matter. Findings of Fact are made where appropriate.

A. There is No Statute of Limitation Issue.

The Commissioner notes that this Matter concerns the 2011 general election for a commissioner position to the Livingston City Commissioner. (FF No. 1). The statute of limitations for enforcement of a campaign practice violation is “4 years after the occurrence of the facts that give rise to the action.” §13-37-130 MCA. The facts leading to a campaign practice violation in this Matter occurred in October and November of 2011. This Decision, and any necessary enforcement action, will not be barred by the statute of limitations.⁷

B. WTP Entities Involved in Candidate Kitts’ Campaign

WTP’s internal documents show that in early 2009 it began to seek funding, based on its claims of election success in 2008 Montana legislative campaigns, for election activities in 2010 Montana legislative races. (WTP “Confidential Overview”, March 1, 2009).⁸ WTP’s Confidential Overview describes its planned use of documents in election activity forecast for a 2010

⁷ The Commissioner includes this discussion because this Matter was mistakenly grouped by the COPP with the 2010 primary election matters listed in footnote 2. The Commissioner therefore mistakenly assumed an earlier date for the election facts at issue leading to a public representation of a statute of limitation concern regarding this Matter. To be clear, because this is a 2011 election there is no statute of limitation issue.

⁸ The WTP “Confidential Overview” was delivered to the Commissioner independent of the “WTP Records” as it was provided to the Commissioner by former WTP staffer Karolyn Loendorf.

Montana legislative race:

1. “Our ambitious Candidate survey program –the backbone of our election year lobbying program—was designed to mobilize the voters...”
2. “Surveys were first sent to candidates in the targeted primaries...”
3. The survey information was combined with other information to choose the pro-development candidate.
4. “In the final weeks of the election, letters and glossy postcards were sent to tens of thousands of likely voters and issue ID’d lists in our targeted races...”

A separate WTP document, the WTP 2010 Election year power point presentation,⁹ illustrates the tenor or some of these letters and postcards by showing 5 such WTP documents attacking candidates.¹⁰

The campaign actions for which WTP claimed credit, including candidate letters, WIFE letters, issue ID’d letters, attack Slicks, and surveys, were taken through several related entities and people, including Direct Mail and Communications, Inc., (Direct Mail) a Colorado for-profit corporation.¹¹ In 2010 Direct Mail operated a print shop in Livingston, Montana under the direction of Allison LeFer. The Commissioner determines that Direct Mail and Allison LeFer are agents of and part of WTP as to any 2010 candidate election activity engaged in by WTP. There is a direct relationship between Direct Mail and WTP, making the two indistinguishable for the purposes of this Decision.

⁹ Also produced to the Commissioner by Ms. Loendorf.

¹⁰ While WTP was primarily interested in legislative races it applied the same “shock and awe” campaign tactics in a 2010 Gallatin County Commissioner race (*Madin v. Sales*) and in the City Commissioner race involved in this Matter.

¹¹ All of the documents used by or on behalf of WTP supported candidates, including surveys, candidate letters, attack letters and Slicks were printed by Direct Mail, whether acting in its own name or by use of assumed names including General Consulting.

Allison LeFer (aka Allison Andrews) was the President of Direct Mail in 2010.¹² Allison LeFer was also directly involved in WTP, signing the majority of WTP's checks at the same time. Allison LeFer is married to Christian LeFer. (Commissioner's records). Candidate Kitts' campaign finance reports disclose payments to "General Consulting."¹³ General Consulting, through agency, is the same as WTP. *Id.*

Likewise, Christian LeFer is an agent of and the same as WTP as to any Candidate Kitts election activity. Christian LeFer is currently listed as one of 5 board members of American Tradition Institute, the 501(c)(3) adjunct to WTP. (Commissioner's records). A March 1, 2009 internal WTP memorandum laying out an agenda for the 2010 Montana legislative elections lists Christian LeFer as WTP's "Director of Strategic Programming." (Commissioner's records). Karolyn Loendorf, a former WTP staffer, reported that it was Christian LeFer who hired her as a WTP staffer to work on 2010 legislative campaigns. (Investigator Notes). Christian LeFer's name regularly appears in 2010 WTP election activity, including his April 2010 attempt to convince John Esp to withdraw as a candidate in the 2010 HD 61 Republican primary election against WTP's chosen candidate, Joel Boniek (Commissioner's Records). Candidate Washburn (2010 HD 69) also reports that he received a phone call from Christian LeFer speaking on behalf of WTP after Candidate Washburn

¹² Direct Mail and Communications, Inc. corporate documents list Allison Andrews as Director and President. Her address is listed as 1237 E. Amherst Circle, Aurora, CO.

¹³ The Commissioner takes administrative notice that prior Decisions (FN 2) have determined that General Consulting is Direct Mail operating under a different name. Further, the Commissioner takes administrative notice that prior Decisions (FN 2) have determined that Direct Mail is an agent of WTP in regard to its 2010 election activity.

criticized WTP at a political event. (Investigative conversation with Candidate Washburn).

C. Coordination

Candidate Kitts' campaign finance reports disclosed \$1,197.56 in payments to Direct Mail using the name "General Consulting" (See FN 12). The single fact of Candidate Kitts' payment to Direct Mail is not enough to create coordination between WTP and Candidate Kitts as to any additional unreported expenses made by WTP. See *Ponte v. Buttrey*. To indicate coordination the payment must be part of a series of campaign actions between the candidate and third party that are extensive enough to create a campaign relationship. (See cases in FN 2). A single activity, such as a single letter, from the third party is not enough to create coordination. See *Ponte v. Buttrey*. Likewise a campaign activity modeled after a third party action, but not including the third party, is not enough to create coordination. See *Madin v. Burnett*.

Coordination is important because a campaign expenditure that is deemed to be "coordinated" between a candidate and another entity or person is treated as though it is a contribution to and/or expense by the candidate's own committee. Contributions to a candidate are limited in amount from any source and prohibited completely from a corporate source. (See §§13-35-227, 13-37-216, MCA). Because a coordinated third party election expense is deemed to be a contribution it becomes subject to the limits and prohibition of these laws.¹⁴

¹⁴ A third party, including a corporation, can participate in an election through an

Montana law [44.10.323(4) ARM] defines coordination as “an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate...” Commissions and Commissioners have found coordination only in particular circumstances. The FEC, while advancing a new coordination regulation in 2012 (11 C.F.R. §109.21(d)(4)), operates under a 6 member commission structure and that commission has deadlocked on basic enforcement decisions. *Coordination Reconsidered*, Briffault, Columbia Law Review, May 2013. In regard to coordination, the FEC has found that there needs to be more than common vendors, interrelated individuals (as in a former employee of the candidate) and shared contacts. Thus, the FEC has not found coordination unless there is actual evidence showing the coordination between the expenditure and the candidate. *Id.*

Coordination decisions by Montana Commissioners show a similar approach to that of the federal decisions. Commissioner Argenbright considered a complaint that a political committee, Citizens for Common Sense Government (CCSG), and six candidates for the Missoula City council were coordinated or linked such that CCSG was a candidate committee subject to contribution limits. *Harmon and Sweet v. Citizens for Common Sense Government, et. al.*, December 31, 1997. Despite extensive crossover in involvement (participation in parade using same mode of transportation) and people, the Commissioner found no coordination because there were “no notes,

independent expenditure. An independent election expenditure is subject only to reporting and attribution and is not subject to contribution limits or bans.

memoranda, records of telephone conversations, correspondence, or other documents” supporting “coordination, cooperation, or consultation”. *Id.* p. 19. Further, there was “little, if any, similarity” in campaign literature. *Id.* p. 23.

Likewise, Commissioner Higgins rejected coordination between a candidate and a political committee that engaged in attack activity against the opposing candidate. *Close v. People for Responsive Government*, December 15, 2005.

The Commissioner found crossover contributors between the political committee and the candidate, but found no evidence of communication or activity showing coordination between the candidate and committee.

Commissioner Unsworth rejected coordination in *Keane v. Montanans for a True Democrat*, April 2, 2008. The Commissioner noted crossover contributions/activity by people involved in both the candidate campaign and the political committee, but found no coordination because “...there is no evidence that MTDC’s expenditures for newspaper and radio ads, billboards, and campaign flyers opposing Candidate Keane and supporting Candidate McAdam were made with the prior knowledge, consent and encouragement of Candidate McAdam or his campaign.” *Id.* p. 9. In addition the Commissioner found that the crossover communication was “limited” and that it was personal and not on behalf of the political committee. *Id.*

In contrast to the above three decisions, Commissioner Vaughey found coordination in *Little v. Progressive Missoula*, July 22, 2004. The Commissioner identified crossover activity, finding that members of the Progressive Missoula steering committee were directly involved in the

candidate's (Allison Handler) campaign. Further, the Commissioner found specific evidence showing that Candidate Handler and the individual committee members knew of the negative attack role that Progressive Missoula would play in support of the candidate's campaign. The Commissioner found that certain barriers between the Handler campaign and Progressive Missoula, including a letter of reproach from Progressive Missoula to Candidate Handler, were artifices designed to disguise the real cooperation. The Commissioner found that the Progressive Missoula expenditures for flyers were made with "...prior knowledge, consent and encouragement of Handler..." Thus they were coordinated expenditures.

This Commissioner has issued a series of Decisions finding coordination, all based on actions between Western (American) Tradition Partnership and 2010 candidates for Montana public office. These Decisions, like *Little v. Progressive Missoula*, rely on documents, actions and activity showing coordination. In total this Commissioner has found undisclosed, unreported, and coordinated corporate involvement by WTP (and agents) in nine 2010 candidate campaigns. (See FN 2).

The Commissioner determines that there is coordination between Candidate Kitts and WTP/Direct Mail. Coordination is found because WTP's relationship to Candidate Kitts is objectively determined to be a campaign relationship. About \$1,200 of Candidate Kitts' \$2,800 in expenditures was paid directly to Direct Mail while another \$400 was spent on stamps that had to be placed on letters printed by Direct Mail since Candidate Kitts listed no

other print costs. (Commissioner's records).¹⁵ Further, while not reported as an election cost by anyone, WTP mailed two Slicks attacking candidates opposing Candidate Kitts.

Taken together, the reported and unreported Candidate Kitts' election expenses involving WTP constituted the most substantial campaign activity engaged in by Candidate Kitts. A majority of Candidate Kitts' campaign expenses, both reported and unreported, involved WTP. This is sharp contrast to *Ponte v. Buttrey* where WTP played a limited vendor role in Candidate Buttrey's campaign.¹⁶ Instead, Candidate Kitts' relationship to WTP is comparable to the campaign relationship WTP/Direct Mail had with the 9 candidates involved in prior sufficiency Decisions. (See, FN 2). As did Candidate Kitts, all 9 candidates used WTP/Direct Mail for their most significant campaign activity, measured by expense and by campaigning. In addition, as is the case with Candidate Kitts, those campaigns involved 3rd party attack Slicks prepared by or orchestrated by WTP/Direct Mail.¹⁷

The Commissioner will make the appropriate findings of fact and sufficiency findings below in this Decision. At this point the Commissioner makes the following sufficiency finding:

¹⁵ Direct Mail's bill shows it printed two letters (a WIFE letter and a candidate letter). Direct Mail's bill further shows it mailed 2,150 WIFE letters while Candidate Kitts' campaign finance reports show that the candidate mailed an additional 300-plus WIFE letters.

¹⁶ Prior Decisions (FN2) have determined WTP includes its corporate agents such as Direct Mail (AKA General Consulting). Candidate Buttrey's pre-election campaign finance report (filed October 20, 2010) lists a General Consulting expense in the amount of \$2,089.33.¹⁶ That same report lists over \$13,000 in expenses for other campaign activity, including billboards, TV, radio and signs.

¹⁷ This was the "shock and awe electoral bombing campaign" that WTP promised to its funders.

Sufficiency Finding No. 1: The Commissioner finds sufficient facts to show that WTP/Direct Mail had a campaign relationship with Candidate Kitts and through this campaign relationship coordinated expenses with candidate Kitts.

D. Coordinated Expenses

Because coordination is found, Candidate Kitts is responsible for a failure to properly disclose, report and/or attribute any in-kind (non-monetary) third party election contribution to his campaign, including those coordinated with Candidate Kitts by a third party. (see principles and reasoning set out in *Bonogofsky v. Kennedy*). As defined by 44.10.323 (2) ARM an in-kind expenditure "...means the furnishing of services property or rights without charge or at a charge which is less than fair market value to a ...candidate..." Such in-kind services include the value of "staff time to draft the letter." (Commissioner Argenbright, *Daubert v. MCW/Orvis*, February 27, 1997 at p. 6).

COPP regulations define a coordinated expenditure as "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate..." 44.10.323(4) ARM. Commissioner Vaughey found such coordination based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate. *Little v. Progressive Missoula*, July 22, 2004.

i. The WIFE Letter

Candidate Kitts' campaign finance reports show payment of \$1,197.56 to Direct Mail operating under its assumed name "General Consulting." Direct Mail's (AKA General Consulting) invoice to Candidate Kitts shows that \$1,094.01 of that amount was billed for cost of preparing and mailing 2,150

copies of a letter signed by Candidate Kitts' wife, Lisa Kitts. The Commissioner's review of WTP records in other matters (*see* FN 2) determined that a "WIFE" letter was routinely prepared by WTP for candidates it supported.¹⁸

The 2,150 Candidate Kitts' WIFE Letters are an election expense, with some payment reported by Candidate Kitts toward the cost of the WIFE letters. This Decision determines whether or not the complete expense of the WIFE Letters was reported and disclosed by Candidate Kitts, including value of services. *See* 44.10.323 (2) ARM and above. Under COPP regulations, Candidate Kitts was required to report as an in-kind contribution the "total value of the services" received as part of the preparation of these WIFE Letters (44.10.513 ARM), including the value of "staff time to draft the letter." *See Daubert v. MCW/Orvis, supra.*

This requirement of disclosure of "total value" makes sense as Montana law dictates that "anything of value" (§13-1-101(7)(a) MCA) provided to a candidate is a contribution. In turn, all contributions must be reported and disclosed by the candidate (§13-37-225 MCA) so that voters and the opposing candidate know who is supporting a particular candidate for public office. If WTP or another entity was providing in-kind services in connection with any one of the letters and those services can be identified, then the value of those services must be reported. *Daubert v. MCC/Orvis, supra.* Valuation of any such identified services for reporting purposes is defined by 44.10.533 ARM as

¹⁸ The Commissioner's review determined that WTP identified a letter from a candidate's wife as a "WIFE" letter.

“fair market value.”¹⁹

The WIFE Letter signed by Lisa Kitts was mailed to a group of Livingston voters.²⁰ The Madin complaint included a copy of the handwritten Lisa Kitts WIFE letter for the 2011 general election. Based on a review of other WIFE letters the Commissioner takes administrative notice that the Lisa Kitts WIFE letter was printed with blue ink on pink off-size (10” by 8”) paper. The Commissioner takes administrative notice, based on review of a number of comparable WIFE letters, that the Lisa Kitts WIFE letter was placed in a pink envelope and mailed.

The Commissioner takes administrative notice that the Lisa Kitts WIFE letter discussed how Lisa and Tom met, praised their marriage, and extolled Tom Kitts’ virtues.²¹ The Commissioner’s review determined that WTP interviewed each wife (using a survey form) to gain the information to draft the content of a WIFE letter. The draft was written and edited by WTP and the candidate into the final WIFE letter text. A scribe was then engaged to carefully write out the final handwritten text and that text was cut, pasted, and mocked up to fit the size of letter paper used for the candidate. A wife signature was added to each WIFE letter.²² After mock-up, the Lisa Kitts WIFE

¹⁹ The Commissioner has retained an expert to set the fair market value, should it be necessary to do so in any enforcement action of this Matter.

²⁰ The Commissioner takes administrative notice that any such list of identified voters has value (*see Wittich v. Campbell*, November 17, 2009).

²¹ The administrative notice is based on the Commissioner’s review of WIFE letters used in other 2010 legislative campaigns as well as the content of the Lisa Kitts Wife letter. The Commissioner’s examination further showed that WTP generally prepared a comparable WIFE letter for each candidate it supported in Montana’s 2010 elections. (WTP records).

²² The Commissioner’s investigator determined, looking to mock-ups and notations on WIFE letter drafts, that there is a common theme and carry-over phrases between WIFE letters.

letter was printed, inserted into a hand addressed pink envelope and a 19 cent bulk presorted postage stamp was used to mail the envelope.²³

There is no value charged or reported by WTP for the cost of writing the content of the Lisa Kitts WIFE letter or for cost of the scribe. The Direct Mail (General Consulting) bill shows Candidate Kitts is listed as paying about 52 cents for each of the 2,150 WIFE letters (including postage) for a cost of \$1,094.01. (Ex. 1, Direct Mail bill). The 52 cents per WIFE letter charged by WTP includes 6 cents for the paper, 19 cents for the postage, and 27 cents to print the WIFE letter, add the Lisa Kitts signature, insert and seal the letter, address the letter and apply bulk postage. There was no charge listed for the envelope used.

The Commissioner determines that the 52 cents Candidate Kitts paid for each such WIFE letter did not pay for the stamp, paper, envelope and ink.²⁴ The Commissioner makes this determination based on the cost of a 2010 WIFE letter in the matter of *Madin v. Burnett*. Melani Burnett, Candidate's Burnett's wife, prepared a letter modeled after a WTP WIFE letter. The cost of the Melanie Burnett letter was reported as the product of a fully disclosed and

Further, the investigator observed that the wife's signature is generally added by the scribe, based on a sample signature from the wife. For example, the Investigator determined that the 2008 Susan Boniek HD 61 WIFE letters (primary and general elections) signatures appear to have been made by the scribe. This is in contrast to the 2010 HD 61 primary election where the Susan Boniek WIFE letter mock-ups in the WTP records show there was direction "to PDF to CL (Christian LeFer) rewrite 1st page not even/neat as other pages", indicating WTP had difficulty getting the scribe to prepare the letter as directed. The WTP records show that the 2010 HD 61 Susan Boniek WIFE letter was eventually computer generated with a scripted font. Susan Boniek then likely signed the computer generated 2010 WIFE letter and added a post-script in her own handwriting.

²³ This varied from the 2010 legislative campaigns where 44 cent stamps were used to mail the WIFE letters. It is noted that an additional 300-plus Lisa Kitts WIFE letters were separately mailed using 44 cent stamps.

²⁴ WTP did not include a charge for the envelope in its bills. See Ex. 2.

reported arms-length transaction. The Melani Burnett letter was printed and handled by an arms-length printer, Executive Services of Bozeman, Montana, a Montana business with a 20 year history independent of WTP. (Commissioner's records). Further, using the Executive Services costs as a template, the Commissioner determines an adjusted cost billing of about 99 cents for each of the Lisa Kitts letters.²⁵ This cost is substantially more than the 52 cents charged by WTP, even without valuing the additional scribe, letter writing and list provision services provided by WTP.

The Commissioner also determines, based on the above information, that there were writing, editing, layout, and production services of substantial value provided by WTP to Candidate Kitts in connection with the Lisa Kitts WIFE letter (*see Daubert v MCC/Orvis*). The value of these services was not covered by any payment to Direct Mail by Candidate Kitts. The Commissioner determines Candidate Kitts paid nothing to WTP for its services in writing, editing, layout and processing the Candidate Kitts WIFE letter.

The Commissioner further determines that Candidate Kitts cooperated with, knew of, and approved of the WTP services involved in the Lisa Kitts WIFE letter. Candidate Kitts was directly involved through his wife in the WIFE letter production. The content was approved by signature and Candidate Kitts

²⁵ Executive Services provided the paper, envelopes, and postage for preparing and mailing 2,950 Melani Burnett letters. The Executive Services' bill shows charges for each of these 2,950 letters including: 12 cents for providing and printing each pink envelopes; 29.1 cents to insert, seal and affix the bulk rate stamp; and 21 cents to print. The total charge of \$3,169.95 means that Candidate Burnett paid about \$1.07 for materials, printing, handling, and mailing each of the 2,950 letters. The Executive Services mailing was done with a bulk rate stamp (billed at 27 cents each) putting the non-stamp costs at 80 cents per WIFE letter. The WTP Lisa Kitts WIFE letter was mailed with a 19 cent bulk rate stamp and this makes the adjusted cost of a comparable Kitts mailing (that is one with a 19-cent stamp cost) \$.99 per letter.

partially paid for the letter. The Commissioner determines that candidate coordination lies under 44.10.323(4) ARM and *Little v. Progressive Missoula, supra*. These unpaid, unreported, and undisclosed services provided by WTP in regard to the WIFE letter met the definition of coordination and should have, but were not, reported as an in-kind contribution/expense to and by Candidate Kitts.

Finding of Fact No. 2: The 52 cents Candidate Kitts reported he paid to General Consulting per WIFE does not cover the cost of the paper, ink and envelope of each WIFE letter. (Commissioner's records).

Finding of Fact No. 3: Candidate Kitts received WIFE letter services in his 2011 general election, including preparation, design, layout, editing, and handling of the WIFE letter. (Commissioner's records).

Finding of Fact No. 4: Candidate Kitts did not pay for, disclose, or report the expense of services involved preparation, design, layout editing, or handling of the WIFE letter. (Commissioner's records).

Finding of Fact No. 5: The WIFE letter services provided to Candidate Kitts were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation operating under the name of General Consulting. (Commissioner's records).

Finding of Fact No. 6: Candidate Kitts knew of, consulted on, and consented to the full range of WIFE letter services and therefore coordinated this activity with WTP and/or Direct Mail. (Commissioner's records).

Sufficiency Finding No. 2: As shown by Findings of Fact 1 through 6, there is sufficient evidence to justify civil prosecution of Candidate Kitts for accepting illegal corporate contributions to his 2011 general election campaign in the form of coordinated in-kind expenses made by a corporation in connection with the WIFE letter.

Sufficiency Finding No. 3: As shown by Findings of Fact 1 through 6, there is sufficient evidence to justify civil prosecution of Candidate Kitts for failing to disclose and report as in-kind contributions election related expenses associated with the WIFE letter.

The Commissioner recognizes that Candidate Kitts' response to the complaint does not admit any coordination with WTP (Commissioner's records). That response is not credible. The records listed above are sufficient to show that Candidate Kitts coordinated in the production of the WIFE letter and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

ii. Third Party Slicks

WTP planned a mass mailing of "letters and glossy postcards to ...tens of thousands of likely voters" (see this Decision, page 5) in selected elections, including the 2011 election of Livingston City Commissioners. Direct Mail described this mass mailing approach as a "shock and awe electoral bombing campaign." (Commissioner's records). WTP "bombed" the citizens of Livingston just prior to the November 8, 2011 City Commission election with two attack slicks: one slick named Candidate Kitts favorably 5 times, Candidate Stern disfavorably 3 times and postured Kitts/Stern as "candidates for city commission" twice. The second attack slick named Candidate Stern disfavorably 6 times. (Commissioner's Records).

There is a campaign expenditure for an advertisement, whether or not

coordinated, that expressly advocates a vote “for” a particular candidate. An express advocacy analysis can be lengthy, depending on the wording examined (See *Bonogofsky v. National Gun Owners Alliance*, COPP-2010-CFP-008). In this Matter a lengthy analysis is not necessary as “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”). There is no other reasonable alternative, given the timing and language of the WTP attack flyers, other than the flyers being an advertisement for Candidate Kitts or against Candidate Stern. The Commissioner determines that the WTP ads are express advocacy and therefore the cost of the ads is an electioneering expense.²⁶

The Commissioner determined, above, that Candidate Kitts, through his wife, signed (thereby accepting content) and partially paid for the 2,150 WIFE Letters discussed above. By so acting Candidate Kitts was directly involved with the WIFE Letters such that he directly showed coordination with WTP (see 44.10.323(4) ARM and *Little v. Progressive Missoula*) such that the fair market value of the accompanying letter services became an in-kind contribution to Candidate Kitts’ campaign.

The Commissioner, by direct observation, hereby identifies and adds the 2

²⁶ This means that WTP has violated Montana’s campaign practice act as Section 13-37-201, MCA requires that WTP file as a political committee “within 5 days after it makes an expenditure.” WTP, however, did not file as a political committee nor did it report the costs of the attack Slicks. (FOF No. 9) The Commissioner determines that sufficient facts exist to show that WTP violated the Montana Campaign Practices Act by failing to file as a political committee.

WTP attack Slicks as election expenses in the 2011 Livingston City Commission election in that the documents attacked Candidate Stern and promoted Candidate Kitts. The Commissioner must now determine whether Candidate Kitts, through coordination, is responsible to attribute, report, and disclose the value [i.e. “election expense”] of these documents.

As an election expense, Candidate Kitts will be deemed to accept the letters as a coordinated in-kind contribution if it is “an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate...” 44.10.323(4) ARM. Commissioner Vaughey found such coordination based on a showing of “...prior knowledge, consent and encouragement ...” of the third party expense by the candidate, *Little v. Progressive Missoula, supra*.

The 2011 local government elections were the third election cycle for WTP involvement in Montana’s elections. By far the most visible and controversial part of WTP’s 2008 and 2010 election activity had been its use of attack letters and slicks. (*see Graybill v. WTP, 2010-COPP-CFP-0016*). The Commissioner takes administrative notice that a candidate endorsed by WTP in the 2011 Livingston City Commission elections would have to know of and consented to the use of attack Slicks, as such use was WTP’s signature electioneering brand.²⁷

In addition to imputed knowledge, the Commissioner finds that

²⁷ The Commissioner interviewed two Republican primary candidates, John Ward (2008, HD 84) and John Esp (2010, HD 61). Both Ward and Esp told the Commissioner that any 2010 legislative candidate accepting WTP’s endorsement had to know of or give consent to WTP’s use of attack letters and Slicks.

Candidate Kitts' specific and companion use of WIFE letters showed that Candidate Kitts expected and knew his WIFE letters would be followed by third party attack letters or Slicks to the same group of voters. In *Little v. Progressive Missoula*, Commissioner Vaughey found that Candidate Handler coordinated with another entity, a PAC called Progressive Missoula (PM), that spent money campaigning against Candidate Handler's opponent. Commissioner Vaughey found such coordination between a candidate and political committee based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate, *supra*. The Commissioner finds that Candidate Kitts meets this standard as to the attack letters are deemed a coordinated contribution to Candidate Kitts.

Finally, the Commissioner notes that Candidate Kitts was involved in a City Commission election. These elections are low budget affairs, usually with an emphasis on neighbor to neighbor campaigning.²⁸ Candidate Kitts' expense reports show the largest single campaign activity was the direct mail campaign carried out by WTP through the WIFE letter.²⁹ The Commissioner further determines that Candidate Kitts improperly benefited from accepting the fruits of an undisclosed, shadow campaign that produced a direct mail letter as well as at least 2 attack Slicks in a local city commissioner campaign unaccustomed to this sort of campaign activity. The Commissioner

²⁸ Candidate Stern reported the most funds (about \$5,000) received and spent. Candidate Stern reported 42 individual and 1 PAC contributors and reported spending on door hangers, copies, newspaper ads, yards signs and stamps.

²⁹ Candidate Kitts reported contributions and expenditures of about \$3,000. Candidate Kitts reported contributions from 12 individuals and 1 PAC and reported 16 expenditures, the largest being the \$1,197.56 payment to General Consulting.

determines that the WIFE letter and the WTP Slicks were an integral part of Candidate Kitts' campaign for which he must take responsibility.

Finding of Fact No. 7: The WTP Slicks were election expenses in the 2011 Livingston City Commission election. (Commissioner's records).

Finding of Fact No. 8: The in-kind election expenses involved in the Slicks identified in FOF No. 7 were not disclosed or reported as election expenses by any entity, including Candidate Kitts. (Commissioner's records).

Finding of Fact No. 9: The election expenses identified in FOF No. 7 were coordinated with Candidate Kitts and became in-kind contributions to Candidate Kitts' campaign. (Commissioner's records).

Finding of Fact No. 10: The election expenses of FOF No. 7 were made by a corporation, WTP. (Commissioner's records).

Sufficiency Finding No. 4: As shown by Findings of Fact 1 through 10, there is sufficient evidence to justify civil prosecution of Candidate Kitts for accepting illegal in-kind corporate contributions to his Livingston City Commission campaign in the form of in-kind coordinated expenses made by a corporation in connection with the documents discussed in FOF No. 7.

Sufficiency Finding No. 5: As shown by Findings of Fact 1 through 10, there is sufficient evidence to justify civil prosecution of Candidate Kitts for failing to disclose and report as in-kind contributions election related expenses in connection with the documents discussed in FOF No. 7.

The Commissioner recognizes that Candidate Kitts' response to the complaint does not admit any coordination with WTP. That response is not credible. The records listed above are sufficient to show that Candidate Kitts coordinated in the production of the Slicks and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution

by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

E. Campaign Finance Reports

Candidate Kitts was required to disclose and report expenditures (“shall report”) by §13-37-225 MCA. Disclosure and reporting are designed to promote transparency, thereby serving the public trust purpose inherent in all reporting and disclosure laws.

Disclosure and reporting is accomplished through the filing of a campaign finance report (Form C-5) with the COPP. These C-5 reports are due for filing (“shall file”) with the COPP on a definite schedule so that the reports can be posted for review by voters seeking information about the candidate. See §13-37-226 MCA. Candidate Kitts was required to file C-5 reports 12 days before and 20 days after the dates of a primary and general election. *Id.*

Candidate

Finding of Fact No. 11: On September 1, 2011, Candidate Kitts filed his initial C5 Campaign finance report for the period of June 1, 2011 to September 1, 2011. On October 3, 2011, Mr. Kitts filed his second C5 campaign report for the reporting period of September 2, 2011 to October 3, 2011. On October 27, 2011, Mr. Kitts filed his third C5 campaign report for the reporting period of October 4, 2011 to October 27, 2011. On November 28, 2011, Mr. Kitts filed his closing C5 campaign report for the reporting period of October 28, 2011 to November 28, 2011. (Commissioner’s records).

The above 4 campaign finance reports were the appropriate number and were timely filed, as required by §13-37-226 MCA. Further, the pre-general election report (due October 27, 2011) disclosed a debt to “General Consulting

Livingston, MT” for “palm cards, candidate letters and postage” in the amount of \$1,197. (Commissioner’s records). Each campaign report is to “disclose...the full name and address of each person to whom expenditures have been made by...the candidate...including the amount, date and purpose of each expenditure....” 13-37-230(1)(a) MCA.

There is an issue as to whether listing by Candidate Kitts of “General Consulting Livingston, MT” met the obligation to disclose “full name and address”, however, the Commissioner sets that issue aside. The reporting issue of importance is the failure of Candidate Kitts to report the full cost of the “candidate letters” and the cost of the attack Slicks, all made by WTP through Direct Mail.

Sufficiency Finding No. 5: As shown by Findings of Fact 1 through 11, there is sufficient evidence to justify civil prosecution of Candidate Kitts for failing to report the full costs of the candidate letters and the Slicks.

ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation as the law mandates that the Commissioner (“shall investigate,” *See*, §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify”, *See* §13-37-124 MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that Candidate Kitts has, as a matter of law, violated Montana's campaign practice laws, including but not limited to: §13-35-227, §13-37-225§13-37-226, §13-37-229, §13-37-230, MCA, and all associated ARMs. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The many decisions to act or to not act made by Candidate Kitts in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse for instances of failing to report and disclose, or for acceptance of corporate in-kind contributions, such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. With the above analysis in mind, this Matter is

also not appropriate for application of the *de minimis* theory.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (see §13-37-124 MCA). This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)³⁰ the Lewis and Clark County attorney for his review for appropriate civil action (see §13-37-124(1) MCA). Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to initiate civil action within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication.

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil adjudication as the Commissioner has discretion [“may then initiate” see §13-37-124(1) MCA] in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of Chapter 37, including those of §13-37-226. [See

³⁰ Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failures to report and disclose occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

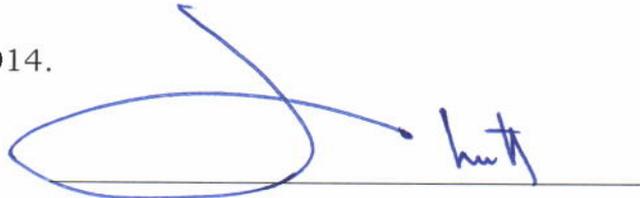
13-37-128 MCA]. Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

At the point this Matter is returned for negotiation of the fine or for litigation, mitigation principles will be considered. See discussion of mitigation principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. The response of Mr. Kitts to this Decision will, in part, guide application of a mitigation principle.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Candidate Kitts violated Montana's campaign practices laws under the analysis set out above.

DATED this 8th day of July, 2014.



Jonathan R. Motl
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General Consulting
1024
Oct 27, 2011

200 So. Main
St
LUBBERSVILLE
INVOICES
1302 24th St W
ATF 59101

PAID 10/31/11

We need an address for reporting

total \$1,197.56

due by Oct 27, 2011

For New Client



Paper Coat-std pkg 2,150 \$0.06 \$132.01
#10 closed; #9-2.85x11 20lb white; 8.5x11 color bond

Postage-Bulk 2,150 \$0.19 \$408.50
Bulk presort standard postage

LTR 4/2pg-Cen 2,050 \$0.27 \$553.50
Letter-Print 4/2 page letter color letterhead & signature
passes

Reply- print single color reply
Carrier-print single color carrier card on #10
BRES/RAE- print single color #9

Insert & seal letter, reply & #9 into #10
Address-import list NOCA; CASS certify; barcode
Stamp- apply bulk presort standard postage

House File Letter 153 \$0.35 \$53.55
personalized letter to house file. Postage and addressing
provided by client

Palm cards 500 \$0.10 \$50.00