

BEFORE THE COMMISSIONER  
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Bonogofsky v. Wittich No. COPP-2010-CFP-031	Summary of Facts and Findings of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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Art Wittich of Bozeman was a candidate for the Montana Senate, (SD 35) in the 2010 Republican primary election. On September 3, 2010 Debra Bonogofsky of Billings filed a complaint with this Office against Dan Kennedy (a 2010 candidate in House District 57) “and also the other (WTP) supported candidates...” Ms. Bonogofsky’s complaint against Candidate Kennedy resulted in a sufficiency Decision issued by this Office (*Bonogofsky v. Kennedy*, COPP 2010-CFP-15).

Following the *Kennedy* Decision Ms. Bonogofsky was consulted and directed that the “other candidates” portion of her complaint be applied to additional candidates according to evidence gathered by the Commissioner when investigating the *Kennedy* complaint. This application included a complaint against Candidate Wittich. On January 24, 2014 this Matter was noticed as a complaint. The January 24 complaint referenced the “action and evidence” identified in *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn*

*v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023. Mr. Wittich was invited to review and respond.

## I. INTRODUCTION

This Decision presents and decides several issues dealing with non-candidate expenditures in a Montana election, in this case a primary election in a single legislative district (SD 35).<sup>1</sup> These expenditure issues have confounded Montana political candidates and this Office for the past three election cycles.

The 2010 SD 35 Republican primary election involved four candidates: Shawn Moran, Dave Ponte, Bruce Samson and Art Wittich. On June 8, 2010, a legislative primary was held and Candidate Wittich advanced as the Republican candidate for the general election with 1,835 votes.<sup>2</sup> (Secretary of State (SOS) website). Candidate Wittich also won the general election in November of 2010 with 6,625 votes to Democrat Diane Elliott's 2,962 votes. (Secretary of State (SOS) website).

Candidate Wittich's campaign finance reports show that his principal election was the primary election, with his primary election expenditures being three times his general election expenditures. In turn, Candidate Wittich's largest primary election expenditure was to Direct Mail and Communications,

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<sup>1</sup> The Montana Legislature has 50 senate districts.

<sup>2</sup> Shawn Moran received 859 votes, Dave Ponte received 153 votes, and Bruce Samson received 808 votes. (Secretary of State (SOS) website).

Inc. in the amount of \$7,007.<sup>3</sup> Direct Mail provided Candidate Wittich all materials and production for 7 letters mailed to SD 35 voters. (*see*, this Decision, below, Commissioner's records).

As identified and discussed in prior Decisions<sup>4</sup> the Direct Mail letters provided 2010 candidates, such as candidate Wittich, with value in the form of unpaid services and materials. This unreported, undisclosed 2010 SD 35 election activity is the focus of this Decision.

## II. ELECTION EXPENSES

This Decision identifies and discusses a number of 2010 SD 35 election expenses that were not reported or disclosed by a candidate or third party. The Commissioner was able to identify election expenses, in part, based on documents supplied by members of the public.<sup>5</sup> Further, the Commissioner reviewed records of Western Tradition Partnership (WTP),<sup>6</sup> a non-profit corporation organized in the state of Colorado. WTP's records, at one time in the possession of the Commissioner's office, are now in the possession of the

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<sup>3</sup> Candidate Wittich's largest reported primary election expenditures were \$7,007 to Direct Mail, \$4,300 on signs, \$2,000 on media and \$2,000 on postage and printing not connected to Direct Mail. (Commissioner's records).

<sup>4</sup> *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023.

<sup>5</sup> For an example of documents supplied by the public, please *see* detailed summary of election activity in the 2010 HD 61 election, attached as Exhibit 1 to this Decision. John Esp was a candidate in the Republican primary in HD 61. The documents listed in this summary were received and saved by members of the Esp extended family during the 2010 HD 61 election.

<sup>6</sup> WTP was involved in 2008 and 2010 candidate elections in Montana. Commissioner Unsworth determined that some WTP 2008 election activities violated Montana campaign practice law as unreported independent expenditures. *Graybill v. WTP*, COPP-2010-CFP-0016. WTP challenged that decision in a Montana District Court. *WTP et. al. v. COPP*, No. BDV-2010-1120, 1<sup>st</sup> Judicial District, Lewis and Clark County. WTP's challenge has been dismissed by the Court, which also awarded sanctions and fines against WTP.

Federal Bureau of Investigation (FBI).<sup>7</sup> These “WTP records” and the documents provided by citizens, allowed the Commissioner to identify otherwise undisclosed and unreported SD 35 2010 election expenses, as set out in this Decision.

The expenditure of money in an election creates a visible election activity. That election activity is elemental in nature in that it cannot be reduced, excused or made to disappear. An election activity, once identified, falls into one of three types of election expense.

The first type is that of a candidate election expense. A candidate election expense includes money spent in an election that is contributed to and expended by a candidate. Candidate election activity, of course, is subject to contribution limits and must be attributed, disclosed and reported by the candidate. A candidate election expense includes a third party election expense coordinated with a candidate, as a coordinated expense is deemed to be an in-kind contribution to a candidate. (*see below*).

The second type of election expense is that of a third party entity independent of a candidate, but focused on a candidate in the election. This election expense is called an “independent expenditure” and it too must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. This expense, however, is not attributed as a contribution to a

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<sup>7</sup> There are 5 boxes of documents, formerly held by the Commissioner, now in the possession of the FBI, with federal possession of these documents taken through the power of a grand jury subpoena issued by a Federal Court. Two of these boxes of documents are the records and work product of the Commissioner’s office that were deemed to be covered by the subpoena. The other three boxes consist of internal WTP documents showing WTP activity in elections held in Montana and Colorado. The WTP Records were delivered to the Commissioner by a third party who found them in a house in Colorado.

candidate and therefore it is not subject to contribution limits or to reporting by a candidate.

The third type of election expense is that made coincident to the election by a third party entity independent of a candidate, but with the use of the money focused on an issue and not on a candidate. This election expense is called “issue advocacy.” This issue advocacy expense is not considered to be a candidate expense and therefore is not subject to campaign practice requirements. Specifically, Montana law does not require that an issue advocacy expense be attributed, reported or disclosed.<sup>8</sup>

A limited discussion of the distinction between candidate, independent and issue advocacy election expenditures was made by the Commissioner in an earlier Decision: *MacLaren v. Montana Conservative Coalition*, COPP-2012-CFP-0027. The distinction between these election expenditures, with particular focus on an independent expenditure, is also discussed in: *Bonogofsky v. Western Tradition Partnership*, COPP-2010-CFP-0007, *Bonogofsky v. National Gun Owners Alliance*, COPP-2010-CFP-0008, *Bonogofsky v. Assembly Action Fund*, COPP-2010-CFP-0009, and *Bonogofsky v. Montana Citizens for Right to Work*, COPP-2010-CFP-0010.

There is much of Montana’s election and candidate culture at stake in the distinctions in expenditures made during the time of an election, as defined by the above listed Decisions and by those that will shortly follow. We are a

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<sup>8</sup> The 2012 Montana Legislative session considered several bills that would have required reporting and disclosure of any election expense, including issue advocacy, made within 60 days of the date of an election. None of these bills passed into law. A 2014 ballot initiative has been proposed to address this issue.

nation of laws. Montanans have long expressed their majoritarian view for open and fair elections with maximum reporting and disclosure of money spent in elections. Candidates run with the expectation that they will not be bushwhacked by late, undisclosed and unreported expenditures. This Decision, and those that will follow, provide guidance to candidates and the public on coordination and the involvement of corporations in a candidate election.

### **III. SUBSTANTIVE ISSUES ADDRESSED**

The substantive areas of campaign finance law addressed by this decision are: 1) Coordinated expenditures; 2) Corporate contributions; 3) Reporting and disclosure; and, 4) Retention and production of campaign accounts and records.

### **IV. DISCUSSION AND FINDINGS**

The following are the foundational relevant facts for a Decision in this Matter:

Finding of Fact No. 1: Art Wittich was a 2010 candidate for the Republican Party nomination to the Montana legislature from SD 35, Montana. Three other candidates (Shawn Moran, Dave Ponte and Bruce Samson) also sought the 2010 nomination by the Republican Party from SD 35. (Secretary of State (SOS) Website).

Finding of Fact No. 2: The primary vote in Montana took place on Tuesday, June 8, 2010. Candidate Wittich won the Republican primary election in SD 35. (SOS Website).

Mr. Wittich, as a candidate in the 2010 SD 35 Republican primary election, was required by law to disclose, report, and attribute all contributions to, and expenses by, his campaigns. The Commissioner notes that there are no

offsetting constitutional speech issues to these campaign practice requirements. The holding of public office in Montana 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.

**A. WTP Entities Involved in Candidate Wittich’s Campaign**

Candidate Wittich, as detailed in this Decision, accepted in-kind services from third party entities. Those third party entities are connected to WTP in such a way that they became agents of or the same as WTP.

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).<sup>9</sup> WTP identified the SD 35 Republican primary election, along with a number of other races, as targeted 2010 Montana legislative races. (WTP records).

WTP’s Confidential Overview describes its planned use of documents in election activity forecast for a 2010 Montana legislative race, such as SD 35:

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.

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<sup>9</sup> 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.

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,<sup>10</sup> illustrates the tenor of some of these letters and postcards by showing 5 such WTP documents attacking candidates.

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., a Colorado for-profit corporation. In 2010 Direct Mail operated a print shop in Livingston, Montana under the direction of Allison LeFer.<sup>11</sup> The Commissioner determines that Direct Mail and Allison LeFer are agents of and part of WTP as to any Candidate Wittich election activity. There is a direct relationship between Direct Mail and WTP, making the two indistinguishable for the purposes of this Decision. Allison LeFer (aka Allison Andrews) was the President of Direct Mail in 2010.<sup>12</sup> 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).

Likewise, Christian LeFer is an agent of and the same as WTP as to any Candidate Wittich election activity. Christian LeFer is currently listed as one of

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<sup>10</sup> Also produced to the Commissioner by Ms. Loendorf.

<sup>11</sup> Candidate Wittich directed payments to Direct Mail through a Livingston Post Office Box address and a Bozeman Post Office Box address. The Livingston Direct Mail PO Box 1112 listed Allison LeFer and Christian LeFer as the persons receiving mail. The Bozeman PO Box 11695 was not listed in Direct Mail’s name, but the US Postal Inspection Service informed the Commissioner’s investigator that “Direct Mail also received mail at this box from 2008-2011.” (Commissioner’s records, Investigator’s notes.)

<sup>12</sup> 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.

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 (*see Ex. 1*). Candidate Washburn (2010 HD 69) also reported that he received a phone call from Christian LeFer speaking on behalf of WTP after Candidate Washburn criticized WTP at a political event. (Investigative conversation with Candidate Washburn).

In the 2008 elections WTP created a front organization, the Coalition for Energy and the Environment, for use as the source of Slicks. (*see Graybill v. WTP*, COPP-2010-CFP-0016).<sup>13</sup> The Commissioner determines that WTP's use of attack letters under its own name is a consistent use in the 2010 elections.

### **B. Coordinated Expenses**

Complainant Debra Bonogofsky raised coordination and corporate contribution issues. *See Bonogofsky v Kennedy* Decision. Candidate Wittich is responsible for a failure to properly disclose, report and/or attribute any in-

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<sup>13</sup> WTP challenged the *Graybill* decision in district court. As part of that litigation a January 4, 2013 Order found that "WTP funded, controlled, and directed CEE during the 2008 election cycle in Montana". *WTP v. Murry*, No. BDV-2010-1120, 1<sup>st</sup> Judicial District, Lewis and Clark County.

kind (non-monetary) third party election contribution to his campaign, including those coordinated with Candidate Wittich 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. A more detailed discussion of the legal elements of coordination, including a review of past coordination decisions by Commissioners, accompanies this Decision as Exhibit 2.

#### **i. The 7 Direct Mail Letters**

Candidate Wittich's campaign finance reports show payment of \$7,007 to Direct Mail for primary election services. Candidate Wittich refused production of the invoice for these services.<sup>14</sup> The "Art Wittich" ledger sheet<sup>15</sup>, coupled

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<sup>14</sup> Candidate Wittich produced 113 pages of documents, consisting of copies his banking records and copies of the campaign finance reports filed with this Office. Candidate Wittich produced no copies of invoices (and refused a follow-up request for such copies) despite a notation of invoice number on campaign checks. In particular, Candidate Wittich produced no copies of Direct Mail invoices, an invoice that other similarly investigated 2010 candidates did produce. See *Ward v. Miller*, COPP-2010-CFP-021.

with copies of letters signed by Candidate Wittich allow the Commissioner to determine that \$7,007 paid by Candidate Wittich was for the partial cost of some or all of the letters signed by Candidate Wittich (hereafter “7 Letters”).<sup>16</sup>

The Commissioner’s review of WTP records has determined that there were 8 basic letters produced by WTP for WTP supported candidates, consisting of two introduction or “Intro letters” with survey, a “WIFE” letter,<sup>17</sup> four issue ID’d letters (gun, life, tax, spend/Right to Work) and a closing letter. The Direct Mail “Art Wittich” ledger shows that at one point Candidate Wittich and Direct Mail considered production of all 8 letters plus a special mailing to absentee voters.<sup>18</sup> The examination of the WTP Records found copies of 7 Candidate Wittich letters including the “Intro letters” with survey, four issue ID’d letters (gun, life, tax, spend/Right to Work) and a closing letter. The examination did not find a copy of a “WIFE” letter.

For the purposes of this Decision the Commissioner determines that the “Art Wittich” ledger is accurate and may be relied on.<sup>19</sup> One indication of reliability is that the “Art Wittich” ledger notes “2000 [was] paid on 4/17/[2010]”. This notation is consistent with the \$2,000 in Wittich campaign

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<sup>15</sup> Direct Mail listed the number of letters provided a candidate on form printed on the front of a candidate’s folder (the “ledger”). A copy of the Art Wittich ledger sheet is attached as Ex. 3.

<sup>16</sup> Candidate Wittich generally refused to produce campaign documents. In particular, Candidate Wittich did not produce copies of any of the 7 letters produced by Direct Mail nor did he produce copies of invoices for campaign expenses.

<sup>17</sup> The Commissioner’s review determined that WTP identified a letter from a candidate’s wife as a “WIFE” letter.

<sup>18</sup> Because invoices were produced it was shown, based on invoices, that Direct Mail printed all 8 letters in *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023.

<sup>19</sup> Should this Matter not settle and progress to litigation Candidate Wittich will be required to produce documents, including the Direct Mail receipt.

checks made out to Direct Mail and dated 4-13-2010. (See COPPWITT25) A second indication of reliability is the consistency of the “Art Wittich” ledger with other WTP candidate ledgers.<sup>20</sup> The Commissioner determines in this Matter that candidate Wittich and Direct Mail produced 7 of the 8 letters (all but the WIFE letter) listed in the Art Wittich ledger.<sup>21</sup> Removing the cost of the WIFE letter adjusts the basic ledger bill to the amount of \$5,898.25. There is an additional \$2,041.50 listed as a cost for “chasing” absentee voters.

Based on the above analysis, the Commissioner determines that the minimum number of letters sent out by Direct Mail for the Wittich campaign is the number listed in the “Art Wittich” ledger. Accordingly, the Commissioner determines that, at a minimum, Candidate Wittich and Direct Mail produced 12,554 candidate Wittich letters consisting of 4,979 Intro letters, 2,596 Issue ID’d letters, and 4,979 closing letters.<sup>22</sup>

The 12,554 Letters are an election expense, with a payment of \$7,007 reported by Candidate Wittich. This Decision determines whether or not the complete expense of the 12,554 Letters was reported and disclosed by Candidate Wittich, including value of services. See 44.10.323 (2) ARM and above. Under COPP regulations, Candidate Wittich was required to report as an in-kind contribution the “total value of the services” received as part of the

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<sup>20</sup> There were WTP candidate ledgers in *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023.

<sup>21</sup> The Commissioner notes that the “Art Wittich” ledger has a ? next to the WIFE letter at one point. The Commissioner will refine this determination once the actual data is determined based on a review of the Direct Mail invoices to the Candidate Wittich campaign.

<sup>22</sup> This is the largest number of candidate letters Direct Mail produced for any single candidate investigated by the Commissioner to this point in time.

preparation of these 8 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.<sup>23</sup> 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 “fair market value.”<sup>24</sup>

### **1. The 2 Intro and Closing letters**

Candidate Wittich engaged Direct Mail for two introduction (Intro) letters and a closing letter. (Ex. 3). Direct Mail produced 4,979 Intro letters (50 cents each for \$2,489.50 cost) and 4,979 closing letters (45 cents each for \$2,240.55 cost) for Candidate Wittich. Each Intro letter mailing included the outgoing

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<sup>23</sup> The Commissioner identified 8 documents constituting an election expense that were mailed to 2010 SD 35 voters. These documents either promoted Candidate Wittich’s campaign or attacked another primary opponent’s campaign. Those 8 documents consist of: 7 candidate letters printed by WTP/Direct Mail and 1 attack letter by WTP. Additional campaign documents, produced under order of a court, may reveal further such documents. The same pattern of large scale election use of documents was employed in a number of 2010 legislative campaigns. Attached as Exhibit 1 is a summary of the most complete 2010 election document record reviewed by the Commissioner, that being the documents attacking Candidate Esp or promoting Candidate Boniek in the 2010 HD 61 Republican primary race. This summary is useful to acquaint the reader with the pattern of election document use as well as the role played by WTP and its aligned groups.

<sup>24</sup> 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.

envelope, the letter, a survey, and return envelope the SD 35 voter could use to return the survey. (WTP records).<sup>25</sup>

The Commissioner determined the services provided by WTP through an examination of WTP records showing Intro and closing letter use. In particular, the Commissioner found that the WTP used a standard practice of cutting and pasting information specific to a candidate, including Candidate Wittich, into pages of a “master” letter (employing standard phrases) used by WTP for multiple legislative candidates. A masthead for Candidate Wittich was then pasted on the final text. (WTP records).

The Commissioner’s review found that Candidate Wittich gave multiple samples of his signature to WTP. One of those signatures was selected by WTP and scanned into a printer menu.<sup>26</sup> The Intro letter was then printed in ink on 8 ½ by 11 paper (Candidate Wittich’s chosen signature was scan printed on the letter), folded, and inserted into an envelope along with survey and return envelope and then mailed, engaging Direct Mail’s rapid fire printing capacity. The Commissioner found a Direct Mail flyer in the WTP records wherein Direct Mail described itself as a “grassroots direct mail fortress” whose equipment included “computer controlled automated insertion technology” capable of printing, inserting, and sealing letters at rate of over 1,000 per hour. (WTP

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<sup>25</sup> The Commissioner determines that there is no other cost entry reported on Candidate Wittich’s campaign finance reports that could support a claim that Candidate Wittich otherwise paid for any of the envelopes, stamps or paper used in the 7 Letters. Further, Direct Mail provided this full range of supplies, materials and services for other 2010 legislative candidates.

<sup>26</sup> The WTP records include the page where “Art” was cut out for use in the Direct Mail scanner.

records). The closing letter was prepared using a similar approach. (WTP records).

The Direct Mail flyer also described its equipment as including a rapid fire “stamp affixer” machine. (WTP records). The Commissioner’s review of WTP records determined that 2010 Montana legislative election documents were mailed by Direct Mail under a presort standard rate stamp called the Patriotic Banner stamp which can be used by mailers of bulk quantities of items such as newsletters or notices.<sup>27</sup> The WTP records include Wittich campaign return envelopes for 5 campaign letters (each addressed to Allison LeFer), all affixed with a Banner stamp. The postage charge was 22 cents per document mailed when this stamp is used. (WTP records, Investigator’s Notes).

The Commissioner takes administrative notice of a minimum cost of printing and handling a mailer, set at 56 cents, exclusive of postage. The Commissioner takes administrative notice of the information in the *Bonogofsky v. Kennedy* Decision from Allegra invoice No. 80910. Allegra’s invoice, dated May 4, 2010, showed a charge to Candidate Kennedy of \$1,103.72 to print, fold, and inkjet address 1,959 one page mailers. This comes to a charge of 56 cents per mailer, exclusive of postage.<sup>28</sup>

The Commissioner’s administrative notice recognizes that Allegra is an operating Montana business that offered services to the public in 2010 at rates

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<sup>27</sup> WTP records and the Esp records show a systemic use by WTP and/or Direct Mail of the Patriotic Banner bulk rate stamp on documents that WTP/Direct Mail prepared, printed, and mailed for candidates.

<sup>28</sup> Postage or “shipping” was separately charged by Allegra at \$470.16, or 24 cents per mailer. This is comparable to the 22 cents bulk stamp rate paid by Direct Mail.

it designed to be competitive. Being competitive, the 56 cents of cost per mailer sets fair market value for a comparable service.

Turning to valuation of the Wittich Intro and closing letters, a base value is established by Allegra's charge of 56 cents to print, fold, and address a one page mailer. The Commissioner determines that the Direct Mail services provided to Candidate Wittich in the production of the Intro and closing letters involved printing, folding, and inserting multiple pages (as well as a return envelope in the case of the Intro letters) into an envelope as well as sealing, stamping and addressing the envelope. The Direct Mail services provided for each of the Intro and closing letters were therefore greater than the Allegra services provided for the less complicated mailer. The Commissioner therefore determines that the 50 or 45 cents Candidate Wittich paid for each of the Intro or closing letters did not cover the cost of the stamp, envelope, paper, and ink. Further, the Commissioner determines that Candidate Wittich paid nothing to WTP for its services in writing, editing, layout, and processing the Intro or closing letters.

The Commissioner finds that Candidate Wittich cooperated with, knew of, and approved of the services involved in the Intro and closing letters. Candidate Wittich print-signed the letters and partially paid for each letter. The Commissioner determines that candidate coordination lies under 44.10.323(4) ARM and *Little v. Progressive Missoula, supra*. These services provided by WTP in regard to the Intro and closing letters met the definition of

coordination and should have, but were not, reported as an in-kind contribution/expense to and by Candidate Wittich.

Finding of Fact No. 3: Candidate Wittich received Intro and closing letter services in his 2010 SD 35 election, including preparation, design, layout, editing and handling of the letters.

Finding of Fact No. 4: Candidate Wittich did not pay for, disclose or report the full expense of services involved preparation, design, layout editing or handling of the Intro and closing letters.

Finding of Fact No. 5: The undisclosed and unreported Intro and closing letter services provided to Candidate Wittich were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 6: Candidate Wittich knew of, consulted on and consented to the full range of Intro and closing letter services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 1: As shown by Findings of Fact 1 through 6, there is sufficient evidence to justify civil prosecution of Candidate Wittich for accepting illegal corporate contributions to his 2010 SD 35 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the Intro and closing letters.

Sufficiency Finding No. 2: As shown by Findings of Fact 1 through 6, there is sufficient evidence to justify civil prosecution of Candidate Wittich for failing to disclose and report as in-kind contributions election related expenses associated with the Intro and closing letters.

The Commissioner recognizes that Candidate Wittich's response to the complaint does not admit any coordination with WTP. (Commissioner's records, Wittich response to complaint). That response is not credible. The records listed above are sufficient to show that Candidate Wittich coordinated in the production of the Intro and closing letters 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.

## **2. Issue ID'd letters**

The Montana Secretary of State (SOS) website reports that 3,655 people voted in the 2010 SD 35 Republican primary. WTP planned multiple ways to direct mail to these voters as it planned a mass mailing of “letters and glossy postcards to ...tens of thousands of likely voters and issue ID'd lists” (see this Decision, page 8) in selected legislative districts, including SD 35. Direct Mail described this mass mailing approach as a “shock and awe electoral bombing campaign.” (Commissioner’s records).

Candidate Wittich’s campaign included use of such “issue ID'd lists.” The issue this presents is that of how the Wittich campaign knew which voters were being “bombed” with the combined mailings from Candidate Wittich and third parties. The Art Wittich ledger states Candidate Wittich was billed 45 cents each for 2,596 “issue ID'd” letters for a cost of \$1,168.20. The “Art Wittich” ledger divides “issue ID'd voters” into four groups, those being: “gun” voters, “life” voters, “tax” voters, and “tax/right to work” voters.

The Commissioner, by review of WTP records, has determined that WTP provided each candidate it chose to support, including Candidate Wittich, with

an identified list of issue ID'd voters in their legislative district.<sup>29</sup> The Commissioner takes administrative notice that any such list of identified voters has value (*see Wittich v. Campbell*, November 17, 2009). This applies to each Candidate Wittich mailing, but particularly to this issue ID'd mailing. The Commissioner finds that provision of likely voter lists, in particular issue ID'd lists, is an additional service value provided by WTP to Candidate Wittich.

A review of WTP records relating to issue ID'd letters was conducted by the Commissioner comparable to that set out in regard to the Intro and closing letters. Based on that review the Commissioner determined that the Candidate Wittich issue ID'd letters were two pages in length, printed on standard 8 1/2 by 11 inch paper stock with use of a scanned blue ink Candidate Wittich signature. The Art Wittich for Senate masthead and the text of the letter were created by cutting and pasting onto the master letter used as a template for all such issue ID'd letters prepared by WTP for the 2010 Montana legislative candidates it supported.<sup>30</sup> As was the case with the Intro and closing letters the Candidate Wittich issue ID'd letters were mailed using the bulk rate Patriotic Banner stamp. Specifically, four separate Candidate Wittich issue ID'd letters were created (one for each group of ID'd voters) and mailed to each issue ID'd group of SD 35 voters. For example, the "gun" issue ID'd voters received a Candidate Wittich letter stating his support of "real conceal carry reform."

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<sup>29</sup> Please See Exhibit 1 for a listing of the comparable approach in the 2010 HD 61 election.

<sup>30</sup> WTP used this issue ID's letter approach for multiple candidates in 2010 elections.

The Commissioner adopts and applies the reasoning set out in the Intro and closing letter determination (*see above*) and determines that writing, editing, layout, and production services of substantial value were provided by WTP to Candidate Wittich in connection with the four issue ID'd letters. The Commissioner further determines that Candidate Wittich paid nothing to WTP/Direct Mail for the services in providing voter ID lists, writing, editing, layout, and processing the Candidate Wittich issue ID'd letters.

Finding of Fact No. 7: Candidate Wittich received issue ID'd letter services in his 2010 SD 35 election, including voter ID'd lists, preparation, design, layout, editing, and handling of the letters.

Finding of Fact No. 8: Candidate Wittich did not pay for, disclose or report the full expense of services involved preparation, design, layout editing or handling of the issue ID'd letters.

Finding of Fact No. 9: The issue ID'd letter services provided to Candidate Wittich were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 10: Candidate Wittich knew of, consulted on, and consented to the full range of issue ID'd services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 3: As shown by Findings of Fact 1 through 10, there is sufficient evidence to justify civil prosecution of Candidate Wittich for accepting illegal corporate in-kind contributions to his 2010 SD 35 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the issue ID'd letters.

Sufficiency Finding No. 4: As shown by Findings of Fact 1 through 10, there is sufficient evidence to justify civil prosecution of Candidate Wittich for failing to disclose and report as in-kind contributions election related expenses associated with the issue ID'd letters.

The Commissioner recognizes that Candidate Wittich's response to the complaint does not admit any coordination with WTP. (see Wittich answer to complaint). That response is not credible. The records listed above are sufficient to show that Candidate Wittich coordinated in the production of the issue ID'd 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 Letters**

The Commissioner determined, above, that Candidate Wittich signed (thereby accepting content) and partially paid for the 7 Letters discussed above. By so acting Candidate Wittich was directly involved with the 7 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 Wittich's campaign.<sup>31</sup>

The Commissioner, by direct observation, has also identified an additional document that is an election expense in the 2010 SD 35 election in that the document attacked Candidate Moran. This document was an attack letter sent by WTP. The Commissioner must now determine who, if anyone, is responsible

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<sup>31</sup> The Commissioner reserves his right to claim further fair market value deficiency as to the production costs Direct Mail charged Candidate Wittich.

to attribute, report, and disclose the value [i.e. “election expense”] of this document.<sup>32</sup>

### **1. The Attack Letter**

The WTP records included a copy of 4 page letter dated June 1, 2010 and authored by WTP and sent to 2010 SD 35 voters. The WTP letter attacked Candidate Moran and praised Candidate Wittich. The Commissioner will add additional claims should further discovery show more such attack letters.

By direct observation the Commissioner determines that the WTP letter was double side printed on standard 8 1/2 by 11 inch yellow paper under the WTP masthead. The letter was signed by Daniel Fuchs, WTP Director of Governmental Affairs. The approach taken in the accompanying survey and WTP letter resulted in the listing of Candidate Moran’s name 11 times, always negatively, in relation to the “June 8” 2010 SD 35 primary vote while always listing Candidate Wittich’s name positively.<sup>33</sup> The WTP letter is a follow up to survey and therefore is consistent with WTP’s overall plan (*see above*) to use surveys, survey based attack letters and Slicks in 2010 Montana legislative race, such as SD 35. Further, the topics addressed in the WTP letter are consistent with the topics of the companion issue ID’d letters mailed by Candidate Wittich. Still further, the WTP attack letter in the 2010 SD 35 race

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<sup>32</sup> There were four Candidate Wittich issue ID’d letters and WTP generally timed these letters to arrive with a third part attack letter on the same issue. The Commissioner will add additional groups should additional attack letters be found during any necessary litigation of this Matter.

<sup>33</sup> The WTP Moran attack letter is, with individualized adjustments, comparable to the attack letters WTP routinely sent in other 2010 elections.

was one of many comparable letters that WTP sent out in 2010 legislative races.

## **2. The Attack Letter Was Coordinated**

The Commissioner determines that the WTP attack letter exists, has value, and is an election expense made by WTP in the 2010 SD 35 legislative race. As an election expense, Candidate Wittich will be deemed to accept the letter 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 2010 elections, including the SD 35 election, were the second election cycle for WTP involvement in Montana’s legislative races. By far the most visible and controversial part of WTP’s 2008 election activity had been its use of attack letters and slicks in 2008 legislative elections. (See *Graybill v. WTP*, 2010-COPP-CFP-0016). The Commissioner takes administrative notice that a candidate endorsed by WTP in the 2010 elections would have to know of and consent to the use of attack letters and Slicks, as such use was WTP’s signature electioneering brand. Further, 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.

In addition to imputed knowledge, the Commissioner finds that Candidate Wittich's specific and companion use of issue ID'd letters keyed to the attack letter topics and the timing of those letters showed that Candidate Wittich expected and knew his issue ID'd 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 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 Wittich meets this standard as to the attack letters are deemed a coordinated contribution to Candidate Wittich.

Finding of Fact No. 11: The WTP attack letters were election expenses in the 2010 SD 35 election.

Finding of Fact No. 12: The in-kind election expenses involved in the letters identified in FOF No. 11 were not disclosed or reported as election expenses by any entity, including Candidate Wittich.

Finding of Fact No. 13: The election expenses identified in FOF No. 12 were coordinated with Candidate Wittich and became in-kind contributions to Candidate Wittich's campaign.

Finding of Fact No. 14: The election expenses of FOF No. 12 were made by a corporation.

Sufficiency Finding No. 5: As shown by Findings of Fact 1 through 14, there is sufficient evidence to justify civil prosecution of Candidate Wittich for accepting illegal in-kind corporate contributions to his 2010 SD 35 campaign in the form of in-kind coordinated expenses, including a WTP attack letter, made by a corporation.

Sufficiency Finding No. 6: As shown by Findings of Fact 1 through 14, there is sufficient evidence to justify civil prosecution of Candidate Wittich for failing to disclose and report as in-kind contributions election related expenses, including a WTP attack letter.

The Commissioner recognizes that Candidate Wittich's response to the complaint does not admit any coordination with WTP and denies any involvement with the attack letters. That response is not credible. The records listed above are sufficient to show that Candidate Wittich coordinated in the production of the letters 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.

### **C. Campaign Reporting and Documents**

There are further issues involved with disclosure, reporting, and document retention by Candidate Wittich's campaign.

## 1. Reporting of Expenditures

Candidate Wittich is required to disclose and report expenditures 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. Consistent with that transparency purpose all expenditures are required to be made by the campaign treasurer through a designated depository. 44.10.503 ARM.

Candidate Wittich designated himself as treasurer and then as deputy treasurer. First Security Bank of Bozeman was designated as the campaign's depository. The following findings of fact apply to reporting and disclosure:

Finding of Fact No. 15: Candidate Wittich filed campaign finance reports as follows:

- i) On May 28, 2010 for the beginning to May 23, 2010;
- ii) On June 29, 2010 for May 24 to June 23, 2010;
- iii) On Oct. 22, 2010 (amended Nov. 24, 2010) for June 24 to Oct. 16, 2010; and,
- iv) On Nov. 24, 2010 for Oct. 17 to Nov. 17, 2010.

There were other campaign finance reports, but these four, as amended are the basis for further findings. Candidate/deputy treasurer Wittich signed each of these 4 reports. (Commissioner's records).

Finding of Fact No. 16: Candidate Wittich established a campaign account at First Security Bank of Bozeman and issued 24 checks for primary election expenditures from that account. COPPWITT0018-0031.

Finding of Fact No. 17: The information in the Wittich campaign finance reports (FOF No. 15) does not match the information in the Wittich campaign account (FOF No. 16). The information differs as follows:

- i) The Wittich campaign finance reports list 12 expenditures for which no checks were issued or drawn on the Wittich campaign account: USPS (\$98.80); Van's IGA (\$26.40); USPS (\$52.80); Lowe's (\$592.50); My Campaign Store (\$75.50);

USPS (\$13.60); My Campaign Store \$2,401; USPS (\$22.40); Fed Ex. Kinkos (\$36.44); Simkins Halin (\$784.00); Art Wittich (\$760.40); and USPS (\$39.60).

- ii) The Wittich campaign account at First Citizens Bank shows 24 checks drawn on the account for primary campaign expenses. Twenty-one checks match amounts listed in the Wittich campaign finance reports. Three checks are not listed in the campaign finance reports. All three checks were written to Art Wittich with “loan payment” written in the margins, those checks being in the amounts of: \$1,109.94, \$692.50 and \$800.
- iii) One of the items the Wittich campaign finance reports lists as a payment is My Campaign Store for \$2,401.00, the exact amount candidate Wittich shows himself as lending the Wittich campaign.

Montana’s reporting and disclosure laws are clear. 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. The disclosure made by candidate in his campaign finance reports must be matched by the Candidate’s campaign account records as “[a]ll expenditures, except expenditures from the petty cash fund, shall be made by check drawn on the designated depository.” 44.10.503 ARM.

Candidate Wittich’s campaign finance reports, as is the case with the reports of any candidate, were filed, scanned and displayed for public view. (FOF No. 15). Candidate Wittich’s campaign bank account was not displayed for public view but, as is the case with any candidate’s campaign account, is available for public view through inspection by the Commissioner [§13-37-111(2)(b)(c) MCA]. Candidate Wittich supplied the record of his campaign account. (FOF No. 16).

Comparison of the Wittich campaign finance reports with the campaign bank accounts show that the two records differ. (FOF No. 17). The Commissioner determines that those differences show failures to meet the disclosure and reporting requirements of Montana law. First, the campaign finance reports failed to report and disclose three campaign checks making payments to Candidate Wittich totaling \$2,602.44, this constituting a violation of 13-37-230(1)(a) MCA. Second, the campaign finance reports show 12 payments to vendors in the amount of \$4,003.44 for which no campaign account checks were issued, this constituting a violation of 44.10.503 ARM.

There could be a partial explanation for Candidate Wittich's apparently gross violations of Montana's reporting and disclosure law. Given the close similarity in numbers (\$2,502.44 and \$2,602.44 for 11 vendors plus the "loan"), perhaps Candidate Wittich paid for some campaign costs personally and then intended to repay himself. But, the Commissioner has no evidence that this is the case because Candidate Wittich refused to produce any documents showing any such circumstance.

Sufficiency Finding No. 7: As shown by Findings of Fact 15 through 17, there is sufficient evidence to justify civil prosecution of Candidate/deputy treasurer Wittich for failing to report three checks paid personally to the candidate.

Sufficiency Finding No. 8: As shown by Findings of Fact 15 through 17, there is sufficient evidence to justify civil prosecution of Candidate/deputy treasurer Wittich for reporting to the public campaign expenses that were not paid for out of the campaign depository.

## 2. Reporting of Contributors

Candidate Wittich reported three primary election pass-the-hat events. Two of the events were held on April 7, 2010 and April 27, 2010 with the number of people attending the events first reported on an amended campaign finance report filed on November 24, 2010. (Commissioner's records).

Montana law limited the amount that could be contributed by an individual to a 2010 legislative campaign to \$160 per election. See §13-37-216 MCA with amounts adjusted for inflation by 44.10.338 ARM. Consistent with that limitation ARM44.10.521 sets requirements for mass collections at fundraising events. The rule requires a listing of the "approximate number of individuals in attendance at the fund-raising event" [*Id.*] and it requires that the "name and amount received from each person" over \$35 be kept as a record. Past commissioners have strictly interpreted the contribution limit, holding that any funds received at a pass the hat fundraiser must be counted toward an individual's limit. *Garver v. Tussing*, February 27, 2008, (Commissioner Unsworth).

Candidate Wittich, in response to an inspection request from this Office, listed 7 anonymous people in attendance at a 4/7/10 "pass the hat" event, with a total amount received of \$390. That contribution amount average is \$55.71 per person, an amount of excess of the \$35 limit. Candidate Wittich violated Montana law when he failed to report the name, address and occupation of these contributors. ARM44.10.521, *Garver v. Tussing*.

Candidate Wittich, in response to an inspection request from this Office, listed 9 anonymous people in attendance at a 4/27/10 “pass the hat” event, with a total amount received of \$540. That contribution amount average is \$60.00 per person, an amount in excess of the \$35 limit. Candidate Wittich violated Montana law when he failed to report the name, address and occupation of these contributors. ARM44.10.521, *Garver v. Tussing*.

Sufficiency Finding No. 9: As shown by the above listed facts there is sufficient evidence to justify civil prosecution of Candidate Wittich for failing to disclose and report to the public the names and addresses of 16 contributors to his 2010 campaign.

### **3. Campaign Document Retention and Production**

Art Wittich served as the deputy treasurer for Candidate Wittich’s 2010 SD 35 campaign. (Commissioner’s records).<sup>34</sup> By law the treasurer of Candidate Wittich’s campaign is required to preserve “detailed accounts” of all expenses made for a period of 4 years. §13-37-208 MCA. The detail in the accounts must be sufficient to determine the “purpose of each expenditure” § 13-37-230(1)(a) MCA. The detail is that required to prepare “...directly from the accounting records, the reports required by Title 13.” ARM44.10.501. Commissioner Vaughey applied that standard to require that invoices must “...describe the work performed...” so that a value can be set for in-kind services. *Motl v. Citizens for More Responsive Govt.*, Decided April 20, 2004, p. 15.

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<sup>34</sup> The treasurer, Nell Feddes, signed no checks and no campaign finance reports thus Candidate Wittich, as deputy treasurer, is also responsible for the treasurer’s functions.

In turn, under Montana law the Commissioner has a right to “inspect any records, accounts or books that must be kept” (§13-37-111(2)(b) MCA). The Commissioner may “require production of any books, papers, correspondence, memoranda, bank account statements ... or other records that are relevant material for the purpose of conducting any investigation...” (§13-37-111(2)(c) MCA).

In this Matter the Commissioner requested such an inspection. Candidate Wittich’s 2010 primary election campaign wrote checks for 24 primary election expenses. Candidate Wittich’s campaign finance reports listed 33 primary election expenses. Candidate Wittich was asked to make all campaign related documents available for inspection. Instead of doing this Candidate Wittich engaged an attorney and produced 113 pages of documents consisting of campaign bank account records and copies of campaign finance reports.

Notably Candidate Wittich produced no copies of receipts, campaign letters, emails or other documents. Candidate Wittich’s actions violate §13-37-208 and interfere with the Commissioner’s powers under §13-37-111 MCA.

Sufficiency Finding No. 10: The Commissioner determines that there is sufficient evidence to justify civil prosecution of Candidate Wittich for failing to maintain campaign records for the four year period of time set out in Title 13 of the Montana Code and for failing to produce records when production of the same was demanded by the Commissioner.

#### **V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS**

The Commissioner issued 10 sufficiency findings in this Matter. These included: failure to report or disclose (Sufficiency Findings Nos. 2, 4, 6, 7, 8

and 9); acceptance of illegal corporate contributions through coordination (Sufficiency Findings Nos. 1, 3 and 5); and failure to maintain or produce campaign finance records. (Sufficiency Finding No. 10).

The sufficiency findings of failures to attribute, report, and disclose as well as the finding of acceptance, through coordination, of illegal corporate contributions are substantial and significant. While each of these findings raise caution flags, the coordination and failure to maintain records findings are a flashing red light to 2014 candidates and their treasurers.

There have been two initial coordination findings by a Montana Commissioner of Political Practices, that being in *Little v. Progressive Missoula* (Commissioner Vaughey) and *Bonogofsky v. Kennedy* (Commissioner Motl). The *Progressive Missoula* matter, however, involved far less services than are involved in this matter and the coordinating third party was a political committee, not a corporation. A political committee can contribute, subject to limits, to a candidate.

This Decision, as did *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023, finds coordination by a corporation. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. 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.

There is lag time in social adjustment when major changes occur in permissible activity, such as the changes made by the *Citizens United* decision. During that lag time opportunistic people and groups may emerge and promote activity such as corporate involvement in candidate campaigns that is risky or down right illegal. This Decision cautions candidates and treasurers that their agreement to partake in such behavior may leave them to pay the societal debt based on determination of error in behavior. In particular, the sufficiency findings in this matter mean that Candidate Wittich faces potentially significant enforcement consequences. There may be similar enforcement consequences in any determination of a similarly postured candidate in other 2010 and 2012 elections.

The Commissioner hereby cautions 2014 candidates in Montana elections to avoid the sort of election entanglement or involvement with a non-profit or for-profit corporation that Candidate Wittich had with WTP and/or Direct Mail. While a corporation may independently make election expenditures (as independent expenditures or issue advocacy), the best protection a candidate has from consequences like those of this Decision is to avoid election contact, interaction or interplay with a corporation unless that contact is fully paid for. That is what the law requires and it is what fair play with an opponent should dictate.

## **VI. 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 Wittich has, as a matter of law, violated Montana’s campaign practice laws, including but not limited to §13-35-225, §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 Wittich in this matter were choices. Excusable neglect cannot be applied to such choices. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. CPP-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 attribute, 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. CPP-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”)<sup>34</sup> 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.

Campaign practice violations, of the nature and scope encountered in this Matter, are new to the modern era Montana politics.<sup>35</sup> Montana’s second Commissioner, Peg Krivec, served her entire 6 year term (1981-1986) without

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<sup>34</sup> Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failures to attribute and report occurred in Lewis and Clark County. This Commissioner chooses to Notice this matter to the county attorney in Lewis and Clark County.

<sup>35</sup> This type of systemic violations in Montana’s past gave rise to many of Montana’s current campaign practice laws.

issuing a Decision. Subsequent Commissioners Colberg, Vaughey, and Argenbright issued decisions that generally provided a platform for earnest political participants to pay a fine for the mistake and adjust future election activity to conform with the rulings.

In contrast, the parties in this Matter have, to date, been unwilling to accept or adjust to Montana's expectations of appropriate election behavior. WTP has, to date, aggressively pursued a self-determined approach to involvement in Montana elections. Candidate Wittich also demonstrates an equally self-determined view of appropriate election activity. Until the recent litigation resulting from candidate actions taken in coordination with WTP, Commissioners have rarely found it necessary to seek the full legal redress allowed by Montana law against a candidate or treasurer.<sup>36</sup> Full legal redress is imposed by a district court judge and comes only after a full due-process district court hearing whereat the candidate may provide evidence and confront witnesses, including the Commissioner. The Commissioner notes that full legal redress includes ineligibility of adjudicated offender to be a candidate for, or to hold, public office (*see* §13-35-106(3) MCA). In addition the offender can be assessed a fine of up to three times the amount of the unlawful contribution or expenditure (*see* §13-37-128 MCA).

Candidate Wittich is a sitting legislator representing SD 35. As such Candidate Wittich is imbued with a duty of public trust and the social debt

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<sup>36</sup> All of the following matters are now filed as litigation in the 1<sup>st</sup> Judicial District, Lewis and Clark County, Montana: *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023.

owed by Candidate Wittich needs to be assessed with that duty in mind. The violations set out above are of such significance that the Commissioner determines the same need to be placed before a Court so that, after a full due process hearing, a Court makes the decision as to application of the full reach of the consequences allowed by Title 13.

### **VII. CONCLUSION**

Based on the preceding discussion, as Commissioner, I find and decide that there is sufficient evidence to show that Candidate Wittich violated Montana's campaign practices laws as set out above and that civil adjudication of the violation is warranted.

Dated this 31st day of March, 2014.



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Jonathan R. Motl  
Commissioner of Political Practices  
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Exhibit 1  
Bonogofsky v. Kennedy COPP-2010-CFP-0015

The *Bonogofsky v. Kennedy* Decision summarizes election actions orchestrated by Western Tradition Partnership (WTP) through 16 direct mail pieces in support of Candidate Kennedy and/or in opposition to Candidate Bonogofsky in the Montana 2010 HD 57 Republican primary election. This document is a summary of comparable direct mail election actions orchestrated by WTP in support of Candidate Joel Boniek and/or in opposition to Candidate John Esp in the 2010 HD 61 Republican primary race. This summary provides a further example of the election related surveys, letters and attack pieces used by WTP to enhance the election of its chosen candidate in 2010 legislative elections.<sup>1</sup> The primary election was set for June 8, 2010. In the two months leading to the following WTP related election actions took place in the HD 61 race:

1. Direct contact with Esp by WTP: On April 4, 2010 WTP, through Christian LeFer, called Candidate Esp. LeFer tried to talk Esp out of running, calling Boniek a beacon of hope to so many. LeFer also accused Esp of spreading rumors about Boniek and threatened to run

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<sup>1</sup> John Esp has a number of family members living in HD 61. Mr. Esp has provided the Commissioner with the Esp family archive of WTP orchestrated actions related to the 2010 Republican primary. The ESP family archive, added to information in the WTP files, created a comprehensive record of WTP activity in the 2010 HD 61 Republican primary election.



a “dirty campaign” against Esp in retaliation (Esp notes, Esp Campaign records).

2. Six Surveys: During May 3 through May 10, 2010 Candidate Esp received 6 candidate surveys -- those being from the National Gun Owners Alliance, Montana Citizens for Right to Work, WTP, the National League of Taxpayers, the National Pro-Life Alliance, and the Montana Tea Party Coalition. *Id.*
3. Boniek letter and Survey: In this same early May 2010 period Boniek sent an undated “Monday morning letter” announcing he was running for the HD 61 nomination, asking for money and enclosing a voter survey. *Id.*
4. 5 to 10 Attack Letters Based on Survey Results: During May 24 through June 1 the National Gun Owner’s Alliance, National ProLife Alliance, Montana Citizens for Right to Work and WTP sent two letters each to HD 61 voters, each letter promoting Candidate Boniek and/or attacking Candidate Esp centered on the June 8 primary election in HD 61. *Id.*
5. 4 Boniek issue letters: Also during May 24 through June 1 Candidate Boniek sent four more letters on issues (abortion, taxes, spending and guns) to groups of HD 61 voters who were ID’d as favorable to his position on these issues. *Id.*

6. 3 final Boniek letters: On June 3, 2010 two people with WTP connections (Lair and Faw) sent a letter attacking Esp. Susan Boniek sent a letter [WIFE letter] imploring a vote in favor of her husband and Candidate Boniek sent a final 6 page candidate letter seeking votes.

*Id.*

7. 6 attack Esp pieces: During the final weeks of the campaign 6 glossy fliers (Slicks) attacking Candidate Esp were mailed or handed to HD 61 voters by four groups: WTP attacked Esp twice on tax/spend and inheritance taxes; Assembly Action Fund attacked Esp on supporting Planned Parenthood; the Sportsman's Rights PAC attacked Esp as opposing "pro-gun hero Joel Boniek", the Montana Conservative Alliance attacked Esp as being supported by unions; and an anonymous "fact check" piece attacked Esp for failing to return surveys. *Id.*

8. The NRA sent postcards to its membership supporting Boniek. *Id.*

The *Bonogofsky v. Kennedy* decision determined that WTP (partly through its agent, a for-profit corporation called Direct Mail and Communications) wrote, edited, printed, stamped and mailed all letters sent by Candidate Kennedy. Excluding the surveys (which only went to the candidate) Candidate Boniek was promoted or Candidate Esp attacked by 24 direct mail pieces, as set out above.

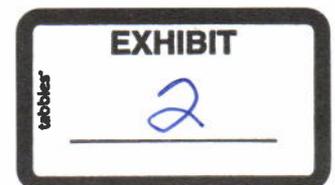
Exhibit 2  
*Bonogofsky v. Kennedy*, COPP-2010-CFP-0015

This Exhibit supplements the legal discussion of coordination, as introduced in the above Decision. This discussion is incorporated by reference into the Decision as though set out in full therein.

An 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.

A third party, including a corporation, can participate in an election through an independent expenditure. An independent election expenditure is subject only to reporting and attribution and is not subject to contribution limits or bans. The Courts, in upholding coordination findings, have recognized that there is a temptation to go past an independent expenditure and coordinate:

Independent expenditures “are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s point of view” (citing to *FEC v. Colo. Republican*, 533 US 431 at 446 (2001)). By contrast, expenditures made after a ‘wink or nod’ often will be “as useful



to the candidate as cash.” (*Id.* at 442, 446). For this reason, Congress has always treated expenditures made “at the request of suggestion of” a candidate as coordinated.

*McConnell v. FEC*, 540 U.S. 93, 224 (2003).

This circumvention of limits, through coordination, is not allowed:

“Moreover, recent cases have recognized that certain restrictions on corporate electoral involvement permissibly hedge against ‘circumvention of [valid] contribution limits.’” 540 U.S., at 205, 124 S. Ct. 619, 157 L. Ed. 2d 491 (quoting *Beaumont*, 539 U.S., at 155, 123 S. Ct. 2200, 156 L. Ed. 2d 179, in turn quoting *FEC v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456 and n. 18, 121 S. Ct. 2351, 150 L. Ed. 2d 461 (2001) (*Colorado II*), (alteration in original).

Montana’s definition of coordination is similar to that of federal law. Section 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. Richard Briffault, *Coordination Reconsidered*, Colum. L. Rev., (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.*

Past coordination decisions by Montana Commissioners show 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, 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.

Likewise Commissioner Unsworth rejected coordination in *Keanne 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 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 campaign (Allison Handler). Further, the Commissioner found specific evidence showing that 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 Handler, were artifices designed to disguise the real cooperation. The Commissioner found that the PM’s expenditures for flyers opposing candidate K. were made with “...prior knowledge, consent and encouragement of Handler...”. Thus they were coordinated expenditures.

The predecessor decision to this Matter (*Graybill v. Western Tradition Partnership*, COPP-2010-CFP-0016 (Commissioner Unsworth)) focused on WTP's activities in 2008 elections in Montana and, while noting shared staffing, did not find coordination, *id* p. 28. Graybill noted "concern and healthy skepticism" as to coordination but spent little time on coordination and instead focused on and found express advocacy.

Times  
 Biz. w/ pre cancel

# Mailing T1+T2

also print ~~250~~ 250  
 #95

**MASTER CANDIDATE FOLDER:**

- Signature
- Letterhead
- Corner card (#10)
- #9

5 Art Wittich

**PRINTED:**

- Letterhead Blue # 8,500
- Letterhead Red # 2,600
- Corner card (#10) Blue 8,500
- Corner card (#10) Red 2,600 - window envelopes
- #9 # 2,000

Primary Mail Budget	Tier 1 & 2 Voters		2906 T1 ✓ 5075 T2 ✓		
	House Ct.	PerPiece	House \$	COPY TO CAND	COPY APPROVED
Intro Letter with Survey	4979	0.5	\$2,489.50		
Letter	3920	0.65	\$2,548.00		
Issue-ID'd voters (R,T,L,G)	2596	0.45	\$1,168.20		
GUN					
LIFE					
TAX					
TAX/RTW					
Final	4979	0.45	\$2,240.55		
<b>Totals</b>			<b>\$8,446.25</b>		

Absentee Chase	T1 Abs vtrs=	T1 Abs. to whom?	T2 Abs. House Ct.	T2 Abs. PerPiece	T2 Abs. House \$
Intro	4083	4083	4083	0.5	\$2,041.50
Wife				0.65	\$-
Postcard				0.38	\$-
<b>Total Abs:</b>					<b>\$2,041.50</b>

<b>TOTAL</b>	\$10,487.75	Deposit:	\$5,243.88	2000 paid 4/17
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this is a little high because it will be house-held

Wittich Survey - 4500 - Done  
 pg 3+4 Intro 4500

**EXHIBIT**  
3

SD 35