BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Bixler v Suprock No. COPP 2013-CFP-13	Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act

John Suprock is a resident of Missoula, Montana. In March of 2013 Mr. Suprock chose to involve himself, by way of publishing a newspaper ad (Ad), in the May 2013 election of Trustees for the Missoula County public school board. Scott Bixler was an incumbent member or Trustee of the Missoula County public school board. The Trustee elections took place on May 7, 2013, and Mr. Bixler was not re-elected. Mr. Bixler filed a complaint alleging Mr. Suprock's Ads violated Montana's campaign laws.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Illegal influence of voters or candidates; 2) Attribution of source of funding of election material; 3) Requirement that individuals register with Commissioner; and, 4) Express advocacy.

SUMMARY OF RELEVANT FACTS

The facts necessary for determination of this matter are as follows:

1. The Missoula, Montana School Board Special District Election was held

on May 7, 2013. Commissioner's Records.

2. Candidates Scott Bixler, Joe Toth, and Drake Lemm were incumbent Missoula County School Board Trustees on the ballot seeking re-election. Commissioner's records.

3. In March of 2013 Mr. Suprock published an ad "seeking persons suitable to win an election to the Missoula County Public School Board" and promising that a "reward of up to $10,000 will be contributed to your campaign to unseat Toni Rehbein, Scott Bixler, Joe Toth ... Drake Lemm..." See Ex. 1, Ad attached to this Decision.

4. On the same day the Ad (Ex. 1) was published Mary Baker of this Office contacted Mr. Suprock to inform him that the ad potentially violated the contribution limit law applicable to Mr. Suprock. Commissioner's records.

5. Mr. Suprock changed his ad to reflect his pledge to make an expenditure of up to $10,000 per seat, rather than a contribution. Ex. 2, Ad attached to this Decision.

6. Mr. Suprock published the Ex. 1 Ad once and the Ex. 2 Ad three times. Mr. Suprock told the Commissioner's investigator that each Ad cost $400, making a total expenditure of $1600. Commissioner's records.

7. Mr. Suprock told the Commissioner's investigator that he published the Ad by himself, without involvement with any other person or group, for the purpose of raising public interest in the School Board elections. Commissioner's records.

8. Mr. Suprock further told the Commissioner's Investigator that he did

not know, had never met and did not make an expenditure on behalf of any of the candidates who defeated the candidates his Ads urged be unseated. Commissioner's records.

9. There were no attributions identifying the entity paying for the Ads. See Exs. 1 and 2.

10. Mr. Suprock did not register with or report expenses to the Commissioner. Commissioner's records.

DISCUSSION

Mr. Suprock published an Ad on four occasions in the midst of a contested school board election in Missoula, Montana [FF No. 6]. The Ad attacked the sitting (incumbent) school board members [FF No. 3, Exs. 1 and 2]. The Ad further offered a $10,000 inducement for an approved candidate (Mr. Suprock would do the approving) to run against an incumbent [Id.]. Mr. Suprock states that the Ad's purpose was to raise the interest of voters in the school board elections [FF No. 7].

Mr. Suprock designed his Ad without regard for the nuances of Montana's campaign practice law. In fact, Mr. Suprock changed his Ad between the first and second publication to rephrase his inducement from a campaign contribution of $10,000 [that would be illegal as it exceeds Montana's applicable contribution limit, ***see*** *§ 13-37-216(1)(a)(iii) MCA]* to a campaign expenditure of $10,000. A $10,000 campaign expenditure would be legal, so long as it was an independent expenditure.

Mr. Suprock spent a significant sum of money ($1,600) to pay for

publishing his Ad [FF No. 6]. Mr. Bixler complained that Mr. Suprock's actions violated the improper nominations [§13-35-221 MCA] and attribution [§13-35-225 MCA] sections of Montana's campaign practice law. An examination of the issues raised by the complaint triggered additional areas of review.

1. Illegal Influence/Consideration/Nominations

For over 100 years Montana has prohibited acts that amount to "vote buying." These prohibited actions, renumbered and reorganized several times within Montana's code and now called "improper nominations", "illegal influence of voters" and "illegal consideration for voting", are set out in Montana law at §§13-35-214, 215, 221 MCA. Mr. Suprock's actions potentially implicate §13-35-214 and §13-35-221 MCA.

a. Sections 13-35-214 and 13-35-221 MCA Must be Criminally Enforced

Violations of Montana's campaign practices law [Title 13] are enforced civilly and/or criminally. The Commissioner's civil enforcement authority, however, is limited to violations of Chapter 37 and certain provisions of Chapter 35. ***See*** §13-37-128 MCA. Sections 13-35-214 and 13-35-221 MCA are not among the Chapter 35 provisions that can be civilly enforced. This means that a violation of these sections of law, if found, are under §13-35-103, MCA, the catch all election law enforcement statute. In turn, Section 13-35-103 provides for enforcement as a criminal misdemeanor.

Over the past two decades the Commissioner has uniformly considered enforcement of §13-35-214 MCA under criminal law standards. ***See*** *Parrent v Ames July 25, 1990: McFadden v Stanko* June 1, 1994; *Masters v Nixon*

August 3, 1994; *Seward v Andrick* December 13, 2004; *Vance v Walseth* February 23, 2009; *Scott v Doyle* COPP-2011-CFP-7; and *Loney v Moore* COPP-2013-CFP-14. In contrast, §13-35-221 MCA has not, prior to this Decision, been involved in a complaint before the Commissioner. This Decision will be made consistent with the criminal law approach made by prior Commissioners. If Mr. Suprock is found to have violated §13-35-214 MCA and/or §13-35-221 MCA, then enforcement of this violation will be by criminal prosecution.

b. Section 13-35-214 and 13-35-221 MCA Were Not Violated

Mr. Suprock admits he published two "candidate wanted" Ads soliciting candidates by first offering to contribute (Ex. 1), and secondly to spend [Ex. 2], up to $10,000 each to unseat three incumbent school board members, each listed by name [FF Nos. 1-7]. The actions taken by Mr. Suprock implicate Montana's "vote buying" statute §13-35-214 MCA:

> A person may not, directly or indirectly, individually or through any other person, for any election, in order to induce any elector to vote or refrain from voting or to vote for or against any particular candidate, political party ticket, or ballot issue:
> (1) give, lend, agree to give or lend, offer or promise any money, liquor, or valuable consideration or promise or endeavor to procure any money, liquor, or valuable consideration;
> (2) promise to appoint another person or promise to secure or aid in securing the appointment, nomination, or election of another person to a public or private position ...

Mr. Suprock's first version of his Ad, published once, states a "reward of up to $10,000 will be contributed". The second version [published 3 times] states "I [Suprock] pledge to spend up to $10,000 per seat at my sole discretion to unseat..." three incumbent schoolboard members. This Commissioner finds

that this language is a "promise to ... aid in securing the ...election of another person" thereby implicating the "action" component of §13-35-214 MCA. Any finding of action violation, however, must be connected to the "purpose" component of §13-35-214 MCA ["...in order to induce any elector to vote... against any particular candidate..."] before an overall violation can be found.

While it is a close call, the Commissioner finds that there is no such connection. Mr. Suprock's promise of aid is too indefinite to be considered as an inducement to a voter. In making this decision the Commissioner is guided by the decisions of prior Commissioners who have uniformly dismissed similar complaints alleging criminal violations of Montana election law: *Parrent v Ames* July 25, 1990 [Commissioner Colburg]: *McFadden v Stanko* June 1, 1994 [Commissioner Argenbright]; M*asters v Nixon* August 3, 1994 [Commissioner Argenbright]; *Seward v Andrick* December 13, 2004 [Commissioner Vaughey]; *Vance v Walseth* February 23, 2009 [Commissioner Unsworth] ; *Scott v Doyle* COPP-2011-CFP-7 [Commissioner Gallik] ; and *Loney v Moore* COPP-2013-CFP-14 [Commissioner Murry]. The dismissed complaints challenged actions such as partisan distribution of water to electors at the polling place and the announcement of the name of an undersheriff by a sheriff candidate.

The facts of this Matter, however, require that the Commissioner also consider and discuss three cases decided by Courts wherein a criminal violation was found based on the action taken against or for a candidate. As discussed below, the cases are distinguishable but are close enough to offer a warning to Mr. Suprock and others who are inclined to engage in this sort of

sketchy electioneering activity.

In *Kommers v Palagi* 111 Mont. 293, 108 P2d 208 (1940) the Montana Supreme Court upheld the removal of Sheriff Palagi from office of the elected sheriff of Cascade County under Montana's Corrupt Practices Act, the predecessor law to §§13-35-214, 221 MCA. Palagi was determined to have submitted false campaign account records and to have used a "slush" fund, consisting of excess mileage and board reimbursement for prisoners, as a secret campaign fund from which he purchased pencils, beer and sewing kits to give to potential voters. The court specifically found that the pencils and "handy menders" were articles of value distributed by the candidate and his deputy sheriffs as his political agents with the intent to influence votes contrary to the provisions of law. Id., 111 Mont. 308, 108 P2d 215. In this Matter the Commissioner finds that the "article of value" [the conditional $10,000 expenditure] was not directly connected to vote inducement as were the items of value distributed directly to electors by candidate Palagi.

In *Tipton v Sands* 103 Mont. 1, 60 P. 2d 662 (1936) the Montana supreme court considered whether a candidate for Chief Justice of the Montana Supreme Court had violated election law by stating that, if elected, he would accept only $6,000 of the $7,500 then being paid to Supreme Court justices. The Court [while excusing the case on other grounds] noted that "...statements published by candidates for a public office that they will, if elected, serve at less salaries or for less fees than those fixed by law are in violation of ...statute, and constitute bribery under the common law."

[citations omitted] Id. 103 Mont. 12, 60 P. 2d 668. The basis for this finding is that the promise to save taxpayers money by turning down a fixed salary is a direct inducement or vote buying. Again, that direct connection does not exist in this Matter.

Finally, in *Trushin v the State of Florida Fla. Ap. Ct., 3rd D., 384 So. 2d 668* (1980), Aff. Florida S.C. 425 S. 2d 1126 (1982) a lawyer, Mr. Trushin, was convicted of a felony offense for attempted vote buying. Mr. Trushin had prepared and circulated a handbill wherein he offered to prepare a free will to anyone who would pledge to vote for Mr. Trushin's preferred judicial candidates. Mr. Trushin asserted that he was unaware his offer was illegal and also asserted he never collected a pledge from any person for whom he actually prepared a will in response to the handbill. In sustaining the felony conviction the Florida Court of Appeals concluded:

> Some might consider that the facts of this case demonstrate that Trushin may have acted stupidly and unethically in circulating his offer to bribe by handbill, but do not merit his conviction of a felony. We do not agree with such a characterization of the defendant's conduct. The "bottom line" is that he offered to purchase votes in return for services rendered.

Id. 384 So. 2d 680. Again, this Matter is distinguishable from Trushin by the lack of direct connection between the pledge or promise and vote inducement. Also, Mr. Suprock did not actually pay out any of his pledged funds while Mr. Trushin actually prepared a number of wills consistent with his promise.

This Commissioner makes this part of the Decision in Mr. Suprock's favor

based on the criminal nature of enforcement, the lack of "connection" of elements of the statute (see above), the fact the Mr. Suprock did not pay out reward funds, and the precedent of decisions by prior Commissioners. The Commissioner hereby notes that the extent of Mr. Suprock's knowledge (or, more accurately, lack of knowledge) of the law is not a factor in this Decision. To put it another way, Mr. Suprock's knowledge or lack of knowledge that he may be committing a crime is not a factor in this Decision.

Here Mr. Suprock knowingly took certain acts [publishing the Ad] and had those acts caused a violation of law they would not have been excused because Mr. Suprock was unaware of the law. Ignorance of the law provides no excuse for its violation. *Wiard v. Liberty N.W. Ins. Corp.*, 2003 MT 295, ¶ 32, 318 Mont. 132, ¶ 32, 79 P.3d 281, ¶ 32. The Supreme Court of Nebraska considered this precise issue of intent/knowing as applied to Nebraska's version of the Corrupt Practices Act and found:

> It is the violation of the [corrupt practices] law by the commission of the prohibited act that is condemned. The intent or good faith of the wrong-doer is not an element in the offense, nor a defense to the objections filed, when the wrongful act is established. A want of improper motive does not alleviate the subversive result prohibited by the state. An enlightened public policy requires that candidates for public office in this country be elected on the basis of fitness for the office and not on that of bargain and sale.

Burkett v State of Nebraska 137 Neb. 704, 708, 291 N. W. 481, 484 (1940). ***See*** also, *Trushin v the State of Florida Fla. Ap. Ct., 3rd D., 384 So. 2d 668* (1980), Aff. Florida S.C. 425 S. 2d 1126 (1982).

Mr. Bixler's complaint focused on §13-35-221, another element of the former Corrupt Practices Act. Section 13-35-221 MCA prohibits actions leading to improper nominations: "A person may not pay or promise valuable consideration to another ... for the purpose of inducing the other person to be ....a candidate..."

Section 13-35-103 MCA requires that Mr. Suprock "...knowingly violates a provision of the election laws..." An attempt to violate can be regarded as the same as an actual violation; ***See*** §13-35-104 MCA, incorporating therein the requirements of §45-4-103 MCA.

Mr. Suprock did initiate action that could have violated §13-35-221 MCA when he solicited candidates and promised a $10,000 contribution to an approved candidate. However, Mr. Suprock took no definite action to identify a candidate or to pay the money. In *Garver v Tussing* February 28, 2007 Commissioner Unsworth, considering the interplay of §13-35-104 and §45-4-103 MCA as part of criminal enforcement of §13-35-214 MCA, noted "...it would be necessary to establish 1) that he had the purpose to commit the specific offense, and 2) that he did an act toward the commission of the offense" *Id.* p. 6.

In *Tussing* the candidate had planned to take an act [use an anonymous "pass the hat" cash contribution] that would, if carried out, have caused a violation of the contribution limit. Tussing, however, cancelled the planned act before it led to any violation. Because "there was no overt act amounting to movement toward commission of the offense" the Commissioner found no

violation [Id. p. 7]. Mr. Suprock is in the same situation in this matter and this Commissioner declines to find a violation of §13-35-221 for the same reason articulated in *Tussing*.

While the criminal complaint against Suprock under §13-35-214 and §13-35-221 MCA is dismissed, candidates and others should take careful note of these statutes and avoid taking actions that trigger such concerns. As the *Trushin* and *Palagi* cases (see above) demonstrate, there is a line that can be crossed with electioneering activity and, once crossed, criminal prosecution is triggered.

It is one thing for a candidate or another person to publish an ad urging a vote against or vote for a candidate. It is another thing for a candidate or another person to approach an elector in a manner that appears to promise something in return for their vote. Elections are contested and there is only one winner. It is important, for the purpose of governance, that the non-prevailing party and his/her supporters see the election as fair. Something that looks like vote buying works the opposite way – the losing candidate, Mr. Bixler in this Matter, sees the election as unfair and challenges the election and presumably governance. Mr. Suprock and others are advised to avoid this sort of Ad or action in future campaigns.

c. Section §13-37-216(1)(a)(iii) MCA was not violated

Mr. Suprock admits that he published two "candidate wanted" Ads soliciting candidates by first offering to contribute [Ex. 1] and secondly to spend [Ex. 2] up to $10,000 to unseat three incumbent school board members,

each listed by name [FF Nos. 1-7]. In 2013 contributions by one individual, such as Mr. Suprock, to a candidate for school board were limited to $160. §13-37-216(1)(a)(iii) MCA, with cost of living adjustment, see Commissioner's website.

Mr. Suprock's first Ad offered to contribute $10,000 [far above the allowed $160] and therefore constituted an attempt to violate law. An attempt to violate can be regard to be the same as an actual violation; ***See*** §13-35-104 MCA, incorporating therein the requirements of §45-4-103 MCA. These statutes were addressed at length by Commissioner Usworth in the Decision of *Garver v Tussing* February 28, 2007. The Commissioner noted "[r]eading these statutes together ... it would be necessary to establish 1) that he had the purpose to commit the specific offense, and 2) that he did an act toward the commission of the offense" *Id.* p. 6.

In *Tussing* the candidate planned to take an act [use an anonymous "pass the hat" cash contribution] that would, if carried out, have caused a violation of the contribution limit. Tussing, however, cancelled the planned act before it led to any violation. Because "there was no overt act amounting to movement toward commission of the offense" the Commissioner found no violation. *Garver v Tussing, supra, p. 7.*

The *Tussing* facts are replicated in this matter. Suprock planned a contribution action that would have violated Montana's contribution limit law but never contributed any money or even found out the name of a candidate. This Commissioner applies the facts of this matter and precedent of *Garver v*

Tussing and determines that there was no overt act leading toward commission of the offense and therefore Suprock did not violate Montana's contribution law.

d. Mr. Suprock Violated The Attribution Requirements of §13-35-225(1) MCA.

Mr. Suprock acted alone when placing his Ads [FF. No. 8]. There are no "coordination" issues and Mr. Suprock is not a political committee under §13-1-101(22) MCA. As an individual Mr. Suprock is exempt from the reporting requirements of §13-37-225 MCA. Further, Mr. Suprock placed his name in the Ad thereby waiving anonymity and eliminating the need for a review of Ad as an anonymous expenditure. ***See*** *Olsen v Vallance* November 17, 2009.

Mr. Suprock spent $1600 on Ads advocating the defeat of certain candidates for public office [FF No. 6]. Under Montana law Mr. Suprock's Ads are election independent expenditures if they are: "...communications expressly advocating the success or defeat of a candidate or ballot issue..." ARM 44.10.323(3). The Commissioner finds that Mr. Suprock's Ads, by using the word "unseat" followed by the name of the candidates who were to be unseated, meet even the strictest independent expenditure measure possible, that being original "magic words" express advocacy requirement of *Buckley v Valeo* 424 U.S. 1 (1976). ***See*** extensive discussion on this issue in *Matter of Graybill v Western Traditional Partnership COPP- 2010-CFP-18 , Matter of Wittich v Main Street Advocacy Fund COPP-2010-CFP-18 and Matter of MacLaren v Montana Conservative Coalition COPP-2012-CFP-27.*

Mr. Suprock's expenditure, while not subject to reporting, was still an independent expenditure under 44.10.323(3) ARM as "an expenditure for communications expressly advocating the success or defeat of a candidate..." Accordingly, Mr. Suprock was required to meet the attribution requirements of §13-35-225 MCA as attribution is required for "all communications advocating the success or defeat of a candidate". Section 13-35-225(1) MCA requires that Mr. Suprock place on the Ads "the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure..."

This Commissioner determines that the $1600 in expenditures made by Mr. Suprock in this Matter were election related independent expenditures that were not properly attributed, as required by law. The law requires attribution and this Matter shows just why attribution is required. Mr. Suprock chose a bold and loud method of election speech. It is logical and fair, thereby promoting civic discourse, that Mr. Suprock would also announce to the public and candidates the name and address of the person paying for this statement.

It is noted that a violation of §13-35-225 MCA may be civilly enforced. ***See*** §13-37-128 MCA. There is therefore no need for a criminal statute analysis (see above) for this violation.

ENFORCEMENT

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision 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. In this matter Montana's campaign the attribution requirement for election materials is mandatory: "...must clearly and conspicuously include the attribution..." §13-35-225(1) MCA.

This Commissioner, having been charged to investigate and decide, hereby determines that Mr. Suprock has, as a matter of law, violated Montana's campaign practice laws, specifically §13-35-225 MCA. Having determined that a campaign practice violation has occurred, 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.

Mr. Suprock's actions in placing the Ad were deliberate and not accidental. Excusable neglect cannot be applied to Mr. Suprock's actions. **See** discussion of excusable neglect principles in *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009.

Likewise, the amount of money expended ($1600) is too significant to be excused as *de minimis.* The Commissioner has applied *de minimis* to expenditures of up to $273 and thereby declined prosecution of an attribution violation caused by use of that $273. **See** *Royston v Crosby* No. COPP-2012-

CFP-41. The $1600 amount, however, is too large for *de minimis*. ***See also*** discussion of *de minimis* principles in *Matters of Vincent* Nos. CPP-2013-CFP-006 and 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution 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. Because of nature of violations [the failure to attribute occurred in Missoula County] this matter is referred to the County Attorney of Missoula County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute [§13-37-124(2) MCA] or fail to prosecute within 30 days [§13-37-124(1) MCA] this Matter returns to this Commissioner for possible prosecution. *Id.*

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 or criminal prosecution 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 law, including those of §13-35-225 MCA. [**See** 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. CPP-2013-CFP-006 and 009.

CONCLUSION

Based on the preceding discussion as Commissioner I find and decide that there is sufficient evidence to show that Mr. Suprock violated Montana's campaign practices laws, specifically §13-35-225 MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. This matter is hereby submitted to [or "noticed to"] the Missoula County Attorney for his review for appropriate civil action under section 13-37-124(1) MCA. Upon return to the Commissioner of this Matter by the County Attorney, this Commissioner will work with Mr. Suprock, in manner set out above, in determining the amount of penalty, should Mr. Suprock choose to settle this Matter with a negotiated penalty.

DATED this 1st day of August, 2013.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P. O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406)-444-4622

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WANTED

Seeking persons suitable to win Election to the Missoula County Public School Board

Qualifications should include one or more of the following:

- Business or Finance Background
- Education degree or have students in the district
- Have successfully managed your own personal finances
- Have the best interests of the students in your decision making

Reward of up to $10,000 will be contributed to your campaign to unseat

Toni Rehbein, Scott Bixler, Joe Toth, (Missoula Seats) *AKA Toni & The Rehbeins*

Drake Lemm (Lolo, Woodman & DeSmet seat)

For Consideration please contact John Suprock 406-926-1106 and have a resumé available to fax or email.

Let's g some common sense back on the School Board

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Exhibit 1 ۴ ۳۲

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I pledge to spend up to $10,000 per seat at my sole discretion to unseat

Toni Rehbein, Scott Bixler, Joe Toth, (Missoula Seats)

Drake Lemm (Lolo, Woodman & DeSmet seat)

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Exhibit 2