

BEFORE THE COMMISSIONER  
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

<p>Esp v. Western Tradition Partnership, now named American Tradition Partnership</p> <p>No. COPP-2012-CFP-048</p>	<p style="text-align:center">Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act</p> <p style="text-align:center">Campaign Violation Findings Also Include Findings Against Direct Mail, Christian LeFer, Allison LeFer, Assembly Action Fund, Doug Lair, Bob Faw, Terry Baird, and Montana Citizens for Right to Work</p>
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John Esp of Big Timber was a candidate for the Montana House of Representatives, District 61, (HD 61) in the 2010 Republican primary election. On December 3, 2012, Mr. Esp filed a complaint with this Office against Western Traditional Partnership (WTP) and Direct Mail based on electioneering activities in the HD 61 2010 primary election. The complaint asserted campaign violations including illegal corporate contributions by WTP.

There are four additional complaints related to the HD 61 2010 election. These complaints are: *Bonogofsky v. Boniek* No. COPP-2010-CFP-027; *Esp v. Montana Citizens for Right to Work*, No. COPP-2010-CFP-026; *Esp v. Assembly Action Fund*, No. COPP-2010-CFP-025; and *Esp v. Lair*, No. COPP-2012-CFP-049. The Decisions in the four related complaints are released simultaneously with this Decision.

## I. INTRODUCTION

The 2010 HD 61 primary election involved two candidates, John Esp and Joel Boniek. Candidate Esp defeated Candidate Boniek in the June 8, 2010 primary election by a vote of 1,512 to 1,347. There was no Democratic candidate filed for HD 61 so Candidate Esp went on to win the general election and became a representative to the 2010 Montana legislature from HD 61.<sup>1</sup> (SOS website).

Esp filed his post-election complaint against WTP because he believed that WTP made unallowed, unreported, and undisclosed 2010 HD 61 election expenditures. Esp complained that the WTP election expenditures were coordinated with Candidate Boniek such that they became illegal corporate contributions to Candidate Boniek's campaign.

An election expense such as those addressed in this Decision falls into one of three types. 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 expenses are, of course, subject to prohibitions and contribution limits and they 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.

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<sup>1</sup> House District 61, as created by the 2000 redistricting commission, is a solid Republican district. The electoral contest of note is the Republican primary.

The companion *Bonogofsky v. Boniek* Decision determined that the WTP expenses are election expenses. The Decision further determined that the WTP expenses are an in-kind contribution to Candidate Boniek, through coordination. The *Bonogofsky v. Boniek* Decision means it is not necessary to determine whether the WTP election expenses fall into one of the remaining two types of election expense; that is, whether the WTP expenses are an independent expenditure or an issue advocacy expenditure.

An independent expenditure is that of a third party entity independent of a candidate, but focused on a candidate in the election. Any “independent expenditure” must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. An independent expenditure, however, is not attributed as a contribution to a 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 related 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>2</sup>

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<sup>2</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.

## II. SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Coordination; and 2) Illegal Corporation Contributions.

## III. DISCUSSION

This Decision does not repeat, but incorporates and relies on, the determinations and reasoning set out in *Bonogofsky v. Boniek*, No. COPP-2010-CFP-027. That Decision determined that certain election expenses made or orchestrated by WTP were coordinated with Candidate Boniek such they became in-kind election contributions to Candidate Boniek.

The basis for a finding of coordination, as explained by *Bonogofsky v. Boniek*, is that Candidate Boniek and WTP acted together such that in-kind election expenses made by WTP became in-kind election contributions to Candidate Boniek. *Bonogofsky v. Boniek* identified the following 2010 HD 61 potentially coordinated election expenses:

1. Eight candidate letters and 1 flyer printed by Direct Mail and signed by Candidate Boniek or his wife.
2. Six attack Slicks –attributed as follows: 2 to WTP, 1 to Assembly Action Fund, 1 to Sportsmen’s Rights PAC, 1 to the Montana Conservative Alliance and 1 anonymous “fact check” mailing.
3. Nine attack letters –attributed as follows: 2 by WTP; 2 by Montana Citizens for Right to Work; 2 by National Gun Owner’s Alliance; 2 by National Pro-life Alliance and 1 for HD residents Doug Lair, Bob Faw and Terry Baird.

Of these 23 documents, *Bonogofsky v. Boniek* found that 17 involved unreported, undisclosed campaign expenditures coordinated with Candidate Boniek. The 17 coordinated campaign documents included the 8 candidate letters, the candidate flyer, 3 Slicks (WTP and Assembly Action Fund) and 5 attack letters (WTP, Montana Citizens for Right to Work and Lair/Faw/Baird).

Coordination is a two way street. *Bonogofsky v. Boniek* found sufficient evidence that Candidate Boniek coordinated illegal corporate election expenses, in the form of services or costs connected with 17 campaign documents, as an in-kind contribution to his campaign. The companion Decision found sufficient evidence that WTP orchestrated or made the other part of the coordinated expense, such that it made illegal coordinated corporate election expenses on behalf of Candidate Boniek.

#### **IV. FINDINGS**

The Commissioner incorporates the *Bonogofsky v. Boniek* findings as to WTP election expenses in the 2010 Montana HD 61 election. These findings include a finding of WTP election expenses and WTP coordinated election expenses. In addition, *Bonogofsky v. Boniek* found that WTP and Direct Mail and Communications, Inc. were Colorado corporations. Further, *Bonogofsky v. Boniek* found that the 2010 HD 61 primary election actions of other third parties, including Allison LeFer, Christian LeFer, Assembly Action Fund, Direct Mail, Montana Citizens for Right to Work and Lair/Faw/Baird were the actions of WTP.

In this Matter the Commissioner further finds that WTP filed articles of amendment with the Colorado Secretary of State in December of 2010 changing the name of the corporate entity to American Tradition Partnership. (Commissioner's records). This Decision and any enforcement of this Decision will be taken against American Tradition Partnership and/or Western Tradition Partnership.

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

The Commissioner finds there is sufficient evidence to show that WTP violated Montana's campaign practice laws, including but not limited to § 13-35-227(1) MCA. Section 13-35-227 MCA prohibits corporate contributions to any Montana candidate for public office. The *Bonogofsky v. Boniek* Decision found sufficient evidence to show that Candidate Boniek violated §13-35-227(2) MCA, the subsection of law that prohibits a candidate from accepting a corporate contribution. In this Decision the Commissioner finds sufficient evidence to show that WTP violated subsection one, the prohibition on a corporation making such an election contribution.

Because WTP's election contribution to a candidate was prohibited in any amount, WTP could not cure the contribution by attribution, registration, reporting, or disclosure. Section 13-35-227 MCA is enforced under the civil provisions of Chapter 37, specifically §13-37-128 MCA. See §13-35-227(4) MCA. Past Commissioners have extended sufficiency Decisions to cover individuals and entities who/that, while not named in a COPP complaint, are included in sufficiency findings. See *Motl v. Yes*, Decided 6-29-09

(Commissioner Unsworth) extending sufficiency findings in a Decision to individuals and corporate entities who/that were not named in the COPP complaint.

The Commissioner finds that sufficient evidence exists to show that Direct Mail, Christian LeFer, Assembly Action Fund, Allison LeFer, Montana Citizens for Right to Work and Lair/Faw/ Baird are responsible for or involved in some of the WTP corporate expenses and therefore sufficient evidence exists to show that each also has violated Montana's Campaign Practices Act. In making this determination the Commissioner notes that separate companion Decisions have been made regarding the actions of Montana Citizens for Right to Work, Assembly Action Fund, and Lair/Faw/Baird.

## **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 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 adjudication.

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 WTP *et. al.*<sup>3</sup> have, as a matter of law, violated Montana's campaign practice laws, including but not limited to §13-35-227 MCA. 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 adjudication of the violation and/or the amount of the fine.

The many decisions to act or to not act made by WTP, *et. al.* 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, but only punishment and for an illegal contribution 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

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<sup>3</sup> *Et. al* means Direct Mail, Assembly Action Fund, Christian LeFer, Allison LeFer, Montana Citizens for Right to Work and Lair/Faw/Baird. The Commissioner chooses to not make findings in this Matter concerning the National Gun Owner's Alliance, National ProLife Alliance, Sportsmen's Rights PAC, or the Montana Conservative Alliance.



applicable, civil adjudication and/or a civil fine is justified, §13-37-124 MCA. This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil adjudication under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)<sup>4</sup> the Lewis and Clark County attorney for his review for appropriate civil action, §13-37-124(1) MCA. Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to adjudicate within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication. *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 adjudication as the Commissioner has discretion (“may then initiate” *see* §13-37-124(1) MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of Chapter 37, including those of §13-35-227 (*see* § 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

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<sup>4</sup> Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failures to report and the misrepresentation of acceptance of illegal corporate contributions occurred in Lewis and Clark County.

The possibility of settlement having been raised it is noted that campaign practice violations, of the nature and scope encountered in this Matter, are new to the modern era Montana politics.<sup>5</sup> Montana's second Commissioner, Peg Krivec, served her entire 6 year term (1981-1986) without 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 infraction and adjust future election activity to conform with the rulings.

The depth and breadth of current challenges to Montana's election culture are shown by this and the companion Decisions. These Decisions show that the Commissioner determined that WTP, to date, has been unwilling to accept or adjust to Montana's expectations of appropriate election behavior. Instead, WTP has aggressively pursued a self-determined approach to involvement in Montana elections.

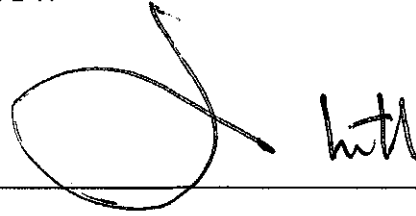
## **VII. CONCLUSION**

Based on the preceding discussion, as Commissioner, I find and decide that there is sufficient evidence to show that WTP *et. al.* violated Montana's campaign practices laws. This matter is hereby submitted to (or "noticed to") the Lewis and Clark County Attorney for his review for appropriate civil action.

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<sup>5</sup> These sorts of violations in Montana's past gave rise to many of Montana's current campaign practice laws.

Dated this 22nd day of January, 2014.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by 'R. Motl'. The signature is positioned above a horizontal line.

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