BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES OF THE STATE OF MONTANA

Fletcher v. Montanans for Veracity, Diversity and Work No. COPP 2014-CFP-028	Dismissal of Complaint Against Kirsten Pabst Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act as to Montanans for Veracity, Diversity and Work

John Fletcher is a resident of Missoula, Montana. Montanans for Veracity, Diversity and Work (MVDW) is a political committee drawing its existence from registration as a PAC with the office of the Montana Commissioner of Political Practices (COPP). Kirsten Pabst is a Missoula resident and attorney who ran for nomination as the Democratic candidate for Missoula County Attorney in the 2014 primary elections.

On May 30, 2014 Mr. Fletcher filed a complaint against MVDW and Candidate Pabst alleging violations, by coordination, of the prohibition of corporate contributions to candidates.

SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Timely reporting of contributions to and expenditures by a PAC; and, 2) Coordination applying corporate contributions to a candidate.

FINDING OF FACTS

The foundation facts necessary for this Decision are as follows:

Finding of Fact No. 1: On November 29, 2013, Kirsten Pabst filed a "Statement of Candidate" (form C-1) with the Commissioner of Political Practices (COPP) as a Democratic candidate for the position of Missoula county attorney. The position of Missoula county attorney is a partisan position, elected by the voters every four years. Two other candidates filed to run on the primary ballot with Ms. Pabst in 2014: Jason Marks (Democrat) and Josh Van de Wetering (Democrat). (Commissioner's records, Missoula County Elections Office, Secretary of State (SOS) Website).

Finding of Fact No. 2. On May 19, 2014 MVDW filed the appropriate "Statement of Organization" (Form C-2) with the COPP and thereby became a Montana political action committee. The form stated that MVDW would "support" Kirsten Pabst and "oppose" Josh Van de Wetering in the June 3, 2014 primary election. (Commissioner's records).

Finding of Fact No. 3: On June 3, 2014 a primary election was held for the Democratic nominee as Missoula county attorney. Kirsten Pabst received 7,762 votes to win the election. Josh Van de Wetering received 4,559 votes and Jason Marks received 1,018 votes. Kirsten Pabst will proceed to the general election November 4, 2014. (Secretary of State's (SOS) website, Missoula County Elections Office)

DISCUSSION

MVDW was registered as a political action committee in Montana during the applicable 2014 election (*See* FF No. 2, *See* 44.10.327(2)(b) ARM). MVDW held itself out as an entity that would accept contributions and make expenditures in the June 3, 2014 primary election in support of or opposition to two particular candidates (*see* FF No. 2). The C-2 form filed by MVDW self identifies the entity as a "political action committee."

In this Matter the type of committee makes a difference as a particular candidate committee files certain pre-election reports detailing contributions

[§13-37-226(3) MCA] while a political action committee files reports detailing expenditures [§13-37-226(5) MCA]. Given that two candidates are listed and the PAC box checked on the MVDW C-2 form, the Commissioner determines that MVDW is an independent committee, defined by 44.10.327(1)(b), (2)(b) ARM and reporting under §13-37-226(5) MCA.

I. Campaign Practices Law Violations

The Fletcher complaint alleges that MVDW made certain campaign expenditures that, by coordination, became illegal contributions to the campaign of Candidate Pabst. The Commissioner is directed ("shall investigate", *See* §13-37-111 MCA) to investigate any related campaign practice violation and, accordingly, also examines the method and timing of MVDW campaign finance reports.

A. Coordination.

For the purposes of a coordination determination the following findings of fact are made:

Finding of Fact No. 4: On July 3, 2014 MVDW filed a campaign finance report showing $9,850 in campaign expenditures. Those expenditures were reported as $3,350 to Greenlight Media Strategies for "flyers" and $6,500 as payment for Missoulian advertising. (Commissioner's records).

Finding of Fact No. 5. The flyers (FOF 4) were mailed to Missoula County residents prior to the June 3, 2014 primary election and attacked Candidate Van de Wetering asking "Can we trust Josh Van de Wetering to be our County Attorney?" (Commissioner's records).

Finding of Fact No. 6: The newspaper ads (FOF 4) were published on or about May 28, 2014 and they advocated a vote for Candidate Pabst. (Commissioner's records.)

Finding of Fact No. 7: MVDW "reported" $11,500 in contributions from 4 Missoula attorneys and 2 corporate entities. (Commissioner's records).

An advertisement, whether or not coordinated, that expressly advocates a vote "for" or "against" a particular candidate becomes a campaign expenditure by the entity making the advertisement. An express advocacy analysis can be lengthy, depending on the wording examined (*See Bonogofsky v. National Gun Owners Alliance,* COPP-2010-CFP-008). However, "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Federal Election Comm'n v. Wisconsin Right to Life,* 551 U.S. 449, 469-70 (2007) ("*WRTL*"). In this Matter it is not necessary to engage in a lengthy analysis as there is no other reasonable alternative to an express advocacy determination, given the timing and language of the flyers and ads. Indeed, MVDW agrees with this analysis as it reports the cost of the ads and flyers as an election expense (FOF No. 4), albeit as an independent election expense by MVDW.

The Fletcher complaint challenges the independence of the MVDW expenditure and asserts that the expenditure was not independent, but coordinated with Candidate Pabst. A campaign expenditure that is deemed to be "coordinated" between a candidate and another entity or person is treated as though it is a contribution to and/or expense by the candidate's own committee. Contributions to a candidate are limited in amount from any source and prohibited completely from a corporate source. (*See* §§13-35-227,

13-37-216, MCA). Because a coordinated third party election expense is deemed to be a contribution it becomes subject to the limits and prohibition of these laws.[1] In this Matter if coordination is found Candidate Pabst will be deemed to have accepted illegal corporate contributions and contributions over the amount allowed by law. *See* FOF No. 7.

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

Coordination decisions by Montana Commissioners show a similar approach to that of the federal decisions. Commissioner Argenbright considered a complaint that a political committee, Citizens for Common Sense Government (CCSG), and six candidates for the Missoula City council were

[1] 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.

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. Commissioner Unsworth rejected coordination in *Keane v. Montanans for a True Democrat,* April 2, 2008. The Commissioner noted crossover contributions/activity by people involved in both the candidate campaign and the political committee, but found no coordination because "...there is no evidence that MTDC's expenditures for newspaper and radio ads, billboards, and campaign flyers opposing Candidate Keane and supporting Candidate McAdam were made with the prior knowledge, consent and encouragement of Candidate McAdam or his campaign." *Id.* p. 9. In addition the Commissioner found that the crossover communication was "limited" and that it was personal

and not on behalf of the political committee. *Id.*

In contrast to the above three decisions, Commissioner Vaughey found coordination in *Little v. Progressive Missoula,* July 22, 2004. The Commissioner identified crossover activity, finding that members of the Progressive Missoula steering committee were directly involved in the candidate's (Allison Handler) campaign. Further, the Commissioner found specific evidence showing that Candidate Handler and the individual committee members knew of the negative attack role that Progressive Missoula would play in support of the candidate's campaign. The Commissioner found that certain barriers between the Handler campaign and Progressive Missoula, including a letter of reproach from Progressive Missoula to Candidate Handler, were artifices designed to disguise the real cooperation. The Commissioner found that the Progressive Missoula expenditures for flyers were made with "...prior knowledge, consent and encouragement of Handler..." Thus they were coordinated expenditures.

This Commissioner has issued a series of Decisions finding coordination, all based on actions between Western (American) Tradition Partnership and 2010 candidates for Montana public office.[2] These Decisions, like *Little v. Progressive Missoula,* rely on documents, actions and activity showing coordination. In total this Commissioner has found undisclosed, unreported,

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[2] *Bonogofsky v. Kennedy,* COPP 2010-CFP-015; *Washburn v. Murray,* COPP 2010-CFP-019; *Ward v. Miller,* COPP 2010-CFP-021; *Clark v. Bannan,* COPP 2010-CFP-023; *Bonogofsky v. Boniek,* COPP-2010-CFP-027; *Bonogofsky v. Wittich,* COPP-2010-CFP-031; *Madin v. Sales,* COPP-2010-CFP-029; *Bonogofsky v. Prouse,* COPP-2010-CFP-033; *Bonogofsky v. Wagman,* COPP-2010-CFP-035; and Madin v. Kitts COPP-2013- CFP- 001. In contrast the Commissioner did not find coordination in *Madin v. Burnett,* COPP-2012-CFP-052; *Ponte v. Buttrey,* COPP-2014-CFP-007; and *Miller v. Van Dyk,* COPP-2014-CFP-002.

and coordinated corporate involvement by WTP (and agents) in ten 2010 candidate campaigns. (*See* FN 2).

In this Matter Candidate Pabst and David Paoli (on behalf of MVDW) expressly and completely denied any coordination. (Commissioner's records).[3] Consistent with the approach taken in prior coordination determinations the Commissioner independently investigated the coordination complaint.

The Fletcher complaint alleged associational identity between Candidate Pabst and MVDW, largely through Paoli's law firm. The Commissioner's investigator examined this issue and determined that Candidate Pabst leased law office space from an entity owned by Paoli. (Commissioner's records). This resulted in Paoli's law firm sharing a law office suite with Pabst's law firm and several additional law firms. *Id.* There was, however, no legal or factual evidence showing that the separate law firms had intermingled funds or legal identities. While attorneys Pabst and Paoli co-counseled on a least one case [4], the Commissioner takes administrative notice, based on 30 years of experience as a Montana trial lawyer, that law firms regularly join together on a particular case without surrendering their separate legal identities. Such situational cooperation and crossover activity does not, by itself, create coordination. *Harmon and Sweet v. Citizens for Common Sense Government.* Further, the Commissioner determines that the separation between the Pabst and Paoli law firms (and related entities) is actual, and not in name only, so as to be

[3] The Commissioner accepts those denials as good faith, but notes that he received comparable denials of coordination in the Matters listed in Footnote 2.

[4] The Commissioner notes that he understands that the Paoli and Pabst law firms joined to offer a co-counsel defense in the high-profile rape trial of a University of Montana football player. Josh Van de Wetering was involved as a prosecutor in that trial.

separation in fact rather than separation in law. *See Vermont Right to Life Committee v Sorrell,* 2nd Circuit No. 12-2904-cv (July 2, 2014, pp. 69-73).

The Commissioner next examines whether or not there is evidence of actual communication or activity showing coordination between the candidate and committee. To that end the Commissioner's investigator interviewed the ad placement representatives for the Missoulian and Greenlight Media Strategies, the two entities through which MVDW made election expenses. Both representatives told the Commissioner's investigator that they dealt with Mr. Paoli. Both stated that they were specifically instructed by Mr. Paoli to avoid any contact at all with Candidate Pabst. (Investigator's notes).

The Commissioner determines that this Matter does not fall under the reach of *Little v. Progressive Missoula* or the Decisions cited in footnote 2. There is no evidence of shared action or information between Candidate Pabst and MVDW. Accordingly, the Commissioner determines that there is a lack of sufficient facts to show a campaign practice violation through coordination.

This coordination portion of the Fletcher complaint is dismissed as against Candidate Pabst and MVDW. Candidate Pabst is therefore fully dismissed in this Matter because a finding of coordination was necessary in order to hold Candidate Pabst responsible for actions of MVDW. There are allegations, discussed below, remaining against MVDW.

B. Campaign Finance Report Filing Violations

MVDW admits that it engaged in election activity, making election expenditures. Accordingly, as an independent committee MVDW is required to

file a campaign finance report:

a) ...on the 12th day preceding the date of an election in which it participates by making an expenditure;
b) ..within 24 hours of making a [$500 or more] debt or expenditure...if made between the 17th day before an election and the day of the election;
c) ...not more than 20 days after an election in which it participates by making an expenditure

See §13-37-226(5) MCA. Montana's campaign related laws require full and timely disclosure of campaign contributions and expenditures. A political committee is required to timely file a certification [§13-37-201 MCA], timely keep and maintain accounts of contributions and expenditures [§13-37-208 MCA] and timely file reports to the Commissioner's office of such contributions and expenditures [§13-37-226 MCA]. The reports, once filed, are available for review by the public, thereby providing transparency and shared access to this information.

1. Pre-Election Report

The primary election took place on June 3, 2014. FF No. 3. MVDW's pre-election PAC report was due 12 days pre-election or no later than May 21, 2014, with reporting current through May 16, 2014. (Commissioner's Website Information, 2014).

> Finding of Fact No. 8: On May 19, 2014 MVDW filed its statement of organization (Form C-2). (Commissioner's records).
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> Finding of Fact No. 9: On May 27, 2014, MVDW filed its first C6 campaign finance report (Form C-6). MVDW listed one corporate contribution in the amount of $4,000 and $2,500 from 3 individual contributions with all contributions made on May 21, 2014. (Commissioner's records).

MVDW created some confusion with its initial filings. MVDW was required to file its certification (Form C-2) within "5 days after it makes an expenditure." (§13-37-201 MCA). As set out below, the first evidence of expenditure and contributions occurred on May 21, 2014. MVDW, however, filed its Form C-2 on May 19, 2014 (FOF No. 8) before it made any expenditure. Because there was no expenditure or contributions made by May 16, 2014 MVDW did not need to file a pre-election campaign finance report and cannot be in violation based on this report.

2. 24-Hour Reports

MVDW chose to fund and make its independent expenditure activity during the 17 day gap between the last day of reporting required by the pre-election campaign finance report and the day of the election. As an independent committee (*See* this Decision, page 3), MVDW must report within 24 hours of making a ($500 or more) debt or expenditure...if made between the 17th day before an election and the day of the election. *See* §13-37-226(5) MCA.

> Finding of Fact No. 10: The Commissioner's investigator determined that David Paoli contacted the Missoulian on May 21, 2014 and established an MVDW account on May 23, 2014. (Investigator's notes). Those contacts resulted in 8 Missoulian ads running between May 27 and June 3, 2014 for a total cost of $6,500. (Commissioner's records).
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> Finding of Fact No. 11: The Commissioner's investigator determined that David Paoli contacted Greenlight Media on May 22 or 23, 2014. (Investigator's notes). That contact resulted in the Flyer preparation in time for a mailing drop date of May 29, 2014. *Id.* The total cost of the flyers was $3,350. (Commissioner's records).

> Finding of Fact No. 12: MVDW filed four 24 hour notices (Form C-7E): On May 29, 2014 disclosing 4 contributors totaling $5,000; On May 29, 2014 disclosing 3 contributors totaling $5,500; On May 29, 2014 disclosing "print ads" expenditures to the Missoulian in the amount of $1,491.20; and, on June 12, 2014 disclosing "advertising" in the Missoulian in the amount of $5,008.80 and with Greenlight in the amount of $3,350.[5]

MVDW's reporting of its expenses does not comport to the requirements of Montana law. MVDW paid $6,500 for the production of and publication of 8 ads in the Missoulian (FOF No. 11). MVDW reported the Ad costs on the date the Ads were published.

The publication or payment date, however, is not determinant of the date reporting is required as, if that were the case, candidates and political committees would pay late and disclose activity after the fact, thereby depriving the opposing candidate and the public of the transparency that is required by reporting and disclosure laws. Instead, Montana statutes (§13-37-230(1)(f) MCA) require the reporting and disclosure of "the amount and nature of debts and obligations owed...". Montana regulations, at 44.10.535 ARM, add that "[i]f the exact amount of a debt or obligation is not known, the estimated amount owed shall be reported."

Past Commissioners have rigorously applied these laws requiring that campaigns "estimate their debts when they are incurred", not after an election. *Akey v. Clark,* March 26, 1999 (Commissioner Vaughey); because "the public has a right to full disclosure of all debts and estimated debts incurred by a

[5] Only the C-7 (24 hour) reports showing expenses appear on the MVDW reports available from the Commissioner's website since C-7 contribution reporting is not required.

candidate during the appropriate reporting periods." *Ream v. Bankhead,* September 10, 1999 (Commissioner Vaughey). This reporting of debt covers services, advertisements campaign expenses in general (*Wilcox v. Raser,* May 26, 2010 (Commissioner Unsworth)) and even the expenses owed musicians (*Hardin v. Ringling* 5, December 17, 2012 (Commissioner Murry)).

In this Matter MVDW engaged in a tightly run and calculated series of independent expenditures. FOF Nos. 10 and 11. MVDW timed its fundraising and expenditures to fall after the pre-election reporting period, presumably to avoid alerting the opposing candidate to its efforts. This left 17 days before the election, a period of time during which MVDW was required to report expenditures within 24 hours.

Specifically, the Commissioner determines that MVDW was required to report the actual or estimated amount of the debt incurred in this Matter on a C-7E form no later than May 24, 2014 for the Missoulian ads ($6,500) and for the Greenlight flyer costs ($3,350).[6] *See* §13-37-230(1)(f) MCA, 44.10.535 ARM, *Akey v. Clark, Ream v Bankhead, Wilcox v. Raser, Hardin v. Ringling 5.* MVDW, however, filed C-7E forms that reported 5 days late for $1,491.20 in Missoulian costs; 19 days late for $5,008.80 in Missoulian costs; and 19 days late for $3,350 in Greenlight costs. (FOF No. 12). The Commissioner finds sufficient facts to show a campaign practice violation for this late reporting.

3. Post-Election Report

MVDW's post-election report was due "not more than 20 days after the

[6] The May 24, 2014 reporting date is based on the facts set out in FOF Nos. 10 and 11.

date of the election" [§13-37-226(5) MCA], or by June 23, 2014. The campaign finance report due after the election, like the pre-election report, requires disclosure of both contributions and expenditures. §13-37-225 MCA.

MVDW filed its post-election report on July 3, 2014, or 10 days late. Further, while MVDW disclosed the required information as to $6,500 in contributions in a voluntarily filed pre-election C-6 form, the July 3 report did not disclose the required information on the contributors of the additional $5,000 to MVDW. The Commissioner hereby finds that there are sufficient facts to show that MVDW failed to meet the requirements of law with its post-election filing. The Commissioner further finds that the post-election report is deficient as filed.

C. Parties

The Commissioner hereby identifies MVDW, David Paoli and J. Michael Barrett as the persons and parties for whom sufficient facts exist to show that each was individually and together responsible for campaign practice violations described in this Decision. J. Michael Barrett is so identified because he is the Treasurer of MVDW. David Paoli is so identified because he planned and carried out the acts that resulted in the campaign practice violations described above.

ENFORCEMENT

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on a complaint 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.

This Commissioner, having been charged to investigate and decide, hereby determines that sufficient evidence exists to show that the MVDW and Messrs. Barrett/Paoli violated Montana's campaign practice laws, including but not limited to §§ 13-37-225 and 226 MCA. Having determined that there is sufficient evidence to show a campaign practice violation has occurred, 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.

MVDW's decision to act was by choice and deliberate. Excusable neglect cannot be applied to the failures in this Matter. *See* discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Likewise, the actions are too significant to be excused as *de minimis*. *See* discussion of *de minimis* principles in *Matters of Vincent,* Nos. COPP-2013-CFP-006 and 009. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a sufficiency finding 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 adjudication under §13-37-124 MCA. This matter will now be submitted to (or "noticed to") the Lewis and Clark County attorney for his review for appropriate civil action. *See* §13-37-124(1) MCA.[7] Should the County Attorney waive the right to adjudicate (§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 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 §13-37-226. (*See* §13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

CONCLUSION

Based on the preceding Discussion as Commissioner I find and decide that the complaint against Kirsten Pabst is dismissed. I further find and decide

[7] Notification is to "...the county attorney in which the alleged violation occurred..." §13-37-124(1) MCA. The failure to report occurred in Lewis and Clark County.

that there is sufficient evidence to show that MVDW, J. Michael Barrett and David Paoli violated Montana's campaign practices laws, including §§13-37-225, 226, 229, and 230 MCA, and that a civil penalty action under § 13-37-128, MCA is warranted. Upon return to the Commissioner of this Matter by the County Attorney, this Commissioner will assess the amount of civil penalty, should MVDW and/or Messrs. Barrett and Paoli choose to settle this Matter with a negotiated fine.

DATED this 16th day of July, 2014.

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