

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Tutvedt v. Roberts, et. al. No. COPP-2012-CFP-047 Welch v. Western Tradition Partnership No. COPP-2014-CFP-015 Welch v. National Right to Work No. COPP-2014-CFP-016	Summary of Facts and Findings of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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On December 3, 2012, Bruce Tutvedt, a 2012 candidate for Senate District 3 (Flathead County) and resident of Kalispell, Montana filed a complaint against Rollan Roberts II, also a 2012 candidate for SD 3 and resident of Whitefish, Montana, as well as American Tradition Partnership, Tax Payers for Liberty, and the National Association for Gun Rights. Mr. Tutvedt alleged that Mr. Roberts improperly used campaign materials lacking attribution, failed to give required notice of advertising and improperly engaged in coordinated campaign activity with the three named corporations.¹

¹ Mr. Tutvedt provided supporting documents with his complaint. Those supporting documents included oversize postcards ("slicks") attacking Mr. Tutvedt's candidacy. The postcards were attributed by American Tradition Partnership, Taxpayers for Liberty, National Association for Gun Rights and the Montana Family Foundation. In addition, Mr. Tutvedt provided an unattributed letter supporting Mr. Roberts' candidacy that was signed by the President of the Montana Pro-Life Coalition.

On April 21, 2014 Sandra Welch of Whitefish filed two complaints. One complaint alleged that 11 groups or individuals violated Montana election law by failing to register, report, or disclose election activity.² The second Welch complaint alleged that the National Right to Work Committee and “its affiliates, agents, officers and directors” engaged in illegal campaign activities through a “secret” Montana political campaign.³

The allegations of the Welch complaints are tied to an actual candidate election campaign through reference to the Tutvedt complaint. By a Notice dated September 8, 2014 the Commissioner considered the statute of limitations and dismissed the Welch complaints for application in 2010 elections. The Notice combined the Welch complaints with the Tutvedt complaint for application to 2012 elections. The Welch and Tutvedt complaints are accordingly dealt with together in this Decision.

I. INTRODUCTION

This Decision presents and decides several issues dealing with candidate and third party expenditures in a single Montana election, that being a primary election in a single legislative senate district (Senate District (SD) 3).⁴ This Decision also discusses and decides general campaign practice violations against several third party entities.

² The groups and individuals were listed as WTP/ATP, Taxpayers for Liberty, Assembly Action Fund, Montana Citizens for Right to Work, Christian LeFer, Allison LeFer, Donald Ferguson, Direct Mail Consulting, Inc., Doug Lair, Geoff Goble, Peter MacKenize and John Does 1-50.

³ The affiliated groups or individuals were listed as National ProLife Alliance, National League of Taxpayers, National Association for Gun Rights, WTP/ATP, National Gun Owners Alliance, Christian and Allison LeFer, Direct Mail and Communications, and John Does 1-50.

⁴ The Montana Legislature has 50 senate districts.

This Decision revisits a particular campaign scheme the Commissioner has reviewed and dealt with in nine prior COPP Decisions involving 2010 Republican primary election legislative campaigns.⁵ That campaign scheme was as follows:

1. A candidate was recruited or emerged to run in a Republican primary election, sometimes as a challenger against an incumbent Republican legislator.
2. The candidate was vetted and then supported by an extensive array of professional and support services provided by individuals and groups organized through the National Right to Work Committee, and specifically through National Right to Work staffer Christian LeFer.⁶

The 2012 SD 3 Republican primary election was consistent with the above scheme.⁷ A candidate emerged (Rollan Roberts, II) to run in the Republican primary election against an incumbent Montana legislator (Senator Bruce Tutvedt). As described below, Candidate Roberts received backing in his 2012

⁵ *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; and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

⁶ The Decisions in FN 5 support this statement.

⁷ Each of the nine candidates listed in FN 5 were subjected to judicial enforcement action in Montana state district court: *COPP v. Miller* BDV-2014-62, 1st JD Lewis and Clark County; *COPP v. Murray* BDV-2014-170, 1st JD Lewis and Clark County; *COPP v. Bannan* BDV-2014-178, 1st JD Lewis and Clark County; *COPP v. Wittich* BDV-2014-251, 1st JD Lewis and Clark County; *COPP v. Wagman* BDV-2014-267, 1st JD Lewis and Clark County; *COPP v. Boniek* XADV-2014-62, 1st JD Lewis and Clark County; *COPP v. Kennedy* BDV-2014-234, 1st JD Lewis and Clark County; *COPP v. Sales* BDV-2014-283, 1st JD Lewis and Clark County; and, *COPP v. Prouse* DDV-2014-250, 1st JD Lewis and Clark County.

campaign from the same corporate group that backed the 2010 Republican primary election candidates listed in footnote 5. The Commissioner now examines Candidate Roberts' 2012 campaign, doing so with the insights and information gained in the comparable 2010 Decisions.⁸

II. DISCUSSION

The allegations of the Tutvedt and Welch complaints implicate a certain group of people and corporations.⁹ The foundational facts necessary for this Decision are the following.

Finding of Fact No. 1: On November 28, 2011, Bruce Tutvedt filed a Statement of Candidate form (Form C-1) with the COPP to run as a Republican candidate for SD 3 (Flathead County). Mr. Tutvedt was an incumbent having prevailed in the 2008 General Election for election from SD 3. (COPP Records, Secretary of State (SOS) Website).

Finding of Fact No. 2: On February 23, 2012, Rollan Roberts II filed a Statement of Candidate form (Form C-1) with the COPP to run as a Republican candidate for election to House District 4 (Flathead County). On March 5, 2012, Rollan Roberts II filed another Statement of Candidate form with the COPP to run as a Republican candidate for election to SD 3. (COPP Records, SOS Website.)

Finding of Fact No. 3: On June 5, 2012, the Montana primary election was held. There were three Republican candidates (Bruce Tutvedt, Rollan Roberts II and Jayson Peters) seeking election from SD 3. Bruce Tutvedt won the Republican primary election: 2,159 votes, Tutvedt; 2,093 votes, Roberts; and 545 votes, Peters. (SOS Website.)

Finding of Fact No. 4: On November 6, 2012 a general election was held for SD 3. Bruce Tutvedt (Republican) received 8,634 votes to Shannon Hanson's (Democrat) 3,737 votes. (SOS website.)

⁸ Two of the judicial actions listed in FN 7 have been resolved by judicial Decision. *COPP v. Boniek* (Judge Pinski) and *COPP v. Prouse* (Judge Reynolds) have resulted in findings of campaign practice violation (corruption) based on the receipt by the candidate of illegal corporate in-kind paid services provided by the corporate group discussed in this Decision. A third judicial action (*COPP v. Wittich*) is set for trial on March 28, 2016.

⁹ This group is largely the same "corporate group" as involved in the 2010 candidate elections listed in FN Nos. 2-4. The 2012 SD 3 election also included several new corporate entities.

The 2012 SD 3 Republican primary election presents as a highly contested primary election with a resulting close vote (FOF No. 3). The Complaints allege that Candidate Roberts engaged in improper campaign tactics including coordination with third parties and failing to attribute campaign expenses.

The Commissioner looks first to the Roberts campaign finance reports. Candidate Roberts was required to file a 12 day pre-election and 20 day post-election campaign finance report for the SD 3 Republican primary election (§13-37-226 MCA). In 2012 the pre-election report was due May 25 and the post-election report was due June 26, 2012.

Finding of Fact No. 5: On May 24, 2012, Candidate Roberts submitted his pre-primary campaign finance report (Form C-5) for the period of February 20, 2012 to May 24, 2012. Candidate Roberts reported contributions and expenses as follows:

(a) \$31,982 in contributions with \$25,312 of that amount coming from contributions or loans from Candidate Roberts and \$6,670 coming from 45 individuals.

(b) \$29,566.65 in 64 expenditures, principally consisting of:

- i) \$10,027 paid for two consulting expenditures;
- ii) \$4,356 paid for 8 expenditures for ads;
- iii) \$2,185 paid for four expenditures for yard signs.
- iv) \$1,202 paid for 18 expenditures for food, drink, gas;
- v) \$8,350 paid for 26 expenditures for materials;
- vi) \$2,500 paid for one expenditure for a campaign event;
- vii) \$926 paid for five expenditures for services.

Finding of Fact No. 6: On June 25, 2012 Candidate Roberts submitted his post primary campaign finance report for the period of May 25, 2012 through June 25, 2012. Candidate Roberts reported contributions and expenses as follows:

(a) \$9,470 in contributions with \$8,000 of that amount coming as a contribution from Candidate Roberts and \$1,470 coming from contributions from 13 individuals.

(b) \$10,525.17 in expenditures principally consisting of:

- i) \$5,565.42 in expenses listed as "advertising" but paid to a consulting firm;
- ii) \$1855 for stamps;
- iii) \$912 for services;

- iv) \$840 for radio ads;
- v) \$549 in gas and volunteer costs.

The Commissioner applies the campaign finance report information to a discussion of coordination.

A. Coordination

Candidate Roberts described the 2010 SD 3 Republican primary election as a “David vs. Goliath” race, with Candidate Roberts being the “David” and Candidate Tutvedt being the “Goliath.”¹⁰ The Commissioner now looks to whether David fought alone or whether, through coordination, he threw or helped throw more electoral stones at Goliath than he reported or disclosed.

In 2012 Candidate Roberts was new to Montana. Candidate Roberts himself said he moved to the Flathead Valley in 2010.¹¹ Opposing campaign material place a later date of arrival at early 2012.¹² The Roberts campaign material did not clarify the date the Candidate arrived in Montana as Candidate Roberts used a mailing address consisting of a mail box drop site on all campaign forms and reports.¹³ The Commissioner’s investigator found no references to dates of Montana-based volunteer, school or family activity in any Candidate Roberts campaign material. The Commissioner determines that Candidate Roberts had a minimal, if any, presence in SD 3 before the spring of

¹⁰ Chapter 1, Roberts “90 Day Race”. Candidate Roberts published an article discussing the 2012 SD 3 election. The article is titled “90 Day Race: The Secret to Massive Results” and it is available for purchase on the website of Roberts’ current Florida based business venture.

¹¹ Daily Interlake interview May 2, 2012. The Commissioner’s investigator could not confirm the 2010 date claimed by Candidate Roberts; computer driven residence locator programs place Candidate Roberts in West Virginia and Florida as late as early 2012.

¹² “Carpetbagger” flyer, published by the Montana Business Advocates for Sensible Elections (MTBASE) attacking Candidate Roberts and supporting Candidate Tutvedt.

¹³ 6477 Hwy 93 South 214a, Whitefish, Montana.

2012, meaning that he entered the 2012 Republican SD 3 primary election as an unknown to SD 3 voters. Despite that late start Candidate Roberts' campaign finance reports show a range of campaign activity¹⁴ with substantial involvement by the candidate.¹⁵

Candidate Roberts' own "90 Day Race article" (FN 10) echoes the above assessment as it states that Candidate Roberts was unknown to voters in SD 3 at the start of his 2012 campaign. Roberts described himself as a "no-name, who's not originally from the state, with no political backing, no war chest and no years of campaigning."¹⁶ Still, Candidate Roberts claimed a victory because in 90 days he gained widespread recognition through a campaign that included "web ads, SEO, Ad words, print ads, a media kit, mailings, phone calls, surveys...".¹⁷ Candidate Roberts attributed part of this success to consultants stating: "I consulted with national advisors who had devoted their lives to state and national politics." *Id.*

There is nothing wrong, of course, with any candidate, including Candidate Roberts, emerging quickly and effectively on the political scene through a well-planned campaign, including receipt of advice from campaign consultants. Candidate Roberts' campaign finance reports, however, must

¹⁴ Two of the 2010 Republican primary elections featured campaigns with limited activity other than corporate sponsored direct mail activity. *Washburn v. Murray*, COPP 2010-CFP-019 and *Bonogofsky v. Prouse*, COPP-2010-CFP-033.

¹⁵ In contrast, in one 2010 primary election the candidate was in Alaska during most of the primary election campaign (*Bonogofsky v. Boniek*, COPP-2010-CFP-027), but the corporate group created an artificial campaign presence for the candidate through extensive direct mail work on behalf of the absent candidate.

¹⁶ 90 Day Race, Chapter 1.

¹⁷ 90 Day Race, Chapter 2.

report and disclose the contributions and expenditures connected with any such campaign consulting activity.¹⁸

The two 2012 primary election campaign finance reports filed by Candidate Roberts disclose about \$40,000 in campaign expenditures (FOF Nos. 5, 6). The expenditures disclose primary election campaign activities consisting of: 1) \$15,592 in consulting expenses;¹⁹ 2) \$10,535 in yard signs, posters and other street advertisements; 3) \$5,196 in campaign ads; 4) \$2,500 to host a campaign event; 5) \$1,855 in stamps; 6) \$1,828 in services; and 7) \$1,751 in gas and volunteer meals.

The consulting expenses reported by Candidate Roberts' campaign finance reports are three payments totaling \$15,592 to Drury Lane Consulting of 7251 South Albion Street, Centennial, Colorado. Drury Lane Consulting is a Colorado Limited Liability Company listing Allison Andrew (AKA LeFer) as its sole officer and agent.²⁰ The Commissioner notes that the response to the complaint made by the attorney for Candidate Roberts admits that "Direct Mail" was the entity Candidate Roberts was actually dealing with through Drury Lane Consulting. The Commissioner determines that Drury Lane

¹⁸ It was the failure to report such paid professional services by 2010 candidates that led to the sufficiency Decisions listed in FN 5.

¹⁹ Candidate Roberts also reported that he paid sums to: "The Engraver, LLC" of Columbia Falls, Montana. The Engraver, however, is in the business of producing campaign materials including "name tags, engraved signs, banners, vehicle magnets and street signs." *Source* : Montana Better Business Bureau Review.

²⁰ The street address is listed as one for both Christian and Allison LeFer. (Commissioner's records).

Consulting is another corporate name under which Christian and Allison LeFer operate.²¹

Christian and Allison LeFer brought with them a certain group of corporations. Based on analysis of certain 2010 Montana Republican primary elections the Commissioner has determined that Christian and Allison LeFer, husband and wife, were paid employees or agents of the National Right to Work Committee, as well as agents or managers of certain affiliated corporate entities.²² The Complaint in this Matter, of course, addressed Candidate Roberts' 2012 Republican primary election campaign, not a 2010 Republican primary election campaign. The Complaint, however, included copies of five 2012 campaign letters²³ signed by Candidate Roberts, along with copies of seven different 2012 campaign glossy postcards ("slicks") attacking Candidate Tutvedt. Further, the complaint included copies of three letters from third party corporations attacking Candidate Tutvedt.

The Commissioner, by examination, identifies the seven slicks as originating from three corporate entities, those being American Tradition Partnership,²⁴ National Association for Gun Rights, and Taxpayers for

²¹ Christian and Allison LeFer routinely used and discarded corporate entities from one campaign to another. For example, Direct Mail and Communications, Inc. used several names in 2008 and 2010 Republican primary election campaigns, including General Consulting and Smart and Simple Campaigns, when associating with candidates.

²² Please see the Decisions listed in FN 5 and the 1st amended expert witness report of Jonathan Motl, filed in *COPP v. Wittich*, BDV-2014-251 1st Judicial District, Lewis and Clark County.

²³ The five letters were an April 10 "intro" letter, a May 22 "taxes" issue letter, a May 23 "2nd amendment" issue letter, a May 24 "life" issue letter, and a May 29 "WIFE" letter.

²⁴ This is the former Western Tradition Partnership, having changed its name to American Tradition Partnership after the 2010 Montana elections.

Liberty.²⁵ The Commissioner, by examination, identifies the attack letters as originating from three corporate entities, those being the National Pro-Life Alliance, Montana Citizens for Right to Work, and American Tradition Partnership.²⁶

The Commissioner, by comparison to 2010 Republican primary election candidate letters, identifies the five Roberts candidate letters as being letters prepared with copy written by National Right to Work staff Jedd Coburn and imprinted with Candidate Roberts' scanned signature. The Commissioner, by reference to the 2010 Republican primary elections, further determines that the timing, content and appearance of the 2012 attack letters or attack slicks were comparable to the counterpart documents used in the 2010 Republican primary elections.

Based on this visible 2012 campaign activity (engagement of the LeFers along with candidate letters, attack letters and attack slicks comparable to those used in 2010 elections) and the source of this campaign activity (the Lefers, National Right to Work and affiliated corporations) the Commissioner hereby determines that Candidate Roberts' engagement of Drury Lane Consulting in his 2012 Republican primary campaign resulted in illegal and unreported campaign activity, through coordination.²⁷ Stated another way,

²⁵ These three non-profit corporations were entities that have been determined to be corporations managed and controlled by the agents and staff, including the Lefers, of National Right to Work. See FN 2.

²⁶ The Tutvedt and Welch complaints included copies of these attack letters.

²⁷ Direct Mail and Communications, Inc. used several names in 2008 and 2010 Republican primary election campaigns, including General Consulting and Smart Simple Campaigns, when associating with 2010 candidates. The response to the complaint made by the attorney

through the Drury Lane campaign engagement Candidate Roberts entered into a relationship with a group of corporate entities and people organized around the National Right to Work Committee and the LeFers.

The campaign relationship with this corporate group provided Candidate Roberts the full range of website, graphics, copy writing, polling, voter ID, survey and third party attack mailing that came with the overall consulting services provided by Christian LeFer and other staffers of National Right to Work.²⁸ In particular, the campaign relationship provided a direct mail campaign, including candidate letters bracketed by issue group attack letters against the opposing candidate. In turn, this direct mail campaign was built around mutual use of a voter SD 35 voter identification base developed by National Right to Work that produced the mailing lists for the four issue letters and the SD 3 voter mailing list.²⁹

Candidate Roberts confirmed and acknowledged that an integrated, Voter ID'd approach was used in his campaign. Candidate Roberts further confirmed a 2012 SD 3 primary election campaign where he had "a team" around him, and "consulted with national advisors" including "three advisors [who] were all

for Candidate Roberts admits that "Direct Mail" was the entity Candidate Roberts was dealing with.

²⁸ Please see footnote 22. The expert report identified in FN 22 was based on a review of document archives delivered to the COPP by the public or gathered by the COPP through subpoena during the discovery phase of the *COPP v. Wittich* litigation. The document archives include the Colorado documents, the Esp family archive, the Loendorf archive, the Hofer archive, the O'Neill archive, the Allen archive and the Green archive. The in-kind services included letter writing, polling, voter identification, walking lists, graphics, attack slicks and campaign consulting services provided without charge to 2010 candidates.

²⁹ See FN 28. The issue letters and the SD 3 mailing list were "ID'd" voter lists in that the National Right to Work staff had used surveys and other information to identify the voters in SD 3 that would respond favorably to the position taken by Candidate Roberts on those selected issues.

extremely competent and some of the most sought-after political minds in the country.”³⁰ Candidate Roberts discloses only one entity (Drury Lane) that could have provided such consulting services (FOF Nos. 4, 5). Indeed, the corporate group assembled by the National Right to Work Committee and provided through Drury Lane was organized to provide just such services³¹ and included just the sort of national level advisors referenced by Candidate Roberts.³²

Accordingly, the Commissioner, through this Decision, determines as follows.

Sufficiency Finding No. 1: The Commissioner determines that sufficient facts exist to show that Candidate Roberts coordinated with National Right to Work agents, staffers and affiliated corporations and people such that he accepted corporate in-kind services in the form of paid professional consultants, voter ID’d mailing lists, copy writing of candidate campaign letters, third party attack slicks, third party attack letters, graphics design, website design and polling.

Sufficiency Finding No. 2: The Commissioner determines that sufficient facts exist to show that Candidate Roberts, through coordination, failed to meet Montana campaign practice law and standards when he accepted in-kind contributions from corporate entities.

Sufficiency Finding No. 3: The Commissioner determines that sufficient facts exist to show that the following entities and people failed to meet Montana campaign practice law and standards by failing to register, report and disclose or by directly or through agency engaging in illegal corporate contributions for or against a SD 3 Republican primary election candidate:

- a. American Tradition Partnership (AKA Western Tradition Partnership)
- b. National Association for Gun Rights.
- c. National Right to Work Committee.
- d. Montana Citizens for Right to Work.

³⁰ 90 Days, Chapters 2, 8.

³¹ Please see FN Nos. 22 and 28.

³² Jedd Coburn, Christian LeFer, and Donny Ferguson were all RTW operatives involved in Montana Republican Primary elections and in other elections throughout the United States.

- e. Taxpayers for Liberty.
- f. National Pro-Life Alliance.
- g. Christian LeFer and Allison LeFer.

Under Montana law a coordinated expenditure 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 applied 44.10.323(4) ARM and found candidate coordination based on a showing of “prior knowledge, consent and encouragement of [the candidate] and her campaign” as to certain ads or flyers attacking the opposing candidate. *Little v. Progressive Missoula*, July 22, 2004. Applying this precedent, the Commissioner determines that Candidate Roberts coordinated because he had prior knowledge of or consented to the attack document. (See Sufficiency Finding No. 1).

None of the Right to Work affiliated corporate entities (American Tradition Partnership, Montana Citizens for Right to Work, National Association for Gun Rights, National Pro-Life Alliance and Taxpayers for Liberty) that produced the attack slicks or attack letters in the 2012 SD 3 Republican primary election reported or disclosed any 2012 campaign expenditures. In that regard, some of the corporations, either directly or through counsel, have responded that they do not need to file, report or disclose.³³ The Commissioner, however, has already determined that the

³³ The NGOA responded on May 19, 2014 through its executive director that it “does not engage in electioneering” but only in protected 1st amendment speech and therefore does not need to report or disclose. On May 12, 2014 the National League of Taxpayers made a similar

content of these flyers and letters (which have comparable content to those flyers and letters used in 2008 and 2010 elections), including multiple references to primary elections and candidates, is such that these letters and flyers are express advocacy and coordinated in-kind expenditures (SF Nos. 2, 3).³⁴

These expenses, determined to be coordinated, are contributions to candidate Roberts and will need to be determined in amount by discovery or expert testimony. The Commissioner notes that the amount of coordinated corporate resources is substantial.³⁵ The Commissioner notes that contributions are illegal in any amount if made by a corporation.³⁶ Stated another way, under Montana culture and law corporate contributions to candidates are not allowed.³⁷

B. Attribution, Reporting and Disclosure

Mr. Roberts, as a candidate in the 2012 SD 3 Republican primary election, was required by law to disclose, report, and attribute all contributions to, and expenses by, his campaign. Under Montana law, Candidate Roberts

argument through its President. On May 13, 2014 the National Pro-Life Alliance made similar argument through Montana counsel.

³⁴ See *Bonogofsky v NGOA*, COPP 2013-CFP-008; See FN 5.

³⁵ Enforcement of the 2010 Republican primary election candidate decisions has shown that full due process discovery, afforded only through judicial action, is necessary for such a determination.

³⁶ While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike Montana's prohibition on corporate contributions (§13-35-227(2) MCA) to candidates, including contributions made in the form of in-kind personal services provided by paid staff of corporations.

³⁷ Candidate Roberts claimed improper campaign practices in the 2012 SD 3 Republican Primary election, writing that the election featured "scandals, bribes, secret polls and personal mudslinging." 90 Days, Chapter 2.

was required to “attribute” campaign materials with “the name and address of the candidate or the candidate’s campaign.” §13-35-225(1)(a) MCA.

The Complaints included photos showing certain of Candidate Roberts’ campaign signs as well as a digital copy of Candidate Roberts’ campaign website. By inspection the Commissioner determines that:

Finding of Fact No. 7: Candidate Roberts did not attribute his campaign website and partially attributed other campaign materials using the phrase “paid for by the candidate” without listing the address of the candidate. (Commissioner’s records.)

Based on FOF No. 7 the Commissioner determines:

Sufficiency Finding No. 4: Sufficient facts exist to show that Candidate Roberts failed to properly attribute campaign materials as required by Montana campaign practice law and standards.

Attribution, disclosure and reporting are designed to promote transparency, thereby serving the public trust purpose inherent in all reporting and disclosure laws. If anything it was even more important that Candidate Roberts, a candidate new to his legislative district, fully identify or attribute his campaign information.

Under Montana law Candidate Roberts is responsible for a failure to properly disclose, report and/or attribute any in-kind (non-monetary) third party election contribution to his campaign, including those coordinated with Candidate Roberts by a third party. (See principles and reasoning set out in *Bonogofsky v. Kennedy*).³⁸ Candidate Roberts did not report or disclose in-kind

³⁸ An in-kind expenditure is treated the same as a cash contribution and includes “... furnishing of services property or rights without charge or at a charge which is less than fair market value to a ...candidate...”(44.10.323 (2) ARM). Such in-kind services include the value

contributions from any of the corporate group entities that the Commissioner has determined provided attack slicks, attack letters, polling, voter ID, copy writing, graphics or other services to his campaign. (FOF Nos. 5, 6.)

Sufficiency Finding No. 5: Sufficient facts exist to show that Candidate Roberts failed to properly report and disclose contributions to his campaign as required by Montana campaign practice law and standards.

The Commissioner reserves the reporting and disclosure issues as to whether Candidate Roberts improperly: maintained campaign accounts and records;³⁹ refunded general election contributions;⁴⁰ provided notice to opposing candidate of campaign material; or maintained primary and general election contributions in separate bank accounts.⁴¹ These issues will be further developed during discovery in the event that enforcement of this Matter proceeds through litigation rather than settlement.

C. Independent Third Party Activity

The Commissioner has in this Decision, above, considered and decided the issues of coordination, including the actions of third party entities involved in that coordination. This does not complete the required examination of third

of “staff time to draft the letter.” *Daubert v. MCW/Orvis*, February 27, 1997, at p. 6, Commissioner Argenbright.

³⁹ By law Candidate Robert’s campaign is required to preserve “detailed accounts” of all contributions received and expenses made for a period of four 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.

⁴⁰ Candidate Roberts’ June 25, 2012 (post-primary) campaign finance report listed \$1,830 in general election contributions that needed to be refunded to contributors. On June 21, 2013 COPP staff emailed Candidate Roberts that he needed to refund the general election contributions and file a closing report. On June 22, 2013 filed a closing report with “corrections” that removed the general election contributions, without specifying that the same were refunded, as required by law. (Commissioner’s records, Investigator’s findings).

⁴¹ See *Connell v. Boulanger*, COPP-2014-CFP-036.

party entities, however, because other corporations engaged in 2010 Montana SD 3 Republican primary election activity that was not part of or coordinated with the campaign of either candidate.

Once a complaint is filed the Commissioner “shall investigate any other alleged violation” including “alleged failures to file any statement” (§13-37-111(2)(a) MCA). The Commissioner is afforded discretion in exercising such investigative authority. *Powell v. Motl*, OP-07111, Supreme Court of Montana, November 6, 2014 Order. The Commissioner exercises such discretion in regard to “independent expenditure” activity in the 2012 SD 3 Republican primary election. Here, the Commissioner uses documents and information filed with the Complaint to identify and discuss 2012 SD 3 Republican primary election activity by the Montana Pro-Life Coalition and the Montana Family Foundation against Candidate Tutvedt or for Candidate Roberts.⁴² There is nothing wrong with independent expenditures in a 2012 candidate election, so long as the entity making the expenditures registers as a political committee and reports and discloses the amount of expenditures.⁴³

i) Dr. Bukacek and the Montana Pro-Life Coalition

In mid-May of 2012 the president of the Montana Pro-Life Coalition (MPLC) sent a letter advocating a “vote for Rollan Roberts for state senate in the

⁴² Candidate Roberts was also attacked by a group called MT Business Advocates for Sensible Election (MTBASE). The attack was disclosed in MTBASE campaign finance reports (see FN 43). A slick provided to the COPP shows a specific attack made through a slick that defined “carpetbagger” as “any opportunistic outsider” or “Rollan Roberts, II.”

⁴³ On June 1, 2012 MTBASE registered as a PAC (filed a Form C-2) with the COPP. On June 25, 2012 MTBASE filed a post primary campaign finance report and disclosed \$4,973.94 in printing and postage for a May 30, 2012 independent expenditure mailing in the “Tutvedt/Roberts” 2012 SD 3 Republican primary election.

upcoming June 5 Republican primary.” The “vote for” language in the letter automatically takes the letter out of any consideration as “issue advocacy.”⁴⁴ The letter is thus a 2012 election expenditure that may be examined for compliance with Montana’s campaign practice act.

Finding of Fact No. 8: The MPLC letter is four pages, stamped and mailed in a business size envelope. It is printed with a “Dr. Annie Bukacek” letterhead but it is signed by Dr. Bukacek as “President Montana Pro-Life Coalition.” The letter sets out no attribution as to who paid for the printing, handling and mailing of the letter. (Commissioner’s records.)

Finding of Fact No. 9: The MPLC, and its president, Dr. Annie Bukacek, appear in news articles in late 2009 and early 2010 in support of actions promoting the position that life begins at conception. In 2012 the MPLC attempted to place a “personhood” ballot question on the November, 2012 election ballot. (SOS records, Jul 2, 2009 Flathead Beacon, January 30, 2010 Billings Gazette.)

The Bukacek/MPLC letter did not attribute who paid for the letter (FOF No 8). Montana law requires that any communication advocating “the success or defeat of a candidate” be identified with ‘paid for by’ followed by the name and address of the person who made or financed the expenditure for the communication.” §13-35-225(1) MCA. It does not matter whether the letter is that of an individual (Dr. Bukacek) or a group (MPLC).⁴⁵ Either way the letter must be attributed.

⁴⁴ An election expense focused on an issue rather than a candidate is called “issue advocacy.” An issue advocacy expense is not considered to be a candidate expense and therefore is not subject to campaign practice requirements.

⁴⁵ The anonymity analysis of *Matter of Concerned Citizens of Lake County* decided November 10, 2011 (Commissioner Gallik) is not applicable as anonymity was waived by the information set out in the letter. *Bixler v. Suprock*, COPP-2013-CFP-013 (Commissioner Motl) and *Olsen v. Valance*, November 17, 2009 (Commissioner Unsworth).

Sufficiency Finding No. 6: Sufficient facts exist to show that Dr. Bukacek and/or MPLC failed to properly attribute an election communication, as required by Montana campaign practice law and standards.

The Commissioner next examines the reporting and disclosure issues arising from the Bukacek/MPLC letter. This discussion requires a determination of whether the letter is that of Bukacek, MPLC or both. This is necessary because an individual making an independent election expenditure solely on his or her own is not required to file a campaign finance report. (See, §13-37-226(1) MCA.) In contrast, a group, such as MPLC, becomes a political committee that must report and disclose its independent election expenditures. *Id.*

The Bukacek/MPLC letter has some characteristics as a letter by one individual (“today I am just writing as your neighbor from Bigfork....”) but it is also signed by Dr. Bukacek as the “President, Montana Pro-Life Coalition.” (FOF No. 8). In turn, the MPLC is a group with a history of activity involving more than one person. (FOF No. 9). With these facts, the COPP has direct precedent on this issue in *Welch v. Davis* 2013-CFP-027 (Commissioner Motl) wherein the representation of speech by a “Quiet Skies” group was enough to establish a political committee. Applying the *Welch* standard to the facts of this matter, the Commissioner determines that the Bukacek/MPLC letter represented itself as speech by a combination of two or more individuals. Under Montana law this combination of individuals became a political committee [“a combination of two or more individuals ...who makes a contribution or expenditure...to support or” §13-1-101(22) MCA] subject to

Montana's campaign and practice laws. Accordingly, the Commissioner makes the following determinations.

Finding of Fact No. 10: The MPLC did not file as a political committee with the COPP (Commissioner's records.)

Under Montana law MPLC became a political committee when it made expenditures, in the form of the MPLC letter supporting Candidate Roberts, in the 2012 SD 3 Republican primary election (44.10.327 ARM). Having made an election expenditure MPLC was required by Montana law to file as a political committee with the COPP (§13-37-201 MCA). MPLC did not file and has not filed with the COPP as a political committee (FOF No. 10).

Sufficiency Finding No. 7: Sufficient facts exist to show that MPLC failed to file as a political committee as required by Montana campaign practice law and standards.

A political committee can engage in an unlimited amount of independent election expense, the same known as an "independent expenditure." However, any such independent election expenditure must be disclosed and reported, albeit by the political committee rather than the candidate (§13-37-226 MCA).

Finding of Fact No. 11: The MPLC did not report or disclose any contributions or expenditures for any 2012 candidate campaign activity. (Commissioner's records.)

Sufficiency Finding No. 8: The Commissioner determines that sufficient facts exist to show that the MPLC failed to comply with Montana campaign practice law and standards by failing to report and disclose campaign expenditures.

The Commissioner notes that the MPLC letter has the appearance (type face, style of writing, pre-cancelled Banner bulk mail stamp) of a letter prepared, printed and mailed by the "corporate group" of entities working with or through

the Right to Work corporate entities. The Commissioner reserves a determination that other corporate entities could also be responsible for sufficiency decisions applied solely to MPLC.

ii) Montana Family Foundation

On October 25, 2010 the Montana Family Foundation (MFF) filed with the COPP (through a Form C-2) as a political action committee (or PAC) under the name of Montana Family PAC. While this PAC remained open during the 2012 elections, the MFF also filed on May 10, 2012 (through a faxed Form C-2) for another political committee called Montana Family Foundation. The COPP, through a letter dated May 18, 2012, classified the Montana Family Foundation as an “incidental” political committee. The latter political committee became the entity through which the MFF reported its 2012 election activity.

Any political committee, including the MFF political committee, was required to file reports “of contributions and expenditures made by or on behalf of a candidate” (§13-37-225(1) MCA). These campaign finance reports must be filed on certain schedules, including those defined by §13-37-226 MCA.

A. The MFF Late Filed As a Political Committee

The MFF may participate in Montana elections subject to Montana’s campaign finance and disclosure requirements. While MFF, in the form of a political committee, may make independent expenditures of any size, it must “file the [C-2] certification ...within 5 days after it makes an expenditure” §13-37-201 MCA. The MFF political committee’s own campaign finance report (filed

by fax on May 23, 2012, FOF No. 13) disclosed expenditures as early as May 1, 2012. Under Montana law the MFF was required to file its C-2 registration form no later than 5 days after that May 1, 2012 expenditure, or no later than May 6, 2012.

Sufficiency Finding No. 9: The Commissioner finds sufficient facts to show that MFF filed its C-2 registration form at least four days later than the time required by §13-37-201 MCA.

The MFF registration form must list “the name...of each candidate whom the committee is supporting or opposing” (44.10.405(f)ARM). The MFF registration form properly listed Candidate Tutvedt (SD 3) as a candidate it would oppose in the June 5, 2012 primary election.

B. The MFF Political Committee Did Not Properly Report and Disclose

As a political committee engaged in independent election expenditures the MFF political committee was required to file its campaign finance reports at the times set out in §13-37-226(5) MCA. This included requirements of filing C-6 campaign finance reports on the “12th” day pre-election and not more than “20 days” following the election. *Id.* The 2012 election day was June 5, 2012. This means that political committee’s campaign 2012 primary election campaign finance reports were due May 24 and June 25, 2012.

Finding of Fact No. 12: The MFF political committee timely filed its pre-primary election campaign finance report on May 23, 2012. The report disclosed the amount of \$16,223.97 paid for “Postcard mailed to constituents” on May 1, 2012.” (Commissioner’s records.)

Finding of Fact No. 13: The MFF political committee timely filed its post-primary election campaign finance report on June 23, 2012. The report disclosed the amount of \$1,179.02 paid for a “Radio Spot to Oppose Tutvedt.” (Commissioner’s records.)

Finding of Fact No. 14: On January 4, 2013 the MFF political committee amended its pre-primary report to disclose that the \$16,223.97 set out in FOF No. 12 was spent on postcards supporting “Halvorson (HD 37), Jones (HD 37), Howard (HD 60), Taylor (SD 6), Lamb (HD 61) and Balance (HD 89). In that same report the MFF “corrected” the pre-primary report to specify that “part of \$16,223.97 opposed Tutvedt, Mobray and Christensen”. (Commissioner’s records.)

Finding of Fact No.15 shows that MFF political committee first reported the “Vote No” Tutvedt flyer in January 2013, months after the SD 3 primary election.

Sufficiency Finding No. 10: The Commissioner finds sufficient facts to show that MFF political committee did not report and disclose independent expenditures in the 2012 SD 3 primary election in the time and manner required by Montana campaign practice law and standards.

Under Montana law independent expenditures “must be reported in accordance with the procedure for reporting other expenditures”. *Hanes v. Bianco*, ARM 44.10.323(3) and ARM 44.10.531(4). Section 13-37-225 MCA requires that the MFF political committee file “periodic reports of ... expenditures made ...on behalf of a candidate” (Emphasis added). The reports must include “debts and obligations owed” by the MFF political committee. §13-37-230(1)(g) MCA. Independent expenditure reporting requires “reporting of the name of the candidate...the independent expenditure was intended to benefit...” ARM 44.10.531(4). The Commissioner determines that the MFF political committee

campaign finance reports did meet not timely these requirements as to multiple expenditures, including the Tutvedt expenditure.⁴⁶

At this point the COPP does not challenge the MFF use of an incidental committee status. This is important because there is a long-standing COPP reporting exception that allows incidental committees to report only expenditures without reporting contributions, other than earmarked contributions. This exception draws legal authority from 44.10.411(5) ARM.

The basis for this exception to contribution reporting lies in the definition of an incidental committee in that such a committee has another primary purpose for existence but only “incidentally becomes a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue.” 44.10.327(2)(c) ARM. Thus an entity with a separate corporate existence and a clear business or other dominant activity would be an incidental committee when it chose to make an independent expenditure in a Montana election.⁴⁷

iii) Independent Expenditures in 2012 Elections

The Commissioner first discussed independent expenditures in detail in *Gibson v. Montana League of Rural Voters*, COPP-2014-CFP-064, a Decision dealing with an independent expenditure in a 2014 election. As noted in *Gibson*, the COPP had before engaged only in minimal discussion of the overall

⁴⁶ The MFF political committee must also take care in the future to file campaign finance reports signed by an officer of the political committee (an officer of MFF does not suffice, unless named by the political committee), as required by Montana law. §13-37-231 MCA.

⁴⁷ Orvis Corporation, for example, was an incidental committee when it spent corporate funds in support of a Montana initiative. *Daubert v. Montanans for Clean Water*, February 27, 1997, Commissioner Argenbright.

reporting and disclosure requirements for entities making independent expenditures in Montana elections.⁴⁸ Before the complaints at the end of the 2014 campaign cycle, independent expenditure discussion had focused on whether or not a particular third party election expense advocated for or against a candidate (“express advocacy”) such that it became a reportable election expense.⁴⁹

Independent expenditures are third party election expenditures that are not coordinated with the candidate.⁵⁰ Independent expenditures in Montana elections increased following the 2010 *Citizens United* decision by the U.S. Supreme Court. Independent expenditures are generally carried out in the form of an election communication (in the SD 3 Candidates’ case, flyers, radio ads and a letter) attacking or supporting a candidate.

The 2014 Montana election cycle was the first to examine and weigh significant independent expenditure activity by multiple entities in multiple elections. The entities making the independent expenditures, as shown by the *Gibson* Decision, did so within a reporting and disclosure culture that lacked the adherence to transparency that is seen in reporting and disclosure by the campaigns of the candidates themselves. There were six complaints filed over 2014 independent expenditure activity.⁵¹

⁴⁸ The COPP has discussed narrow issues regarding independent expenditures in Montana elections as early as 2003. See *Haines v. Bianco*, (March 2003, Commissioner Vaughey).

⁴⁹ See *Bonogofsky v. NGOA*, COPP-2010-CFP-008.

⁵⁰ Independent expenditures are those “not made with, at the request of suggestion of, or the prior consent of a candidate...” 44.10.323(3) ARM.

⁵¹ *Shellnutt v. Planned Parenthood*, COPP-2014-CFP-058; *Perea v. MDP*, COPP-2014-CFP-055; *Buttrey v. MDP*, COPP-2014-CFP-050, *Kary v. MDP*, COPP-2014-CFP-059; *Gibson v. MDP*, COPP-2014-CFP-062 and *Gibson v. Montana League of Rural Voters*, COPP-2014-CFP-064.

As explained in the *Gibson* Decision, entities involved in independent expenditures in Montana's 2016 election cycle will need to adapt such that they fully and timely report and disclose independent expenditures, with those independent expenditures listed on a candidate-by-candidate basis. This disclosure, timely made and itemized according to candidate, is what Montana law requires and it is what the press, public and the opposing candidate need if there is to be transparency in election expenditures. The Commissioner notes that MFF, while failing to meet the requirements of law in 2012 elections, likely acted with responsibility comparable to that of most corporations, political committees or other entities making independent expenditures in Montana's 2012 or 2014 elections. The first time nature of the offense set out in this Decision, will be recognized as a factor supporting mitigation for this particular Decision.

III. 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 Roberts and the corporations listed in this Decision have, as a matter of law, violated Montana's campaign practice laws, including but not limited to the statutes and regulations set out in this Decision. 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 Roberts and /or the corporations named in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse for instances of failing to attribute, report and disclose, or for acceptance of or spending 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”)⁵² 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.⁵³ Montana’s second Commissioner, Peg Krivec, served her entire six 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 mistake and adjust future election activity to conform with the rulings.

⁵² 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.

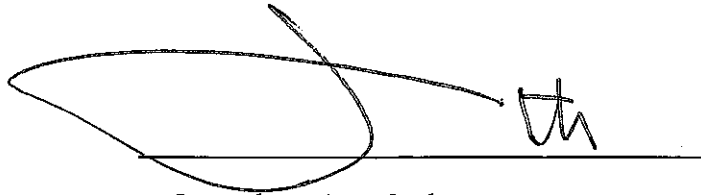
⁵³ This type of systemic violations in Montana’s past gave rise to many of Montana’s current campaign practice laws.

In contrast, the corporate group identified in this Matter, and any candidates served by this corporate group have, to date, been unwilling to accept or adjust to Montana's expectations of appropriate election behavior. Until the recent litigation resulting from candidate actions taken in coordination with the corporate group, Commissioners have rarely found it necessary to seek the full legal redress allowed by Montana law against a candidate or treasurer. 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).

IV. CONCLUSION

Based on the preceding discussion, as Commissioner, I find and decide that there is sufficient evidence to show that Candidate Roberts and the corporations, as well as the political committees named in this Decision violated Montana's campaign practices laws as set out above and that civil adjudication of the violation is warranted.

Dated this 14th day of January, 2016.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a smaller, more legible signature.

Jonathan R. Motl
Commissioner of Political Practices
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