

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Ward v. Miller No. COPP-2010-CFP-021	Summary of Facts and Findings of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
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Mike Miller of Helmsville and Joe Dooling of Helena were candidates for the Montana House of Representatives, House District 84, (HD 84) in the 2010 Republican primary election. In June of 2010 John Ward of Helena filed a complaint with this Office against Assembly Action Fund (*Ward v Assembly Action Fund* No. COPP-2010-CFP-006) asserting impropriety in its use of attack flyers in the 2010 HD 84 Republican primary election. On November 12, 2013 the earlier Ward complaint was extended to Candidate Miller and Western Tradition Partnership, with the extended complaint including review of coordination and corporate contribution issues. The extended complaint referenced and incorporated the issues identified in *Bonogofsky v. Kennedy*, COPP 2010-CFP-15.

I. INTRODUCTION

This Decision presents and decides several issues dealing with non-candidate expenditures in a Montana election, in this case a primary election

in a single legislative district (HD 84).¹ These expenditure issues have confounded Montana political candidates and this Office for the past three election cycles.

The 2010 HD 84 primary election involved two candidates, Mike Miller and Joe Dooling. Candidate Miller defeated Candidate Dooling in the June 8, 2010 primary election by a vote of 972 to 479. Candidate Miller went on to win the general election and became a representative to the 2010 Montana legislature from HD 84². (SOS website).

Candidate Miller reported 2010 primary contributions of about \$6,500, disclosing 44 individual and 7 PAC contributors. (Commissioner's records). Candidate Dooling reported 2010 primary contributions of \$5,500, disclosing 52 individual and one campaign committee contributors.

Candidate Miller reported eighteen 2010 primary election expenditures totaling \$5,400, transferring about \$1,100 to a general election account. (Commissioner's records). Candidate Dooling reported sixteen 2010 primary election expenditures totaling \$5,500. (Commissioner's records).

House District 84 is a large district, over 2,500 square miles in size. Both candidates reported the majority of their expenditures on direct mail activity. Candidate Miller reported 2010 primary elections payments to Direct Mail and Communications, Inc. for "print services" in the amount of \$2,816.64

¹ The Montana Legislature has 100 house districts.

² House District 84, as created by the 2000 redistricting commission, is a solid Republican district. The electoral contest of note is the Republican primary. In 2008 Candidate Miller defeated then incumbent John Ward in the Republican primary by a vote of 645 to 620. (Data from Secretary of State's website).

and payments of postage expenses of \$187.85. Direct Mail provided Candidate Miller 8 letters (written, stamped, and mailed) and one attack flyer or Slick for its payments (*see*, this Decision, below). Candidate Dooling reported primary expenses totaling \$5,400 including payment of \$3,617.86 to Allegra Printing for 4 campaign mailings and \$847.17 for postage associated with the mailings. (Commissioner's records).

Candidate Dooling reported campaign expenses consistent with disclosed election activity favorable to his candidacy. Candidate Miller did not. As set out in this Decision there was far more election activity favorable to Candidate Miller and/or against Candidate Dooling than reported in Candidate Miller's campaign reports or by any third party. (*see* Decision, below). This unreported, undisclosed 2010 HD 84 election activity is the focus of this Decision.

II. ELECTION EXPENSES

This Decision identifies and discusses a number of 2010 HD 84 election expenses that were not reported or disclosed by a candidate or third party. The Commissioner was able to identify election expenses, in part, based on documents supplied by members of the public.³ Further, the Commissioner reviewed records of Western Tradition Partnership (WTP),⁴ a non-profit corporation organized in the state of Colorado. WTP's records, at one time in

³ For an example of documents supplied by the public, please *see* detailed summary of election activity in the 2010 HD 61 election, attached as Exhibit 1 to this Decision. John Esp was a candidate in the Republican primary in HD 61. The documents listed in this summary were received and saved by members of the Esp extended family during the 2010 HD 61 election.

⁴ WTP was involved in 2008 and 2010 candidate elections in Montana, including Candidate Miller's 2008 HD 84 primary election. Commissioner Unsworth determined that some WTP 2008 election activities violated Montana campaign practice law as unreported independent expenditures. *Graybill v. WTP*, COPP-2010-CFP-0016. WTP challenged that decision in a Montana District Court. *WTP et. al. v. COPP*, No. BDV-2010-1120, 1st Judicial District, Lewis and Clark County. WTP's challenge has been dismissed by the Court, which also awarded sanctions and fines against WTP.

the possession of the Commissioner's office, are now in the possession of the Federal Bureau of Investigation (FBI).⁵ These "WTP records" and the documents provided by citizens, allowed the Commissioner to identify otherwise undisclosed and unreported HD 84 2010 election expenses, as set out in this Decision.

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

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

The second type of election expense is that of a third party entity independent of a candidate, but focused on a candidate in the election. This election expense is called an "independent expenditure" and it too must be disclosed, reported, and attributed, albeit by the third party rather than the

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

candidate. This expense, 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 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.⁶

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

There is much of Montana's election and candidate culture at stake in the distinctions in expenditures made during the time of an election, as defined

⁶ 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.

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

III. SUBSTANTIVE ISSUES ADDRESSED

The substantive areas of campaign finance law addressed by this decision are: 1) Coordinated Expenditures; 2) Reporting and Disclosure; 3) Retention and Production of Campaign Accounts and Records; and 4) Attribution.

IV. DISCUSSION AND FINDINGS

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

Finding of Fact No. 1: Mike Miller was a 2010 candidate for the Republican Party nomination to the Montana legislature from HD 84, Montana. Another candidate, Joe Dooling, also sought the 2010 nomination by the Republican Party from HD 84. (Secretary of State (SOS) Website).

Finding of Fact No. 2: Candidate Miller was the incumbent legislator in HD 84, having been elected in 2008. (SOS Website).

Finding of Fact No 3: The primary vote in Montana took place on Tuesday, June 8, 2010. Candidate Miller won the Republican primary election in HD 84 by a vote of 972 to 479. (SOS Website).

Mr. Miller and Mr. Dooling, as candidates in the 2010 HD 84 Republican primary election, were required by law to disclose, report, and attribute all contributions to, and expenses by, their campaigns. The Commissioner notes that there are no offsetting constitutional speech issues to these campaign practice requirements. The holding of public office in Montana is a “public trust” (§ 2-2-103 MCA) and Montana’s interest in preventing corruption of this public trust allows it to impose campaign practice requirements on a candidate for public office.

A. WTP Entities Involved in Candidate Miller’s Campaign

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

WTP’s internal documents show that in early 2009 it began to seek funding, based on its claims of election success in 2008 Montana legislative campaigns, for election activities in 2010 Montana legislative races. (WTP “Confidential Overview”, March 1, 2009).⁷ WTP identified the HD 84 Republican primary election, along with a number of other races, as targeted 2010 Montana legislative races. (WTP records).

WTP’s Confidential Overview describes its planned use of documents in election activity forecast for a 2010 Montana legislative race, such as HD 84:

⁷ The WTP “Confidential Overview” was delivered to the Commissioner independent of the “WTP Records” as it was provided to the Commissioner by former WTP staffer Karolyn Loendorf.

1. “Our ambitious Candidate survey program –the backbone of our election year lobbying program—was designed to mobilize the voters...”
2. “Surveys were first sent to candidates in the targeted primaries...”
3. The survey information was combined with other information to choose the pro-development candidate.
4. “In the final weeks of the election, letters and glossy postcards were sent to tens of thousands of likely voters and issue ID’d lists in our targeted races...”

A separate WTP document, the WTP 2010 Election year power point presentation,⁸ illustrates the tenor or some of these letters and postcards by showing 5 such WTP documents attacking candidates.

The campaign actions for which WTP claimed credit, including candidate letters, WIFE letters, issue ID’d letters, attack slicks, and surveys, were taken through several related entities and people, including Direct Mail and Communications, Inc., a Colorado for-profit corporation. In 2010 Direct Mail operated a print shop in Livingston, Montana under the direction of Allison LeFer. The Commissioner determines that Direct Mail and Allison LeFer are agents of and part of WTP as to any Candidate Miller election activity. There is a direct relationship between Direct Mail and WTP, making the two indistinguishable for the purposes of this Decision. Allison LeFer (aka Allison Andrews) was the President of Direct Mail in 2010.⁹ Allison LeFer was also directly involved in WTP, signing the majority of WTP’s checks at the same time. Allison LeFer is married to Christian LeFer. (Commissioner’s records).

⁸ Also produced to the Commissioner by Ms. Loendorf.

⁹ Direct Mail and Communications, Inc. corporate documents list Allison Andrews as Director and President. Her address is listed as 1237 E. Amherst Circle, Aurora, CO.

Likewise, Christian LeFer is an agent of and the same as WTP as to any Candidate Miller election activity. Christian LeFer is currently listed as one of 5 board members of American Tradition Institute, the 501(c)(3) adjunct to WTP. (Commissioner's records). A March 1, 2009 internal WTP memorandum laying out an agenda for the 2010 Montana legislative elections lists Christian LeFer as WTP's "Director of Strategic Programming." (Commissioner's records). Karolyn Loendorf, a former WTP staffer, reported that it was Christian LeFer who hired her as a WTP staffer to work on 2010 legislative campaigns. (Investigator Notes). Christian LeFer's name regularly appears in 2010 WTP election activity, including his April 2010 attempt to convince John Esp to withdraw as a candidate in the 2010 HD 61 Republican primary election against WTP's chosen candidate, Joel Boniek (*see Ex. 1*). Candidate Washburn (2010 HD 69) also reports that he received a phone call from Christian LeFer speaking on behalf of WTP after Candidate Washburn criticized WTP at a political event. (Investigative conversation with Candidate Washburn).

Montana Citizens for Right to Work, a Montana not-for-profit corporation is also deemed to be the same as or an agent of WTP. The WTP records included a Montana Citizens for Right to Work letter promoting Candidate Miller and attacking Candidate Dooling. This letter is consistent with a national and statewide pattern of similar candidate related activity by Right to Work groups.¹⁰ The Commissioner determines that Montana Citizens for Right to Work is an agent of and part of WTP as to any Candidate Miller election

¹⁰ Please see copy of November 21, 2013 letter from former NRTWC employee Dennis Fusaro attached to this Decision as Exhibit 2.

activity. The Commissioner's review of WTP files determined that Montana Citizens for Right to Work letters were handled in the same manner as WTP letters. The Montana Citizens for Right to Work letters were printed, handled, and mailed by Direct Mail with Allison LeFer receiving a copy of the letter, presumably to confirm that it had been mailed.¹¹ Both the WTP and Montana Citizens for Right to Work letters were placed in sleeves, files or held in envelopes in the same manner in the WTP records. Christian LeFer was a principal in the production of both the WTP and Montana Citizens for Right to Work letters, personally signing the last letter. The Commissioner determines that Montana Citizens for Right to Work letters were part of WTP's "backbone" of candidate survey attacks mounted in a "shock and awe electoral bombing campaign." (Commissioner's records).

Assembly Action Fund, Inc. is a Colorado not-for-profit corporation listed as the author of flyers attacking Candidate Miller. The Commissioner determines that Assembly Action Fund is also an agent of and the same as WTP as to any Candidate Miller election activity. The Assembly Action Fund was, for all practical purposes, unorganized in regard to the 2010 elections. The Assembly Action Fund was incorporated as a non-profit corporation in Colorado on May 25, 2010, two weeks before the June 8, 2010 election. (Commissioner's records).

¹¹ The Commissioner viewed the return letters addressed to Allison LeFer in the WTP records. The WTP records included candidate issue letters that were stamped with the Banner Stamp and mailed to Allison LeFer at her Livingston, MT address.

The Assembly Action Fund's presence in Montana is limited to use of its name on attack Slicks used in the 2010 legislative elections. The people who can be connected with the Assembly Action Fund have WTP connections. (Commissioner's Records). Christian LeFer registered the Assembly Action Fund domain name. (Commissioner's Records). Direct Mail operative, Jeremy Hofer, signed the purchase order for the radio ads against Candidate Bonogofsky and signed the Assembly Action Fund check paying for ads. (Bonogofsky Complaint Document).¹² The Commissioner's Investigator was unable to locate any people who would admit to connections with the Assembly Action Fund.

In the 2008 elections WTP created a front organization, the Coalition for Energy and the Environment, for use as the source of Slicks. (*see Graybill v. WTP*, COPP-2010-CFP-0016).¹³ The Commissioner finds that the Assembly Action Fund is another such artifice created by WTP for use in the 2010 elections.

B. Coordinated Expenses

Complainant John Ward, by the November 12, 2013 Complaint Notice, expanded his 2010 complaint to that of this separate complaint against Candidate Miller. The complaint against Candidate Miller incorporated the

¹² Jeremy Hofer was listed in the 2010 Direct Mail corporate documents as a Director and Corporate Secretary. Hofer's address was listed as 1237 East Amherst Circle, Aurora, CO, the same address used by Allison LeFer.

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

coordination and corporate contribution issues discussed in the *Bonogofsky v Kennedy* Decision.

Candidate Miller 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 Miller by a third party. (see principles and reasoning set out in *Bonogofsky v. Kennedy*). As defined by 44.10.323 (2) ARM an in-kind expenditure "...means the furnishing of services property or rights without charge or at a charge which is less than fair market value to a ...candidate..." Such in-kind services include the value of "staff time to draft the letter." (Commissioner Argenbright, *Daubert v. MCW/Orvis*, February 27, 1997 at p. 6).

COPP regulations define a coordinated expenditure as "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate..." 44.10.323(4) ARM. Commissioner Vaughey found such coordination based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate. *Little v. Progressive Missoula*, July 22, 2004. A more detailed discussion of the legal elements of coordination, including a review of past coordination decisions by Commissioners, accompanies this Decision as Exhibit 3.

i. The 8 Direct Mail Letters

Candidate Miller's campaign finance reports show payment of \$2,816.64 to Direct Mail. Direct Mail's invoice to Candidate Miller shows that \$2,281.65

of that amount was billed for cost of the 8 letters signed by Candidate Miller or his wife (hereafter "8 Letters").¹⁴

The Commissioner's review of WTP records has determined that the 8 Letters consisted of two introduction or "Intro letters" with survey, a "WIFE" letter,¹⁵ four issue ID'd letters (gun, life, tax, spend/Right to Work) and a closing letter. The Direct Mail bill attached as Exhibit 4 shows that Candidate Miller paid for 4,345 such letters. In particular, the bill shows Candidate Miller paid for 1,230 Intro letters, 1,534 Issue ID'd letters (consisting of 4 separate letters directed to each of 4 issue groups), 707 WIFE letters, and 874 final letters.

The 8 Letters are an election expense, with partial payment of \$2,281.65 reported by Candidate Miller. This Decision determines whether or not the complete expense of the 8 Letters was reported and disclosed by Candidate Miller, including value of services. See 44.10.323 (2) ARM and above. Under COPP regulations, Candidate Miller was required to report as an in-kind contribution the "total value of the services" received as part of the preparation of these 8 Letters (44.10.513 ARM), including the value of "staff time to draft the letter." See *Daubert v. MCW/Orvis, supra*.

This requirement of disclosure of "total value" makes sense as Montana law dictates that "anything of value" (§13-1-101(7)(a) MCA) provided to a

¹⁴ Candidate Miller generally refused to produce campaign documents, but did produce a June 5, 2010 bill from Direct Mail and Communications. Candidate Miller did not produce copies of any of the 8 letters shown by the bill. A copy of the Direct Mail bill is attached as Exhibit 4.

¹⁵ The Commissioner's review determined that WTP identified a letter from a candidate's wife as a "WIFE" letter.

candidate is a contribution.¹⁶ In turn, all contributions must be reported and disclosed by the candidate (§13-37-225 MCA) so that voters and the opposing candidate know who is supporting a particular candidate for public office. If WTP or another entity was providing in-kind services in connection with any one of the letters and those services can be identified, then the value of those services must be reported. *Daubert v. MCC/Orvis, supra*. Valuation of any such identified services for reporting purposes is defined by 44.10.533 ARM as “fair market value.”¹⁷

1. The WIFE LETTER

One of the 8 Letters was a letter signed by JoAnne Miller, Candidate Miller’s wife, and mailed to an identified group of HD 84 voters (“WIFE letter”). As part of the charges listed in the Direct Mail bill Candidate Miller is listed as paying 65 cents for each of 707 WIFE letters (including postage) for a cost of \$459.55. (Ex. 4, Direct Mail bill).

The WTP Records included a copy of the handwritten JoAnne Miller WIFE letter for the 2008 general election. The Commissioner was unable to locate and review a 2010 Republican primary election Miller WIFE letter, but was told

¹⁶ The Commissioner identified 12 documents constituting an election expense that were mailed to 2010 HD 69 voters. These documents either promoted Candidate Miller’s campaign or attacked Candidate Dooling’s campaign. Those 12 documents consist of: 8 candidate letters printed by WTP/Direct Mail; 2 attack Slicks; and, 2 attack letters by third party groups. The same pattern of large scale election use of documents was employed in a number of 2010 legislative campaigns. Attached as Exhibit 1 is a summary of the most complete 2010 election document record reviewed by the Commissioner, that being the documents attacking Candidate Esp or promoting Candidate Boniek in the 2010 HD 61 Republican primary race. This summary is useful to acquaint the reader with the pattern of election document use as well as the role played by WTP and its aligned groups.

¹⁷ The Commissioner has retained an expert to set the fair market value, should it be necessary to do so in any enforcement action of this Matter.

in investigative interviews that this letter was sent out in handwritten form in the 2010 primary. (Commissioner's records).

The Commissioner takes administrative notice, based on the WIFE letter costs paid by Candidate Miller and based on the practice of WTP in preparing WIFE letters in other 2010 Montana primary elections, that the JoAnne Miller WIFE letter was handwritten. Based on a review of other WIFE letters the Commissioner takes administrative notice that the JoAnne Miller WIFE letter was printed with blue ink on pink off size (10" by 8") paper. The Commissioner takes administrative notice based on review of a number of comparable WIFE letters that the JoAnne Miller WIFE letter was placed in a pink envelope, hand addressed, and mailed with a 44 cent stamp.¹⁸

The Commissioner takes administrative notice that the JoAnne Miller WIFE letter discussed how JoAnne and Mike met, praised their marriage, and extolled Mike Miller's virtues.¹⁹ The Commissioner's review determined that WTP interviewed each wife (using a survey form) to gain the information to draft the content of a WIFE letter. The draft was written and edited by WTP into the final WIFE letter text. A scribe was then engaged to carefully write out the final handwritten text and that text was cut, pasted, and mocked up to fit the size of letter paper used for the candidate. A wife signature was added to

¹⁸ For example, a copy of the Marla Wagman WIFE letter was received as part of the Esp family document archive. See Ex. 1. Wagman was also a candidate chosen for support by WTP.

¹⁹ The administrative notice is based on the Commissioner's review of WIFE letters used in other 2010 legislative campaigns as well as the content of the 2008 JoAnne Miller Wife letter. The Commissioner's examination further showed that WTP prepared a comparable WIFE letter for each candidate it supported in Montana's 2010 elections. (WTP records).

each WIFE letter.²⁰ After mock-up, the JoAnne Miller WIFE letter was printed, inserted into a hand addressed pink envelope and a 44 cent stamp was used to mail the envelope. The Commissioner determines that the 60 cents Candidate Miller paid for each such WIFE letter, at most, paid for the stamp, envelope, paper and ink.

In making the above determination the Commissioner takes administrative notice that minimum cost of printing and handling a mailer is 56 cents, exclusive of postage. The Commissioner takes administrative notice of the information in the *Bonogofsky v Kennedy* Decision from Allegra invoice No. 80910. Allegra's invoice, dated May 4, 2010, showed a charge to Candidate Kennedy of \$1,103.72 to print, fold, and inkjet address 1,959 mailers. This comes to a charge of 56 cents per mailer, exclusive of postage.²¹

The Commissioner further takes administrative notice that minimum printing costs of 43 cents per item is the minimum fair market value for a flyer or Slick used in a 2010 HD election, exclusive of postage. Candidate Dooling's direct mailing consisted of a flyer or Slick supporting his candidacy. Allegra

²⁰ The Commissioner's investigator determined, looking to mock-ups and notations on WIFE letter drafts, that there is a common theme and carry-over phrases between WIFE letters. Further, the investigator observed that the wife's signature is generally added by the scribe, based on a sample signature from the wife. For example, the Investigator determined that the 2008 Susan Boniek HD 61 WIFE letters (primary and general elections) signatures appear to have been made by the scribe. This is in contrast to the 2010 HD 61 primary election where the Susan Boniek WIFE letter mock-ups in the WTP records show there was direction "to PDF to CL [Christian LeFer] rewrite 1st page not even/neat as other pages", indicating WTP had difficulty getting the scribe to prepare the letter as directed. The WTP records show that the 2010 HD 61 Susan Boniek WIFE letter was eventually computer generated with a scripted font. Susan Boniek then likely signed the computer generated 2010 WIFE letter and added a post-script in her own handwriting.

²¹ Postage or "shipping" was separately charged by Allegra at \$470.16, or 24 cents per mailer. This is comparable to the 22 cents bulk stamp rate paid by Direct Mail.

charged 43 cents per Slick it printed and addressed for Candidate Dooling. Mailing costs were separately billed. (Commissioner's records).

The Commissioner's administrative notice recognizes that Allegra is an operating Montana business that offered services to the public in 2010 at rates it designed to be competitive. Being competitive, the 56 cents of cost per mailer and 43 cents per Slick sets fair market value for a comparable service.

In regard to the WIFE letter, Allegra charged 56 cents to print, fold, and address a one page mailer. The Commissioner determines that the Direct Mail services provided to Candidate Miller in the production of the WIFE letter involved printing, folding, and inserting multiple pages into an envelope as well as sealing and addressing the envelope. The Direct Mail services provided for each of the 8 Letters were therefore greater than the Allegra services provided for the less complicated mailer.

The Commissioner, based on the above analysis and common sense, determines that Direct Mail's after postage charge of 21 cents (WIFE letter) to 23 cents for the remaining 7 Letters does not cover the envelope, paper, and ink costs of the 8 Letters.²² The Commissioner also determines, based on the above information, that there were writing, editing, layout, and production services of substantial value provided by WTP to Candidate Miller in connection with the JoAnne Miller WIFE letter (*see Daubert v MCC/Orvis*). The value of

²² Montana law, at ARM 44.10.513(1)(b)(ii) requires that WTP/Direct Mail report as an in-kind contribution "...the difference between the fair market value at the time of the contribution and the amount charged the contribute...". Candidates routinely engage businesses, such as Allegra, to provide goods or services for the candidate's campaign. There is no contribution involved so long as the candidate pays fair market value for the goods or services. If fair market value is not charged then the difference becomes an in-kind contribution to the candidate.

these services was not covered by any payment to Direct Mail by Candidate Miller. The Commissioner determines Candidate Miller paid nothing to WTP for its services in writing, editing, layout and processing the Candidate Miller WIFE letter.

The Commissioner further determines that Candidate Miller cooperated with, knew of, and approved of the WTP services involved in the JoAnne Miller WIFE letter. Candidate Miller was directly involved through his wife in the WIFE letter production. The content was approved by signature and Candidate Miller partially paid for the letter. The Commissioner determines that candidate coordination lies under 44.10.323(4) ARM and *Little v Progressive Missoula, supra*. These unpaid, unreported, and undisclosed services provided by WTP in regard to the WIFE letter met the definition of coordination and should have, but were not, reported as an in-kind contribution/expense to and by Candidate Miller.

Finding of Fact No. 4: The 65 cents Candidate Miller reported he paid to Direct Mail per WIFE letter leaves 21 cents, after the 44 cent stamp cost is deducted. The 21 cents does not cover the cost of the paper, ink and envelope of each WIFE letter.

Finding of Fact No. 5: Candidate Miller received WIFE letter services in his 2010 HD 84 election, including preparation, design, layout, editing, and handling of the WIFE letter.

Finding of Fact No. 6: Candidate Miller did not pay for, disclose, or report the expense of services involved preparation, design, layout editing, or handling of the WIFE letter. ²³

²³ In September of 2012 Candidate Miller was called as a witness by WTP (ATP) in a lawsuit: *Lair, ATP, et. al. v Murry* No. CV-12-H-CCL US District Court, Montana. Candidate Miller testified to knowledge of campaign practices, including knowledge of dealing with in-kind contributions.

Finding of Fact No. 7: The WIFE letter services provided to Candidate Miller were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 8: Candidate Miller knew of, consulted on, and consented to the full range of WIFE letter services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 1: As shown by Findings of Fact 1 through 8, there is sufficient evidence to justify civil prosecution of Candidate Miller for accepting illegal corporate contributions to his 2010 HD 84 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the WIFE letter.

Sufficiency Finding No. 2: As shown by Findings of Fact 1 through 8, there is sufficient evidence to justify civil prosecution of Candidate Miller for failing to disclose and report as in-kind contributions election related expenses associated with the WIFE letter.

The Commissioner recognizes that Candidate Miller's response to the complaint does not admit any coordination with WTP (Miller answer to Ward complaint). (Commissioner's records). That response is not credible. The records listed above are sufficient to show that Candidate Miller coordinated in the production of the WIFE letter and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

2. The 2 Intro and Closing letters

Candidate Miller also engaged Direct Mail for two introduction (Intro) letters and a closing letter. (Direct Mail bill, Ex. 4). Direct Mail produced 1230 Intro letters (50 cents each for \$615 cost) and 874 closing letters (45 cents each for \$393.30 cost) for Candidate Miller. Each Intro letter mailing included the outgoing envelope, the letter, a survey, and return envelope the HD 84 voter could use to return the survey. (WTP records).

The Commissioner determined the services provided by WTP through an examination of WTP Intro and closing letter records comparable to that set out above in regard to the WIFE letter. In particular, the Commissioner found that the WTP used a standard practice of cutting and pasting information specific to a candidate, including Candidate Miller, into pages of a "master" letter used by WTP for multiple legislative candidates. A masthead for Candidate Miller was then pasted on the final text. (WTP records).

The Commissioner's review found that Candidate Miller gave multiple samples of his signature to WTP. One of those signatures was selected by WTP and scanned into a printer menu. The Intro letter was then printed in ink on 8 ½ by 11 paper (Candidate Miller's chosen signature was scan printed on the letter), folded, and inserted into an envelope along with survey and return envelope and then mailed, engaging Direct Mail's rapid fire printing capacity. The Commissioner found a Direct Mail flyer in the WTP records wherein Direct Mail described itself as a "grassroots direct mail fortress" whose equipment included "computer controlled automated insertion technology" capable of

printing, inserting, and sealing letters at rate of over 1,000 per hour. (WTP records). The closing letter was prepared using a similar approach. (WTP records).

The Direct Mail flyer also described its equipment as including a rapid fire "stamp affixer" machine. (WTP records). The Commissioner's review of WTP records determined that, except for special letters like the WIFE letter, 2010 Montana legislative election documents were mailed by Direct Mail under a presort standard rate stamp called the Patriotic Banner stamp which can be used by mailers of bulk quantities of items such as newsletters or notices.²⁴ The postage charge was 22 cents per document mailed when this stamp is used. (WTP records, Investigator's Notes).

The Commissioner determined that the Candidate Miller Intro and closing letters were mailed using the Patriotic Banner stamp. The Commissioner, under the reasoning set out in regard to the WIFE letter, determines that the 50 or 45 cents Candidate Miller paid for each for each such letter did not cover even the cost of the stamp, envelope, paper, and ink. Further, the Commissioner determined that Candidate Miller paid nothing to WTP for its services in writing, editing, layout, and processing the Intro or closing letters.

The Commissioner finds that Candidate Miller cooperated with, knew of, and approved of the services involved in the Intro and closing letters.

²⁴ WTP records and the Esp records show a systemic use by WTP and/or Direct Mail of the Patriotic Banner bulk rate stamp on documents that WTP/Direct Mail prepared, printed, and mailed for candidates.

Candidate Miller signed the letters and partially paid for the letter. The Commissioner determines that candidate coordination lies under 44.10.323(4) ARM and *Little v. Progressive Missoula, supra*. These services provided by WTP in regard to the Intro and closing letters met the definition of coordination and should have, but were not, reported as an in-kind contribution/expense to and by Candidate Miller.

Finding of Fact No. 9: Candidate Miller received Intro and closing letter services in his 2010 HD 84 election, including preparation, design, layout, editing and handling of the letters.

Finding of Fact No. 10: Candidate Miller did not pay for, disclose or report the expense of services involved preparation, design, layout editing or handling of the Intro and closing letters.

Finding of Fact No. 11: The Intro and closing letter services provided to Candidate Miller were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 12: Candidate Miller knew of, consulted on and consented to the full range of Intro and closing letter services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 3: As shown by Findings of Fact 1 through 12, there is sufficient evidence to justify civil prosecution of Candidate Miller for accepting illegal corporate contributions to his 2010 HD 84 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the Intro and closing letters.

Sufficiency Finding No. 4: As shown by Findings of Fact 1 through 12, there is sufficient evidence to justify civil prosecution of Candidate Miller for failing to disclose and report as in-kind contributions election related expenses associated with the Intro and closing letters.

The Commissioner recognizes that Candidate Miller's response to the complaint does not admit any coordination with WTP. (Commissioner's records, Miller answer to Ward complaint). That response is not credible. The records

listed above are sufficient to show that Candidate Miller coordinated in the production of the Intro and closing letters and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

3. Issue ID'd letters

The Candidate Miller Intro, WIFE, and closing letters discussed above, this Decision, did not go to all HD 84 primary voters. The SOS website reports that 1,451 people voted in the 2010 HD 84 Republican primary. (see Finding of Fact 3). WTP planned a mass mailing of "letters and glossy postcards to ...tens of thousands of likely voters and issue ID'd lists" (see this Decision, page 26) in selected legislative districts, including HD 84. Direct Mail described this mass mailing approach as a "shock and awe electoral bombing campaign." (Commissioner's records).

The issue the ID'd letters present is of just which voters were being "bombed" with the combined mailings from Candidate Miller and third parties. The Direct Mail bill to Candidate Miller states he was billed 45 cents each for 1,524 "issue" letters for a cost of \$703.80. The cover sheets to WTP's candidate files divided "issue ID'd voters" into four groups, those being: "gun" voters, "life" voters, "tax" voters, and "tax/right to work" voters.

The Commissioner, by review of WTP records, has determined that WTP provided each candidate it chose to support, including Candidate Miller, with an identified list of issue ID'd voters in their legislative district.²⁵ The Commissioner takes administrative notice that any such list of identified voters has value (*see Wittich v. Campbell*, November 17, 2009). This applies to each Candidate Miller mailing, but particularly in this issue ID'd mailing. The Commissioner finds that provision of likely voter lists, in particular issue ID'd lists, is an additional service value provided by WTP to Candidate Miller.

A review of WTP records relating to issue ID'd letters was conducted by the Commissioner comparable to that set out in regard to the WIFE letter. Based on that review the Commissioner determined that the Candidate Miller issue ID'd letters were two pages in length, printed on standard 8 1/2 by 11 inch paper stock with use of a scanned blue ink Candidate Miller signature. The Mike Miller masthead and the text of the letter were created by cutting and pasting "Mike Miller" onto the master letter used as a template for all such issue ID'd letters prepared by WTP for the 2010 Montana legislative candidates it supported.²⁶ As was the case with the Intro and closing letters the Candidate Miller issue ID'd letters were mailed using the bulk rate Patriotic Banner stamp. Specifically, four separate Candidate Miller issue ID'd letters were created (one for each group of ID'd voters) and mailed to each issue ID'd group of HD 84 voters. For example, the "gun" issue ID'd voters received a Candidate Miller letter stating his support of the 2nd amendment.

²⁵ Please See Exhibit 1 for a listing of the comparable approach in the 2010 HD 61 election.

²⁶ WTP used this issue ID's letter approach for multiple candidates in 2010 elections.

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

Finding of Fact No. 13: Candidate Miller received issue ID'd letter services in his 2010 HD 84 election, including preparation, design, layout, editing, and handling of the letters.

Finding of Fact No. 14: Candidate Miller did not pay for, disclose or report the expense of services involved preparation, design, layout editing or handling of the issue ID'd letters.

Finding of Fact No. 15: The issue ID'd letter services provided to Candidate Miller were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation.

Finding of Fact No. 16: Candidate Miller knew of, consulted on, and consented to the full range of issue ID'd services and therefore coordinated this activity with WTP and/or Direct Mail.

Sufficiency Finding No. 5: As shown by Findings of Fact 1 through 16, there is sufficient evidence to justify civil prosecution of Candidate Miller for accepting illegal corporate in-kind contributions to his 2010 HD 84 campaign in the form of coordinated in-kind expenses made by a corporation in connection with the issue ID'd letters.

Sufficiency Finding No. 6: As shown by Findings of Fact 1 through 16, there is sufficient evidence to justify civil prosecution of Candidate Miller for failing to disclose and report as in-kind contributions election related expenses associated with the issue ID'd letters.

The Commissioner recognizes that Candidate Miller's response to the complaint does not admit any coordination with WTP. (see Miller answer to Ward complaint). That response is not credible. The records listed above are sufficient to show that Candidate Miller coordinated in the production of the issue ID'd letter and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

ii. Third Party Slicks and Letters

The Commissioner determined, above, that Candidate Miller signed (thereby accepting content) and partially paid for the 8 Letters discussed above. By so acting Candidate Miller was directly involved with the 8 Letters such that he directly showed coordination with WTP (see 44.10.323(4) ARM and *Little v. Progressive Missoula*) such that the fair market value of the accompanying letter services became an in-kind contribution to Candidate Miller's campaign.²⁷

The Commissioner, by direct observation, has also identified an additional 4 documents that are election expenses in the 2010 HD 84 election in that the documents attacked Candidate Dooling. Two of these 4 documents were glossy

²⁷ The Commissioner reserves his right to claim further fair market value deficiency as to the production costs Direct Mail charged Candidate Miller.

attack flyers called "Slicks" by WTP.²⁸ The remaining two documents were attack letters sent by WTP or AAF. The Commissioner must now determine who, if anyone, is responsible to attribute, report, and disclose the value [i.e. "election expense"] of these documents.

1. The Attack Slicks

The Commissioner has, above, determined that the Assembly Action Fund is an agent of or the same as WTP. The WTP records include invoice No. 473 showing the cost of 13 Slicks used in ten 2010 Montana legislative races (Ex. 5, this Decision). The Commissioner found copies of each of the 13 Slicks in the WTP records and each of the Slicks was mailed under the Patriotic Banner bulk rate stamp. The Commissioner determines that Assembly Action Fund Slicks were printed and mailed by Direct Mail. Invoice No. 473 shows 1,503 Slicks were printed and mailed attacking Candidate Dooling on "Main Street."²⁹ Additional Slicks listed on the invoice attacked candidates: Washburn, HD 69; Bonogofsky, HD 57; Dooling, HD 84; Moran, SD 35; Welch, HD 3; Esp, HD 61; Barnhardt, HD 4; Gilman, HD 71; Flynn, HD 68; and, Arthun, SD 31.

The expense of the 1503 of the 2,537 Slicks attacking Candidate Dooling (the Main Street Slicks) was not reported or disclosed by any entity, including Candidate Miller. (Commissioner's records). The Commissioner's examination of WTP records found a second Slick attacking Candidate Dooling published

²⁸ These 2 documents are identified by direct observation. There may be more such documents that have not yet been identified.

²⁹ The Candidate Dooling "Main Street Slicks" were charged at 43 cent cost per unit, including the 22 cent stamp, making the total invoice amount \$646.29 for the Dooling Slicks.

under the name of Taxpayers for Liberty. Candidate Miller was billed and paid \$444.69 for 1034 “slicks” in the Direct Mail invoice of June 5, 2010 (Ex. 4 this Complaint).³⁰

2. The Attack Letters

The WTP records included copies of two attack letters, one prepared by WTP and the other by Montana Citizens for Right to Work (MCRTW).

a. The WTP letter

The WTP records included a copy of 4 page letter dated June 1, 2010 and authored by WTP and sent to 2010 HD 84 voters. The letter was accompanied by a two page summary of HD 84 candidate survey results focused on property rights and environmental issues.

By direct observation the Commissioner determines that the WTP letter was double side printed on standard 8 1/2 by 11 inch yellow paper under the WTP masthead. The letter was signed by Daniel Fuchs, WTP Director of Governmental Affairs. The approach taken in the survey and WTP letter resulted in the listing of Candidate Dooling’s name 11 times, always negatively, in relation to the “June 8” 2010 HD 84 primary vote while always listing Candidate Millers name positively.³¹ The WTP letter was mailed using the bulk rate Patriotic Banner bulk rate stamp. The WTP letter is a follow up to survey and therefore is consistent with WTP’s overall plan (see above) to use surveys,

³⁰ Candidate Miller’s response to the complaint did not identify the Slick that he paid for and, despite partially paying for one Slick, he further claimed he had “nothing to do with” any such Flyer of Slick. (Candidate Miller’s response to complaint).

³¹ The WTP Dooling attack letter is, with individualized adjustments, comparable to the attack letters WTP routinely sent in other 2010 elections.

survey based attack letters and Slicks in 2010 Montana legislative race, such as HD 57. Further, the topics addressed in the WTP letter are consistent with the topics of the companion issue ID'd letters mailed by Candidate Miller. Still further, the WTP attack letter in the 2010 HD 84 race was one of many comparable letters that WTP sent out in 2010 legislative races.

b. The Montana Citizens for Right to Work Letter

The WTP records further included copies of May 28, 2010 survey-based three page letter issued under the name of Montana Citizens for Right to Work. The letter was signed by Christian LeFer, as Executive Director. The letter attacked Candidate Dooling and promoted Candidate Miller in the same manner described above in regard to the WTP letter.

The Montana Citizens for Right to Work letter was, by its own language, the second such letter sent out by Montana Citizens for Right to Work to 2010 HD 84 Republican primary election voters. The Commissioner's review of WTP records determined that two Montana Citizens for Right to Work attack letters were routinely sent in 2010 Montana legislative races, most four days apart under the dates of May 24 and May 28, 2010. While the Commissioner did not observe the Candidate Miller postage, the postage stamp used by Montana Citizens for Right to Work in comparable mailings in other 2010 candidate races is a non-profit bulk rate stamp.³²

³² The non-profit stamp is prepaid (at 5 cents a stamp) but additional charges are added depending on the weight and size of the mailing. The total charge will likely be less than the 22 cent Patriotic Banner bulk rate charge. There was a Right to Work political committee registered with the COPP for the 2010 elections. That political committee reported no in-kind or other contributions to Candidate Miller.

3. The Attack Letters and Slicks are Coordinated

The Commissioner determines that the WTP and MCRTW attack letters exist, have value, and are an election expense made by WTP and/or MCRTW in the 2010 HD 84 legislative race. As an election expense, Candidate Miller will be deemed to accept the letters as a coordinated in-kind contribution if it is "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate..." 44.10.323(4) ARM.

Commissioner Vaughney found such coordination based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate, *Little v. Progressive Missoula, supra*.

The 2010 elections, including the HD 84 elections, were the second election cycle for WTP involvement in Montana's legislative races. By far the most visible and controversial part of WTP's 2008 election activity had been its use of attack letters and slicks in 2008 legislative elections. (*see Graybill v. WTP, 2010-COPP-CFP-0016*). The Commissioner takes administrative notice that a candidate endorsed by WTP in the 2010 elections would have to know of and consented to the use of attack letters and Slicks, as such use was WTP's signature electioneering brand. Further, the Commissioner interviewed two Republican primary candidates, John Ward (2008, HD 84) and John Esp (2010, HD 61). Both Ward and Esp told the Commissioner that any 2010 legislative candidate accepting WTP's endorsement had to know of or give consent to WTP's use of attack letters and Slicks.

In addition to imputed knowledge, the Commissioner finds that Candidate Miller's specific and companion use of issue ID'd letters keyed to the attack letter topics and the timing of those letters showed that Candidate Miller expected and knew his issue ID'd letters would be followed by third party attack letters or Slicks to the same group of voters. In *Little v. Progressive Missoula*, Commissioner Vaughey found that Candidate Handler coordinated with another entity, a PAC called Progressive Missoula (PM), that spent money campaigning against Handler's opponent. Commissioner Vaughey found such coordination between a candidate and political committee based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate, *supra*. The Commissioner finds that Candidate Miller meets this standard as to the attack letters are deemed a coordinated contribution to Candidate Kennedy.

Likewise, the Commissioner determines that the AAF attack Slicks exist, have value and are an election expense made by AAF/WTP in the 2010 HD 84 legislative race. As an election expense, Candidate Miller will be deemed to accept the cost of the AAF/WTP Slicks as a coordinated in-kind contribution if it is "an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate..." 44.10.323(4) ARM. Commissioner Vaughey found such coordination based on a showing of "...prior knowledge, consent and encouragement ..." of the third party expense by the candidate, *Little v. Progressive Missoula, supra*.

Finally, the Commissioner notes that Candidate Miller literally turned his campaign over to WTP/Direct Mail with his expense reports showing limited campaign activity other than the activity carried out by WTP through Direct Mail. The Commissioner further determines that Candidate Miller improperly benefited from accepting the fruits of an undisclosed, shadow campaign that produced 8 direct mail letters as well as at least 2 attack Slicks and 2 attack letters. Candidate Miller won an election in which he did not report or disclose the major expenses of his campaign and given the coordination and complexity that he consented to or was part of, the Commissioner determines that the letters and Slicks were an integral part of Candidate Miller's campaign for which he must take responsibility.

The Commissioner further determines that Candidate Miller paid for a set of 1034 attack Slicks. Any denial of Candidate Miller of affiliation with WTP/Direct Mail Attack Slicks is belied by his payment of the Direct Mail bill. The amount paid by Candidate Miller was 43 cents per Slick for each of 1034 Slicks. The Commissioner determines that a Banner Stamp was used to mail the Slick at a cost of 22 cents per stamp, leaving 21 cents to cover the cost of the paper and ink used in the Slick.³³ This leaves nothing to cover the cost of writing, designing, and layout of the Slick. The Commissioner further determines that Taxpayers for Liberty, having billed Candidate Miller through Direct Mail/WTP, is the same as or an agent of WTP.

³³ The Commissioner has taken administrative notice, this Decision page 16, that 43 cents is the minimum fair market value cost of printing and handling a Slick, exclusive of postage.

Finding of Fact No. 17: The WTP/Assembly Action Fund Slick, the Taxpayers for Liberty Slick, the WTP attack letter and the MCRTW attack letter were election expenses in the 2010 HD 84 election.

Finding of Fact No. 18: The in-kind election expenses involved in the Slicks and letters identified in FOF No. 17 were not disclosed or reported as election expenses by any entity, including Candidate Miller.

Finding of Fact No. 19: The election expenses identified in FOF No. 18 were coordinated with Candidate Miller and became in-kind contributions to Candidate Miller's campaign.

Finding of Fact No. 20: The election expenses of FOF No. 18 were made by a corporation.

Sufficiency Finding No. 7: As shown by Findings of Fact 1 through 20, there is sufficient evidence to justify civil prosecution of Candidate Miller for accepting illegal in-kind corporate contributions to his 2010 HD 84 campaign in the form of in-kind coordinated expenses made by a corporation in connection with the documents discussed in FOF No. 18.

Sufficiency Finding No. 8: As shown by Findings of Fact 1 through 22, there is sufficient evidence to justify civil prosecution of Candidate Miller for failing to disclose and report as in-kind contributions election related expenses in connection with the documents discussed in FOF No. 18.

The Commissioner recognizes that Candidate Miller's response to the complaint does not admit any coordination with WTP and denies any involvement with the attack Slicks or letters (see Miller answer to Ward complaint). That response is not credible. The records listed above are sufficient to show that Candidate Miller coordinated in the production of the Slicks/letters and violated Montana law as set out in the sufficiency findings. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Campaign contribution by a corporation and/or

acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

D. Campaign Attribution, Reporting and Documents

There are further issues involved with the attribution, reporting, and document retention by Candidate Miller's campaign.

1. Attribution of Expenditures

Candidate Miller is required to "attribute" expenditures by §13-35-225(1) MCA. Candidate Miller paid a Direct Mail bill for the partial cost of 1034 Slicks attacking Candidate Dooling, but did not attribute his name as the party making an expenditure for the Slicks.

Sufficiency Finding No. 9: The Commissioner determines that there is sufficient evidence to justify civil prosecution of Candidate Miller for failing to attribute election related expenses in connection with 1034 Slicks.

2. Reporting of Expenditures

Candidate Miller is required to report expenditures by §13-37-225 MCA. Candidate Miller received undisclosed and unreported in-kind expenditures as set out in findings of fact and sufficiency findings, above.

3. Campaign Document Retention and Production

Mike and JoAnn Miller served as the treasurer and deputy treasurer of Candidate Miller's 2010 HD 84 campaign. (Commissioner's records). By law the treasurer of Candidate Miller's campaign is required to preserve "detailed

accounts” of all expenses made for a period of 4 years. §13-37-208 MCA. The detail in the accounts must be sufficient to determine the “purpose of each expenditure” § 13-37-230(1)(a) MCA. The detail is that required to prepare “...directly from the accounting records, the reports required by Title 13.”

ARM44.10.501. Commissioner Vaughey applied that standard to require that invoices must “...describe the work performed...” so that a value can be set for in-kind services. *Motl v Citizens for More Responsive Govt.* Decided April 20, 2004, p. 15.

In turn, under Montana law the Commissioner has a right to “inspect any records, accounts or books that must be kept” (§13-37-111(2)(b) MCA). In this Matter the Commissioner requested such an inspection. Candidate Miller’s 2010 primary election campaign engaged in 18 expenses. Candidate Miller was asked to provide copies of the documents concerning those expenses. Candidate Miller produced 7 pages of documents, including the June 5, 2010 Direct Mail invoice (see Ex. 4). Candidate Miller did not produce copies of his campaign bank records, the 8 letters, the Slick or the other documents comprising each expense. Candidate Miller claimed that “I disposed of the material from previous campaigns (to 2012) like letters and flyers that were not required to be archived.” Likewise Candidate Miller claimed that his computer crashed thereby destroying any electronic record.

Candidate Dooling, in contrast, produced a copy of the complete bank record for his 2010 HD 84 campaign, showing each deposit or expenditure. Each deposit was supported by a copy of the contribution checks (including

envelopes) comprising each deposit. Each expenditure was supported by the bill from the service or materials provider, along with a copy of the flyer, envelope, calling card or other campaign material associated with the expense. (Commissioner's records).

Sufficiency Finding No. 10: The Commissioner determines that there is sufficient evidence to justify civil prosecution of Candidate Miller for failing to maintain campaign records for the four year period of time set out in Title 13 of the Montana Code.

V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS

The Commissioner issued 10 sufficiency findings in this Matter. These included: failure to attribute (Sufficiency Finding No. 9); failure to report or disclose (Sufficiency Findings Nos. 2, 4, 6, 8); acceptance of illegal corporate contributions through coordination (Sufficiency Findings Nos. 1,3,5,7); and failure to maintain campaign finance records for the required time period. (Sufficiency Finding No. 10).

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

There have been two prior coordination findings by a Montana Commissioner of Political Practices, that being in *Little v. Progressive Missoula* (Commissioner Vaughney) and *Bonogofsky v Kennedy* (Commissioner Motl). The *Progressive Missoula* matter, however, involved far less services than are

involved in this matter and the coordinating third party was a political committee, not a corporation. A political committee can contribute, subject to limits, to a candidate.

This Decision, as did *Bonogofsky v Kennedy*, finds coordination by a corporation. While *Citizens United* allows a corporation to make independent expenditures in candidate elections, it did not strike the prohibition on corporate contributions to candidates. Acceptance of a corporate contribution by a Montana candidate, whether in cash or in-kind services, is illegal in any amount. See §13-35-227(2) MCA.

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

The Commissioner hereby cautions 2014 candidates in Montana elections to avoid the sort of election entanglement or involvement with a non-profit or for-profit corporation that Candidate Miller had with WTP and/or

Direct Mail. While a corporation may independently make election expenditures (as independent expenditures or issue advocacy), the best protection a candidate has from consequences like those of this Decision is to avoid election contact, interaction or interplay with a corporation unless that contact is fully paid for. That is what the law requires and it is what fair play with an opponent should dictate.

VI. ENFORCEMENT OF SUFFICIENCY FINDINGS

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must make, a decision as the law mandates that the Commissioner ("shall investigate," *See*, §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ("shall notify", *see* §13-37-124 MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. 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 Miller has, as a matter of law, violated Montana's campaign practice laws, including but not limited to §13-35-225, §13-35-227, §13-37-225, §13-37-226, §13-37-229, §13-37-230, MCA and all associated ARMs. Having determined that sufficient evidence of a campaign practice

violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The many decisions to act or to not act made by Candidate Miller in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse for instances of failing to attribute, report and disclose, or for acceptance of corporate in-kind contributions, such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 0009. 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”)³⁴ 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.³⁵ 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 mistake and adjust future election activity to conform with the rulings.

In contrast, the parties in this Matter have, to date, been unwilling to accept or adjust to Montana’s expectations of appropriate election behavior. WTP has, to date, aggressively pursued a self-determined approach to involvement in Montana elections. Candidate Miller also demonstrates an equally self-determined view of appropriate election activity. Commissioners have rarely found it necessary to seek the full legal redress allowed by Montana law against a candidate or treasurer.³⁶ Full legal redress is imposed by a district court judge and comes only after a full due-process district court

³⁴ 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.

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

³⁶ Commissioners have filed district court enforcement actions in several Matters. After filing these Matters settled without active district court enforcement litigation.

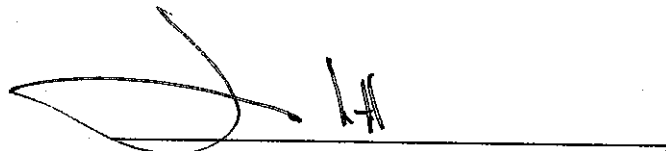
hearing whereat the candidate may provide evidence and confront witnesses, including the Commissioner. The Commissioner notes that full legal redress includes ineligibility of adjudicated offender to be a candidate for, or to hold, public office (see §13-35-106(3) MCA). In addition the offender can be assessed a fine of up to three times the amount of the unlawful contribution or expenditure (see §13-37-128 MCA).

Candidate Miller is a sitting legislator representing HD 84. As such Candidate Miller is imbued with a duty of public trust and the social debt owed by Candidate Miller needs to be assessed with that duty in mind. The violations set out above are of such significance that the Commissioner determines the same need to be placed before a Court so that, after a full due process hearing, a Court makes the decision as to application of the full reach of the consequences allowed by Title 13.

VII. CONCLUSION

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

Dated this 18th day of December, 2013.

A handwritten signature in black ink, appearing to read 'Jonathan R. Motl', is written over a horizontal line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana

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Exhibit 1
Bonogofsky v. Kennedy COPP-2010-CFP-0015

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

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

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



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

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

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

Id.

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

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

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

November 21, 2013

NRTWC BOD Members
8001 Braddock Road, 5th Floor
Springfield, VA 22160
VIA Email

Dear NRTWC Board Members and Officer:

Events in Montana involving the shenanigans of Christian Lefer and former NRTWC Director of Government Affairs Dimitri Kesari have led me to communicate to you. The irresponsible actions of President Mark Mix and his unwillingness to take responsibility for his actions have put me in a difficult position. When I got into politics and public policy in the late 1980s, I did not agree to join some sort of white-collar Cosa Nostra, nor will I accept some sort of claim that I am bound by a NRTWC Omerta.

The ends do not justify the means. And Jesus Christ is the standard, not the whims and arbitrary ethics of someone like Huck Walther and his protégé Mike Rothfeld. Politics is not simply the adjudication of power. It is about serving our Lord Jesus Christ. I know I have failed in this. It is time you recognized that your management leadership has done so, too.

We are supposed to be the good guys and gals. We are not supposed to adopt the methods of the Union Bosses.

I urge you to clean up your own house before the bad guys do it for you.

- 1) In late 2009 Iowa Rep. Kent Sorenson received the gift from a registered lobbyist, Alina Severs (now Alina Waggoner) of an airline ticket to fly to a seminar in Corpus Christi, Texas. I was told the value was roughly \$1000. The authorities could verify this by reviewing the passenger lists in late 2009 and determining who paid for the ticket. This ticket was provided by the lobbyist at the instruction of Dimtri Kesari, the lobbyist's employer and at the same time an employee of the National Right to Work Committee. Alina was employed by Mid-America Right to Work Committee, but Dimitri Kesari, an employee of the National Right to Work Committee, had hire and fire authority over her. I brought this to the attention of Mark Mix and Doug Stafford, Dimitri's employers and supervisors at the Committee. I believed at the time, and still do, that this is a violation of the Iowa Ethics Law. Mr. Mix refused to deal with it and told me not to tell him about these sorts of things.
- 2) In the 2008 and 2010 election cycles several current and past candidates or legislators received contributions to their campaigns that were unreported either completely or in part. These contributions consisted of material goods and labor services. These things of value given to candidates to advance his or her campaign were either not reported, or they were subsidized so that part of the value given can only be understood as an in-kind contribution. These



contributions were made from a non-profit corporate source in apparent violation of Iowa campaign and election law.

- 3) I have reason to believe this activity continued in the 2012 election cycle in Iowa. The program is very regular. I believe the officers almost to a man (or woman) have been involved to some extent.
- 4) The contributions discussed above consisted of the following elements:
 - A. "Field staff" paid out of monies belonging to one or more non-profit corporate entities working in election districts on the orders and at the direction of their employers and supervisors to assist with the election of multiple candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
 - B. Copy writing services paid out of monies belonging to one or more non-profit corporate entities working on the orders and at the direction of their employers and supervisors to assist with the election of multiple candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
 - C. Computer equipment belonging to by one or more non-profit corporate entities used by employees of one or more non-profit corporate entities on the orders and at the direction of the officers and executive staff of these entities to write letter copy to advance the election of multiple state candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
 - D. Printing labor services provided and paid out of monies belonging to one or more non-profit corporate entities working on the orders and at the direction of the officers and supervisors to assist with the election of multiple candidates in Iowa, and other states. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.
 - E. Printing and mail preparation equipment owned, or the use of such equipment subsidized, by one or more non-profit corporate entities and used by employees of one or more non-profit corporate entities on the orders and at the direction of the officers and executive staff of these entities to produce mailings and other election communications to advance the election of multiple state candidates in Iowa, and other states. In some cases campaign volunteers used this corporate equipment to prepare and produce such mailings for the candidates and their campaigns. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.

- F. Use of office space leased by one or more non-profit corporate entities and used by employees of one or more non-profit corporate entities on the orders and at the direction of the officers and executive staff of these entities to produce mailings and other election communications to advance the election of multiple state candidates in Iowa, and other states. In some cases campaign volunteers used this corporately leased office space to prepare and produce such mailings for the candidates and their campaigns. This is an apparent violation of Iowa (and possibly other states) campaign and election law both as to the source of the money and the fact that the contributions went unreported.

The main printing facility was relocated to Indiana in late September 2010 on the orders of Mark Mix, President, and Doug Stafford, Vice President, at the National Right to Work Committee. These two men supervised and employed Dimitri Kesari in his capacity as Director of Government Affairs.

These actions also appear to be violations of Federal Law (the Internal Revenue Code) in that the expenditures were not reported on IRS Form 990 (2010), Part IV (Checklist of Required Schedules), line 3 which asks, "Did the organization engage in any direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If 'Yes' complete Schedule C, Part I." I believe this may have occurred over many election cycles in multiple states at the direction of and with the involvement of Dimitri Kesari, Doug Stafford, Mark Mix and many other of the executive staff and employees of the National Right to Work Committee. The NRTWC IRS Form 990 for 2010 was checked with an "X" under the No column. This is the year for which I have direct knowledge and other evidence that such activities did take place.

I believe this same issue is a problem for the Mid-America Right to Work Committee whose Chairman, Cornell Gethmann, resides in Iowa. He is also a board member of the National Right to Work Committee

Sincerely,

Dennis Fusaro
P.O. Box 1829
Front Royal, VA 22630
540-622-7676



IA tax mail









Jedd Coburn <jnc@nrtw.org>

Wed, May 12, 2010 at 11:04 AM

To: Dennis Fusaro <grassrootsva@gmail.com>, "Travis C. Ratliff" <tcrtw@gmail.com>, director@iowagunowners.org

Here ya'll go.

8 attachments

-  IA HD HD 8 Shaw Tax letter _C_j_p_.pdf
11K
-  IA HD 2 Beardshear Tax _A_j_p_.pdf
11K
-  IA HD 42 Pearson Tax Letter _D_j_p_.pdf
11K
-  IA HD 73 Billings Tax Letter _E_j_p_.pdf
11K
-  IA HD HD 8 Shaw Tax letter (C))(p).doc
41K
-  IA HD 2 Beardshear Tax (A))(p).doc
38K
-  IA HD 42 Pearson Tax Letter (D))(p).doc
41K
-  IA HD 73 Billings Tax Letter (E))(p).doc
41K

From: "Mark A. Mix" <mam@nrtw.org>
Date: October 5, 2010, 8:32:25 PM EDT
To: <grassrootsva@gmail.com>
Subject: Fw: Received from DNK this PM

----- Original Message -----

From: Mark A. Mix
To: Dennis N. Fusaro
Sent: Tue Oct 05 20:31:24 2010
Subject: Fw: Received from DNK this PM

----- Original Message -----

From: Mark A. Mix
To: 'grassrootsva@gmail.com' <grassrootsva@gmail.com>; Doug Stafford
Sent: Tue Oct 05 20:30:27 2010
Subject: Re: Received from DNK this PM

Doug we need to discuss this tell dnk to stand down on dnf.

Mark

----- Original Message -----

From: grassrootsva@gmail.com <grassrootsva@gmail.com>
To: Mark A. Mix
Sent: Tue Oct 05 20:25:26 2010
Subject: Received from DNK this PM

Dennis,

This weekend Doug and I spoke about the Iowa program and here are the results of our conversation.

Yes, you are in charge of the Iowa state program but like all state directors you are required to report to me what is going on in the state and when additional projects are needed; all those requests must go through me. If Jared or I send you a request I expect cooperation. Case in point wife letter requests from today. No response from you until this evening. Stop trying to go around me. It won't work.

As for your requests:

We left you about 175k sheets of paper on hand (35 Cases) - that should be more than enough for IGO printing and small jobs. If you need more paper let me know what projects you need them for.

You only have about 15k of #10 and 15K of #9 envelopes. You will probably need more envelopes, so give me a count of what you will need and what projects they will be for.

Do not buy any large quantities of paper or envelopes without my express permission.

As for expense reports - we have a system - all expense reports are emailed to Jared (originals w/receipts can be scanned or mailed to him in Indiana), he will compile everything for me to review before payment is made. I will pay them all once a week unless one of the field staff has an unexpected need.

If you need stamps let me know for what project and I will be able to send stamps out. But since I have seen very little in printing sent over to the print shop I presume you do not need much postage.

If you need money deposited into the account please let me know what it will be used for.

I understand another riso was purchased - we do not need another riso - especially one that is not compatible with any of our other equipment. One riso is all you need for small jobs. We are not willing to pay for this or supplies for this machine since it can only be used on that machine.

This purchase should have been requested through me first. I also understand our riso repairman spent 6 hours on the phone getting that machine up and running, who is paying for his time?

This week we will need all the lists (intro/final, issues, wife) pulled and sent over to irtwmail@gmail.com so we can have them uploaded on the wiki.

Please name each file in the following format (HD90_Burgmeier_Intro_R.xls) - district number, candidate name, letter type and party id. All the intro and issue letters have been placed on the wiki. Please get them approved and send us final copy for proofing and printing.

One other concern Doug and I discussed is you pulling full-time staff off Jarad Klein's race - we have worked with him for two years and he is doing our whole program. He is one of our guys and will probably win but pulling staff from his race and not even calling the candidate is not how we have dealt with him or any other candidate we have ever worked with. I also understand that Jane Jaek is not doing most of our mail program. What happened? She was on board two years ago and earlier this year, what changed? I would like a final list of what candidates are doing what pieces of mail each will be doing. Please have that by cob on Wednesday. So we can be prepared. Thank you, Dimitri Dimitri Kesari
Director of Government Affairs
National Right to Work Committee
Sent via BlackBerry by AT&T

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

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

An expenditure that is deemed to be “coordinated” between a candidate and another entity or person is treated as though it is a contribution to and/or expense by the candidate’s own committee. Contributions to a candidate are limited in amount from any source and prohibited completely from a corporate source. (See §§13-35-227, 13-37-216, MCA). Because a coordinated third party election expense is deemed to be a contribution it becomes subject to the limits and prohibition of these laws.

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

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



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

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

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

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

Montana’s definition of coordination is similar to that of federal law. Section 44.10.323(4) ARM defines coordination as “an expenditure made in cooperation with, consultation with, at the request or suggestion of, or the prior consent of a candidate...”

Commissions and Commissioners have found coordination only in particular circumstances. The FEC, while advancing a new coordination regulation in 2012 (11 C.F.R. §109.21(d)(4)), operates under a 6 member commission structure and that commission has deadlocked on basic enforcement decisions. Richard Briffault, *Coordination Reconsidered*, Colum. L. Rev., (May 2013). In regard to coordination, the FEC has found that there needs to be more than common vendors, interrelated individuals (as in a

former employee of the candidate) and shared contacts. Thus, the FEC has not found coordination unless there is actual evidence showing the coordination between the expenditure and the candidate. *Id.*

Past coordination decisions by Montana Commissioners show similar approach to that of the federal decisions. Commissioner Argenbright considered a complaint that a political committee, Citizens for Common Sense Government (CCSG), and six candidates for the Missoula City council were coordinated or linked such that CCSG was a candidate committee subject to contribution limits. *Harmon and Sweet v. Citizens for Common Sense Government, et. al.*, December 31, 1997. Despite extensive crossover in involvement (participation in parade using same mode of transportation) and people, the Commissioner found no coordination because there were "no notes, memoranda, records of telephone conversations, correspondence or other documents" supporting "coordination, cooperation or consultation". *Id.* p. 19. Further, there was "little, if any, similarity" in campaign literature. *Id.* p. 23.

Likewise, Commissioner Higgins rejected coordination between a candidate and a political committee that engaged in attack activity against the opposing candidate. *Close v. People for Responsive Government*, December 15, 2005. The Commissioner found crossover contributors between the political committee and the candidate but found no evidence of communication or activity showing coordination between the candidate and committee.

Likewise Commissioner Unsworth rejected coordination in *Keanne v. Montanans for a True Democrat*, April 2, 2008. The Commissioner noted

crossover contributions/activity by people involved in both the candidate campaign and the political committee but found no coordination because "...there is no evidence that MTDC's expenditures for newspaper and radio ads, billboards, and campaign flyers opposing candidate Keane and supporting candidate McAdam were made with the prior knowledge, consent and encouragement of McAdam or his campaign." *Id.* p. 9. In addition the Commissioner found that the crossover communication was "limited" and that it was personal and not on behalf of the political committee. *Id.*

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

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

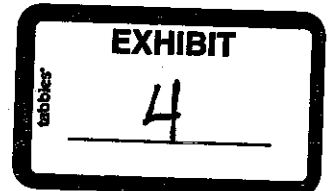
Direct Mail & Communications
P.O., Box 11695
Bozeman MT 59718
United States

Invoice: Direct Mail & Communications
INVOICE

Client Billing

Invoice #:	Miller
Date:	June 5, 2010
Amount Due USD:	\$1,191.07

Item	Description	Unit Cost (\$)	Quantity	Price (\$)
Print	Intro Letters to Abs mailed 5/10	0.50	550	275.00
Print	Intro Letter to PPV	0.50	680	340.00
Print	Larger Palm Card Printing (\$110 per 1000)	110.00	1	110.00
Print	Issue Letter	0.45	1564	703.80
Print	Wife Letter	0.65	707	459.55
Print	Final Letter	0.45	874	393.30
Print	Slicks	0.43	1034	444.62
	postage paid	-35.2	1	-35.20
Subtotal:				2,691.07
Total:				2,691.07
Amount Paid:				-1,500.00
Balance Due USD:				\$1,191.07





Invoice No.

473

INVOICE

Customer

Name Assembly Action Fund
 Address PO Box 3662
 City Lewistown State MT ZIP 59457
 Phone _____

Date 6/10/2010
 Order No. _____
 Rep _____

Qty	Description	Unit Price	TOTAL
1500	HD 3 Welch Main Street Slick	\$0.43	\$645.00
1000	HD 4 Barnhart Main Street Slick	\$0.43	\$430.00
2000	HD 57 Bonogofsky Main Street Slick	\$0.43	\$860.00
1,500	HD 71 Gilman Main Street Slick	\$0.43	\$645.00
2,000	HD 69 Washburn Main Street Slick	\$0.23	\$460.00
1,503	HD 84 Dooling Main Street Slick	\$0.43	\$646.29
2,143	SD 31 Arthun Main Street Slick	\$0.43	\$921.49
1,000	SD 35 Moran Main Street Slick	\$0.43	\$430.00
1300	HD 57 Bonogofsky Abortion Slick	\$0.43	\$559.00
1,500	HD 61 Esp Abortion Slick	\$0.43	\$645.00
1,129	HD 68 Washburn Abortion Slick	\$0.43	\$485.47
1499	HD 68 Flynn Main Street Slick	\$0.43	\$644.57
1,282	HD 84 Barnhart Slick- first class postage & two colors	\$0.54	\$692.28

Payment Details

Cash
 Check
 Credit

Name _____
 Check #: _____

SubTotal	\$8,064.10
Discount/Contribution	
Taxes State	
TOTAL	\$8,064.10

Office Use Only

also purchased \$ 3,524 in Radio

Thank you for your business!

