

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the Complaint) **SUMMARY OF FACTS**
Against Barbara Campbell, Utility) **AND**
Solutions, LLC, and Double-Tree, Inc.) **STATEMENT OF FINDINGS**

Art Wittich filed a complaint against Barbara Campbell, Utility Solutions, LLC, Double-Tree, Inc., and John Hulme on January 26, 2007 alleging that Campbell, her associated business entities, and Hulme violated numerous provisions of Montana’s campaign finance and practices statutes and rules in mailing 500 to 1000 letters opposing Wittich’s state senate candidacy just days before the November 7, 2006 general election.

SUMMARY OF FACTS

1. Wittich is a Bozeman, Montana attorney who was the Republican nominee for Senate District 32 in 2006.
2. Democratic incumbent State Senator Larry Jent, also a Bozeman attorney, was Wittich’s opponent. Senator Jent defeated Wittich by a vote of 2569 to 1638 in the November 7, 2006 general election.
3. Barbara Campbell resides in Bozeman.
4. Campbell incorporated Double-Tree in 1977 for the purpose of assisting Montana’s cities, towns, and counties in securing financing to upgrade their public water and sewer systems.
5. Campbell and the other members of Utility Solutions formed the company in 2003 to provide privately owned public utility services to properties in the Four Corners area east of Bozeman. Utility Solutions provides water and sewer services, by contract, to the Four Corners County Water and Sewer District (FCCWS District).
6. Double-Tree is Utility Solutions’ managing member.

7. Wittich filed six lawsuits between 2003-2006 on behalf of various clients, challenging the creation, operation, and actions of the FCCWS District. (See, e.g., *Lohmeier v. Gallatin County*, 2006 MT 88, 332 Mont. 39, 125 P. 3d 775.) Utility Solutions ultimately became a party to some of the lawsuits. Senator Jent's law partner, Matt Williams, was co-counsel for Utility Solutions in the Wittich litigation.
8. The litigation described in the previous paragraph was contentious, and the subject of numerous public debates before the Gallatin County Board of County Commissioners, state administrative agencies, and legislative committees. The *Bozeman Daily Chronicle* (*Chronicle*) published several newspaper stories about the lawsuits and related public proceedings.
9. Campbell had an ownership interest in two subdivisions located within the FCCWS District.
10. John Hulme was the president of the FCCWS District during a portion of the time that the lawsuits filed by Wittich were being litigated. Hulme was also a licensed realtor and marketing agent for the Four Corners subdivisions. One of the lawsuits filed by Wittich named Hulme as a defendant and sought to void the contract between the FCCWS District and Utility Solutions. Hulme and Campbell were also friends for many years.
11. Utility Solutions filed counterclaims seeking damages from one or more of Wittich's clients on October 26, 2006. Utility Solutions alleged that the lawsuits filed by Wittich's clients had adversely affected bond financing for construction of the water and sewer infrastructure needed to serve the FCCWS District's residents and subdivisions.
12. On November 2, 2006, Campbell and her attorney, John Kauffman, prepared a press release concerning the lawsuits filed by Art Wittich against Utility Solutions and others. Campbell faxed the press release to the *Chronicle* from the Double-Tree fax machine. The press release announced that after "years of harassment and failed lawsuits," Utility Solutions had decided to file counterclaims for damages. The press release included Utility Solutions' description of the lawsuits filed by Wittich, stating that "four of the six lawsuits have been dismissed as failing to state claims." The release also described Utility Solutions' damage claims, repeatedly identifying Art Wittich as counsel for the

individual clients who were trying “to take control over the existing District and cause economic harm to Utility Solutions. . .”

13. The *Chronicle* notified Campbell later in the day on November 2, 2006 that it would not write a story on the Utility Solutions’ damage claims until after the election. The *Chronicle* did not publish a story about Utility Solutions’ claims for damages until November 12, 2006.

14. Campbell was frustrated by the *Chronicle*’s decision to delay running a news story based on the November 2, 2006 press release until after the general election. Campbell decided to change the release into a letter, adding the banner “VOTE AGAINST ART WITTICH” at the top of the page. She said she made 500 to 1000 copies of the letter on her office copier, which is used by both Double-Tree and Utility Solutions for its business operations. The letter was, in substance, virtually identical to the November 2, 2006 press release. The letter was not signed, did not identify the author, and did not include a disclaimer indicating who had paid for the mailing. The envelopes used to mail the letters did not include a return address.

15. Both Campbell and Kauffman deny that Kauffman was consulted about Campbell’s decision to convert the press release into a campaign letter opposing Art Wittich. Kauffman stated that the press release was not intended to be used as anything other than a press release.

16. Campbell contacted John Hulme at approximately 3:30 or 4 pm on November 2, 2006 and asked him to pick up some stamps and envelopes and come to her office. Hulme said he purchased stamps and envelopes with his own funds. He declined Campbell’s offer to reimburse him for his purchase of the stamps and envelopes and said he did not receive reimbursement from any other entity.

17. Kris Vandersloot, an employee of Double-Tree and a long-time friend of Campbell, joined Hulme and Campbell at the Double-Tree/Utility Solutions office to prepare the “VOTE AGAINST ART WITTICH” letters for mailing. Campbell initially could not recall whether the preparation of the mailing occurred in the afternoon or evening, but subsequently indicated that it probably occurred late in the afternoon because Vandersloot was already in the office and did not have to be summoned. Campbell said

Vandersloot was not paid by Double-Tree for her work on the mailing and believes Vandersloot's participation occurred after work on November 2, 2006. When asked to produce time sheets and/or employment records, Campbell and Kauffman indicated that Vandersloot does not punch a time clock and that detailed employee records are not kept by Double-Tree.

18. Campbell used Double-Tree's mailing list to send out the "VOTE AGAINST ART WITTICH" letter. It contains names and addresses of individuals and businesses throughout Montana and other states. Campbell identified individuals and businesses with Gallatin County addresses who were involved in real estate (brokers, agents, and contractors) as potential recipients of the anti-Wittich mailing. Campbell printed labels containing the names and addresses of the Gallatin County residents on the Double-Tree mailing list. Campbell and Hulme estimate that 500 to 1000 letters were mailed on Friday, November 3, 2006.

19. Wittich became aware of Campbell's November 3, 2006 mailing on Monday, November 6, 2006, the day before the November general election. He said several realtors called and said they had received the anonymous "VOTE AGAINST ART WITTICH" letters.

20. Wittich became aware of Campbell's November 2, 2006 press release in a November 9, 2006 conversation with a *Chronicle* reporter. The reporter had called Wittich and asked him to comment on the Utility Solutions' counterclaims for damages. The *Chronicle* reporter indicated the inquiry was based on a press release received from Campbell and the reporter faxed Wittich a copy of the press release.

21. Wittich's complaint indicates that he has no knowledge that Senator Jent or Matt Williams knew about or participated in Campbell's November 3, 2006 mailing. Senator Jent denied knowing anything about Campbell's letter before it was mailed. Senator Jent said he turned down a campaign contribution from Campbell because she and Wittich were involved in a "blood feud." Williams also denied any advance knowledge of Campbell's November 3, 2006 letter, or that he and his law office staff were consulted about the letter.

STATEMENT OF FINDINGS

Campbell's response to Wittich's complaint states she was not aware of the disclaimer or reporting requirements in Title 13, Chapters 35 and 37, MCA. Campbell also states that she takes full responsibility for the decision to convert her November 2, 2006 press release to a mailing opposing Wittich's candidacy and that she did not consult with anyone in making the decision.

Despite her willingness to accept full responsibility, Campbell's eleventh hour effort to expressly advocate the defeat of Art Wittich is, because of its timing, an especially egregious violation of Montana's campaign finance and practices laws and rules. Her anonymous letter was mailed the Friday before the general election (November 3, 2006) and not received until either the Saturday (November 4) or Monday (November 6) before the November 7 election. Wittich did not become aware of Campbell's anonymous mailing until November 6, too late to make a public response before the election. Campbell's anonymous mailing expressly advocating a vote against Wittich violated several key provisions of Montana's campaign finance and practice statutes and rules.

Montana's Anonymous Contributions/Expenditures Prohibition

§ 13-35-225(1), MCA, requires that "(c)ommunications advocating the success or defeat of a candidate. . . through any. . . direct mailing, poster, handbill. . . or other form of general political advertising must clearly and conspicuously include the attribution 'paid for by' followed by the name and address of the person who made or financed the expenditure for the communication." If a political committee finances the communication, the attribution must include the "name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer." *Id.*

Campbell's November 3, 2006 mailing opposing Wittich's state senate candidacy was unquestionably anonymous – it did not identify who financed or authored the mailing and did not include the financier's or the author's address. However, the legality of Campbell's anonymous mailing requires consideration of recent court decisions balancing First Amendment rights against the public disclosure requirements of statutes like Montana's prohibition against anonymous campaign expenditures.

Recent federal court decisions have, based on the U.S. Supreme Court decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), reaffirmed the right of individuals to engage in limited anonymous campaign activities involving ballot issues, and declared statutes similar to Montana's § 13-35-225(1), MCA, unconstitutional because they applied to both ballot issue and candidate campaigns. (See, e.g., *ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004); and *Swaffer v. Cane, et al.*, 610 F. Supp. 2d 962 (E.D. Wisc. 2009).) Conversely, statutes have been upheld if they apply only to candidate campaigns and more than a *de minimis* campaign expenditure is made. (See, e.g., *McConnell v. FEC*, 540 U.S. 93 (2003); and *Majors v. Abell*, 361 F. 3d 349 (7th Cir. 2004).)

As Commissioner, I have no legal authority to decide the constitutionality of § 13-35-225(1), MCA. However, I do have an obligation to narrowly construe the facts and application of § 13-35-225(1), MCA, to avoid, if possible, constitutional questions. (See the cases cited and discussed in the November 17th, 2009 decision in the *Matter of the Complaint Against Jack Vallance* (*Vallance* decision), page 6.) A fair reading of the court decisions cited in the preceding paragraph as applied to the facts of this case suggest that the key factual determinations to be made are:

1. Was Campbell's anonymous campaign expenditure made to support or oppose a candidate, not a ballot issue?
2. Did Campbell's anonymous candidate campaign expenditure involve more than a *de minimis* (approaching zero) amount?
3. Did Campbell's anonymous candidate campaign expenditure involve express advocacy (urging a vote for or against a specific candidate)?
4. Did Campbell act alone and use only her personal resources in making the anonymous candidate campaign expenditure?
5. Was Campbell acting independently and not coordinating the anonymous campaign expenditure with a candidate or his organized supporters?

Campbell was expressly advocating a vote against state senate candidate Art Wittich. Beginning with the seminal decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), reporting and disclosure requirements in candidate campaigns, including the mandatory disclosure of independent expenditures involving express advocacy, have passed constitutional muster because of the potential for corruption and fraud in such campaigns. Conversely, the minimal potential for *quid pro quo* corruption in ballot issue campaigns and the intrusiveness of a mandatory source identification requirement for all political speech,

including independent expenditures, in controversial ballot issue campaigns have been the basis for invalidating statutes like § 13-35-225(1), MCA, as applied to ballot issues. (See *McIntyre, Swaffer, and Heller, supra.*)

Campbell's candidate campaign expenditure was not *de minimis*. Postage to mail 500 to 1000 letters was at least \$195 for 500 letters (500 x .39 = \$195) and double that amount if 1000 letters were mailed. If the fair market value of the copy machine, copy paper, mailing list, office space, and envelopes are added (See the in-kind expenditure rule, 44.10.533, ARM), the overall value of the expenditure likely exceeded \$500. If Vandersloot was paid for her time spent preparing the mailing, the expenditure is even greater.

The threshold for reporting the name, address, and employer of an individual making a monetary or in-kind campaign contribution to a candidate is \$35. (§ 13-37-229(2), MCA.) The maximum amount that an individual could contribute to a legislative candidate in 2006 was \$130. (§ 13-37-216(1)(a)(iii), MCA, and 44.10.330, ARM.)

The recent 9th Circuit decision in *Canyon Ferry Baptist Church v. Unsworth*, 556 F. 3d 1021 (9th Cir. 2009) (*Canyon Ferry*), involved Montana's in-kind expenditure rule. *Canyon Ferry* defines what constitutes a *de minimis* expenditure for the purpose of imposing reporting obligations in a ballot issue campaign.

The Church in *Canyon Ferry* had placed "Battle for Marriage" CI-96 petitions in its foyer, allowed one of its members to use the Church's copy machine to make a few dozen copies of the CI-96 petition (the member used her own paper), and the Church's Pastor had exhorted the attendees to sign the petitions in the Church's foyer as part of a regularly scheduled service. (*Id* at 1028.) A unanimous three-judge panel ruled that:

- Montana's in-kind expenditure rule, 44.10.323(2), ARM, was not, on its face, void for vagueness. (*Id* at 1028-1029.)
- Montana has a sufficient "state informational interest" to justify the mandatory reporting of expenditures and contributions, even in ballot issue campaigns. But the absence of a "minimum value threshold" for triggering reporting requirements is unconstitutional as applied to the Church's ballot issue activities in the case. (*Id* at 1028-1030 and 1031-1033.)

- Montana’s in-kind expenditure rule was unconstitutionally vague as applied to the placement of the petitions in the Church’s foyer and the Pastor’s exhortation to sign the petitions. These acts, according to the Court, did not provide objective notice that a reportable service had been provided. The Church suffered no economic (cognizable) detriment in placing a few petition pages in the foyer during a regularly scheduled service. The Church’s maintenance costs for conducting a regularly scheduled service were the same, regardless of whether its Pastor spent a portion of the program endorsing a ballot issue. The Church paid no fee for simulcast during the service, and the Pastor was paid to preach regardless of whether he endorsed the ballot issue or not. These two activities carried no “objective market value” according to the Court. (*Id* at 1030.)
- Montana’s in-kind expenditure rule was not unconstitutionally vague as applied to a parishioner’s use of the Church’s copy machine to make copies of the ballot issue petitions. Objective criteria existed for determining the value of providing the service (the copy machine) – wear and tear on the copier and what the parishioner would have been charged had she obtained the copies on the “open market.” *Id.* However, the one-time use of the Church’s copy machine was a *de minimis* expenditure, according to the Court, and subjecting the Church to Montana’s incidental political committee reporting requirements violated the Church’s First Amendment rights. (*Id* at 1033-1034.)
- The Court concluded that “there must be a level below which mandatory disclosure of campaign expenditures by ‘incidental committees’ runs afoul of the First Amendment.” (*Id.* at 1034.) But the Court also acknowledged that it “may very well be that such a level is not susceptible to dollar estimation or that all monetary contributions convey sufficiently valuable information about the supporters of an initiative to justify the burden of disclosure.” (*Id.*)

Campbell’s expenditure was not *de minimis* under *Canyon Ferry*. The postage, paper, envelopes, and copy machine had objective and calculable market value. Campbell’s extensive mailing list and the use of her business office space also had significant and calculable value. The expenditure amounted to at least several hundred dollars and likely exceeded \$500, substantially exceeding the maximum amount that may

be contributed to a candidate in the general election campaign. It clearly exceeded the *de minimis* amount (approaching zero) involved in *Canyon Ferry*. Nothing in *Canyon Ferry* or the cases cited in the *Vallance* decision suggest that even a one-time expenditure of substantially more than a *de minimis* amount is not reportable.

Campbell did not act alone or use only her personal resources. Two other individuals were enlisted by Campbell to assist in preparing the mailing. One of those individuals, Hulme, partially financed the mailing by providing postage and envelopes. Campbell used the equipment and office space of the corporation (Double-Tree) and the LLC that she manages and controls (Utility Solutions) to prepare and distribute the mailing.

Campbell's November 3, 2006 expenditure involved coordinated contributions from others (Hulme, Double-Tree, Utility Solutions, and perhaps Vandersloot). The distribution of express advocacy in coordination with others created a political committee as defined in § 13-1-101(20), MCA.

The recent federal cases cited in this decision appear to extend First Amendment protections only to independent expenditures, not coordinated candidate campaign expenditures. Campbell's anonymous campaign mailing was an independent expenditure and was not coordinated with Wittich's opponent, Senator Larry Jent, or his law partner, Matt Williams. While it was an independent expenditure, however, Campbell's anonymous campaign mailing cannot satisfy the other criteria used by the federal courts to excuse compliance with the disclaimer requirements of § 13-35-227(1), MCA, on constitutional grounds. The Campbell expenditure involved express advocacy in a candidate campaign (not a ballot issue), was more than *de minimis*, and was not limited to Campbell's own personal resources.

Based on the preceding facts, Campbell, the business entities she controls and operates (Double-Tree and Utility Solutions), and Hulme violated the anonymous campaign expenditure prohibitions of § 13-35-225(1), MCA.¹

¹ Campbell's November 2, 2006 press release to the Chronicle was not unlawful or a reportable campaign expenditure. Montana's definitions of "contribution" and "expenditure" exclude from reporting the cost of "any bona fide news story, commentary, or editorial...." See Sections 13-1-101(7)(b)(ii) and 13-1-101(11)(b)(iii), MCA.

Illegal Corporate Expenditures in a Candidate Campaign

§ 13-35-227(1), MCA, prohibits corporations from making contributions or expenditures “in connection with a candidate or a political committee that supports or opposes a candidate or a political party.” It is also illegal for a “person, candidate, or political committee. . . [to] accept or receive a corporate contribution. . . ” (§ 13-35-227(2), MCA.) Double-Tree made an in-kind expenditure opposing the candidacy of Art Wittich in violation of § 13-35-227(1), MCA. Campbell and her cohorts violated § 13-35-227(2), MCA, by using Double-Tree’s copier, other equipment, and office space (and perhaps an employee) to send out a mailing opposing Wittich’s state senate candidacy.

Wittich also alleges that Utility Solutions, an LLC, violated § 13-35-227, MCA, because Double-Tree, a corporation, is Utility Solutions’ managing member. Montana’s prohibition against corporations making contributions or expenditures to support or oppose candidates was first enacted as part of a 1912 initiative intended to reduce the Anaconda Company’s dominance of Montana politics. The Montana legislature has not expanded the corporate contribution prohibition to other non-human business entities such as limited liability companies or expressly declared that an LLC is subject to the §13-35-227 prohibitions because it may be managed by a corporation. The legislature could consider this issue, but as Commissioner, I cannot insert what has been omitted from §13-35-227, MCA. (See §1-2-101, MCA.)

Political Committee Violations

A “political committee” is “a combination of two or more individuals or person other than an individual who makes a contribution or expenditure” to support or oppose a candidate, petition for nomination, ballot issue, or an earmarked contribution. (§ 13-1-101(20), MCA.) The coordinated actions of Campbell, Hulme, and the business entities controlled by Campbell created an independent “particular candidate committee” formed to oppose Art Wittich’s state senate candidacy. (See 44.10.327(2)(a)(ii), ARM, and page 8 of the Commissioner’s “Pink Book, Accounting and Reporting Manual for Political Committees.”) There is no

evidence that the Campbell committee was formed to support or oppose any other candidate.

The Campbell committee violated several of Montana's campaign organization and reporting requirements.

- The Campbell committee violated § 13-37-201, MCA, by failing to file an organizational statement identifying its officers, treasurer, and campaign depository within five days after making the November 3, 2006 expenditure.
- The Campbell committee's November 3, 2006 expenditure was reportable as an independent expenditure within 20 days after the November 6, 2006 general election. (§ 13-37-226(3), MCA.) It was not reported.
- The committee had continuing post-election reporting obligations until it filed a closing/termination report. (44.10.409, ARM.)

CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, a civil penalty action under §13-37-128, MCA, is warranted against Campbell, Double-Tree, Utility Solutions, and Hulme.

Dated this 17th day of November, 2009.



Dennis Unsworth
Commissioner of Political Practices