

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

<p>Commissioner v. Western Tradition Partnership (now named American Tradition Partnership) and all others similarly involved</p> <p>No. COPP-2010-CFP-032</p>	<p style="text-align: center;">Summary of Facts and Finding of Sufficient Evidence to Show a Violation of Montana’s Campaign Practices Act</p> <p style="text-align: center;">Campaign Violation Findings Also Include Findings Against Direct Mail, Christian LeFer, and Allison LeFer.</p>
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Art Wittich of Bozeman was a candidate for the Montana Senate, District 35, (SD 35) in a 2010 Republican primary election. On September 3, 2010 Debra Bonogofsky of Billings filed a complaint with this Office against Dan Kennedy (a 2010 candidate in House District 57) “and also the other (WTP)¹ supported candidates...” Ms. Bonogofsky’s complaint against Candidate Kennedy resulted in a sufficiency Decision issued by this Office (*Bonogofsky v. Kennedy*, COPP 2010-CFP-15).

Following the *Kennedy* Decision Ms. Bonogofsky was consulted and directed that the “other candidates” portion of her complaint be applied to additional candidates according to evidence gathered by the Commissioner

¹ Western Tradition Partnership is a not for profit corporation incorporated in the State of Colorado.

when investigating the *Kennedy* complaint. This application included a complaint against Candidate Wittich. On January 24, 2014 the Matter of *Bonogofsky v. Wittich*, COPP 2010-CFP-31 was noticed as a complaint. This Matter (*Commissioner v. WTP*, COPP 2010-CFP-32) was filed as a companion complaint with *Bonogofsky v. Wittich*, COPP 2010-CFP-31.

The Decision in this Matter is released simultaneously with the Decision in *Bonogofsky v. Wittich*, COPP 2010-CFP-31.

I. INTRODUCTION

The 2010 SD 35 Republican primary election involved four candidates: Shawn Moran, Dave Ponte, Bruce Samson and Art Wittich. On June 8, 2010, a legislative primary was held and Candidate Wittich advanced as the Republican candidate for the general election with 1,835 votes.² (Secretary of State (SOS) website). Candidate Wittich also won the general election in November of 2010 with 6,625 votes to Democrat Diane Elliott's 2,962 votes. (SOS website).

The complaint in *Bongofsky v. Wittich*, No. COPP-2010-CFP-31, raised issues, now decided, relating to corporate contributions and coordination. The Commissioner filed the Complaint in this Matter as a means to discuss and decide the companion campaign practice actions of entities and individuals who also were involved with corporate contributions and coordination with

² Shawn Moran received 859 votes, Dave Ponte received 153 votes, and Bruce Samson received 808 votes. (Secretary of State (SOS) website).

Candidate Wittich, as described in the companion Decision *Bongofsky v. Wittich*, No. COPP-2010-CFP-31.

An election expense such as those addressed in this Decision falls into one of three types. The first type is that of a candidate election expense. A candidate election expense includes money spent in an election that is contributed to and expended by a candidate. Candidate election expenses are, of course, subject to prohibitions and contribution limits and they must be attributed, disclosed and reported by the candidate. A candidate election expense includes a third party election expense coordinated with a candidate, as a coordinated expense is deemed to be an in-kind contribution to a candidate.

The companion *Bongofsky v. Wittich* Decision determined that the WTP expenses were election expenses in the 2010 SD 35 election. The Decision has further determined that the WTP expenses are an in-kind election contribution to Candidate Wittich, through coordination.

The *Bongofsky v. Wittich* Decision means the WTP election expenses do not fall into one of the remaining two types of election expense; that is, the WTP expenses are neither an independent expenditure nor an issue advocacy expenditure. An independent expenditure is that of a third party entity independent of a candidate, but focused on a candidate in the election. Any “independent expenditure” must be disclosed, reported, and attributed, albeit by the third party rather than the candidate. An independent expenditure,

however, is not attributed as a contribution to a candidate and therefore it is not subject to contribution limits or to reporting by a candidate.

The third type of election expense is that made coincident to the election by a third party entity independent of a candidate, but with the use of the money focused on an issue and not on a candidate. This election expense is called issue advocacy. This “issue advocacy” expense is not considered to be a candidate related expense and therefore is not subject to campaign practice requirements. Specifically, Montana law does not require that an issue advocacy expense be attributed, reported or disclosed.³

II. SUBSTANTIVE ISSUES ADDRESSED

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

III. DISCUSSION

This Decision does not repeat, but incorporates and relies on, the determinations and reasoning set out in *Bonogofsky v. Wittich*. The *Bonogofsky v. Wittich* Decision determined that certain 2010 SD 35 election expenses made by or orchestrated by WTP were coordinated with Candidate Wittich such they became in-kind election contributions to Candidate Wittich.

The basis for a finding of coordination, as explained by *Bongofsky v. Wittich*, is that Candidate Wittich and WTP acted together such that in-kind election expenses made by WTP became in-kind election contributions to

³ The 2012 Montana Legislative session considered several bills that would have required reporting and 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.

Candidate Wittich. *Bongofsky v. Wittich* identified the following 2010 SD 35 coordinated election expense as made by, or under the direction of, WTP:

1. "7 Letters" printed by Direct Mail⁴ and signed by Candidate Wittich or his wife.
2. "1 attack letter" –attributed by WTP.

Coordination is a two way street. *Bongofsky v. Wittich* found sufficient evidence that Candidate Wittich coordinated illegal WTP corporate election expenses as an in-kind contribution to his campaign. This companion Decision finds sufficient evidence that WTP, as the other part of the coordinated expense, made illegal coordinated corporate election expenses on behalf of Candidate Wittich.

IV. FINDINGS

The Commissioner incorporates the *Bongofsky v. Wittich* findings as to WTP election expenses in the 2010 Montana SD 35 election. These findings include a finding of WTP election expenses and WTP coordinated election expenses. In addition, *Bongofsky v. Wittich* found that WTP and Direct Mail and Communications, Inc. were Colorado corporations. Further, *Bongofsky v. Wittich* found that the actions of other third parties, including those of Allison LeFer and Christian LeFer were the actions of WTP.

In this Matter the Commissioner further finds that WTP filed articles of amendment with the Colorado Secretary of State in December of 2010

⁴ Direct Mail and Communications, Inc. is a Colorado for-profit corporation.

changing the name of the corporate entity to American Tradition Partnership. (Commissioner's Records). This Decision and any enforcement of this Decision will be taken against American Tradition Partnership and/or Western Tradition Partnership.

V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS

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

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

individuals and corporate entities who/that were not named in the COPP complaint.

The Commissioner finds that sufficient evidence exists to show that Direct Mail, Christian LeFer and Allison LeFer are responsible for or involved in some of the WTP corporate expenses and therefore sufficient evidence exists to show that each also has violated Montana's Campaign Practices Act. The Commissioner may expand this list to include additional third party entities as further discovery is conducted in regard to candidate Wittich's campaign.

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 act on a violation as the law mandates that the Commissioner ("shall investigate," See, §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient evidence" of a violation the Commissioner must ("shall notify", See §13-37-124 MCA) initiate consideration for adjudication.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that WTP *et. al.*⁵ have, as a matter of law, violated Montana's campaign practice

⁵ *Et. al* means Direct Mail, Christian LeFer and Allison LeFer.

laws, including but not limited to §13-35-227 MCA. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect adjudication of the violation and/or the amount of the fine.

The many decisions to act or to not act made by WTP, *et. al.* in this matter were choices. Excusable neglect cannot be applied to such choices. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009. Montana has determined that political discourse is more fairly advanced when election funding is kept fair and, through disclosure, the public is informed as to the identity of those who seek to influence elections. There can be no excuse, but only punishment and for an illegal contribution such as are involved in this matter.

Likewise, the amounts of money are too significant to be excused as *de minimis*. See discussion of *de minimis* principles in *Matters of Vincent*, Nos. CPP-2013-CFP-006 and 009. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified, §13-37-124 MCA. This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil adjudication under §13-37-124 MCA. This

matter will now be submitted to (or “noticed to”)⁶ the Lewis and Clark County attorney for his review for appropriate civil action, §13-37-124(1) MCA. Should the County Attorney waive the right to adjudicate (§13-37-124(2) MCA) or fail to adjudicate within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible adjudication. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil adjudication as the Commissioner has discretion (“may then initiate” *see* §13-37-124(1) MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a complaint in district court against any person who intentionally or negligently violates any requirement of Chapter 37, including those of §13-37-226. (*See* § 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

VII. CONCLUSION

Based on the preceding discussion, as Commissioner, I find and decide that there is sufficient evidence to show that WTP *et. al.* violated Montana’s

⁶ Notification is to “...the county attorney in which the alleged violation occurred...” §13-37-124(1) MCA. The failures to report, including acceptance of illegal corporate contributions, occurred in Lewis and Clark County.

campaign practices laws. This matter is hereby submitted to (or “noticed to”) the Lewis and Clark County Attorney for his review for appropriate civil action.

Dated this 31st day of March, 2014.

A handwritten signature in blue ink, consisting of a large, stylized loop followed by the initials "JRM", is positioned above a solid horizontal line.

Jonathan R. Motl
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