

BEFORE THE COMMISSIONER
OF POLITICAL PRACTICES OF THE STATE OF MONTANA

Madin v. Sales No. COPP-2010-CFP-029	Summary of Facts and Findings of Sufficient Evidence to Show a Violation of Montana's Campaign Practices Act
---	---

Scott Sales of Livingston was a candidate for County Commissioner, Gallatin County, Montana in the 2010 Republican primary election. On January 14, 2013 Kent Madin of Bozeman, Montana filed a COPP complaint related to Mr. Sales' 2010 campaign for the Gallatin County Commission.

Commissioner James Murry dismissed the Madin complaint in a one page letter dated April 23, 2013 declaring "no evidence of coordination." On January 24, 2014 Commissioner Jonathan Motl reopened the Madin complaint, assigning the complaint the COPP number listed above. The Notice of Reopening noted that since April 23, 2013 the Commissioner's Office completed investigations in 5 comparable matters and issued 5 Decisions: *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023.

The above listed Decisions determined actions and evidence related to coordination and corporate contribution issues that were not considered in the April 23, 2013 Murry dismissal letter. Accordingly, the April 23, 2013 letter was withdrawn in its entirety and this Matter was reopened. The Notice to Reopen noted that Mr. Madin was contacted and agreed that his complaint should be reopened for the further consideration, investigation, and Decision.

I. INTRODUCTION

This Decision presents and decides several issues dealing with non-candidate expenditures in a Montana election, in this case a primary election for nomination for a seat as county commissioner. These expenditure issues have confounded Montana political candidates and this Office for the past three election cycles.

The 2010 Gallatin County Commissioner District #2 election involved a Republican primary election between the incumbent Commissioner Joe Skinner and Scott Sales. (Gallatin County election department). On June 8, 2010, a primary vote was held and Candidate Skinner prevailed as the Republican candidate for the general election with 6,020 votes to Candidate Sale's 5,226 votes. (*Id.*). Candidate Skinner also won the general election in November of 2010 with 19,472 votes to Democrat Carol Stahl's 10,731 votes.

Candidate Sale's campaign finance filings report his campaign raised and spent approximately \$22,500. (Commissioner's records). In turn, Candidate Sales largest primary election expenditure was to Direct Mail and

Communications, Inc. in the amount of \$12,397.49. Direct Mail provided Candidate Sales all materials and services for letters and other documents directly mailed to Gallatin County voters. (see, this Decision, below, Commissioner's records). As identified and discussed in prior Decisions¹, Direct Mail documents and services provided 2010 candidates, such as candidate Sales, with value in the form of unpaid services and materials. This unreported, undisclosed 2010 Gallatin County election activity is the focus of this Decision.

II. ELECTION EXPENSES

This Decision identifies and discusses 2010 Gallatin County election expenses that were not reported or disclosed by a candidate or third party. The Commissioner was able to identify these undisclosed candidate election expenses, in part, based on a pattern of conduct between 2010 candidates and several corporate entities organized to work in conjunction with a lead corporation, Western Tradition Partnership (WTP).² WTP is (or was) a non-profit corporation organized in the state of Colorado. Further, the Commissioner reviewed an archive of WTP records related to the 2010 elections in Montana. WTP's records, at one time in the possession of the

¹ *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; *Bonogofsky v. Prouse*, COPP-2010-CFP-033; *Bonogofsky v. Wagman*, COPP-2010-CFP-035 and *Clark v. Bannan*, COPP 2010-CFP-023.

² WTP was involved in 2008 and 2010 candidate elections in Montana. 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.

Commissioner’s office, were transferred to the possession of the Federal Bureau of Investigation (FBI).³ These “WTP records” and the insights gained from other investigations allowed the Commissioner to identify otherwise undisclosed and unreported Gallatin County 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 candidate. This expense, however, is not attributed as a contribution to a

³ There are 5 boxes of documents, first held by the Commissioner, transferred to 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 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.⁴

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 by the above listed Decisions and by those that will shortly follow. We are a

⁴ 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.

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) Corporate contributions; 3) Reporting and disclosure; and 4) Retention and production of campaign accounts and records.

IV. DISCUSSION AND FINDINGS

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

Finding of Fact No. 1: Scott Sales was a 2010 candidate for the Republican Party nomination for County Commissioner of Gallatin County, Montana. Joe Skinner also sought the same 2010 nomination by the Republican Party. (Gallatin County election office).

Finding of Fact No. 2: The primary vote in Montana took place on Tuesday, June 8, 2010. Candidate Skinner won the Republican primary election for District 2, County Commissioner, Gallatin County. (*Id.*).

Mr. Sales, as a candidate in a 2010 Gallatin County Republican primary election, was required by law to disclose, report, and attribute all contributions to, and expenses by, his 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 Sale’s Campaign

Candidate Sales, 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 elections. (WTP “Confidential Overview,” March 1, 2009).⁵ WTP’s Confidential Overview describes its planned use of documents in election activity forecast for 2010 Montana elections:

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...”

⁵ 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.

A separate WTP document, the WTP 2010 Election year power point presentation,⁶ illustrates the tenor of 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 Sales 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 2010.⁷ 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).

Likewise, Christian LeFer is an agent of and the same as WTP as to any Candidate Sales 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).

⁶ Also produced to the Commissioner by Ms. Loendorf.

⁷ 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.

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 reported 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).

B. Coordinated Expenses

Complainant Madin raised coordination and corporate contribution issues. Candidate Sales 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 Sales 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 2.

1. Three Direct Mail Letters

Candidate Sales' campaign finance reports show payment of \$12,397.49 to Direct Mail for primary election services. Candidate Sales refused production of any campaign documents, including the invoice for these Direct Mail services.⁸ A February 24, 2014 response letter from Candidate Sales attorney asserted that the copy of the "Scott Sales" ledger sheet⁹ provided Candidate Sales by the Commissioner was "not remotely" reflective of his actual campaign activity.

That "not remotely" assertion by Candidate Sales is objectively false and is therefore rejected by the Commissioner for the reasons set out below. The Commissioner's review of WTP records has determined that the basic group of 7 letters produced by WTP and provided a WTP supported candidate consisted of an introduction or "Intro letter" with survey, a "WIFE" letter,¹⁰ four issue ID'd letters (gun, life, tax, spend/Right to Work) and a closing letter. The Direct

⁸ Candidate Sales engaged Helena attorney Chris Gallus who sent back a two page letter (with no attached documents) disputing the authority of the COPP to investigate Candidate Sales' campaign and maligning the motive of the Commissioner in conducting the investigation. Candidate Sales produced two pages of documents during the prior investigation conducted by Commissioner Murry.

⁹ Direct Mail listed the number of letters provided a candidate on form printed on the front of a candidate's folder (the "ledger"). A copy of the Scott Sales ledger sheet is attached as Ex. 3.

¹⁰ The Commissioner's review determined that WTP identified a letter from a candidate's wife as a "WIFE" letter.

Mail Scott Sales ledger shows that Candidate Sales and Direct Mail anticipated collaboration to produce these 7 letters.¹¹

WTP planned a 2010 campaign focused on use of surveys followed by thousands of letters and glossy postcards. (This Decision, pp. 7-8). Direct Mail colorfully described this mass mailing approach as a “shock and awe electoral bombing campaign.”¹² The Commissioner determines that the size of the election district (the entirety of Gallatin County) caused Candidate Sales and WTP to adjust the scope of the Candidate Sales direct mail campaign to three letters.¹³

The Commissioner’s determination is, in part, based on Candidate Sales’ campaign finance reports which show payments for 3 or 4 “mailers.” The determination is also based on a review of the WTP records. Those records included copies of a May 10, 2010 Intro letter (with accompanying survey), an undated Sandie Sales WIFE letter and a June 4, 2010 closing letter. The cost¹⁴ of those three letters is shown by the ledger as \$13,848.70 and therefore within reach of the \$12,397.49 amount Candidate Sales reported as payment to Direct Mail. The Commissioner concludes that the collaboration between

¹¹ The Commissioner used invoices or review of a copy of a letter to show that Direct Mail printed 8 letters in *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023. Seven letters (one, rather than two, Intro letters) were produced in *Bonogofsky v. Wittich*, COPP 2010-CFP-031, *Bonogofsky v. Prouse*, COPP 2010-CFP-033 and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

¹² There were WTP candidate ledgers in *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023, *Bonogofsky v. Prouse* COPP-2010-CFP-033, *Bonogofsky v. Wittich* COPP-2010-CFP-031 and *Bonogofsky v. Wagman*, COPP-2010-CFP-035.

¹³ Candidate Sales paid Direct Mail \$12,397.49. That is the largest amount paid to Direct Mail by a WTP-supported 2010 candidate for Montana elected office.

¹⁴ Cost as used in this sentence means a subsidized cost since the Commissioner decides that WTP/Direct Mail provided uncompensated services and materials to Candidate Sales.

Candidate Sales and WTP, at a minimum, included the Intro, WIFE and closing letters.

This issue could have been definitively resolved had Candidate Sales produced a copy of the Direct Mail invoice. Candidate Sales was required by law to keep and produce such records but refused to produce documents, including the Direct Mail receipt.¹⁵ Candidate Sales refusal to produce records is explicit: “I have provided a copy of the cancelled check to Direct Mail indicating I paid them for the service they provided. I do not have additional correspondence, records or other information for you other than what is maintained in the reports filed with your office.”¹⁶ (Sales’ response letter of March 8, 2013.)

In addition to being illegal, the document refusal by Candidate Sales triggers evidentiary standards used by the Commissioner. Under Montana’s rules of evidence the Commissioner may draw inferences (§26-1-501 MCA) against Candidate Sales because “weaker and less satisfactory evidence is offered and it appears that is within the power of the party to offer stronger and more satisfactory evidence...” §26-1-303(5) MCA. Applying that law to this Decision means that Candidate Sales had and has the ability to produce evidence showing exactly what he did purchase from Direct Mail/WTP. Candidate Sales did not and does not do so. Accordingly, the Commissioner determines that the “Scott Sales” ledger evidence presents reliable evidence as

¹⁵ See this Decision, pp. 25-27. The Direct Mail receipts that have been produced by candidates corroborate the Direct Mail ledgers. The Direct Mail receipt in *Ward v. Miller*, COPP 2010-CFP-021 included a cost charged for an Assembly Action Fund Slick.

¹⁶ All WTP supported Candidates, to varying degrees, refused to produce campaign documents.

to letters mailed by Direct Mail/WTP on behalf of Candidate Sales.¹⁷ It is evidence as Candidate Sales produced no countering evidence.

Based on the above analysis, the Commissioner determines that the minimum number of letters sent out by Direct Mail for the Sales campaign is the number listed in the “Scott Sales” ledger for the Intro, WIFE and closing letters. Accordingly, the Commissioner determines that, at a minimum, Candidate Sales and Direct Mail produced 26,462 candidate Sales letters consisting of 9,576 Intro letters, 7,310 WIFE letters, and 9,576 closing letters. (Ex. 3).

The 26,462 Letters are an election expense, with a payment of \$12,397.49 reported by Candidate Sales. This Decision determines whether or not the complete expense of the 26,462 letters was reported and disclosed by Candidate Sales, including value of services. *See 44.10.323 (2) ARM* and above. Under COPP regulations, Candidate Sales was required to report as an in-kind contribution the “total value of the services” received as part of the preparation of these 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 candidate is a contribution.¹⁸ In turn, all contributions must be reported and

¹⁷ Should this Matter not settle and progress to litigation Candidate Sales will be required to produce documents, including the Direct Mail receipt.

¹⁸ The Commissioner identified 6 documents constituting an election expense that were mailed to 2010 Gallatin County voters. These documents either promoted Candidate Sale’s campaign or attacked another primary opponent’s campaign. Those 6 documents consist of: 3 candidate

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.”¹⁹

a. The Intro and Closing letters

Candidate Sales engaged Direct Mail for an Intro letters and a closing letter. (Ex. 3). Each Intro letter mailing included the outgoing envelope, the letter, a questionnaire, and return envelope the Gallatin County voter could use to return the survey. (WTP records).²⁰

The Commissioner determined the services provided by WTP through an examination of WTP records showing Intro and closing letter use. In particular, the Commissioner found that the WTP used a standard practice of cutting and pasting information specific to a candidate, including Candidate Sales, into pages of a “master” letter (employing standard phrases) used by WTP for multiple 2010 candidates for public office. A masthead for Candidate Sales was then pasted on the final text. (WTP records).

letters printed by WTP/Direct Mail and 3 Slicks. Additional campaign documents, produced under order of a court, may reveal further such documents.

¹⁹ 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.

²⁰ The Commissioner determines that there is no other cost entry on Candidate Sales’ campaign finance records that can justify a claim that Candidate Sales otherwise paid for any of these items. Further, Direct Mail provided this full range of supplies, materials and services for other 2010 Montana candidates for elective office.

The Commissioner's review found that WTP supported candidates gave multiple samples of their signature to WTP.²¹ 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 Sales' chosen signature was scan printed on the letter), folded, and inserted into an envelope along with questionnaire 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 most 2010 Montana 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.²² The WTP records include multiple copies of the

²¹ The investigation failed to locate a sample Scott Sales signature in the WTP records. However, the Scott Sales Intro and Closing letters are 4 and 3 pages in length, respectively, and use an orange accent color on the first page with an identical blue ink printed signature on the last page. The Commissioner determines that the Scott Sales signature was scanned into the Direct Mail printer and print-signed just as were signatures for other 2010 candidates supported by WTP.

²² 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.

March 10 Sales Intro letter affixed with a Banner stamp.²³ The postage charge was 22 cents per document mailed when this stamp is used. (WTP records, Investigator's Notes).

The Commissioner takes administrative notice of a minimum cost of printing and handling a one-page mailer, set at 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 one page mailers. This comes to a charge of 56 cents per mailer, exclusive of postage.²⁴

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 sets fair market value for a comparable service.

Turning to valuation of the Candidate Sales Intro and closing letters, a base value is established by Allegra's charge of 56 cents to print, fold, and address a one page mailer. The Commissioner determines that the Direct Mail services provided to Candidate Sales in the production of the Intro and closing letters involved printing, folding, and inserting multiple pages (as well as a return envelope in the case of the Intro letters) into an envelope as well as sealing, stamping and addressing the envelope. The Direct Mail services were

²³ The Sales' June 4, 2010 closing letter was mailed with a 44 cent stamp. (WTP records.)

²⁴ 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.

objectively greater than the Allegra services provided for the less complicated mailer. The Commissioner therefore determines that the 50 or 45 cents (28 to 1 cent after postage)²⁵ Candidate Sales paid for each of the Intro or closing letters did not cover the cost of the stamp, envelope, paper, and ink. Further, the Commissioner determines that Candidate Sales paid nothing to WTP for its services in writing, editing, layout, and processing the Intro or closing letters.

The Commissioner finds that Candidate Sales cooperated with, knew of, and approved of the services involved in the Intro and closing letters. Candidate Sales print-signed the letters and partially paid for each 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 been, but were not, reported as an in-kind contribution/expense to and by Candidate Sales.

Finding of Fact No. 3: Candidate Sales received Intro and closing letter services in his 2010 Gallatin County Commissioner election, including preparation, design, layout, editing and handling of the letters. (Commissioner's records).

Finding of Fact No. 4: Candidate Sales did not pay for, disclose or report the full expense of services involved preparation, design, layout editing or handling of the Intro and closing letters. (Commissioner's records).

Finding of Fact No. 5: The undisclosed and unreported Intro and closing letter services provided to Candidate Sales were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation. (Commissioner's records).

²⁵ Postage was 22 cents for the Intro letter and 44 cents for the closing letter. (WTP records.)

Finding of Fact No. 6: Candidate Sales 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. (Commissioner's records).

Sufficiency Finding No. 1: As shown by Findings of Fact 1 through 6, there is sufficient evidence to justify civil prosecution of Candidate Sales for accepting illegal corporate contributions to his 2010 Gallatin County campaign in the form of coordinated in-kind expenses made by a corporation in connection with the Intro and closing letters.

Sufficiency Finding No. 2: As shown by Findings of Fact 1 through 6, there is sufficient evidence to justify civil prosecution of Candidate Sales 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 Sales' response to the complaint does not admit any coordination with WTP. (Commissioner's records). That response is not credible. The records listed above are sufficient to show that Candidate Sales 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.*

b. The WIFE LETTER

The Commissioner's review of WTP records included an observation of a 6 page Sandie Sales letter that was printed with blue ink on pink off-size (10" by 8") paper. The Commissioner further observed that the Sandie Sales WIFE

letter was placed in a pink envelope, hand addressed, and mailed with a 44 cent stamp.

The Commissioner observed that the Sandie Sales WIFE letter bemoaned the negative campaigning against Scott, discussed how Sandie and Scott met, praised their marriage, and extolled Scott Sales' virtues. 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.²⁶ 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 each WIFE letter.²⁷ After mock-up, the Sandie Sales WIFE letter was printed, inserted into a hand addressed pink envelope and a 44 cent stamp was used to mail the envelope.

The Commissioner has, based on information in a prior Decision, determined that the 65 cents WTP/Direct Mail showed as charged for each such WIFE letter was not fair market value for cost of materials, even without valuing the services.²⁸ The Commissioner determines, based on the above information, that there were writing, editing, layout, and production services of substantial value provided by WTP to Candidate Sales in connection with the Sandie Sales WIFE letter (*see Daubert v MCC/Orvis*). The Commissioner

²⁶ Scott Sales confirmed this information gathering process in writing to the Commissioner's investigator.

²⁷ 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 [such as recurrent use of "you see" as an introduction to a sentence] between WIFE letters.

²⁸ The minimum fair market value of printing and handling a WIFE letter is set at \$1.34 per WIFE letter. *Madin v. Burnett* 2012-CFP-052.

further determines that Candidate Sales cooperated with, knew of, and approved of the WTP services involved in the Sandie Sales WIFE letter. Candidate Sales was directly involved through his wife in the WIFE letter production. The content was approved by signature. 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 Sales.

Finding of Fact No. 7: Candidate Sales received WIFE letter services in his 2010 Gallatin County election, including preparation, design, layout, editing, and handling of the WIFE letter. (Commissioner's records).

Finding of Fact No. 8: Candidate Sales did not pay for, disclose, or report the expense of services involved preparation, design, layout editing, or handling of the WIFE letter. (Commissioner's records).

Finding of Fact No. 9: The WIFE letter services provided to Candidate Sales were provided by a corporation, whether through the WTP corporation or the Direct Mail corporation. (Commissioner's records).

Finding of Fact No. 10: Candidate Sales 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. (Commissioner's records).

Sufficiency Finding No. 3: As shown by Findings of Fact 1 through 10, there is sufficient evidence to justify civil prosecution of Candidate Sales for accepting illegal corporate contributions to his 2010 Gallatin County Commissioner campaign in the form of coordinated in-kind expenses made by a corporation in connection with the WIFE letter.

Sufficiency Finding No. 4: As shown by Findings of Fact 1 through 10, there is sufficient evidence to justify civil prosecution of Candidate Sales for failing to disclose and report as in-kind contributions election related expenses associated with the WIFE letter.

2. Third Party Slicks

The Commissioner determined, above, that Candidate Sales or his wife signed (thereby accepting content) and partially paid for the 3 Letters discussed above. By so acting Candidate Sales was directly involved with the 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 Sales' campaign.²⁹

The Commissioner, by direct observation, has also identified an additional 3 documents, each a glossy flyer called a "Slick" by WTP.³⁰ Each Slick attacks opposing candidate Skinner or promotes Candidate Sales. The Commissioner must now determine who is responsible to attribute, report, and disclose the value [i.e. "election expense"] of these documents.

Two attack Slicks ("You lie", Joe Skinner) and ("spending exploded" under Skinner) were attributed to WTP.³¹ A third Slick praising Scott Sales as

²⁹ The Commissioner reserves his right to claim further fair market value deficiency as to the production costs Direct Mail charged Candidate Sales.

³⁰ These 3 documents are identified by direct observation. There may be more such documents that have not yet been identified.

³¹ WTP identified itself as a "501(c)4 organization that does not endorse, support or oppose candidates for election."

a Tea Party leader was attributed to Taxpayers for Liberty.³² Each of these three slicks was mailed to Gallatin County voters.

Candidate Sales will be deemed to accept the Slicks as a coordinated in-kind contribution to his campaign 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*. Specifically, Commissioner Vaughey found that Candidate Handler coordinated with another entity, a PAC called Progressive Missoula 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 2010 elections, including the Gallatin County Commissioner election, 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

³² Taxpayers for Liberty identified itself as a “501(c) 4 organization that does not endorse, support or oppose candidates for election.”

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.

The Commissioner determines that Candidate Sales had prior knowledge of, consented to and encouraged WTP actions, including the attack Slicks. Accordingly, the Commissioner determines that Candidate Sales coordinated with WTP such that attack Slicks became part of Candidate Sales campaign for which he must take responsibility.³³

The Commissioner rejects Candidate Sales post-election characterization of WTP/Direct Mail as a "vendor." WTP's 2010 master plan for electing candidates for public office in Montana was that of a participant, not a vendor. WTP's connection to and use of Direct Mail for its "shock and awe electoral bombing campaign" is established. WTP's independent fundraising to support its 2010 Montana electoral activities is established. The invasive reach of WTP into 2010 Candidate campaigns is established as Candidate Sales is the 9th 2010 candidate for Montana public office investigated by this Office.

WTP has a campaign relationship, as opposed to a vendor relationship, with candidates. Candidate Sales has his own Direct Mail ledger, indicating a campaign relationship with WTP. Candidate Sales' campaign reports show only two extensive campaign activities --- yard signs and Direct Mail

³³ The Commissioner declines to include the Taxpayers for Liberty slick in this Decision.

campaigning. If there was objective evidence of something more arms-length then Candidate Sales should have produced emails, draft letters, receipts and other documentary proof of his independent, non-coordinating actions. Candidate Sales produced no such proof. Candidate Sales' unsupported assertions of independence from Direct Mail/WTP are overwhelmed by objective evidence and are not credible.

Finding of Fact No. 11: The WTP Slicks were election expenses in the 2010 Gallatin County Commissioner election. (Commissioner's records).

Finding of Fact No. 12: The in-kind election expenses involved in the Slicks and letters identified in FOF No. 11 were not disclosed or reported as election expenses by any entity, including Candidate Sales. (Commissioner's records).

Finding of Fact No. 13: The election expenses identified in FOF No. 11 were coordinated with Candidate Sales and became in-kind contributions to Candidate Sales' campaign. (Commissioner's records).

Finding of Fact No. 14: The election expenses of FOF No. 11 were made by a corporation. (Commissioner's records).

Sufficiency Finding No. 5: As shown by Findings of Fact 1 through 14, there is sufficient evidence to justify civil prosecution of Candidate Sales for accepting illegal in-kind corporate contributions to his 2010 Gallatin County Commission campaign in the form of in-kind coordinated expenses made by a corporation in connection with the documents discussed in FOF No. 11.

Sufficiency Finding No. 6: As shown by Findings of Fact 1 through 14, there is sufficient evidence to justify civil prosecution of Candidate Sales for failing to disclose and report as in-kind contributions election related expenses in connection with the documents discussed in FOF No. 11.

The Commissioner recognizes that Candidate Sales response to the complaint does not admit any coordination with WTP or involvement with the

attack Slicks or letters. That response is not credible. The records listed above are sufficient to show that Candidate Sales coordinated in the production of the Slicks 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.

C. Campaign Document Retention and Production

There little doubt but that disclosure is favored child of all campaign practice regulators: "...disclosure offers much more robust protections against corruption." *McCutcheon v. FEC*, No. 12-536 (April 2, 2014), majority opinion (Roberts) citing to *Citizens United v. FEC*, 558 U.S. 310 at 370-371 (2010). Disclosure, however, is an empty protection without the public's ability (through a campaign practice office) to review and assess campaign documents as necessary to insure that disclosure is completely made. Scott Sales served as the treasurer for his own 2010 County Commissioner campaign. (Commissioner's records).³⁴ Under Montana law a campaign treasurer 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

³⁴ Scott Sales was an experienced candidate and officer holder, having been elected to 4 terms (2002, 2004, 2006 and 2008) of service as representative to the Montana legislature.

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). The Commissioner may “require production of any books, papers, correspondence, memoranda, bank account statements ... or other records that are relevant material for the purpose of conducting any investigation...” (§13-37-111(2)(c) MCA).

The 4 year time period that “detailed accounts” were to be kept had not expired. Candidate Sales had accounts to keep. Candidate Sales 2010 primary election campaign shows he ordered checks for use in paying primary election expenses. Candidate Sales’ campaign finance reports listed primary election expenses. Candidate Sales was asked to make all campaign related documents available for inspection. Candidate Sales produced two pages of documents, refusing to produce his bank records, invoices or copies of any campaign letters. Instead of doing this Candidate Sales engaged an attorney who assisted in the refusal to produce records. Candidate Sales’ actions violate §13-37-208 and interfere with the Commissioner’s powers under §13-37-211 MCA.

Sufficiency Finding No. 7: The Commissioner determines that there is sufficient evidence to justify civil prosecution of Candidate Sales for failing to maintain campaign records for the four year period of time set out in Title 13 of the Montana Code and for failing to produce records when production of the same was demanded by the Commissioner.

D. Attribution of Expenditures

Candidate Sales is required to “attribute” expenditures by §13-35-225(1) MCA in that the “all [campaign]’ communications” must: “clearly and conspicuously include the attribution ‘paid for by’ followed by the name and address … of the candidate or candidate’s campaign.” *Id.*

The Commissioner objectively determines that the Sandie Sales WIFE letter and the May 10, 2010 Scott Sales letter lacked such an attribution entirely. The Sandie Sales letter was sent in an envelope that at best had an attribution printed on the outside, bottom, back of the envelope. The May 10, 2010 letter was accompanied by a questionnaire printed on green legal size paper stock that had an attribution on the bottom of the printed page. Neither attribution being divorced from the actual electioneering document meets the “all communications” or “conspicuously” requirements of law.

Sufficiency Finding No. 8: The Commissioner determines that there is sufficient evidence to justify civil prosecution of Candidate Sales for failing to attribute election related expenses including the Sandie Sales WIFE letter and the March 10, 2010 letter signed by Scott Sales.

V. SUMMARY OF CAMPAIGN PRACTICE VIOLATIONS

The Commissioner issued 8 sufficiency findings in this Matter. These included: failure to report or disclose (Sufficiency Findings Nos. 2, 4, and 6); acceptance of illegal corporate contributions through coordination (Sufficiency

Findings Nos. 1, 3, and 5); failure to maintain or produce campaign finance records (Sufficiency Finding No. 7) and failure to attribute (sufficiency Finding No. 8).

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 were two initial coordination findings by a Montana Commissioner of Political Practices, that being in *Little v. Progressive Missoula* (Commissioner Vaughay) 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. Wagman*, COPP 2010-CFP-035; *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; and *Clark v. Bannan*, COPP 2010-CFP-023; *Bonogofsky v. Wittich*, COPP-2010-CFP-031; and, *Bonogofsky v. Prouse*, COPP-2010-CFP-033, 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 Sales 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 Sales 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 act on, an alleged campaign practice violation as the law mandates that the Commissioner (“shall investigate,” *See, §13-37-111(2)(a) MCA*) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is “sufficient evidence” of a violation the Commissioner must (“shall notify”, *see §13-37-124 MCA*) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that Candidate Sales 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 Sales 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 009. With the above analysis in mind, this Matter is also not appropriate for application of the *de minimis* theory.

Because there is a finding of sufficient showing of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil adjudication and/or a civil fine is justified (see §13-37-124 MCA). This Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. This matter will now be submitted to (or “noticed to”)³⁵ 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.

³⁵ 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.

Campaign practice violations, of the nature and scope encountered in this Matter, are new to the modern era Montana politics.³⁶ Montana's second Commissioner, Peg Krivec, served her entire 6 year term (1981-1986) without issuing a Decision. Subsequent Commissioners Colberg, Vaughay, 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 Sales also demonstrates an equally self-determined view of appropriate election activity. Until the recent litigation resulting from candidate actions taken in coordination with WTP, Commissioners have rarely found it necessary to seek the full legal redress allowed by Montana law against a candidate or treasurer.³⁷ Full legal redress is imposed by a district court judge and comes only after a full due-process district court hearing whereat the candidate may provide evidence and confront witnesses, including the Commissioner. The Commissioner notes that full legal redress includes ineligibility of adjudicated offender to be a candidate for, or to hold, public office (*see* §13-35-106(3) MCA). In addition the offender can be

³⁶ This type of systemic violations in Montana's past gave rise to many of Montana's current campaign practice laws.

³⁷ All of the following matters are now filed as litigation in the 1st Judicial District, Lewis and Clark County, Montana: *Bonogofsky v. Kennedy*, COPP 2010-CFP-015; *Washburn v. Murray*, COPP 2010-CFP-019; *Ward v. Miller*, COPP 2010-CFP-021; *Bonogofsky v. Boniek*, COPP-2010-CFP-027; *Bonogofsky v. Wittich*, COPP 2010-CFP-031; *Bonogofsky v. Prouse*, COPP 2010-CFP-033; and, *Clark v. Bannan*, COPP 2010-CFP-023.

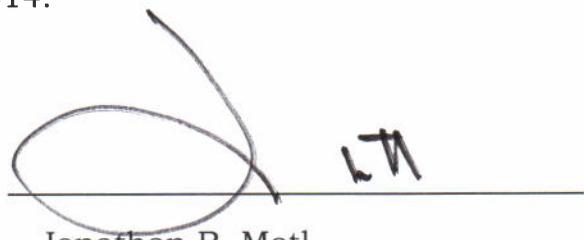
assessed a fine of up to three times the amount of the unlawful contribution or expenditure (see §13-37-128 MCA).

Candidate Sales is a sitting legislator representing SD 34. As such Candidate Sales is imbued with a duty of public trust and the social debt owed by Candidate Sales 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 Sales violated Montana's campaign practices laws as set out above and that civil adjudication of the violation is warranted.

Dated this 7th day of April, 2014.

A handwritten signature in black ink, appearing to read "JRM", is written over a horizontal line.

Jonathan R. Motl
Commissioner of Political Practices
Of the State of Montana
P.O. Box 202401
1205 8th Avenue
Helena, MT 59620
Phone: (406) 444-4622

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.

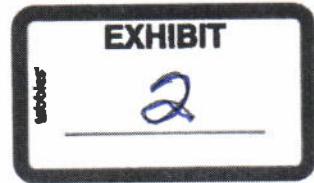
Exhibit 2
Bonogofsky v. Kennedy, COPP-2010-CFP-0015

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 Vaughney 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.

Times New Roman
Boymann

5155

Scott Sales

MASTER CANDIDATE FOLDER:

- Signature
- Letterhead
- Corner card (#10)
- #9

PRINTED:

- Letterhead Blue # #5,000 (10,000 to start)
- Letterhead Red # _____
- Corner card (#10) Blue 5,000
- Corner card (#10) Red _____
- #9 # 9,200

Primary Mail Budget	Tier 1 Voters				
	House Ct.	Per Piece	House \$	COPY TO CAND	COPY APPROVED
Intro Letter with Survey	5154 (P) 9576	0.5	\$4,788.00		
Wife Letter	7310	0.65	\$4,751.50		
Issue-ID'd voters (R,T,L,G)	8411	0.45	\$3,784.95		
	1913				
	1793				
	1678				
	TAX/RTW	3027			
Final	9576	0.45	\$4,309.20		
	Totals		\$17,633.65		

Absentee Chase	T1 Abs vtrs=	6626			
	doing?	to whom?	House Ct.	Per Piece	House \$
Intro				0.5	\$-
Wife				0.65	\$-
Postcard				0.38	\$-
Total Abs:					\$-

TOTAL \$17,633.65 Deposit: \$8,816.83

11,000 Surveys - Done 3m

10,000 Intro Letter - Done 3m

EXHIBIT

3