

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
IN THE MATTER OF THE COMPLAINT FILED BY JILL DUVALL REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE ELBERT COUNTY BOARD OF COUNTY COMMISSIONERS AND ROBERT ROWLAND, A COMMISSIONER THEREOF	▲ COURT USE ONLY ▲
	CASE NUMBER: OS 2013-0012
FINAL AGENCY DECISION	

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon complaint by Jill Duvall, a resident of Elbert County, alleging that the Elbert County Board of County Commissioners, and Commissioner Robert Rowland, violated the Colorado Fair Campaign Practices Act (the "FCPA") by expending public money to urge voter support of a local ballot issue then pending before the electorate. Hearing of the complaint was held at the Office of Administrative Courts on December 13, 2013. Lark H. Fogel, Esq., represented the Complainant, Ms. Duvall. Alex M. Beltz, Esq., represented Board of County Commissioners and Commissioner Rowland.

Summary of the Case

The Secretary of State received Ms. Duvall's complaint via e-mail on November 8, 2013. On December 2, 2013, the Secretary of State received the mailed copy of the complaint bearing Ms. Duvall's original signature, and forwarded the complaint to the Office of Administrative Courts for hearing.¹ Hearing was held at the Office of Administrative Courts on December 13, 2013. Ms. Duvall was represented by Lark H. Fogel, Esq. The Elbert County Board of County Commissioners (the "BOCC") and Commissioner Rowland (collectively, the "Respondents") were represented by Alex M. Beltz, Esq.

Ms. Duvall alleges that Respondents violated § 1-45-117(1)(a)(I)(B), C.R.S. of the FCPA by expending public money to hire a consultant to prepare and present four town hall meetings urging voters to pass a local ballot issue increasing the county's

¹ Per Secretary of State Rule 18.4.3, 8 CCR 1505-6, when a complaint is filed by e-mail the signed original must be filed within five calendar days thereafter. Because Ms. Duvall's original complaint was filed December 2, 2013, more than five calendar days after the e-mail complaint was filed, the ALJ will treat December 2, 2013 as the original filing date.

property tax mill levy. Section 1-45-117(1)(a)(I)(B), prohibits any political subdivision of the state from expending any public money to urge voters to vote for or against a local ballot issue. The ballot issue involved in this case, referred to herein as Ballot Issue 1C, proposed to increase county tax revenues by approximately 1 million dollars annually for general fund operating expenditures. It was placed before the voters at the November 5, 2013 election. All four town hall meetings were held in October 2013, the month before the election.

At no time during the town hall meetings did the consultant or Commissioner Rowland specifically ask voters to vote for Ballot Issue 1C. Nevertheless, Ms. Duvall contends that because the meetings occurred shortly before the election and the consultant's presentation was obviously designed to underscore the county's need for increased revenue, the meetings could not be reasonably interpreted as anything but a plea for passage of Ballot Issue 1C.

Respondents do not dispute that the BOCC spent money to hire a consultant to assess the county's financial situation and to present that assessment at four town hall meetings; however, Respondents deny that they urged voters to vote for Ballot Issue 1C and deny that they violated the FCPA.

For reasons explained below, the ALJ finds the evidence proves that Respondents did violate the FCPA, as alleged.

Findings of Fact

The Respondents

1. Elbert County is a rural county situated east of the I-25 corridor between Denver and Colorado Springs.
2. Elbert County is governed by an elected board of county commissioners of three members. Robert Roland is one of those commissioners, and is the BOCC chair.
3. Elbert County is not a home rule county, and therefore its actions are subject to the FCPA.

Ballot Issue 1C

4. Elbert County is in financial difficulty. In an effort to meet its anticipated operating expenses, the BOCC scheduled a special meeting on September 4, 2013 to receive reports from the county's various department heads regarding their staffing and budget concerns, and to consider several ballot measures including a proposal to increase the county's property tax mill levy. Exhibit B.

5. The BOCC resolved to certify language to the Elbert County Clerk and Recorder for a ballot issue to increase the mill levy by 4 mills with all proceeds generated to be deposited into the county general fund for payment of operating expenditures. Commissioner Rowland was one of the two commissioners voting in favor of the resolution. Exhibit B, p. 8.

6. The ballot issue title was fixed pursuant to § 31-11-11, C.R.S. and was designated as Ballot Issue 1C. Ballot Issue 1C read as follows:

Shall Elbert County taxes be increased \$1,045,374.60 annually (first full fiscal year dollar increase) by such amounts as may be generated annually thereafter by the imposition of an additional mill levy of not to exceed four mills for general fund purposes and applied for the purpose of funding Elbert County General Fund operating expenditures, and shall Elbert County be permitted to collect, retain and expend all revenues derived from such taxes and any earnings thereon, regardless of whether the annual revenues from such taxes in any year after the first full fiscal year in which it is in effect exceed the estimated dollar amount stated above, either as a voter-approved revenue change or an exception to limits on revenues and spending, and without limiting the collection or spending of any other revenues or funds by the county under Article X, section 20 of the Colorado Constitution of any other law?

Exhibit A.

7. Ballot Issue 1C was placed on the Official Coordinated Election Ballot for Elbert County to be considered by the voters at the November 5, 2013 election.

The Consultant Contract and Town Hall Meetings

8. Timotheos, Inc. is a strategic consulting company located in Elbert County. Its president and sole consultant is Mr. Timothy Buchanan. In addition to his consulting work, Mr. Buchanan teaches graduate courses at Regis University in Denver on the topics of communications, performance management, behavioralism, and leadership, among others. Hereafter, the ALJ will refer to Timotheos, Inc. and Mr. Buchanan collectively as "Buchanan."

9. In August, Buchanan consulted with the BOCC to "provide suggestions about revenue ideas for the county, as well as ideas for living with limited revenues and controlling expenses" and to "assess Performance Management for departments." Buchanan was paid \$1,300 for this service. Exhibit D, p. 16.

10. One of the recommendations Buchanan made to the BOCC was to be more transparent with the citizens of Elbert County regarding the county's financial difficulties.

11. At its special meeting of September 4, 2013, the BOCC discussed a proposal to contract with Buchanan for "the provision of leadership, communication and strategic consulting services" to the BOCC. Among other things, the BOCC wanted Buchanan to prepare and present information regarding the county's financial condition and sustainability at four town hall meetings to be held at various locations within the county. The BOCC unanimously voted in favor of this proposal. Exhibit B, p. 6.

12. The contract with Buchanan, signed by Commissioner Rowland on behalf of the BOCC, required Buchanan to provide the following services over the period of September 4, 2013 through November 15, 2013:

- a. Coaching and training for BOCC in organizational leadership and effective team strategies.

b. Assistance in formulating BOCC communications strategies in relation to town hall meetings in regards to the state of the county financially, *the data behind the decision to place the mill levy increase on the ballot*, and the discussed adjustments in services for the upcoming fiscal year.

c. Assistance in moderating the public town hall meetings to ensure that all citizens are allowed to speak, to be sure that all questions are answered, and all of this be done in an orderly and professional manner.

Exhibit C, p. 4 (emphasis added).

13. For his services, Buchanan was paid \$15,000 in three installments of \$5,000 each. Exhibit C, p. 1. The money was paid from the county's general fund on September 17, 2013, October 21, 2013, and November 13, 2013. Exhibit D, p. 2.

14. The contract with Buchanan was approved at the same meeting that the BOCC discussed and approved the resolution to proceed with Ballot Issue 1C. Thus, at the same time the BOCC approved Ballot Issue 1C, it also hired Buchanan to make presentations to the county's electorate regarding the county's financial status and explaining "the data behind the decision to propose a mill levy."

15. During the meeting, the BOCC's attorney explained that no public funds could be used to encourage voters to vote for or against a ballot issue, and one of the commissioners read aloud the state law governing use of public moneys for ballot issues. Exhibit B, p. 6. Mr. Buchanan, who was also present at the meeting, stated that he completely understood the concern, but assured the BOCC that when such concerns had been raised before he "passed with flying colors by the Secretary of State every time." Exhibit B, p. 7.

16. In fulfillment of his contract, Buchanan did primarily two things:

a. First, Buchanan conducted a study of the BOCC's management effectiveness as well as the county's financial condition by interviewing the county's elected officials and department heads, and considering anonymous surveys completed by those individuals regarding the commissioners' management effectiveness. Buchanan's report of this study is Exhibit 3. In connection with this study, Buchanan provided feedback and coaching to the BOCC in organizational leadership and effective team strategies. The work occupied the majority of Buchanan's time and effort under the contract.

b. Second, Buchanan prepared a presentation for the four town hall meetings to discuss the BOCC's management challenges and the county's financial condition. Per his contract, Buchanan gave the presentation and moderated the discussion at each of the four meetings. He also attended a fifth meeting with county employees at which he gave a similar presentation.

17. Buchanan's report, issued November 12, 2013 (Exhibit 3), presents a rather unfavorable picture of both the county's financial condition and the BOCC's dysfunctional management style. According to the report, over the past 20 years the county has experienced a significant increase in demand for services that has

overwhelmed its budget and resulted in a struggle "to reach some sort of consensus over management of county services, resources and employees." Exhibit 3, p. 1.

18. According to the report, two incumbent commissioners were unseated in the most recent general election in the hope that the challengers would "usher in a new era of leadership for the county, which would bring it out of the financial and organizational problems it was experiencing." Unfortunately, this hope was short lived as the new BOCC members soon learned that they were unable to correct the financial direction of the county as they had hoped. Exhibit 3, p. 1.

19. Overall, Buchanan found that the BOCC was internally divisive and dysfunctional, and was suffering loss of confidence from county department heads and officials, as well as growing attacks from political factions within the county. Exhibit 3, p. 2. Part of Buchanan's plan to address this loss of confidence was to promote transparency through the town hall meetings he had proposed.

20. All four town hall meetings were held in October 2013. To make the meetings maximally accessible to the public, the meetings were held in the evening at four different locations throughout the county. Flyers advertising the meetings were posted at various places throughout the county. The flyers informed the public that the purpose of the meeting was to present information regarding the county's financial condition. The flyers did not mention Ballot Issue 1C or the proposed mill levy increase.

21. Commissioner Rowland attended each meeting. Either he or another county commissioner opened each meeting and introduced Buchanan. Because the BOCC knew that no public funds could be used to encourage voters to vote for a ballot issue, the county commissioner who opened the meeting read a "disclaimer" stating that the proposed mill levy increase was not a topic for discussion at the meeting. The commissioner then turned the meeting over to Buchanan who gave a 45 to 55 minute presentation that included his findings about the county's financial status, followed by a question and answer period which Buchanan moderated.

22. Exhibit 2 is a copy of the presentation Buchanan used during the meetings. Exhibit 2 contains no specific mention of the proposed mill levy increase or Ballot Issue 1C. However, the only alternative offered to massively decreasing county services was to "increase revenues." This alternative is presented on the last page of the presentation, entitled "Remedy Recommendations," and reads:

- The county simply has one of two choices to make:
 - Massively Decrease Service
 - Increase revenues

Exhibit 2, p. 30.

23. Although Buchanan made a point of not mentioning Ballot Issue 1C during his presentation, several members of the public asked questions about the proposed mill levy increase. For example, one member of the public asked why the BOCC was asking for another tax increase when one had been approved four years ago.

24. There is no convincing evidence that Buchanan, any county commissioner, or any other county official who spoke during the meetings overtly asked

voters to vote for Ballot Issue 1C.

25. On October 25, 2013, after the last of the four meetings was held, the Elbert County Prairie Times published a letter to the editor from Mr. Buchanan. In that letter, Mr. Buchanan expressed his dismay at the cynicism he encountered during the public meetings. According to the letter, "These critics did not get the point that there is a problem, because that would mean they could no longer accuse and blame, which sadly, is the only platform many of them have to stand on." Although Buchanan did not specifically mention Ballot Issue 1C or the proposed mill levy increase in his letter, the editorial column is captioned, "Vote Yes on the Commissioners Tax Increase." Exhibit E. It is not clear whether that title was provided by Buchanan or was added by the editors.

26. There is no evidence that, as a part of his consulting contract with the BOCC, Mr. Buchanan was required or even encouraged to write the letter to the editor or to express a personal opinion in favor of Ballot Issue 1C. To the contrary, Mr. Buchanan testified that he understood his job was to conduct a study of the county's financial status and sustainability and present those facts at the town hall meetings. He denied any obligation to "campaign on behalf of the county."

27. Despite the BOCC's efforts to not be seen as urging voters to support Ballot Issue 1C, many meeting attendees believed that was exactly what was intended. Five members of the voting public who attended one or more of the meetings testified at the hearing. These witnesses observed that the overriding theme of the town hall meetings was that the county was in dire financial straits and needed more revenue. Because the witnesses knew that the BOCC had placed Ballot Issue 1C on the ballot, the witnesses viewed the town hall meetings as a sales pitch for the mill levy increase even though neither Buchanan nor the commissioners specifically recommended its passage. As several witnesses observed, the "elephant in the room" was the proposed tax increase.

28. Mr. Buchanan testified that although he believed the BOCC should have held town hall meetings to explain the county's financial problems much earlier in the year, probably back in June, he believed that conducting the meetings just before the election was "better late than never."

29. Although the evidence is clear that the BOCC understood it could not spend public money to advocate in support Ballot Issue 1C, and both Commissioner Rowland and Mr. Buchanan denied any such intent, the preponderance of the credible evidence is convincing that the town hall presentations were intended to do just that. The substantial evidence supporting this finding includes:

a. The BOCC initially consulted Buchanan in August 2013 to "provide suggestions and revenue ideas for the county" (Exhibit D, p. 16);

b. It is reasonable to infer that one of those ideas was to raise revenue by gaining voter support for a tax increase;

c. On September 4, 2013, the BOCC adopted a resolution for such a tax increase, known as Ballot Issue 1C, and at the very same meeting voted to hire Buchanan to, among other things, present "the data behind the decision to place

the mill levy increase on the ballot" at town hall meetings (Exhibit C, p. 4);

d. A witness (William Thomas) who attended the September 4, 2013 BOCC meeting testified that based upon what he heard at that meeting, he understood that the purpose of the town hall meetings was to provide information about the ballot issue;

e. Each of Buchanan's invoices listed "Mill Levy Consulting" as the service for which the county was being billed. Exhibit D, pp. 2-13. Although Mr. Buchanan testified that this was an error and did not accurately describe what was actually done, the ALJ finds his explanation unconvincing. The terminology he chose to use on every invoice together with the express language of his contract show that both he and the BOCC understood that his efforts were at least in part intended to justify the mill levy increase;

f. The meeting presentations, prepared and given by Buchanan, painted a bleak picture of the county's financial status and offered only the choices of increasing revenues or "massively" decreasing services. Exhibit 3. Buchanan offered no facts that could reasonably be construed as supporting an alternative other than a tax increase, even though such facts arguably existed. For example, one attendee who testified at the hearing (Paul Crisan) questioned whether a tax increase was necessary in light of the county's rising property values; however, Mr. Buchanan's presentation did not address that issue.

g. Although the county's financial predicament was not new and had been known for some time, the BOCC scheduled all the town hall meetings for the month preceding the election. The fact that these meetings were held after the proposed mill levy increase was already on the ballot and just before the election leads to a strong inference that the meetings were intended to influence the outcome of that election.

30. The evidence does not clearly identify how much of the \$15,000 paid to Buchanan was for his work in preparing and presenting information supporting the mill levy increase, and how much was for his leadership and management consulting services. However, Mr. Buchanan testified that preparing for and presenting the town hall meetings was "minimal" and only a "small part" of his effort; and that his "paramount" concern and the larger part of his effort was directed toward assessing the BOCC's organizational leadership issues. The ALJ has no reason to disbelieve Mr. Buchanan on this point, and accepts this testimony as true.

Discussion and Conclusions of Law

The Elements of an FCPA Violation

The Fair Campaign Practice Act, §§ 1-45-101 to 118, C.R.S., was originally enacted in 1971, repealed and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII of the Colorado Constitution. The purpose of the FCPA is to avoid the potential for, and the appearance of, corruption in the political process. Section 1-45-102.

The section of the FCPA at issue in this case is § 1-45-117(1)(a)(I)(B). The

relevant portion of that section prohibits state agencies and political subdivisions of the state from expending "any moneys from any source . . . to urge electors to vote in favor of or against any . . . local ballot issue that has been submitted for the purpose of having a title fixed pursuant to section 31-11-111 or that has had a title fixed pursuant to that section." Its purpose is to promote confidence in government by prohibiting the use of money authorized for public purposes to advance the personal viewpoint of one group over another. *Denver Area Labor Federation v. Buckley*, 924 P.2d 524, 528 (Colo. 1996). The essence of the prohibition is not to stifle expression of opinion about ballot issues, but to prevent public entities from using public resources to persuade voters how to vote on those issues. *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1006 (Colo. 2004) ("the expressed purpose of the [FCPA] was to prevent state or political subdivisions from devoting public resources toward persuading voters during an election.")

As applied to this case, the elements necessary to prove a violation of § 1-45-117(1)(a)(I)(B) are:

- 1) The BOCC is a political subdivision of the state;
- 2) The BOCC expended public money;
- 3) To urge electors to vote in support of a local ballot issue, specifically Ballot Issue 1C;
- 4) The title to which had been fixed or submitted for the purpose of having a title fixed pursuant to § 31-11-111, C.R.S.

Even if the elements have been met, one or more exceptions may apply. For example, nothing prevents a representative of a public entity from responding to unsolicited questions about a pending issue, or prevents a policy maker from spending up to \$50 of public money incidental to expressing his or her personal opinion. Section 1-45-117(1)(a)(II). Furthermore, nothing prevents a public entity from spending public money to distribute a factual summary provided the summary includes arguments both for and against the issue (see § 1-45-117(1)(b)(I)); prevents a public official from expressing a personal opinion (see § 1-45-117(1)(b)(II)); or prevents a governing body from passing a resolution or taking a position of advocacy with regard to a pending issue (see § 1-45-117(1)(b)(III)(A)).

*The Evidence Proves the BOCC Improperly
Urged Residents to Vote for Ballot Issue 1C*

There is no dispute that the county is a political subdivision of the state and that the BOCC is its governing body. Nor is there any dispute that Ballot Issue 1C was a local ballot issue that had its title fixed pursuant to § 31-11-111, C.R.S. Finally, there is no dispute that, by majority vote, the BOCC referred Ballot Issue 1C to the electorate and by unanimous vote used public money to contract with Buchanan for the purpose of, among other things, presenting public meetings to educate voters about the county's financial straits. The key disputed issue is whether the BOCC spent that money with the intent to "urge" voters to support Ballot Issue 1C.

The FCPA does not define the term "urge," but in *Skruch v. Highlands Ranch*

Metro. Dist., 107 P.3d 1140 (Colo. App. 2004), the court of appeals provided direction as to how that term should be applied. In *Skruch*, the respondent metropolitan districts paid for a brochure that made only positive arguments in favor of a bond issue and presented no contrary arguments. Because the brochure was entirely one-sided in its presentation, the court held that it had the effect of urging the electorate to vote for the issue. *Id.* at 1143.

It is apparent from the evidence that Respondents believed they could avoid an FCPA violation by simply not mentioning Ballot Issue 1C during the town hall meetings. But, avoiding an FCPA violation is not so simple. *Skruch* has rejected the argument that "express advocacy" is required to prove a violation of § 1-45-117(1)(a)(I). According to the court, it was sufficient that the metropolitan districts' brochure was an exclusively positive document that had the effect of encouraging voters to support a pending bond issue. *Id.* at 1143-44. It is not even necessary that the ballot issue be specifically identified by name, if the effect of the presentation is to urge voters "to vote a certain way." *Id.* at 1145. Given that the town hall meetings painted a dire one-sided picture of the county's financial condition and were held just before the election, the proposed tax increase was clearly "the elephant in the room." Understandably, those in attendance viewed the presentation as a sales pitch to get them to support Ballot Issue 1C even though the ballot issue was not specifically mentioned. Because the presentation was designed to encourage voters "to vote a certain way," it violated § 1-45-117 of the FCPA.

The evidence does not support, any of the enumerated exceptions found in §§ 1-45-117(1)(a) and (b). Although the BOCC may have intended to present only a "factual summary" supporting their decision to propose a mill levy increase, the law provides no exception for factual summaries unless the summary includes "arguments both for and against the proposal." Section 1-45-117(1)(b)(I), C.R.S. This is not discretionary. *Skruch*, 107 P.3d at 1143 ("any factual summary . . . must include arguments both for and against a proposal.") If, as here, a presentation contains only information supporting a pending ballot issue, then that presentation is necessarily one that urges a favorable vote.

In summary, Respondents no doubt intended to comply with the FCPA and to act in the best interests of their county, but they nonetheless violated the FCPA by spending public money to urge voters to support a pending ballot issue.

Sanction

Violations of § 1-45-117 subject the public entity to the sanctions identified in Colo. Const. art. XXVIII, §§ 9(2) and 10(1) and to any other "appropriate order or relief," including injunctive relief or orders directing the persons responsible for the expenditures to make restitution to the public entity. Section 1-45-117(4), C.R.S. Section 9(2) of Article XXVIII provides that if a violation is found, the ALJ may enter "any appropriate order, sanction, or relief authorized by [Article XXVIII]." Section 10(1) of Article XXVIII provides for the imposition of a civil penalty of "at least double and up to five times the amount contributed, received, or spent." The ALJ, however, has considerable discretion in determining the sanction to be imposed, including no monetary sanction at all. *Patterson Recall Comm. v. Patterson*, 209 P.3d 1210, 1218-

19 (Colo. App. 2009).

In this case, the ALJ concludes it would not be appropriate to impose a civil penalty against the BOCC because such penalty would likely be satisfied from county funds, and thus would only penalize the Elbert County taxpayers. Because the purpose of § 1-45-117 is to protect taxpayer funds from being misspent, it makes little sense to impose a further burden upon those funds when a violation is found.

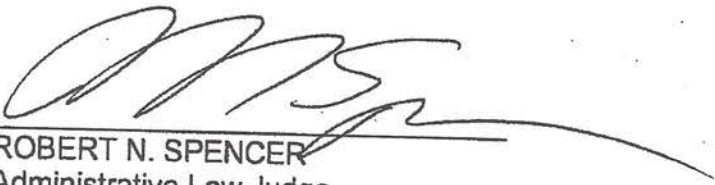
On the other hand, ordering the individual who made an improper expenditure to reimburse the county for that expenditure is a viable option. The evidence, however, does not establish precisely how much of the \$15,000 paid to Buchanan was improperly expended. Although some portion of that amount compensated Buchanan for preparing and presenting information about the county's poor financial condition at the town hall meeting, a significant undivided portion of that amount compensated Buchanan for his legitimate efforts to assess and address the BOCC's dysfunctional leadership and management issues, unrelated to the ballot issue. Given Mr. Buchanan's testimony that the time he spent on assessing and presenting the county's financial issues was minimal and only a small part of his effort, the ALJ selects \$1,000 as a conservative estimate of that portion of the contract price improperly expended to support Ballot Issue 1C.

The ALJ thus orders Commissioner Rowland, as an individual responsible for the improper expenditure, to reimburse the county general fund the amount of \$1,000 within 30 days of the date of this order.²

Agency Decision

The alleged violation of § 1-45-117(1)(a)(I)(B), C.R.S. has been proven. The BOCC is hereby enjoined from future violations. Commissioner Robert Rowland is ordered to reimburse the county general fund the amount of \$1,000 within 30 days of the date of mailing of this decision.

Done and Signed
December 24, 2013



ROBERT N. SPENCER
Administrative Law Judge

Hearing digitally recorded in CR #1

Exhibits admitted:

Complainant's exhibits: A - E

Respondents' exhibits: 1, 2, 3

² Although the other two commissioners may also be jointly responsible for approving the improper expenditure, neither was personally named by Complainant as a respondent. Due process of law requires that an individual who may be the subject of an adverse agency action receive personal notice and an opportunity to be heard. Because the other commissioners were not named as respondents, they did not receive personal notice. Sections 24-4-105(1) and (2), C.R.S.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above **FINAL AGENCY DECISION** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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Suzanne Staiert
Deputy Secretary of State
Secretary of State's Office
1700 Broadway, Suite 270
Denver, CO 80290

on this 10 day of ^{January} December, 2013.


Court Clerk