

C A M P A I G N F O R

ACCOUNTABILITY

July 14, 2020

**By email: [governor@pa.gov](mailto:governor@pa.gov)**

The Honorable Thomas Wolf  
Governor of Pennsylvania  
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**By email: [jshapiro@attorneygeneral.gov](mailto:jshapiro@attorneygeneral.gov)**

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**By email: [teresamill@pa.gov](mailto:teresamill@pa.gov)**

The Honorable Teresa D. Miller  
Secretary  
Pennsylvania Department of Human Services  
625 Forster St., Rm 333  
Harrisburg, PA 17120

**Re: Request for Termination of Pennsylvania’s Contract with Real Alternatives**

Dear Governor Wolf, Attorney General Shapiro, and Secretary Miller:

Campaign for Accountability (hereinafter “CfA”) respectfully requests that you investigate and terminate Pennsylvania’s contract with Real Alternatives (hereinafter “RA”),<sup>1</sup> a non-profit

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<sup>1</sup> Letter to RA from Pennsylvania Department of Human Services (hereinafter “DHS”), *First One-Year Renewal of Agreement Number SAP 4100079673* (Jun. 24, 2019) (hereinafter “2019 AASP Grant Renewal”), available at <https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html> ; DHS Grant Agreement with RA, *Contract Number 4100079673* (Feb. 15, 2018) (hereinafter “2018 AASP Grant Agreement”), available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>. Documents cited throughout this letter were obtained via Right-to-Know Law requests submitted to DHS by CfA. See Right-to-Know Law Request to DHS from CfA (Nov. 18, 2019), available at <https://www.documentcloud.org/documents/6961745-CfA-Request-PA-DHS-RA-15-16-Reporting-18-19.html> ; Right-to-Know Law Request to DHS from CfA (Nov. 18, 2019), available at <https://www.documentcloud.org/documents/6961744-CfA-Request-PA-DHS-RA-Update11-18-19.html> ; Right-to-

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 2

organization that receives state funding to run Pennsylvania's Alternative to Abortion Services Program (hereinafter "AASP" or "AAS Program").<sup>2</sup> RA appears to be exploiting its position administering the AAS Program in order to enrich its executives with taxpayer dollars, skim money intended for service providers, and misappropriate public funding earmarked for certain operational expenses, while simultaneously failing to effectively deliver the health services that it has agreed to provide to Pennsylvanians.

### **Background**

RA is based in Harrisburg and was established in 1995 to administer Pennsylvania's newly funded alternatives to abortion initiative.<sup>3</sup> From its inception, a Pennsylvania lawyer named Kevin Bagatta has been RA's President and CEO,<sup>4</sup> and the organization has administered a Pennsylvania-wide government-funded anti-abortion program, now known as AAS Program.<sup>5</sup>

In the early 1990s, Pennsylvania began statewide funding of pregnancy and parenting support programming and in 1997 the state awarded RA its first contract, for \$2.1 million, to administer Pennsylvania's AAS Program.<sup>6</sup>

By 2002, RA's contract was increased to \$5.3 million.<sup>7</sup> In 2012, Pennsylvania and RA signed a contract under which RA received \$30 million over 5 years.<sup>8</sup> In 2016, the contract was increased to more than \$32 million.<sup>9</sup> The state awarded RA a new two-year contract for \$12.7

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Know Law Request to DHS from CfA (Nov. 6, 2019), available at <https://www.documentcloud.org/documents/6961743-CfA-Request-PA-DHS-RA-Comms-11-6-19.html>.

<sup>2</sup> The name of the program varies across documents. The grant agreements refer to it as the "Alternative to Abortion Services Program." See, e.g., DHS Grant Agreement with RA, *Contract Number 4100079673*, 14 (Aug 15, 2012) (hereinafter "2012 AASP Grant Agreement"), available at [https://contracts.patreaury.gov/Admin/Upload/203444\\_4100060934.pdf](https://contracts.patreaury.gov/Admin/Upload/203444_4100060934.pdf). DHS refers to the program as the "Alternatives to Abortion Services Program" on its website. See Pennsylvania Department of Human Services, *Alternatives to Abortion*, Reproductive Health (last accessed June 30, 2020), available at <https://www.dhs.pa.gov/Services/Other-Services/Pages/Reproductive-Health.aspx>. RA also refers to the program as the "Pennsylvania Pregnancy and Parenting Support Services Program." See, e.g., Real Alternatives, *Year End Status Report: July 1, 2018 to June 30, 2019*, 2 (Sep. 18, 2019) (hereinafter "FY 18/19 Status Report"), available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>.

<sup>3</sup> See ZENIT Daily Dispatch, *Finding Real Alternatives to Abortion: Interview with Official of Pro-Life Government-Funded Agency*, ETERNAL WORLD TELEVISION NETWORK (Apr. 19, 2007), available at <https://www.ewtn.com/catholicism/library/finding-real-alternatives-to-abortion-9709>.

<sup>4</sup> According to Mr. Bagatta, in 1995 he answered "an advertisement in the local newspaper from a pro-life organization looking for a director to start a statewide government-funded program." *Id.* RA originally administered Pennsylvania's AAS Program under its former name, Morning Star Project WIN Advisory Council. See Real Alternatives, *History of Government-funded Pregnancy and Parenting Support Services*, REALALTERNATIVES.ORG (last accessed June 30, 2020), available at <https://www.realalternatives.org/https-wp-content-uploads-2019-06-history-2019-pdfhistory/>.

<sup>5</sup> ZENIT Daily Dispatch, *supra* n. 3.

<sup>6</sup> Real Alternatives, *supra* n. 4.

<sup>7</sup> *Id.*

<sup>8</sup> 2012 AASP Grant Agreement, available at [https://contracts.patreaury.gov/Admin/Upload/203444\\_4100060934.pdf](https://contracts.patreaury.gov/Admin/Upload/203444_4100060934.pdf).

<sup>9</sup> Letter to RA from DHS, *re: Grant No: 4100060934 Increase* (Feb. 18, 2016), available at [https://contracts.patreaury.gov/Admin/Upload/343732\\_4100060934\\_FA\\_2-26-2016\\_201602261010.pdf](https://contracts.patreaury.gov/Admin/Upload/343732_4100060934_FA_2-26-2016_201602261010.pdf).

million, covering October 1, 2017 until June 20, 2019.<sup>10</sup> This contract was renewed for one year in 2019 for over \$7.2 million.<sup>11</sup> Even today, RA continues to be the program’s sole administrator and purportedly received over \$3.5 million in state and federal funding in Pennsylvania’s interim budget.<sup>12</sup> Since its inception, RA has received over \$100 million from Pennsylvania to administer the AAS Program.<sup>13</sup> RA’s experience as the sole AASP grantee in Pennsylvania led other states, including Indiana and Michigan, to contract with RA to implement their own alternatives to abortion programs.<sup>14</sup> Pennsylvania, however, remains RA’s main contract and is worth millions more than RA’s other two contracts combined.

RA implements the AAS Program by recruiting service providers—many of which are crisis pregnancy centers that counsel women not to have abortions.<sup>15</sup> RA’s agreements with these service providers specify that they must not provide or refer women to other clinics for abortions.<sup>16</sup> RA also forbids subrecipients from discussing contraception with patients and the service providers are not reimbursed by RA for the provision, referral, or advocacy of any kind of contraception.<sup>17</sup> Further, CfA has learned RA forbids subcontractors from recommending or even discussing barrier methods of contraception when a patient is diagnosed with a sexually transmitted disease.

In 2016, Pennsylvania’s Auditor General (hereinafter “PA Auditor”) opened an investigation into RA’s invoicing and reimbursement procedures, as well as the overall effectiveness of RA’s operations. The PA Auditor discovered that RA was siphoning additional state funds into its own coffers, beyond those administrative fees already paid by Pennsylvania.<sup>18</sup>

The audit revealed that RA had reimbursed its service providers for only 97% of the program services they provided, withholding the remaining 3% for itself as a “Program

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<sup>10</sup> 2018 AASP Grant Agreement at 2, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>.

<sup>11</sup> 2019 AASP Grant Renewal at 1, available at <https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html>.

<sup>12</sup> General Appropriation Act of 2020, Public Law No. 1 § 222 (2020).

<sup>13</sup> Real Alternatives, *supra* n. 4.

<sup>14</sup> *Id.*

<sup>15</sup> RA is the sole entity that oversees the AAS Program and directly collects state money to administer the program. See 2019 AASP Grant Renewal, available at <https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html> ; 2018 AASP Grant Agreement, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>.

<sup>16</sup> See 2018 AASP Grant Agreement at 18, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html> ; see also Real Alternatives, *Deceptive Agenda Driven Attacks*, REALALTERNATIVES.ORG (“[T]o be able to comply with the terms of the Grant Agreement, the Service Provider organizations must be ‘life-affirming’ in their counseling.”) (last accessed Jun. 30, 2020), available at <https://www.realalternatives.org/presskit/deceptive-agenda-driven-attacks/>.

<sup>17</sup> See 2018 AASP Grant Agreement at 18, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>.

<sup>18</sup> Performance Audit Report, *Pennsylvania Department of Human Services: Real Alternatives Grant*, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF THE AUDITOR GENERAL, 14 (Sep. 5, 2017) (hereinafter “2017 Auditor General Report”), available at [https://www.paauditor.gov/Media/Default/Reports/DHS\\_RA\\_Audit\\_Report.pdf](https://www.paauditor.gov/Media/Default/Reports/DHS_RA_Audit_Report.pdf).

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 4

Development and Advancement Fee,” although RA’s contract already includes ample funds for administrative expenses.<sup>19</sup> RA explained that the purpose of this 3% fee was to “promote the development and expansion of Real Alternatives initiatives . . . both locally and nationally.”<sup>20</sup> RA had not previously disclosed the existence of this 3% fee to Pennsylvania, nor to any other state with which RA had contracts.<sup>21</sup> RA’s service providers generally believed that the fee was a requirement to do business with RA.<sup>22</sup>

The PA Auditor concluded RA’s siphoning of roughly \$500,000 in taxpayer funds for the generic purpose of promoting and advancing RA’s own development was improper.<sup>23</sup> Rather than engage in a lengthy, tax-funded legal action, Pennsylvania changed the terms of its agreement with RA to mandate that RA reimburse its service providers for 100% of the value of the services they provided.<sup>24</sup> RA agreed to comply with the mandate, but then required the service providers to sign additional, separate agreements, to which Pennsylvania was not a party, requiring the service providers to remit a 3% fee back to RA after receiving the 100% reimbursements.<sup>25</sup> Thus, by functionally swapping one check for two, RA continues to siphon Pennsylvania taxpayers’ money into its own coffers.

The AASP grant is intended to provide funding for services to assist pregnant women<sup>26</sup> and new parents, yet RA has prioritized its own self-enrichment. RA continues to pocket 3% of the AASP money intended for the service providers, regardless of the ample reimbursement it receives from the Department of Human Services (hereinafter “DHS”) for administering the

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<sup>19</sup> *Id.*; *infra* n. 34.

<sup>20</sup> Press Release, *Auditor General DePasquale Says Audit Stopped Abuse of State Funds by Abortion Alternative Provider Real Alternatives*, COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF THE AUDITOR GENERAL (Sep. 19, 2017), available at <http://www.paauditor.gov/press-releases/auditor-general-depasquale-says-audit-stopped-abuse-of-state-funds-by-abortion-alternative-provider-real-alternatives>.

<sup>21</sup> 2017 Auditor General Report at 15, available at [https://www.paauditor.gov/Media/Default/Reports/DHS\\_RA\\_Audit%20Report.pdf](https://www.paauditor.gov/Media/Default/Reports/DHS_RA_Audit%20Report.pdf). RA claimed to have prior authorization for the 3% fee, but RA is never able to provide proof of authorization to DHS. In 2016, DHS stated RA was unable to provide “written documentation that DHS explicitly approved the additional agreement language related to the three percent fee.” Letter to RA from DHS, *Response to RA: Inappropriate Bills Identified for Services Providers and Three Percent Fee*, 2 (July 29, 2016) (hereinafter “July 29, 2016 DHS Letter”), available at <https://www.documentcloud.org/documents/6950803-72916-Letter-to-Ra.html>.

<sup>22</sup> Molly Born, *State to Begin Audit of Abortion-Alternative Group*, PITTSBURGH POST-GAZETTE (Sep. 26, 2016), available at <http://www.post-gazette.com/news/state/2016/09/26/State-to-begin-audit-of-abortion-alternative-group/stories/201609260035>.

<sup>23</sup> 2017 Auditor General Report at 14, available at [https://www.paauditor.gov/Media/Default/Reports/DHS\\_RA\\_Audit\\_Report.pdf](https://www.paauditor.gov/Media/Default/Reports/DHS_RA_Audit_Report.pdf).

<sup>24</sup> Kate Giammarise, *Officials: State-Funded Anti-Abortion Group Does Not Have to Return Fees*, PITTSBURGH POST-GAZETTE (Mar. 27, 2018), available at <http://www.post-gazette.com/news/state/2018/03/27/Pennsylvania-DHS-won-t-see-funds-back-from-anti-abortion-group-Real-Alternatives/stories/201803260122>.

<sup>25</sup> The new contract between DHS and RA “merely says the company must pay its subcontractors without any deduction,” and DHS “decided not to recoup the contested taxpayer funds because that would require a protracted lawsuit using taxpayer funds.” Marie McCullough, *Dispute Questions Anti-Abortion Group’s Use of Taxpayer Dollars*, THE PHILADELPHIA INQUIRER (Mar. 16, 2018), available at <http://www.philly.com/philly/health/real-alternatives-audit-department-human-services-taxpayer-money-20180316.html>.

<sup>26</sup> CfA recognizes that people of any gender identity may become pregnant and uses “pregnant women” as a shorthand for all people who are or may become pregnant.

program. In addition, the organization brazenly repurposes taxpayer dollars earmarked for the program's administration and service provision to oppose RA's public record obligations.

Beyond appropriating various program funds for its own use, RA's management of the AAS Program is also riddled with inefficiency. RA's exorbitant executive salaries—Mr. Bagatta's 2018 salary was over \$300,000<sup>27</sup>—dwarf the salaries for executives of other comparable programs.<sup>28</sup> RA's bloated advertising expenses have more than quintupled over the last 5 years and depleted resources intended to fund AASP services for Pennsylvanians.<sup>29</sup> These ever-growing expenditures have been a bad return on investment—they correspond with a decreasing number of clients receiving AASP services year after year.<sup>30</sup> While RA's executive compensation and advertising expenses grow exponentially, RA has consistently failed to fully expend funding for service provision.<sup>31</sup> Further, RA's purported advertising expenses are heavily skewed to the very end of each fiscal year, even though potential clients would seemingly require AASP services evenly across the calendar.<sup>32</sup> RA has had more than ample time to develop an efficient and effective process for providing AASP services, but has failed to do so.

### **Real Alternatives' Misuse of Pennsylvania Taxpayer Dollars**

While administering the AAS Program, RA regularly pockets taxpayer money intended for AASP service providers for its own private use through implementation of its so-called Program and Development Agreement or fee. This money is on top of the over \$2 million RA receives annually for administering the AAS Program. When questioned about this practice, RA has repeatedly fought to continue its skimming. RA also demands that taxpayer funds be used to cover its litigation costs incurred fighting legitimate public record requests. Both constitute misuse of taxpayer money and RA's consistent efforts to maintain these practices demonstrates the organization's eagerness to improperly redirect public money for its own non-public purposes.

#### *Real Alternatives' Program Development and Advancement Fee*

Pennsylvania's grant agreements with RA require the organization to "arrange for the provision of direct alternatives to abortion services, statewide, to clients requiring alternatives to abortion services."<sup>33</sup> In return, DHS pays RA roughly \$2,132,800 to cover the organization's administrative and operational expenses required to perform its contractual obligations.<sup>34</sup> In

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<sup>27</sup> Real Alternatives, 2017/2018 Return of Organization Exempt Form Income Tax Form 990, 29 (May 15, 2019), (hereinafter "FY 17/18 Form 990"), available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/08\\_2019\\_prefixes\\_22-23%2F232868660\\_201806\\_990\\_2019081216561821](https://projects.propublica.org/nonprofits/display_990/232868660/08_2019_prefixes_22-23%2F232868660_201806_990_2019081216561821).

<sup>28</sup> See, *infra* pp. 13-15.

<sup>29</sup> See, *infra* pp. 15-16.

<sup>30</sup> *Id.*

<sup>31</sup> See, *infra* pp. 11-13.

<sup>32</sup> See, *infra* pp. 16-18.

<sup>33</sup> 2018 AASP Grant Agreement at 9, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>; 2012 AASP Grant Agreement at 9, available at [https://contracts.patresury.gov/Admin/Upload/203444\\_4100060934.pdf](https://contracts.patresury.gov/Admin/Upload/203444_4100060934.pdf).

<sup>34</sup> This figure represents the difference between the entire AASP FY 2018/2019 budget and the portions of the budget purportedly dispersed by RA to the service providers, specifically the "Counseling Reimbursement" and "Pregnancy

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 6

accordance with its contract, RA separately contracts with independent service providers who receive state funding to provide alternatives to abortion services.<sup>35</sup> RA is tasked with identifying these subcontractors, monitoring their performance and compliance with the program requirements, managing the collection and disbursement of state funding, and ensuring that the subcontractors are paid appropriately.<sup>36</sup>

RA also has side agreements with each of the AASP service providers, not provided for in its AASP contract with DHS,<sup>37</sup> called Program Development and Advancement Agreements (hereinafter “PDAA”).<sup>38</sup> It appears the PDAAs require each subcontractor to pay RA 3% of the AASP money received from the state.<sup>39</sup> In annual audit reports RA catalogues these payments under “[r]evenues, gains, and other support,” separate from the other public funding collected from the state.<sup>40</sup> Similarly, RA’s 990s separately list the PDAA payments under “Program Service Revenue.”<sup>41</sup>

At one time, RA reduced the amount of AASP money paid to each subcontractor by 3% and directly pocketed the funds, purportedly in the name of efficiency and in accordance with the PDAAs.<sup>42</sup> It appears that RA changed its policy after the practice was challenged, and eventually began paying its subcontractors in full, but required them to return 3% of payments received back to RA.<sup>43</sup>

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Test Kit” line items. See Real Alternatives, *Report of Final Expenses for Fiscal Year 2018/2019*, 2-3 (Sep. 16, 2019) (hereinafter “FY 18/19 Final Expense Report”), available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>.

<sup>35</sup> Second Affidavit of Kevin Bagatta ¶¶ 7-8 (Oct. 23, 2019), *Carter v. PA Department of Human Services*, No. AP 2017-2304 (Pa. Office of Open Records 2017) (hereinafter “Bagatta 2d Aff.”).

<sup>36</sup> 2018 AASP Grant Agreement at 10, 18-19, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>.

<sup>37</sup> Bagatta 2d Aff. ¶ 9.

<sup>38</sup> Bagatta 2d Aff. ¶ 10.

<sup>39</sup> Letter to RA from DHS, 7 (Apr. 25, 2016) (enclosing the Final Audit Report of Real Alternatives prepared by DHS’s Division of Audit and Review) (hereinafter “2016 Division of Audit and Review Final Audit”), available at <https://www.documentcloud.org/documents/6940146-DAR-FinalAuditRefort2016.html>.

<sup>40</sup> See, e.g., McKonly & Asbury, *Real Alternatives Financial Statement with Supplementary Information: Years Ended June 30, 2018 and 2017 and Independent Auditor’s Report*, 7-8 (Mar. 27, 2019) (hereinafter “FY 17/18 Audit Report”), available at <https://www.documentcloud.org/documents/6952909-Real-Alternatives-6-30-18-Single-Audit.html>.

<sup>41</sup> Given RA’s contention that these payments are made to “champion RA’s beliefs”, see *infra* n. 56, it is notable that these payments are not included on the form as “other contributions, gifts, grants, and similar amounts not included above.” See FY 17/18 Form 990 at 9, available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/08\\_2019\\_prefixes\\_22-23%2F232868660\\_201806\\_990\\_2019081216561821](https://projects.propublica.org/nonprofits/display_990/232868660/08_2019_prefixes_22-23%2F232868660_201806_990_2019081216561821).

<sup>42</sup> July 29, 2016 DHS Letter at 2, available at <https://www.documentcloud.org/documents/6950803-72916-Letter-to-Ra.html>. RA asserted this was done to reduce the back-and-forth of payments and did not constitute RA wrongly keeping state funding intended for service providers. See Molly Born, *Anti-abortion Nonprofit Seeks to Halt State Audit*, PITTSBURGH POST-GAZETTE (Mar. 16, 2017), available at <https://www.post-gazette.com/news/state/2017/03/16/Anti-abortion-nonprofit-Real-Alternatives-seeks-to-halt-state-audit/stories/201703160128>.

<sup>43</sup> Born (Mar. 16, 2017), *supra* n. 42.

RA's AASP contracts with DHS have never contained any reference to a "Program Development Advancement Agreement" or a 3% fee being requested or required of the AASP subcontractors. Nevertheless, RA's financial statements confirm these repayments.<sup>44</sup> In 2016, when the Bureau of Financial Operations Audit Report by the PA Auditor questioned the propriety of these fees, RA claimed that DHS (then the Department of Public Welfare or DPW) officials were aware of and had approved the fees in 1997.<sup>45</sup> RA did not provide any evidence to support DHS approval of either RA's initial withholding of 3% of all payments to subcontractors or later, the auxiliary contracts requiring subcontractors to return 3% of payments.<sup>46</sup>

In a recent lawsuit RA did not claim that DHS supported the PDAAs or enforcement of RA's 3% fee.<sup>47</sup> Instead, RA asserted that the PDAAs are not referenced in its AASP grant agreement with DHS and are "completely unrelated to services provided by [RA] under the Grant Agreement."<sup>48</sup> RA even currently relies on this assertion to resist related Right-to-Know Law requests.<sup>49</sup>

*Real Alternatives Abused its Position as State Contractor to Pressure Partners*

Without DHS's approval or support of its 3% fee, RA instead contends the PDAA payments are entirely separate agreements, unrelated to RA's administration of the AAS Program, claiming subcontractors make them voluntarily using their private money, albeit money originally earned from the state.<sup>50</sup> According to Mr. Bagatta, these payments cover costs associated with various RA expenses and initiatives, including RA's "presentations about creating alternatives to abortion programs *in other states*,"<sup>51</sup> RA's pursuit of new state contracts in Pennsylvania,<sup>52</sup> RA's maintenance of "cash reserves" to cover local and national operations when government payments

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<sup>44</sup> RA refers to its 3% fee in these statements as a "Program Advancement and Development" Agreement or Fee, depending on the year the statements reference. See McKonly & Asbury, *Real Alternatives Financial Statement with Supplementary Information: Years Ended June 30, 2016 and 2015 and Independent Auditor's Report*, 7-8 (Nov. 3, 2016) (hereinafter "FY 15/16 Audit Report"), available at <https://www.documentcloud.org/documents/6939954-FinancialStatement20162015.html>; McKonly & Asbury, *Real Alternatives Financial Statement with Supplementary Information: Years Ended June 30, 2015 and 2014 and Independent Auditor's Report*, 7-8 (Jan. 15, 2016) (hereinafter "FY 14/15 Audit Report"), available at <https://www.documentcloud.org/documents/6939953-FinancialStatement20152014.html>.

<sup>45</sup> See Kevin I. Bagatta, and Thomas A. Lang, *DHS Meeting to Discuss BFO Audit Report Finding #3*, REAL ALTERNATIVES, 5 (May 25, 2016), available at <https://www.documentcloud.org/documents/6951067-5-25-16-RA-Powerpoint-Finding-3-2.html>.

<sup>46</sup> July 29, 2016 DHS Letter at 2, available at <https://www.documentcloud.org/documents/6950803-72916-Letter-to-Ra.html>.

<sup>47</sup> *Equity Forward v. Department of Human Services*, No. 225 C.D. 2018, 2019 WL 2400524 (Pa. Commw. Ct. May 17, 2019).

<sup>48</sup> Affidavit of Kevin I. Bagatta ¶ 27 (Jan. 4, 2018), *Carter v. PA Department of Human Services*, No. AP 2017-2304 (Pa. Office of Open Records 2017).

<sup>49</sup> RA argues that the PDAAs are "private agreements among private parties that have nothing to do with the tasks required under the 2012 Grant Agreement, and are not subject to access under Section 506(d) or otherwise." Remand Position Statement of Real Alternatives at 2 (Oct. 25, 2019), *Carter v. PA Department of Human Services*, No. AP 2017-2304 (Pa. Office of Open Records 2017).

<sup>50</sup> Bagatta 2d Aff. ¶ 10.

<sup>51</sup> *Id.* ¶ 13(a) (emphasis in original).

<sup>52</sup> *Id.* ¶ 13(b).

are delayed,<sup>53</sup> RA’s “advance[ment] and protect[ion] of its life-affirming programming” otherwise not chargeable to the state,<sup>54</sup> and RA’s “development and publication of sexual health education websites directed to teens and parents of teens.”<sup>55</sup>

It is unclear what, if anything, these subcontractors receive in return for their private payments to RA. Mr. Bagatta claims RA’s subcontractors entered the PDAs “in pursuit of the private interest of championing the shared belief of Real Alternatives and the Providers that alternatives to abortion programs are good and valuable services to women, both in Pennsylvania and nationwide.”<sup>56</sup> In that case, it appears that these PDAs lack consideration.<sup>57</sup> In fact, if the PDA payments are not a requirement of participation in the AAS Program, then they are gifts individually made to RA by each AASP subcontractor in amounts proportional to the respective subcontractors’ AASP earnings. Generally, a contract lacking consideration is not enforceable<sup>58</sup> unless it contains an additional and express statement of intention to be legally bound.<sup>59</sup> The existence of such an express statement, however, would reinforce the obligatory nature of these fees, rendering the contract unenforceable.<sup>60</sup>

The nature of these PDA payments cuts against RA’s assertion that they are made voluntarily. First, RA’s original reference to this 3% payment as the Program Advancement and Development Fee<sup>61</sup> belies RA’s assertion that the payments are voluntary.<sup>62</sup> Notably, in 2016, DHS auditors asked three RA service providers whether the 3% fee provided for in the PDA was

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<sup>53</sup> *Id.* ¶ 13(c).

<sup>54</sup> *Id.* ¶ 13(d).

<sup>55</sup> *Id.* ¶ 13(e).

<sup>56</sup> *Id.* ¶ 17.

<sup>57</sup> *E.g., Stelmack v. Glen Alden Coal Co.*, 14 A.2d 127, 129 (Pa. 1940) (holding that a promise lacked consideration where it was entirely gratuitous, purely for the purpose of a benefit to promisee as a voluntary act).

<sup>58</sup> *E.g., Pennsylvania Environmental Defense Foundation v. Commonwealth*, 214 A.3d 748, 759 (Pa. Commw. Ct. 2019) (stating that a contract without consideration is invalid).

<sup>59</sup> Pennsylvania only holds written and signed contracts without consideration enforceable if the writing contains an additional and express statement of intention to be legally bound. 33 P.S. § 6; *see, e.g., Socko v. Mid-Atlantic Systems of CPA, Inc.*, 126 A.3d 1266, 1276-77 (Pa. 2015) (holding that a written, express statement of intent to be legally bound supplies consideration).

<sup>60</sup> RA’s claim that the payments are voluntary implicitly acknowledges that RA cannot use its position to force subcontractors to pay it. *See, infra* pp. 22-23. If RA made representations to subcontractors that the PDAs were obligatory, while telling DHS they are not, then RA made material misrepresentations and the PDAs are unenforceable. *Greenwood v. Kadoich*, 357 A.2d 604, 607-08 (Pa. Super. Ct. 1976) (“Where a party is induced to enter into a transaction by means of . . . material misrepresentation, such a transaction can be avoided by the innocent party.”); *College Watercolor Grp. v. William H. Newbauer, Inc.*, 360 A.2d 200, 206 (Pa. 1976) (quoting Restatement of Contracts § 476 (Am. Law Inst. 1932)) (“Where a party is induced to enter into a transaction with another party that he was under no duty to enter into by means of the latter’s fraud . . . the transaction is voidable as against the latter”).

<sup>61</sup> *See, e.g.*, FY 14/15 Audit Report at 7, available at <https://www.documentcloud.org/documents/6939953-FinancialStatement20152014.html>.

<sup>62</sup> A fee is generally “[t]he sum which a public officer . . . is authorized to demand as payment for the execution of his/[her] official functions,” “[e]xtended to denote the remuneration paid or due . . . any professional [], a director of a public company, etc. for an occasional service,” or “[t]he sum paid for admission to an examination, a society, etc.” *Fee*, Oxford English Dictionary (2d ed. 1989), available at [www.oed.com/view/Entry/68943](http://www.oed.com/view/Entry/68943). In this case that would indicate that the Program Advancement and Development Fee is a sum paid in return for RA’s administrative services and/or admittance to the AASP.



voluntary, as RA contended. Two of the three service providers stated that they “assumed that the fee was a cost of doing business” with RA.<sup>63</sup> Second, neither gifts nor donations require a contract. Third, and perhaps most odd for “gifts,” all of RA’s subcontractors regularly pay the same 3% amount of their AASP funds to RA each year, with none opting against making the payments.<sup>64</sup>

*Real Alternatives’ Use of Taxpayer Money to Combat Right-to-Know Requests*

In addition to lining its own pockets with funds earmarked for AASP service providers, RA has also repeatedly used taxpayer dollars to combat public record requests. Pennsylvania’s Right-To-Know Law (hereinafter “RTKL”) is “designed to promote access to official government information in order to prohibit secrets, scrutinize the actions of public officials, and make public officials accountable for their actions.”<sup>65</sup> RA should not be using taxpayer money to curtail the taxpayers’ legally protected right to access government program information.<sup>66</sup> Unfortunately, in 2014 RA was allowed to do just that. RA’s FY 2013/2014 Budget Revision requesting the use of \$16,000 budgeted for administrative expenses to cover legal consulting fees for resisting RTKL requests was approved.<sup>67</sup>

In March, 2017, DHS received a RTKL request seeking information about “all centers receiving money through the Real Alternatives non-profit agency and/or who are part of Pennsylvania’s ‘Alternatives to Abortion’ Program.”<sup>68</sup> DHS explained to RA that any entity performing a “governmental function” is required to comply with RTKL requests for related

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<sup>63</sup> 2016 Division of Audit and Review Final Audit, 7 (Apr. 25, 2016), available at <https://www.documentcloud.org/documents/6940146-DAR-FinalAuditRefort2016.html>; Born (Sep. 26, 2016), *supra* n. 22.

<sup>64</sup> This is despite the variation in the subcontractors’ economic circumstances and generally small budgets compared to RA’s \$9 million annual budget. See, e.g., Blessed Margaret of Castello Home for Crisis Pregnancies, 2018 Return of Organization Exempt from Income Tax Form 990 (Aug. 20, 2019), available at [https://projects.propublica.org/nonprofits/display\\_990/232431876/10\\_2019\\_prefixes\\_22-23%2F232431876\\_201812\\_990\\_2019100916730437](https://projects.propublica.org/nonprofits/display_990/232431876/10_2019_prefixes_22-23%2F232431876_201812_990_2019100916730437); St. Josephs Center, 2017 Return of Organization Exempt from Income Tax Form 990 (May 7, 2019), available at [https://projects.propublica.org/nonprofits/display\\_990/240795689/05\\_2019\\_prefixes\\_23-26%2F240795689\\_201806\\_990\\_2019052816346578](https://projects.propublica.org/nonprofits/display_990/240795689/05_2019_prefixes_23-26%2F240795689_201806_990_2019052816346578); but see Catholic Charities of The Diocese of Pittsburgh, 2017 Return of Organization Exempt from Income Tax Form 990 (May 14, 2019), available at [https://projects.propublica.org/nonprofits/display\\_990/251326213/07\\_2019\\_prefixes\\_23-26%2F251326213\\_201806\\_990\\_2019071216483125](https://projects.propublica.org/nonprofits/display_990/251326213/07_2019_prefixes_23-26%2F251326213_201806_990_2019071216483125).

<sup>65</sup> *Bowling v. Office of Open Records*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010), *aff’d* 75 A.3d 453 (Pa. 2013).

<sup>66</sup> Under Pennsylvania law, the determination of whether or not a record is subject to access is generally made by the agency’s records officer. 65 P.S. §67.506(d)(3). Here, however, RA is asserting that the records are not subject to public access. As DHS explained to RA, “generally the Commonwealth does not pay for a contractor’s or grantee’s right to know expenditures and expects to be indemnified in the event the Commonwealth incurs expenses related to a contractor’s or grantee’s RTKL appeals.” See Email to RA from DHS, *RE: Checking In* (Oct. 16, 2018), available at <https://www.documentcloud.org/documents/6953014-Ex5-Oct2018CheckingIn.html>.

<sup>67</sup> Letter to Pennsylvania Department of Public Welfare from RA, *RE: 2-13/2014 Alternative to Abortion Grant Budget Revision Request*, 4 (Apr. 16, 2014), available at <https://www.documentcloud.org/documents/6950970-Ex3-Apr2014BudgetRevision.html>.

<sup>68</sup> Email to RA from DHS, *Right to Know Law Request* (Mar. 20, 2017), available at <https://www.documentcloud.org/documents/6943507-462-Right-to-Know-Law-Request-Redacted.html>.

documents in its possession.<sup>69</sup> DHS also stated that, “[a]ccording to the grant agreement,” RA must provide several of the requested documents.<sup>70</sup> RA responded by forwarding the request to its lawyers for an opinion regarding the “applicability” of the request.<sup>71</sup> DHS requested that the determination be provided back to DHS by the next day, but RA replied that it would not be able to respond within that timeframe.”<sup>72</sup> A week later, RA forwarded a letter from its lawyer stating that RA was not required to release any of the requested information pursuant to the RTKL.<sup>73</sup> DHS consequently denied the RTKL request.<sup>74</sup> When no appeal was filed, records pertaining to the AASP subcontractors—who are paid with taxpayer money—were denied to the public, based on the memo written by an attorney hired by RA.

In May, 2018 RA sent a budget revision request to, among other things, increase the “Administrative Operating Budget” line by \$20,000 to fund RA’s additional legal fees relating to RTKL litigation.<sup>75</sup> DHS contested these fees, explaining that the “legal fees are related to *Real Alternative’s decision to contest a Right-To-Know-Law Request* based on *its* contention that the requested records were unrelated to the Grant Agreement or constituted Real Alternative proprietary confidential information.”<sup>76</sup> RA submitted a letter to DHS outlining what it contended was DHS’s violation of the AASP contract, and a contract dispute ensued between DHS and RA regarding the propriety of RA’s using public funding to oppose RTKL requests.<sup>77</sup>

It appears RA’s main argument was that since it had been able to repurpose taxpayer dollars to oppose a public records request in 2014, it was permissible to continue the practice in 2018.<sup>78</sup> DHS explained to RA, however, that the prior practice was inconsistent with state RTKL, stating “[w]e are working to correct these [RTKL budget] mistakes moving forward, which is why this particular aspect of the budget revision is not being approved.”<sup>79</sup> The requested amount was

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<sup>69</sup> *Id.*; 65 P.S. § 607.506(d).

<sup>70</sup> *Supra* n. 68; *see* 2018 AASP Grant Agreement at 46, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>.

<sup>71</sup> Email to DHS from RA, *Right to Know Law Request*, 2 (Mar. 22, 2017), available at <https://www.documentcloud.org/documents/6943508-447-Re-Right-to-Know-Law-Request-Redacted.html>.

<sup>72</sup> *Id.* at 1.

<sup>73</sup> Email to DHS from RA, *RTKL Request*, 2 (Mar. 28, 2017) (enclosing legal opinion from RA outside counsel), available at <https://www.documentcloud.org/documents/6943509-465-RTKL-Request.html>.

<sup>74</sup> Email to RA from DHS, *Right-to-Know Law Request* (Apr. 13, 2017), available at <https://www.documentcloud.org/documents/6943510-464-Right-to-Know-Law-Request-Redacted.html>.

<sup>75</sup> Letter to RA from DHS, *Re: 2017/2018 Pregnancy and Parenting Support Services Program Budget Revision Request*, 6 (May 14, 2018), available at <https://www.documentcloud.org/documents/6950235-Signed-Budget-Revision-Request-May-15-2018.html>.

<sup>76</sup> Letter to RA from DHS, *Re: 2017/2018 Pregnancy and Parenting Support Services Program Budget Revision Request, Grant No. 4100079673* (Nov. 18, 2018) (emphasis added), available at <https://www.documentcloud.org/documents/6943511-October-Final-Budget-Revision-2018.html>.

<sup>77</sup> Emails between RA and DHS, *RE: [External] Contract dispute*, 2 (Nov. 23, 2018), available at <https://www.documentcloud.org/documents/6943512-FW-External-Contract-Dispute-Redacted.html>.

<sup>78</sup> Email to DHS from RA, *Re: Real Alternatives first FY 17-18 Budget Revision* (Jun. 1, 2018), available at <https://www.documentcloud.org/documents/6956044-Ex2-June2018LangEmail.html>.

<sup>79</sup> Email to RA from DHS, *RE: Real Alternatives first FY 17-18 Budget Revision* (Jun. 4, 2018), available at <https://www.documentcloud.org/documents/6950836-Ex4-Jun2018emailCorrecting.html>.

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 11

ultimately left out of the revised FY 2017/2018 budget,<sup>80</sup> but RA continued to pursue its contract dispute with DHS.

Perhaps because of RA's ongoing legal pressure, DHS allowed RTKL fees incurred in FY 2019/2020 to be reimbursed through the grant agreement.<sup>81</sup> However, DHS clarified that this "concession" did "not represent any course of dealings" with RA and directed RA not to make any future reimbursement claims relating to legal and/or consulting fees for compliance with RTKL requests.<sup>82</sup>

RA has continuously attempted to force Pennsylvania taxpayers to pay RA's legal costs to improperly avoid complying with Pennsylvania's RTKL.

### **Real Alternative's Inefficient Implementation of the AAS Program**

In addition to RA's explicit policies and actions to improperly redirect money intended for AASP service providers to its own coffers, the organization is also a wasteful steward of taxpayer money. RA's implementation of the AAS Program has not been effective in achieving its own intended goal of decreasing abortions in the state. Between 2014 and 2017 the national abortion rate decreased by 8%, while Pennsylvania's declined by only 1% over the same period.<sup>83</sup> In RA's almost 25 years administering the AAS Program, which has cost Pennsylvania over \$100 million, 309,144 clients have been served.<sup>84</sup> Put another way, under RA's administration, fewer than one client is served per day at each of the AASP sites at a rough average cost of over \$320 per client.

Further, over the last 5 years RA has served a shrinking number of clients.<sup>85</sup> Despite this, the AASP advertising budget and RA's executive compensation have consistently grown. Clearly, Pennsylvanians are not seeing a good return on their continued investment in RA and its executives. After two decades administering the AAS Program, RA has shown that it should no longer be entrusted with this multimillion-dollar statewide program.

### *Unused Services Funds*

In each of the last four fiscal years, RA has left over half a million dollars budgeted for AASP services unspent.<sup>86</sup> Pennsylvania developed the AAS Program to "provide[ ] social and

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<sup>80</sup> Letter to RA from DHS, *Re: 2017/2018 Pregnancy and Parenting Support Services Program Budget Revision Request, Grant No. 4100079673* (Jan. 14, 2019), available at <https://www.documentcloud.org/documents/6950838-Final-Budget-Revision-Jan-2019.html>.

<sup>81</sup> Email to RA from DHS, *Response Needed: Side Letter*, 2 (Jun. 28, 2019), available at <https://www.documentcloud.org/documents/6950843-19-RTKL-348-037-Redacted.html>.

<sup>82</sup> *Id.*

<sup>83</sup> Fact Sheet, *State Facts About Abortion: Pennsylvania*, GUTTMACHER INSTITUTE (Mar. 2020), available at <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-pennsylvania>.

<sup>84</sup> Real Alternatives, *supra* n. 4; FY 18/19 Status Report at 6, available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>.

<sup>85</sup> *See infra* p. 15.

<sup>86</sup> *See* FY 18/19 Final Expense Report at 2-3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>; Real Alternatives, Report of Final Expenses for Fiscal Year 2017/2018, 3-4 (Dec. 5, 2018) (hereinafter "FY 17/18 Final Expense Report"), available at <https://www.documentcloud.org/documents/6951496-Ltr-Refund-for-June-2018-Right-to-Know-Charge-2.html>; Real Alternatives, Report of Final Expenses for Fiscal

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 12

educational services as training/counseling,” “food and clothing pantries and housing assistance.”<sup>87</sup> The bulk of the AASP funding is allocated to “counseling reimbursement” and is intended to cover these services, yet a significant portion of the unspent funds was budgeted for counseling reimbursement.<sup>88</sup> Whether this is because RA has not engaged sufficient numbers of service providers<sup>89</sup> or there is not sufficient demand for the services offered by RA’s subcontractors is unclear.

Further, consistent discrepancies between RA’s reported “counseling reimbursement” expenditures and “service provider reimbursement”—two figures that ostensibly should be equal—raise a question as to whether RA is improperly keeping for itself some of the funding intended for AASP service providers. In four of the last 5 years, RA’s “total reimburse[ment]” to service providers as recorded in its year end status reports has been 5-9% less than the “counseling reimbursement” expenditures RA reported to DHS in its final expense reports,<sup>90</sup> yet it appears

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Year 2016/2017, 2-3 (Jul. 20, 2017) (hereinafter “FY 16/17 Final Expense Report”), available at <https://www.documentcloud.org/documents/6951487-June-2017-Expenditures-Redacted-2.html> ; Real Alternatives, Report of Final Expenses for Fiscal Year 2015/2016, 5 (Sep. 15, 2016) (hereinafter “FY 15/16 Final Expense Report”), available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html>.

<sup>87</sup> Department of Human Services, *supra* n. 2.

<sup>88</sup> See FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html> ; FY 17/18 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951496-Ltr-Refund-for-June-2018-Right-to-Know-Charge-2.html> ; FY 16/17 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951487-June-2017-Expenditures-Redacted-2.html> ; FY 15/16 Final Expense Report at 5, available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html>.

RA had to regularly repay DHS hundreds of thousands of dollars budgeted for AASP services that went unspent. For example, in FY 2015/2016 RA repaid DHS \$590,602.74. FY 15/16 Final Expense Report at 1-2, available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html>.

<sup>89</sup> It is notable that DHS’s website’s summary of the RA’s program states that “[c]lose to 100 centers across Pennsylvania are checked annually to ensure they follow the Department of Human Services’ standards, and staffed with caring professionals and trained counselors.” Department of Human Services, *supra* n. 2. However, since 2014, RA only monitored and/or visited an average of 46 sites annually. See, e.g., FY 18/19 Final Expense Report at 6 (stating RA only performed 38 site monitorings and 6 site visits that fiscal year), available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>.

<sup>90</sup> Compare FY 18/19 Status Report at 52, available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>, with FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html> ; compare Real Alternatives, *Year End Status Report July 1, 2016 to June 30 2017*, 53 (July 1, 2016 to June 30, 2017) (hereinafter “FY 16/17 Status Report”), available at <https://www.documentcloud.org/documents/6957161-Year-End-Report-2016.html>, with FY 16/17 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951487-June-2017-Expenditures-Redacted-2.html> ; Real Alternatives, *Final Fiscal Year Status Report July 1, 2015 to June 30, 2016*, 70 (Sep. 14, 2016) (hereinafter “FY 15/16 Status Report”), available at <https://www.documentcloud.org/documents/6957160-FY-15-16-Status-Report.html>, with FY 15/16 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html> ; compare Real Alternatives, *Final Fiscal Year Status Report July 1, 2014 to June 30, 2015*, 135 (July 1, 2014 to June 30, 2015) (hereinafter “FY 14/15 Status Report”), available at <https://www.documentcloud.org/documents/6950999-FY-14-15-Status-Report.html>, with Real Alternatives, *Report of Final Expenses for Fiscal Year 2014/2015*, 3 (Sep. 15, 2015) (hereinafter “FY 14/15 Final Expense Report”), available at <https://www.documentcloud.org/documents/6951469-Final-Expenses-July-2014-to-June-2015->

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 13

these two reporting figures constitute the same expenditures. An investigation into this discrepancy is warranted.

### *Executive Compensation*

The AAS Program is established to fund alternatives to abortion services for women in Pennsylvania, and includes federal funds for serving individuals whose monthly income is less than 185% of the Federal Poverty Income Guidelines,<sup>91</sup> or approximately \$48,470 for a family of four.<sup>92</sup> RA, however, has long used AASP funding to pay its executives' significant salaries. As of 2018, RA's highest paid employee, President and CEO Kevin Bagatta, received a total annual compensation of \$307,421.<sup>93</sup> RA's second highest paid employee, RA's Vice President of Operations, Thomas Lang, received total compensation of \$235,774.<sup>94</sup>

These figures dwarf the executive salaries at organizations that administer other DHS grant programs, even when those organizations are much larger. For example, the CEO of the Pennsylvania Coalition Against Rape (hereinafter "PCAR"), which has an operating budget over twice the size of RA's, received a total annual compensation of approximately \$150,000<sup>95</sup> and the CFO's total compensation was \$92,515.<sup>96</sup> Pennsylvania Coalition Against Domestic Violence (hereinafter "PCADV") operates a DHS program about four times the size of the one operated by

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[Redacted.html](#). These numbers are incongruous in FY 2017/2018 as well, but the amount reported in the status report is 26% higher than reimbursement in the final expense report. Compare Real Alternatives, *Year End Status Report July 1, 2017 to June 30, 2018*, 101 (July 1, 2017 to June 30, 2018) (hereinafter "FY 17/18 Status Report"), available at <https://www.documentcloud.org/documents/6957213-Year-End-Report-2018.html>, with FY 17/18 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951496-Ltr-Refund-for-June-2018-Right-to-Know-Charge-2.html>. The final budget for FY 2017/2018 does not cover a full twelve months, which may explain this anomaly.

<sup>91</sup> See 2018 AASP Grant Agreement at 9, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>; see 2012 AASP Grant Agreement at 9, available at [https://contracts.patresury.gov/Admin/Upload/203444\\_4100060934.pdf](https://contracts.patresury.gov/Admin/Upload/203444_4100060934.pdf).

<sup>92</sup> Pennsylvania federal poverty level figure taken from the federal poverty guidelines for the 48 contiguous U.S. states and the District of Columbia. See Connecticut Department of Social Services, *Federal Poverty Levels – 3/2020-3/2021*, 2.1.1 OF CONNECTICUT (Mar. 2020), available at <https://uwc.211ct.org/federal-poverty-levels-4115-33116/>; see Office of the Assistant Secretary for Planning and Evaluation, *2020 Poverty Guidelines for the 48 Contiguous States and the District of Columbia*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES (Jan. 17, 2020), available at <https://aspe.hhs.gov/poverty-guidelines>.

<sup>93</sup> FY 17/18 Form 990 at 29, available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/08\\_2019\\_prefixes\\_22-23%2F232868660\\_201806\\_990\\_2019081216561821](https://projects.propublica.org/nonprofits/display_990/232868660/08_2019_prefixes_22-23%2F232868660_201806_990_2019081216561821).

<sup>94</sup> *Id.*

<sup>95</sup> Pennsylvania Coalition Against Rape, *2017 Return of Organization Exempt From Income Tax Form 990*, 1, 77 (Feb. 5, 2019), available at [https://projects.propublica.org/nonprofits/display\\_990/232067636/04\\_2019\\_prefixes\\_20-23%2F232067636\\_201806\\_990\\_2019041916230122](https://projects.propublica.org/nonprofits/display_990/232067636/04_2019_prefixes_20-23%2F232067636_201806_990_2019041916230122). Because the organization changed CEOs that year, it may be also be informative to review the prior year's Form 990. See Pennsylvania Coalition Against Rape, *2016 Return of Organization Exempt From Income Tax Form 990*, 8 (Jan. 24, 2018), available at <https://projects.propublica.org/nonprofits/organizations/232067636/201820379349300312/full>.

<sup>96</sup> Pennsylvania Coalition Against Rape (2017), *supra* n. 95 at 8.

RA, yet in 2017 the organization's executive director's total compensation was \$175,584 and its deputy director's was \$120,758.<sup>97</sup>

Though RA's total executive compensation does not entirely come from its AASP grant, Pennsylvania taxpayers are the largest contributor. RA's current AASP contract provides for Mr. Bagatta to receive \$150,000 a year for the 45% of his time dedicated to running Pennsylvania's grant project.<sup>98</sup> Mr. Lang's AASP salary was \$140,000, with no indication of how much of his time is dedicated to Pennsylvania's program.<sup>99</sup> By comparison, the executives heading up PCADV and PCAR each dedicate 100% of their time to running their roughly \$25 million and \$20 million programs, respectively. Broken down, while Mr. Bagatta earns roughly \$160 an hour from DHS, the PCADV executive director earns \$80.75 an hour and the PCAR CEO earns \$66.74 an hour.

RA's 990s do not clarify the source of its executives' reported total compensation, but as approximately 99.68% of RA's revenue comes from its three state grants, it would appear the salaries are largely comprised of public funds.<sup>100</sup> Notably, however, compensation for Mr. Bagatta and Mr. Lang in RA's three state contracts do not add up to the total salaries reported for both men in RA's Form 990s.<sup>101</sup> This raises a question as to the source of their additional compensation, especially because the amount of RA's non-public funding does not cover the difference, even if the entirety of that funding went directly to Mr. Bagatta's and Mr. Lang's pockets.<sup>102</sup> This

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<sup>97</sup> Pennsylvania Coalition Against Domestic Violence, *2016 Return of Organization Exempt From Income Tax Form 990*, 7-8 (May 14, 2018), available at [https://projects.propublica.org/nonprofits/display\\_990/232052886/09\\_2018\\_prefixes\\_22-23%2F232052886\\_201706\\_990\\_2018091915706051](https://projects.propublica.org/nonprofits/display_990/232052886/09_2018_prefixes_22-23%2F232052886_201706_990_2018091915706051). Due to changes in organization's leadership there is no comparable executive director salary in 2018, but the deputy director's 2018 total compensation was \$148,354. See Pennsylvania Coalition Against Domestic Violence, *2017 Return of Organization Exempt From Income Tax Form 990* (Jan. 25, 2019), available at <https://projects.propublica.org/nonprofits/organizations/232052886/201910259349300611/full>.

<sup>98</sup> 2019 AASP Grant Renewal at 3, 5, available at <https://www.documentcloud.org/documents/6939360-RA-PA-19-20-Extension-Searchable.html>.

<sup>99</sup> *Id.* at 4, 7.

<sup>100</sup> FY 17/18 Form 990 at 1, available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/08\\_2019\\_prefixes\\_22-23%2F232868660\\_201806\\_990\\_2019081216561821](https://projects.propublica.org/nonprofits/display_990/232868660/08_2019_prefixes_22-23%2F232868660_201806_990_2019081216561821).

<sup>101</sup> Compare *id.*, with 2018 AASP Grant Agreement at 31-32, available at <https://www.documentcloud.org/documents/6939361-RA-PA-17-19-Contracts-Searchable.html>, and Indiana State Department of Health Contract with RA, *Professional Services Contract*, 21 (Dec. 4, 2017), available at <https://contracts.idoa.in.gov/idoacontractsweb/PUBLIC/109027-000.pdf>, and Grant Agreement Between Michigan Department of Health and Human Services and RA, *Agreement # E20182832-00 Pregnancy and Parenting Support Services Program – 2018 Part 1*, 32 (Dec. 6, 2017), available at <https://www.documentcloud.org/documents/6953034-Copy-of-October-2017-September-2018.html>. CfA received RA's Michigan contract through a Freedom of Information Act Request to the Michigan Department of Health and Human Services. See CfA Freedom of Information Act Request to Michigan Department of Health and Human Services (Aug. 28, 2019), available at <https://www.documentcloud.org/documents/6433205-CfA-Request-MDHHS-8-28-19.html>.

<sup>102</sup> FY 17/18 Form 990, available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/08\\_2019\\_prefixes\\_22-23%2F232868660\\_201806\\_990\\_2019081216561821](https://projects.propublica.org/nonprofits/display_990/232868660/08_2019_prefixes_22-23%2F232868660_201806_990_2019081216561821).

discrepancy should be investigated – RA should not be permitted to surreptitiously redirect additional taxpayer funding to further pad its executive salaries.

*Ballooning Advertising Expenses*

Over the past 5 years RA’s advertising budget has ballooned from \$61,426.40<sup>103</sup> in FY 2014/2015 to \$750,000 in FY 2018/2019, an over twelve-fold increase.<sup>104</sup> An advertising budget of this size, roughly one-tenth of the entire program budget, is significant. RA’s advertising budget did not grow in a vacuum, and those 5 years also saw a significant increase in RA’s advertising expenditures. In FY 2014/2015, RA’s advertising expenditures far exceeded its advertising budget; the organization reportedly spent \$114,482 on advertising.<sup>105</sup> By FY 2018/2019 RA’s advertising expenditures were up to \$640,684.33,<sup>106</sup> a five-and-a-half-fold increase. During these years, two-thirds to nine-tenths of RA’s advertising expenditures regularly occurred in the last three months of RA’s fiscal year.

These skyrocketing advertising expenses have not proven a good return on investment. In 2018 RA justified its request for an additional \$125,000 advertising dollars by claiming: “[t]here is a correlation between the number of women served in the Program and the advertising that we are able to do.”<sup>107</sup> Yet, while RA’s advertising expenses have quintupled, RA served nearly 1,000 fewer clients, with 10,000 fewer visits, in FY 2018/2019 than it did 5 years prior.<sup>108</sup>

RA’s purported advertising expenses appear disproportionately higher than the value of the advertising RA pursued. In FY 2017/2018 RA reportedly spent more than \$500,000 on educational literature sent to thirty school nurses in a tiny fraction of the over 1,000 high schools

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<sup>103</sup> FY 14/15 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951469-Final-Expenses-July-2014-to-June-2015-Redacted.html>.

<sup>104</sup> FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>.

<sup>105</sup> FY 14/15 Audit Report at 20, available at <https://www.documentcloud.org/documents/6952904-REVIEW-SINGLE-AUDIT6-30-15.html>. Comparing RA’s FY 2014/2015 audit report and final expense report, RA purportedly spent \$53,055 more on advertising than what DHS reimbursed it for. *See supra* n. 103. According to RA’s FY 2014/2015 990 forms, however, RA only reported a total of \$25,232 in additional funding from outside sources that year, raising a question as to what funds RA used to cover its additional advertising expenses for that year. *See Real Alternatives, 2014 Return of Organization Exempt From Income Tax Form 990*, 1 (Apr. 18, 2016), available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/2016\\_06\\_EO%2F23-2868660\\_990\\_201506](https://projects.propublica.org/nonprofits/display_990/232868660/2016_06_EO%2F23-2868660_990_201506).

<sup>106</sup> FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>.

<sup>107</sup> Emails between RA and DHS, *Real Alternatives first FY 17-18 Budget Revision*, 4-5 (May 11, 2018) (hereinafter “FY 17/18 Budget Revision Emails”), available at <https://www.documentcloud.org/documents/6950997-19-RTKL-348-Feldman-009-Redacted.html>.

<sup>108</sup> *Compare*, FY 14/15 Status Report at 11, available at <https://www.documentcloud.org/documents/6950999-FY-14-15-Status-Report.html>, with FY 18/19 Status Report at 6, available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>.

in Pennsylvania, and a digital campaign targeting women and girls ages 16-34 in Philadelphia, Allentown, Pittsburgh, Harrisburg, and surrounding areas.<sup>109</sup>

In FY 2018/2019, RA increased its advertising spending to over \$640,000, with none directed to digital ads. Instead it was spent entirely on:

- 1) Advertisements in four Harrisburg-area school districts' sports calendars for the 2018/2019 school year;
- 2) Distributable educational information for a single county assistance office and one local church;
- 3) Educational letters and literature sent to two of Pennsylvania State University's campuses, thrift stores, and thirty school nurses in a few of Pennsylvania's over 1,000 high schools;
- 4) Community awareness booths at three training conferences;
- 5) Advertisements on the sides of buses in Harrisburg, York, Reading, Allentown/Bethlehem/Easton, and Lancaster from October 2018 until April 2019;
- 6) A three-month radio advertising campaign that purportedly ran statewide; and
- 7) Local promotions for one-tenth of the AASP service sites.<sup>110</sup>

While RA failed to invest in digital advertising, industry experts were predicting that "digital ads will overtake traditional spending in 2019."<sup>111</sup> Notably, in May 2018 RA had told DHS officials that it requested a higher advertising budget to cover "TV/radio spots, to Facebook ads, Google ads, print ads, bus ads, etc."<sup>112</sup>

Additionally, it is curious that RA's advertising expenditures are not made consistently throughout the year, but rather are highly concentrated in the fourth quarter of RA's fiscal year, when Pennsylvania is setting the next year's budget.

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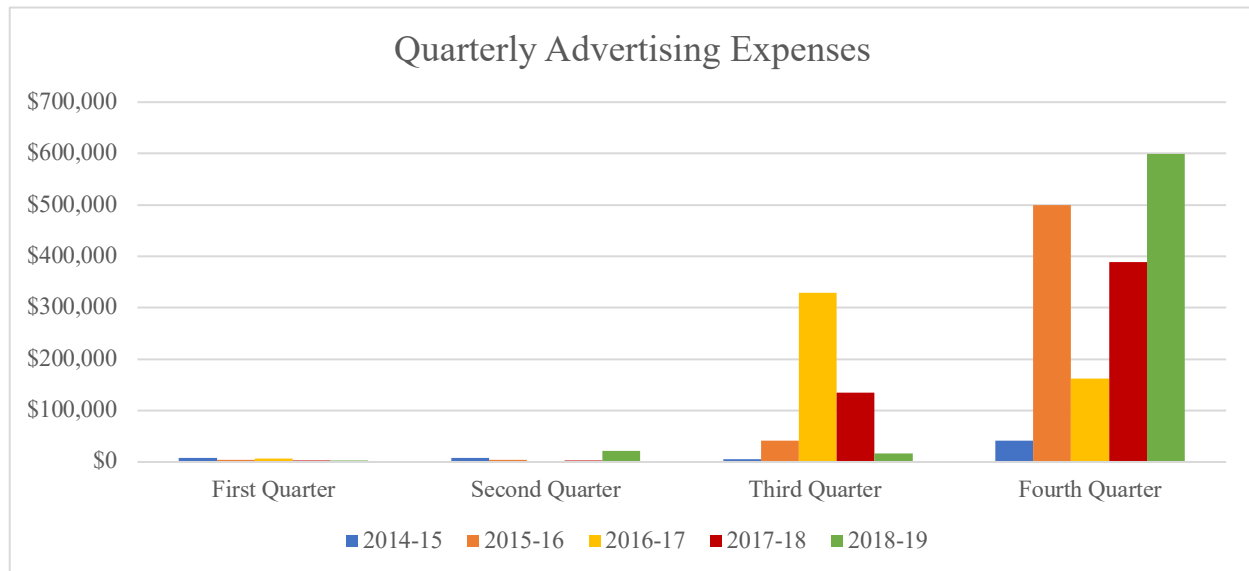
<sup>109</sup> FY 17/18 Status Report at 9, available at <https://www.documentcloud.org/documents/6957213-Year-End-Report-2018.html>.

<sup>110</sup> FY 18/19 Status Report at 6, available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>. RA did not provide any additional detail regarding the breadth of the advertising efforts it pursued, nor the associated expenses. It is therefore very difficult to assess the reasonableness of any of these individual expenditures, though even without the additional detail it is difficult to imagine these items costing well over half a million dollars.

<sup>111</sup> Anthony Ha, *eMarketer Predicts Digital Ads Will Overtake Traditional Spending in 2019*, TECHCRUNCH (Feb. 20, 2019), <https://techcrunch.com/2019/02/20/emarketer-digital-ad-forecast/>.

<sup>112</sup> FY 17/18 Budget Revision Emails at 4-5, available at <https://www.documentcloud.org/documents/6950997-19-RTKL-348-Feldman-009-Redacted.html>.





See Appendix 1 [RA's Annual Advertising Expenditures by Quarter]

In four of the last 5 years, over two-thirds of RA's advertising expenditures were made between April and June, with RA's fourth quarter expenses accounting for over 90% of RA's annual advertising expenditures in two of those years.<sup>113</sup> In the fifth year, RA's third and fourth quarters together accounted for over 98% of its annual advertising expenses.<sup>114</sup> There is no apparent reason for RA's concentrating its advertising in these end-of-the-year months. In fact, this is at odds with RA's purported policy of recording its advertising expenditures during the time

<sup>113</sup> Compare Real Alternatives, *March 2019 Expense Report*, 3 (Apr. 18, 2019) (hereinafter "March 2019 Expense Report"), available at <https://www.documentcloud.org/documents/6950998-Expenses-March.html>, with FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>; compare Real Alternatives, *March 2018 Expense Report*, 3 (Apr. 20, 2018) (hereinafter "March 2018 Expense Report"), available at <https://www.documentcloud.org/documents/6962110-RA-March-2018-Expenses-Redacted.html>, with FY 17/18 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951496-Ltr-Refund-for-June-2018-Right-to-Know-Charge-2.html>; compare Real Alternatives, *March 2016 Expense Report*, 2 (Apr. 19, 2016) (hereinafter "March 2016 Expense Report"), available at <https://www.documentcloud.org/documents/6957287-4100060934-Expenses-Mar-16-Backup-Redacted.html>, with FY 15/16 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html>; compare Real Alternatives, *March 2015 Expense Report*, 3 (Apr. 17, 2015) (hereinafter "March 2015 Expense Report"), available at <https://www.documentcloud.org/documents/6962170-4100060934-Expenses-Mar-15-Backup-Redacted.html>, with FY 14/15 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951469-Final-Expenses-July-2014-to-June-2015-Redacted.html>.

<sup>114</sup> Compare Real Alternatives, *December 2016 Expense Report*, 4 (Jan. 19, 2017) (hereinafter "December 2016 Expense Report"), available at <https://www.documentcloud.org/documents/6962117-329-Real-Alternatives-December-2016-Expenses.html>, with FY 16/17 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951487-June-2017-Expenditures-Redacted-2.html>.

period the advertisements first run.<sup>115</sup> For example, the costs of the bus advertisements that RA ran between October 2018 and April 2019 seemingly should have been recorded during the second quarter of that fiscal year, yet over 93% of RA’s advertising costs were recorded in the fourth quarter, suggesting RA may be manipulating its reporting to justify a larger grant.

RA’s skyrocketing advertising costs and the declining number of clients served seem, at best, to indicate RA’s advertising efforts are inefficient and ineffective and that this taxpayer money could be better spent. At worst, these numbers could indicate RA is misusing its public funding under the deceptive guise of advertising costs. RA’s extremely wasteful use of taxpayer money should be investigated, and the organization should be held accountable for any misspent dollars.

### *Hotline*

Perhaps RA’s single most wasteful expense is its referral hotline. Over the last 5 years, an average of \$24,800.80 has been allocated annually for operation of RA’s LIFE AID hotline, a toll-free referral system, with an average of only 156 calls a year. In FY 2015/2016, the year with the highest number of calls, 317, the least amount was budgeted, \$18,079.09.<sup>116</sup> That amounts to each call—63 of which were initiated out of state—costing Pennsylvania taxpayers approximately \$57, in the program’s best year. In FY 2018/2019, the hotline received only 52 calls the whole year, including 5 out of state calls.<sup>117</sup> That year RA’s budget included \$28,500 for the hotline’s operation though RA only spent \$6,191.14.<sup>118</sup> Even spending a fraction of the allotted budget, each of those 52 calls cost taxpayers approximately \$119. Spending tens and even hundreds of taxpayer dollars per call to a referral hotline is not an efficient use of state funding.

## **Violations of Pennsylvania Law**

### *Theft by Failure to Make Required Disposition of Funds Received*

Under Pennsylvania law, a person is guilty of theft by failure to make required disposition of funds received if he or she “obtains property upon agreement, or subject to a known legal obligation, to make specified payments or other disposition” and “intentionally deals with the property obtained as his [or her] own and fails to make the required payment or disposition.”<sup>119</sup>

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<sup>115</sup> FY 17/18 Audit Report at 15, available at <https://www.documentcloud.org/documents/6952909-Real-Alternatives-6-30-18-Single-Audit.html>.

<sup>116</sup> The \$18,079.09 amount is a summation of the line items “LIFE AID Hotline Counselors” and “Toll Free Referral System.” See FY 15/16 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html> ; FY 15/16 Status Report at 87-88, available at <https://www.documentcloud.org/documents/6957160-FY-15-16-Status-Report.html>.

<sup>117</sup> FY 18/19 Status Report at 67-68, available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>.

<sup>118</sup> FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>.

<sup>119</sup> 18 Pa. C.S.A. § 3927(a).

Pennsylvania courts have held that the property need not be used or spent, but merely treated as the defendant's own.<sup>120</sup>

Officers of the government are considered to have “deal[t] with the property as [their] own” when they “fail[] to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.”<sup>121</sup> Further, there is a presumption that the “legal obligation relevant to [their] criminal liability” is known by government officers.<sup>122</sup> Under Pennsylvania law, “government” is defined to include “any corporation or association carrying out the functions of government.”<sup>123</sup>

RA is entrusted with state funding and tasked with dispersing that money, in its entirety, to those providing AASP services. Yet, by requiring AASP subcontractors to sign PDAs and pay back 3% of their state funding, RA is pocketing money that its DHS-approved budget earmarked for the program's service providers,<sup>124</sup> treating those funds as its own.<sup>125</sup> RA does not seek DHS approval or even inform DHS of how it spends the money collected from subcontractors.<sup>126</sup> The result of RA's mandatory PDAA payments is that RA “fail[s] to make proper disposition of taxpayer funds” in this case collected for provision of AASP services, “and instead, deal[s] with them as [RA's] own in participating in the diversion of such funds for [RA's private] purposes.”<sup>127</sup>

Similarly, the discrepancy between the amount of “counseling reimbursements” reported on RA's final expense reports and the amount of “total service provider reimbursement” recorded in RA's status reports also appears to indicate that RA treats money intended for service providers as its own. Most years RA's reported annual payment to service providers is roughly 92% of the reimbursement it receives from DHS for its counseling expenditures.<sup>128</sup> The disconnect between the two numbers suggests RA is improperly retaining 8% of counseling reimbursement payments seemingly unaccounted for in its annual audits.<sup>129</sup> Because RA carries out a government function by administering the AAS Program it falls within the legal definition of government, meaning that any “shortage or falsification of accounts” revealed in an RA audit could constitute an inappropriate “deal[ing] with property as [its] own.”<sup>130</sup>

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<sup>120</sup> See *Commonwealth v. Veon*, 109 A.3d 754, 773-74 (Pa. Super. Ct. 2015) (quoting *Commonwealth v. Wood*, 637 A.2d 1335, 1344 (Pa. Super. Ct. 1994)) (holding a defendant is guilty of failure to make required disposition of funds if he or she “deals with property as his own” and is not required to actually use the property).

<sup>121</sup> 18 Pa. C.S.A. § 3927(b).

<sup>122</sup> *Id.*

<sup>123</sup> 18 Pa. C.S.A. § 3901.

<sup>124</sup> *Supra* p. 6.

<sup>125</sup> Bagatta 2d Aff. ¶ 10.

<sup>126</sup> *Supra* pp. 7-9.

<sup>127</sup> See *Commonwealth v. Stetler*, 95 A.3d 864, 886 (Pa. Super. Ct. 2014) (upholding the conviction of a legislator who used taxpayer money for campaign expenses).

<sup>128</sup> *Supra* pp. 12-13.

<sup>129</sup> *Commonwealth v. Crafton*, 367 A.2d 1092, 1096 (Pa. Super. Ct. 1976) (holding that payment less than what was owed was sufficient to show failure to make required payment and that showing specific monies were not dispersed was not required).

<sup>130</sup> 18 Pa. C.S.A. § 3901.

RA's exorbitant executive compensation may also constitute theft by failure to make required disposition of received funds. According to RA's final expense reports, approximately half of its top executives' salaries are covered by RA's AASP grant funding.<sup>131</sup> The other half of their salaries are partially covered by funding from RA's Michigan and Indiana contracts, with a portion of RA's executive compensation coming from some other funding source.<sup>132</sup> RA's 990s make clear that 99.68% of RA's funding comes from its state contracts, and that any outside funding is insufficient to cover the unaccounted for portions of RA's executive salaries,<sup>133</sup> raising questions as to source of the rest of RA's executive compensation funding. If RA uses additional AASP funding earmarked for reimbursement of other administrative or operational expenses to pad its executives' salaries, this could constitute theft by failure to make required disposition of funds received.<sup>134</sup>

### *Theft by Deception*

Pennsylvania law states that a person commits theft by deception if he or she "intentionally obtains or withholds property of another by deception," including "intentionally creat[ing] or reinforce[ing] a false impression."<sup>135</sup> This law "rejects the traditional restriction that fraud must entail deception as to an existing fact," and rather includes "[w]hatever means the actor selects as the effective ones to deceive."<sup>136</sup>

RA leads its subcontractors to believe that entering a PDAA and paying back 3% of their earnings is the "cost of doing business" with RA, when in fact there is no such prerequisite to becoming a DHS subcontractor in the AAS Program.<sup>137</sup> By convincing subcontractors the 3% kickback is required to participate in the AAS Program, RA may be committing theft by deception.

RA represents to DHS that its advertising campaign is a "significant project" and requires a budget that has skyrocketed twelve-fold over the last 5 years.<sup>138</sup> But RA's advertising efforts do not appear correspondingly significant.<sup>139</sup> If RA falsely represented its need for advertising funds,

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<sup>131</sup> *Supra* pp. 13-15.

<sup>132</sup> *Supra* p. 14.

<sup>133</sup> FY 17/18 Form 990 at 1, 29, available at [https://projects.propublica.org/nonprofits/display\\_990/232868660/08\\_2019\\_prefixes\\_22-23%2F232868660\\_201806\\_990\\_2019081216561821](https://projects.propublica.org/nonprofits/display_990/232868660/08_2019_prefixes_22-23%2F232868660_201806_990_2019081216561821).

<sup>134</sup> See *Commonwealth v. English*, 597 A.2d 122, 124 (Pa. Super. Ct. 1991) (upholding conviction of defendant who spent money on his own salary rather than required third-party payments); see also, *Attorney General Josh Shapiro Announces Felony Charges Against Former Philadelphia City Representative* (Nov. 13, 2018) (Attorney General Shapiro charged a former city official for applying "leftover" city funds earmarked for a bike race to other purposes), available at <https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-announces-felony-charges-against-former-philadelphia-city-representative/>.

<sup>135</sup> 18 Pa. C.S.A. § 3922(a).

<sup>136</sup> See *Commonwealth v. Parker*, 564 A.2d 246, 249 (Pa. Super. Ct. 1989) (quoting *Commonwealth v. Quartapella*, 539 A.2d 855, 856 (Pa. Super. Ct. 1988) (stating that the purpose of the theft by deception statute is to broaden the previous definition of false pretenses).

<sup>137</sup> *Supra* p. 9.

<sup>138</sup> See, e.g., FY 18/19 Status Report at 6, available at <https://www.documentcloud.org/documents/6950841-July-2019-End-of-Year-Report.html>; *supra* p. 15.

<sup>139</sup> *Supra* pp. 15-16.

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 21

misrepresented its advertising expenses, or improperly spent funds budgeted for advertising on other expenses, RA would be guilty of theft by deception.<sup>140</sup>

#### *Theft by Extortion*

Pennsylvania law defines theft by extortion as “intentionally obtain[ing] or withhold[ing] property of another by threatening to . . . (4) take or withhold action as an official, or cause an official to take or withhold action; . . . or (7) inflict any other harm which would not benefit the actor.”<sup>141</sup> The statute does not define who constitutes an official, but the dictionary definition is “a person holding public office or having official duties, especially as a representative of a government or administration, or in connection with some public institution or officially-constituted body.”<sup>142</sup> RA uses public funding to administer the AAS Program in place of DHS. In this role RA performs official duties and represents a public grant program administering certain services.

AASP subcontractors believe that their participation in the AAS Program, and the receipt of that government funding, was contingent upon their signing a separate PDAA and paying RA the demanded 3% fee.<sup>143</sup> If RA obtains 3% of the service providers earnings by either threatening to otherwise withhold participation in the state’s AAS Program or to withhold reimbursements earned by the service provider it would constitute threat by extortion.

#### *Tampering with Public Records*

In Pennsylvania it is an offense to tamper with public records, including “knowingly mak[ing] a false entry in, or false alteration of, any record, document or thing belonging to, or received or kept by, the government for information or record, or required by law to be kept by others for information of the government”<sup>144</sup> or “intentionally and unlawfully destroy[ing], conceal[ing], remov[ing] or otherwise impair[ing] the verity or availability of any such record,

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<sup>140</sup> See *Commonwealth v. Doria*, 163 A.2d 918, 920 (Pa. Super. Ct. 1960) (upholding conviction of defendant who obtained funds to purchase one property but premeditatedly and intentionally misapplied them to a different property); see *Commonwealth v. Petrosky*, 166 A.2d 682, 687-88 (Pa. Super. Ct. 1960) (upholding conviction of defendant who falsely charged for more services than he provided).

<sup>141</sup> 18 Pa. C.S.A. § 3923(a).

<sup>142</sup> *Official*, Oxford English Dictionary (3d ed. 2004), available at [www.oed.com/view/Entry/130654](http://www.oed.com/view/Entry/130654). It may also be informative to consider whom Pennsylvania courts have considered to be officials in the context of a different statute declaring official oppression to be a criminal offense. The court in *Commonwealth v. Russ* stated that the “[p]erformance of the crime of official oppression is not limited to persons commonly thought of as public officials...It applies to any person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity.” 503 A.2d 450, 451-52 (Pa. Super. Ct. 1986) (quotation omitted) (noting “[t]he evil that the law seeks to prevent is the unlawful abuse of official authority”).

<sup>143</sup> 2016 Division of Audit and Review Final Audit at 7, available at <https://www.documentcloud.org/documents/6940146-DAR-FinalAuditRefort2016.html>.

<sup>144</sup> 18 Pa. C.S.A. § 4911(a)(1).

document or thing.”<sup>145</sup> Pennsylvania courts have broadly applied the statute’s “all-inclusive language.”<sup>146</sup>

RA’s repeated failures to honor its RTKL obligations and refusal to inform DHS about the contractual obligations it sets for AASP service providers appear to constitute intentional and systematic efforts by RA to impair the availability of records and documents kept on behalf of the government.<sup>147</sup> Further, RA’s AASP contract requires RA to report a breakdown of its grant expenditures to DHS and should include how the 3% of service provider funding collected by RA through the PDAA fees are being spent. By refusing to furnish DHS with such documents, RA may be intentionally impairing their availability in violation of the statute.<sup>148</sup>

As a grantee, RA is required to provide various records to DHS for oversight of RA’s administration of a state program. Various items included in RA’s required reporting raise questions, including RA’s significant advertising expenses purportedly made at the end of each fiscal year,<sup>149</sup> as well as RA’s reported “counseling reimbursement” expenses, which are consistently higher than its total reported service provider payments.<sup>150</sup> These irregularities could indicate that RA “knowingly makes [] false entr[ies] in . . . records kept [] for the information of the government.”<sup>151</sup>

#### *Misrepresentation to Service Providers and DHS*

A contract may be voided on the ground of fraudulent misrepresentation when there is:

- (1) a representation;
- (2) which is material to the transaction at hand;
- (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false;
- (4) with the intent of misleading another into relying on it;
- (5) justifiable reliance on the misrepresentation; and
- (6) resulting injury proximately caused by the reliance.<sup>152</sup>

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<sup>145</sup> 18 Pa. C.S.A. § 4911(a)(3).

<sup>146</sup> *Commonwealth v. Barger*, 375 A.2d 756, 763-64 (Pa. Super. Ct. 1977) (holding that police reports are implicated by the statute’s “all-inclusive language”).

<sup>147</sup> *See supra* pp. 9-11.

<sup>148</sup> 18 Pa. C.S.A. § 4911(a)(3).

<sup>149</sup> *Supra* pp. 16-18.

<sup>150</sup> *Supra* pp. 12-13.

<sup>151</sup> 18 Pa. C.S.A. § 4911(a)(1).

<sup>152</sup> *Porreco v. Porreco*, 811 A.2d 566, 570 (Pa. 2002).

In addition, concealment of material facts can also constitute fraudulent misrepresentation.<sup>153</sup> Reliance on a misrepresentation is justifiable when the party making the misrepresentation has superior information over the party relying on that information.<sup>154</sup>

RA either falsely represents to its subcontractors that signing PDAA and paying the corresponding fee is required to receive state AASP funds or conceals that this payment is voluntary. These representations are material to providers' decisions to sign the subcontract offered by RA. In all likelihood, not all AASP subcontractors share RA's particular anti-abortion and anti-birth control views and some might have preferred not to promote RA's private initiatives. It is also possible that some potential AASP service providers declined to join the program in order to avoid paying this fee to RA. As RA's misrepresentations are likely the sole reason some providers entered into PDAAs, it is a material misrepresentation by RA and cause for those PDAA contract to be voided.

RA may also have made false representations to DHS to obtain increased funding for advertising. If RA obtained higher advertising budgets while intending to spend those funds on something other than advertising, RA fraudulently misrepresented its intentions to obtain a more favorable agreement.<sup>155</sup>

#### *Misapplication of Property of Government Institutions*

A person is guilty of misapplication of entrusted property and property of government or financial institutions if he or she "applies or disposes of property that has been entrusted to him [or her] as a fiduciary, or property of the government or of a financial institution, in a manner which he [or she] knows is unlawful and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted."<sup>156</sup> A violation occurs when a defendant converts property to his own use or fails to pay on demand.<sup>157</sup> The capacity in which money is received and held determines whether it is public.<sup>158</sup>

RA is functioning in a governmental capacity in its administration of AAS Program and has both been paid by DHS for this service and been entrusted with specific state funds to dispense to the AASP service providers. Those AASP funds are public money, yet RA converts 3% of that

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<sup>153</sup> See *De Joseph v. Zambelli*, 139 A.2d 644, 647 (Pa. 1958) *affirming* 11 Pa. D. & C.2d 447, 452-53 (Pa. 1957) (holding intentional concealment of damage was fraudulent representation); see also, *Clement Martin, Inc. v. Gussey*, 157 A.2d 412, 415 (Pa. Super. Ct. 1959) ("Fraud arises where the misrepresentation is knowingly false or where there is a concealment of facts calculated to deceive.").

<sup>154</sup> *Id.*

<sup>155</sup> See *College Watercolor Grp. v. William H. Newbauer, Inc.*, 360 A.2d 200, 206 (Pa. 1976) ("Statements of intention, however, which do not, when made, represent one's true state of mind are misrepresentations known to be such and are fraudulent.").

<sup>156</sup> 18 Pa. C.S.A. § 4113(a)

<sup>157</sup> See *Commonwealth v. Gorman*, 182 A.3d 1035, 1045-46 (Pa. Super. Ct. 2018) (finding an organization's fiduciary who failed to pay donations he received to the group and instead applied funds how he saw fit was guilty of misapplication of entrusted funds); *Commonwealth v. Oren*, 228 A.2d 9, 11 (Pa. Super. Ct. 1967) (finding under a predecessor to 18 Pa. C.S.A. § 4113 that an officer who converts public money to his or her own use, or who fails to pay over public money in his or her care when legally required to do so, is guilty of embezzlement).

<sup>158</sup> See *Oren*, 228 A.2d at 11 (holding that money held by sheriff for use in his public duty is public money regardless of destination).

The Honorable Thomas Wolf  
The Honorable Josh Shapiro  
The Honorable Teresa Miller  
July 14, 2020  
Page 24

public money for its own use via its PDAAs. Those 3% fees constitute an unearned benefit to RA at the expense of the subcontractors who actually provide the program's services, and who are the intended recipients of the funding, indicating RA may have misapplied government property.

### **Conclusion**

Over the course of nearly 25 years of administering the AAS Program, and despite receiving tens of millions of dollars from Pennsylvania taxpayers, RA has delivered little to the state's residents. RA has shortchanged AASP service providers to pad its coffers and prioritized its own private interests over those of Pennsylvanians. RA brags about the total number of clients served by the program it administers, but when broken down over the years and across the state, it equates to fewer than one client a day receiving services at each AASP site. Pennsylvania should immediately terminate RA's contract and direct the money designated for RA to be rerouted to organizations with demonstrated ability to serve the pregnant women and young families of Pennsylvania.

Thank you for your attention to this matter.

Sincerely,

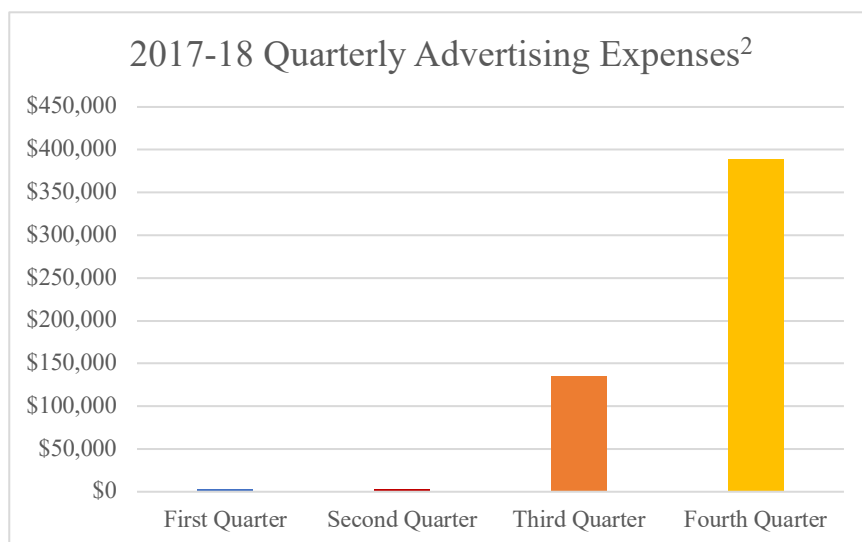
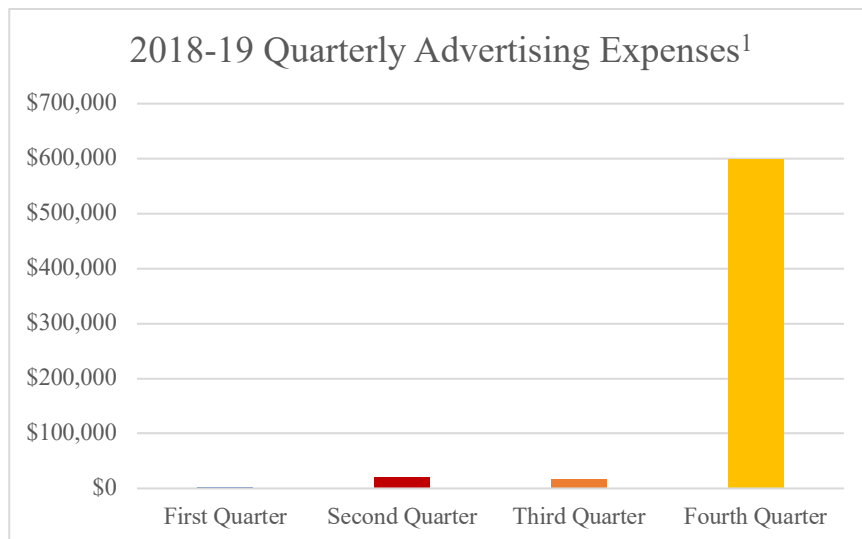
A handwritten signature in blue ink, appearing to read "Alice C.C. Huling".

Alice C.C. Huling  
Counsel



## Appendix 1

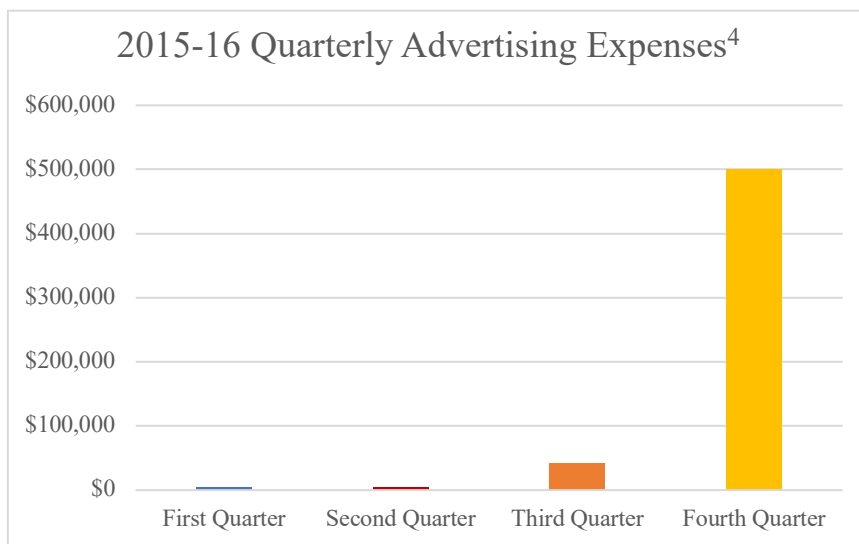
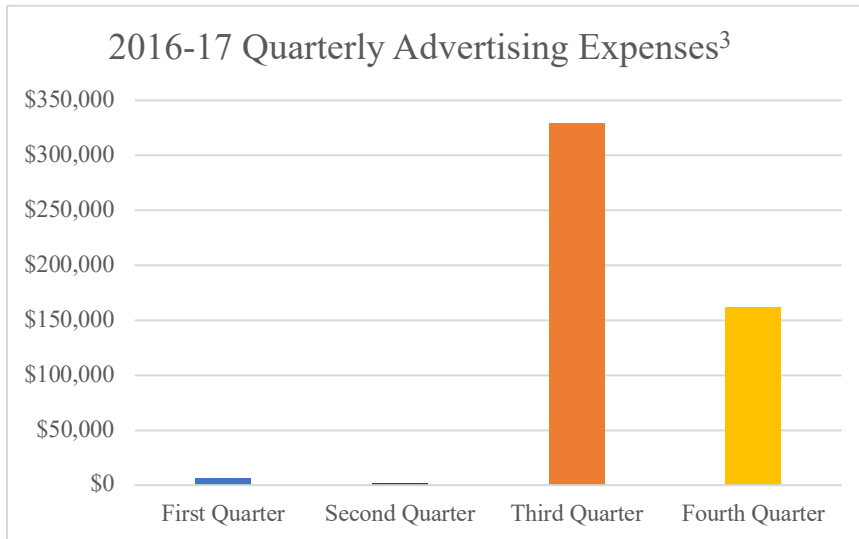
### RA's Annual Advertising Expenditures by Quarter



<sup>1</sup> Real Alternatives, *October 2018 Expense Report*, 5 (Nov. 20, 2018), available at <https://www.documentcloud.org/documents/6962100-October-Approved-Expenses-RA.html> ; Real Alternatives, *December 2018 Expense Report*, 2 (Jan. 25, 2019), available at <https://www.documentcloud.org/documents/6962101-Approved-December-2018-Expenditure-Report.html> ; March 2019 Expense Report at 3, available at <https://www.documentcloud.org/documents/6950998-Expenses-March.html> ; FY 18/19 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6950996-Final-Expenses-18-19.html>.

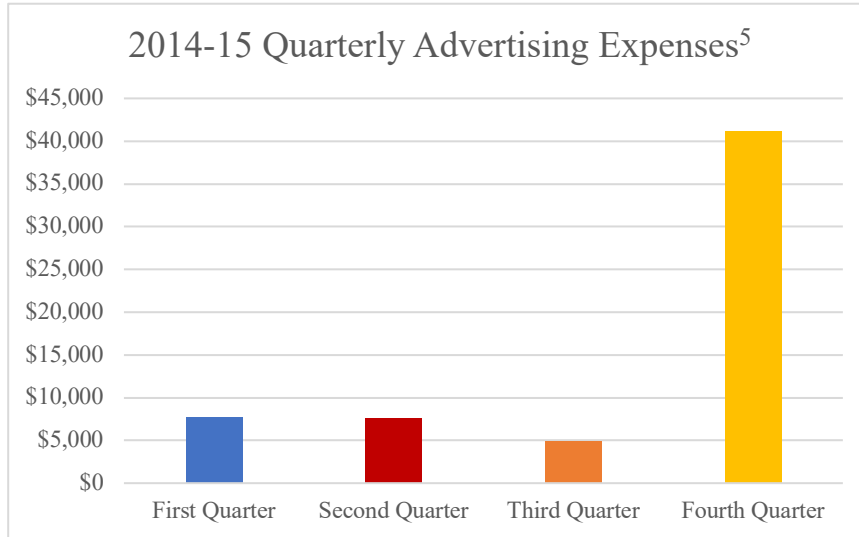
<sup>2</sup> FY 17/18 Audit Report at 22, available at <https://www.documentcloud.org/documents/6952909-Real-Alternatives-6-30-18-Single-Audit.html> ; FY 17/18 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951496-Ltr-Refund-for-June-2018-Right-to-Know-Charge-2.html>.

While RA's document production did not provide records stating its monthly expenses during the second and third quarters of FY 2017/2018, it did include records indicating RA spent a total of \$137,635.02 on advertising between October 1, 2017 and March 31, 2018, of which \$135,087.50 was spent in the month of March. March 2018 Expense Report at 3, available at <https://www.documentcloud.org/documents/6962110-RA-March-2018-Expenses-Redacted.html>. This graph assumes everything spent during that six-month period but not spent in March was spent in the second quarter.



<sup>3</sup> Real Alternatives, *October 2016 Expense Report*, 3 (Nov. 17, 2016), available at <https://www.documentcloud.org/documents/6962113-4100060934-Expenses-Oct-16-Redacted.html> ; December 2016 Expense Report at 4, available at <https://www.documentcloud.org/documents/6962117-329-Real-Alternatives-December-2016-Expenses.html> ; Real Alternatives, *March 2017 Expense Report*, 4 (Apr. 19, 2017), available at <https://www.documentcloud.org/documents/6962119-257-Real-Alternatives-March-2017-Expenses-Redacted.html> ; FY 16/17 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951487-June-2017-Expenditures-Redacted-2.html>.

<sup>4</sup> Real Alternatives, *October 2015 Expense Report*, 3 (Nov. 19, 2015), available at <https://www.documentcloud.org/documents/6962129-4100060934-Expenses-Oct-15-Backup-Redacted.html> ; Real Alternatives, *December 2015 Expense Report*, 3 (Jan. 20, 2015), available at <https://www.documentcloud.org/documents/6962167-4100060934-Expenses-Dec-15-Backup-Redacted.html> ; March 2016 Expense Report at 3, available at <https://www.documentcloud.org/documents/6957287-4100060934->



[Expenses-Mar-16-Backup-Redacted.html](https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html) ; FY 15/16 Final Expense Report at 4, available at <https://www.documentcloud.org/documents/6951042-Final-Expenses-July-2015-to-June-30-2016-Redacted.html>.

<sup>5</sup> While RA's document production did not provide records stating its monthly expenses during the first and second quarters of FY 2014/2015, it did include records indicating RA spent a total of \$15,281.59 on advertising between July 1, 2014 and December 31, 2014. Real Alternatives, *December 2014 Expense Report*, 3 (Jan. 20, 2015), available at <https://www.documentcloud.org/documents/6962169-4100060934-Expenses-Dec-14-Backup-Redacted.html>. This graph splits RA's advertising expenses from that six-month period equally between the first and second quarters. March 2015 Expense Report at 3, available at <https://www.documentcloud.org/documents/6962170-4100060934-Expenses-Mar-15-Backup-Redacted.html> ; FY 14/15 Final Expense Report at 3, available at <https://www.documentcloud.org/documents/6951469-Final-Expenses-July-2014-to-June-2015-Redacted.html>.