

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Moog v. Fox  No. COPP 2012-CFP-032	<u>Dismissal of Complaint</u>
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On October 24, 2012, Helena, Montana, resident Kim Moog filed a complaint with the COPP against Tim Fox, also a resident of Helena, Montana, alleging Mr. Fox violated Montana campaign finance and practice laws during his 2012 campaign for election as Montana Attorney General.

**SUBSTANTIVE ISSUES ADDRESSED**

The substantive area of campaign finance law addressed by this decision is that of appropriate responsive behavior to changes in judicial interpretation of Montana's campaign practice laws.

**FINDING OF FACTS**

The foundational facts necessary for this Decision is as follows:

Finding of Fact No. 1: The complaint alleges, and Candidate Fox does not deny, that the 2012 Fox campaign for attorney general accepted certain over-the-limit contributions [\$47,000 in total, coming from 12 individuals and the Montana Republican party], as discussed further below. (Commissioner's records).

**DISCUSSION**

The complaint alleges that Candidate Fox accepted certain campaign

contributions in amounts that caused the donor to exceed the amounts allowed by Montana law. Under Montana law in place at the start of the 2012 campaign cycle an individual was limited to a maximum contribution of \$310, and a political party to maximum contribution of \$8,150, to a candidate for the elected office of Attorney General of the State of Montana. 44.10.338 ARM, 2012.

The 2012 general election took place on November 6, 2012. A month prior to the general election (on October 3, 2012) Montana's contribution limit laws were enjoined<sup>1</sup> as unconstitutional by an Order issued by a federal judge. *Lair v. Murry*, CV-12-12-H-CCL U.S. District Court, for District of Montana. That Federal Court Order prohibited enforcement of Montana laws limiting the amount of money that could be contributed to the campaigns of 2012 candidates for Montana public office. The Federal Court Order allowed a flood of over-the-limit money to pour into a number of 2012 Montana candidate campaigns, including the campaign of Candidate Fox, and it touched off a firestorm of litigation.

The litigation sequence needs to be discussed first because it places in context Candidate Fox's handling of the over-the-limit campaign contributions received by his campaign. The October 3, 2012 Order by the Montana Federal District Court was immediately appealed to the 9<sup>th</sup> Circuit and on October 9, 2012 the 9<sup>th</sup> Circuit temporarily stayed<sup>2</sup> the Montana District Court Order.

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<sup>1</sup> "Enjoined" is term used to mean a court prohibited a certain action, in this case it prohibited enforcement of Montana's campaign contribution limits.

<sup>2</sup> "Stayed" means the 9<sup>th</sup> Circuit suspended the Federal District Order, leaving it of no effect unless later restored.

The 9<sup>th</sup> Circuit's stay restored Montana's laws setting campaign contribution limits, including the contribution limits applicable to Candidate Fox's campaign for Attorney General.

During the 6 days that Montana's contribution limits were enjoined as unconstitutional Candidate Fox's campaign received contributions in amounts that exceeded the limits imposed by Montana's contribution limit laws.

Finding of Fact No. 2: There were \$47,000 in over-the-limit donations accepted by Candidate Fox during October 3 through October 9, 2012. (Commissioner's records).

The Commissioner declines to find that Candidate Fox violated Montana law in accepting the over-the-limit contributions, as all such contributions were received during the 6 day period when enforcement of Montana's campaign contribution limits was enjoined by the now-stayed Federal District Court Order.

The Commissioner now turns to the second issue – that is whether or not facts exist to show that Candidate Fox improperly handled the over-the-limit campaign funds addressed in Finding of Fact No. 2. The background facts necessary for consideration of this issue are as follows:

Finding of Fact No. 3: The complaint in this Matter was filed on October 24, 2012. (Commissioner's records).

Finding of Fact No. 4: The \$47,000 in over-the-limit contributions to the 2012 Fox campaign came from 12 individuals and the Montana Republican party. Those sums were refunded by the Fox campaign to the contributors on October 25, 2012. (Commissioner's records).

The second issue requires a determination as to whether or not the Fox campaign acted illegally by delaying refund action and holding the over-the-limit campaign funds for the 16 days between October 9, 2012 (the day Montana's contribution limit laws were restored) and October 25, 2012 (the day the Fox campaign refunded the over-the-limit contributions).<sup>3</sup> Again, resolution of this issue starts with a review of the sequence of related litigation.

The 9<sup>th</sup> Circuit issued its initial October 9 Order as a temporary stay of the Federal District Court's injunctive Order, pending its review of the District Court's findings of fact and conclusions of law. (*Lair v. Murry*, Docket 167). On October 10 the Federal District Court issued its findings and conclusions. (*Lair v. Murry*, Docket 168). On October 16, 2012 the merits panel of the 9<sup>th</sup> Circuit reviewed the Federal District Court's findings and conclusions and converted the temporary stay into a permanent stay until the case could be heard on appeal. (*Lair v. Murry*, Docket 173).

Litigation on the issue then intensified over the next 8 days, including: an attempt to appeal the 9<sup>th</sup> Circuit Court's permanent stay Order to the US Supreme Court (denied); the filing of a new state district court lawsuit (*Bullock v. Hill*, 1<sup>st</sup> Judicial District, Lewis and Clark County) by one 2012 gubernatorial candidate against the other candidate who had taken in a \$500,000 over-the-limit contribution during October 3 to October 9; a removal of the state district court lawsuit to Montana Federal Court; and, a motion for contempt filed against Candidate Bullock in Federal Court in the *Lair v. Murry* matter (denied).

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<sup>3</sup> There is no allegation or evidence that Candidate Fox used any of the \$47,000 for campaign purposes.

The legal matters came to a head on October 24, 2012 when the Federal Court refused jurisdiction and remanded<sup>4</sup> the *Bullock v. Hill* matter back to state district court. On that same day (October 24) the *Bullock v. Hill* state district court judge, upon remand from Federal Court, issued a temporary restraining Order prohibiting gubernatorial Candidate Hill from spending any of the \$500,000 received by his campaign in over-the-limit contributions.

Based on the above discussion, the Commissioner determines that October 24, 2012 was the date that a 2012 candidate for Montana public office could reasonably determine that the judicial interruption of Montana's contribution limits (by the Federal Court injunction in *Lair v. Murry*) was void and of no consequence for the 2012 elections. Accordingly, the Commissioner determines that October 25, 2012 (the next day) was a reasonably prudent time for a candidate to refund any over-the-limit contributions taken in during the 6 day period of judicial interruption.

In making this determination the Commissioner considers that the Fox campaign made its refunds the day after the complaint was filed in this Matter. Normally, prompt corrective action after a complaint is filed affects mitigation, but does not alleviate responsibility for the wrongful act. However, in this Matter the first reasonable day to refund was October 25, 2012, the date after the judicial battles reached a definitive end point. Candidate Fox refunded on that date, making the fact of a prior complaint filing of no consequence.

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<sup>4</sup> "Remanded" is term that means the case was returned to the court of origin, in this matter that means *Hill v. Bullock* went back to the state district court.

The Commissioner takes note that *Lair v. Murry* is still before the 9<sup>th</sup> Circuit Court awaiting a final ruling. The Commissioner, however, determines that the actions of Candidate Fox in promptly refunding each and all over-the-limit contributions take him outside of the reach of the forthcoming 9<sup>th</sup> Circuit Court Decision. Whether the Federal District Court Order injunctioning Montana's contribution limit laws is sustained or reversed, the refunds made by Candidate Fox were timely made such that relevant facts do not support a finding that Candidate Fox has engaged in an illegal campaign practice. This Decision, being made on the facts of October 25, 2012 contribution refunds, does not apply to the other over-the-limit contribution complaints pending with the COPP against other 2012 Montana candidates for election to public office. The resolution of those remaining complaints is, at least in part, dependent on the 9<sup>th</sup> Circuit Court's ruling on the constitutionality of Montana's contribution limit laws. The COPP's Order of January 4, 2013, delaying a Decision on those complaints until the 9<sup>th</sup> Circuit Court issues its ruling, remains in effect as to those candidates.<sup>5</sup>

### **DECISION**

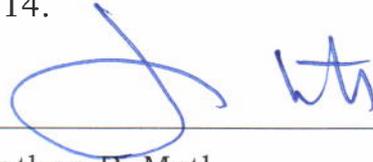
This Commissioner, having duly considered the matters raised in the Complaint, and having completed his review and investigation, hereby holds and determines, under the above stated reasoning, that there is a lack of sufficient facts to show any campaign practice act violation by Candidate Fox.

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<sup>5</sup> The order is published on the COPP website in the "opinions" listing under the "campaign information" menu bar.

The Commissioner hereby dismisses this complaint.

DATED this 25<sup>th</sup> day of September, 2014.



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