IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

HELENA DIVISION

DOUG LAIR, STEVE DOGIAKOS, AMERICAN TRADITION PARTNERSHIP, AMERICAN TRADITION PARTNERSHIP PAC, MONTANA RIGHT TO LIFE ASSOCIATION PAC, SWEET GRASS COUNCIL FOR COMMUNITY INTEGRITY, LAKE COUNTY REPUBLICAN CENTRAL COMMITTEE, BEAVERHEAD COUNTY REPUBLICAN CENTRAL COMMITTEE, JAKE OIL LLC, JL OIL LLC, CHAMPION PAINTING INC, and JOHN MILANOVICH,	)	CV 12-12-H-CCL
Plaintiffs,	)	ORDER
vs.	)	
JAMES MURRY, in his official capacity as Commissioner of Political Practices; STEVE BULLOCK, in his official capacity as Attorney General of the State of Montana; and LEO GALLAGHER, in his official capacity as Lewis and Clark County Attorney;	)	
Defendants.	)	

Plaintiffs move to hold Defendants in civil contempt under Federal Rule of Civil Procedure 70(e). (*See* doc. 175.) The Court ordered expedited response and reply briefs. Having considered those briefs and the parties' arguments, the Court is ready to rule.

At the outset, it must be noted that the Court is bound by certain rules and procedure. One rule we encounter dozens of times each year is that when a district court order is appealed to a higher court—e.g., the Ninth Circuit—the district court loses jurisdiction to the appellate court and that jurisdiction does not return until the Ninth Circuit issues the mandate. Another rule is that upon a stay of an injunctive judgment pending appeal, the district court judgment is still valid but its enforceability is in a state of suspension pending determination of the appeal.

Application of these rules requires the Court to deny the pending motions unless there are factors present to take the case outside the customary rules. This analysis therefore begins with a rather complete statement of the prior proceedings.

BACKGROUND

Plaintiffs' motion comes before the Court in an unusual posture. At this point, two federal district judges, the Ninth Circuit, a Montana state court, and the U.S. Supreme Court have all addressed this case in one way or another.

Plaintiffs filed this lawsuit in the Billings Division for the District of Montana on September 6, 2011. They claim that several of Montana's campaign finance and election laws are unconstitutional under the First Amendment. The statutes that they challenge are:

> Montana Code Annotated § 13–35–225(3)(a), which requires authors of political election materials to disclose another candidate's voting record;
>
> Montana Code Annotated § 13–37–131, which makes it unlawful for a person to misrepresent a candidate's public voting record or any other matter relevant to the issues of the campaign with knowledge that the assertion is false or with a reckless disregard of whether it is false;
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> Montana Code Annotated § 13–37–216(1), (5), which limits contributions that individuals and political committees may make to candidates;
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> Montana Code Annotated § 13–37–216(3), (5), which imposes an aggregate contribution limit on all political parties; and
>
> Montana Code Annotated § 13–35–227, which prevents corporations from making either direct contributions to candidates or independent expenditures on behalf of a candidate.

Plaintiffs moved for a preliminary injunction on September 7, 2011, seeking to enjoin Defendants from enforcing each of these statutes. Before any action was taken on the motion, Defendants moved to change venue. The Court granted that motion on January 31, 2012, and the case was transferred to this Court.

On February 16, 2012, this Court held a hearing on the motion for a

preliminary injunction and enjoined enforcement of Montana's vote-reporting requirement and political-civil libel statute (*See* doc. 66); Mont. Code Ann. §§ 13–35–225(3)(a), 13–37–131. The Court denied the motion as to the remaining statutes. (*Id.*)

The Court issued its scheduling order on March 9, 2012. The parties agreed that all of the issues regarding the contribution limits in Montana Code Annotated § 13–37–216(1), (3), and (5) would be resolved through a bench trial and that all other matters would be adjudicated by summary judgment. (*See* doc. 73.) The Court and the parties all agreed to place this matter on an expedited schedule so that it will be resolved prior to this year's election.

Cross-motions for summary judgment were filed, and the Court held a hearing on May 12, 2012. The Court granted both motions in part and denied them in part. (*See* doc. 90.) The Court permanently enjoined Montana's vote-reporting requirement, political-civil libel statute, and ban on corporate contributions to political committees that the committees use for independent expenditures. *See* Mont. Code Ann. §§ 13–35–225(3)(a), 13–37–131,13–35–227. The Court, however, concluded that Montana's ban on direct and indirect corporate contributions to candidates and political parties is constitutional. *Id.* at § 13–35–227. The parties cross-appealed that order but then voluntarily dismissed

the appeals on July 23, 2012.

The Court's summary judgment order is therefore the final judgment on the issues that it addressed. The only remaining issue after the parties dismissed their appeals was the constitutionality of the contribution limits found in Montana Code Annotated § 13–37–216. As the Court has previously noted, the Montana Legislature will have an opportunity to revisit all of these statutes when it convenes in less than three months.

On June 20, 2012, Defendants—without leave of the Court—moved for summary judgment on Plaintiffs' claims concerning the contribution limits. The Court denied the motion because, as explained in the scheduling order, the parties agreed that those claims would be resolved only through a bench trial. Moreover, Defendants' motion was untimely.

The Court held a bench trial from September 12, 2012, to September 14, 2012, in order to resolve Plaintiffs' claims related to Montana's campaign contribution limits in Montana Code Annotated § 13–37–216(1), (3), and (5). At the final pretrial conference immediately preceding the trial, Plaintiffs renewed their motion for summary judgment, and the Court took that motion under advisement.

On October 3, 2012, the Court issued a brief order permanently enjoining

Defendants from enforcing Montana's campaign contribution limits that are found in Montana Code Annotated § 13–37–216. (Doc. 157.) That same day, Defendants moved to stay the injunction, pending their appeal. (Doc. 159.) The next day, on October 4, 2012, Defendants filed their notice of appeal to the Ninth Circuit. On October 9, 2012, this Court denied the motion to stay because, in its view, Defendants would not likely prevail on the merits in light of the U.S. Supreme Court's decision in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006). (Doc. 166.)

Defendants also moved the Ninth Circuit to stay the Court's injunction. On October 9, 2012—the same day that this Court denied the stay—the Ninth Circuit temporarily stayed the injunction, largely because the Court had not yet issued its detailed findings of fact and conclusions of law. (Doc. 167.)

This Court issued its 38-page findings of fact and conclusions of law on October 10, 2012. (Doc. 168.) As the Court explained in its findings of fact and conclusions of law, Plaintiffs had the better arguments at the bench trial. The Court concluded that Montana's contribution limits are unconstitutional under *Randall v. Sorrell*, 126 S. Ct. 2479 (2006). In *Randall*, six justices of the U.S. Supreme Court concurred in a judgment that Vermont's contribution limits violated the first amendment. The *Randall* Court expressly identified Montana's limits as among the lowest in the country. And, indeed, Montana's limits are

lower, in part, than those that the *Randall* Court declared unconstitutional. Montana's limits are well below limits that the U.S. Supreme Court has previously upheld.

Six days after the Court issued its findings of fact and conclusions of law, a motions panel for the Ninth Circuit issued a 31-page opinion continuing the stay until the merits panel decides the appeal. (Doc. 173.) Plaintiffs asked the U.S. Supreme Court to lift the stay, but it denied the request. (Doc. 177.)

This Court's injunction, then, was in effect and enforceable from October 3, 2012, to October 9, 2012, when the Ninth Circuit's stay was first put in place. Once the stay was in place, Montana's contribution limits at Montana Code Annotated § 13–37–216 were again enforceable.

During that six-day window between October 3, 2012, and October 9, 2012, Rick Hill, a gubernatorial candidate for Montana, accepted a donation of $500,000 from the Montana Republican Party.[1] (Doc. 179 at 2.) On October 17, 2012—well after the Ninth Circuit's stay was put in place—Kevin O'Brien, the campaign manager for Steve Bullock (Mr. Hill's opponent) filed a complaint with the Commissioner on Political Practices. (Doc. 175-4.) Mr. O'Brien claims that Mr. Hill violated Montana's contribution limits by accepting the $500,000 donation.

[1] The Court recognizes that there is a distinction between Mr. Hill and his campaign, as well as a distinction between Mr. Bullock in his official capacity and in his individual capacity. The Court need not resolve or apply those distinctions, though, to decide the pending motions.

(*Id.*) The next day, Mr. Bullock and his running mate, John Walsh, sued Mr. Hill in state court, making the same allegations. (Doc. 175-6.)

Mr. Hill removed Mr. Bullock and Mr. Walsh's complaint to federal court on October 18, 2012—the same day that Mr. Bullock and Mr. Walsh filed their complaint in state court. (*See Bullock v. Hill*, 6:12–cv–97 (D. Mont.) (doc. 1).) Mr. Bullock and Mr. Walsh moved the federal court to remand the case back to state court, and a judge of this Court—Judge Dana Christensen—granted that motion on October 24, 2012. (*See id.* at (doc. 10).) That same day, State Court Judge Kathy Seeley, to whom the case was remanded, issued a temporary restraining order enjoining Mr. Hill from further spending any of the $500,000 donation that he had accepted. (Doc. 179-4.)

On October 19, 2012, a day after Mr. Bullock sued Mr. Hill in state court, the plaintiffs in this case moved to hold the defendants in contempt. The thrust of the plaintiffs' allegations is as follows: "Defendant Bullock selectively, unreasonably, and in bad faith initiated enforcement proceedings of MCA Section 13–37–216 [i.e., Montana's contribution limits] against his opponent, Mr. Hill." (Pls.' Br., doc. 175 at ¶ 20.) Plaintiffs claim that the state court lawsuit and the complaint filed with the Commissioner on Political Practices violates this Court's October 3, 2012 injunction, which prohibited the defendants from enforcing the contribution limits in Montana Code Annotated § 13–37–216.

Plaintiffs ask the Court to hold Mr. Bullock in civil contempt under Federal Rule of Civil Procedure 70(e) and pay a contempt fine conditioned on his dismissal of the state court lawsuit against Mr. Hill or any other candidate or contributor who accepted contributions while this Court's injunction was in effect. Plaintiffs ask for the same remedy against the Commissioner of Political Practices, and they ask that Defendants pay compensatory damages, attorney's fees, and costs to Mr. Hill and his campaign.

After receiving Plaintiffs' motion, the Court ordered an expedited briefing schedule and set a tentative date for hearing.

On October 25, 2012, the date that briefing closed for the contempt motion, Mr. Hill and his campaign moved to intervene in this case. (Doc. 179.) They ask this Court to issue a temporary restraining order blocking Judge Seeley's temporary restraining order. (*See id.*) As they claim:

> This action by Judge Seeley, one instigated by Bullock, has made a mockery of this Court's Order issued on October 3, 2012, which the Hill Campaign (and many other candidates) relied upon in good faith at a time when it was in full force and effect. Bullock and Judge Seeley are trifling with this Court's jurisdiction. Without immediate relief, this travesty will enable the Bullock campaign to, in all likelihood, steal a gubernatorial election.

(*Id.* at 3–4.)

STANDARD

Federal Rule of Civil Procedure 70(e) permits a court to hold a disobedient party in contempt. "The party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by clear and convincing evidence, not merely a preponderance of the evidence." *In re Dual–Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993).

ANALYSIS

I. Jurisdiction

The Court does not have jurisdiction to entertain Plaintiffs' motion. "The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount*, 459 U.S. 56, 58–50 (1982) (per curiam). Ordinarily, then, once a notice of appeal is filed, the district court does not regain jurisdiction over the case until the higher court files the mandate. *In re Thorp*, 655 F.2d 997, 998 (9th Cir. 1981).

This rule, though, "is not absolute." *In re Padilla*, 222 F.3d 1184, 1190 (2000). District courts have jurisdiction to enforce an injunction, even after that injunction has been appealed, but only if the injunction has not been stayed or superseded. *Id.* ("*Absent a stay or supersedeas*, the trial court . . . retains jurisdiction to implement or enforce the judgment or order but may not alter or

expand upon the judgment.") (emphasis added); *accord In re Rains*, 428 F.3d 893, 904 (9th Cir. 2005).

Since the Ninth Circuit stayed the injunction here, the Court does not have jurisdiction to now enforce it. The Court, therefore, cannot levy civil contempt sanctions "to compel future compliance" with the stayed injunction. *See Intl. Union v. Bagwell*, 512 U.S. 821, 827 (1994); *see also Farmhand, Inc. v. Anel Engg. Indus.*, 693 F.2d 1140, 1145–46 (5th Cir. 1982) (holding that a district court has jurisdiction to issue a contempt order based on a violation of an injunction only if the injunction has not been stayed or superseded (citing, *inter alia*, *Hoffman v. Beer Drivers & Salesmen's Local*, 536 F.2d 1268, 1276 (9th Cir. 1976)).

In short, the Court does not have jurisdiction to issue a contempt order under Federal Rule of Civil Procedure 70(e).

II. Merits

Even if the Court has jurisdiction, Plaintiffs claims fail on the merits. "The party alleging civil contempt must demonstrate that the alleged contemnor violated the court's order by clear and convincing evidence, not merely a preponderance of the evidence." *In re Dual–Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d at 695.

Here, Plaintiffs summarize the purportedly improper conduct as follows:

"Defendant Bullock selectively, unreasonably, and in bad faith initiated enforcement proceedings of MCA Section 13–37–216 [i.e., Montana's contribution limits] against his opponent, Mr. Hill." Those proceedings include: (1) a lawsuit that was filed on October 18, 2012, and is currently pending in state court before Judge Seeley and (2) a complaint filed with the Commissioner of Political Practices on October 17, 2012. To be sure, Plaintiffs have not provided any evidence that the Commissioner of Political Practices has taken any enforcement action against Mr. Hill or any other candidate in any other race. The Commissioner has, however, asked Mr. Hill to respond to Mr. O'Brien's complaint.

The Ninth Circuit stayed the Court's injunction on October 9, 2012. The injunction was in force from October 3, 2012, to October 9, 2012. Plaintiffs do not allege that Defendants took any action during that time period that violated the injunction. The only conduct that Plaintiffs complain of happened after the Ninth Circuit stayed the injunction on October 9, 2012, when the injunction, though still valid and not reversed, was unenforceable. Since the conduct complained of took place after the date that the injunction was enforceable, the conduct could not have violated the injunction.

Even though the Court denies Plaintiffs' motion to hold Defendants in contempt, this order should not be construed as a determination that the

contribution in question, made during a period when the injunction was valid and enforceable, was an illegal contribution. That is the question before Judge Seeley.

III. Motion to intervene

The motion to intervene from Mr. Hill and his campaign is, on its face and by their admission, an attempt to appeal a state court decision to federal court. That is a classically impermissible action under another rule—the *Rooker-Feldman* doctrine. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *D.C. Ct. Apps. v. Feldman*, 460 U.S. 462 (1983). Also, this district judge may not review and reverse the action of another district judge in the same or related proceeding.

Nor does the district court have jurisdiction to issue a restraining order under the Anti-Injunction Act. 22 U.S.C. § 2283. The Act reads: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The Act, though, does not give this Court jurisdiction to now issue a temporary restraining order because, for the reasons discussed above, there is no jurisdiction to "aid" and there is no judgment "to protect or effectuate," since the Ninth Circuit has stayed the Court's injunction.

Mr. Hill and his campaign still may have a remedy in state court. It would

seem that they can appeal Judge Seeley's decision or petition the Montana Supreme Court for a writ of supervisory control. *See* Mont. R. App. P. 14(3). Here, though, they seek an extreme remedy—i.e., an order restraining the effect of a state court order without a showing of a lack of a state remedy. Surely, the Montana Courts will protect the rights of the parties. Plaintiffs may also be able to seek review of this Court's order in the Ninth Circuit.

Since Mr. Hill and his campaign have not asserted a protectable interest, their motion to intervene must be denied. Fed. R. Civ. P. 24.

CONCLUSION

The Court does not have jurisdiction to hold Defendants in contempt. Even if it did, the merits of Plaintiffs' argument fail because the conduct complained of happened while the Court's injunction was stayed and therefore unenforceable.

The remedy and intervention sought by Mr. Monforton, Mr. Hill's attorney, is an extreme remedy—federal interference with a state court—something rarely done in civil matters and then only on critically unusual facts not existent here.

This matter has been well researched. Counsel have not cited—nor has the Court found—specific authority authorizing this Court to grant the relief sought by the pending motions. Accordingly,

IT IS ORDERED that the plaintiffs' motion to hold defendants in contempt (doc. 175) is DENIED.

IT IS FURTHER ORDERED that the hearing tentatively scheduled for October 29, 2012, is VACATED. There will be no hearing.

IT IS FURTHER ORDERED that the motion to intervene (doc. 179) is DENIED.

Dated this 26th day of October 2012.

CHARLES C. LOVELL
SENIOR UNITED STATES DISTRICT JUDGE