

BEFORE THE FEDERAL ELECTION COMMISSION

2012 JUN 13 A 9 08

In the Matter of)
)
MUR 6546) DISMISSAL AND
Michael J. Fox) CASE CLOSURE UNDER THE
Fox 41, LLC) ENFORCEMENT PRIORITY
) SYSTEM

GENERAL COUNSEL'S REPORT

Under the Enforcement Priority System ("EPS"), the Commission uses formal scoring criteria as a basis to allocate its resources and decide which matters to pursue. These criteria include without limitation an assessment of the following factors: (1) the gravity of the alleged violation, taking into account both the type of activity and the amount in violation; (2) the apparent impact the alleged violation may have had on the electoral process; (3) the complexity of the legal issues raised in the matter; and (4) recent trends in potential violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), and developments of the law. It is the Commission's policy that pursuing relatively low-rated matters on the Enforcement docket warrants the exercise of its prosecutorial discretion to dismiss cases under certain circumstances.

The Office of General Counsel has determined that MUR 6546 should not be referred to the Alternative Dispute Resolution Office. Also, for the reasons set forth below, the Office of General Counsel recommends that the Commission exercise its prosecutorial discretion to dismiss MUR 6546.

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1 The Complainant, Jan Schneider, alleges that Michael J. Fox and/or Fox 41, LLC,
2 a limited liability company owned by Mr. Fox, erected a large, double-sided sign on a
3 commercial property that read "Defeat Obama in 2012," and contained no disclaimer, in
4 violation of 2 U.S.C. § 441d. Complaint at 2, ¶¶ 4-6; 3-4, ¶¶ 8-10. According to the
5 complaint, the sign was located on property in Sarasota, Florida owned by Fox 41, LLC,
6 adjacent to a highly-traveled U.S. highway and is visible to traffic traveling on the
7 highway in both directions. *Id.* at 2, ¶¶ 4-5. Complainant also states, with reference to an
8 attached newspaper article, that a representative of Fox 41, LLC, reportedly said the sign
9 is the first of 10,000 similar signs that Mr. Fox hopes will be erected throughout the
10 country before July 4, 2012, and that Mr. Fox has established a fund to pay for the cost of
11 the signs. *Id.* at 2-3, ¶ 7; Ex. A.

12 Mr. Fox filed a response acknowledging that he paid for the seven by nine foot
13 sign, which is located on property he owns, presumably as the sole shareholder of Fox 41,
14 LLC. Response at 1. He maintains that the sign was not authorized by a candidate, a
15 candidate committee, a political party, or any agent thereof. *Id.* Mr. Fox states that the
16 City of Sarasota issued a permit for the sign, and that the city did not consider it an
17 "election sign," a determination that he represents would have prohibited issuance of the
18 permit under the city code. *Id.* He further states that he was unaware at the time the
19 permit was issued whether or not Federal election law applied. *Id.* Mr. Fox represents
20 that the sign was removed at his "sole discretion" on April 5, 2012. *Id.* He characterizes
21 his application for a city permit as an indication of his good faith. *Id.* at 2.

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1 Mr. Fox denies that any fund has been established to pay for the cost of the
2 "Defeat Obama" sign or any other sign. *Id.* at 1. He further addresses the allegation
3 stemming from the press report about establishing a fund for 10,000 similar signs by
4 stating that he has no control over other people's information, sources or reports and that
5 the allegation is "hearsay." *Id.* at 2.

6 The Act and the Commission's regulations require that a public communication
7 that expressly advocates the election or defeat of a clearly identified candidate must
8 include a disclaimer. 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(2). If the communication
9 is not authorized by a candidate, a candidate committee, or any agents thereof, it must
10 state the full name and the permanent street address, telephone number or World Wide
11 Web address of the person financing it and that it is not authorized by any candidate or
12 candidate committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). A "public
13 communication" includes outdoor advertising facilities, such as billboards and "any other
14 form of general political advertising." 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. Signs are
15 encompassed within the term "any other form of general public political advertising,"
16 although they are not specifically enumerated in Sections 431(22) and 100.26.
17 *See* 11 C.F.R. § 110.11(c)(2)(i) (specific reference to "signs" in a provision setting out
18 more specific requirements for disclaimers on printed communications); *see also* MUR
19 6032 (Tom Leatherwood for Congress) (dismissal of low-rated matter involving, in
20 pertinent part, the lack of disclaimer on yard signs that the Committee later corrected);
21 MUR 5156 (Mark Morton) Statement of Reasons of Commissioner Darryl R. Wold,
22 Statement of Reasons of Chairman Mason and Commissioner Bradley Smith (concurring,

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1 in part with Commissioner Wold), and Statement of Reasons of Commissioner Scott
2 Thomas (writing separately) (each concluding, in part, that a single sign expressly
3 advocating the election and defeat of federal candidates required a disclaimer, but
4 recommending dismissal instead of finding reason to believe the Act had been violated
5 and taking no further action).²

6 Thus, as a public communication that expressly advocated the defeat of a federal
7 candidate, the "Defeat Obama in 2012" sign should have included a disclaimer.³

8 Mr. Fox states that he has now taken down the sign and denies that any fund has
9 been established to pay for this sign or other signs. The Office of General Counsel has no
10 information to the contrary.

11 **RECOMMENDATIONS**

12 Accordingly, because Mr. Fox and/or Fox, LLC, apparently financed a single sign
13 that is no longer on display, the Office of General Counsel has determined that further
14 Enforcement resources are not warranted in this matter. Therefore, the Office of General
15 Counsel recommends that the Commission exercise its prosecutorial discretion to dismiss
16 this matter and close the file. *See Heckler v. Chaney*, 470 U.S. 821 (1985). We also
17 recommend that the Commission remind Michael J. Fox and Fox 41, LLC, of the
18 Commission's disclaimer requirements under 2 U.S.C. § 441d(a)(1) and 11 C.F.R.
19 § 110.11.

² At the time the Commission considered MUR 5156 in March 2002, the Act had not been amended to include the definition of "public communication" at Section 431(22). However, the disclaimer provisions at 2 U.S.C. § 441d applied to "any other type of general public political advertising."

³ If the cost of the sign was greater than \$250, Mr. Fox or his company should have filed an independent expenditure report with the Commission. *See* 2 U.S.C. § 434(c); *see also* 11 C.F.R. § 109.10(b). We have no information, however, about the cost of the relatively small sign.

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