DISTRICT COURT, DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
Plaintiffs: DOUGLAS H. BARBER, *et al.*; v. Defendants: BILL OWENS, as Governor of the State of Colorado, *et al.*	▲ COURT USE ONLY ▲ Case Number(s): **04CV6602** Courtroom: 8

AMENDED COURT'S ORDER RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER is before the Court on the above referenced motions. The Court, having reviewed all related pleadings, the file, and being fully advised, hereby FINDS and ORDERS as follows:

The Plaintiffs contend that the transfers aggregating some $442 million from 31 Cash Funds to the General Fund to pay the general expenses of government were in violation of the Colorado Constitution. Further, the Plaintiffs contend that the special taxes, fees, surcharges and assessments, as they are continued, increased or extended to replenish the monies transferred, are also in violation of the Colorado Constitution.

STANDING

Standing is a threshold issue that must be determined before a court may review the merits of a case. *Ainscough v. Owens,* 90 P.3d 851, 855 (Colo. 2004). To establish standing under Colorado law, a plaintiff generally must have: (1) suffered an injury-in-fact, (2) to a legally protected interest. *See id.* at 855,856; *see also Wimberly v. Ettenberg,* 194 Colo. 163, 168, 570 P.2d 535, 539 (1977). The "injury-in-fact" prong of Colorado's standing test is

required by the separation of powers doctrine in article III of the Colorado Constitution; it assures that an actual controversy exists so that the matter is proper one for judicial resolution. *See Conrad v. City and County of Denver,* 656 P.2d 662, 668 (Colo. 1982). This prong requires "a concrete adverseness which sharpens the presentation of the issues that parties argue to the courts." *Ainscough,* 90 P.3d at 856 (quoting *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000)). Standing cannot be conferred by the "remote possibility of a future injury" or an injury that is "overly 'indirect and incidental' to the defendant's action." (quoting *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890-91 (Colo. 2001); *see also O'Bryant v. Public Utils. Comm'n*, 778 P.2d 648 (Colo. 1989).

The "legally protected interest" prong involves an inquiry as to whether the constitution, the common law, or statute, rule or regulation protects the plaintiff's legal interest. *Ainscough*, 90 P.3d at 856. A legally protected interest may be a tangible or economic interest arising out of property or contract, or a statute that confers privilege; on the other hand, it may be intangible, such as an interest in free speech or in having a government that operates in conformity with the constitution. *See id.; see also Colorado State Civil Serv. Employees Ass'n v. Love*, 167 Colo. 436, 448 P.2d 624 (1968); *Howard v. City of Boulder*, 132 Colo. 401, 290 P.2d 237 (1955). This Court finds that Plaintiffs', except for Heggem-Lundquist, claimed injury was to a "legally protected interest." However, this Court will address the "injury-in-fact" prong of the test for standing as it relates to each Plaintiff in this action.

1. Douglas H. Barber:

Douglas Barber is a real estate broker licensed by the State of Colorado. Douglas Barber has been a licensed realtor in Colorado since 1975. In the past, he has paid into the Real Estate Recovery Fund. The Real Estate Recovery Fund is a special fund established by § 12-61-301, C.R.S. (2004). The fund exists to reimburse members of the public for actual and direct out-of-pocket losses, court costs, and reasonable attorney fees stemming from

negligence, fraud, willful misrepresentation, or conversion of trust funds committed by a broker. After obtaining a court judgment and exhausting all other remedies, a member of the public may apply for payment from the fund.

The fund is financed through licensee disciplinary fines, reinstatement fees, interest income. However, if on January 1 of any year, the balance in the fund is less than $350,000, the Real Estate Commission is required to set and collect an additional recovery fund fee from licensees when they renew their licenses. § 12-61-301(4)(a), C.R.S. (2004). This fee, which may not exceed $40, takes effect July 1 of that year and remains in effect for three years. § 12-61-301(4)(a), C.R.S. (2004). The Commission sets the fee at a level sufficient to reestablish and maintain a $350,000 minimum fund balance. § 12-61-301(4)(a). As a result of a transfer of $3.2 million from the Real Estate Recovery Fund to the General Fund, as of January 1, 2004, the fund balance was below $350,000 statutory minimum, requiring the Commission to assess a recovery fund fee for the next three-year renewal cycle.

Douglas Barber will be required to pay this assessment when the time for his license renewal arises. Douglas has not paid the new $31.00 recovery fund fee because his license is not presently up for renewal. His current license is valid through December 31, 2006. However, he will have to pay the fee when and if he renews his license.

Defendants argue that Douglas Barber has not sustained an injury-in-fact, since he has not had to pay the fee and will not pay the fee until he renew, if he renews, his license in the future. Defendants further argue that Douglas Barber's potential payment of the fee in December 2006 is not sufficiently immediate and real to warrant review at this time. This Court disagrees.

Although it is necessary for a Plaintiff to show injury-in-fact, he or she does not have to "risk the imposition of fines or imprisonment or the loss of property or profession in order to secure the adjudication of uncertain legal right." *Mt. Emmons Mining Company v. Town of Crested Butte*, 690 P.2d 231 (Colo. 1984) (*quoting from Community Tele-Communications, Inc. v. Heather Corp.,* 677 O,2d 330, 334 (Colo. 1984). Douglas Barber has been a licensed real estate broker since 1976 and is due to renew his license in December of 2006. Courts generally "will not consider 'uncertain or contingent future matters' because the injury is

speculative and may never occur." *Stell v. Boulder County Dep't of Social Serves.*, 92 P.3d 910, 914 (Colo. 2004). However, based on the facts of this case Douglas Barber's future injury is not speculative, is sufficiently immediate and real, and is more than just a remote possibility of a future injury. This Court finds Douglas H. Barber does have standing to challenge the transfer of funds from the Real Estate Recovery Fund.

2. Rick Kerber, d/b/a Kerber's Oil Company:

Rick Kerber is in the home-fuel delivery business as a jobber for Sinclair Oil Company. He is presently paying a fee on every load of fuel that he buys, which money is placed into the Petroleum Storage Tank Fund. Because the balance in the Petroleum Storage Tank Fund fell below $5 million, the fees were increased from $50 per 8,000 gallon truckload to $75. This Court finds that Rick Kerber has standing to challenge the transfer from the Petroleum Storage Tank Fund to the General Fund

3. Heggem-Lundquist Paint Company:

Heggem-Lundquist Paint Company is a Denver-based company that has been in the interior finish construction business since 1949. It pays approximately $400,000 per year in workers compensation insurance premiums.

Pursuant to statute, all insurance companies pay a percentage surcharge on the premiums written in Colorado; self-insured employers pay a surcharge on a calculated premium-equivalent. Insurance companies and self-insured employers pay this percentage surcharge two times a year to the Division of Workers' Compensation. Once the surcharge monies are received by the Division, they are allocated to four funds. Three of those funds are the subject of this suit: the Major Medical Fund, the Subsequent Injury Fund and the Workers' Compensation Cash Fund. The surcharge is to continue until "actuarial soundness' is achieved, when or if that occurs. Although the allocation of the surcharge has varied since July

1, 2003 to direct a larger portion to the Subsequent Injury and Major Medical Funds, the overall surcharge rate of 3.818 percent has remained the same.

This Court finds Heggem-Lundquist lacks standing because Heggem-Lundquist has not suffered any injury-in-fact. The statutory surcharge on workers' compensation insurance premiums written in Colorado is assessed to the insurer. Because Heggem-Lundquist does not pay the statutory surcharge that is allocated to the Major Medical, Subsequent Injury, and Workers' Compensation Cash Funds, by definition is not a fee-payer. Heggem-Lundquist attempts to establish an "injury-in-fact" by asserting that its insurer passes on the cost of the surcharge as part of its workers' compensation premiums. Even if the Insurer recovers the cost of paying the surcharge from its insured, that would not give Heggem-Lundquist standing. Many companies and corporations pass on cost of doing business to its customers and certainly that does not open the doors of the court to customers of those businesses to assert claims or causes of actions of the companies and corporations.

This Court finds Heggem-Lundquist also lacks standing because Heggem-Lundquist does not have a "legally protected interest." A business entity that pays a particular tax or surcharge may have a legal interest in assuring that the tax or surcharge is spent in accordance with constitutional requisites; however, the law does not extend standing to persons or entities to which the cost of the tax or surcharge may or may not be later passed. Consequently, Heggem-Lundquist lacks standing to challenge the transfers from those funds that are supported by the statutory surcharge.

Accordingly, Heggem-Lundquist lacks standing to challenge the transfers from the Major Medical Fund, the Subsequent Injury Fund and the Workers' Compensation Cash Fund to the General Fund and this Court, therefore, dismisses Heggem-Lundquist's claims with respect to those transfers.

Except for the challenged transfers made by Plaintiffs, Barber and Kerber, involving the Real Estate Recovery Fund and the Petroleum Storage Tank Fund, Plaintiffs have no relationship whatsoever with the remaining cash funds identified in the Complaints. Plaintiffs have not paid any special taxes, fees, surcharges or other assessments into any other cash funds

or have any present claim to monies in those other funds. Thus the Plaintiffs have no injury or cognizable legal interest with respect to the transfers from the remaining 29 Cash Funds.

Accordingly, all claims with respect to the transfers from the cash funds, other than the Real Estate Recovery Fund and the Petroleum Storage Tank Fund, are hereby dismissed.

Finally, Plaintiffs contention that TABOR itself confers standing is without merit. Tabor does permit "individual or class action enforcement suits [to] be filed;" it merely creates a private cause of action under that law. It does not automatically give standing to any individual or entity who wants to file suit, the two prong test must be satisfied to have standing.

ISSUES

1. Did the transfers from the Cash Funds to the General Fund constitute debt within the meaning of Article XI, Sections 3 and 4, of the Colorado Constitution?

2. Do the transfers from Cash Funds represent a tax policy change within the meaning of Article X, Section 20(4)(a), of the Colorado Constitution?

3. Has the special taxes, fees, surcharges and assessments as a result of the transfers been transformed into a new tax within the meaning of Article X, Section 20(4)(a), of the Colorado Constitution?

DISCUSSION

The General Assembly holds plenary power to appropriate state funds, subject only to constitutional limitations. *See, Colo. Gen. Assembly. v. Lamm,* 704 P.2d 1371, 1380 (Colo.1985). "A constitutional challenge to legislation necessarily implicates the separation of powers doctrine under our tripartite system of government. Each branch of government must be accorded sufficient operating room to exercise its constitutional authority. Indeed, the judicial axiom that legislative enactments are vested with a presumption of constitutionality is nothing more than an obvious acknowledgement that the law-making function should not be subjected to unwarranted judicial encroachment." Therefore, "in cases involving neither a

fundamental right nor a suspect classification that the party challenging the constitutionality of a statute … bear the heavy burden of proving its unconstitutional beyond a reasonable doubt." *Mt. Emmons Mining Company v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984); *People v. Alexander*, 663 P.2d 1024 (Colo. 1983); *Dawson v. PERA*, 664 P.2d 702 (Colo. 1983).

Did the transfers from the Cash Funds to the General Fund constitute debt within the meaning of Article XI, Sections 3 and 4, of the Colorado Constitution?

The Plaintiffs contend that the transfers aggregating some $442 million from the 31 Cash Funds to the General Fund to pay the general expenses of government were in violation of the Article XI, Sections 3 and 4, of the Colorado Constitution. Plaintiffs assert that the transfers from the Cash Funds violated Colo. Const. Art. XI, § 3 requires a balanced budget each year and Section 4 of this article, which provides that no debt may be incurred unless certain strictures are observed, including the levy of a tax to repay the money. Therefore, the Plaintiffs argue the transfers from the Cash Funds to the General Fund created illegal debt.

The purpose of these constitutional provisions is that the "state shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue [or] erect public buildings for the use of the state" is to prevent the pledging of state revenue for future years or the creation of obligations that would require future revenues from a tax otherwise available for general purposes. *In re Submission of Interrogatories on House Bill 99-1325, 1999*, 979 P.2d 549 (modified on denial of rehearing). Some of the characteristics of debt prohibited by constitutional provision restricting state's ability to contract "any debt by loan in any form" are: (1) obligations that pledge revenues of future years; (2) obligations that require the use of revenue from a tax otherwise available for general purposes; (3) obligations legally enforceable against the state in future years; (4) obligations for which future legislatures do not have the discretion to appropriate funds. *Id.* "Debt" is created within constitutional prohibition when an obligation is created that requires revenue from tax otherwise available for general

purposes to meet it (Const. art. 11, §§ 3, 4). *Johnson v. McDonald*, 97 Colo. 324, 49 P.2d 1017 (Colo. 1935).

Regarding all 31 Cash Funds, Plaintiffs argue that the transfers created a "debt" in violation of the Colorado constitution on the theory that the transfers are illegal and that illegal transfers must be repaid. Regarding 18 of the 31 Cash Funds, Plaintiffs contend they are express trusts and that the General Assembly, as trustee of the trusts, violated its fiduciary duty when it improperly transferred monies out of the trust, which created a debt to repay under trust laws in violation of the Colorado Constitution.[1]

Regarding Plaintiffs' contention that 18 of the Cash Funds are trust, Plaintiffs argue that the legislature, as trustee, has misappropriated the money in the funds and is obligated to return the money to the funds, citing as authority The Restatement (Second) of Trusts which states, in cases of misappropriation of trust assets, the trustee is under a duty to immediately and unconditionally restore the money. "A trustee who commits a breach of trust is . . . chargeable with the amount required to restore the values of the trust estate . . . ." In the case of a transferee who has notice, the Restatement states that "the transferee can be compelled . . . if he has not disposed of the property, to restore it to the trust." If the trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, the transferee does not hold the property free of the trust. . . . If he has not disposed of the property but still retains it, the beneficiary can charge him as constructive trustee of the property and can compel him to restore it to the trust, together with any income which he has received here from, or with the value of the use of the property for the period during which he held it. Therefore, the Plaintiffs assert the obligation of the State to restore the monies transferred constitute a "debt" within the meaning of Article XI, Section 3, of the Colorado Constitution

[1] The Petroleum Storage Tank Fund and the Real Estate Recovery Fund are not in this group. Based on this Court's decision regarding standing, the only Cash Funds under consideration in this order are the Petroleum Storage Tank Fund and the Real Estate Recovery Fund. Normally, that would end the consideration of this argument. However, the Cash Funds related to Heggem-Lundquist Paint Company are among those Cash Funds Plaintiffs argue are express trust. This Court will continue its analysis and resolution of this issue on the merits because it may later be determined that this Court's finding that Heggem-Lundquist Paint Company lacked standing was err.

and the obligation to repay the money transferred was not attended by a levy of a tax sufficient to pay the interest on and extinguish the principal of such debt as required by Article XI, Section 4, of the Colorado Constitution violate the Colorado's constitution.

Plaintiffs contend that following eighteen (18) of the Cash Funds are express trusts:

1. Colorado Children's Trust Fund
2. Colorado Travel and Tourism Promotion Fund
3. Disabled Telephone Users Fund
4. Educator Licensure Cash Fund
5. Employment Support Fund
6. Family Stabilization Services Fund
7. Family Support Registry Fund
8. Hazardous Substance Response Fund
9. Major Medical Insurance Fund
10. Motor Carrier Fund
11. Off-Highway Vehicle Recreation Fund
12. Older Coloradans Cash Fund
13. Severance Tax Trust Fund
14. Subsequent Injury Fund
15. Trade Name Registration Fund
16. Unclaimed Property Trust Fund
17. Unemployment Compensation Fund
18. Worker's Compensation Cash Fund

Plaintiffs argue that these are limited trust with the duty to segregate and maintain the money in the accounts for the purposes for which the monies were collected. Plaintiffs further argue that the respective statutes indicate an intent to create a trust. For instance, the Plaintiffs argue that the statutes creating the Colorado Children's Trust, Severance Tax Trust Fund and Unclaimed Property Trust Fund actually state that a trust fund is created and that the money is to be credited to the respective trust funds. In addition, Plaintiff argues that the pertinent statutes for all 18 of the Cash Funds identified above as express trusts typically provide that unexpended money "shall remain in the fund" and "shall not revert or be transferred to the general fund or any other fund," or similar language.

Plaintiffs cite only three funds in which the General Assembly used the word "trust" to describe the fund. While Plaintiffs assert that certain other language purports to express an intent to make these funds "trust," of the remaining 15 out of 18 alleged "trust" funds, none

uses the word "trust" anywhere in the statutes establishing the funds. It should also be noted that the remaining 13 of the 31 cash funds do not contain the word "trust" or the language Plaintiffs argue purports to express an intent to make the funds "trust" funds.

This Court finds that none of the 18 Cash Funds are trust funds, as the Plaintiffs argue. The statutes creating the funds do not create a trust that would in any way restrict the powers of the General Assembly to appropriate (transfer) funds. The same is true concerning all 31 Cash Funds. Plaintiffs' assert that the transfers created debt because the transfers are illegal. The 31 Cash Funds are special funds, which are nothing more than a particular fund from which money can be drawn. *Travelers' Ins. Co. v. City of Denver*, 11 Colo. 434, 440, 18 P. 556, 559 (1888). Crediting money to a special fund, in and of itself, means only that money from the General Fund usually is not used to fund the activity for which the special fund was created. It does not mean that the General Assembly is prohibited from appropriating the money in the special fund for another purpose.

> "It is undisputed that the power to legislate granted to the General Assembly by article V, section 1 of the Colorado Constitution permits the General Assembly to define the operation of grants of governmental authority articulated by the constitution, [cites omitted] and that the power of the General Assembly over appropriations is absolute."

Colorado General Assembly v. Lamm, 700 P.2d 508, 519. These funds were created under the General Assembly's legislative power to enact. Plaintiff essentially argues that once a special fund is created it can not be amended or repealed. The General Assembly has plenary power to enact, repeal or amend laws. *Colorado Ass'n of Public Employees v. Board of Regents*, 804 P.2d 138, 142 (Colo. 1990); *Colorado General Assembly v. Lamm*, 738 P.2d 1156, 1169 (Colo. 1987). Even assuming, *arguendo*, that some of the Cash Funds are trust funds, the General Assembly has the constitutional power to amend or repeal provisions of the fund. To hold otherwise effectively would limit the General Assembly plenary powers.

The statues authorizing the transfers do not pledge future revenues. Section 24-75-217, C.R.S. (2004) authorizes repayment of certain funds transferred in fiscal year 2002 only if the revenues are sufficient. Such a contingent obligation is not a constitutional debt. *Gude v. City of Lakewood*, 636 P.2d 691, 699 (Colo. 1981). The transfers do not authorize any repayment

from any fund. Nothing in any of the legislation authorizing the transfers establishes any obligation, and there is no requirement that the General Assembly reimburse any of the transferred funds.

The transfer of monies from the Cash Funds to the General Fund is within the powers of the General Assembly and is, therefore, not illegal and does not create "debt" in violation Article XI, Sections 3 and 4, of the Colorado Constitution.

Does the transfers from Cash Funds represent a tax policy change within the meaning of Article X, Section 20(4)(a), of the Colorado Constitution?

Plaintiffs contend the transfer constituted a "new tax" or a "tax policy change directly causing a tax revenue gain" absent voter approval, in violation of Colo. Const. art. X, § 20(4)(a) ("TABOR"). The transfers neither constituted a new "tax" as discussed later in this order nor a change in tax policy directly causing a tax revenue gain. TABOR's purpose is to limit the growth of government, not hinder the delivery basic services and functions. In this case, the transfers did not create new income streams or otherwise "directly cause a net tax revenue gain." As discussed in more detail later in this order, contrary to Plaintiffs' contentions that a one time or occasional transfer from a special fund for the purpose of ensuring that government can provide essential services do not destroy the principal purpose of the special fund. Both before and after these transfers, the fees or assessments were and are still pursuant to statute collected and used principally for the purposes for which the funds were established. The diversion does not increase the growth of government. The charges are still fees, as they were before and continue to be, and not new taxes or a change in tax policy contemplated by TABOR.

Has the special taxes, fees, surcharges and assessments as a result the transfers been transformed into a new tax within the meaning of Article X, Section 20(4)(a), of the Colorado Constitution?

The charges assessed for each of the cash funds are fees, surcharges, special taxes, or assessments. Plaintiffs allege that, by transferring money from the cash funds to the General Funds, these fees, surcharges, special taxes, or assessments ("fees") are now new "taxes" subject to compliance with Colo. Const. Art. X, § 20(4)(a).

Plaintiffs' argument is without merit. The transfer of the revenues from a special fund to the general fund does not convert the "fees" to new "tax." The distinction between a tax and other forms of assessment is based upon the methods adopted for collecting them and fixing their amount. *Walker v. Bedford*, 93 Colo. 400, 405, 26 P.2d 1051, 1053 (1933). In making this determination, a court must analyze the language of the enabling law to determine whether it regulates business by assessing a fee or simply raises revenue by taxing property. *Rancho Colorado, Inc. v. City of Broomfield,* 196 Colo. 444, 449, 586 P.2d 659, 663 (1978). Courts will review the language to determine the purpose for which the charges are originally imposed. If the language discloses that the primary purpose for the imposition of a fee is to fund a particular objective, then the charge is a fee. Conversely, if the fee is primarily designed to raise revenues, then it is a tax. The language of the statute is determinative.

The Tenth Circuit has noted that the classic "tax" is imposed by a legislative body upon a large segment of society. It is intended to benefit the community at large. By contrast, the classic "fee" generally serves regulatory purposes and is imposed by an agency upon those subject to its regulations. *Marcus v. Kansas Dep't of Revenue*, 170 F.3d 1305, 1311 (10th Cir. 1999). A fee does not become a tax merely because it may be used on occasion for a more generic purpose. Rather, the court must examine the "dominant purpose" of the charge and determine whether any diversion alters its "essential character." *Id.*

Plaintiffs contend that the fees are transformed into "taxes" if they are redirected to the General Fund. The General Assembly used some of the money in these Cash Funds to offset revenue deficiencies in certain fiscal years. The legislation authorizing the transfers confirms that the General Assembly did not intend to use these funds on a regular basis to supplement the general fund. These transfers do not signal any alteration in the overall purpose of the Cash Funds. The monies from the Cash Funds were used only to address an immediate and severe revenue shortfall. This temporary diversion does not transform the monies from fees

into "taxes." The "dominant purpose" of the charges remains the same in each of the Cash Funds.

Court's authority to grant relief requested is limited.

Even assuming that the General Assembly did not properly transfer money from the Cash Funds to the General Fund, this Court does not have authority to grant the relief, restoration of the money to the Cash Funds, requested by the Plaintiffs. "The General Assembly alone represents the legislative, one of the three coordinate branches of the state government. It is not subject to control in a purely legislative function, such as the appropriation or allocation of money, by the judicial branch of the government. In the case at bar the courts can do no more than declare to be unconstitutional the act of the General Assembly providing for diverting funds from their constitutionally prescribed use. Reimbursement, if any, must come as the voluntary legislative act of the General Assembly." *Davis v. Pensioners Protective Ass'n*, 135 PL.2d 142, 147 (Colo. 1943)

Conclusion

For the foregoing reasons and authorities, this Court grants the Defendants' Motion for Summary Judgment and denies Plaintiffs' Cross Motion for Partial Summary Judgment.

IT IS THEREFORE ORDERED that summary judgment is hereby entered in favor of the Defendants and against the Plaintiffs on all claims.

DATED this 18th day of March 2005.

BY THE COURT:

/s/ R. Michael Mullins

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R. MICHAEL MULLINS
District Court Judge

cc: All Counsel