

No. D-1-GN-10-001924

TEXAS DEMOCRATIC PARTY;
BOYD L. RICHIE, IN HIS CAPACITY
AS CHAIRMAN OF THE TEXAS
DEMOCRATIC PARTY; AND JOHN
WARREN, IN HIS CAPACITY
AS DEMOCRATIC NOMINEE FOR
DALLAS COUNTY CLERK,

Plaintiff

vs.

TEXAS GREEN PARTY;
KAT SWIFT, INDIVIDUALLY AND
IN HER CAPACITY AS CHAIRWOMAN
OF THE TEXAS GREEN PARTY;
TAKE INITIATIVE AMERICA, INC.;
FREE AND EQUAL, INC.;
TIM MOONEY; UNKNOWN DONORS;
AND THE 2010 UNKNOWN NOMINEES
OF THE TEXAS GREEN PARTY,

Defendant

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

353rd JUDICIAL DISTRICT

BENCH BRIEF REGARDING
VIOLATIONS OF THE TEXAS ELECTION CODE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW TEXAS DEMOCRATIC PARTY, BOYD L. RICHIE, in his capacity as
Chairman of the Texas Democratic Party, and JOHN WARREN, in his capacity as Democratic
Nominee for Dallas County Clerk (hereinafter, collectively "TDP"), Plaintiffs herein, and submit this
Bench Brief Regarding Violations of the Texas Election Code for consideration by the Court at the
temporary injunction hearing.

I.
Introduction

On June 6, 2010, the TDP learned that the recent efforts to get the Texas Green Party (“TGP”) on the general election ballot was not an effort made of those Texans who want to elect TGP candidates to office, but was an effort orchestrated by people inside and outside of Texas who do not support the TGP. In fact, the financing that allowed the TGP to obtain the necessary signatures to appear on the ballot originated from supporters of another political party and amounts to nothing more than a ploy to undermine support for the TDP and its nominees in the upcoming 2010 General Election.

Texas has enacted campaign finance laws to prevent hidden schemes by mandating certain reporting requirements and prohibiting corporations from making monetary contributions to influence elections in an effort to obtain open and honest elections. Further, Texas law allows private parties to sue violators for unlawful violations in order to aid enforcement. Thus, the TDP filed suit against the TEXAS GREEN PARTY (“TGP”), CHRISTINE MORSHEDI (“Morshedi”), Individually and in her Capacity as Chairwoman of the TGP¹, TAKE INITIATIVE AMERICA, INC. (“TIA”), FREE AND EQUAL, INC. (“FE”), TIM MOONEY (“Mooney”), UNKNOWN CONSPIRATORS, UNKNOWN DONORS, and THE 2010 UNKNOWN NOMINEES OF THE TGP (hereinafter, collectively “Defendants”) in order to enjoin unlawful practices and shed light on the Defendants’ failure to properly disclose the donors of the money used for the contribution and an unlawful corporate contribution.

1 Initially Plaintiffs sued Kat Swift as Chair. Plaintiffs learned in discovery prior to the hearing that the Chair responsible for the legal actions complained of in this suit is Christine Morshedi so an amended lawsuit has been filed to reflect that revelation by Plaintiffs.

The TDP requested a temporary restraining order, temporary and permanent injunctions, writ of mandamus, declaratory judgment, and damages. The TGP agreed to a temporary restraining order until such time as a temporary injunction hearing could be held.

RELIEF REQUESTED

Plaintiffs request the following relief at this Injunction Hearing:

1. Enjoin TGP and Morshedi from certifying nominees for the Texas Green Party to the Secretary of State's Office.
2. Enjoin TGP and Morshedi from taking any action to place nominees of the TGP placed on the 2010 General Election Ballot.
3. Further or in the alternative, Plaintiffs request the TGP and Morshedi be ordered to reject the unlawful contribution by June 30, 2010 as required by TEC 254.034.

SUMMARY OF ELECTION CODE VIOLATIONS

TGP, Morshedi, and Defendants have violated or threaten to violate a litany of provisions in the Texas Election Code as more fully described herein. However, there are four central violations:

1. Accepting a political contribution from a corporation. *See* TEC 253.094 and 253.104.
2. Accepting a contribution from a General Purpose Committee when the Committee has not filed a treasurer appointment and the required 60 days has not elapsed. *See* TEC 253.003 and 253.037.

3. Accepting a contribution from an out-of-state committee without obtaining the written disclosure required by law. *See* TEC 253.032.
4. Accepting a contribution made in the name of another. *See* TEC 253.001

II.

Brief Summary Evidence

In February 2010, the TGP requested bid proposals from several different petition gathering companies including FE in order to determine the cost of gathering enough signatures to place its candidates on the 2010 General Election ballot in Texas. TGP obtained the proposals, but learned that previously promised funding was not available. However, in March or April of 2010 TGP was contacted by FE with what TGP has described as “fairy tale financing.” FE stated it had the funding to pay for TGP’s petition drive and it would take care of obtaining the signatures to place the TGP on the ballot. FE explained to TGP it had donors that wished to remain anonymous, and since it was not a corporation, it would not have to disclose the donors under the Texas campaign finance laws. On or about May 24, 2010, the TGP obtained the necessary signatures from the petition drive and submitted its documents to the Secretary of State (“SOS”) in Travis County, Texas seeking access to the 2010 General Election ballot for its nominees for public office.

In reality FE was not the entity that contributed the funds for the petition drive. The money flowed first through TIA, a Delaware corporation. Further, TIA was not alone in making or authorizing the contribution because an Arizona Republican operative, Mooney, aided in finding donors for the contribution and an anonymous donor or donors actually made the contribution. At deposition, TGP officers testified that a decision as to whether accept or reject the contribution at

issue would not be made until June 30, 2010 despite having already submitted the petitions derived from such activity to the Secretary of State.

III.
Legal Authorities and Arguments

A. Applicant's Burden for Temporary Injunction Regarding Violations of the TEC

The TDP seeks temporary injunctive relief pursuant to Section 273.081 of the Texas Election Code². Under the statute, a person who is being harmed or is in danger of being harmed by a violation or threatened violation of the TEC is entitled to appropriate injunctive relief to prevent the violation from continuing or occurring. Tex. Elec. Code § 273.081. At a temporary injunction hearing, an applicant is not required to establish he will ultimately prevail in a suit. *Walling v. Metcalfe*, 863 S.W.2d at 58 (Tex. 1993); *Transport Co. of Texas v. Robertson Transports, Inc.*, 152 Tex. 551, 261 S.W.2d 549, 556 (Tex. 1953). He must simply present some evidence under the applicable rules of law in support of his causes of action. *Sands v. Estate of Buys*, 160 S.W.3d 684, 687 (Tex. App. — Fort Worth 2005, no pet.). Thus, in order to succeed in obtaining injunctive relief under Section 273.081, the TDP must present some evidence that (1) it is being harmed or is in danger of being harmed (2) by a violation or a threatened violation of the TEC. Tex. Elec. Code § 273.081.

B. The TDP Will Be Harmed

The TDP will be harmed by the continued actions of the Defendants because the improper certification of TGP nominees on the 2010 General Election ballot will necessarily take away votes from the TDP candidates. According to the evidence, putting the TGP on the ballot is good news for

² Hereinafter referred to as the TEC for brevity purposes.

Rick Perry, in the sense that the TGP label draws votes away from the TDP rather the Republicans. Moreover, TDP and its nominees will have to raise and spend money in order to persuade voters not to vote for the TGP nominees and will have to campaign as such. Also, TDP is harmed because TGP's acceptance of illegal corporate contributions puts the TDP and its nominees at a disadvantage.

Normally, violations of the TEC and thus, the violators, are not discovered until after an election when it is too late to prevent the harm. Those that violate the TEC rely on this fact. However, the Court in this case has the unique opportunity to prevent the Defendants from reaping the benefit of violating the TEC by preventing the benefit of the unlawful contribution, the signatures, from being used to place TGP on the ballot.

C. Defendants have Violated the Texas Campaign Finance Laws

1. The Contribution for the Signatures was Unlawful

Chapter 253 of the election code regulates political contributions and expenditures in Texas. *Ex Parte Ellis*, 279 S.W.3d 1, 7 (Tex. 2010). A corporation may not make a political contribution or political expenditure that is not authorized by the TEC. Tex. Elec. Code § 253.094. A "corporation" is defined under the TEC provisions regarding corporate contributions and expenditures to include corporations organized under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, and the Texas Non-Profit Corporation Texas Nonprofit Corporation Law, federal law, or law of another state or nation. *Id.* at § 253.091. A "political contribution" is a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* at § 251.001(5),(3). Whether a contribution is made before, during or after an election does not affect its status as a campaign contribution. *Id.* A

“political expenditure” an expenditure made by any person in connection with a campaign for an elective office or on a measure. *Id.* at § 251.001(12),(7). Again, whether a contribution is made before, during or after an election does not affect its status as a campaign contribution. *Id.*

a. What is Allowed

Subchapter D of the TEC specifically authorizes certain corporate contributions and expenditures. For example, a corporation may “make campaign contributions from its own property in connection with an election on a measure only to a political committee for supporting or opposing measures exclusively,” Tex. Elec. Code § 253.096, and “to finance the establishment or administration of a general-purpose committee” or “to finance the solicitation of political contributions to a general-purpose committee from the corporation's stockholders, employees, or families.” *Id.* at § 253.100(a), (b). Other political contributions or political expenditures specifically authorized by subchapter D include: direct expenditures “in connection with an election on a measure,” *id.* at § 253.097, direct expenditures “for the purpose of communicating directly with [the corporation's] stockholders or members,” *id.* at § 253.098, and “expenditures to finance nonpartisan voter registration and get-out-the-vote campaigns aimed at its stockholders or members.” *id.* at § 253.099.

When it comes to political contributions to a political party, a corporation may make a contribution from its own property to a political party to be used by the party only to: (1) defray normal overhead and administrative or operating costs incurred by the party; or (2) administer a primary election or convention held by the party. *Id.* at §§ 253.104(a); 257.002(a). Thus, with the

exception of the enumerated types of contributions and expenditures expressly authorized, all other "campaign contributions" and "expenditures" by corporations are prohibited.

Here, TIA, a corporation as defined by the TEC, clearly made a contribution to TGP, a political party. A "contribution" means a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a transfer. *Id.* at § 251.001(2). The money paid to FE for the signatures is a contribution. Thus, the only way for the contribution of the money for the petition drive or the signatures themselves to be authorized is if the petition drive is considered a "normal overhead and administrative or operating cost incurred by the party" or if the petition drive is considered administering a primary election or convention.

Although Section 257.002 does not provide specific examples of "normal overhead and administrative or operating costs" or what constitutes an expenditure to "administer a primary election or convention," guidance as to the meaning of these terms may be found elsewhere in the TEC and opinions issued by the Texas Ethics Commission. Section 253.100 of the TEC sets forth examples of expenditures for the administration of a general-purpose committee including such expenses as office space maintenance and repairs, telephone and internet services, office equipment, utilities, general office and meeting supplies, and salaries for routine clerical, data entry, and administrative assistance necessary for the proper administrative operation of the committee. Tex. Elec. Code § 253.100(a)(1)-(6).

Additionally, the Texas Ethics Commission ("Ethics Commission") has examined the issue as to what is a "normal overhead and administrative or operating cost." This term describes items

such as expenditures for office space, utilities, and other usual costs of operating an organization.” Op. Tex. Ethics Comm’n No. 272 (1995) (finding that a mailings to encourage support for a party is not an administrative expense.) Further, corporate donations for the purchase of a building for a permanent party headquarters are an authorized administrative expense. Op. Tex. Ethics Comm’n No. 176 (1993) (political party may use corporate donations to purchase a building for a permanent party headquarters). Although no specific examples of costs of administering a primary election or convention are provided, the term “administer” implies that the same type of administrative and operating costs incurred for a party may also be allowed for expenditures for a primary election or convention, i.e. office space, utilities, and other usual costs of operating a primary election or convention. No where does the terms “nominating” or “ballot qualification” costs appear in the TEC financial statutes or in the Ethics Commission Opinions. This is despite the fact the legislature refers to those terms extensively in other parts of the Code.

b. What is Not Allowed

Since only administrative and operation type expenses in administering a party organization, a primary election, or convention are allowed, any other corporate contribution to a political party is prohibited. The TEC sets out examples of the types of expenditures that are improper under Section 253.100. A corporation may not make expenditures to a general- purpose committee for such things as brochures and direct mail supporting or opposing a candidate, partisan voter registration and get-out-the-vote drives, political fund-raising other than from its stockholders or members, or voter identification efforts, voter lists, or voter databases that include persons other than a corporation’s own stockholders or members. Tex. Elec. Code § 253.100 (d)(3)-(6).

Even more specifically, the Ethics Commission has addressed an activity that is similar to the petition drive in this case: voter registration drives. The Ethics Commission found that the term “normal overhead and administrative or operating cost” does not include expenditures for voter registration drives. Op. Tex. Ethics Comm’n No. 272 (1995). Costs associated with obtaining signatures to put a political party on the ballot is prohibited. Accordingly, the TIA’s contribution to FE to pay for a petition drive involving people persuading the public to sign up to vote for the TGP candidates is not an administrative or overhead type cost, and clearly unlawful under the TEC.

2. Even if the Contribution was Lawful, the Defendants Failed to Make and Obtain Proper Disclosures

Pursuant to Section 253.001 of the Texas Election Code, a person may not knowingly make or authorize a political contribution or a political expenditure in the name of another unless the person discloses in writing to the recipient the name and address of the person actually making the contribution in order for the recipient to make the proper disclosure. Tex. Elec. Code § 253.001. Again, a “political contribution” is defined as a “campaign contribution” which is a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. Tex. Elec. Code § 251.001(3). When the contribution was made to TGP, there is evidence to support that the person or persons that made or authorized the contribution to the TGP in the name of the TIA did not disclose the name and address of the actual donor or donors of the funds.

Additionally, a candidate, officeholder, or political committee may not knowingly accept political contributions totaling more than \$500 from an out-of-state political committee unless, before accepting the contribution, the candidate, officeholder, or political committee receives

specific information from the out-of-state committee. Tex. Elec. Code § 253.032(a). The evidence is uncontroverted the value of the contribution was more than \$500,000. The disclosure must include information regarding each person who has contributed more than \$100 to the out-of-state committee or the out-of-state committee's statement of organization. *Id.* at § 253.032(a)(1)-(2). A "political committee" means a group of persons that has as a principal purpose accepting political contributions or making political expenditures. *Id.* at § 251.001(12). Although TIA may argue that promoting ballot initiatives and ballot access is not a political purpose, it admits that it primarily supports independents and minor parties to get access to the ballot. Thus, the TIA in concert with Mooney and anonymous donors amounts to a political committee.

Further, an "out-of-state political committee" means a political committee that makes political expenditures outside this state and in the 12 months immediately preceding the making of a political expenditure by the committee in this state makes 80 percent or more of the committee's total political expenditures in any combination of elections outside this state and federal offices not voted in this state. *Id.* at § 251.001(15). TIA is a foreign nonprofit corporation that has worked together with Mooney, an Arizona resident, and an anonymous donor or donors to contribute funds totaling more than \$500 to the TGP. The TIA has formed a political committee with the principal purpose of making political expenditures for various independent or minority groups such as the TGP and likely has made 80 percent of its expenditures outside of Texas over the past 12 months. Although the TIA out-of-state political committee has made a political contribution to TGP totaling more than \$500, it has failed to make the disclosures required by the TEC.

3. The Defendants All Participated in the Unlawful Contribution or Expenditure under the TEC

The TEC sets out several actions that amount to a violation of the Texas campaign financing laws. Pursuant to Section 253.002, a person may not knowingly make or authorize a direct campaign expenditure.³ Tex. Elec. Code § 253.002(a). A person may not knowingly make or authorize a political expenditure in violation of the TEC. *Id.* at § 253.004. A person may not knowingly make or authorize a political expenditure wholly or partly from a political contribution the person knows to have been made in violation of the TEC. *Id.* at § 253.005(a). A person may not knowingly make a political contribution that violates the TEC. *Id.* at § 253.003(a). A person may not knowingly accept a political contribution the person knows to have been made in violation of the TEC. *Id.* at § 253.003(b). Lastly, a corporation may not make a political contribution or political expenditure that is not authorized by the TEC. *Id.* at § 253.094.

A “direct campaign expenditure” is a campaign expenditure that does not constitute a campaign contribution by the person making the expenditure. *Id.* at § 251.002 (8). A “campaign expenditure” is a payment of money or any other thing of value made by a person in connection with a campaign for an elective office or on a measure. *Id.* at § 251.001(7). A “campaign contribution” is a contribution to a candidate or political committee that is offered or given with the intent that it be used in connection with a campaign for elective office or on a measure. *Id.* at § 251.001(3). Therefore, each Defendant cited herein in making, authorizing, or accepting an unlawful contribution or expenditure has violated the TEC.

³ An exception to this prohibition is if a corporation makes an expenditure authorized by the TEC. Tex. Elec. Code 253.002(b)(2). However, as demonstrated herein, the expenditure or contribution in this case is not authorized by the TEC.

IV.
Conclusion

For the reasons set forth above, the TDP is entitled to a temporary injunction enjoining the TGP and Morshedi from taking any steps to certify TGP nominees for the 2010 General Election ballot until the legality of the contribution is determined by a final trial on the merits. Additionally and in the alternative, Plaintiffs are entitled to an injunction requiring TGP and Morshedi to reject the contribution described herein on or before June 30, 2010. Pursuant to Section 273.081 of the TEC, TDP is entitled to enjoin the Defendants from harming TDP or threatening harm by a violation or threatened violation of the TEC. The TDP will be harmed by the addition of the TGP candidates on the 2010 General Election ballot. Further, Defendants actions in making, authorizing, and accepting the contribution that paid for the signatures for the TGP petition and failing to properly disclose the contribution amount to violations of the TEC and are prohibited. Accordingly, the TGP should not be allowed to reap the benefit of its own violations as well as others violations of the TEC in order to obtain access to the upcoming 2010 General Election.

Dated this 24th day of June, 2010.

Respectfully submitted,

TEXAS DEMOCRATIC PARTY

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing instrument has been directed to the following counsel of record and/or interested parties herein by facsimile transmission, by certified mail, return receipt requested, and/or by regular first class U.S. Mail on this the 24th day of June, 2010:

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