

# TEXAS ETHICS COMMISSION

IN THE MATTER OF  
  
KELLY FERRO,  
  
RESPONDENT

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BEFORE THE  
  
TEXAS ETHICS COMMISSION  
  
SC-220107

## ORDER and AGREED RESOLUTION

### I. Recitals

The Texas Ethics Commission (the commission) met on March 8, 2002, and voted to accept jurisdiction of Sworn Complaint SC-220107 filed against Kelly Fero, Respondent. The commission met again on July 12, 2002, to consider Sworn Complaint SC-220107. A quorum of the commission was present at both meetings. Based on the investigation conducted by commission staff, the commission determined that there is credible evidence of violations of Sections 255.001 and 253.031(b), Election Code, laws administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposes this agreed resolution to the respondent.

### II. Allegations

The complainant alleges that the respondent created and posted on a website political advertising that did not contain a political advertising disclosure statement, that misrepresented the true source of the political advertising, and that misrepresented the respondent's identity.

### III. Facts Supported by Credible Evidence

Credible evidence available to the commission supports the following findings of fact:

1. The complaint involves communications posted on a website by Kelly Fero, the respondent.
2. The complainant submitted copies of various pages from the website, as well as a copy of a web page showing the website's registration information.
3. The web address for the website is "enronownsthegop.com." The format and appearance of the website is very similar to that of the Republican Party of Texas.
4. The banner at the top of the website's main page and each additional page of the website states "Republican Party of Texas . . . brought to you by Enron." The "E" in "Republican" Party is tilted to look like the "E" symbol used by Enron.

5. The primary focus of the website is to discuss the decision by certain Texas officeholders in the Republican Party to not return contributions they received from Enron.
6. The website's main page, as well as each additional page of the website, provided a link to a section titled "Who We Are." The copy of that web page shows that it included a statement attributing the website to "Texas '02," stating that "Texas '02" was directed and funded by Texas Democrats, and explaining the goal of "Texas '02" is to elect Democratic candidates to statewide offices.
7. The website's main page did not show a physical address. However, it did contain a web address for e-mail, press contacts, and the webmaster.
8. The "Who We Are" page as well as the other web pages also included a web address for e-mail and the webmaster. That address was different than the web address on the main page.
9. The sworn complaint included a copy of a web page from "register.com," a web domain registration service. The name "Texas '02" appears on the registration, which is the same entity shown under the "Who We Are" section on the website.
10. The registration information from "register.com" submitted with the complaint shows the name, address, and e-mail address of an individual who is not the respondent as the administrative contact and billing contact for the website.
11. The e-mail address on the registration form is the same as that shown on the "Who We Are" page of the website.
12. The respondent made a sworn response in which he swears that on January 22, 2001, he initiated the process of creating a website by reserving an e-mail address, kfero@texas'02.com, for which he paid \$189. That e-mail address does not appear on the website.
13. The respondent swears that he set up the website "[t]o allow me to more effectively express my opinions regarding Enron and its political influence."
14. The respondent swears that he did not do any further work on the project until November 2001, at which time he began the work of actually developing the website in consultation with a friend with expertise in the area. His friend volunteered his services to help with the website, and was not paid for the work that he did.
15. The respondent swears that on January 16, 2002, he reserved the "domain name" "enronownsthegop.com" by submitting a request to the domain registration company along with a payment of \$35.
16. The respondent swears that the website became operational upon his paying a fee of \$270.56 to an internet service provider.

17. The respondent swears that on February 14, 2002, he paid an additional \$199.99 to the internet service provider for additional bandwidth, and also paid another \$20 for extra e-mail capacity.
18. The respondent swears that he personally paid all the payments made for setting up the website.
19. The respondent swears that the website "was not created or maintained in concert with anyone else, other than my friend that provided assistance to me on a volunteer basis."
20. The respondent swears that he "used the name Texas '02 simply as a label to highlight my view of the importance of this issue in the upcoming election cycle, and to be consistent with the e-mail address I had been using for 13 months."
21. The respondent swears that it was not his intent to represent to people viewing the website that the website was "created or maintained by a group, committee or organization other than me and my friend. . . ."
22. The respondent swears that the use of the term "Texas Democrats" that was used in the original "Who We Are" page was meant to refer to him and his friend who had helped him develop the website because they are both Texas Democrats "who believe the 2002 elections represent a real opportunity for Texans to take charge of the future."
23. The respondent swears that after receiving the complaint he changed the "Who We Are" page to "avoid any confusion." The new "Who We Are" page states that the "site is directed and personally funded by Kelly Fero under the informal name Texas '02 with plenty of volunteer advice from Texas Democrats."
24. The respondent swears that when he created the website, he did not know of anyone else or any group using the name "Texas '02."
25. The respondent swears, "I thought that at some point a Democratic campaign committee might be formed and might desire to take over control of the website and email address, but that was merely a possibility. I received no assurances from anyone nor made any promises to anyone regarding future control or operation of the website."
26. The respondent swears that he is not associated with a general-purpose committee named Texas '02 that filed a campaign treasurer appointment on January 24, 2002, and that "this website was not created or maintained in concert with the Texas '02 general-purpose political committee that was formed on January 24, 2002 via the Form GTA filed with the Texas Ethics Commission designating Ms. Kristi D. Towler as its treasurer. I have never discussed this website with Ms. Towler nor anyone else affiliated with the Texas '02 general-purpose political committee. I note that my efforts relating to this website commenced a full year before this general purpose political committee was formed."

#### IV. Findings and Conclusions of Law

The facts described in Section III support the following findings and conclusions of law:

##### **Political advertising disclosure statement**

1. "Political advertising" is defined in relevant part as a communication that supports or opposes a candidate, public officer, or political party and that, in return for consideration, is published in a newspaper, magazine, or other periodical or is broadcast on radio or television, or that appears in a pamphlet, circular, flier, sign, or similar form of written communication. Section 251.001(16), Election Code.
2. Communications available on the World Wide Web constitute political advertising because they are the functional equivalent of a pamphlet, circular, flier, or similar form of written communication.
3. The website at issue is political advertising because it opposes a political party and a number of that party's public officers and candidates for public office, as well as supporting an opposing party and its candidates.
4. A person may not enter into a contract or agreement to print or publish political advertising that does not indicate that it is political advertising, and that does not contain the full name and address of the person who entered into the contract or agreement with the printer or publisher, or the full name and address of the person that individual represents. Section 255.001, Election Code.
5. The respondent admits that he entered into a contract or agreement with an internet service provider to provide him a website, and then posted political advertising on that website.
6. Even if there was initially no contract or agreement with the internet service provider to publish political advertising, subsequent payments to the internet service provider after the posting of the political advertising constitute a contract or agreement to publish political advertising. Therefore, the respondent was responsible for including a political advertising disclosure statement on the website.
7. A political advertising disclosure statement must include a statement that the advertising is political advertising.
8. The section on the website titled "Who We Are" includes the name "Texas '02" as being responsible for the site, the political affiliation of "Texas '02," the fact that the goal of "Texas '02" is to elect candidates of one party, the fact that "Texas '02" is directed and funded by Texas Democrats, and the web addresses for contacting "Texas '02."
9. Although a person reading the website would understand that the materials on the website oppose a political party and the public officers and candidates of that party, and support

- another party and the candidates of that party, the statement that the website is political advertising does not appear on the website.
10. The "Who We Are" page states that the website was created by "Texas '02."
  11. The respondent entered into the contract with the internet service provider and included on the website the name of the entity he represents. Thus, the appropriate name was provided on the website.
  12. Although a political advertising disclosure statement must include an address, the statutes and rules applicable to political advertising disclosure statements do not specify what type of address is required. Section 255.001, Election Code; Section 26.3, Ethics Commission Rules.
  13. In the absence of a rule to the contrary, a person reading the statute and rule could reasonably conclude that a web address is sufficient to meet the address requirement where a website is the medium in which political advertising is communicated.
  14. The "Who We Are" page of the website included a web address that was the same as that used by the respondent's friend who helped him develop the website, as shown by the copy of the domain registration web page from "register.com."
  15. As to the location of the name and address of the person responsible for the website, in Ethics Advisory Opinion No. 380 (1997), the commission determined the political advertising disclosure statement must be "in the advertising," but that the disclosure information is not required on an envelope that is used to transmit political advertising, provided that the political advertising in the envelope complies with the requirements of Section 255.001, Election Code.
  16. A similar situation exists with regard to the website at issue in this complaint. The main page of the website does not carry a political advertising disclosure statement, although it does contain a web address and a link to the "Who We Are" page.
  17. The "Who We Are" page likewise does not carry a political advertising disclosure statement but it too contains a web address and a description of who is responsible for the website.
  18. The web page from the domain registration company shows the registrant as "Texas '02," which was the name used in the "Who We Are" section.
  19. Other than the statement that the website is political advertising, the information required to be in a political advertising disclosure statement is found on the website.
  20. Political advertising must include a statement that it is political advertising. There is no such statement on the website. Therefore, there is credible evidence that the respondent

committed a technical or *de minimis* violation of Section 255.001, Election Code, by failing to include on the website the statement that the advertising was political advertising.

**True Source and Misrepresentation of Identity:**

21. "Campaign communication" is defined in relevant part as a written or oral communication relating to a campaign for nomination or election to public office. Section 251.001(17), Election Code.
22. A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person enters into a contract or other agreement to print, publish, or broadcast political advertising that purports to emanate from a source other than its true source, or knowingly represents in a campaign communication that the communication emanates from a source other than its true source. Section 255.004, Election Code.
23. A person commits an offense if, with intent to injure a candidate or influence the result of an election, the person misrepresents the person's identity or, if acting or purporting to act as an agent, misrepresents the identity of the agent's principal, in political advertising or a campaign communication. Section 255.005(a), Election Code.
24. The gravamen of the complaint is that since the respondent's website used a logo that was very similar to that of the Republican Party of Texas, and the material posted on the website constituted a campaign communication, the respondent's site misrepresented the true source of the campaign communication and misrepresented the identity of the person responsible for the campaign communication.
25. Although the information clearly identifying the source of the communication was available only if a person looking at the website chose to click on links that would open that information, the advertising is clearly a parody and would not lead a reader to believe that the Republican Party of Texas published it.
26. The respondent swears that he developed the website in consultation with his friend and that he used the name Texas '02 to refer to himself and his friend. The respondent points out that he had been using the e-mail address for 13 months, and that he used the name Texas '02 under the "Who We Are" page on the website "to highlight my view of the importance of this issue in the upcoming election cycle, and to be consistent with the email address I had been using for 13 months."
27. A political committee is a group of persons that has as a principal purpose accepting political contributions or making political expenditures. Section 251.001(12), Election Code.
28. A political expenditure is a campaign expenditure or officeholder expenditure. Section 251.001(10). The definition of campaign expenditure is, in relevant part, an expenditure made in connection with a campaign for elective office. Section 251.001(7).

29. The commission has opined that a committee may use its name on political advertising before filing a campaign treasurer appointment. Ethics Advisory Opinion No. 404 (1998). As stated in that opinion, "[t]he Election Code does not prescribe the method of creation or the organizational structure of a political committee. Nor does it set out a procedure by which a political committee must adopt a name. The Election Code does contain several provisions that regulate the names of certain types of political committees, but nothing in the Election Code prevents a political committee from using its name before it files a campaign treasurer appointment. The name that a political committee uses in the disclosure statement required by Election Code section 255.001 must, of course, be a name that the political committee uses consistently."
30. The evidence shows that the website was developed in order for the respondent and his friend to be involved in the 2002 elections in support of Democratic candidates, and the expenditures for the website were for that purpose. Therefore, the expenditures were campaign expenditures.
31. Based on the respondent's stated purpose and the campaign expenditures he made, the respondent and his friend met the definition of a general-purpose committee. The respondent swears he had been using the name for 13 months. Therefore, absent another restriction, the committee could use the name "Texas '02" in a political advertising disclosure statement.
32. A general-purpose committee is prohibited from using a name that is the same as or deceptively similar to the name of any other general-purpose committee whose campaign treasurer appointment is filed with the commission.
33. According to commission records, a group other than the respondent and his friend, using the name "Texas '02," filed a campaign treasurer appointment as a general-purpose committee on January 24, 2002.
34. The respondent swears that he had used the name "Texas '02" as an e-mail address for over a year before he created the website.
35. The respondent swears that when he created the website he "was not aware of any other person or group using the name Texas '02," and swears that he changed the "Who We Are" page after the complaint was filed to avoid any confusion.
36. The "Who We Are" page from the website now states that the respondent funds and directs the website "under the informal name Texas '02 with plenty of volunteer advice from Texas Democrats...."
37. Because a political committee may use its name in political advertising before it files a campaign treasurer appointment, because the respondent began using the name "Texas '02" before the other group filed a campaign treasurer appointment using that name, and because the respondent has been using that name consistently, there is credible evidence that the respondent did not conceal the true source of the website, or misrepresent the identity of the

person responsible for the website, in violation of Sections 255.004 and 255.005, Election Code.

### **Requirement to File Campaign Treasurer Appointment**

38. Although not alleged, it is clear from the respondent's sworn statement that he and his friend constituted a political committee and that the expenditures the committee made were political expenditures, as discussed in the preceding section.
39. A political committee may not knowingly accept political contributions or make or authorize political expenditures exceeding \$500 unless a campaign treasurer appointment is in effect. Section 253.031(b), Election Code.
40. The respondent's affidavit shows that as of February 14, 2002, the expenditures directly related to the website totaled \$525.55 (\$35 to reserve the domain name and a total of \$490.55 to the internet service provider). The respondent has not filed a campaign treasurer appointment for a committee. Therefore, there is credible evidence that the respondent, as a member of a political committee, violated Section 253.031(b), Election Code, by exceeding the \$500 expenditure threshold before filing a campaign treasurer appointment.

### **V. Representations and Agreement by Respondent**

By signing this ORDER and AGREED RESOLUTION and returning it to the commission:

1. The respondent neither admits nor denies the facts described under Section III and the commission's findings and conclusions of law described under Section IV, and consents to the entry of this ORDER and AGREED RESOLUTION solely for the purpose of resolving and settling this sworn complaint.
2. The respondent consents to the entry of this Order before any adversarial evidentiary hearings or argument before the commission, and before any formal adjudication of law or fact by the commission. The respondent waives any right to a hearing before the commission or an administrative law judge, and further waives any right to a post-hearing procedure established or provided by law.
3. The respondent acknowledges that a person may not enter into a contract or agreement to print or publish political advertising that does not indicate that it is political advertising. The respondent further acknowledges that a political committee may not knowingly accept political contributions or make or authorize political expenditures exceeding \$500 unless a campaign treasurer appointment is in effect. The respondent agrees to fully and strictly comply with these requirements of the law.
4. Notwithstanding any other provisions of this ORDER and AGREED RESOLUTION, the respondent understands and agrees that the commission will consider the respondent to have committed the violations described under Section IV, Paragraphs 20 and 40, if it is necessary



to consider a sanction to be assessed in any future sworn complaint proceedings against the respondent.

### **VI. Confidentiality**

This ORDER and AGREED RESOLUTION describes a violation that the commission has determined is neither technical nor *de minimis*. Accordingly, this ORDER and AGREED RESOLUTION is not confidential under Section 571.140, Government Code, and may be disclosed by members and staff of the commission.

### **VII. Sanction**

After considering the seriousness of the violations described under Sections III and IV, including the nature, circumstances, consequences, extent, and gravity of the violations, after considering the fact that no previous violations by this respondent are known to the commission, and after considering the sanction necessary to deter future violations, the commission imposes a \$100 civil penalty for the violation described under Section IV, Paragraph 40. No fine is imposed for the technical or *de minimis* violation described under Section IV, Paragraph 20.

### **VIII. Order**

The commission hereby ORDERS:

1. that this proposed AGREED RESOLUTION be presented to the respondent;
2. that if the respondent consents to the proposed AGREED RESOLUTION, this ORDER and AGREED RESOLUTION is a final and complete resolution of SC-220107;
3. that the respondent may consent to the proposed AGREED RESOLUTION only by signing an original of this document and mailing the signed original and the \$100 civil penalty to the Texas Ethics Commission, P.O. Box 12070, Austin, Texas 78711, no later than September 13, 2002; and
4. that the executive director shall promptly refer SC-220107 to either the commission or to an administrative law judge to conduct hearings on the commission's behalf and to propose findings of fact and conclusions of law to the commission in accordance with law if the respondent does not agree to the resolution of SC-220107 as proposed in this ORDER and AGREED RESOLUTION.

AGREED to by the respondent on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

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Kelly Fero, Respondent

EXECUTED ORIGINAL received by the commission on: \_\_\_\_\_.

Texas Ethics Commission

By:

\_\_\_\_\_  
Tom Harrison, Executive Director