

TEXAS ETHICS COMMISSION

IN THE MATTER OF
LYDA NESS-GARCIA,
RESPONDENT

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BEFORE THE
TEXAS ETHICS COMMISSION
SC-2803116

ORDER and AGREED RESOLUTION

I. Recitals

The Texas Ethics Commission (the commission) held a preliminary review hearing on April 21, 2010, to consider sworn complaint SC-2803116. A quorum of the commission was present. The commission determined that there is credible evidence of violations of sections 253.003, 253.094, and 253.005 of the Election Code, laws administered and enforced by the commission. To resolve and settle this complaint without further proceedings, the commission proposed this resolution to the respondent.

II. Allegations

The complaint alleged that the respondent accepted political contributions from a corporation and made political expenditures from corporate contributions. The complaint also alleged that the respondent accepted political contributions in excess of the judicial contribution limits.

III. Facts Supported by Credible Evidence

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

1. The respondent is an attorney who was licensed by the State Bar of Texas in 1998 and who was a judicial candidate for the 388th Judicial District (El Paso County) in the 2008 primary election.
2. At the time of the allegations, the population for the 388th Judicial District Court was approximately 680,000.
3. On June 27, 2007, the respondent filed a Judicial Campaign Treasurer Appointment (JCTA). On February 1, 2008, she filed another JCTA, and on May 20, 2008, she filed an amended JCTA (AJCTA).

4. The respondent signed the three documents acknowledging that she was aware of the restrictions in title 15 of the Election Code on contributions from corporations and labor organizations.
5. The three contributions at issue were disclosed on the respondent's February 2008 8-day pre-election report, which was filed electronically with the commission using the commission software.
6. The report disclosed total political contributions of approximately \$8,600, total political expenditures of approximately \$4,640, and zero political contributions maintained as of the last day of the reporting period.
7. The report disclosed a \$2,500 contribution from David Bingham, a \$2,500 contribution from Bingham Investments, Inc., and a \$2,500 contribution from EP Four Amigos LP.
8. The respondent's name appeared on the signature line for the report.
9. The complaint alleged that David Bingham was the registered agent for Bingham Investments, Inc., and EP Four Amigos Management LLC, and that the respondent exceeded the contribution limits when she accepted three \$2,500 political contributions, one from David Bingham, one from Bingham Investments, Inc., and another from EP Four Amigos LP.
10. Texas Secretary of State (SOS) records show Bingham Investments, Inc. registered as a domestic for-profit corporation and David Bingham as its registered agent, director, and president.
11. SOS records show EP Four Amigos, LP as a domestic limited partnership, David Bingham as its registered agent, and EP Four Amigos Management, LLC as its general partner. SOS records show no limited partner.
12. SOS records show EP Four Amigos Management, LLC as a domestic limited liability company, David Bingham as its registered agent, and David Bingham and Greg Malooley as its managers.
13. On or about April 28, 2008, the respondent received notice of the sworn complaint.
14. The next report filed by the respondent following the February 2008 8-day pre-election report (the report at issue) was the July 2008 semiannual report.

15. The July 2008 semiannual report disclosed zero political contributions, zero political expenditures, and zero political contributions maintained as of the last day of the reporting period.
16. The respondent filed a final report on October 6, 2008, disclosing a \$490 political expenditure, zero political contributions, and zero political contributions maintained.
17. The respondent provided testimony at the preliminary review hearing.

IV. Findings and Conclusions of Law

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

Accepting a Corporate Contribution and Making an Expenditure with a Corporate Contribution

1. A corporation may not make a political contribution or political expenditure that is not authorized by this subchapter. ELEC. CODE § 253.094.
2. The prohibition applies to corporations that are organized under the Texas Business Corporation Act, the Texas For-Profit Corporation Law, the Texas Non-Profit Corporation Act, the Texas Nonprofit Corporation Law, federal law, or law of another state or nation. ELEC. CODE § 253.091.
3. A partnership that has corporate partners is subject to the same restrictions on political activity that apply to corporations. *See* Ethics Advisory Opinion No. 221 (1994).
4. A person may not knowingly make a political contribution in violation of chapter 253 of the Election Code nor knowingly accept a political contribution the person knows to have been made in violation of that chapter. ELEC. CODE § 253.003.
5. A political contribution means a campaign contribution or an officeholder contribution. ELEC. CODE § 251.001(5). A campaign contribution means 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. ELEC. CODE § 251.001(3). 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. ELEC. CODE § 251.001(2).
6. In order to show a violation of section 253.003 of the Election Code, the evidence must show that the contributor was a corporation, that at the time the respondent accepted the

- contribution she knew that corporate contributions were illegal, and that the respondent knew the particular contribution at issue was from a corporation.
7. The respondent accepted a contribution from EP Four Amigos LP, a limited partnership with no corporate partner as a general partner. However, the status of the limited partner(s) is unclear. Thus, the evidence is not sufficient to show whether EP Four Amigos LP had a corporate partner.
 8. The respondent also accepted a political contribution of \$2,500 from Bingham Investments, Inc., a corporation.
 9. The respondent was licensed to practice law in 1998 and she signed the campaign treasurer appointment forms acknowledging that she was aware of the restrictions on political contributions from corporations and labor organizations. The campaign treasurer appointments were filed prior to the date that the report at issue was filed. Thus, at the time the respondent accepted the \$2,500 political contribution from Bingham Investments, Inc., she knew that it was illegal to accept corporate contributions.
 10. The respondent's name appeared on the signature line for the report at issue that disclosed a political contribution from Bingham Investments, Inc.
 11. To file a report electronically with the commission requires the use of a candidate's personal password. An electronically filed report includes an acknowledgment, under penalty of perjury, that the report is true and correct.
 12. The contribution clearly came from an entity whose name included the designation "Inc.," placing the respondent on notice that the contribution was from a corporation. Thus, the respondent knew that the political contribution was from a corporation.
 13. At the time that the respondent accepted the corporate contribution from Bingham Investments, Inc., she knew that corporate contributions were illegal, and she knew that the particular contribution at issue was from a corporation. Therefore, there is credible evidence of a violation of section 253.003 of the Election Code for the acceptance of a political contribution prohibited by section 253.094 of the Election Code.
 14. 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 this chapter. ELEC. CODE § 253.005.
 15. A political expenditure means a campaign expenditure or an officeholder expenditure. ELEC. CODE § 251.001(10). A campaign expenditure means an expenditure made by any person in

connection with a campaign for an elective office or on a measure. Whether an expenditure is made before, during, or after an election does not affect its status as a campaign expenditure. ELEC. CODE § 251.001(7). An expenditure means a payment of money or any other thing of value and includes an agreement made or other obligation incurred, whether legally enforceable or not, to make a payment. ELEC. CODE § 251.001(6).

16. In order to show a violation of section 253.005 of the Election Code, the evidence must show that the respondent accepted a political contribution that was made in violation of chapter 253 of the Election Code, and that the respondent knew that it was an illegal political contribution at the time that she made a political expenditure from the illegally accepted contribution.
17. The report at issue disclosed that the respondent accepted a corporate political contribution, made political expenditures, and that there were no political contributions maintained as of the last day of the reporting period. Thus, the respondent made political expenditures from the corporate political contribution.
18. At the time that the respondent made political expenditures using funds from the corporate political contribution, the respondent knew that corporate political contributions were illegal. Therefore, there is credible evidence of a violation of section 253.005 of the Election Code for the spending of a political contribution prohibited by section 253.094 of the Election Code.

Exceeding the Judicial Contribution Limits

19. A judicial candidate or officeholder with a judicial district population of 250,000 to one million may not knowingly accept political contributions from a person that in the aggregate exceed \$2,500 in connection with each election in which the person is involved. ELEC. CODE §§ 253.155 (a), (b)(2)(B).
20. The respondent was a judicial candidate for the 388th Judicial District Court, a district with a population of approximately 680,000. Thus, the respondent was prohibited from accepting contributions from a person that in the aggregate exceeded \$2,500 in connection with the 2008 election.
21. The respondent accepted three \$2,500 political contributions, one from David Bingham, one from Bingham Investments, Inc., and another from EP Four Amigos LP.
22. The complaint asserted that the respondent exceeded the judicial contribution limit when she accepted these contributions because David Bingham was the registered agent for the two businesses at issue.

23. There is insufficient evidence to show that David Bingham and the businesses at issue were not separate entities. Thus, there is insufficient evidence that the respondent accepted contributions from a person in excess of the judicial contribution limit. Therefore, there is insufficient evidence of a violation of section 253.155 of the Election Code.

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 or 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 this sworn complaint.
2. The respondent consents to this order and agreed resolution and waives any right to further proceedings in this matter.
3. The respondent acknowledges that a corporation may not make a political contribution or political expenditure that is not authorized by chapter 253 of the Election Code, and that chapter does not authorize a political contribution to a candidate by a corporation. The respondent further acknowledges that a person may not knowingly accept a political contribution the person knows to have been made in violation of chapter 253 of the Election Code. The respondent also acknowledges that 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 chapter 253 of the Election Code. The respondent agrees to comply with these requirements of the law.

VI. Confidentiality

This order and agreed resolution describes violations that the commission has determined are neither technical nor *de minimis*. Accordingly, this order and agreed resolution is not confidential under section 571.140 of the 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, and consequences of the violations, and after considering the sanction necessary to deter future violations, the commission imposes a \$1,000 civil penalty contingent upon the respondent reimbursing Bingham Investments, Inc. \$2,500 and paying the \$1,000 civil penalty no

later than October 30, 2010. The respondent shall furnish to the commission evidence of the required \$2,500 reimbursement to Bingham Investments, Inc., and file a campaign finance report disclosing the required reimbursement.

If the respondent does not both reimburse the amount at issue (\$2,500) and pay the \$1,000 civil by October 30, 2010, then the commission imposes a \$3,500 civil penalty due no later than October 30, 2010.

The respondent agrees that the Texas Ethics Commission, P. O. Box 12070, Austin, Texas 78711, must receive from the respondent evidence of the \$2,500 reimbursement and full payment of the \$1,000 civil penalty no later than October 30, 2010, or full payment of a \$3,500 civil penalty no later than October 30, 2010, and agrees to waive any right to a hearing related to this sworn complaint. The respondent further agrees that if evidence of the reimbursement of \$2,500 to Bingham Investments, Inc., and the \$1,000 civil penalty is not received by October 30, 2010, the civil penalty will be \$3,500 and the matter of the collection of the civil penalty will be referred to the Office of the Attorney General of Texas.

VIII. Order

The commission hereby orders that if the respondent consents to the proposed resolution, this order and agreed resolution is a final and complete resolution of SC-2803116.

AGREED to by the respondent on this _____ day of _____, 20__.

Lyda Ness-Garcia, Respondent

EXECUTED ORIGINAL received by the commission on: _____.

Texas Ethics Commission

By: _____
David A. Reisman, Executive Director