

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE**

MINUTE ORDER

DATE: 10/31/2012

TIME: 04:49:00 PM

DEPT: 54

JUDICIAL OFFICER PRESIDING: Shelleyanne W L Chang

CLERK: K. Pratchen

REPORTER/ERM:

BAILIFF/COURT ATTENDANT:

CASE NO: **34-2012-00131550-CU-PT-GDS** CASE INIT.DATE: 10/25/2012

CASE TITLE: **Fair Political Practices Commission vs. Americans for Responsible Leadership**

CASE CATEGORY: Civil - Unlimited

APPEARANCES

NATURE OF PROCEEDINGS: RULING ON SUBMITTED MATTER - APPLICATION FOR PRELIMINARY INJUNCTION

Having taken this matter under submission, the Court affirms the tentative ruling and, for ease of reference, reprints the tentative ruling below with modifications.

Petitioner Fair Political Practices Commission's ("FPPC") application for preliminary injunction is GRANTED.

Background

The FPPC seeks a preliminary injunction pursuant to Gov't Code §91003(a) ordering Respondent Americans For Responsible Leadership ("ARL") to immediately produce all records requested by the FPPC and answer any and all questions relevant to its audit related to ARL's contribution of \$11,000,000 to the Small Business Action Committee PAC on or about October 15, 2012 to defeat Proposition 30 and support Proposition 32. FPPC argues that a review of the documents is needed before the November 6, 2012 General Election to ensure that ARL complied with applicable disclosure laws.

ARL is an Arizona non-profit corporation. ARL's campaign contributions have primarily been for campaigns in Arizona. There is no record of ARL making contributions in the State of California prior to the contribution in question here. In response to the contribution, the FPPC initiated an audit of ARL's records. ARL did not produce records and the FPPC filed the instant Petition and seeks a preliminary injunction compelling ARL to produce all records related to the October 15, 2012 contribution to the Small Business Action Committee PAC within 24 hours of this ruling.

"[T]rial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued." (*Davenport v. Blue Cross of California* (1997) 52 Cal. App. 4th 435, 446.) A mandatory injunction such as the one requested here (i.e. compelling Respondent to perform an act or surrender property), "is rarely granted." (*Id.*) Such an injunction is not permitted except in "extreme cases where the right thereto is clearly established and it appears that irreparable harm will flow from its refusal." (*Id.*) For the reasons set forth below, the Court finds the FPPC has met this burden.

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Analysis

Reasonable Probability of Prevailing on The Merits

The FPPC contends that pursuant to Gov't Code §90003 it may conduct an audit or investigation with regard to any reports or statements required by the Political Reform Act of 1974 (the "Act"). (FPPC's MP&A's 4:18-23.) The FPPC argues that it seeks to verify whether ARL solicited funds and received contributions totaling \$1,000 or more, thereby becoming a committee pursuant to Gov't Code §82103(a). In the event ARL is a committee pursuant to Gov't Code §82013(a) and contributes ten thousand dollars (\$10,000) or more in connection with an election, ARL must file a supplemental pre-election statement no later than 12 days before the election. (Gov't Code §84202.5.) Moreover, if ARL earmarked the contribution for a specific committee, the organization was required to inform the Small Business Action Committee PAC ("SBAC") of the earmarking and the SBAC is required to disclose the donor(s) prior to the election. (Gov't Code §84302.) FPPC further contends that the ARL is a "major donor" pursuant to Gov't Code §82013(c).

ARL does not dispute that the FPPC has the legal authority to conduct an audit; the limited question before the court is whether the FPPC may audit ARL's records now or after the November 6, 2012 General Election. ARL argues that the action is premature because Gov't Code §90002 only authorizes an audit or investigation after an election. (ARL's Opposition, 5:19-26; Gov't Code §90002.) Gov't Code §90002, however, is not applicable here. That section expressly states that "no audit or investigation of any candidate, controlled committee, or committee primarily supporting or opposing a candidate or a measure in connection with a report or statement required by Chapter 4 of this title, shall begin until after the last date for filing the first report or statement following the general, runoff or special election for the office for which the candidate ran, or following the election at which the measure was adopted or defeated..." (Gov't Code §90002)(emphasis added.)

However, as the FPPC notes, ARL is not a "candidate, controlled committee, or committee primarily supporting or opposing a candidate or a measure." Indeed, ARL is a 501(c)(4) non-profit corporation based in Arizona and is not any of the entities specified in Gov't Code §90002. The Court, therefore, finds that Gov't Code §90002 does not limit FPPC's audit authority to post-election audits or investigations of ARL's records. The FPPC has the authority to audit ARL's records to determine whether ARL's donors earmarked their donations or whether ARL solicited any donations, thereby triggering the disclosure requirements of 2 CCR §18412 pursuant to its authority under Gov't Code §90003 without waiting for the General Election to occur.

ARL further contends that the FPPC did not follow its own procedures for responding to a complaint filed with the FPPC. ARL contends that the FPPC's Executive Director may not make a "final determination on any items listed in subdivisions (f)(1)(A-E) until 14 calendar days have passed from the date the complaint was received by the Enforcement Division, unless the final determination is to take no action." (2 C.C.R. §18360(f)(3).) Here, the complaint was filed with the FPPC on October 18, 2012 and the Petition was filed seven calendar days later on October 25, 2012. The 14 days period, however, only applies when the Executive Director makes a final determination to: (a) investigate the allegations of the complaint, (b) refer the complaint another governmental agency, (c) take no action on the complaint, or (d) take additional time to evaluate the complaint to determine whether an investigation should ensue. (2 C.C.R. §18360(f)(1)(A)-(E).) Here, the Executive Director has not yet made a final determination on the items listed in 2 C.C.R. §18360(f)(1)(A)-(E). Indeed, according to the FPPC, the complaint is currently under review for potential investigation by the FPPC. (Reply, 4:5-6.) The FPPC is conducting an audit pursuant to Gov't Code §90007 in order to "encourage compliance and detect violations of the [Political Reform] Act"; it asserts that it is not conducting an investigation which is statutorily defined as part of a process to determine the facts and circumstances of a potential violation and any appropriate penalty; the regulation does not prohibit the Executive Director from conducting an audit prior to the

expiration of the 14-day time period.

ARL further contends that the FPPC initiated civil litigation without following the procedures identified in 2 C.C.R. §18361.2(a)-(b). However, the "civil litigation" contemplated by the Act is one for "penalties and remedies" under the Act. (Gov't Code §91001.) Here, FPPC merely seeks to audit ARL, there has been no investigation to determine whether there has been a violation of the Act, and no decision to seek penalties against ARL. Moreover, the Executive Director has been delegated authority to act in the name of the FPPC between meetings of the FPPC. (Gov't Code §83108.) Thus, the Executive Director did not violate its own procedures by filing the instant Petition and the Court rejects this argument.

In sum, the Court finds that the FPPC has satisfied its burden to demonstrate a probability of prevailing on the merits of the Petition. Specifically, that it has the general authority to audit ARL prior the November 6, 2012 General Election to determine: (1) whether the ARL is a committee pursuant to Gov't Code §82013(a) or a "major donor" pursuant to Gov't Code §82013(c); (2) if it is a committee pursuant to Gov't Code §82013(a), whether ARL violated the pre-election reporting requirements; and (3) whether any donations were earmarked for specific purposes.

At oral argument, ARL argued that Gov't Code §90003 does not apply here because no "statement or report" has yet to be filed. FPPC argued, and the Court agrees, that the Act must be "liberally construed to accomplish its purpose" which is, in part, that "receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." (Gov't Code §§81002, 81003.) The language of Gov't Code §90003 states that the FPPC may conduct audits and investigations "with respect to any report or statement." The statute does not limit the ability of the FPPC to conduct an audit or investigation with respect to reports or statement only after they have been filed. The Court, therefore, liberally construing Gov't Code §90003 consistent with the provisions of the Government Code, finds that FPPC has the authority to conduct an audit or investigation prior to a report or statement being filed.

Balancing of Harms

The Court finds that the balancing of the harms clearly favors FPPC. ARL argues that ordering the production of documents will violate ARL's, as well as, its donors' First Amendment Rights. ARL fears that "once disclosed, this information can never be fully withdrawn from the public record, and no remedy exists to make whole the victim of the unlawful disclosure." (Supplemental Opposition, 13:7-9.) Here, ARL's concerns are alleviated because FPPC keeps its audit records confidential. (Reply, fn. 30.) As FPPC confirms "[t]he FPPC's audit of Respondent's records may in fact show that disclosure has been appropriate and lawful. Or it may show that further disclosure is needed. In either case, *the records of the audit will not be subject to public release* and all legal requirements and processes will be followed by the FPPC." (Reply, 13:14-17. Emphasis Added.)

In addition, ARL's due process rights will not be violated because, in the event the audit finds a violation, the FPPC is required to follow certain procedures prior to imposing a penalty. The Court has no quarrel with the premise cited by ARL in its Supplemental Opposition that non-profit corporations have constitutional rights and that citizens may associate together in non-profit corporations to exercise their constitutional rights (*Citizens United v. FEC* (2010) 130 S.Ct. 876, 900), that, however, is not the constitutional right at stake here and that case is inapposite. By this preliminary injunction, however, the FPPC is not seeking to restrict, and the Court is not, limiting expenditures by ARL. The Court is simply concluding that the FPPC, under its statutory authority can conduct an audit to determine whether it has complied with applicable California law and regulations and whether, under applicable California regulations, the FPPC can determine whether the donors' identities must be disclosed. Nothing in *Citizens United* prohibits this state-mandated disclosure.

At oral argument, ARL again argued that it and its donor's First Amendment rights would be violated by the disclosure. However, the Supreme Court recognized in *Citizens United*, that there was "no constitutional impediment" to the application of the Bipartisan Campaign Reform Act of 2002's disclaimer and disclosure requirement. (*Citizens United, supra*, 130 S.Ct. at 916 [stating "the *First Amendment* protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way."].) Moreover, there had been no showing that the requirements would impose a chill on speech or expression. (*Id.*) In the cases cited by ARL, the responding parties demonstrated the likelihood that the disclosure would be a restraint on their members' constitutional rights. (See *Perry v. Schwarzenegger* (591 F.3d 1147, 1164 [responding party presented declarations from several individuals attesting to the impact the compelled disclosure would have on participation and formulation of strategy]; see also *NAACP v. Alabama* (1958) 357 U.S. 449, 462 [responding party had made an "uncontroverted showing" that on prior occasions, disclosure of members' identities subjected them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."].) Here, however, ARL has made no such showing and, in the absence of such a showing, the court is unable to conclude that disclosure would violate ARL's First Amendment Rights.

On the other hand, the court finds that the People of the State of California will suffer irreparable harm. Without the FPPC's audit and review of appropriate records, potential disclosure of information prior to the General Election critical to the public in deciding how to vote for Propositions 30 and 32 may not be made.

While ARL argued at hearing that FPPC could not demonstrate irreparable harm. The Court disagrees. The Court finds that irreparable harm has occurred and continues to occur as each day passes and voters continue to cast their votes without information that may influence their votes (if the FPPC determines that ARL has violated its disclosure requirements.)

Thus, under the legal standard established by *Davenport v. Blue Cross*, 52 Cal.App.4th 336, the Court finds that the FPPC has clearly established a right to a mandatory injunction. The Court further finds that irreparable injury to the People of the State of California will flow from a refusal to grant the preliminary injunction requested.

The Court has received the FPPC belated filing of its "Memorandum of Law re: Prohibitory Nature of Injunction Compelling Compliance with Audit." Given the express language of the FPPC's proposed order and its concession in its Reply that the applicable legal standard to apply is one for a request for a mandatory injunction, the Court declines to amend the FPPC's request as one for a prohibitory injunction.

Finally, the Court did not consider the Appendix of Media Statements filed by Respondent as it is irrelevant to the legal issues presented.

No undertaking is required pursuant to CCP §529(b)(3).

The Court will sign the formal order lodged by the FPPC amended to mandate compliance with the order by ARL no later than 5:00 p.m. (PDT), Thursday, November 1, 2012. The FPPC's counsel is directed pick up the formal order in Department 54 by 9:00 a.m. (PDT) on November 1, 2012 and serve it on ARL no later than 10:00 a.m. (PDT) on November 1, 2012. Fax service of the order is sufficient.

The Clerk is directed to fax this order to the parties.