

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

NEAL GREENBAUM, *et al.*,

Plaintiffs,

vs.

No. 13-cv-00426 MCA/ACT

AMY BAILEY, in her official capacity
as the Clerk for the City of Albuquerque, *et al.*,

Defendants.

ORDER TO SHOW CAUSE

This matter is before the Court *sua sponte*. Plaintiffs assert a First Amendment and Equal Protection challenge to Article XIII § 4(f) of the Albuquerque City Charter ("Article XIII"). That provision states:

Ban on Contributions from Business Entities and City Contractors. [1] No candidate shall accept a contribution in support of the candidate's campaign from any corporation, limited liability company, firm, partnership, joint stock company or similar business entity or any agent making a contribution on behalf of such a business entity. [2] No candidate shall accept a contribution in support of the candidate's campaign from any person, other than a City employee, who at the time of the contribution is in a contractual relationship with the City to provide goods or services to the City. The remedy for an unknowing violation of this subsection shall be the return of the contribution.

Candidates who violate this provision may be subjected to a public reprimand, a fine, or both.

Article XIII § 10(e). Candidates who are successful in an election and who have violated this provision may be further sanctioned by suspension or removal from office. Article XIII § 10(g).

The Parties

Plaintiff Neal Greenbaum is an owner of A.B.C. LLC, d/b/a/ Park It Place. Park It Place contracts with the City of Albuquerque for the provision of parking lot management services and leases land from the City that it uses to offer parking services to the public. Greenbaum desires to make campaign contributions in Albuquerque municipal elections, and would do so but for Article XIII § 4(f). Plaintiffs Victor Jury, Gail Armstrong, and Dale Armstrong each has a management role or an ownership interest in a local business with a contractual relationship with the City. Each has made personal campaign contributions to a mayoral or city council campaign during the 2013 election cycle. Plaintiff-in-Intervention Robert Torch, a/k/a Taxicab Bob, is an officer and proprietor of Plaintiff-in-Intervention Giant Cab Incorporated, a New Mexico corporation. Giant Cab made a contribution to Janie Arnold Jones for City Council, but that donation was returned. Giant Cab desires to make campaign contributions in Albuquerque municipal elections, and would do so but for Article XIII § 4(f).

Defendant Amy Bailey is sued in her official capacity as Albuquerque City Clerk. Her office administers City elections. Her office assists the Board of Ethics and Campaign Practices in administering Article XIII. The Board of Ethics and Campaign Practices ("the Board") is responsible for enforcing the provisions of Article XIII. Pursuant to Article XIII, the Board has issued "Rules and Regulations of the Board of Ethics and Campaign Practices for the Election Code of the City Charter (2009).

Standing

The Court notes that Defendant-Intervenor Committee to Elect Pete Dinelli Mayor raised the matter of standing in its Brief In Support Of Defendants' Bailey And the Board's Motion to

Dismiss [Doc. 14]. However, the question raised there was based on an apparent misreading of Article XIII § 4(f). As will be explained more fully below, that provision has a much narrower reach than the parties appear to have assumed thus far.

"It is well established that any party, including the court *sua sponte*, can raise the issue of standing for the first time at any stage of the litigation." *New England Health Care Employees Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008). To establish Article III standing, "[a] plaintiff must prove (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.*

Plaintiff Greenbaum. As the Court reads the first sentence of Article XIII § 4(f), only the business entity itself is disabled from making contributions. The first sentence of Article XIII § 4(f) does not prohibit the human agents of a business entity from making contributions, in their own names. As the Court reads the second sentence, only the "person" with the contractual relationship is disabled from making contributions. The contractual relationship alleged in the Complaint is between A.B.C., LLC and the City, not Greenbaum, individually, and the City.¹ Greenbaum, individually, does not fall within either prohibition. Because Article XIII § 4(f)

¹In Plaintiff Greenbaum's case, this point is borne out by New Mexico law defining the relationship of the members of an LLC to the LLC. *See* NMSA 1978, §§ 53-19-13 ("the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company"); 53-19-14 ("A member of a limited liability company is not a proper party to a proceeding by or against the limited liability company solely by reason of being a member of the limited liability company. . . .").

does not apply to Greenbaum, individually, he suffers no injury from Article XIII § 4(f) for purposes of standing.

The Court has considered Article XIII § 4©) (1)(E), which defines the term "business dealings with the city." That term does not appear in Article XIII 4(f); instead, Article XIII § 4(f) employs the term "contractual relationship with the City." The Court notes that a City Charter Review Task Force proposed the term "business dealings with the city" be used in place of "contractual relationship with the City" in the draft version of Article XIII § 4(f). [Doc. 1-2 at 4-5] The fact that this revision was proposed and rejected suggests that the use of "contractual relationship with the City" instead of "business dealings with the city" was not an oversight. The Court therefore declines to substitute the term "business dealings with the city" for "contractual relationship with the City," the term used in Article XIII § 4(f).

Plaintiffs Jury, Armstrong and Armstrong. These plaintiffs appear to be challenging the prohibition on donations set out in the second sentence of Article XIII § 4(f). As noted in the case of Plaintiff Greenbaum, only the "person" with the contractual relationship is disabled from contributing by the second sentence of Article XIII § 4(f). The complaint alleges that local business in which Plaintiffs have an interest are in a contractual relationship with the City, not that these Plaintiffs, individually, have contractual relationships with the City. Accordingly, Plaintiffs, individually, are not disabled from contributing in their own names by Article XIII § 4(f), and cannot establish that they, individually, are injured by Article XIII § 4(f) for purposes of standing.

Plaintiff-in-Intervention Torch and Giant Cab Company. The Court concludes that Plaintiff Torch lacks standing for substantially the reasons noted above with respect to the other

individual plaintiffs. The Court concludes that Plaintiff Giant Cab Company, a New Mexico Corporation, has standing to challenge the ban on corporate contributions set out in the second sentence of Article XIII § 4(f).

IT IS THEREFORE HEREBY ORDERED that Plaintiffs Neal Greenbaum, Victor Jury, Gail Armstrong, and Dale Armstrong and Plaintiff-in Intervention Robert Torch file by 5:00 p.m. Thursday, July 11, 2013, a written response showing cause why this action should not be dismissed as to each of them for want of standing.

SO ORDERED this 2nd day of July, 2013.


M. CHRISTINA ARMIJO
Chief United States District Judge