THE MAKE MICHIGAN PARTY, Complainant

v.

THE FOR UM PARTY,
ROBERT GREENFIELD,
PAVITRA ABRAHAM
&
JACOB PODELL, Respondents

Appearances:
Justin Kingsolver & Matthew Fernandez, Counsel for Complainant
Erika Kaneko, Counsel for Respondents

Heard Before REESE, NICHOLS, and FOX, Commissioners. Commissioner LE did not participate in the consideration of this complaint.

FINAL OPINION & ORDER

Commissioner REESE delivers the opinion of the Commission in which NICHOLS and FOX join.

This matter comes before the University Elections Commission (“the Commission”) on the complaint of Complainant, THE MAKE MICHIGAN PARTY (“Make Michigan”), against the above captioned Respondents for violations of Article VI of the CSG Compiled Code (“the Election Code”). Petitioner alleges that Respondents falsely claimed the endorsement of Campus SafeRide LLC in violation of §B(7)(c)(i) of the Election Code, which provides:

i. Unauthorized Endorsement. Any campaign material claiming endorsement from any person or group of people that is not authorized by that person or group of people must include a disclaimer in the form: “Not authorized by <name>”, where name is the name of the person or group of people from whom endorsement is claimed. Candidates and parties may imply endorsement by securing and retaining written permission from the person or group of people from whom endorsement is claimed. No more than one violation may be assessed per day.

CSG Complied Code, art. VI § (B)(7)(c)(i). Make Michigan’s complaint was filed with the Election Director on March 24, 2014. Respondents were advised of the complaint on the same day and given twenty-four hours time to file a response. Respondents filed their reply brief and counterclaim through counsel on March 25,
2014 at 1:43 am. Make Michigan filed its reply brief to the counterclaim on March 26, 2014 at 8:27 am.\(^1\)

Under Rule 4(E)(4) of the UEC Rules of Procedure, the counterclaim was joined with the original action. A hearing on this matter was held on March 26, 2014.

Preliminarily, the parties do not contest, and thus the Commission assumes without deciding, (1) that the social media posts in question constitute “campaign materials” within the meaning of the Election Code, (2) that Campus SafeRide LLC did not, in any way, endorse Respondents, and (3) that Respondents have not previously been assessed demerits on the days in question for violations of § (B)(7)(e)(i) of the Election Code.

I

The interpretation of this provision of the Election Code is a matter of first impression for the Commission; specifically the Commission is now called to define the phrase “claiming endorsement.” We turn first to plain meaning. The word “endorse” in the sense used in the Election Code generally means “to approve openly” or “to express support or approval of publicly and definitely.” *Merriam-Webster’s Collegiate Dictionary* 412 (11th ed. 2009). From here we must qualify the general definition by reference to the target of the statute at issue; that is, the very fact that we deal with the *Election Code*, means that the support or approval conveyed must be *electoral* in nature and must relate specifically to a Central Student Government election. Thus far, then, it is at least clear that, in order to “claim” endorsement, a candidate or party must somehow convey that a third party publically supports or approves of their candidacy or platform.

Of course, that answer does little to answer the question of what actions are sufficient to claim an endorsement. For this, we must consider the purpose of the statute. The obvious purpose of barring unauthorized endorsements (where a candidate does not acknowledge their unauthorized nature) is to protect voters from campaign materials which attempt to mislead them into believing that a party or candidate has been publically endorsed by a third party when in reality that is not the case. The ultimate question, then, is whether or not voters would believe that an official endorsement exists after viewing the campaign materials

\(^1\) This reply brief was filed outside the time period for a reply to a counterclaim set forth in Rule 4(E)(3) of the UEC Rules of Procedure. Respondents filed a prehearing motion under Rule 4 to exclude this brief. The Commission voted to admit the brief under its authority to make exceptions to the Rules “as justice so requires” where a party attempts in good faith to comply, in recognition of the fact that Make Michigan’s counsel had class and the relative novelty of the Rules of Procedure. UEC R.P. 1(C). Future parties are on notice that failure to comply with the time limits set forth in the Rules may result in exclusion.
in question. As the rationality of individual voters varies, this test must be qualified by the usual legal expedience of a reasonableness standard.

We therefore HOLD that campaign materials “claim endorsement” if their nature is such that a reasonable voter, viewing the materials, would believe that the third party referenced therein has publicly and definitely expressed its support or approval for the candidate/party or his/her/its platform. We note for the record that under this definition, the claim of endorsement clearly would not have to be explicit. The question of whether or not any particular material meets this standard is a question of fact.

The outer boundaries of this standard are easy to delineate. On the one hand, a campaign poster which explicitly states “X supports candidate Y for CSG Representative” when no such endorsement exists would unquestionably constitute unauthorized endorsement. On the other, a statement that merely states that a candidate has some sort of experience or has worked on a particular project involving association or cooperation with a third party, without more, cannot be what the CSG meant by a claim of endorsement. The absurdity of a holding otherwise is easily demonstrated. If we were to hold that campaign materials discussing past associations or projects involving third parties are endorsements, the electoral system would be gravely harmed. Because of the threat of litigation, candidates would never be able to discuss their past work or relationships involving third parties. Voters therefore would be unable to learn of a candidate or party’s desirable qualities (e.g., work ethic, leadership) because all candidates would refrain from discussing their past accomplishments. The only alternative would be for every claim of experience to be qualified by a disclaimer. Either scenario would clearly be intolerable and beyond what the Assembly could have intended.

Thus we have described the two outer bounds of what may constitute a claim of endorsement. At one end are “express endorsements,” and at the other, campaign materials that take credit for past accomplishments. But this is a spectrum, and the difficult cases exist in the middle. However, certain factors would tend to indicate that a candidate is claiming endorsement. For example, relevant factors that would indicate a candidate is claiming endorsement would include: adding statements about how much one’s work was valued, the inclusion of photos with individuals or symbols of an organization, or the use of an organization’s logo. We do not pretend to be able to provide an exhaustive list of such factors here, but this
much, at least, is certain: as one moves away from statements claiming past experience and towards express claiming of endorsement, the implication of endorsement becomes stronger and thus more problematic.

It is important to note that the truth of the statements at issue is irrelevant (excepting of course where an explicit claim of endorsement is made and the parties contest whether or not it was authorized). The question is whether or not the statements made, whether true or not, would lead a reasonable person to believe that the third party supports the candidate or party. Accordingly, the Commission makes no findings of fact regarding the extent or nature of Respondent Greenfield’s involvement with SafeRide (either the App designed by Campus SafeRide LLC or the Program sponsored by the University).

II

Having thus provided our interpretation of the Election Code, we now move to a consideration of the facts at issue in this case. Complainant bears the burden of proving a violation of the Election Code beyond the reasonable doubt. We have explained this to mean that “in a case before the UEC, a petitioner bears the burden of producing evidence sufficient to evoke in a majority of the commissioners an abiding conviction of the respondent’s guilt, such as they would be willing to act upon it in the most significant of their own affairs.” Keeney v. Garthus, UEC-2014-W-009, 2 (March 13, 2014). Make Michigan has certainly carried this burden to the extent it has shown beyond a reasonable doubt that the posts in question existed. As to the extent that a reasonable voter would construe them to convey endorsement, we are less universally convinced. We therefore consider the posts at issue individually.

We begin with Respondent Greenfield’s tweet (“Great [working] with Summit and Andrew on the SafeRide application! Seems as though both parties are working together! @vote_forUM”). This statement merely claims that Mr. Greenfield is working with other students on the SafeRide app, and was posted right after a meeting in which Mr. Greenfield discussed the app and offered criticisms. On the whole, we think it merely states an experience the candidate claims to have had and therefore FIND that it does not convey any impression of endorsement.

Next we consider the posts by the For UM party. The first post about which Make Michigan complains was a Facebook post reading:

for UM is excited to see the announcement of the SafeRide App!
Our own Engineering candidate Rob Greenfield worked intricately on the application by working with students, the administration, and top safety officials to help make this app a reality. The application was a multifaceted effort that involved piloting both the app and the extended routes for night ride and safe ride. Thrilled to see FORUM keeping up its pledge to make our campus a safer place.

[a link to the SafeRide app in iTunes was placed here]

The second was a tweet reading: “Thrilled with @vote_forUM Engineering candidate @RobTG4’s integral work in the planning and improvement of the new #SafeRideApp. #SaferUofM.” To work backwards, the tweet here resembles in many ways that posted by Mr. Greenfield and we similarly FIND that it does not convey an impression of endorsement to a reasonable voter. The Facebook post is somewhat more problematic in that, despite the fact that the text is mostly a factual explication of Mr. Greenfield’s experience, it contains a link transporting viewers to the iTunes app store where they could download the app. The hyperlink does imply a somewhat closer nexus between ForUM and Campus SafeRide LLC by referencing the application and providing a direct connection to the application. However, because this is merely a text link (with no images or further info about Campus SafeRide LLC) we think this link is in the nature of providing additional information about the SafeRide effort on which ForUM claims Mr. Greenfield worked and would likely be perceived as such by a reasonable voter. Thus, we also FIND that this post does not convey an impression of endorsement.

Respondent Podell’s Facebook post is more problematic. It reads “I am so lucky to be running with such innovative people like [Mr. Greenfield] on FORUM.” It also contains a link to the iTunes App store page for the SafeRide App, but this time is accompanied by a large thumbnail image of the Campus SafeRide LLC logo. The post indicates it was shared “via for UM.” We FIND that, taken together, the clear electoral content (devoid of any description of Mr. Greenfield’s work) of the post coupled with the presence and prominence of the logo would convey to a reasonable voter the impression that Campus SafeRide LLC has endorsed Mr. Podell, Mr. Greenfield and FORUM. We FIND no mitigating factors as this could easily have been avoided (see below); however, we also believe that, because the implication was not explicit nor egregious, it does not merit the assessment of the full four demerits allowed for a major violation and conclude that three demerits should be assessed against Mr. Podell. Make Michigan has not asked us to consider whether or not this post was made in coordination with For UM or Mr. Greenfield, so we decline to
tread where parties have not invited us and do not consider the assessment of demerits against them for this violation.

III

We come last of all to the post made by Respondent Abraham, which also presents a novel question for decision: whether or not a candidate can be penalized for implying that a third party has endorsed another candidate? Preliminarily, we FIND that, based upon the text of the post (“Check it out! [Mr. Greenfield] doing work!”) accompanied by a thumbnail image similar to that in Mr. Podell’s post, Ms. Abraham’s post would lead a reasonable voter to believe that an endorsement of Mr. Greenfield did exist. However, we FURTHER FIND that Make Michigan has not shown beyond a reasonable doubt that endorsement of For UM generally nor of Ms. Abraham personally could be so inferred, because the “via For UM” portion of the post is small and the connection to Ms. Abraham too attenuated. We also note again that Make Michigan has not asked us to consider coordination with For UM or Mr. Greenfield.

Accordingly, whether or not the post was a violation turns solely on the question of law stated at the beginning of this section. The plain language § (B)(7)(e)(i) itself is unclear on this point, but it should not be read in isolation. The other provisions of § (B)(7) all establish violations that a candidate might commit in his/her capacity as a candidate and for his/her own benefit. Read in pari materia, then, the section at issue today should be similarly limited. Furthermore, the word “claim” itself conveys a sense of personal gain from the unauthorized use, which is absent where a candidate acts more as a worker for another candidate than for herself.

We therefore HOLD that, where a candidate acting outside his/her capacity as a candidate implies an unauthorized endorsement of a different candidate by a third party without the proper disclaimer, the act should be treated as that of a campaign volunteer under §(B)(8)(e). That is, if this was done in coordination with the candidate claimed to be endorsed, the candidate benefiting from the unauthorized endorsement is the candidate against whom the violation should be assessed. This is consistent with the CSG’s purposes of punishing those who benefit from misleading the public and holding candidates responsible for the actions of those who campaign on their behalf.
It is clear here that Ms. Abraham was not benefiting (based upon our earlier finding of fact) from the implied endorsement and therefore not acting in her capacity as a candidate; moreover, we lack any basis to find coordination with Mr. Greenfield or For UM (see above). Therefore we FIND no violation of the election code as to her. That is not to say that there could never be a situation in which a candidate could be acting in his or her capacity as a candidate when he/she claims another candidate was endorsed by a third party. For instance, a candidate claiming that an opponent was endorsed by an unsavory third party might be found to violate this provision regardless of the fact that he or she was not claiming an unauthorized endorsement for his/herself. This case does not present any such situation.

IV

The Commission now addresses the counterclaim filed by respondents. The relevant portions of the Election Code read:

i. Filing a frivolous election complaint. An election complaint is frivolous if it fails to meet the minimum standard for a complaint, as defined by Article VI, § C(1)(c). . . .

c. Complaints shall set forth the names of the respondent(s), clearly identify the campaign rule that was allegedly violated, and allege sufficient facts to show that, if taken to be true, the alleged violation is plausible. Stating legal conclusions without factual support or formulaic recitations of elements of a cause of action are not sufficient.

CSG Complied Code, art. VI § (B)(7)(d)(v), § (C)(1)(c). Respondents allege only that the facts alleged here do not show that a violation of the Election Code was plausible and do not rise above the assertion of legal conclusions and/or formulaic recitations. We disagree.

Although Complainant does not prevail on the majority of its allegations, this alone does not make its complaint implausible. Complainant alleged sufficient facts to show a violation may have occurred, even if it also provided facts which the Commission ultimately determined to be irrelevant to the question at issue. Given the lack of any precedent defining the relevant legal concepts, we FIND that the complaint filed in this matter was not frivolous and therefore need not reach the questions of granting leave to amend or assessing demerits. For the reference of future parties, we note that the burden on a counterclaim complainant is very high, even in situations where a counterclaim is warranted. Therefore, even though parties asserting a counterclaim are protected from an assertion that their counterclaim is, itself, frivolous, we submit that in
many instances the chances that it will bear fruit are not great enough to justify the time and effort which the parties may spend preparing for argument.

V

The Commission wishes to express its appreciation of the work that individuals on both sides of this dispute have done to help make the University of Michigan a safer place for students of all backgrounds, regardless of the precise way in which they have made those contributions. The fact that the Commission did not need to inquire into or make findings as to the extent or effectiveness of these efforts in order to reach its decision does not mean that we do not value them.

It is unfortunate that parties who both care so deeply about our campus have been drawn into this dispute and so we feel bound to suggest a way that it might be avoided into the future. The Election Code provides a way in which parties can insulate themselves from liability under this section and that is to include a disclaimer of endorsement/authorization whenever they believe an implication of endorsement could be perceived. It may very well be that they may use this option more than is necessary following this opinion, but that is not altogether unfortunate in as much as leads to a more open and honest electoral context. That is a goal that all parties, especially parties who care as deeply about the University of Michigan as those in the instant case do, can support and it is a goal that is expressed in the provision of the Election Code we interpret today.

Additionally, some may view our opinion today as providing a way for candidates to lie about their accomplishments and past experiences. The integrity and honesty of candidates is obviously of extraordinary importance to the vitality of the elections as a whole. As Commissioners, we would hope (and as fellow students, we demand) that candidates speak only the truth. However, neither lying nor exaggeration is a violation of the Election Code. The Commission does not sit as an arbiter of the truth of the campaign pledges, platforms and claims of candidates, and that is as it should be – the role of fact-checker is properly reserved to their opponents, the press, and the public. The courts cannot be a remedy for every evil and still preserve their role as a neutral body constrained by law and not by passion, as unsatisfying as that reality is to parties who feel that they have suffered an injury for which a court will not grant relief.
Campus SafeRide LLC feels that Mr. Greenfield took credit where no credit was due. But as we noted above, whether or not that is the case is not a question within the jurisdiction of the Commission to decide. Make Michigan could have issued statements attacking Mr. Greenfield's claims. Make Michigan could have argued to the public that Mr. Greenfield's work on the application was limited or non-existent. It could have argued that Mr. Greenfield is a fraud. It could have placed these important issues into the stream of public discourse, and it could have let the voters decide the issue at the ballot box. Instead, Make Michigan decided to press its case before us. We do not malign their intentions, but we do question the wisdom of seeking solace from a panel of Commissioners and not from the hearts and minds of the electorate in the free marketplace of ideas.

We therefore find the Respondent, THE FOR UM PARTY, NOT GUILTY of a violation of § (B)(7)(e)(i) of the Election Code. As a result, no demerits shall be assessed against this Respondent.

We further find the Respondents, ROBERT GREENFIELD and PAVITRA ABRAHAM, NOT GUILTY of a violation of § (B)(7)(e)(i) of the Election Code. As a result, neither demerits nor any reduction of weighted votes shall be assessed against these Respondents.

We further find the Respondent, JACOB PODELL, to be GUILTY of a violation of § (B)(7)(e)(i) of the Election Code.

We further find Complainant, THE MAKE MICHIGAN PARTY, NOT GUILTY of a violation of §(B)(7)(d)(v) of the Election Code. As a result, no demerits shall be assessed against the Complainant.

It is therefore ORDERED that three (3) demerits be assessed against Respondent, JACOB PODELL, for a violation of § (B)(7)(e)(i) of the Election Code and that the total weighted votes cast for him in the upcoming election be reduced by nine (9) percent accordingly. Respondent PODELL’s demerits totaling less than five, he remains eligible for election.

It is FURTHER ORDERED that the claims against THE FOR UM PARTY, ROBERT GREENFIELD and PAVITRA ABRAHAM as well as the counterclaim against THE MAKE MICHIGAN PARTY are DISMISSED with prejudice.

It is so ordered.