CAUSE NO. D-1-GN-16-002031

MARTIN A. HARRY, Contestant, and DONALD S. ZIMMERMAN, Contestant, v. CITY OF AUSTIN; STEVE ADLER, MAYOR; ORA HOUSTON, DELIA GARZA, SABINO RENTERIA, GREGORIO CASAR, ANN KITCHEN, DON ZIMMERMAN, LESLIE POOL, ELLEN TROXCLAIR, KATHIE TOVO AND SHERI GALLO, CITY COUNCIL MEMBERS, Contestees.	§ § § § § § § § § § § § § § §	IN THE DISTRICT COURT TRAVIS COUNTY, TEXAS 98TH JUDICIAL DISTRICT

CITY OF AUSTIN'S NO-EVIDENCE MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

The City of Austin, Mayor Steve Adler, and Council Members Ora Houston, Delia Garza, Sabino Renteria, Gregorio Casar, Ann Kitchen, Don Zimmerman, Leslie Pool, Ellen Troxclair, Kathie Tovo, and Sheri Gallo (together, "City") file this No-Evidence Motion for Summary Judgment concerning the Original Petitions of Martin A. Harry ("Harry") and Donald S. Zimmerman ("Zimmerman"):

I. SUMMARY

1. Harry and Zimmerman ("Contestants") filed election contests pursuant to Election Code section 233.002, seeking to overturn the results of the City of Austin's May 7, 2016 special election concerning Proposition 1 and the regulation of Transportation Network Companies (TNCs). The City is entitled to a no-evidence summary judgment because Contestants cannot meet their burden of showing by clear and convincing evidence that a

violation of the Election Code materially affected the outcome of the election. *See Woods v. Legg*, 363 S.W.3d 710, 713 (Tex.App.—Houston [1st Dist.] 2011, no pet.); *Honts v. Shaw*, 975 S.W.2d 816, 822 (Tex.App.—Austin 1998, no pet.).

II. PROCEDURAL HISTORY

2. Contestant Harry filed his Original Petition and Application for Temporary Restraining Order and Temporary Injunction on May 10, 2016. He contests the election pursuant to Chapters 221 and 233 of the Election Code, alleging multiple failures by the City. He alleges that the City violated a mandatory election requirement by failing to place two separate questions on the May 7 ballot. Orig. Pet. ¶¶ 15-17. He also alleges misleading ballot language and other format errors. *Id.* ¶¶ 18-20.

3. Contestant Zimmerman filed his Original Petition in a separate action on June 16, 2016. Zimmerman also contests the election pursuant to Chapters 221 and 233 of the Election Code. Zimmerman alleges that the ballot language was misleading because it omitted "chief features that reflect [the] character and purpose" of Proposition 1. *Zimmerman v. Adler*, Travis County District Court, Cause No. D-1-GN-16-002583, Orig. Pet. ¶¶ 54-61. He also alleges ballot format errors. *Id.* ¶¶ 62-67.

4. On September 1, 2016, the District Court consolidated the Harry and Zimmerman contests into this single action.

5. On October 25, 2016, the Court conducted a hearing on Harry's application for a temporary injunction and on a plea to the jurisdiction filed by the City.

6. On February 13, 2017, the Court denied Harry's application for a temporary injunction. The Court also denied the City's plea to the jurisdiction.

III. MOTION FOR NO-EVIDENCE SUMMARY JUDGMENT

7. To succeed on a no-evidence motion for summary judgment, a defendant must allege that, after adequate time for discovery, there is no evidence of an essential element of a plaintiff's cause of action. TEX. R. CIV. PROC. 166a(i); *see Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009). If the defendant meets its burden, the burden shifts to the plaintiff to produce more than a scintilla of evidence to raise a genuine issue of material fact regarding the challenged element. TEX. R. CIV. PROC. 166a(i); *see Forbes, Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003). The evidence must be sufficient to allow reasonable and fair-minded people to differ in their conclusions on whether the challenged fact exists; evidence that raises only a speculation or surmise is insufficient. *Forbes*, 124 S.W.3d at 172. If less than a scintilla of evidence is produced, the defendant is entitled to summary judgment on the plaintiff's cause of action.

A. Adequate Time for Discovery

8. The City may seek a no-evidence summary judgment regarding Contestants' claims because both Harry and Zimmerman have had adequate time for discovery. *See* TEX. R. CIV. PROC. 166a(i). To determine whether an adequate time for discovery has passed, courts consider the following nonexclusive factors: (1) the nature of the suit, (2) the evidence necessary to controvert the motion, (3) the length of time the case has been on file, (4) the length of time the motion has been on file, (5) the amount of discovery that has already taken place, (6) whether the movant requested stricter deadlines for discovery, and (7) whether the discovery deadlines in place were specific or vague. *Community Initiatives, Inc. v. Chase Bank of Texas, N.A.*, 153 S.W.3d 270, 278 (Tex.App.—El Paso 2004, no pet.). Rule 166a(i) does not require that discovery be completed before a no-evidence motion is filed. *Id.*

9. Here, Contestants have had an adequate time for discovery. Harry filed his petition on May 10, 2016, over nine months ago, and Zimmerman filed his petition on June 16, 2016, over eight months ago. No discovery is pending, and the City deserves finality in regard to the election results. Under these conditions, the City has filed its motion "after adequate time for discovery." *See, e.g., Carter v. MacFadyen*, 93 S.W.3d 307, 311 (Tex.App.—Houston [14th Dist.] 2002, pet. denied) (affirming no-evidence MSJ filed eight months after petition and granted two months before end of discovery); *McClure v. Attebury*, 20 S.W.3d 722, 730 (Tex.App.—Amarillo 1999, no pet.) (affirming no-evidence MSJ filed seven months after suit was filed).

B. No Evidence of an Essential Element of Contestants' Claims

10. The City is entitled to a no-evidence summary judgment on Contestants' claims because they cannot meet their burden of showing by clear and convincing evidence that the outcome of the election was materially affected by a violation of the Election Code. *See Woods*, 363 S.W.3d at 713; *Honts*, 975 S.W.2d at 822.

11. The Third Court of Appeals recently discussed a trial court's "limited" scope of inquiry in an election contest. *See Pressley v. Casar*, Case Nos. 03-15-00368-CV, 03-15-00505-CV, 2016 WL 7584051 at *2-3 (Tex.App.—Austin Dec. 23, 2016) (unreported decision). As the Election Code provides:

> (a) The tribunal hearing an election contest shall attempt to ascertain whether the outcome of the contested election, as shown by the final canvass, is not the true outcome because:
>
> (1) illegal votes were counted; or
>
> (2) an election officer or other person officially in the administration of the election:
>
> (A) prevented eligible voters from voting;
>
> (B) failed to count legal votes; or
>
> (C) engaged in other fraud or illegal conduct or made a mistake.
>
> (b) In this title, "illegal vote" means a vote that is not legally countable.

> (c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

TEX. ELEC. CODE § 221.003.

12. A contestant must prove by clear and convincing evidence that a violation of the Election Code occurred and that it materially affected the outcome of the election. *Woods*, 363 S.W.3d at 713; *Honts*, 975 S.W.2d at 822. The outcome of the election is "materially affected" when a different and correct result would have been achieved in the absence of the violation. *Woods*, 363 S.W.3d at 713; *Willet v. Cole*, 249 S.W.3d 585, 589 (Tex.App.—Waco 2008, no pet.). Clear and convincing evidence is that which produces in the factfinder a "firm belief or conviction" as to the truth of the allegations. *In re Lipsky*, 460 S.W.3d 579, 589 (Tex. 2015); *Woods*, 363 S.W.3d at 713. "An election contestant's burden is a heavy one, and the declared result will be upheld unless there is clear and convincing evidence of an erroneous result." *Pressley*, 2016 WL 7584051 at *3 (citing *Willet*, 249 S.W.3d at 589).

13. Contestants cannot prevail on their claims because there is no evidence that the outcome of the election would have been different but for alleged violations of the Election Code.

PRAYER

The City's motion for no-evidence summary judgment should be granted because Contestants cannot meet their burden of demonstrating by clear and convincing evidence that any Election Code violations changed the outcome of the election. The City requests that the Court enter a take nothing judgment against Harry and Zimmerman, and for all other relief to which it may be justly entitled.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

This is to certify that I served a copy of the foregoing on all parties or their attorneys of record, in compliance with the Texas Rules of Civil Procedure, this 28th day of February, 2017.

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