

NO. D-1-GN-14-000744

MACHETE PRODUCTIONS, LLC,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
vs.	§	
	§	TRAVIS COUNTY, TEXAS
HEATHER PAGE, DAVID MORALES,	§	
ROBERT HUDGINS, CAROL PIRIE, and	§	
EVAN FITZMAURICE,	§	
	§	
Defendants.	§	53RD
	§	_____ JUDICIAL DISTRICT

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Machete Productions, LLC (“Machete Productions” or “Plaintiff”) files this Original Petition, as follows:

This Petition addresses the arbitrary application of Texas law by members of the Texas Film Commission (the “Film Commission”) and other government officials to discriminate against Machete Productions by denying Machete Productions a grant of taxpayer funds based solely on the supposed political message of the motion picture *Machete Kills*. Machete Productions qualified for a significant grant from the Texas Moving Image Industry Incentive Program (the “Incentive Program”), which is a state-sponsored program created by the Texas legislature with the aim of luring film production to Texas, with all the financial benefits that provides to the local economy. Machete Productions spent millions of dollars in Texas and created hundreds of jobs for Texans. However, the Film Commission, which administers the Incentive Program, denied Machete Productions’ application for a grant in a one page letter, citing a statutory reference that supposedly provides the Film Commission the right to deny an application based on “general standards of decency” and “the diverse beliefs and values of the

citizens of Texas.” The real reason for the Commission’s denial is that the Commission was concerned with the political fallout from providing public money to a film perceived as glorifying the role of a Mexican Federale (Mexican Federal Police Officer) and sympathizing with immigrants.

The Incentive Program, on its face and as applied by the Film Commission, is unconstitutional because it arbitrarily allocates taxpayer funds based on the perceived political message of the motion pictures being produced. The Commission’s denial of Machete Productions’ application was wrongful, arbitrary and improperly based upon the factually incorrect determination that the script for *Machete Kills* is either indecent or is contrary to the “diverse believes and values of Texans.”

I.
Discovery Level

1. Plaintiff intends that discovery be conducted under Level 2 of Texas Rule of Civil Procedure 190.3.

II.
Parties

2. Plaintiff Machete Productions is a California limited liability company with its principal place of business in Los Angeles County, California. Machete Productions owns the rights to any Incentive Program grant for the production of *Machete Kills*.

3. Defendant Heather Page is the current Director of the Texas Film Commission, a government agency established in the Office of the Governor pursuant to Chapter 485 of the Texas Government Code (the “Film Commission”). Defendant Page is sued in her official and individual capacities, along with her predecessors and successors in office. She is an individual

residing in Travis County, Texas and may be served with process at the Film Commission, 1100 San Jacinto, Ste. 3.410, Austin, Texas 78711-3246, or wherever she may be found.

4. Defendant David Morales is a former interim Director of the Film Commission and the General Counsel of the Office of the Governor of the State of Texas. He is sued in his official and individual capacities, along with his predecessors and successors in office. He is an individual residing in Travis County, Texas and may be served with process at the Office of the Governor, State Capitol Building., 1100 Congress, Room 2S.1, Austin, Texas 78701, or wherever he may be found.

5. Defendant Robert Hudgins is a former Director of the Film Commission. He is sued in his official and individual capacities, along with his predecessors and successors in office. He is an individual residing in Travis County, Texas and may be served with process at his residence, or wherever he may be found.

6. Defendant Carol Pirie is a former Deputy Director of the Film Commission. She is sued in her official and individual capacities, along with her predecessors and successors in office. She is an individual residing in Dallas County, Texas and may be served with process at her residence, 5807 Charlestown Dr., Dallas, Texas 75230, or wherever she may be found.

7. Defendant Evan Fitzmaurice is a former Director of the Film Commission. He is sued in his official and individual capacities, along with his predecessors and successors in office. He is an individual residing in Travis County, Texas and may be served with process at his residence, 804 E. 47th St., Apt. A, Austin, Texas 78751, or wherever he may be found.

8. Pursuant to Texas Civil Practice & Remedies Code Section 104.005, to give the State of Texas an opportunity to defend this suit, Plaintiff also requests service of process upon

Texas Attorney General Greg Abbott. General Abbott may be served with process by serving the Texas Attorney General's Office, 209 W. 14th Street, Austin, Texas 78701.

III.
Jurisdiction and Venue

9. The amount in controversy is within the jurisdictional limits of this Court.

10. Venue is proper in this county under Texas Civil Practice & Remedies Code Section 15.002(a)(1) because all or a substantial part of the events or omissions giving rise to the claims occurred in Travis County. Venue is also proper under Texas Civil Practice & Remedies Code Section 15.002(a)(2) because Defendants Hudgins, Fitzmaurice, and Pirie were all residents of Travis County at the time the causes of action accrued, and under Texas Civil Practice & Remedies Code Section 15.005, as to all defendants, because the claims asserted arise out of the same transaction, occurrence, or series of transactions or occurrences. In addition, venue is mandatory in this county pursuant to Texas Government Code Section 2001.038(b).

IV.
Facts

The Texas Moving Image Industry Incentive Program

11. In 2007, the Texas Legislature created and funded the Incentive Program, with the stated goal of promoting economic development and job creation by providing incentives from public funds to encourage movie and television companies to film on location in Texas. The Incentive Program is administered by the Film Commission.

12. In 2009, the Texas Legislature allocated \$62 million for the Program and its administration. In 2011, the Legislature allocated an additional \$32 million.

13. Section 485.022 of the Texas Government Code requires that an applicant for a Program economic incentive grant satisfy three simple, objective criteria in order to qualify for a

grant. The applicant must (a) spend a minimum of \$250,000 in Texas; (b) hire Texas residents as a minimum of 70 percent of its production crew, actors and extras; and (c) film at least 60 percent of its project in Texas.

14. In addition, the statute purports to authorize the Film Commission to deny an application, even if it meets all of the above criteria, “because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the office, in a moving image project. In determining whether to act on or deny a grant application, the office shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas.” TEX. GOV’T CODE ANN. § 485.022(e).

15. Chapter 121 of the Texas Administrative Code implements the statute, including its content-related provision. Administrative Code Section 121.4(b) purports to authorize the Commission to “deny an application or eventual payment on an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the Film Commission, in a moving image project. In determining whether to act on or deny an application, the Texas Film Commission shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texas.” Neither the state nor the administrative scheme defines the terms “inappropriate content” or “content that portrays Texas or Texans in a negative fashion,” leaving subject to the absolute discretion of the Film Commission.

16. In addition to budget and staffing numbers, an applicant for a grant under the Incentive Program must submit a script to the Film Commission, purportedly to determine whether it contains “inappropriate content” or “portrays Texas or Texans in a negative fashion.” The Film Commission then reviews the final cut of the film to verify that there has been no

substantial change from the approved script and no “inappropriate content” or “anti-Texas” content has slipped into the film.

The *Machete* Application

17. In 2009 and 2010, Machete Chop Shop, Inc. (“Chop Shop”) pursued a grant from the Incentive Program for the production of the film *Machete*, an action film about the exploits of a former Mexican “Federale,” written and directed by Robert Rodriguez and starring Danny Trejo, Robert de Niro and Jessica Alba. Its application met all of the Incentive Program’s objective and ascertainable constitutional criteria. The producers projected spending over \$9 million in qualified funds in Texas, of which almost \$8 million would go to qualified Texas wages. They projected creating 545 Texas jobs, or just over 95% of the project’s total payroll headcount.

18. A copy of the *Machete* script accompanied the 2009 application. The Film Commission expressed no misgivings about the film’s content at that time. In the spring and summer of 2010, however, *Machete* attracted considerable political controversy even prior to its release. For example, according to the *Texas Tribune*, public access television show host Alex Jones called *Machete* the “equivalent of a Hispanic *Birth of a Nation*,” joining a chorus demanding that the *Machete* application be denied due to its perceived political viewpoint.

19. In the wake of the political controversy surrounding *Machete*, the Film Commission abruptly decided that *Machete* was not qualified for a grant under the Incentive Program.

20. On December 1, 2010, Carol Pirie, then the Commission’s Deputy Director, sent the producers a letter denying the *Machete* application due to “inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by [sic] office[.]” The letter

provided no details regarding the supposed “inappropriate content,” nor any explanation of how the film portrayed “Texas or Texans in a negative fashion.” Defendant Robert Hudgins was the Commission Director at the time. One week after the date of Ms. Pirie’s letter, for unknown reasons, all of the Commission’s *Machete*-related documents were turned over to Milton Rister, Governor Perry’s Director for Administration, at Rister’s request.

21. Machete Productions is informed and believes, and based thereon alleges that before denying the application for a grant relating to *Machete*, the Film Commission had rarely, if ever, denied funding on the basis of “inappropriate” or “anti-Texas” content. For example, before denying the *Machete* application, the Commission awarded hundreds of thousands of dollars for the filming of *Friday the 13th*, a 2009 revival of the well-known “slasher” franchise.

The Machete Kills Application

22. *Machete* was a successful film, and Machete Productions decided to create a sequel, entitled *Machete Kills*. As with *Machete*, the producers wanted to film *Machete Kills* in Texas. Months before Machete Productions’ grant application for *Machete Kills*, Defendant David Morales, Governor Perry’s general counsel, arranged a meeting with one of the film’s producers. Morales told the producer that Machete Productions should not apply for a grant, regardless of whether the film qualified under the statute and the rules. Morales indicated that because of the perceived political nature of the content of *Machete*, the Film Commission would never award a grant to *Machete Kills*. Machete Productions refused to be intimidated, and it filed a grant application. The application met all of the applicable objective criteria for a grant. It projected spending almost \$10 million in qualified funds in Texas, of which just over \$6 million would go to qualifying Texas wages. *Machete Kills* projected to create 531 Texas jobs, or just over 90% of the film’s total payroll head count.

23. On June 26, 2012 Morales – acting under color of state law as the “designated Director of the Texas Film Commission” for matters related to *Machete Kills* – issued a letter denying the application because of “inappropriate content.” Neither Morales nor anyone at the Film Commission explained to Machete Productions the reasons for the conclusion that the content of the script was “inappropriate.”

V.

Claims Pursuant to 42 U.S.C. § 1983

24. Defendants’ denial of the Plaintiff’s applications for economic incentives for *Machete Kills* violated Machete Productions’ rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, as applied to the states through the Fourteenth Amendment. Specifically:

- a. The provisions of Section 485.022(e) of the Texas Government Code and Section 121.4(b) of the Texas Administrative Code permitting the Commission to deny economic incentives based on “offensive” and “anti-Texas” content are invalid on their face as they are content-based criteria for determination of entitlement to a grant of public monies, and therefore violate the First Amendment.
- b. The Defendants’ application of Section 485.022(e) of the Texas Government Code and Section 121.4(b) of the Texas Administrative Code in a manner that denied a grant to Machete Productions based on the political messages Defendants’ attributed to *Machete Kills* violated the First, Fifth and Fourteenth Amendments to the United States Constitution.

25. Defendants violated Machete Productions’ constitutional rights under color of state law, causing Plaintiff harm in the amount of the improperly denied incentives.

VI.
Claims Under the Texas Constitution

26. Defendants' denial of Machete Productions' applications for economic incentives for *Machete* and *Machete Kills* based on the content and perceived viewpoint of the films violated Article I, Section 8 of the Texas Constitution. Specifically:

- a. The provisions of Section 485.022(e) of the Texas Government Code and Section 121.4(b) of the Texas Administrative Code permitting the Commission to deny economic incentives based on "offensive" and "anti-Texas" content are facially invalid under Article I, Section 8 of the Texas Constitution.
- b. The Defendants' application of Section 485.022(e) of the Texas Government Code and Section 121.4(b) of the Texas Administrative Code of the Texas Administrative Code to deny the Plaintiff's applications for economic incentives for *Machete* and *Machete Kills* based on purported "offensive" and "anti-Texas" content violated Article I, Section 8 of the Texas Constitution.

27. The Defendants' denial of the Plaintiff's applications for economic incentives for *Machete* and *Machete Kills* based on the content and perceived viewpoint of the films violated Article I, Section 8 of the Texas Constitution.

VII.
Request for Declaratory Judgment

28. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, Plaintiff seeks a declaratory judgment that:

- a. Defendants violated the First Amendment of the United States Constitution and Article I, Section 8 of the Texas Constitution by: (i) applying Section 485.022(e) of the Texas Government Code and Section 121.4(b) of the Texas Administrative

Code to deny Plaintiff's applications for economic incentives for *Machete* and *Machete Kills* based on purported "offensive" and "anti-Texas" content; and (ii) denying Plaintiff's applications for economic incentives for *Machete* and *Machete Kills* based on the content and perceived viewpoint of the films.

- b. the following language in Section 485.022(e) of the Texas Government Code is invalid as an unconstitutional abrogation of freedom of speech, in violation of the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Texas Constitution:

may deny an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the office, in a moving image project. In determining whether to act on or deny a grant application, the office shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texans.

- c. the following language in Section 121.4(b) of the Texas Administrative Code is invalid as an unconstitutional abrogation of freedom of speech, in violation of the First and Fourteenth Amendments of the United States Constitution and Section 8 of the Texas Constitution:

may deny an application or eventual payment on an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the Texas Film Commission, in a moving image project. In determining whether to act on or deny an application, the Texas Film Commission shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texans.

- d. Pursuant to Section 2001.038 of the Texas Government Code, the following language in Section 121.4(b) of the Texas Administrative Code, promulgated by the Commission pursuant to and in implementation of unconstitutional statutory

provisions, is invalid in that it interferes with or impairs Plaintiff's legal rights or privileges:

may deny an application or eventual payment on an application because of inappropriate content or content that portrays Texas or Texans in a negative fashion, as determined by the Texas Film Commission, in a moving image project. In determining whether to act on or deny an application, the Texas Film Commission shall consider general standards of decency and respect for the diverse beliefs and values of the citizens of Texans.

VIII.
Request for Injunctive Relief

29. Plaintiff requests a permanent injunction: (i) enjoining Defendants, their officers, agents, servants, attorneys and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, from enforcing the above-mentioned provisions of the Texas Government Code and the Texas Administrative Code; and (ii) ordering that the Commission grant Plaintiff's applications, nunc pro tunc.

IX.
Attorney's Fees

30. Plaintiff has retained the undersigned counsel to represent Plaintiff in this action. Plaintiff seeks to recover a reasonable attorneys' fee pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code and 28 U.S.C. § 1988 as part of costs.

X.
Jury Demand

31. Plaintiff hereby demands a trial by jury and tenders the necessary fee.

Prayer

WHEREFORE, Plaintiff requests that Defendants be cited to appear and answer herein, and that on final hearing, Plaintiff be awarded judgment as follows:

A. A permanent injunction: (i) enjoining the Defendants, their officers, agents, servants, attorneys and all persons in active concert or participation with them who receive actual notice of the injunction by personal service or otherwise, from enforcing the above-mentioned provisions of the Texas Government Code and the Texas Administrative Code; and (ii) ordering that the Film Commission grant Plaintiff's applications;

B. A declaratory judgment that (i) Plaintiff's Incentive Program grant applications were unlawfully denied and Plaintiff is entitled to Incentive Program grants; and (ii) the above-mentioned provisions of the Texas Government Code and Texas Administrative Code are unconstitutional on their face and as applied to Plaintiff;

C. As to the individual defendants, Plaintiff seeks the maximum award against which the state will indemnify such individuals under Chapter 104 of the Civil Practice & Remedies Code.

D. An award of reasonable attorneys' fees and costs of suit; and

E. Such other and further relief, legal or equitable, to which Plaintiff may show itself to be justly entitled.

Respectfully submitted,

The Storm Law Firm PLLC

/s/ Eric B. Storm

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ATTORNEYS FOR PLAINTIFF MACHETE
PRODUCTIONS, LLC

REQUEST FOR DISCLOSURE

Plaintiff hereby requests that Defendants disclose the information and materials required by Tex. R. Civ. P. 194.2 within fifty days of service of this request.