

MEETING MINUTES

January 13, 2016

I. Call to Order & Orders of the Day

Roll Call

PRESENT: Chair Michael Smith, Vice Chair Rolanda Pierre Dixon, and Commission Members Madhavee Vemulapalli, Adrian Gonzales and Chris Peacock

ABSENT: None

STAFF: Investigator/Evaluator Steven Miller, Investigator/Evaluator Caroline Lee, Chief Deputy City Attorney Patricia Deignan, Deputy City Attorney Arlene Silva, City Clerk Toni Taber and Deputy City Clerk Cecilia McDaniel

OTHER: Noelia Espinola, Court Reporter with Advantage Reporting Services

Call to Order

The members of the San José Ethics Commission convened at 5:34 p.m. in Room W-120 of City Hall, 200 E. Santa Clara Street, CA 95113.

Orders of the Day

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, and seconded by Chair Michael Smith and carried unanimously, the Commission approved the adoption of the January 13, 2016 agenda. (5-0)

II. Closed Session - None

III. Hearings

- A. Continuation of hearing on Amended Bohrer Complaint filed by Hanson Bridgett on October 9, 2015 against multiple respondents alleging violations of the San Jose Municipal Code (Independent Investigator/Evaluator)

Documents Filed: 1) Report from Hanson Bridgett LLP dated November 12, 2015 regarding Steven D. Miller v. Paul Fong, et al., Complaint filed October 9, 2015; 2) Reponse by Respondent Van Le dated November 17, 2015; 2) Responses by Respondent Donald P. Gagliardi dated November 18-19, 2015; 4) Response by Respondent Dave Cortese dated November 18, 2015; 5) Response by Respondent Donald Rocha date November 19, 2015; 6) Supplemental Report from Hanson Bridgett LLP dated January 5, 2016 regarding Amended Bohrer Complaint filed by Hanson Bridgett; 7) Response by Respondent Lan Diep dated January 6, 2016; 8)

Response by Respondent Lois Wilco-Owens dated January 6, 2016; 9) Response by Respondent Donald P. Gagliardi received January 7, 2016; 10) 2nd Response by Respondent Donald P. Gagliardi dated January 7, 2016; 11) Response by Respondent Bob Levy received January 10, 2016; 12) Response by Respondent Magdalena Carrasco received January 11, 2016; 13) Response by Respondent Kathy Sutherland received January 11, 2016; 14) Supplemental Memorandum from City Attorney Richard Doyle dated January 12, 2016 to the San Jose Ethics Commission regarding the hearing process of the San Jose Ethics Commission; 15) Response by Respondent Donald P. Gagliardi to City Attorney Memo; and 16) Response by Respondent Donald P. Gagliardi re Ethics Commission Minutes.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. Complainant William Bohrer was not present. Respondents Don Gagliardi, Lan Diep, Kathy Sutherland, and Bob Levy were present. Chair Michael Smith opened the floor for public comment. Martha O'Connell, Bob Levy, Johnny Khamis, Steve Ellenberg, City Clerk Toni Taber and Donald Gagliardi made public comments. See attached transcript for full discussion and public comment made at hearing.

Evaluator Steve Miller summarized the complaint and his recommendations to the Commission. Respondents Kathy Sutherland, Donald Gagliardi, and Lan Diep provided testimony. See attached transcript for full discussion and testimony provided at hearing.

Action: Chair Michael Smith moved that the Commission find that there is sufficient evidence to establish that no violation has occurred. Vice Chair Rolanda Pierre Dixon seconded the motion, which carried with a 3-2 vote. (Noes: Gonzales and Vemulapalli)

Each Commissioner certified that he or she personally heard the testimony at the hearing and reviewed the entire evidence in the record.

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried unanimously, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's findings, and further, that the Commission authorize the Chair to approve and sign the resolution. (5-0) Chair Michael Smith declared the hearing on this matter closed.

- B. Continuation of hearing on Complaint filed by William Bohrer on July 23, 2015 against Tim Orozco and Neighbors for Tim Orozco for San Jose City Council District 4 2015 Committee alleging violations of San Jose Municipal Code (Independent Investigator/Evaluator)

Documents Filed: 1) Report from Hanson Bridgett LLP dated August 24, 2015 regarding William Bohrer v. Tim Orozco and Neighbors for Tim Orozco for San Jose City Council District 4 2015 Committee, Complaint filed July 23, 2015; and 2)

Response by Respondent Tim Orozco dated September 8, 2015.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. Complainant William Bohrer was not present. Respondent Tim Orozco and Linda Perry, treasurer of his campaign committee, were present. Chair Michael Smith opened the floor for public comment. Johnny Khamis, Linda Perry and Respondent Tim Orozco made public comments. See attached transcript for full discussion and public comment made at hearing. Evaluator Steve Miller provided his thoughts on the matter. No testimony was provided.

Action: Chair Michael Smith moved that the Commission find that there is sufficient evidence to establish that no violation has occurred. Vice Chair Rolanda Pierre Dixon seconded the motion, which carried with a 3-2 vote. (Noes: Gonzales and Vemulapalli)

Each Commissioner certified that he or she personally heard the testimony at the hearing and reviewed the entire evidence in the record.

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried unanimously, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's findings, and further, that the Commission authorize the Chair to approve and sign the resolution. (5-0) Chair Michael Smith declared the hearing on this matter closed.

C. See Item VII.A.2

IV. Public Record - None

V. Consent Calendar

- A. Approve the Minutes of November 19, 2015 – Regular Meeting
- B. Approve the Minutes of December 9, 2015 – Regular Meeting

Action: Deferred to February 10, 2016 meeting.

VI. Reports

- A. Chair – None
- B. City Attorney – None
 - 1. Legislative update
- C. City Clerk
 - 1. Legislative update – None
 - 2. Status of compliance with Commission resolutions – None
 - 3. Status report on filings (Form 700, Campaign Statements, Lobbyists) – Completing audit of lobbyist reports. Still looking at having lobbyist electronically file their reports. Checking with the City and County of Santa Clara to see if they would like to share cost to electronically file through Netfile.

4. Elections update – List of potential candidates and dates of interest are on the updated Clerk’s Election webpage. The Clerk’s Office receive a notice of intent to file a petition regarding business taxes. They will need approximately 18,852 signatures to qualify. The number of registered voters in San Jose has decrease to 377,000 from 410,000.
 5. Update on FPPC Forum – None
 6. Status of referral of Ethics Commission Complaint filed by Maribel Agyala regarding vendor with no sales permit – Complaint was outside of Commission’s jurisdiction. Referred complainant to Finance.
- D. Investigator/Evaluator – None

VII. Old Business

- A. 1. Discussion and possible action to rescind or amend the penalty imposed on July 8, 2015 in the complaint filed on June 5, 2015 by Tom Cochran against Manh Nguyen and Manh Nguyen for San Jose Council D4 2015. (Chair)

Documents Filed: 1) Memorandum from City Clerk Toni Taber to the Ethics Commission dated January 6, 2016 regarding request to add item to agenda; 2) Ethics Commission Resolution No. 2015-13 Imposing Fine on Manh Nguyen; 3) Letter from City Attorney Richard Doyle to Manh Nguyen dated November 4, 2015; 4) FPPC Warning Letter dated September 1, 2015; and 5) Response by Respondent Manh Nguyen dated January 12, 2016.

Motion: After discussion, Chair Michael Smith moved that the Commission initiate a hearing to consider rescinding or amending the penalty imposed on Manh Nguyen. Vice Chair Rolanda Pierre Dixon seconded the motion.

Discussion: Chair Michael Smith explained why he introduced this item to the Commission. Evaluator Steve Miller provided background on the matter. Deputy City Attorney Arlene Silva informed the Commission on changes to San Jose Municipal Code Title 12 which became effective on December 18, 2015. Jonathan Padilla, Bryan Do and Johnny Khamis made public comments urging the Commission to rescind the penalty.

Action: On a call for the question, the motion carried. (4-1; Noes: Pierre Dixon)

2. Depending on the outcome of item VII.A.1., Hearing to rescind or amend the penalty imposed on July 8, 2016 in the complaint filed on June 5, 2015 by Tom Cochran against Manh Nguyen and Manh Nguyen for San Jose Council D4 2015. (Chair)

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. Complainant Tom Cochran was not present. Jonathan Padilla was present for Respondent Manh Nguyen. See attached transcript for full discussion and testimony provided at hearing.

Action: Vice Chair Pierre Dixon moved that the Commission rescind the penalty imposed on Manh Nguyen related to the complaint filed on June 5, 2015 by Tom Cochran. Chair Smith seconded the motion, which carried unanimously. (5-0)

Each Commissioner certified that he or she personally heard the testimony at the hearing and reviewed the entire evidence in the record.

Discussion: The Commission discussed informing the Fair Political Practices Commission of the decision to rescind Manh Nguyen's penalty. Jonathan Padilla and Bryan Do provided public comment. See attached transcript for full discussion and public comment provided. The Commission decided against notifying the Fair Political Practices Commission.

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried unanimously, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's findings, and further, that the Commission authorize the Chair to approve and sign the resolution. (5-0) Chair Michael Smith declared the hearing on this matter closed.

The hearings concluded at 7:33 p.m. Court Reporter Noelia Espinola left shortly thereafter.

- B. Discussion and possible action regarding revisions to Council Resolution 76954, Regulations and Procedures for the San Jose Ethics Commission. (City Attorney)

Document Filed: Draft revisions to City Council Resolution 76954 and Memorandum from City Attorney Richard Doyle to the San Jose Ethics Commission dated January 6, 2016 regarding Proposed Revisions to the Regulations and Procedures of the San Jose Ethics Commission.

Discussion: Deputy City Attorney Arlene Silva reviewed the draft changes to City Council Resolution 76954 with the Commission. Commissioner Madhavee Vemulapalli would like to see the name of the Commission changed. City Clerk Toni Taber agreed. Further changes to the City Council Resolution 76954 will need to be made.

Action: No action taken.

- C. Discussion and possible action regarding ad hoc subcommittee on community outreach. (City Clerk)

Action: No report. Deferred to next meeting.

- D. Discussion and possible action on report from ad hoc subcommittee on potential for organizing statewide forum of Ethics Commissions campaign finance laws. (Commissioner Gonzales)

Discussion and possible action on referral to Ethics Commission by Councilmember Charles "Chappie" Jones to compare rules of other cities to determine if additional changes are recommended regarding the length of the campaign contribution period.

Document Filed: Research on local contribution windows.

Discussion: Commissioner Adrian Gonzales discussed the contribution periods for other local cities.

Action: Commissioner Adrian Gonzales moved that staff work with the subcommittee to draft a memo to Rules to indicate the Commission's recommendation that the City of San Jose's contribution period be extended to 180 days post-election for the sole purpose of retirement of debt; which includes payment of administrative costs and legal counsel fees. The Commission does not recommend extending the pre-election contribution period, which is currently set at 180 days prior to the election. Vice Chair Rolanda Pierre Dixon seconded the motion. On a call for the question, the motion carried unanimously. (5-0)

E. Scheduling of Special Ethics Commission meeting if needed. (City Clerk)

Action: No action taken.

VIII. New Business

A. Discussion and possible action regarding the Mayor's Biennial Ethics Review. (City Attorney)

Documents Filed: Memorandum from City Clerk Toni Taber to the Honorable Mayor and City Council dated December 3, 2015 regarding the Mayor's 2015 Biennial Ethics Review and Recommendations.

Discussion: Deputy City Attorney Arlene Silva reviewed the Mayor's 2015 Biennial Ethics Review and Recommendations Memorandum with the Commission. The Commission discussed the issue. Deputy City Attorney Arlene Silva will review the gift ordinance and bring back a chart of differences between the City of San Jose's gift ordinance and state rules.

IX. Public Comment – None.

X. Future Agenda Items and Adjournment

The next meeting is scheduled for Wednesday, February 10, 2016 at 5:30 p.m. in City Hall, T-1446.

The following agenda items will be discussed at the next Ethics Commission meeting:

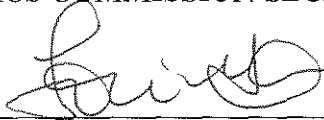
- Gift Ordinance Comparison Chart
- City Council Resolution 76954 Revisions
- Nomination and election of officers
- Approval of minutes
- Open Government Training

The meeting was adjourned at approximately 8:13 p.m.



MICHAEL SMITH, CHAIR

ATTEST:
ETHICS COMMISSION SECRETARY



TONI J. TABER, CMC
CITY CLERK

Attachment: Transcript of Hearing dated January 13, 2016, Reported by Noelia Espinola, CSR, License Number 8060, Advantage Reporting Services, No. 50890, pages 1 through 79.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Taken On January 13, 2016

CITY OF SAN JOSE ETHICS COMMISSION

PAGE 1 TO PAGE 79

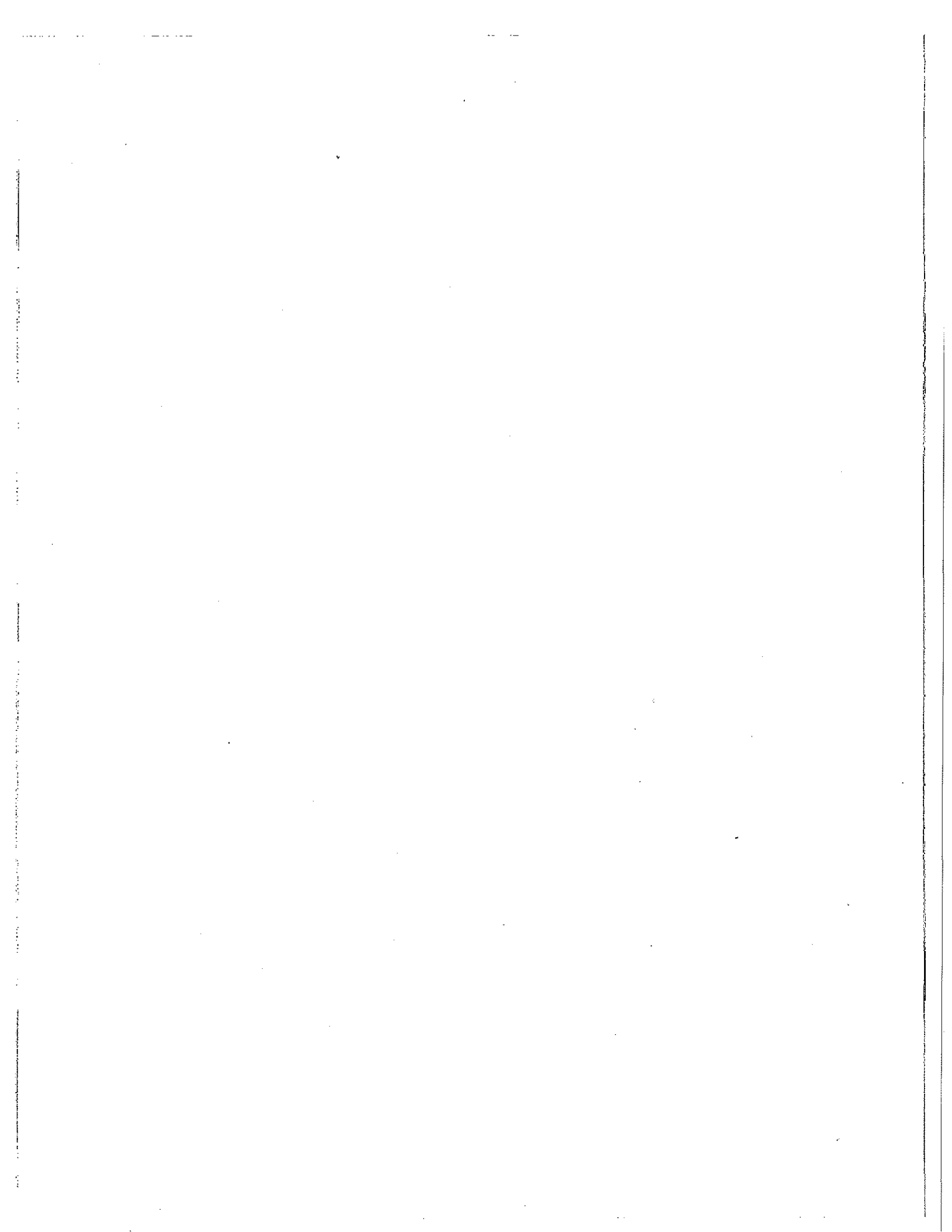
CONDENSED TRANSCRIPT

Advantage Reporting

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

<p>CITY OF SAN JOSE ETHICS COMMISSION</p> <p>REPORTER'S TRANSCRIPT OF PROCEEDINGS</p> <p>Date: Wednesday, January 13, 2016 Time: 5:36 p.m. Location: San Jose City Hall 200 E. Santa Clara Street Wing - Room 120 San Jose, CA 95113</p> <p>Reported By: Noelia Espinola, CSR License Number #8060</p> <p>#50890</p>	<p>Page 3</p> <p>1 PROCEEDINGS 2 3 CHAIRMAN SMITH: We move into hearings, 4 Item IIIA. 5 Okay. It is – by the way, for those who 6 haven't been here before, I have a script that I more 7 or less follow to make sure that we follow procedure 8 and that I won't forget anything. And some of it I 9 read through, because there's a lot of detail on 10 history and whatnot. 11 It is Wednesday, January 13th, 2016, and this 12 hearing of the City of San Jose Ethics Commission is 13 being held in Room W-120 of San Jose City Hall. All 14 members of the Commission are present. 15 The Commission will continue a hearing on the 16 expanded scope of a complaint originally filed with the 17 City Clerk on July 23rd, 2015, by William Bohrer 18 alleging that Tim Orozco and the Neighbors for Tim 19 Orozco for San Jose City Council District 4 2015 20 Committee violated Section 12.06.910 of the San Jose 21 Municipal Code. Specifically, the allegation of the 22 original complaint was that the respondents failed to 23 file Late Contribution Reports, known as Form 497s, 24 with the San Jose City Clerk as required. The City 25 Clerk promptly notified and provided a copy to the</p>
<p>Page 2</p> <p>1 2 APPEARANCES 3 4 San Jose Elections Commission: MICHAEL SMITH, Chair ROLANDA PIERRE-DIXON, 5 Vice-Chair CHRIS PEACOCK 6 MADHAVEE VEMULAPALLI ADRIAN GONZALES 7 8 9 Staff: ARLENE F. SILVA, Deputy City Attorney PATRICIA DEIGNAN, 10 Chief Deputy City Attorney 11 TONI TABER, City Clerk 12 13 CECILIA McDANIEL, Deputy City Clerk 14 15 Independent Investigator/Evaluator: HANSON BRIDGETT, LLP BY: STEVEN D. MILLER, 16 CAROLINE LEE, Attorneys at Law 17 425 Market Street 26th Floor 18 San Francisco, CA 94105 (415) 777-3200 19 20 The Reporter: ADVANTAGE REPORTING SERVICES BY: NOELIA ESPINOLA, 21 CSR #8060 1083 Lincoln Avenue 22 San Jose, CA 95125 (408) 920-0222 23 24 25 -o0o-</p>	<p>Page 4</p> <p>1 Independent Evaluator, and the Evaluator notified and 2 provided a copy to the respondents on July 24th, 2015. 3 The Independent Evaluator's Report and Recommendations 4 were submitted to the City Clerk on August 24th, 2015, 5 and copies were then provided to the complainant, 6 respondents and Commission members and posted to the 7 city web site with the agenda for a hearing held on 8 September 9th, 2015. At this hearing, the Independent 9 Evaluator reported that, based on a random survey of 10 compliance by other candidates in municipal elections 11 held during 2014 and 2015, it appeared that numerous 12 other candidates may have violated Title 12's late 13 contribution reporting requirements. As a result, the 14 Commission directed the Independent Evaluator to 15 undertake a broader investigation of other candidates 16 in those elections. In accordance with the 17 Commission's regulations and procedures, the 18 Independent Evaluator subsequently filed an expanded 19 complaint with the City Clerk on October 9th, 2015, 20 alleging that Paul Fong, Charles Jones, Bob Levy, 21 Xavier Campos, Magdalena Carrasco, Donald Rocha, Lols 22 Wilco-Owens, Donald Gagliardi, Raul Peralez, Kathy 23 Sutherland, Maya Esparza, Van Le, Buu Thai, Dan [sic] 24 Cortese, Rose Herrera, Sam Liccardo, Madison Nguyen, 25 Pierluigi Oliverio, Lan Diep and Bhupindar Dhillon</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 5	Page 7
<p>1 violated Section 12.09.910 of the San Jose Municipal 2 Code by failing to file Form 497s reporting late 3 contributions received during the statutorily required 4 "Late Contribution" period immediately preceding the 5 June 3rd, 2014, November 4th, 2014, and/or April 7th, 6 2015, elections. The Evaluator notified and provided a 7 copy of the complaint to the respondents on 8 October 12th, 2015. The Independent Evaluator's Report 9 and Recommendations were submitted to the City Clerk on 10 November 12th, 2015, and copies were then provided to 11 the respondents and Commission members and posted to 12 the city web site with the agenda for a hearing held on 13 November 19th, 2015. The Commission took no action at 14 that time, and the hearing was continued. In the 15 interim, the Independent Evaluator submitted a 16 supplemental report to the City Clerk on January 5th, 17 2016, and copies were then provided to the respondents 18 and Commission members and posted to the city web site 19 with the agenda for tonight's hearing.</p> <p>20 The Commission's regulations and procedures 21 pertaining to investigations and hearings are 22 established by Resolution 76954, which was adopted by 23 the City Council on April 15th, 2014. All parties to 24 these proceedings have been provided copies of the 25 Resolution. The regulations and procedures have been</p>	<p>1 MR. DIEP: I'm Lan Diep. 2 MS. SUTHERLAND: Kathy Sutherland. 3 MR. LEVY: Bob Levy. 4 CHAIRMAN SMITH: In the back? Anyone? No? 5 Oh. 6 MR. OROZCO: Tim Orozco. 7 CHAIRMAN SMITH: You're actually in the other 8 hearing, even though your name has been mentioned here. 9 Okay. I would also like to have city staff 10 and representative of Hanson Bridgett, the Commission's 11 Independent Evaluator, please identify themselves for 12 the record, starting down here. 13 MR. MILLER: Steven Miller. 14 MS. LEE: Caroline Lee. 15 MS. DEIGNAN: Patty Deignan. 16 MS. SILVA: Arlene Silva. 17 MS. TABER: Toni Taber. 18 CHAIRMAN SMITH: And? 19 MS. McDANIEL: Cecilia McDaniel. 20 CHAIRMAN SMITH: All right. Under the 21 Commission's regulations and procedures, the 22 respondents may submit a written response to the Report 23 and Recommendations. The response may contain legal 24 arguments, a summary of evidence and any mitigating or 25 exculpatory information.</p>
Page 6	Page 8
<p>1 adopted in order to ensure the fair, just and timely 2 resolution of complaints before the Commission. 3 This hearing is open to the public. It is 4 being electronically recorded, and we have a court 5 reporter with us to compile a transcript. The formal 6 rules of evidence do not apply to this hearing, but all 7 testimony will be under oath or affirmation. The 8 complainant will be treated like any other witness in 9 providing evidence. The Chair may compel the testimony 10 of witnesses and may compel the production of relevant 11 documents to the Evaluator by subpoena. Witnesses may 12 be excluded at the discretion of the Commission. 13 Commission members may ask questions of witnesses or 14 the Evaluator when recognized by the Chair.</p> <p>15 At this time I would like to have the 16 original complainant, William Bohrer, and the 17 respondents or their representatives please identify 18 themselves for the record.</p> <p>19 So if you can just raise your hand and 20 identify yourself if you fall under that category. 21 Start in the front, maybe.</p> <p>22 MR. GAGLIARDI: I'm sorry. Talking about 23 complainants or respondent? 24 CHAIRMAN SMITH: Both. 25 MR. GAGLIARDI: I'm Don Gagliardi.</p>	<p>1 As of now, we have received responses from 2 the following individuals: Van Le, dated November 17, 3 2015; Don Gagliardi, dated November 18th, 4 November 19th, 2015, two submittals on January 7th, 5 2016, and two more on January 12th, 2016; Dave Cortese, 6 dated November 19, 2015; Donald Rocha, dated 7 November 19, 2015; Lan Diep, dated January 6th, 2016; 8 Lois Wilco-Owens, dated January 6, 2016; Bob Levy, 9 dated January 10th, 2016; Magdalena Carrasco, dated 10 January 11, 2016; Kathy Sutherland -- and Kathy 11 Sutherland, dated January 11, 2016.</p> <p>12 Do the Commissioners and staff all have 13 copies? 14 These were all done on the agenda, so you 15 should have them.</p> <p>16 Okay. The complainant or any other 17 interested person may also submit a brief or written 18 argument, and at this time we have not received any.</p> <p>19 Okay. I'm going to just take a minute and 20 explain. We're going to do things a little 21 differently. We've changed our -- kind of our format a 22 little bit since the last meeting in November, 23 separating public comment, which is done not under 24 oath, from testimony, which is done under oath. So 25 we're going to, right now, go into a public comment</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 9	Page 11
<p>1 period, where members of the public -- In this case, 2 including Respondents, if you wish -- can make a 3 statement not under oath. And then you'll be limited 4 to two minutes. We will take testimony, if you wish to 5 make testimony, that would be under oath, a few minutes 6 later in the hearing. 7 So are there members -- I've got some yellow 8 cards for that. I can start with those, if there's 9 members of the public who would like the opportunity to 10 speak. So let me start with the yellow cards. I'll do 11 them in reversal order -- or in the order I got them, 12 as best I can tell. Let's see. That's for the other 13 one. 14 So Kathy Sutherland. You can -- there's a 15 microphone. Just state your name and go ahead. 16 MS. SUTHERLAND: Okay. My name is Kathy 17 Sutherland, and I was a candidate for Council 18 District 3 in the primary in 2014. And I've got a 19 written statement. I don't know if this is public 20 comment or under oath. And I don't understand if it's 21 the same message -- if it can be the same message. 22 CHAIRMAN SMITH: If you can do it in two 23 minutes, you can do it now. But, if not, you might 24 want to wait. If you have a written statement, it 25 might be better to wait. I'll leave it to you.</p>	<p>1 I was given it in writing more than once?" 2 So I plead with you, for the good of the 3 public, to dismiss these charges against these 4 candidates tonight in a timely manner. 5 CHAIRMAN SMITH: Okay. Bob Levy, did you 6 want to do it now or -- 7 MR. LEVY: I'll do it now. 8 CHAIRMAN SMITH: Okay. 9 MR. LEVY: My name is Bob Levy. I was a 10 candidate for City Council District 1 in 2014. And I 11 just want to echo the sentiments of our last speaker. 12 I'd like to see these charges dismissed. I think the 13 candidates did do due diligence, tried to follow the 14 law. The law is very confusing. We have a number of 15 professional treasurers who still couldn't follow the 16 law. Our mayor, our vice mayor, et cetera. 17 Personally, I haven't run for office in 18 20 years. I had a friend who was my treasurer. We 19 thought we followed the letter of the law to the T, 20 and, unfortunately, we didn't. But there actually was 21 no ethical violations involved. 22 So I would like to request that the 23 Commission dismiss these charges. 24 I'd also like to request the City to address 25 the root cause problems that resulted in this. You</p>
Page 10	Page 12
<p>1 MS. SUTHERLAND: Then I'll -- I guess I'll 2 wait, because I don't want to be cut off. 3 CHAIRMAN SMITH: Okay. That's fine. 4 MS. SUTHERLAND: All right. 5 CHAIRMAN SMITH: Let's see. Martha 6 O'Connell? Is that what's on this one? 7 MS. O'CONNELL: Is this on? 8 CHAIRMAN SMITH: It doesn't sound like it. 9 MS. O'CONNELL: I apologize for missing the 10 meeting in November. I had another meeting at the same 11 time. 12 I think it was October when I spoke to you 13 guys as a member of the public and pleaded with you to 14 dismiss these -- these charges. There was some 15 discussion among the Commissioners that you were doing 16 this for the public. And I don't think that you're 17 really serving the public to carry this on any longer. 18 The City Clerk has graciously admitted the error from 19 her office, has taken full responsibility. And I don't 20 think it serves democracy or the public or just regular 21 folks like me, who have never held a political office 22 and might want to run for City Council, and am looking 23 at "My God. Am I going to be dragged into a hearing 24 because I made a mistake, based on what I thought was 25 due diligence in pursuing the answer to a question, and</p>	<p>1 know, and I'm sure the Clerk's Office is doing that, 2 making sure that's the case. 3 But there was two issues that were done. And 4 one was -- there's really three. We made a mistake to 5 begin with, based on what we thought we were doing the 6 right thing. 7 Second, then the -- the misdirection, you 8 know, to put in better terms. 9 But, finally, the follow-up. You know, I got 10 two flash drives, certified letters, you know, lots of 11 e-mails. The amount of effort, money, that was spent 12 on this is ridiculous for something that was obviously 13 not an ethical violation. And I'd like to see the 14 City, you know, be able to address the way they, you 15 know, followed up on this, the way they handled the 16 situation. Because it should have been resolved long 17 ago, without the amount of resources that were 18 dedicated to this. 19 So thank you very much for your time. 20 CHAIRMAN SMITH: Johnny Khamis? 21 MR. KHAMIS: My name is Johnny Khamis. 22 This is not on, is it? 23 MS. TABER: It doesn't have the speaker 24 system that you're used to hearing. This is more for 25 recording than for amplifying.</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 13

1 MR. KHAMIS: Okay. All right. My name is
2 Johnny Khamis. I'm a City Council member for District
3 Number 10. I've been a candidate a couple of times. I
4 know what it's like to be on both sides of this
5 process.

6 And I -- I just wanted to bring to the
7 attention a couple of things. First of all, the Clerk
8 has graciously apologized for sending out wrong
9 information to all of these candidates.

10 Actually, I'm speaking on this side. I'm
11 going to give you the same -- same speech on the
12 following item for Manh Nguyen.

13 The City Attorney found that there was no
14 evidence for -- for intentional violations and advised
15 the Council to waive the fees during City Council
16 recently. The Council has waived the fees for Manh
17 Nguyen, and the Council is -- would possibly do this --
18 most likely do the same thing if you decided to charge
19 any of these folks as well.

20 You know, the City Council has also taken
21 under consideration many of the new fixes that you guys
22 put into the system. A lot of the recommendations that
23 you've put forward on simplifying the laws we've
24 actually taken and turned into laws. So we've actually
25 taken some steps to make it simpler.

Page 14

1 I want to -- you know, it is an extremely
2 daunting process to be a candidate. You possibly can't
3 even do it without a professional advisor and a
4 treasurer these days. So it's -- it's becoming so that
5 only the rich class gets to run for office. And I
6 don't think that this is what this Commission wants in
7 the end.

8 My advice is to drop the charges on all of
9 these, including Manh Nguyen, and move forward. Move
10 forward with -- you know, with a way to make things
11 simpler and go after the people who are intentionally
12 causing these problems and not the ones who are -- get
13 caught up in making mistakes.

14 Thank you very much for your time.

15 CHAIRMAN SMITH: Thank you.

16 Steve Ellenberg?

17 MR. ELLENBERG: Good evening. My name is
18 Steve Ellenberg. I'm here as a citizen of San Jose. I
19 was a supporter of Don Gagliardi for his campaign for
20 City Council. I was a supporter and a contributor to
21 Bob Levy on his campaign.

22 I just want to make a couple of points. I
23 think, first of all, context is always important in
24 looking at any charge. I'm also a lawyer, so I don't
25 want you to be confused about that. Context is always

Page 15

1 important. We come here as an ethics committee. And
2 the suggestion, therefore, with these charges is
3 someone has committed an ethical violation. And as a
4 lawyer or if you're a business person or in any other
5 profession or line of work, the idea that you've even
6 been charged with an ethical violation as opposed to
7 making a mistake or -- an honest mistake is one that I
8 think the Commission needs to address. Because the --
9 the lasting effect, regardless of the end result,
10 really even with anything other than a dismissal, can
11 be profound for some of these individuals.

12 Second point I'd like to make in terms of
13 context -- I mean, I'm not as familiar as others are
14 with this. But I heard -- I believe it was Mr. Miller
15 introduced. His name was introduced twice during the
16 Chair's roll call, as both the complainant and the
17 Independent Evaluator. And I think the committee needs
18 to really address how that can be. How is that not a
19 conflict of interest?

20 Two more -- one more major point. In the
21 transcripts that I've had an opportunity to read, the
22 committee was focused on the idea that ignorance of the
23 law is no excuse. With respect, I don't think there's
24 been ignorance of the law. In fact, the opposite is
25 true. The candidates were presented with a confusing

Page 16

1 law. And rather than ignore it, which might be a
2 violation, they actually sought out guidance from the
3 person responsible for administering the law. And they
4 followed the guidance of the person responsible for
5 administering the law. That is the height of ethics.
6 These people should be commended.

7 CHAIRMAN SMITH: Could you wrap up.

8 MR. ELLENBERG: I have finished. Thank you.

9 CHAIRMAN SMITH: Thank you.

10 Okay. I don't have any more cards.

11 Toni Taber?

12 MS. TABER: I'm going to go ahead and time
13 me.

14 We already know that I provided bad advice.
15 I've said that in multiple previous meetings. I've
16 said it in October, November. I've had a written
17 statement to you. So I'm not going to dwell on that.
18 I feel that that is mitigating circumstances, which you
19 are allowed to take into consideration, according to
20 your script.

21 I also wanted to bring up a couple of other
22 points. The FPPC regulations allows the waiving of
23 fines if the violation is not willful. I went ahead
24 and did research on the past few annual reports from
25 FPPC. Most of the fines that I've -- that I saw -- and

4 (Pages 13 to 16)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 17	Page 19
<p>1 I say "most." As an English major, I can't say "all" 2 because I didn't read all of them. Most fines imposed 3 were on habitual offenders, not on first-time 4 offenders. Not on people who relied on bad advice from 5 the FPPC. 6 Additionally, most of the people that are 7 fined by the FPPC have the ability, under state law, to 8 go out and raise additional money at any time under 9 their campaign. We don't allow that. None of these 10 candidates, none of these people who had a violation, 11 are allowed to go out and raise additional funds to pay 12 for any fines we impose. Whereas state candidates, 13 special district candidates, anybody who follows the 14 state rules and doesn't have local rules. 15 And I felt that was information that you need 16 to consider when you have your discussion. 17 CHAIRMAN SMITH: Thank you. 18 Okay. Anyone else like to make public 19 comment? 20 If not, we'll move on. 21 Okay. At this time -- 22 MR. GAGLIARDI: I'd actually like to make a 23 request. I think it's appropriate. I'm Don Gagliardi. 24 If you need a card, I have one. I'll submit it. 25 One of the arguments -- I intend to speak at</p>	<p>1 hear me okay? Just say -- yell if you can't hear me. 2 So you have before you our written reports 3 from November 12th, 2015, as well as the supplemental 4 report from earlier this year, in January. And these 5 are both related to the report. You also have before 6 you -- that was submitted in August, August 24th. And 7 that report is agendaized for the next item on this. 8 Although they are all inextricably linked under one 9 broader complaint. 10 The November report, in particular, is very 11 data-intensive. And we want to make sure to offer the 12 Commission the opportunity to walk through the data in 13 that report together, for your benefit or for the 14 public's benefit, if you deem it necessary. But I want 15 to take -- before we do that, I want to take a step 16 back and try and put this issue in perspective for the 17 Commission and provide some context and then ask 18 whether you want us even to proceed with the detailed 19 walk-through of the report before we do that. 20 Just as a refresher, the reason why we're all 21 here is that both Title 12 of the Municipal Code and 22 the Political Reform Act include the concept of late 23 contribution reporting. The purpose of this concept is 24 that the public should know about contributions 25 received shortly before an election that otherwise</p>
Page 18	Page 20
<p>1 some length during the -- my testimony. But I have -- 2 I have raised a complete defense. I'm legally innocent 3 under the doctrine of entrapment by estoppel. And 4 under the law it's appropriate to consider that before 5 the trial actually begins. In this case, the hearing. 6 So I would like to request that before you 7 take testimony under oath and continue this process and 8 go on, that this Commission make a motion to dismiss 9 all charges against all the candidates and we can all 10 go home. That's what I would request of this 11 Commission. I think it's appropriate to do so. And it 12 would be helpful to hear the Commission's views on that 13 before you take testimony. 14 Thank you. 15 CHAIRMAN SMITH: Unless someone would like to 16 make a motion, I think it's appropriate to hear 17 testimony. I won't say that there won't be such a 18 motion subsequently, but I think we should go ahead 19 and -- go ahead with the process. 20 So at this time I'll recognize Steve Miller 21 from the Hanson Bridgett law firm to present the 22 Independent Evaluator's Report and Recommendations or a 23 summary thereof. 24 MR. MILLER: Thank you. 25 Good evening, Commissioners. Can you all</p>	<p>1 would not appear on campaign finance reporting until 2 after the election is over. Excuse me. 3 In 2013, the Political Reform Act definition 4 of a late contribution changed and no longer was in 5 harmony with the definition of a late contribution that 6 exists in -- existed in Title 12. And the changes were 7 in two key respects. 8 First, the Political Reform Act raised the 9 threshold of a late contribution from \$250 to \$1,000. 10 And, second, the Political Reform Act changed such that 11 late contributions in this now-larger amount needed to 12 be reported for late contributions that were received 13 90 days before the election instead of the shorter 14 16-day election that had previously been in effect in 15 the Political Reform Act. Title 12 definitions did not 16 change but remain at that \$250 threshold applicable for 17 24-hour reporting during the 16-day period. As a 18 result, since 2013, there has existed two parallel sets 19 of rules, both of which are applicable to candidates 20 for San Jose offices. 21 And with that statutory framework in mind, I 22 think it's helpful -- I hope it's helpful for the 23 Commission and the approach we have taken is we want to 24 look at this perspective from the candidate's -- at 25 this issue from the candidate's perspective.</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 21	Page 23
<p>1 And it seems to us -- and our instincts, I 2 think, as are borne out by the fact-finding and data in 3 our investigation. It seems to us that candidates 4 facing the statutory scheme in this definitional split 5 that I just explained could reasonably fall into one or 6 maybe more than one combination of categories. A 7 candidate could hire an expert, a lawyer, to help 8 navigate the complex landscape. A candidate faced with 9 understanding the Political Reform Act but now seeing 10 confusion with regards to Title 12 could seek advice 11 from the City -- the City Clerk. Candidate might try 12 to do the best on one's own, based on written guidance 13 provided by the City Clerk's Office and published 14 material on the FPPC's web site. Or, I suppose, a 15 fourth category, candidate could willfully decide to 16 take advantage of inconsistencies and flout all 17 regulations and decide then to take a free pass.</p> <p>18 And the Commission, at its hearing in -- back 19 in September on the original complaint by Mr. Bohrer 20 against Mr. Orozco, reasonably wanted to have complete 21 information and, to the extent that there were 22 additional candidates who may have violated the rules, 23 wanted to learn as much as possible, if there were 24 explanations for the differing manners and ways and 25 types of compliance of these different candidates,</p>	<p>1 Title 12.</p> <p>2 Third, many but -- important, perhaps -- not 3 all candidates sought counsel from the City Clerk, who, 4 in response, has acknowledged the provision of 5 incorrect advice as to Title 12's late contribution 6 reporting fines. I believe the City Clerk -- and 7 please correct me if I'm wrong -- initially advised the 8 Commission that she had provided such advice to all 9 candidates, but we did not find evidence that it was 10 provided to every single candidate.</p> <p>11 Fourth, some -- but, again, not all 12 candidates did not reach out to the City Clerk but -- 13 or receive information from the City Clerk but, 14 instead, relied on written guidance provided by the 15 City Clerk. And that written guidance did not 16 completely describe the reporting and definitional 17 scheme that exists once the split in 2013 happened and 18 was, therefore, still ambiguous.</p> <p>19 And, finally, one candidate, Xavier Campos, 20 had a lawyer who correctly understood the -- the 21 complex definitional split and advised as to Title 12 22 definitions and how they differed from the Political 23 Reform Act requirements. And this lawyer even brought 24 this very issue to the attention of the City Clerk, 25 although it does not appear that any further action was</p>
<p>Page 22</p> <p>1 based on those four optional types of categories I just 2 described. Did some candidates comply? And, if so, 3 why? And why are they not similarly situated from 4 other candidates?</p> <p>5 And to that end and as Chairman Smith has 6 mentioned -- excuse me -- President Smith. I think I 7 just gave you a demotion.</p> <p>8 CHAIRMAN SMITH: No, Chair. 9 MR. MILLER: Oh, Chair? Okay. 10 CHAIRMAN SMITH: King? 11 MR. MILLER: We performed an additional 12 investigation, thorough under the circumstances -- we 13 tried to be thorough but efficient -- of all candidates 14 for all city elections since this 2013 definitional 15 split in the late contribution -- the split of late 16 contributions.</p> <p>17 And our reports include the results of that 18 investigation. And, I think, generally, I would 19 summarize those results as the following.</p> <p>20 First, all candidates, save one, failed 21 correctly to understand and follow Title 12's 22 definition and reporting requirements for late 23 contributions.</p> <p>24 Second, no candidate deliberately or 25 willfully flouted the rules and intentionally violated</p>	<p>Page 24</p> <p>1 taken in response to that contact.</p> <p>2 However, even with this expert legal 3 understanding of the accurate situation, the respondent 4 Campos nevertheless failed to file reports of all late 5 contributions as required, although that failure was 6 for reasons unconnected to the confusion over this 7 definitional split.</p> <p>8 Our investigation has not revealed a logical, 9 easily digestible basis as to why candidates fall into 10 the various categories just mentioned. Experienced 11 candidates with professional compliance support, 12 first-time candidates with volunteer staff or no staff 13 at all, to the same extent are in the same boat as to 14 violating the -- failing to submit the Late 15 Contribution Reports under Title 12. Doesn't matter 16 whether the contributions are large or small, whether 17 they raised a ton of money or a few contributions. 18 They're all essentially in the same boat.</p> <p>19 And I know that was an issue that was of 20 interest. I think Commissioner Peacock wanted to know 21 if there was some way to sort out why any disparities 22 would happen, and the data does not support any such 23 categorization.</p> <p>24 Only six of the respondents did not directly 25 receive incorrect advice from the City Clerk but,</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

<p style="text-align: center;">Page 25</p> <p>1 nevertheless, failed to comply with Title 12's 2 requirements. And -- however, with the possible 3 exception of Mr. Bhupindar Dhillon, none of those six 4 candidates received contributions over a thousand 5 dollars, requiring separate compliance with the 6 Political Reform Act.</p> <p>7 And so it's difficult, if not impossible, to 8 conclude as to what extent they were confused by the 9 definitional split. There's just an absence of 10 evidence as to why it is that they did not comply.</p> <p>11 And so our takeaway from all of the above -- 12 and I'm going to wrap up very soon. I appreciate your 13 indulgence. Our takeaway, confirmed by the data that 14 is in your written reports, suggests a perfect storm 15 of, number one, a rule that's confusing in the first 16 place; number two, a rule made more confusing by the 17 split in 2013 from the Political Reform Act definition; 18 number three, made more difficult by the incomplete and 19 confusing written material distributed by the City 20 Clerk's Office; and then, finally, the -- add an 21 incorrect advice provided by the City Clerk. And the 22 results -- and the result is the confusion that you are 23 now -- by now, well familiar with and the failure to 24 file late contributions.</p> <p>25 The facts of our investigation do not provide</p>	<p style="text-align: center;">Page 27</p> <p>1 available to them.</p> <p>2 CHAIRMAN SMITH: Yeah, I was thinking the 3 same thing myself. We've got -- and we only need one 4 there at the table. We can temporarily give that one 5 up. Why don't you take one of those. We don't need 6 two.</p> <p>7 Thank you, Cecilia.</p> <p>8 Okay. Now, any -- any questions for 9 Mr. Miller or requests for additional information?</p> <p>10 COMMISSIONER PIERRE-DIXON: I do not have any 11 further questions. I think that you have been 12 thorough, going over it in our last meeting. I've had 13 an opportunity to read it, so I'm satisfied at this 14 point. But I would leave it to my other commissioners.</p> <p>15 CHAIRMAN SMITH: I'm also satisfied. I don't 16 think we need any more.</p> <p>17 Okay. Thank you. And we'll move to the 18 next -- okay. At this time I would call upon 19 Respondents or their representatives to come forward 20 and present any written or oral testimony. Each 21 speaker will be limited to five minutes. And we can 22 take them -- I don't know. We want to start here.</p> <p>23 Yeah, Ms. Sutherland, if you want to -- just 24 call -- you need -- this is testimony. So if you would 25 please state your name for the record and raise your</p>
<p style="text-align: center;">Page 26</p> <p>1 us a basis to recommend that the Commission reasonably 2 treat different respondents differently. All are in 3 the same boat. Again, for the possible exception that 4 we note in our supplemental January report regarding 5 Mr. Dhillon. However, facts are the facts. And we are 6 the fact -- we're investigating the facts. And we 7 conclude, indisputably, that the respondents have 8 violated Title 12 by their failure to report late 9 contributions. Although, at the appropriate time, we 10 want to take the opportunity to share with you a 11 recommendation as to what action the Commission might 12 take if you agree with our initial conclusion that a 13 violation has occurred.</p> <p>14 And so I think I'll pause there and either 15 take questions from you -- and seek direction. We're 16 prepared to walk you through, election by election, 17 candidate by candidate, how many late contributions 18 were received and not reported and provide you all the 19 information you would like. But it's possible that you 20 have heard enough and are ready to have your 21 deliberations now. So I think I'll pause and let you 22 decide how and whether you'd like us to proceed.</p> <p>23 COMMISSIONER PEACOCK: Mr. Chairman, we have 24 got a couple of people without chairs and a couple 25 extra chairs. I wonder if we could make those chairs</p>	<p style="text-align: center;">Page 28</p> <p>1 right hand.</p> <p>2 MS. SUTHERLAND: Kathy Sutherland.</p> <p>3</p> <p>4 KATHY SUTHERLAND, 5 being first duly sworn by the Chairperson to tell the 6 truth, the whole truth and nothing but the truth, 7 testified as follows:</p> <p>8</p> <p>9 CHAIRMAN SMITH: Thank you. Go ahead.</p> <p>10 MS. SUTHERLAND: Five minutes?</p> <p>11 CHAIRMAN SMITH: Five minutes.</p> <p>12 MS. SUTHERLAND: So thank you very much. And 13 I prepared some thoughts here.</p> <p>14 To the Commission: When I first appeared 15 before you in November, I walked in confident that the 16 fair and ethical thing would be done and that the 17 charges would be dismissed. While listening to the 18 meeting, it dawned on me that any determination of 19 guilt by the Ethics Commission would be seen as an 20 ethical violation, not an election filing violation. I 21 was naively surprised that this -- that this matter did 22 not get dismissed and left the meeting shaking my head, 23 wondering where all this was going to go.</p> <p>24 Now, two months later, here we are again. 25 And in these two months I've become extremely</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 29

1 frustrated and, at times, angry with this entire
2 process. I've had to personally take time out of my
3 day to go to the post office to physically sign for a
4 copy of regulations that should have been provided with
5 the campaign binder, to satisfy some kind of
6 technicality. And I spent time reading the pages and
7 pages of correspondence from candidates, staff and
8 multiple lawyers. And lawyers write a lot. And I
9 spent time sending in my own personal response, and
10 here I am again.

11 I have much better things to do with my time.
12 I can't begin to count up the number of hours city
13 staff and their paid representatives have spent on this
14 issue. Hours that cost residents of the city of San
15 Jose real money. Money that could have been spent
16 improving the broken system but instead went to pay for
17 outside lawyers and precious staff time. And the hours
18 spent by each candidate reading the material and
19 responding to the Commission that can't be monetized
20 but our valuable and precious free personal hours.

21 You all know that there was no intention of
22 ignoring campaign reporting rules by myself or any of
23 the other candidates. You all know that we were
24 misinformed and not provided the necessary information
25 for proper filing. Yet here we are.

Page 30

1 And I am here again asking you to dismiss
2 these charges.
3 Questions I hope you're asking yourself as
4 you consider your next steps are: What do you hope to
5 gain from your decision? Does this improve
6 accountability or transparency? What is the cost to
7 the community for all this ill will? Will your
8 decision cause other potential candidates to think
9 twice about running for office? Given the
10 circumstances, will your actions damage the reputation
11 of me and other candidates? Is this a fair process if
12 these charges are not dismissed? And, most
13 importantly, what is the ethical and fair thing to do?

14 So, once again, I ask that you dismiss these
15 charges. And thank you very much for your time.

16 CHAIRMAN SMITH: Okay. Anyone else?
17 Sir?

18 MR. GAGLIARDI: Yeah, Don Gagliardi. I would
19 like to know what the source of the five-minute
20 limitation is.

21 CHAIRMAN SMITH: I'm sorry. Standard
22 procedure. Would you please state your name --

23 MR. GAGLIARDI: Is that stated in a rule?

24 CHAIRMAN SMITH: Would you please state your
25 name.

Page 31

1 MR. GAGLIARDI: I'm Don Gagliardi. I already
2 had stated my name.

3 CHAIRMAN SMITH: Okay. And would you raise
4 your right hand.
5

6 DONALD GAGLIARDI,
7 being first duly sworn by the Chairperson to tell the
8 truth, the whole truth and nothing but the truth,
9 testified as follows:
10

11 MR. GAGLIARDI: Okay. I have submitted a
12 number of submissions, at some length. I understand
13 that four of the five Commissioners are not lawyers,
14 and so I'd like to be able to explain some of what I've
15 submitted. Especially in the context of where I
16 believe this Commission is getting misadvice from the
17 lawyers who are advising this Commission.

18 I object to the five-minute limitation. It's
19 insufficient here. And the fact that you brought
20 claims against 20 candidates should not be -- prejudice
21 me and give me the opportunity to defend myself. So I
22 object to the five-minute. I don't believe that's
23 sufficient, and I believe it violates due process.

24 I'm an individual. I'm not True Fresh. And,
25 therefore, there are additional constitutional

Page 32

1 safeguards for my right to be heard.

2 I want to -- I want to underscore again: I
3 am legally innocent of the charges. Legally innocent.
4 These charges must be dismissed, based on the doctrine
5 of entrapment by estoppel.

6 Exculpatory information is something that
7 Mr. Miller is required, under your own rules, to
8 investigate. He's required. Section F9 of the
9 Resolution. He did not do so. Neither in his original
10 report, his supplemental report or in his remarks here
11 tonight. He has not discussed entrapment by estoppel.

12 You have nothing on this doctrine but the
13 submissions that I and Mr. Yip have given you on that
14 doctrine. It's exculpatory. It means that I'm legally
15 innocent. Whether or not I violated the specific
16 provisions of Title 12, I am legally innocent. Just as
17 somebody who commits a homicide in self-defense can be
18 found not guilty of a homicide. It's legally not
19 guilty. Same concept. It's a constitutional doctrine.
20 I have that defense. It's outlined in my briefing.

21 In addition, I have procedural defenses based
22 on due process. I know you received a memo from Rick
23 Doyle. I fundamentally disagree with this memo. You
24 would be well advised to disregard Mr. Doyle's memo.

25 And you don't have to take my word for it. I

8 (Pages 29 to 32)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 33	Page 35
<p>1 have a memo from the League of Cities. This is the 2 organization where city attorneys attend. This is two 3 months after the True Fresh decision, the California 4 Supreme Court decision in July of 2013. There was a 5 convocation of city attorneys across California on 6 constructing ethical due process walls following 7 various cases, including Howitt, which is a case that I 8 cited about the problems here.</p> <p>9 Now, this memo -- which I would read portions 10 into the record, but I don't have sufficient time. So 11 I advise you to look very long and hard. But I want to 12 make clear: This memo cites the Today's Fresh Start 13 case from the California Supreme Court. It also cites 14 the cases I cited. It distinguishes that there are 15 law. The cases I cited are on point. The cases 16 Mr. Doyle cited, the case is not on point. And, again, 17 they're all discussed in here. There wouldn't be a 18 convocation on constructing ethical due process laws 19 unless there's a real concern, even after the Today's 20 Fresh decision.</p> <p>21 So, again, Mr. Doyle's memo is not on point 22 here. And you would be very ill-advised to rely on 23 Mr. Doyle's memo for the view that you can go ahead and 24 accept Mr. Miller's acting in these multiple rules. 25 You cannot. This Commission directed Mr. Miller to</p>	<p>1 this up. It is the City Attorney's Office. The City 2 Attorney delegated giving advice to the candidates to a 3 nonlawyer, Toni Taber, the Clerk.</p> <p>4 That is, in itself, arguably, an ethical 5 violation. I believe it is an ethical violation. I 6 believe it means somebody should report Mr. Doyle to 7 the state bar and ask him to explain himself before 8 that ethics tribunal as to why he is submitting the 9 giving of legal advice to candidates to nonlawyers.</p> <p>10 CHAIRMAN SMITH: Can you wrap up, please. 11 It's five minutes.</p> <p>12 MR. GAGLIARDI: All right. Well, I think 13 I've raised my point. I am legally innocent, and this 14 Commission is legally disabled from doing anything 15 other than dismissing the charges.</p> <p>16 CHAIRMAN SMITH: Okay. Thank you. 17 Any questions? 18 Okay. Thank you. 19 Anyone else? Respondents? 20 Okay. If you would state your name and raise 21 your right hand, please. 22 MR. DIEP: My name is Lan Diep. 23 24 LAN DIEP, 25 being first duly sworn by the Chairperson to tell the</p>
Page 34	Page 36
<p>1 file a complaint against me and the other respondents. 2 He is acting both in an adversarial role and in an 3 evaluative and investigative role.</p> <p>4 That is illegal. It is illegal under case 5 law in the state of California that's still applied, 6 that city attorneys across the state were discussing 7 two months after the Today's Fresh decision that 8 Mr. Doyle cites in his memo. It is a very serious 9 issue, and it precludes any of you from doing anything 10 else but dismissing me, even if I'm guilty. Okay? 11 Even if I did not have a full legal exculpatory 12 defense -- which I do and Mr. Miller never discussed. 13 Even if I were guilty, you still would have to dismiss 14 these charges because of the procedural constitutional 15 mishaps that have happened here.</p> <p>16 Now, everybody has talked about how common 17 sense means you should dismiss these charges. But it 18 goes beyond common sense. It is illegal for this 19 Commission to do anything other than dismiss these 20 charges.</p> <p>21 It is a very, very serious matter. Mr. Doyle 22 is not taking it sufficiently seriously. He has done 23 an incredible disservice to this Commission. 24 And I'd like to point out to this Commission 25 it's not Toni Taber at the Clerk's Office that screwed</p>	<p>1 truth, the whole truth and nothing but the truth, 2 testified as follows: 3 4 CHAIRMAN SMITH: Thank you. 5 MR. DIEP: So I find myself in a tenuous 6 position to comment on, I believe, before the fact of 7 anything happening in this hearing. So legal argument 8 that I have, I submitted in writing. I think it's 9 adequate and perhaps better than anything I could state 10 right here on the spot.</p> <p>11 But I did want to take this time to 12 acknowledge the Commissioners, in their roles as civil 13 servants, volunteering their time to serve on this 14 Commission. I understand that that is a service, and 15 the City owes you a debt of gratitude for that.</p> <p>16 But I would just like to point out that as an 17 attorney, I have won cases; I've lost cases. And 18 generally you bite the bullet and you accept that in 19 your day-to-day work. Because, on the whole, you 20 believe in justice and you believe in the process.</p> <p>21 In this instance, if there is anything that 22 happens out of this hearing today but for dismissal -- 23 even if there is a finding of violation but there is 24 mitigating circumstances so there are no fines, that 25 would be a very bitter pill to swallow. Because,</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 37

1 observing this process over the many weeks, I can say
2 that I don't really have faith in this process.

3 There have been legal arguments put forth by
4 myself and other candidates in writing and in person.
5 Much of the debate, discussion, has been around that.
6 I don't really dispute any of the factual findings that
7 Mr. Miller has said. But nobody to this point has
8 really addressed the issues that Mr. Gagliardi and I
9 have brought up about process, about the fact of
10 whether somebody -- although he's compelled by the
11 regulations to file that complaint -- although I will
12 say, as an aside, the transcript shows that he prompted
13 that. But, anyways, even with that, there are real
14 questions of process, whether somebody who was
15 investigating that can fulfill dual roles.

16 This Commission needs to realize -- or think
17 about, reflect upon, what its role is in this city. Is
18 it there to enforce the law or is it there to sit in
19 judgment? You cannot do both.

20 If this Commission is tasked with going and
21 investigating campaigns and finding violators, it has
22 done a very poor job of that. Because these violations
23 stand back for two years. If this Commission is
24 complaint-driven and relies only on complaints to point
25 out people who have done wrong -- you investigate it

Page 38

1 and then assess fines as necessary -- it is somewhat of
2 a sham to go investigate other people who have not been
3 complained against when you order somebody, as part of
4 this Commission, to start the investigation.

5 So I come here hoping that this Commission
6 reflects upon these loftier issues and to see whether
7 it can recognize its own reflection. Thank you.

8 CHAIRMAN SMITH: Thank you.

9 Any questions?

10 None. Okay. Thank you.

11 Okay. Anyone else? Okay.

12 Mr. Miller, do you have any additional
13 comments at this point, before we go into discussion?

14 MR. MILLER: No.

15 CHAIRMAN SMITH: Okay. Now is the time for
16 the Commission to make its decision. We have the
17 following options.

18 First, we may find that further investigation
19 is necessary. If so, we shall direct the Evaluator to
20 conduct further investigations and report back to the
21 Commission.

22 Second, we may find that there is sufficient
23 evidence to establish that no violation has occurred.

24 Third, we may find that there is insufficient
25 evidence to establish that a violation has occurred.

Page 39

1 Fourth, we may find, based upon a
2 preponderance of the evidence from the entire record of
3 the proceedings, that a violation has occurred.

4 We would need to make a finding for each
5 respondent for each potential violation. The findings
6 may be made by separate motion, one for each respondent
7 and/or one for each potential violation, or the
8 Commission may act in one motion.

9 I'm going to make a couple of comments, and
10 then I'm going to make a motion to get the ball
11 rolling.

12 This is a very unusual case. Extraordinary
13 case. I've been on this Commission for almost nine
14 years, and I've seen nothing quite like it in many
15 respects. We have had cases in the past where there
16 were clear violations but there were significant
17 mitigating circumstances, and in those cases we have
18 typically found a violation but assess no penalty
19 because of the mitigating circumstances.

20 I -- I've thought a lot about this the last
21 few days. And in Mr. Miller's supplemental report, I
22 was struck by the idea that we could do that plus issue
23 a public statement that there were no ethical or moral
24 lapses involved or words to that effect. And then I
25 thought about it some more and I read some of the

Page 40

1 responses from the respondents, and I've decided, in my
2 own mind, that the only way we can really do this in a
3 just manner is to find no violation.

4 So I am going to make a motion, and then if
5 it gets seconded we can discuss it. So my motion is
6 that the Commission finds that there is sufficient
7 evidence to establish that no violation has occurred.
8 Anyone like to second that?

9 COMMISSIONER PIERRE-DIXON: I would second
10 it.

11 CHAIRMAN SMITH: Thank you.

12 Discussion?

13 COMMISSIONER PIERRE-DIXON: I'd like to begin
14 a discussion.

15 I've done a lot of thinking on this case in
16 the last few days or few months. I'm one of the
17 members of the Commission, I think, that really pushed
18 to get a full understanding of what has occurred in
19 this matter, because it was very upsetting to me to
20 understand that this many candidates did not understand
21 the process and the law. And if that's happening with
22 those who are lawyers, all the way down to those that
23 are laypersons, something needs to be done and
24 something needs to be corrected. And I wanted it to be
25 fully out there. I wanted to know everything about it.

10 (Pages 37 to 40)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 41	Page 43
<p>1 Because when I make decisions, I want to know 2 everything there is to know. 3 I think at this point, finally, we have our 4 answers. It's a shame that it's taken this long, but 5 we know process takes time. 6 We now find that no one did anything -- I 7 don't think anybody did anything purposely, but 8 certainly things did not go the way they should have. 9 We acknowledge that there is a problem there, and the 10 problem should be adjusted and fixed. 11 So I am satisfied at this time to find that 12 there is no violation, only based on the fact of all of 13 the investigation that has gone on and been cleared 14 before this point. 15 CHAIRMAN SMITH: Other comments? 16 COMMISSIONER PEACOCK: I just want to echo a 17 lot of what Commissioner Pierre-Dixon said. 18 I think this -- this inquiry has enabled the 19 Commission to take a thorough, detailed independent 20 look at kind of a messy situation. It enabled us to 21 compare apples to apples. And by looking at all 22 campaigns, we avoided this drip, drip that we saw at 23 the beginning and were able to make a -- and enabled 24 us, I believe, to make a final determination that 25 treats everyone as evenhandedly as possible.</p>	<p>1 to where you all are, that -- did somebody let the 2 shrubbery grow over? Maybe; maybe not. Was there 3 any -- any moral, any ethical, violation involved? I 4 don't believe so. 5 CHAIRMAN SMITH: Okay. Other comments? 6 COMMISSIONER GONZALES: Mr. Chair. 7 CHAIRMAN SMITH: Yes. 8 COMMISSIONER GONZALES: So I'm considering 9 whether we find a violation or not. 10 Now, I have to think about, I guess, some 11 issues that haven't been discussed today. And there's 12 been this assumption the whole time that because the 13 City Clerk gave ill advice, that it excuses all 14 violations of the law. And I have to challenge that 15 assumption as to why the City Clerk is the ultimate 16 authority. Because the fact is the City Clerk isn't 17 the authority. The City Clerk does not propagate laws. 18 The City Council does. With advice from the Ethics 19 Commission, which sometimes gets advice from the City 20 Clerk and City Attorney. So when you think about the 21 accusation that this is the supreme authority, the City 22 Clerk is not. 23 Now, indeed, if we were to take a step back 24 and look at the structure of laws in California, 25 elections are administered through two different sets</p>
Page 42	Page 44
<p>1 I know it wasn't fun for a lot of people, 2 especially those who believed they were following the 3 rules and found themselves concerned about their 4 reputations. 5 And if you look back and say we made a 6 decision at one point, then it turned out there was 7 some more facts. Then there were some more facts. And 8 I think that this inquiry has enabled us to call a 9 timeout, let the facts catch up and enable us to -- I 10 think, to make as good a decision, as defensible a 11 decision, as we can. 12 And I appreciate a lot of the information 13 that was received, the hard work that went into it and 14 the thoughtful responses from a lot of the candidates. 15 And one that came to mind -- not the only one -- was 16 from Councilwoman Carrasco. And she said, "What we are 17 accused of doing, under the circumstances, is the 18 equivalent of overgrown shrubbery, a technical code 19 violation that evinces no moral turpitude or lack of 20 ethics." 21 I appreciate the fact that a ruling by the 22 Ethics Commission is meaningful today, that somebody 23 feels like a rule that we do can speak to things, to 24 somebody's actions, to their reputation and all. 25 And I just -- so I -- I'm very much leaning</p>	<p>1 of laws, the Elections Code and the Political Reform 2 Act, which is embedded inside the Government Code. If 3 you look inside the Elections Code, it talks about 4 election officials. The prima facie in California 5 being the Secretary of State, which is in charge of 6 administering elections for the federal and state 7 government and then relies upon local election 8 officials to help administer local municipal elections. 9 The Elections Code defines election officials as 10 registrars of voters, city clerks and those officials 11 that have been designated as the elections official. 12 Those officials are in charge of administering the 13 Elections Code. 14 If you look inside the Elections Code, it 15 talks about the whole administration of the elections 16 process, but it doesn't talk about the regulation of 17 campaign finance. Indeed, campaign finance, the 18 reporting of contributions and expenditures, falls 19 under the Political Reform Act. The Political Reform 20 Act delegating the oversight of campaign finance to the 21 FPPC. 22 If you look at the structure of the City 23 Charter and Municipal Code here in San Jose, there is a 24 similar structure. If you look inside Title 12, there 25 is a specific subsection that says if you need advice,</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 45

1 you get it from the City Attorney. It doesn't say, Get
2 It from the City Clerk. It says, Get It from the City
3 Attorney.

4 There is a process inside the Code, if you
5 were to read Title 12, that allows you to be able to
6 get the opinion that you should have gotten. Indeed,
7 our Evaluator/Investigator, Mr. Miller, when he has a
8 finding, the first thing he does is he confers with the
9 City Attorney to make sure that his interpretation is
10 correct. And as we've been presented with this case,
11 the City Attorney confirms that there was a requirement
12 to report late contributions.

13 So, when I think about it, I think about
14 there is a process in the Code, in Title 12, that would
15 have allowed candidates to come to the same advice --
16 there was a process they should have followed. And it
17 makes me think that the candidates were not reading
18 Title 12, as they're obliged to do as candidates.

19 And so I have to play devil's advocate
20 because -- now, I do feel that the preponderance of
21 evidence -- I don't feel it's necessary to penalize
22 individuals any more. But I'm not exactly on the same
23 page that we should exonerate everyone and say no harm,
24 no foul.

25 CHAIRMAN SMITH: Okay. Any other comments?

Page 46

1 COMMISSIONER VEMULAPALLI: I was thinking
2 this for long time. And I --

3 CHAIRMAN SMITH: You want to get the
4 microphone.

5 COMMISSIONER VEMULAPALLI: So there is no
6 ethics violation. But on that Title 12, at least,
7 there is a violation. That's what I feel. It's not
8 intentional, but there is a mitigation factors. Maybe
9 bad advice or something. But, in my opinion, Title 12,
10 there is a violation.

11 I don't know if you can't mix everybody under
12 the same category, because I see some people actually
13 followed and some people are not followed. Some
14 people -- actually, at least one person, I see he
15 didn't even file the 497.

16 So that's my opinion.

17 CHAIRMAN SMITH: Okay. If there's any
18 additional comments? If not, we can vote.

19 COMMISSIONER PEACOCK: Just one additional
20 question here.

21 CHAIRMAN SMITH: Yes.

22 COMMISSIONER PEACOCK: It sounds like one of
23 the things that makes this complicated is you got a
24 little situation here, a little situation there. And
25 there's no -- the only common thread is there was the

Page 47

1 failure to file. Do we put additional weight on people
2 who were on the Commission -- City Council and voted
3 for this as opposed to others who were not and relied
4 on the Clerk's advice? I just want to ask that as a
5 question.

6 CHAIRMAN SMITH: My answer would be no. But
7 because people -- I guess I would expect people on City
8 Council to be a little more familiar with it. But
9 there's so much stuff that goes through City Council
10 that they have to approve. The stuff that comes from
11 us is just one little piece of it.

12 So I think that would probably be an unfair
13 burden to say that because you voted for this in one
14 15-minute session in one meeting two years ago, you
15 should have known better. That's just me. I don't
16 know if anybody else wants to comment on that.

17 COMMISSIONER PIERRE-DIXON: In looking at
18 everything and reading all the materials that we've
19 looked at since -- I'm trying to remember -- July, I'm
20 at the point now where I cannot say that there was a
21 violation, because people did not understand what the
22 law was. In my mind, if I was clear that they
23 understood what the law was and created the violation
24 and somehow just were late in reporting or didn't get
25 it in on time, then I would say technically there's a

Page 48

1 violation here, but I would find mitigating
2 circumstances.

3 From everything that I've seen, it's so far
4 apart and so across the board in terms of what everyone
5 knew. And the one candidate that did know exactly what
6 to do had an attorney on staff, working through the
7 process. If that's what it took for everybody to
8 understand the law, then I think that we have to say --
9 I have to say, in my own mind, that there's no
10 violation. And that's sort of where I put it.

11 CHAIRMAN SMITH: Okay. So -- Commissioner
12 Gonzales.

13 COMMISSIONER GONZALES: Just for that one
14 assumption, I have a quick response. It is not a
15 requirement to have an attorney to get an
16 interpretation. There was a clause in Title 12 at free
17 of charge that says ask the City Attorney for advice.
18 It is there. You can read it, and you would see it.

19 COMMISSIONER PIERRE-DIXON: I would be fine
20 with that, except the City Attorney also had a document
21 that was wasn't correct. And so we had that as well.

22 COMMISSIONER GONZALES: The City Clerk had
23 incorrect document. The City Attorney correctly
24 interpreted that there was a requirement for late
25 contribution reporting.

12 (Pages 45 to 48)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 49	Page 51
<p>1 CHAIRMAN SMITH: Okay. If there's nothing 2 else, the motion is to find no violation. So all in 3 favor? 4 (Commissioners Smith responded Aye and 5 Commissioners Pierre-Dixon and Peacock raised their 6 hands.) 7 CHAIRMAN SMITH: Opposed? 8 (Commissioners Gonzales and Vemulapalli 9 raised their hands.) 10 CHAIRMAN SMITH: The motion passes, 3 to 2. 11 Okay. Move on from that. Just a couple of 12 things before we tie this up. Couple of quick things. 13 First of all, upon adoption of the motion, 14 the Chair must ask each Commission member to certify 15 that they have heard or read the testimony at the 16 hearing and have reviewed all the evidence in the 17 record by affirming "So certified." 18 Commissioner Vemulapalli, so certified? 19 COMMISSIONER VEMULAPALLI: So certified. 20 CHAIRMAN SMITH: Commissioner Peacock? 21 COMMISSIONER PEACOCK: So certified. 22 CHAIRMAN SMITH: Commissioner Gonzales? 23 COMMISSIONER GONZALES: So certified. 24 CHAIRMAN SMITH: Commissioner Pierre-Dixon? 25 COMMISSIONER PIERRE-DIXON: So certified.</p>	<p>1 resolution. 2 MS. SILVA: Or it could be included in the 3 resolution that you're going to -- that we're going to 4 issue based on -- 5 CHAIRMAN SMITH: Okay. Because we have to -- 6 yeah, we have to issue -- we're going to have a motion 7 in a couple of minutes to do a resolution to document 8 our findings, and it could be addressed in there. 9 COMMISSIONER PEACOCK: Okay. 10 CHAIRMAN SMITH: Okay. So, if there's no 11 action, we'll move on. 12 Under the Commission's regulations and 13 procedures, the Commission shall issue a decision by 14 resolution. At this time I would entertain a motion 15 directing the City Attorney to draft a resolution of 16 the Commission's findings and authorizing the Chair to 17 approve and sign the resolution. 18 I'll make the motion. So moved. 19 COMMISSIONER PIERRE-DIXON: Second. 20 CHAIRMAN SMITH: Pierre-Dixon -- Commissioner 21 Pierre-Dixon, seconded. 22 No discussion. All in favor? 23 (All Commissioners responded Aye.) 24 CHAIRMAN SMITH: Any opposed? 25 (No response.)</p>
Page 50	Page 52
<p>1 CHAIRMAN SMITH: And me, Commissioner Smith, 2 so certified. 3 There are no orders or penalties. 4 Let me just ask one question. At the end of 5 this -- we talked about referrals to other agencies. 6 Is there any interest in the idea that was mentioned 7 that Mr. Dhillon violated the FPPC rule on the 8 thousand-dollar limit as well as the city limit? 9 I feel compelled to at least bring up the 10 thought: Should we refer that matter to the FPPC? We 11 found no violation of Title 12. I don't know. I'm 12 just sort of inclined to say no, but I really feel 13 compelled to bring it up and see if -- see what the 14 Commission thinks. If there's no interest, we'll move 15 on. 16 COMMISSIONER PEACOCK: I don't have a 17 response or a reaction on that. 18 At the appropriate time, I think it might be 19 helpful to have some sort of statement from the 20 Commission that says kind of we realize that there was 21 this mess, we -- sort of explains a little bit more 22 about -- of our reasoning on that. And I don't know 23 where the appropriate place to do that is. Could that 24 just be a separate resolution -- 25 CHAIRMAN SMITH: Oh, that could be in the</p>	<p>1 CHAIRMAN SMITH: It's unanimous. 2 Okay. This hearing is now closed. We move 3 on to the second hearing. 4 MS. McDANIEL: Public statement? Were you 5 going to add something in that resolution for the 6 public statement? 7 CHAIRMAN SMITH: Oh. 8 MS. SILVA: Yeah, you just closed it. Do you 9 want to -- 10 CHAIRMAN SMITH: I'm sorry. Do we want to go 11 back and decide what that statement should be? Or we 12 could -- we could draft a res- -- we could -- okay, let 13 me reopen. We could go back -- normally what we do is 14 we work up a resolution, and I sign it and out it goes. 15 We could work up some proposed language in this case 16 and bring it back to the Commission rather than sitting 17 here and trying to figure out the verblage tonight. 18 COMMISSIONER PEACOCK: I would suggest that, 19 because I think it also would apply to the other cases 20 involved, too. I think it's a good umbrella -- 21 CHAIRMAN SMITH: Yeah. The thought of 22 sitting here and trying to figure out that statement 23 now, with all of the other stuff we have to do -- 24 COMMISSIONER PEACOCK: I have some thoughts 25 on that. I'm not looking forward to wordsmithing by</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 53

1 committee so --

2 MS. SILVA: So let me clarify something. In
3 the ordinance, when there is an issuance of a public
4 statement, that's tied to if the Commission found that
5 there was a violation in this -- In this title. But
6 the Commission found that there was no violation, and
7 so the -- It's not tied into that that statement has to
8 be in conjunction with a motion that there was a
9 violation.

10 CHAIRMAN SMITH: So you're saying we could do
11 some kind of a public statement independent --

12 MS. SILVA: Independent -- outside --
13 independent of the motion that you did.

14 CHAIRMAN SMITH: Okay. That's fine. That's
15 probably better.

16 COMMISSIONER PEACOCK: That's fine. This is
17 more for the historical record than --

18 CHAIRMAN SMITH: And I think it could also
19 tie into things that we're doing and some of the things
20 that we've already done in the Code and then some of
21 the things that we're going to do on the resolution so
22 that these kind of things don't happen again. I think
23 the statement could include those kind of things.

24 MS. SILVA: And also take into consideration
25 that our next meeting is the second week of next month,

Page 55

1 City Clerk as required. The City Clerk promptly
2 notified and provided a copy of the complaint to the
3 Independent Evaluator, and the Evaluator notified and
4 provided a copy to the respondent on July 24th, 2015.
5 The Independent Evaluator's Report and Recommendations
6 were submitted to the City Clerk on August 24th, 2015,
7 and copies were then provided to the complainant,
8 respondents and Commission members and posted to the
9 city web site with the agenda for a hearing held on
10 September 9th, 2015. At the hearing, the Commission
11 found that the respondents had violated
12 Section 12.06.910 of the San Jose Municipal Code but
13 deferred action on penalties pending an investigation
14 and hearing on allegations that a majority of
15 candidates failed to meet the Municipal Code filing
16 requirements for late contributions during the City of
17 San Jose June 2014 Primary Election, November 2014
18 Run-off Election, April 2016 Special Primary Election
19 and June 2015 Special Run-off Election. At a
20 continuation of the hearing held on November 19, 2015,
21 the Commission rescinded the finding of a violation
22 pending completion of a hearing on the expanded
23 complaint regarding other candidates in municipal
24 elections held during 2014 and 2015.

25 I'm going to skip over the stuff about the

Page 54

1 so this is not going to come out in a week or two
2 weeks. It's going to have another meeting. We only
3 have monthly meetings.

4 CHAIRMAN SMITH: That's fine. I'll close it
5 again. And now that it's closed, we'll put something
6 on the agenda for next time to talk about a public
7 statement addressing this whole situation with this
8 group of complaints.

9 Okay. Now on to the second one, which I
10 suspect will take a lot less time.

11 Okay. If we're ready. I'm going to
12 short-circuit some of this stuff here.

13 Again, it's Wednesday, January 13th, 2016,
14 and this hearing of the City of San Jose Ethics
15 Commission is being held in Room W-120 of San Jose City
16 Hall. All members of the Commission are present.

17 The Commission will continue a hearing on a
18 complaint filed with the City Clerk on July 23rd, 2015,
19 by William Bohrer alleging that Tim Orozco and the
20 Neighbors for Tim Orozco for San Jose City Council
21 District 4 2015 Committee -- that's a mouthful --
22 violated Section 12.06.910 of the San Jose Municipal
23 Code. Specifically, the allegation is that the
24 respondent -- the respondents failed to file Late
25 Contribution Reports on this Form 497 with the San Jose

Page 56

1 resolution because we just talked about that in the
2 previous hearing. And about the rules. And we don't
3 need to introduce anybody except the complainant, who
4 is not -- William Bohrer, who is not here, and Tim
5 Orozco, who I know is here.

6 Okay. Under the Commission's regulations and
7 procedures, the respondents may submit a written
8 response to the Report and Recommendations. The
9 response may contain legal arguments, a summary of
10 evidence and any mitigating or exculpatory information.

11 I believe we -- we received a response from
12 Mr. Orozco dated September 8th, 2015. As far as I
13 know, that's the only written response we've received.

14 And the complainant may also submit a brief
15 or written argument. And we have not received anything
16 from the complainant.

17 So, at this point, public comment. If anyone
18 would like to make a public comment, as we discussed
19 last time.

20 Yes?

21 MS. McDANIEL: Council Member Khamis has
22 indicated that he would like to enter in the same
23 comments that he did previously for the other
24 complaint.

25 MR. KHAMIS: For Item Number VII.

14 (Pages 53 to 56)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 57	Page 59
<p>1 CHAIRMAN SMITH: Oh, that's the other one. 2 MS. McDANIEL: He made it during IIIA, 3 though. 4 CHAIRMAN SMITH: So you want -- 5 MR. KHAMIS: And for Tim too. 6 CHAIRMAN SMITH: Okay. So does that mean we 7 just insert that without him actually having to get up 8 and say it? 9 MS. McDANIEL: Is that okay or a no? 10 CHAIRMAN SMITH: It's okay with me. 11 MS. SILVA: That's fine. Just indicate the 12 same comments. 13 MS. McDANIEL: Okay. Okay. 14 CHAIRMAN SMITH: Same comments he made. 15 Okay. 16 MR. KHAMIS: Save you guys time. 17 CHAIRMAN SMITH: Okay. That's fine. Your 18 comments apply to all three. So that was understood, I 19 think. 20 Okay. Let's see. So there was no one 21 wishing to make public comment? 22 Did you want to -- do you want to make public 23 comment rather than -- 24 MS. PERRY: Yeah. 25 CHAIRMAN SMITH: Okay. Because you're the</p>	<p>1 told the 502 was sufficient, that information was up 2 and available to the public in February -- on February 3 26th. So everyone had the ability to see every 4 transaction on the net file after we finally got access 5 to the net file on the 26th of February. 6 So I just want to reiterate again this whole 7 process. I think we've learned a lot of things. And 8 I'm glad to see, on the positive side, that you are 9 making changes. You should be commended for making 10 those changes. Toni Taber should be commended for 11 coming forth and saying that there was violations by 12 her office in giving wrong information. So I think 13 we're all coming to a better understanding and an 14 education process for San Jose. 15 Thank you. 16 CHAIRMAN SMITH: That's -- thank you. 17 Any other public comment? 18 If not, Mr. Miller. Do you want to -- I 19 don't know if there's anything left to say after last 20 time. 21 MR. MILLER: I don't have any report to make 22 to you, given the actions you have taken. 23 I do feel that -- I will offer the following, 24 which is, in the future, in my future investigations of 25 complaints that are filed, I do not believe that</p>
Page 58	Page 60
<p>1 treasurer. Okay. So come on up. This is -- okay. So 2 that's Mr. Khamis. And this is Linda Perry, right? 3 MS. PERRY: Yes. After six months. 4 CHAIRMAN SMITH: Yes, we know you now. 5 MS. PERRY: I appreciate all the comments 6 that were made in the previous hearing. I think when 7 we have 22 candidates telling you all the same types of 8 issues and also Mr. Miller -- really, my concern is 9 that we are treated equally under this. 10 To update the group over the six months, all 11 the 497 forms were filed, including the loan. And, in 12 fact, all of them except that one had been filed before 13 our first hearing with you. We self-corrected. 14 CHAIRMAN SMITH: Okay. 15 MS. PERRY: We did -- we sought the advice 16 from the City Clerk's Office as well as questioned 17 written materials that were submitted, that did not 18 make sense, with the State. So we met the state 19 threshold at all times. It was just your Title 12 that 20 had the difference. 21 So, again, I'm concerned about the whole 22 stigma of the process. I think, Mr. Peacock, you gave 23 a good analogy. To me, if you're unethical, it was 24 intentional, you were trying to hide money -- that was 25 not the case. And even the loan case, when we were</p>	<p>1 Title 12 instructs me to consider an ethical lapse as a 2 predicate for a factual finding of a violation of the 3 Title 12 but, rather, is for the Commission to consider 4 in finding mitigating circumstances that might indicate 5 a -- how it affects its penalties. And I do -- so 6 that's how I'm going to continue to proceed. 7 COMMISSIONER PIERRE-DIXON: I don't think 8 there's any problem with that. I think the problem was 9 then what happened in this particular case in terms of 10 not only what they were told but what was also in the 11 manual. That was where my problem came in. 12 CHAIRMAN SMITH: Okay. Thank you. 13 Any other comments or questions of 14 Mr. Miller? 15 Okay. Mr. Orozco, did you care to say 16 anything or -- if you wish to, you can come forward 17 and -- 18 MR. OROZCO: Just public comment. 19 CHAIRMAN SMITH: Yeah, okay. We can go ahead 20 and treat it as public comment. That's fine. 21 MR. OROZCO: I don't have any prepared 22 remarks. But, you know, I do want to say it's been a 23 long process. I want to thank you, the Commissioners, 24 for coming -- bringing us together, for highlighting, 25 coming to -- making this rule come to light,</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 61

1 essentially, right? I mean, it was difficult for us
2 candidates to -- to find what this rule was all about,
3 the late contribution rule. And now, because of your
4 work, there has been change. And the City Council is
5 well aware of -- you know, of making that change. In
6 fact, I believe Johnny Khamis said that they did make
7 the change. So -- and it's only because of your
8 efforts that that happened.

9 So this will prevent candidates in the future
10 from making the same mistake. And so, you know,
11 it's -- it's an experience, and it was a good
12 experience to run for City Council. And, you know --
13 but we want good candidates to step up to the plate.
14 And the only way that they're going to do that is
15 knowing that the Ethics Commission is not going to be
16 down their back.

17 And, as you said, I mean, I can't afford to
18 hire an attorney to run for office. So I'm just a
19 simple guy. You know, an average -- an average guy
20 that stepped up to the plate, ran for Council. And I
21 don't want to be discouraged in the future from ever
22 having to run again. So -- and we don't want to
23 discourage other candidates to run again.

24 So I just want to thank you. Thank you so
25 much for your service. And that's that. Thank you.

Page 62

1 CHAIRMAN SMITH: Thank you.

2 Okay. The complainant is not here, so there
3 would be no complainant's testimony.

4 And we move on to Commission discussion and
5 action. I'm going to kick it off by making the same
6 motion that I made before, in the last hearing.
7 Without going through all the verbiage, I move that the
8 Commission find that there is sufficient evidence to
9 establish that no violation has occurred.

10 COMMISSIONER PIERRE-DIXON: I would second.

11 CHAIRMAN SMITH: Any discussion?

12 If not, all in favor?

13 (Commissioners Smith responded Aye and
14 Commissioners Pierre-Dixon and Peacock raised their
15 hands.)

16 CHAIRMAN SMITH: Opposed?

17 (Commissioners Gonzales and Vemulapalli
18 raised their hands.)

19 COMMISSIONER GONZALES: Me.

20 CHAIRMAN SMITH: It's 3 to 2 again. And the
21 motion passes.

22 Okay. So we need -- with that, we need to
23 get a certification. Upon adoption of the motion, the
24 Chair must ask each Commission member to certify that
25 they have heard or read the testimony at the hearing

Page 63

1 and have reviewed all the evidence in the record by
2 affirming "So certified."

3 Commissioner Vemulapalli?

4 COMMISSIONER VEMULAPALLI: So certified.

5 CHAIRMAN SMITH: Commissioner Peacock?

6 COMMISSIONER PEACOCK: So certified.

7 CHAIRMAN SMITH: Commissioner Gonzales?

8 COMMISSIONER GONZALES: So certified.

9 CHAIRMAN SMITH: Commissioner Pierre-Dixon?

10 COMMISSIONER PIERRE-DIXON: So certified.

11 CHAIRMAN SMITH: And me, Commissioner Smith,
12 so certified.

13 One of these days I'm just going to blank out
14 and forget somebody's name and be horribly embarrassed,
15 but it hasn't happened yet, I don't think.

16 Okay. One more item here. Again, under the
17 Council's -- Commission's regulations and procedures,
18 we shall issue a decision by resolution. At this point
19 I would entertain a motion directing the City Attorney
20 to draft a resolution of the Commission's findings and
21 authorizing the Chair to approve and sign the
22 resolution.

23 I'll move. So moved.

24 Do I have a second?

25 COMMISSIONER PIERRE-DIXON: Second.

Page 64

1 CHAIRMAN SMITH: Commissioner Pierre-Dixon
2 seconded.

3 All in favor?

4 (All Commissioners responded Aye.)

5 CHAIRMAN SMITH: Opposed?

6 (No response.)

7 CHAIRMAN SMITH: It's unanimous.

8 This hearing is closed.

9 (Discussion off the written record.)

10 CHAIRMAN SMITH: It is Wednesday,

11 January 13th, 2016, and this hearing of the City of San
12 Jose Ethics Commission is being held in Room W-120 of
13 San Jose City Hall. All members of the Commission are
14 present.

15 The Commission will conduct a hearing to
16 consider action to rescind or amend the penalty imposed
17 in the case of a complaint filed with the City Clerk on
18 June 5th -- do we have any water in here, or do we not
19 have that either?

20 MS. TABER: We have drinks.

21 CHAIRMAN SMITH: I'm losing my voice.

22 Thank you. Okay. It may not sound better to
23 you, but it sounds better to me.

24 Okay. Where was I? Let's see. To

25 rescind -- let's see. Let me start at the beginning.

16 (Pages 61 to 64)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 65

1 The Commission will conduct a hearing to
2 consider action to rescind or amend the penalty imposed
3 in the case of a complaint filed with the City Clerk on
4 June 5th, 2015, by Tom Cochran alleging that Manh
5 Nguyen and the Manh Nguyen for City -- San Jose City
6 Council D4 2015 Committee violated Section 12.06.910 of
7 the San Jose Municipal Code. Specifically, the
8 allegation was that the respondent failed to file
9 Form 497s, reporting as late contributions numerous
10 nonmonetary contributions received during the
11 statutorily required "Late Contribution" period
12 immediately preceding the date of the election. The
13 City Clerk promptly notified and provided a copy of the
14 complaint to the Independent Evaluator, and the
15 Evaluator notified and provided a copy to the
16 respondent on June 5th, 2015. The Independent
17 Evaluator's Report and Recommendations were submitted
18 to the City Clerk on July 1st, 2015, and copies were
19 then provided to the complainant, respondents and
20 Commission members and posted to the city web site with
21 the agenda for a public hearing held on July 8, 2015.
22 After considering the Report, testimony and evidence
23 presented at the public hearing, the Ethics Commission
24 made the following findings and conclusions, which are
25 documented in Commission Resolution 2015-13:

Page 66

1 One, that based on the preponderance of the
2 evidence presented from the entire record and
3 proceedings, there was sufficient evidence to establish
4 that at least 99 violations of San Jose Municipal Code
5 Section 12.06.910 by Respondents Manh Nguyen and Manh
6 Nguyen for San Jose Council D4 2015 Committee with
7 respect to the allegations in the Complaint have
8 occurred; and
9 Two, that the Ethics Commission in imposing
10 penalties considered all the relevant circumstances
11 surrounding the case and mitigating circumstances; and
12 Three, that the penalty imposed is assessed
13 at \$10,000; and
14 Four, that the penalty imposed includes
15 consideration of all late contributions and Statement
16 and Reporting requirements on Form 497s for both the
17 April 7th, 2015, and June 23rd, 2015, District 4
18 Special Elections.
19 Pursuant to San Jose Municipal Code
20 Section -- I'm going to leave that out, as to how we
21 got here. The bottom line is, because additional
22 information came up, with an additional complaint which
23 was filed and then expanded to include a total of
24 21 other candidates for similar but not identical,
25 certainly, situations, I requested that we consider

Page 67

1 having this hearing. And a motion was made earlier in
2 the meeting this evening -- and it passed by a 4-to-1
3 vote -- to have this hearing to consider rescinding or
4 amending the penalties.
5 I'm going to skip over the stuff about the
6 resolution and that the hearing is open to the public,
7 et cetera.
8 And at this time I'd ask that the -- well,
9 okay. Is anyone here officially representing the
10 respondent?
11 Mr. Padilla. Okay.
12 And there's no one here, as far as I know,
13 representing the original complainant; is that correct?
14 Okay. As far as Respondents' written
15 response, we have a response from Manh Nguyen dated
16 January 12th, 2016, which was attached to the agenda.
17 So, Commissioners and staff, we all have a copy.
18 And we have not received anything from the
19 original complainant.
20 Do we have any public comment on this in
21 addition to -- we had public comment when we were
22 considering having this hearing. Is there any
23 additional public comment?
24 No? Okay. Do we need to hear anything from
25 the Evaluator?

Page 68

1 COMMISSIONER PIERRE-DIXON: No.
2 CHAIRMAN SMITH: No. Okay.
3 Would -- okay. We can take testimony if --
4 as far as the respondent, if you wish. I can swear you
5 in and take testimony, or do your previous comments
6 cover what you want to cover? It's up to you.
7 MR. PADILLA: It's always fun to be on the
8 record.
9 CHAIRMAN SMITH: Okay. So raise your right
10 hand, please.
11 MR. DO: I'll keep that in mind, though.
12
13 JONATHAN PADILLA,
14 being first duly sworn by the Chairperson to tell the
15 truth, the whole truth and nothing but the truth,
16 testified as follows:
17
18 CHAIRMAN SMITH: Okay. Go ahead.
19 MR. PADILLA: I'll just be brief. I think
20 folks here have heard me probably too much over the
21 last half-year. I'd like to -- hope that this is the
22 last day we've entered this long nightmare for the City
23 of San Jose. I think the comments entered into the
24 record from our commentary dated January 12th speak for
25 themselves.

17 (Pages 65 to 68)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 69

1 I will say that I think, in the spirit of
2 what happened with the other cases, the best thing to
3 do would be to have no penalty; in fact, agendize this
4 to have the finding removed entirely, to follow the
5 precedent from the other hearings. That would be the
6 argument I would make.

7 And Council Member Nguyen, who is not here
8 tonight, had no malicious intention on any of this. It
9 was clearly a mistake, a mistake that has led us to,
10 possibly, on a good side, a clear look at the ethics
11 situation facing the City of San Jose, how we can make
12 our system stronger. I know the Council member has
13 felt that -- his hope, that out of all this turmoil the
14 City faces, that our system of democratic processes
15 becomes stronger and that people take a more active
16 role in their government. The last thing we want is
17 that this have a chilling effect on entry of people
18 into government.

19 So those would be my comments. Again,
20 hopefully allows us the ability to look at the system
21 as a whole and to avoid the politics behind the Ethics
22 Commission. Because I fear it has become a venue for
23 folks that have personal vendettas amongst each other.
24 And that's the last thing we want for City resources
25 and others. We've seen that be the case far too often

Page 70

1 the last few years.

2 CHAIRMAN SMITH: Any questions?

3 Thank you.

4 Okay. So the complainant is not present, so
5 we will not have any testimony.

6 Basically, now is the time to make a
7 decision. We have found violations, and we consider
8 orders and penalties. And we have four options. We
9 can find mitigating circumstances, in which case we
10 would rescind the original penalty and take no further
11 action; we could issue a public statement or reprimand;
12 we could require corrective action by a particular
13 deadline and/or we can impose a penalty in accordance
14 with Chapter 12.04, which, as we discussed earlier, if
15 we do decide to impose -- I guess it would be rescind
16 the original and agree -- and impose a different
17 penalty, but it would have to be at least a thousand
18 dollars.

19 And I'm not going to make a motion. I'm
20 going to leave the floor open. Discussion, motion,
21 whatever you want.

22 COMMISSIONER PIERRE-DIXON: I say we make a
23 motion to rescind the penalty.

24 CHAIRMAN SMITH: I'll second that.

25 Discussion?

Page 71

1 COMMISSIONER GONZALES: Question.

2 CHAIRMAN SMITH: Yes.

3 COMMISSIONER GONZALES: So, just to clarify
4 or confirm, if we are going to rescind it, there is no
5 minimum penalty?

6 CHAIRMAN SMITH: Right. It's only -- it's
7 only if we decide to assess a penalty under the old
8 rules that the thousand dollars kicks in. That's why
9 we had to take the break, to make sure we had it
10 straight with the City Attorney. So, basically, if
11 we -- if this motion were to pass, the final result
12 would be the original finding of violation would stand,
13 but because of mitigating circumstances there would be
14 no penalty.

15 Discussion?

16 Commissioner Peacock?

17 COMMISSIONER PEACOCK: Yeah, this is also a
18 question to clarify -- I think it's obvious -- to make
19 sure. Out of the range of candidates we discussed
20 tonight who have been part of this -- this inquiry, all
21 of them except for one would be seen as having no
22 violation. Council Member Nguyen would be shown with a
23 violation, but he --

24 CHAIRMAN SMITH: That's correct.

25 COMMISSIONER PEACOCK: -- but his would not

Page 72

1 be -- have a penalty, right?

2 CHAIRMAN SMITH: That's correct.

3 Any other discussion?

4 Okay. Let's vote. All in favor of the
5 motion to rescind the penalty.

6 (All Commissioners raised their hands.)

7 CHAIRMAN SMITH: It's unanimous.

8 Okay. So I need, again, to ask each

9 Commission member to certify that you have heard or
10 read the testimony and reviewed all the evidence in the
11 record by affirming "So certified."

12 Commissioner Vemulapalli?

13 COMMISSIONER VEMULAPALLI: So certified.

14 CHAIRMAN SMITH: So certified.

15 Commissioner Peacock?

16 COMMISSIONER PEACOCK: So certified.

17 CHAIRMAN SMITH: Commissioner Gonzales?

18 COMMISSIONER GONZALES: So certified.

19 CHAIRMAN SMITH: Commissioner Pierre-Dixon?

20 COMMISSIONER PIERRE-DIXON: So certified.

21 CHAIRMAN SMITH: And me, Commissioner Smith,
22 so certified.

23 Now, I need to ask the question kind of to

24 the point that Commissioner Gonzales made at our last
25 meeting. Given that the -- this relates to the FPPC.

18 (Pages 69 to 72)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 73	Page 75
<p>1 Given that the FPPC took no action based on action we 2 had taken, should we take some step to notify the FPPC 3 that we have rescinded that action, and then it's up to 4 them to decide if they want to do anything? 5 MS. SILVA: There was a separate filing that 6 was made to the FPPC. 7 MS. TABER: Yeah, I would be more 8 comfortable. Because I believe it had been referred to 9 the FPPC by somebody else. 10 CHAIRMAN SMITH: Oh, it didn't come from us. 11 That's right. 12 MS. McDANIEL: There was a complaint. There 13 was a complaint. 14 CHAIRMAN SMITH: They sent a letter -- 15 COMMISSIONER GONZALES: It was the same 16 complainant. 17 CHAIRMAN SMITH: It was the same -- yeah, it 18 was the same complainant. But we saw a letter from the 19 FPPC that basically said, as I recall, because San Jose 20 Ethics Commission has imposed a fine we're not going to 21 do anything. 22 MS. McDANIEL: Cochran filed a complaint with 23 us as well as this Commission, and they responded to 24 his complaint. 25 CHAIRMAN SMITH: I'm just wondering if we</p>	<p>1 thing that has changed is there were claims made at the 2 time of the original hearing about bad advice from the 3 Clerk's office. And we discounted that, largely, I 4 believe, in making our findings. And it was when we 5 got the other cases that we realized, oh, yeah. There 6 was some bad advice. 7 So I think, in all fairness, the violations 8 are still there. And they're rather large violations 9 and a lot of them. But the matter of -- at least as it 10 relates to the Municipal Code requirement regarding the 11 contributions of over 250 within the last 16 days, 12 that's different. As far as the state rules, I don't 13 know that anything has changed. 14 COMMISSIONER PEACOCK: To me, it seems 15 appropriate that if the -- if the FPPC made a decision 16 based on one action of this Commission, it would just 17 be fair to say -- to notify the Commission that what we 18 did changed. And they -- 19 CHAIRMAN SMITH: That wasn't -- 20 COMMISSIONER GONZALES: The letter says "The 21 Enforcement Division has completed its investigation of 22 the facts." So the FPPC did conduct its own 23 investigation. I don't know the correspondence between 24 Council Member Candidate Manh Nguyen and the FPPC. But 25 the only decision they made regarding our actions was</p>
Page 74	Page 76
<p>1 should do anything. 2 MS. TABER: I was thinking of something else. 3 CHAIRMAN SMITH: I don't know. I guess -- 4 anybody, staff, have any advice on that as to -- or 5 we're free to do what we want? 6 MS. DEIGNAN: You're free to do what you 7 want. 8 COMMISSIONER GONZALES: I would support 9 referring it back to the FPPC. Because he did violate 10 state law, and they did indicate that they agreed with 11 our findings and did not penalize him because they 12 thought we were going to penalize him. And 13 Commissioners and people testifying over the past 14 hearings have said that facts have changed, but I don't 15 think facts of this case have changed. The only thing 16 that's really changed is that we found out more people 17 violated the law. 18 CHAIRMAN SMITH: That's correct. 19 COMMISSIONER GONZALES: And so, from the 20 start, the same defense complaints that Council Member 21 Manh Nguyen gave to the State, is the same as it is 22 now. I would think the FPPC would still have its 23 finding of a violation. 24 CHAIRMAN SMITH: Yeah, I think the only 25 thing -- correct my agreement with you, I think the one</p>	<p>1 penalization. 2 CHAIRMAN SMITH: Right. Yeah. So -- yeah. 3 So I guess if somebody wanted to, we could have a 4 motion to notify FPPC of this change of circumstance. 5 We have a comment. I'll accept a comment. 6 MR. PADILLA: Just a quick comment. If 7 notice is to be given, that would be to explain the 8 extenuating circumstances and just the quagmire that 9 the City has gone through. That would basically note 10 the situation with the Clerk's Office and explain the 11 relevance to the whole scenario. 12 MR. DO: And it is not only that you dismiss 13 the fine -- dismiss the fine today, but you also 14 dismiss the 20-plus others. 15 CHAIRMAN SMITH: I think, to be fair, we all 16 have to be put into perspective. It wouldn't just be, 17 Oh, by the way, we had a change of heart. Yeah, it 18 would have to be -- it would be -- could be rather 19 extensive explanation for it. 20 MR. DO: And would open the additional 21 investigation that we have to go through. And Manh 22 Nguyen would have to go through a fact-finding for the 23 FPPC that he went through here. 24 CHAIRMAN SMITH: Right. Well, that's -- 25 yeah. I don't know.</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Page 77	Page 79
<p>1 I can -- did we have -- we don't have a 2 motion. Yeah, I do think there's an up side and a down 3 side. On the one hand, I think it would be fair, if 4 they based their decision on penalties on something we 5 did, to let them know. But, on the other hand, if it's 6 going to continue, it would take a rather extensive 7 letter to -- a well-thought-out letter to lay out all 8 the circumstances. And it might keep this whole thing 9 dragging on for more months while the FPPC messes with 10 it. I'm sort of -- I don't know. 11 Other comments? 12 COMMISSIONER VEMULAPALLI: Are we required to 13 let them -- are we required to -- 14 COMMISSIONER GONZALES: We're not required 15 to. We have an option to defer it to the FPPC. 16 CHAIRMAN SMITH: Hang on a second. Okay. 17 So -- okay. Well, we need a motion or we move on and 18 close the hearing. 19 Don't have a motion? Okay. We don't have a 20 motion. 21 So, under the Commission's regulations and 22 procedures -- although I guess city staff could feel 23 compelled independent of us, if they wanted to, if they 24 felt it was the right thing to do. 25 Anyway, under the Commission's regulations</p>	<p>1 2 I, NOELIA ESPINOLA, do hereby certify: 3 That said hearing was taken down by me at the 4 time and place therein named, and thereafter reduced to 5 computerized transcription under my direction. 6 I further certify that I am not interested in 7 the outcome of this hearing. 8 9 10 11 Dated: _____ 12 NOELIA ESPINOLA, CSR #8060 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>Page 78</p> <p>1 and procedures, the Commission shall issue a decision 2 by resolution. At this time I would entertain a motion 3 directing the City Attorney to draft a resolution on 4 the Commission's findings and penalties and authorizing 5 the Chair to approve and sign the resolution. 6 So moved. 7 CHAIRMAN SMITH: Do I have a second? 8 COMMISSIONER PIERRE-DIXON: Yes. 9 CHAIRMAN SMITH: Second. Okay. All in 10 favor? 11 (All Commissioners responded Aye.) 12 CHAIRMAN SMITH: Any opposed? 13 (No response.) 14 CHAIRMAN SMITH: Okay. Passes unanimously. 15 This hearing is now closed, and we'll move on 16 to other business. 17 (Whereupon, Item III Hearings concluded at 18 7:33 p.m.) 19 20 21 22 23 24 25</p>	

A				
ability 17:7 59:3 69:20	76:20	afford 61:17	answer 10:25 47:6	39:18 71:7
able 12:14 31:14 41:23 45:5	Additionally 17:6	agencies 50:5	answers 41:4	assessed 66:12
absence 25:9	address 11:24 12:14 15:8,18	agenda 4:7 5:12 5:19 8:14 54:6 55:9 65:21 67:16	anybody 17:13 41:7 47:16 56:3 74:4	assumption 43:12,15 48:14
accept 33:24 36:18 76:5	addressed 37:8 51:8	agendize 69:3	Anyway 77:25	attached 67:16
access 59:4	addressing 54:7	agendized 19:7	anyways 37:13	attend 33:2
accountability 30:6	adequate 36:9	ago 12:17 47:14	apart 48:4	attention 13:7 23:24
accurate 24:3	adjusted 41:10	agree 26:12 70:16	apologize 10:9	attorney 2:9,10 13:13 35:2 36:17 43:20 45:1,3,9,11 48:6,15,17,20 48:23 51:15 61:18 63:19 71:10 78:3
accusation 43:21	administer 44:8	agreed 74:10	apologized 13:8	attorneys 2:16 33:2,5 34:6
accused 42:17	administered 43:25	agreement 74:25	appear 20:1 23:25	Attorney's 35:1
acknowledge 36:12 41:9	administering 16:3,5 44:6,12	ahead 9:15 16:12,23 18:18 18:19 28:9 33:23 60:19 68:18	appeared 4:11 28:14	August 4:4 19:6 19:6 55:6
acknowledged 23:4	administration 44:15	allegation 3:21 54:23 65:8	apples 41:21,21	authority 43:16 43:17,21
act 19:22 20:3,8 20:10,15 21:9 23:23 25:6,17 39:8 44:2,19 44:20	admitted 10:18	allegations 55:14 66:7	applicable 20:16 20:19	authorizing 51:16 63:21 78:4
acting 33:24 34:2	adopted 5:22 6:1	alleging 3:18 4:20 54:19 65:4	applied 34:5	available 27:1 59:2
action 5:13 23:25 26:11 51:11 55:13 62:5 64:16 65:2 70:11,12 73:1,1,3 75:16	adoption 49:13 62:23	alleging 3:18 4:20 54:19 65:4	apply 6:6 52:19 57:18	Avenue 2:21
actions 30:10 42:24 59:22 75:25	ADRIAN 2:6	alleging 3:18 4:20 54:19 65:4	approach 20:23	average 61:19 61:19
active 69:15	advantage 2:20 21:16	allow 17:9	appropriate 17:23 18:4,11 18:16 26:9 50:18,23 75:15	avoid 69:21
add 25:20 52:5	adversarial 34:2	allowed 16:19 17:11 45:15	approve 47:10 51:17 63:21 78:5	avoided 41:22
addition 32:21 67:21	advice 14:8 16:14 17:4 21:10 23:5,8 24:25 25:21 35:2,9 43:13 43:18,19 44:25 45:15 46:9 47:4 48:17 58:15 74:4 75:2,6	allows 16:22 45:5 69:20	April 5:5,23 55:18 66:17	aware 61:5
additional 17:8 17:11 21:22 22:11 27:9 31:25 38:12 46:18,19 47:1 66:21,22 67:23	advise 33:11	ambiguous 23:18	arguably 35:4	Aye 49:4 51:23 62:13 64:4 78:11
	advised 13:14 23:7,21 32:24	amend 64:16 65:2	argument 8:18 36:7 56:15 69:6	
	advising 31:17	amending 67:4	arguments 7:24 17:25 37:3 56:9	B
	advisor 14:3	amount 12:11 12:17 20:11	Arlene 2:8 7:16	back 7:4 19:16 21:18 37:23 38:20 42:5 43:23 52:11,13 52:16 61:16 74:9
	advocate 45:19	amplifying 12:25	aside 37:12	
	affirmation 6:7	analogy 58:23	asking 30:1,3	
	affirming 49:17 63:2 72:11	and/or 5:5 39:7 70:13	assess 38:1	
		angry 29:1		
		annual 16:24		

REPORTER'S TRANSCRIPT OF PROCEEDINGS

bad 16:14 17:4 46:9 75:2,6	11:5,9 14:21 Bohrer 3:17 6:16 21:19 54:19 56:4	21:15 22:24 23:10,19 26:17 26:17 29:18 48:5 75:24	69:2 75:5 catch 42:9 categories 21:6 22:1 24:10 categorization 24:23 category 6:20 21:15 46:12 caught 14:13 cause 11:25 30:8 causing 14:12 Cecilia 2:12 7:19 27:7 certainly 41:8 66:25 certification 62:23 certified 12:10 49:17,18,19,21 49:23,25 50:2 63:2,4,6,8,10 63:12 72:11,13 72:14,16,18,20 72:22 certify 49:14 62:24 72:9 79:2,6 cetera 11:16 67:7 Chair 2:4 6:9,14 22:8,9 43:6 49:14 51:16 62:24 63:21 78:5 Chairman 3:3 6:24 7:4,7,18 7:20 9:22 10:3 10:5,8 11:5,8 12:20 14:15 16:7,9 17:17 18:15 22:5,8 22:10 26:23 27:2,15 28:9 28:11 30:16,21 30:24 31:3	35:10,16 36:4 38:8,15 40:11 41:15 43:5,7 45:25 46:3,17 46:21 47:6 48:11 49:1,7 49:10,20,22,24 50:1,25 51:5 51:10,20,24 52:1,7,10,21 53:10,14,18 54:4 57:1,4,6 57:10,14,17,25 58:4,14 59:16 60:12,19 62:1 62:11,16,20 63:5,7,9,11 64:1,5,7,10,21 68:2,9,18 70:2 70:24 71:2,6 71:24 72:2,7 72:14,17,19,21 73:10,14,17,25 74:3,18,24 75:19 76:2,15 76:24 77:16 78:7,9,12,14 Chairperson 28:5 31:7 35:25 68:14 chairs 26:24,25 26:25 Chair's 15:16 challenge 43:14 change 20:16 61:4,5,7 76:4 76:17 changed 8:21 20:4,10 74:14 74:15,16 75:1 75:13,18 changes 20:6 59:9,10 Chapter 70:14 charge 13:18
based 4:9 10:24 12:5 21:12 22:1 32:4,21 39:1 41:12 51:4 66:1 73:1 75:16 77:4	borne 21:2 bottom 66:21 break 71:9 Bridgett 2:15 7:10 18:21 brief 8:17 56:14 68:19 briefing 32:20 bring 13:6 16:21 50:9,13 52:16 bringing 60:24 broader 4:15 19:9 broken 29:16 brought 23:23 31:19 37:9 bullet 36:18 burden 47:13 business 15:4 78:16 Buu 4:23	candidates 4:10 4:12,15 11:4 11:13 13:9 15:25 17:10,12 17:13 18:9 20:19 21:3,22 21:25 22:2,4 22:13,20 23:3 23:9,12 24:9 24:11,12 25:4 29:7,23 30:8 30:11 31:20 35:2,9 37:4 40:20 42:14 45:15,17,18 55:15,23 58:7 61:2,9,13,23 66:24 71:19 candidate's 20:24,25 card 17:24 cards 9:8,10 16:10 care 60:15 Caroline 2:16 7:14 Carrasco 4:21 8:9 42:16 carry 10:17 case 9:1 12:2 18:5 33:7,13 33:16 34:4 39:12,13 40:15 45:10 52:15 58:25,25 60:9 64:17 65:3 66:11 69:25 70:9 74:15 cases 33:7,14,15 33:15 36:17,17 39:15,17 52:19	ball 39:10 bar 35:7 basically 70:6 71:10 73:19 76:9 basis 24:9 26:1 becoming 14:4 beginning 41:23 64:25 begins 18:5 believe 15:14 23:6 31:16,22 31:23 35:5,6 36:6,20,20 41:24 43:4 56:11 59:25 61:6 73:8 75:4 believed 42:2 benefit 19:13,14 best 9:12 21:12 69:2 better 9:25 12:8 29:11 36:9 47:15 53:15 59:13 64:22,23 beyond 34:18 Bhupindar 4:25 25:3 binder 29:5 bit 8:22 50:21 bite 36:18 bitter 36:25 blank 63:13 board 48:4 boat 24:13,18 26:3 Bob 4:20 7:3 8:8	
	C			
	C 2:2 3:1 CA 1:16 2:18,22 California 33:3 33:5,13 34:5 43:24 44:4 call 15:16 27:18 27:24 42:8 campaign 14:19 14:21 17:9 20:1 29:5,22 44:17,17,20 campaigns 37:21 41:22 Campos 4:21 23:19 24:4 candidate 9:17 11:10 13:3 14:2 21:7,8,11			

14:24 44:5,12 48:17 charged 15:6 charges 10:14 11:3,12,23 14:8 15:2 18:9 28:17 30:2,12 30:15 32:3,4 34:14,17,20 35:15 Charles 4:20 Charter 44:23 Chief 2:10 chilling 69:17 CHRIS 2:5 circumstance 76:4 circumstances 16:18 22:12 30:10 36:24 39:17,19 42:17 48:2 60:4 66:10,11 70:9 71:13 76:8 77:8 cited 33:8,14,15 33:16 cites 33:12,13 34:8 Cities 33:1 citizen 14:18 city 1:1,14 2:9 2:10,11,13 3:12,13,17,19 3:24,24 4:4,7 4:19 5:9,12,16 5:18,23 7:9 10:18,22 11:10 11:24 12:14 13:2,13,15,20 14:20 21:11,11 21:13 22:14 23:3,6,12,13 23:15,24 24:25 25:19,21 29:12	29:14 33:2,5 34:6 35:1,1 36:15 37:17 43:13,15,16,17 43:18,19,20,21 44:10,22 45:1 45:2,2,9,11 47:2,7,9 48:17 48:20,22,23 50:8 51:15 54:14,15,18,20 55:1,1,6,9,16 58:16 61:4,12 63:19 64:11,13 64:17 65:3,5,5 65:13,18,20 68:22 69:11,14 69:24 71:10 76:9 77:22 78:3 civil 36:12 claims 31:20 75:1 Clara 1:14 clarify 53:2 71:3 71:18 class 14:5 clause 48:16 clear 33:12 39:16 47:22 69:10 cleared 41:13 clearly 69:9 Clerk 2:11,13 3:17,24,25 4:4 4:19 5:9,16 10:18 13:7 21:11 23:3,6 23:12,13,15,24 24:25 25:21 35:3 43:13,15 43:16,17,20,22 45:2 48:22 54:18 55:1,1,6 64:17 65:3,13	65:18 clerks 44:10 Clerk's 12:1 21:13 25:20 34:25 47:4 58:16 75:3 76:10 close 54:4 77:18 closed 52:2,8 54:5 64:8 78:15 Cochran 65:4 73:22 code 3:21 5:2 19:21 42:18 44:1,2,3,9,13 44:14,23 45:4 45:14 53:20 54:23 55:12,15 65:7 66:4,19 75:10 combination 21:6 come 15:1 27:19 38:5 45:15 54:1 58:1 60:16,25 73:10 comes 47:10 comfortable 73:8 coming 59:11,13 60:24,25 commended 16:6 59:9,10 comment 8:23 8:25 9:20 17:19 36:6 47:16 56:17,18 57:21,23 59:17 60:18,20 67:20 67:21,23 76:5 76:5,6 commentary 68:24 comments 38:13	39:9 41:15 43:5 45:25 46:18 56:23 57:12,14,18 58:5 60:13 68:5,23 69:19 77:11 Commission 1:2 2:4 3:12,14,15 4:6,14 5:11,13 5:18 6:2,12,13 11:23 14:6 15:8 18:8,11 19:12,17 20:23 21:18 23:8 26:1,11 28:14 28:19 29:19 31:16,17 33:25 34:19,23,24 35:14 36:14 37:16,20,23 38:4,5,16,21 39:8,13 40:6 40:17 41:19 42:22 43:19 47:2 49:14 50:14,20 51:13 52:16 53:4,6 54:15,16,17 55:8,10,21 60:3 61:15 62:4,8,24 64:12,13,15 65:1,20,23,25 66:9 69:22 72:9 73:20,23 75:16,17 78:1 Commissioner 24:20 26:23 27:10 40:9,13 41:16,17 43:6 43:8 46:1,5,19 46:22 47:17 48:11,13,19,22 49:18,19,20,21	49:22,23,24,25 50:1,16 51:9 51:19,20 52:18 52:24 53:16 60:7 62:10,19 63:3,4,5,6,7,8 63:9,10,11,25 64:1 68:1 70:22 71:1,3 71:16,17,25 72:12,13,15,16 72:17,18,19,20 72:21,24 73:15 74:8,19 75:14 75:20 77:12,14 78:8 commissioners 8:12 10:15 18:25 27:14 31:13 36:12 49:4,5,8 51:23 60:23 62:13,14 62:17 64:4 67:17 72:6 74:13 78:11 Commission's 4:17 5:20 7:10 7:21 18:12 51:12,16 56:6 63:17,20 77:21 77:25 78:4 commits 32:17 committed 15:3 committee 3:20 15:1,17,22 53:1 54:21 65:6 66:6 common 34:16 34:18 46:25 community 30:7 compare 41:21 compel 6:9,10 compelled 37:10 50:9,13 77:23 compile 6:5
---	---	--	---	--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

complainant 4:5 6:8,16 8:16 15:16 55:7 56:3,14,16 62:2 65:19 67:13,19 70:4 73:16,18	19:23 32:19 concern 33:19 58:8 concerned 42:3 58:21 conclude 25:8 26:7 concluded 78:17 conclusion 26:12 conclusions 65:24 conduct 38:20 64:15 65:1 75:22 confers 45:8 confident 28:15 confirm 71:4 confirmed 25:13 confirms 45:11 conflict 15:19 confused 14:25 25:8 confusing 11:14 15:25 25:15,16 25:19 confusion 21:10 24:6 25:22 conjunction 53:8 consider 17:16 18:4 30:4 60:1 60:3 64:16 65:2 66:25 67:3 70:7 consideration 13:21 16:19 53:24 66:15 considered 66:10 considering 43:8 65:22 67:22 constitutional 31:25 32:19 34:14	constructing 33:6,18 contact 24:1 contain 7:23 56:9 context 14:23,25 15:13 19:17 31:15 continuation 55:20 continue 3:15 18:7 54:17 60:6 77:6 continued 5:14 contribution 3:23 4:13 5:4 19:23 20:4,5,9 22:15 23:5 24:15 48:25 54:25 61:3 65:11 contributions 5:3 19:24 20:11,12 22:16 22:23 24:5,16 24:17 25:4,24 26:9,17 44:18 45:12 55:16 65:9,10 66:15 75:11 contributor 14:20 convocation 33:5,18 copies 4:5 5:10 5:17,24 8:13 55:7 65:18 copy 3:25 4:2 5:7 29:4 55:2,4 65:13,15 67:17 correct 23:7 45:10 48:21 67:13 71:24 72:2 74:18,25 corrected 40:24	corrective 70:12 correctly 22:21 23:20 48:23 correspondence 29:7 75:23 Cortese 4:24 8:5 cost 29:14 30:6 Council 3:19 5:23 9:17 10:22 11:10 13:2,15,15,16 13:17,20 14:20 43:18 47:2,8,9 54:20 56:21 61:4,12,20 65:6 66:6 69:7 69:12 71:22 74:20 75:24 Councilwoman 42:16 Council's 63:17 counsel 23:3 count 29:12 couple 13:3,7 14:22 16:21 26:24,24 39:9 49:11,12 51:7 court 6:4 33:4 33:13 cover 68:6,6 created 47:23 CSR 1:18 2:21 79:11 cut 10:2	8:8,9,9,11 56:12 67:15 68:24 79:10 daunting 14:2 Dave 8:5 dawned 28:18 day 29:3 68:22 days 14:4 20:13 39:21 40:16 63:13 75:11 day-to-day 36:19 deadline 70:13 debate 37:5 debt 36:15 decide 21:15,17 26:22 52:11 70:15 71:7 73:4 decided 13:18 40:1 decision 30:5,8 33:3,4,20 34:7 38:16 42:6,10 42:11 51:13 63:18 70:7 75:15,25 77:4 78:1 decisions 41:1 dedicated 12:18 deem 19:14 defend 31:21 defense 18:2 32:20 34:12 74:20 defenses 32:21 defensible 42:10 defer 77:15 deferred 55:13 defines 44:9 definition 20:3,5 22:22 25:17 definitional 21:4 22:14 23:16,21 24:7 25:9
D				
			D 2:15 3:1 damage 30:10 Dan 4:23 data 19:12 21:2 24:22 25:13 data-intensive 19:11 date 1:12 65:12 dated 8:2,3,6,6,7	

definitions 20:15 23:22	direct 38:19	33:14	35:25 68:14	English 17:1
Deignan 2:9	directed 4:14	distributed	dwelt 16:17	ensure 6:1
7:15,15 74:6	33:25	25:19	D4 65:6 66:6	enter 56:22
delegated 35:2	directing 51:15	district 3:19		entered 68:22
delegating 44:20	63:19 78:3	9:18 11:10	E	68:23
deliberately	direction 26:15	13:2 17:13	E 1:14 2:2,2 3:1	entertain 51:14
22:24	79:5	54:21 66:17	3:1	63:19 78:2
deliberations	directly 24:24	Division 75:21	earlier 19:4 67:1	entire 29:1 39:2
26:21	disabled 35:14	doctrine 18:3	70:14	66:2
democracy	disagree 32:23	32:4,12,14,19	easily 24:9	entirely 69:4
10:20	discounted 75:3	document 48:20	echo 11:11	entrapment
democratic	discourage	48:23 51:7	41:16	18:3 32:5,11
69:14	61:23	documented	education 59:14	entry 69:17
demotion 22:7	discouraged	65:25	effect 15:9 20:14	equally 58:9
Deputy 2:9,10	61:21	documents 6:11	39:24 69:17	equivalent 42:18
2:13	discretion 6:12	doing 10:15 12:1	efficient 22:13	error 10:18
describe 23:16	discuss 40:5	12:5 34:9	effort 12:11	Esparza 4:23
described 22:2	discussed 32:11	35:14 42:17	efforts 61:8	especially 31:15
designated	33:17 34:12	53:19	either 26:14	42:2
44:11	43:11 56:18	dollars 25:5	64:19	Espinola 1:18
detail 3:9	70:14 71:19	70:18 71:8	election 19:25	2:20 79:2,11
detailed 19:18	discussing 34:6	Don 6:25 8:3	20:2,13,14	essentially 24:18
41:19	discussion 10:15	14:19 17:23	26:16,16 28:20	61:1
determination	17:16 37:5	30:18 31:1	44:4,7 55:17	establish 38:23
28:18 41:24	38:13 40:12,14	Donald 4:21,22	55:18,18,19	38:25 40:7
devil's 45:19	51:22 62:4,11	8:6 31:6	65:12	62:9 66:3
Dhillon 4:25	64:9 70:20,25	Doyle 32:23	elections 2:4	established 5:22
25:3 26:5 50:7	71:15 72:3	33:16 34:8,21	4:10,16 5:6	estoppel 18:3
Diep 4:25 7:1,1	dismiss 10:14	35:6	22:14 43:25	32:5,11
8:7 35:22,22	11:3,23 18:8	Doyle's 32:24	44:1,3,6,8,9,9	et 11:16 67:7
35:24 36:5	30:1,14 34:13	33:21,23	44:11,13,14,15	ethical 11:21
differed 23:22	34:17,19 76:12	draft 51:15	55:24 66:18	12:13 15:3,6
difference 58:20	76:13,14	52:12 63:20	electronically	28:16,20 30:13
different 21:25	dismissal 15:10	78:3	6:4	33:6,18 35:4,5
26:2 43:25	36:22	dragged 10:23	Ellenberg 14:16	39:23 43:3
70:16 75:12	dismissed 11:12	dragging 77:9	14:17,18 16:8	60:1
differently 8:21	28:17,22 30:12	drinks 64:20	embarrassed	ethics 1:2 3:12
26:2	32:4	drip 41:22,22	63:14	15:1 16:5
differing 21:24	dismissing 34:10	drives 12:10	embedded 44:2	28:19 35:8
difficult 25:7,18	35:15	drop 14:8	enable 42:9	42:20,22 43:18
61:1	disparities 24:21	dual 37:15	enabled 41:18	46:6 54:14
digestible 24:9	dispute 37:6	due 10:25 11:13	41:20,23 42:8	61:15 64:12
diligence 10:25	disregard 32:24	31:23 32:22	enforce 37:18	65:23 66:9
11:13	disservice 34:23	33:6,18	Enforcement	69:10,21 73:20
	distinguishes	duly 28:5 31:7	75:21	evaluative 34:3

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Evaluator 4:1,1 4:9,14,18 5:6 5:15 6:11,14 7:11 15:17 38:19 55:3,3 65:14,15 67:25	expenditures 44:18 experience 61:11,12 Experienced 24:10 expert 21:7 24:2 explain 8:20 31:14 35:7 76:7,10 explained 21:5 explains 50:21 explanation 76:19 explanations 21:24 extensive 76:19 77:6 extent 21:21 24:13 25:8 extenuating 76:8 extra 26:25 Extraordinary 39:12 extremely 14:1 28:25 e-mails 12:11	74:14,15 75:22 factual 37:6 60:2 fact-finding 21:2 76:22 failed 3:22 22:20 24:4 25:1 54:24 55:15 65:8 failing 5:2 24:14 failure 24:5 25:23 26:8 47:1 fair 6:1 28:16 30:11,13 75:17 76:15 77:3 fairness 75:7 faith 37:2 fall 6:20 21:5 24:9 falls 44:18 familiar 15:13 25:23 47:8 far 48:3 56:12 67:12,14 68:4 69:25 75:12 favor 49:3 51:22 62:12 64:3 72:4 78:10	47:1 54:24 59:4,5 65:8 filed 3:16 4:18 54:18 58:11,12 59:25 64:17 65:3 66:23 73:22 filing 28:20 29:25 55:15 73:5 final 41:24 71:11 finally 12:9 23:19 25:20 41:3 59:4 finance 20:1 44:17,17,20 find 23:9 36:5 38:18,22,24 39:1 40:3 41:6 41:11 43:9 48:1 49:2 61:2 62:8 70:9 finding 36:23 37:21 39:4 45:8 55:21 60:2,4 69:4 71:12 74:23 findings 37:6 39:5 51:8,16 63:20 65:24 74:11 75:4 78:4 finds 40:6 fine 10:3 48:19 53:14,16 54:4 57:11,17 60:20 73:20 76:13,13 fined 17:7 fines 16:23,25 17:2,12 23:6 36:24 38:1 finished 16:8 firm 18:21 first 13:7 14:23	20:8 22:20 25:15 28:5,14 31:7 35:25 38:18 45:8 49:13 58:13 68:14 first-time 17:3 24:12 five 27:21 28:10 28:11 31:13 35:11 five-minute 30:19 31:18,22 fixed 41:10 fixes 13:21 flash 12:10 floor 2:17 70:20 flout 21:16 flouted 22:25 focused 15:22 folks 10:21 13:19 68:20 69:23 follow 3:7,7 11:13,15 22:21 69:4 followed 11:19 12:15 16:4 45:16 46:13,13 following 8:2 13:12 22:19 33:6 38:17 42:2 59:23 65:24 follows 17:13 28:7 31:9 36:2 68:16 follow-up 12:9 Fong 4:20 forget 3:8 63:14 Form 3:23 5:2 54:25 65:9 66:16 formal 6:5 format 8:21
exception 25:3 26:3 excluded 6:12 exculpatory 7:25 32:6,14 34:11 56:10 excuse 15:23 20:2 22:6 excuses 43:13 existed 20:6,18 exists 20:6 23:17 exonerate 45:23 expanded 3:16 4:18 55:22 66:23 expect 47:7	F F 2:8 faced 21:8 faces 69:14 facie 44:4 facing 21:4 69:11 fact 15:24 26:6 31:19 36:6 37:9 41:12 42:21 43:16 58:12 61:6 69:3 factors 46:8 facts 25:25 26:5 26:5,6 42:7,7,9	fear 69:22 February 59:2,2 59:5 federal 44:6 feel 16:18 45:20 45:21 46:7 50:9,12 59:23 77:22 feels 42:23 fees 13:15,16 felt 17:15 69:13 77:24 figure 52:17,22 file 3:23 5:2 24:4 25:24 34:1 37:11 46:15	first 13:7 14:23	

forms 58:11	future 59:24,24	55:25 60:6	half-year 68:21	67:3,6,22 75:2
forth 37:3 59:11	61:9,21	61:14,15 62:5	Hall 1:14 3:13	77:18 78:15
forward 13:23	F9 32:8	62:7 63:13	54:16 64:13	79:3,7
14:9,10 27:19		66:20 67:5	hand 6:19 28:1	hearings 3:3
52:25 60:16	G	70:19,20 71:4	31:4 35:21	5:21 69:5
foul 45:24	G 3:1	73:20 74:12	68:10 77:3,5	74:14 78:17
found 13:13	Gagliardi 4:22	77:6	handled 12:15	heart 76:17
32:18 39:18	6:22,25,25 8:3	Gonzales 2:6	hands 49:6,9	height 16:5
42:3 50:11	14:19 17:22,23	43:6,8 48:12	62:15,18 72:6	held 3:13 4:7,11
53:4,6 55:11	30:18,18,23	48:13,22 49:8	Hang 77:16	5:12 10:21
70:7 74:16	31:1,1,6,11	49:22,23 62:17	Hanson 2:15	54:15 55:9,20
four 22:1 31:13	35:12 37:8	62:19 63:7,8	7:10 18:21	55:24 64:12
66:14 70:8	gain 30:5	71:1,3 72:17	happen 24:22	65:21
fourth 21:15	generally 22:18	72:18,24 73:15	53:22	help 21:7 44:8
23:11 39:1	36:18	74:8,19 75:20	happened 23:17	helpful 18:12
FPPC 16:22,25	getting 31:16	77:14	34:15 60:9	20:22,22 50:19
17:5,7 44:21	give 13:11 27:4	good 11:2 14:17	61:8 63:15	Herrera 4:24
50:7,10 72:25	31:21	18:25 42:10	69:2	hide 58:24
73:1,2,6,9,19	given 11:1 30:9	52:20 58:23	happening 36:7	highlighting
74:9,22 75:15	32:13 59:22	61:11,13 69:10	40:21	60:24
75:22,24 76:4	72:25 73:1	gotten 45:6	happens 36:22	hire 21:7 61:18
76:23 77:9,15	76:7	government	hard 33:11	historical 53:17
FPPC's 21:14	giving 35:2,9	44:2,7 69:16	42:13	history 3:10
framework	59:12	69:18	harm 45:23	home 18:10
20:21	glad 59:8	graciously 10:18	harmony 20:5	homicide 32:17
Francisco 2:18	go 8:25 9:15	13:8	head 28:22	32:18
free 21:17 29:20	14:11 16:12	gratitude 36:15	hear 18:12,16	honest 15:7
48:16 74:5,6	17:8,11 18:8	group 54:8	19:1,1 67:24	hope 20:22 30:3
Fresh 31:24	18:10,18,19	58:10	heard 15:14	30:4 68:21
33:3,12,20	28:9,23 29:3	grow 43:2	26:20 32:1	69:13
34:7	33:23 38:2,13	guess 10:1 43:10	49:15 62:25	hopefully 69:20
friend 11:18	41:8 52:10,13	47:7 70:15	68:20 72:9	hoping 38:5
front 6:21	60:19 68:18	74:3 76:3	hearing 3:12,15	horribly 63:14
frustrated 29:1	76:21,22	77:22	4:7,8 5:12,14	hours 29:12,14
fulfill 37:15	God 10:23	guidance 16:2,4	5:19 6:3,6 7:8	29:17,20
full 10:19 34:11	goes 34:18 47:9	21:12 23:14,15	9:6 10:23	Howitt 33:7
40:18	52:14	guilt 28:19	12:24 18:5	
fully 40:25	going 8:19,20,25	guilty 32:18,19	21:18 36:7,22	I
fun 42:1 68:7	10:23 13:11	34:10,13	49:16 52:2,3	idea 15:5,22
fundamentally	16:12,17 25:12	guy 61:19,19	54:14,17 55:9	39:22 50:6
32:23	27:12 28:23	guys 10:13	55:10,14,20,22	identical 66:24
funds 17:11	37:20 39:9,10	13:21 57:16	56:2 58:6,13	identify 6:17,20
further 23:25	40:4 51:3,3,6		62:6,25 64:8	7:11
27:11 38:18,20	52:5 53:21	H	64:11,15 65:1	ignorance 15:22
70:10 79:6	54:1,2,11	habitual 17:3	65:21,23 67:1	15:24

REPORTER'S TRANSCRIPT OF PROCEEDINGS

ignore 16:1	55:3,5 65:14	interest 15:19	63:16 78:17	57:5,16 58:2
ignoring 29:22	65:16 77:23	24:20 50:6,14		61:6
III 78:17	indicate 57:11	interested 8:17	J	kick 62:5
IIIA 3:4 57:2	60:4 74:10	79:6	January 1:12	kicks 71:8
ill 30:7 43:13	indicated 56:22	interim 5:15	3:11 5:16 8:4,5	kind 8:21 29:5
illegal 34:4,4,18	indisputably	interpretation	8:7,8,9,10,11	41:20 50:20
ill-advised 33:22	26:7	45:9 48:16	19:4 26:4	53:11,22,23
immediately 5:4	individual 31:24	interpreted	54:13 64:11	72:23
65:12	individuals 8:2	48:24	67:16 68:24	King 22:10
important 14:23	15:11 45:22	introduce 56:3	job 37:22	knew 48:5
15:1 23:2	indulgence	introduced	Johnny 12:20,21	know 9:19 12:1
importantly	25:13	15:15,15	13:2 61:6	12:8,9,10,14
30:13	inextricably	investigate 32:8	JONATHAN	12:15 13:4,20
impose 17:12	19:8	37:25 38:2	68:13	14:1,10 16:14
70:13,15,16	information	investigating	Jones 4:20	19:24 24:19,20
imposed 17:2	7:25 13:9	26:6 37:15,21	Jose 1:1,14,16	27:22 29:21,23
64:16 65:2	17:15 21:21	investigation	2:4,22 3:12,13	30:19 32:22
66:12,14 73:20	23:13 26:19	4:15 21:3	3:19,20,24 5:1	40:25 41:1,2,5
imposing 66:9	27:9 29:24	22:12,18 24:8	14:18 20:20	42:1 46:11
impossible 25:7	32:6 42:12	25:25 38:4,18	29:15 44:23	47:16 48:5
improve 30:5	56:10 59:1,12	41:13 55:13	54:14,15,20,22	50:11,22 56:5
improving 29:16	66:22	75:21,23 76:21	54:25 55:12,17	56:13 58:4
inclined 50:12	initial 26:12	investigations	59:14 64:12,13	59:19 60:22
include 19:22	initially 23:7	5:21 38:20	65:5,7 66:4,6	61:5,10,12,19
22:17 53:23	innocent 18:2	59:24	66:19 68:23	67:12 69:12
66:23	32:3,3,15,16	investigative	69:11 73:19	74:3 75:13,23
included 51:2	35:13	34:3	judgment 37:19	76:25 77:5,10
includes 66:14	inquiry 41:18	Investigator/E...	July 3:17 4:2	knowing 61:15
including 9:2	42:8 71:20	2:15	33:4 47:19	known 3:23
14:9 33:7	insert 57:7	involved 11:21	54:18 55:4	47:15
58:11	inside 44:2,3,14	39:24 43:3	65:18,21	
incomplete	44:24 45:4	52:20	June 5:5 55:17	L
25:18	instance 36:21	issuance 53:3	55:19 64:18	lack 42:19
inconsistencies	instincts 21:1	issue 19:16	65:4,16 66:17	Lan 4:25 7:1 8:7
21:16	instructs 60:1	20:25 23:24	justice 36:20	35:22,24
incorrect 23:5	insufficient	24:19 29:14		landscape 21:8
24:25 25:21	31:19 38:24	34:9 39:22	K	language 52:15
48:23	intend 17:25	51:4,6,13	Kathy 4:22 7:2	lapse 60:1
incredible 34:23	intention 29:21	63:18 70:11	8:10,10 9:14	lapses 39:24
independent	69:8	78:1	9:16 28:2,4	large 24:16 75:8
2:15 4:1,3,8,14	intentional	issues 12:3 37:8	keep 68:11 77:8	largely 75:3
4:18 5:8,15	13:14 46:8	38:6 43:11	key 20:7	lasting 15:9
7:11 15:17	58:24	58:8	Khamis 12:20	late 3:23 4:12
18:22 41:19	intentionally	item 3:4 13:12	12:21,21 13:1	5:2,4 19:22
53:11,12,13	14:11 22:25	19:7 56:25	13:2 56:21,25	20:4,5,9,11,12

22:15,15,22	31:12	looked 47:19	28:21 34:21	messes 77:9
23:5 24:4,14	letter 11:19	looking 10:22	40:19 50:10	messy 41:20
25:24 26:8,17	73:14,18 75:20	14:24 41:21	75:9	met 58:18
45:12 47:24	77:7,7	47:17 52:25	Maya 4:23	MICHAEL 2:4
48:24 54:24	letters 12:10	losing 64:21	mayor 11:16,16	microphone
55:16 61:3	let's 9:12 10:5	lost 36:17	McDANIEL	9:15 46:4
65:9,11 66:15	57:20 64:24,25	lot 3:9 13:22	2:12 7:19,19	Miller 2:15 7:13
law 2:16 11:14	72:4	29:8 39:20	52:4 56:21	7:13 15:14
11:14,16,19	Levy 4:20 7:3,3	40:15 41:17	57:2,9,13	18:20,24 22:9
15:23,24 16:1	8:8 11:5,7,9,9	42:1,12,14	73:12,22	22:11 27:9
16:3,5 17:7	14:21	54:10 59:7	mean 15:13 57:6	32:7 33:25
18:4,21 33:15	Liccardo 4:24	75:9	61:1,17	34:12 37:7
34:5 37:18	License 1:19	lots 12:10	meaningful	38:12,14 45:7
40:21 43:14	light 60:25		42:22	58:8 59:18,21
47:22,23 48:8	limit 50:8,8	<u>M</u>	means 32:14	60:14
74:10,17	limitation 30:20	MADHAVEE	34:17 35:6	Miller's 33:24
laws 13:23,24	31:18	2:6	meet 55:15	39:21
33:18 43:17,24	limited 9:3	Madison 4:24	meeting 8:22	mind 20:21 40:2
44:1	27:21	Magdalena 4:21	10:10,10 27:12	42:15 47:22
lawyer 14:24	Lincoln 2:21	8:9	28:18,22 47:14	48:9 68:11
15:4 21:7	Linda 58:2	major 15:20	53:25 54:2	minimum 71:5
23:20,23	line 15:5 66:21	17:1	67:2 72:25	minute 8:19
lawyers 29:8,8	linked 19:8	majority 55:14	meetings 16:15	minutes 9:4,5,23
29:17 31:13,17	listening 28:17	making 12:2	54:3	27:21 28:10,11
40:22	little 8:20,22	14:13 15:7	member 10:13	35:11 51:7
lay 77:7	46:24,24 47:8	59:9,9 60:25	13:2 49:14	misadvice 31:16
laypersons	47:11 50:21	61:5,10 62:5	56:21 62:24	misdirection
40:23	LLP 2:15	75:4	69:7,12 71:22	12:7
Le 4:23 8:2	loan 58:11,25	malicious 69:8	72:9 74:20	mishaps 34:15
League 33:1	local 17:14 44:7	Manh 13:12,16	75:24	misinformed
leaning 42:25	44:8	14:9 65:4,5	members 3:14	29:24
learn 21:23	Location 1:14	66:5,5 67:15	4:6 5:11,18	missing 10:9
learned 59:7	loftier 38:6	74:21 75:24	6:13 9:1,7,9	mistake 10:24
leave 9:25 27:14	logical 24:8	76:21	40:17 54:16	12:4 15:7,7
66:20 70:20	Lois 4:21 8:8	manner 11:4	55:8 64:13	61:10 69:9,9
led 69:9	long 12:16 33:11	40:3	65:20	mistakes 14:13
Lee 2:16 7:14,14	41:4 46:2	manners 21:24	memo 32:22,23	mitigating 7:24
left 28:22 59:19	60:23 68:22	manual 60:11	32:24 33:1,9	16:18 36:24
legal 7:23 24:2	longer 10:17	Market 2:17	33:12,21,23	39:17,19 48:1
34:11 35:9	20:4	Martha 10:5	34:8	56:10 60:4
36:7 37:3 56:9	look 20:24 33:11	material 21:14	mentioned 7:8	66:11 70:9
legally 18:2 32:3	41:20 42:5	25:19 29:18	22:6 24:10	71:13
32:3,14,16,18	43:24 44:3,14	materials 47:18	50:6	mitigation 46:8
35:13,14	44:22,24 69:10	58:17	mess 50:21	mix 46:11
length 18:1	69:20	matter 24:15	message 9:21,21	monetized 29:19

REPORTER'S TRANSCRIPT OF PROCEEDINGS

<p>money 12:11 17:8 24:17 29:15,15 58:24 month 53:25 monthly 54:3 months 28:24,25 33:3 34:7 40:16 58:3,10 77:9 moral 39:23 42:19 43:3 motion 18:8,16 18:18 39:6,8 39:10 40:4,5 49:2,10,13 51:6,14,18 53:8,13 62:6 62:21,23 63:19 67:1 70:19,20 70:23 71:11 72:5 76:4 77:2 77:17,19,20 78:2 mouthful 54:21 move 3:3 14:9,9 17:20 27:17 49:11 50:14 51:11 52:2 62:4,7 63:23 77:17 78:15 moved 51:18 63:23 78:6 multiple 16:15 29:8 33:24 municipal 3:21 4:10 5:1 19:21 44:8,23 54:22 55:12,15,23 65:7 66:4,19 75:10</p> <hr/> <p style="text-align: center;">N</p> <p>N 2:2 3:1 naively 28:21 name 7:8 9:15</p>	<p>9:16 11:9 12:21 13:1 14:17 15:15 27:25 30:22,25 31:2 35:20,22 63:14 named 79:4 navigate 21:8 necessary 19:14 29:24 38:1,19 45:21 need 17:15,24 27:3,5,16,24 39:4 44:25 56:3 62:22,22 67:24 72:8,23 77:17 needed 20:11 needs 15:8,17 37:16 40:23,24 Neighbors 3:18 54:20 Neither 32:9 net 59:4,5 never 10:21 34:12 nevertheless 24:4 25:1 new 13:21 Nguyen 4:24 13:12,17 14:9 65:5,5 66:5,6 67:15 69:7 71:22 74:21 75:24 76:22 nightmare 68:22 nine 39:13 Noelia 1:18 2:20 79:2,11 nonlawyer 35:3 nonlawyers 35:9 nonmonetary 65:10 normally 52:13 note 26:4 76:9</p>	<p>notice 76:7 notified 3:25 4:1 5:6 55:2,3 65:13,15 notify 73:2 75:17 76:4 November 5:5 5:10,13 8:2,3,4 8:6,7,22 10:10 16:16 19:3,10 28:15 55:17,20 now-larger 20:11 number 1:19 11:14 13:3 25:15,16,18 29:12 31:12 56:25 numerous 4:11 65:9</p> <hr/> <p style="text-align: center;">O</p> <p>O 3:1 oath 6:7 8:24,24 9:3,5,20 18:7 object 31:18,22 obliged 45:18 observing 37:1 obvious 71:18 obviously 12:12 occurred 26:13 38:23,25 39:3 40:7,18 62:9 66:8 October 4:19 5:8 10:12 16:16 offenders 17:3,4 offer 19:11 59:23 office 10:19,21 11:17 12:1 14:5 21:13 25:20 29:3 30:9 34:25</p>	<p>35:1 58:16 59:12 61:18 75:3 76:10 offices 20:20 official 44:11 officially 67:9 officials 44:4,8,9 44:10,12 oh 7:5 22:9 50:25 52:7 57:1 73:10 75:5 76:17 okay 3:5 7:9 8:16,19 9:16 10:3 11:5,8 13:1 16:10 17:18,21 19:1 22:9 27:8,17 27:18 30:16 31:3,11 34:10 35:16,18,20 38:10,11,11,15 43:5 45:25 46:17 48:11 49:1,11 51:5,9 51:10 52:2,12 53:14 54:9,11 56:6 57:6,9,10 57:13,13,15,17 57:20,25 58:1 58:1,14 60:12 60:15,19 62:2 62:22 63:16 64:22,24 67:9 67:11,14,24 68:2,3,9,18 70:4 72:4,8 77:16,17,19 78:9,14 old 71:7 Oliverio 4:25 once 11:1 23:17 30:14 ones 14:12 one's 21:12</p>	<p>open 6:3 67:6 70:20 76:20 opinion 45:6 46:9,16 opportunity 9:9 15:21 19:12 26:10 27:13 31:21 opposed 15:6 47:3 49:7 51:24 62:16 64:5 78:12 opposite 15:24 option 77:15 optional 22:1 options 38:17 70:8 oral 27:20 order 6:1 9:11 9:11 38:3 orders 50:3 70:8 ordinance 53:3 organization 33:2 original 3:22 6:16 21:19 32:9 67:13,19 70:10,16 71:12 75:2 originally 3:16 Orozco 3:18,19 7:6,6 21:20 54:19,20 56:5 56:12 60:15,18 60:21 outcome 79:7 outlined 32:20 outside 29:17 53:12 overgrown 42:18 oversight 44:20 owes 36:15 O'Connell 10:6 10:7,9</p>
--	--	--	--	---

o0o 2:24	70:10,13,17,23	78:8	preceding 5:4	proceedings 1:9
<hr/>	71:5,7,14 72:1	pill 36:25	65:12	5:24 39:3 66:3
P	72:5	place 25:16	precious 29:17	process 13:5
P 2:2,2 3:1	pending 55:13	50:23 79:4	29:20	14:2 18:7,19
Padilla 67:11	55:22	plate 61:13,20	precludes 34:9	29:2 30:11
68:7,13,19	people 14:11	play 45:19	predicate 60:2	31:23 32:22
76:6	16:6 17:4,6,10	plead 11:2	prejudice 31:20	33:6,18 36:20
page 45:23	26:24 37:25	pleaded 10:13	prepared 26:16	37:1,2,9,14
pages 29:6,7	38:2 42:1	please 6:17 7:11	28:13 60:21	40:21 41:5
paid 29:13	46:12,13,14	23:7 27:25	preponderance	44:16 45:4,14
parallel 20:18	47:1,7,7,21	30:22,24 35:10	39:2 45:20	45:16 48:7
part 38:3 71:20	69:15,17 74:13	35:21 68:10	66:1	58:22 59:7,14
particular 19:10	74:16	plus 39:22	present 3:14	60:23
60:9 70:12	Perez 4:22	point 15:12,20	18:21 27:20	processes 69:14
parties 5:23	perfect 25:14	27:14 33:15,16	54:16 64:14	production 6:10
pass 21:17 71:11	performed	33:21 34:24	70:4	profession 15:5
passed 67:2	22:11	35:13 36:16	presented 15:25	professional
passes 49:10	period 5:4 9:1	37:7,24 38:13	45:10 65:23	11:15 14:3
62:21 78:14	20:17 65:11	41:3,14 42:6	66:2	24:11
PATRICIA 2:9	Perry 57:24 58:2	47:20 56:17	President 22:6	profound 15:11
Patty 7:15	58:3,5,15	63:18 72:24	prevent 61:9	prompted 37:12
Paul 4:20	person 8:17 15:4	points 14:22	previous 16:15	promptly 3:25
pause 26:14,21	16:3,4 37:4	16:22	56:2 58:6 68:5	55:1 65:13
pay 17:11 29:16	46:14	political 10:21	previously 20:14	propagate 43:17
Peacock 2:5	personal 29:9,20	19:22 20:3,8	56:23	proper 29:25
24:20 26:23	69:23	20:10,15 21:9	prima 44:4	proposed 52:15
41:16 46:19,22	personally 11:17	23:22 25:6,17	primary 9:18	provide 19:17
49:5,20,21	29:2	44:1,19,19	55:17,18	25:25 26:18
50:16 51:9	perspective	politics 69:21	probably 47:12	provided 3:25
52:18,24 53:16	19:16 20:24,25	poor 37:22	53:15 68:20	4:2,5 5:6,10,17
58:22 62:14	76:16	portions 33:9	problem 41:9,10	5:24 16:14
63:5,6 71:16	pertaining 5:21	position 36:6	60:8,8,11	21:13 23:8,10
71:17,25 72:15	physically 29:3	positive 59:8	problems 11:25	23:14 25:21
72:16 75:14	piece 47:11	possible 21:23	14:12 33:8	29:4,24 55:2,4
penalization	Pierluigi 4:25	25:2 26:3,19	procedural	55:7 65:13,15
76:1	Pierre-Dixon	41:25	32:21 34:14	65:19
penalize 45:21	2:4 27:10 40:9	possibly 13:17	procedure 3:7	providing 6:9
74:11,12	40:13 41:17	14:2 69:10	30:22	provision 23:4
penalties 50:3	47:17 48:19	post 29:3	procedures 4:17	provisions 32:16
55:13 60:5	49:5,24,25	posted 4:6 5:11	5:20,25 7:21	public 6:3 8:23
66:10 67:4	51:19,20,21	5:18 55:8	51:13 56:7	8:25 9:1,9,19
70:8 77:4 78:4	60:7 62:10,14	65:20	63:17 77:22	10:13,16,17,20
penalty 39:18	63:9,10,25	potential 30:8	78:1	11:3 17:18
64:16 65:2	64:1 68:1	39:5,7	proceed 19:18	19:24 39:23
66:12,14 69:3	70:22 72:19,20	precedent 69:5	26:22 60:6	52:4,6 53:3,11

REPORTER'S TRANSCRIPT OF PROCEEDINGS

54:6 56:17,18 57:21,22 59:2 59:17 60:18,20 65:21,23 67:6 67:20,21,23 70:11 public's 19:14 published 21:13 purpose 19:23 purposely 41:7 Pursuant 66:19 pursuing 10:25 pushed 40:17 put 12:8 13:22 13:23 19:16 37:3 47:1 48:10 54:5 76:16 p.m 1:13 78:18	49:5,9 62:14 62:18 72:6 ran 61:20 random 4:9 range 71:19 Raul 4:22 reach 23:12 reaction 50:17 read 3:9 15:21 17:2 27:13 33:9 39:25 45:5 48:18 49:15 62:25 72:10 reading 29:6,18 45:17 47:18 ready 26:20 54:11 real 29:15 33:19 37:13 realize 37:16 50:20 realized 75:5 really 10:17 12:4 15:10,18 37:2,6,8 40:2 40:17 50:12 58:8 74:16 reason 19:20 reasonably 21:5 21:20 26:1 reasoning 50:22 reasons 24:6 recall 73:19 receive 23:13 24:25 received 5:3 8:1 8:18 19:25 20:12 25:4 26:18 32:22 42:13 56:11,13 56:15 65:10 67:18 recognize 18:20 38:7	recognized 6:14 recommend 26:1 recommendati... 26:11 recommendati... 4:3 5:9 7:23 13:22 18:22 55:5 56:8 65:17 record 6:18 7:12 27:25 33:10 39:2 49:17 53:17 63:1 64:9 66:2 68:8 68:24 72:11 recorded 6:4 recording 12:25 reduced 79:4 refer 50:10 referrals 50:5 referred 73:8 referring 74:9 reflect 37:17 reflection 38:7 reflects 38:6 Reform 19:22 20:3,8,10,15 21:9 23:23 25:6,17 44:1 44:19,19 refresher 19:20 regarding 26:4 55:23 75:10,25 regardless 15:9 regards 21:10 registrars 44:10 regular 10:20 regulation 44:16 regulations 4:17 5:20,25 7:21 16:22 21:17 29:4 37:11 51:12 56:6 63:17 77:21,25	reiterate 59:6 related 19:5 relates 72:25 75:10 relevance 76:11 relevant 6:10 66:10 relied 17:4 23:14 47:3 relies 37:24 44:7 rely 33:22 remain 20:16 remarks 32:10 60:22 remember 47:19 removed 69:4 reopen 52:13 report 4:3 5:8 5:16 7:22 18:22 19:4,5,7 19:10,13,19 26:4,8 32:10 32:10 35:6 38:20 39:21 45:12 55:5 56:8 59:21 65:17,22 reported 1:18 4:9 20:12 26:18 reporter 2:20 6:5 REPORTER'S 1:9 reporting 2:20 4:13 5:2 19:23 20:1,17 22:22 23:6,16 29:22 44:18 47:24 48:25 65:9 66:16 reports 3:23 16:24 19:2 22:17 24:4,15 25:14 54:25	representative 7:10 representatives 6:17 27:19 29:13 representing 67:9,13 reprimand 70:11 reputation 30:10 42:24 reputations 42:4 request 11:22,24 17:23 18:6,10 requested 66:25 requests 27:9 require 70:12 required 3:24 5:3 24:5 32:7,8 55:1 65:11 77:12,13,14 requirement 45:11 48:15,24 75:10 requirements 4:13 22:22 23:23 25:2 55:16 66:16 requiring 25:5 res 52:12 rescind 64:16,25 65:2 70:10,15 70:23 71:4 72:5 rescinded 55:21 73:3 rescinding 67:3 research 16:24 residents 29:14 resolution 5:22 5:25 6:2 32:9 50:24 51:1,3,7 51:14,15,17 52:5,14 53:21 56:1 63:18,20
---	--	---	---	---

Q

quagmire 76:8
question 10:25
46:20 47:5
50:4 71:1,18
72:23
questioned
58:16
questions 6:13
26:15 27:8,11
30:3 35:17
37:14 38:9
60:13 70:2
quick 48:14
49:12 76:6
quite 39:14

R

R 2:2 3:1
raise 6:19 17:8
17:11 27:25
31:3 35:20
68:9
raised 18:2 20:8
24:17 35:13

<p>63:22 65:25 67:6 78:2,3,5 resolved 12:16 resources 12:17 69:24 respect 15:23 66:7 respects 20:7 39:15 responded 49:4 51:23 62:13 64:4 73:23 78:11 respondent 6:23 24:3 39:5,6 54:24 55:4 65:8,16 67:10 68:4 respondents 3:22 4:2,6 5:7 5:11,17 6:17 7:22 9:2 24:24 26:2,7 27:19 34:1 35:19 40:1 54:24 55:8,11 56:7 65:19 66:5 67:14 responding 29:19 response 7:22 7:23 23:4 24:1 29:9 48:14 50:17 51:25 56:8,9,11,13 64:6 67:15,15 78:13 responses 8:1 40:1 42:14 responsibility 10:19 responsible 16:3 16:4 result 4:13 15:9 20:18 25:22</p>	<p>71:11 resulted 11:25 results 22:17,19 25:22 revealed 24:8 reversal 9:11 reviewed 49:16 63:1 72:10 rich 14:5 Rick 32:22 ridiculous 12:12 right 7:20 8:25 10:4 12:6 13:1 28:1 31:4 32:1 35:12,21 36:10 58:2 61:1 68:9 71:6 72:1 73:11 76:2,24 77:24 Rocha 4:21 8:6 ROLANDA 2:4 role 34:2,3 37:17 69:16 roles 36:12 37:15 roll 15:16 rolling 39:11 Room 1:15 3:13 54:15 64:12 root 11:25 Rose 4:24 rule 25:15,16 30:23 42:23 50:7 60:25 61:2,3 rules 6:6 17:14 17:14 20:19 21:22 22:25 29:22 32:7 33:24 42:3 56:2 71:8 75:12 ruling 42:21 run 10:22 11:17 14:5 61:12,18</p>	<p>61:22,23 running 30:9 Run-off 55:18 55:19</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>S 2:2 3:1 safeguards 32:1 Sam 4:24 San 1:1,14,16 2:4,18,22 3:12 3:13,19,20,24 5:1 14:18 20:20 29:14 44:23 54:14,15 54:20,22,25 55:12,17 59:14 64:11,13 65:5 65:7 66:4,6,19 68:23 69:11 73:19 Santa 1:14 satisfied 27:13 27:15 41:11 satisfy 29:5 save 22:20 57:16 saw 16:25 41:22 73:18 saying 53:10 59:11 says 44:25 45:2 48:17 50:20 75:20 scenario 76:11 scheme 21:4 23:17 scope 3:16 screwed 34:25 script 3:6 16:20 second 12:7 15:12 20:10 22:24 38:22 40:8,9 51:19 52:3 53:25 54:9 62:10</p>	<p>63:24,25 70:24 77:16 78:7,9 seconded 40:5 51:21 64:2 Secretary 44:5 Section 3:20 5:1 32:8 54:22 55:12 65:6 66:5,20 see 9:12 10:5 11:12 12:13 38:6 46:12,14 48:18 50:13,13 57:20 59:3,8 64:24,25 seeing 21:9 seek 21:10 26:15 seen 28:19 39:14 48:3 69:25 71:21 self-corrected 58:13 self-defense 32:17 sending 13:8 29:9 sense 34:17,18 58:18 sent 73:14 sentiments 11:11 separate 25:5 39:6 50:24 73:5 separating 8:23 September 4:8 21:19 55:10 56:12 serious 34:8,21 seriously 34:22 servants 36:13 serve 36:13 serves 10:20 service 36:14 61:25</p>	<p>SERVICES 2:20 serving 10:17 session 47:14 sets 20:18 43:25 shaking 28:22 sham 38:2 shame 41:4 share 26:10 shorter 20:13 shortly 19:25 short-circuit 54:12 shown 71:22 shows 37:12 shrubbery 42:18 43:2 sic 4:23 side 13:10 59:8 69:10 77:2,3 sides 13:4 sign 29:3 51:17 52:14 63:21 78:5 significant 39:16 Silva 2:8 7:16,16 51:2 52:8 53:2 53:12,24 57:11 73:5 similar 44:24 66:24 similarly 22:3 simple 61:19 simpler 13:25 14:11 simplifying 13:23 single 23:10 Sir 30:17 sit 37:18 site 4:7 5:12,18 21:14 55:9 65:20 sitting 52:16,22</p>
--	---	---	--	--

REPORTER'S TRANSCRIPT OF PROCEEDINGS

<p>situated 22:3 situation 12:16 24:3 41:20 46:24,24 54:7 69:11 76:10 situations 66:25 six 24:24 25:3 58:3,10 skip 55:25 67:5 small 24:16 Smith 2:4 3:3 6:24 7:4,7,18 7:20 9:22 10:3 10:5,8 11:5,8 12:20 14:15 16:7,9 17:17 18:15 22:5,6,8 22:10 27:2,15 28:9,11 30:16 30:21,24 31:3 35:10,16 36:4 38:8,15 40:11 41:15 43:5,7 45:25 46:3,17 46:21 47:6 48:11 49:1,4,7 49:10,20,22,24 50:1,1,25 51:5 51:10,20,24 52:1,7,10,21 53:10,14,18 54:4 57:1,4,6 57:10,14,17,25 58:4,14 59:16 60:12,19 62:1 62:11,13,16,20 63:5,7,9,11,11 64:1,5,7,10,21 68:2,9,18 70:2 70:24 71:2,6 71:24 72:2,7 72:14,17,19,21 72:21 73:10,14 73:17,25 74:3 74:18,24 75:19</p>	<p>76:2,15,24 77:16 78:7,9 78:12,14 somebody 32:17 35:6 37:10,14 38:3 42:22 43:1 73:9 76:3 somebody's 42:24 63:14 somewhat 38:1 soon 25:12 sorry 6:22 30:21 52:10 sort 24:21 48:10 50:12,19,21 77:10 sought 16:2 23:3 58:15 sound 10:8 64:22 sounds 46:22 64:23 source 30:19 speak 9:10 17:25 42:23 68:24 speaker 11:11 12:23 27:21 speaking 13:10 special 17:13 55:18,19 66:18 specific 32:15 44:25 Specifically 3:21 54:23 65:7 speech 13:11 spent 12:11 29:6 29:9,13,15,18 spirit 69:1 split 21:4 22:15 22:15 23:17,21 24:7 25:9,17 spoke 10:12 spot 36:10 staff 2:8 7:9</p>	<p>8:12 24:12,12 29:7,13,17 48:6 67:17 74:4 77:22 stand 37:23 71:12 Standard 30:21 start 6:21 9:8,10 27:22 33:12 38:4 64:25 74:20 starting 7:12 state 9:15 17:7 17:12,14 27:25 30:22,24 34:5 34:6 35:7,20 36:9 44:5,6 58:18,18 74:10 74:21 75:12 stated 30:23 31:2 statement 9:3,19 9:24 16:17 39:23 50:19 52:4,6,11,22 53:4,7,11,23 54:7 66:15 70:11 statutorily 5:3 65:11 statutory 20:21 21:4 step 19:15 43:23 61:13 73:2 stepped 61:20 steps 13:25 30:4 Steve 14:16,18 18:20 Steven 2:15 7:13 stigma 58:22 storm 25:14 straight 71:10 Street 1:14 2:17 stronger 69:12 69:15</p>	<p>struck 39:22 structure 43:24 44:22,24 stuff 47:9,10 52:23 54:12 55:25 67:5 submissions 31:12 32:13 submit 7:22 8:17 17:24 24:14 56:7,14 submittals 8:4 submitted 4:4 5:9,15 19:6 31:11,15 36:8 55:6 58:17 65:17 submitting 35:8 subpoena 6:11 subsection 44:25 subsequently 4:18 18:18 sufficient 31:23 33:10 38:22 40:6 59:1 62:8 66:3 sufficiently 34:22 suggest 52:18 suggestion 15:2 suggests 25:14 summarize 22:19 summary 7:24 18:23 56:9 supplemental 5:16 19:3 26:4 32:10 39:21 support 24:11 24:22 74:8 supporter 14:19 14:20 suppose 21:14 supreme 33:4,13 43:21</p>	<p>sure 3:7 12:1,2 19:11 45:9 71:9,19 surprised 28:21 surrounding 66:11 survey 4:9 suspect 54:10 Sutherland 4:23 7:2,2 8:10,11 9:14,16,17 10:1,4 27:23 28:2,2,4,10,12 swallow 36:25 swear 68:4 sworn 28:5 31:7 35:25 68:14 system 12:24 13:22 29:16 69:12,14,20</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 11:19 Taber 2:11 7:17 7:17 12:23 16:11,12 34:25 35:3 59:10 64:20 73:7 74:2 table 27:4 take 8:19 9:4 16:19 18:7,13 19:15,15 21:16 21:17 26:10,12 26:15 27:5,22 29:2 32:25 36:11 41:19 43:23 53:24 54:10 68:3,5 69:15 70:10 71:9 73:2 77:6 takeaway 25:11 25:13 taken 10:19 13:20,24,25</p>
--	--	--	--	---

20:23 24:1 41:4 59:22 73:2 79:3 takes 41:5 talk 44:16 54:6 talked 34:16 50:5 56:1 Talking 6:22 talks 44:3,15 tasked 37:20 technical 42:18 technicality 29:6 technically 47:25 tell 9:12 28:5 31:7 35:25 68:14 telling 58:7 temporarily 27:4 tenuous 36:5 terms 12:8 15:12 48:4 60:9 testified 28:7 31:9 36:2 68:16 testifying 74:13 testimony 6:7,9 8:24 9:4,5 18:1 18:7,13,17 27:20,24 49:15 62:3,25 65:22 68:3,5 70:5 72:10 Thai 4:23 thank 12:19 14:14,15 16:8 16:9 17:17 18:14,24 27:7 27:17 28:9,12 30:15 35:16,18 36:4 38:7,8,10 40:11 59:15,16 60:12,23 61:24 61:24,25 62:1	64:22 70:3 thereof 18:23 thing 12:6 13:18 27:3 28:16 30:13 45:8 69:2,16,24 74:15,25 75:1 77:8,24 things 8:20 13:7 14:10 29:11 41:8 42:23 46:23 49:12,12 53:19,19,21,22 53:23 59:7 think 10:12,16 10:20 11:12 14:6,23 15:8 15:17,23 17:23 18:11,16,18 20:22 21:2 22:6,18 24:20 26:14,21 27:11 27:16 30:8 35:12 36:8 37:16 40:17 41:3,7,18 42:8 42:10 43:10,20 45:13,13,17 47:12 48:8 50:18 52:19,20 53:18,22 57:19 58:6,22 59:7 59:12 60:7,8 63:15 68:19,23 69:1 71:18 74:15,22,24,25 75:7 76:15 77:2,3 thinking 27:2 40:15 46:1 74:2 thinks 50:14 third 23:2 25:18 38:24 thorough 22:12	22:13 27:12 41:19 thought 10:24 11:19 12:5 39:20,25 50:10 52:21 74:12 thoughtful 42:14 thoughts 28:13 52:24 thousand 25:4 70:17 71:8 thousand-dollar 50:8 thread 46:25 three 12:4 57:18 66:12 threshold 20:9 20:16 58:19 tie 49:12 53:19 tied 53:4,7 Tim 3:18,18 7:6 54:19,20 56:4 57:5 time 1:13 5:14 6:15 8:18 10:11 12:19 14:14 16:12 17:8,21 18:20 26:9 27:18 29:2,6,9,11,17 30:15 33:10 36:11,13 38:15 41:5,11 43:12 46:2 47:25 50:18 51:14 54:6,10 56:19 57:16 59:20 67:8 70:6 75:2 78:2 79:4 timely 6:1 11:4 timeout 42:9 times 13:3 29:1 58:19 title 4:12 19:21	20:6,15 21:10 22:21 23:1,5 23:21 24:15 25:1 26:8 32:16 44:24 45:5,14,18 46:6,9 48:16 50:11 53:5 58:19 60:1,3 today 36:22 42:22 43:11 76:13 Today's 33:12 33:19 34:7 told 59:1 60:10 Tom 65:4 ton 24:17 Toni 2:11 7:17 16:11 34:25 35:3 59:10 tonight 11:4 32:11 52:17 69:8 71:20 tonight's 5:19 total 66:23 transaction 59:4 transcript 1:9 6:5 37:12 transcription 79:5 transcripts 15:21 transparency 30:6 treasurer 11:18 14:4 58:1 treasurers 11:15 treat 26:2 60:20 treated 6:8 58:9 treats 41:25 trial 18:5 tribunal 35:8 tried 11:13 22:13 true 15:25 31:24	33:3 truth 28:6,6,6 31:8,8,8 36:1,1 36:1 68:15,15 68:15 try 19:16 21:11 trying 47:19 52:17,22 58:24 turmoil 69:13 turned 13:24 42:6 turpitude 42:19 twice 15:15 30:9 two 8:4,5 9:4,22 12:3,10 15:20 20:7,18 25:16 27:6 28:24,25 33:2 34:7 37:23 43:25 47:14 54:1 66:9 types 21:25 22:1 58:7 typically 39:18
U				
				ultimate 43:15 umbrella 52:20 unanimous 52:1 64:7 72:7 unanimously 78:14 unconnected 24:6 underscore 32:2 understand 9:20 22:21 31:12 36:14 40:20,20 47:21 48:8 understanding 21:9 24:3 40:18 59:13 understood 23:20 47:23 57:18

REPORTER'S TRANSCRIPT OF PROCEEDINGS

undertake 4:15	42:19 43:3,9	57:22 59:6,18	we've 8:21 13:23	25:14,19 27:20
unethical 58:23	46:6,7,10	60:22,23 61:13	13:24 27:3	56:7,13,15
unfair 47:12	47:21,23 48:1	61:21,22,24	45:10 47:18	58:17 64:9
unfortunately	48:10 49:2	68:6 69:16,24	53:20 56:13	67:14
11:20	50:11 53:5,6,9	70:21 73:4	59:7 68:22	wrong 13:8 23:7
unusual 39:12	55:21 60:2	74:5,7	69:25	37:25 59:12
update 58:10	62:9 71:12,22	wanted 13:6	whatnot 3:10	W-120 3:13
upsetting 40:19	71:23 74:23	16:21 21:20,23	Wilco-Owens	54:15 64:12
	violations 11:21	24:20 40:24,25	4:22 8:8	
	13:14 37:22	76:3 77:23	willful 16:23	X
V	39:16 43:14	wants 14:6	willfully 21:15	Xavier 4:21
valuable 29:20	59:11 66:4	47:16	22:25	23:19
Van 4:23 8:2	70:7 75:7,8	wasn't 42:1	William 3:17	
various 24:10	violators 37:21	48:21 75:19	6:16 54:19	Y
33:7	voice 64:21	water 64:18	56:4	yeah 27:2,23
Vemulapalli 2:6	volunteer 24:12	way 3:5 12:14	Wing 1:15	30:18 51:6
46:1,5 49:8,18	volunteering	12:15 14:10	wish 9:2,4 60:16	52:8,21 57:24
49:19 62:17	36:13	24:21 40:2,22	68:4	60:19 71:17
63:3,4 72:12	vote 46:18 67:3	41:8 61:14	wishing 57:21	73:7,17 74:24
72:13 77:12	72:4	76:17	witness 6:8	75:5 76:2,2,17
vendettas 69:23	voted 47:2,13	ways 21:24	witnesses 6:10	76:25 77:2
venue 69:22	voters 44:10	web 4:7 5:12,18	6:11,13	year 19:4
verbiage 52:17		21:14 55:9	won 36:17	years 11:18
62:7	W	65:20	wonder 26:25	37:23 39:14
vice 11:16	wait 9:24,25	Wednesday 1:12	wondering	47:14 70:1
Vice-Chair 2:5	10:2	3:11 54:13	28:23 73:25	yell 19:1
view 33:23	waive 13:15	64:10	word 32:25	yellow 9:7,10
views 18:12	waived 13:16	week 53:25 54:1	words 39:24	Yip 32:13
VII 56:25	waiving 16:22	weeks 37:1 54:2	wordsmithing	
violate 74:9	walk 19:12	weight 47:1	52:25	\$
violated 3:20	26:16	well-thought...	work 15:5 36:19	\$1,000 20:9
4:12 5:1 21:22	walked 28:15	77:7	42:13 52:14,15	\$10,000 66:13
22:25 26:8	walk-through	went 16:23	61:4	\$250 20:9,16
32:15 50:7	19:19	29:16 42:13	working 48:6	
54:22 55:11	walls 33:6	76:23	wouldn't 33:17	#
65:6 74:17	want 9:24 10:2	we'll 17:20	76:16	#50890 1:25
violates 31:23	10:22 11:6,11	27:17 50:14	wrap 16:7 25:12	#8060 1:19 2:21
violating 24:14	14:1,22,25	51:11 54:5	35:10	79:11
violation 12:13	19:11,14,15,18	78:15	write 29:8	
15:3,6 16:2,23	20:23 26:10	we're 8:20,25	writing 11:1	I
17:10 26:13	27:22,23 32:2	19:20 26:6,15	36:8 37:4	1 11:10
28:20,20 35:5	32:2 33:11	51:3,6 53:19	written 7:22	1st 65:18
35:5 36:23	36:11 41:1,16	53:21 54:11	8:17 9:19,24	10 13:3
38:23,25 39:3	46:3 47:4 52:9	59:13 73:20	16:16 19:2	10th 8:9
39:5,7,18 40:3	52:10 57:4,22	74:5 77:14	21:12 23:14,15	1083 2:21
40:7 41:12				11 8:10,11

12 19:21 20:6,15	5:8,10,13 8:3,4	502 59:1	
21:10 23:1,21	8:6,7 19:3		
24:15 26:8	54:18,21 55:4	<hr/> 6 <hr/>	
32:16 44:24	55:6,10,18,19	6 8:8	
45:5,14,18	55:20,24 56:12	6th 8:7	
46:6,9 48:16	65:4,6,16,18	<hr/> 7 <hr/>	
50:11 58:19	65:21 66:6,17	7th 5:5 8:4 66:17	
60:1,3	66:17	7:33 78:18	
12th 5:8,10 8:5	2015-13 65:25	76954 5:22	
19:3 67:16	2016 1:12 3:11	777-3200 2:18	
68:24	5:17 8:5,5,7,8	<hr/> 8 <hr/>	
12's 4:12 22:21	8:9,10,11	8 65:21	
23:5 25:1	54:13 64:11	8th 56:12	
12.04 70:14	67:16	<hr/> 9 <hr/>	
12.06.910 3:20	21 66:24	9th 4:8,19 55:10	
54:22 55:12	22 58:7	90 20:13	
65:6 66:5	23rd 3:17 54:18	920-0222 2:22	
12.09.910 5:1	66:17	94105 2:18	
120 1:15	24th 4:2,4 19:6	95113 1:16	
13 1:12	55:4,6	95125 2:22	
13th 3:11 54:13	24-hour 20:17	99 66:4	
64:11	250 75:11		
15th 5:23	26th 2:17 59:3,5		
15-minute 47:14			
16 75:11	<hr/> 3 <hr/>		
16-day 20:14,17	3 9:18 49:10		
17 8:2	62:20		
18th 8:3	3rd 5:5		
19 8:6,7 55:20	<hr/> 4 <hr/>		
19th 5:13 8:4	4 3:19 54:21		
<hr/> 2 <hr/>	66:17		
2 49:10 62:20	4th 5:5		
20 11:18 31:20	4-to-1 67:2		
20-plus 76:14	408 2:22		
200 1:14	415 2:18		
2013 20:3,18	425 2:17		
22:14 23:17	497 46:15 54:25		
25:17 33:4	58:11		
2014 4:11 5:5,5	497s 3:23 5:2		
5:23 9:18	65:9 66:16		
11:10 55:17,17	<hr/> 5 <hr/>		
55:24	5th 5:16 64:18		
2015 3:17,19 4:2	65:4,16		
4:4,8,11,19 5:6	5:36 1:13		

