
SPECIAL MEETING MINUTES

March 2, 2015

I. Call to Order & Orders of the Day

Roll Call

PRESENT: Chair Michael Smith, Vice Chair Rolanda Pierre Dixon and Commissioners Chris Peacock (5:40 p.m.) and Madhavee Vemulapalli.

ABSENT: All Present.

STAFF: Deputy City Attorney Arlene Silva, City Clerk Toni Taber, Investigator/Evaluator Steven Miller and Deputy City Clerk Ruth Krantz.

OTHER: Nina Pavone, Court Reporter with Advantage Reporting Service.

Call to Order

The members of the San José Ethics Commission convened at 5:32 p.m. in Room W-262 of City Hall, 200 E. Santa Clara Street, CA 95113. City Clerk Toni J. Taber, announced the reappointment of Rolanda Pierre Dixon and introduced the newly appointed Commissioner, Madhavee Vemulapalli.

Matt Kamkar, Policy and Legislative Advisor for the Office of Councilmember Chappie Jones, Liaison to the Ethics Commission, introduced himself and offered the Councilmember's assistance to the Commission. Chair Michael Smith noted that a Council liaison had not previously been appointed for the Ethics Commission because of concerns about the possible appearance of a conflict of interest and asked staff to investigate.

Orders of the Day

Action: Upon motion by Vice Chair Rolanda Pierre Dixon, seconded by Commissioner Madhavee Vemulapalli and carried unanimously, the Commission approved the adoption of the March 2, 2015 agenda. (3-0-1. Absent: Peacock.)

II. Closed Session - None

III. Hearings

- A. Continuation of hearing on Complaint filed by Bui Dinh against Supervisor Dave Cortese filed October 14, 2014 and subsequently amended to include Councilmember Tam Nguyen, alleging violations of Title 12 of the San Jose Municipal Code. (Independent Investigator/Evaluator)

Document Filed: (1) Supplemental report from Hanson Bridgett LLP dated February 2, 2015 regarding Bui Dinh against Dave Cortese and Dave Cortese for Mayor 2014 Committee and Tam Nguyen, addressing the alleged violation of Title 12.06.910 of the San José Municipal Code – Coordination and Failure to Report Expenditure Made at Behest of Candidate. (2) Email from Dave Cortese dated March 2, 2015, responding to allegations filed October 14, 2014 and supplemented by the Commission on December 10, 2014.

Discussion: Chair Michael Smith summarized the hearing procedures. He opened the public hearing and indicated that, per procedure, the newest member of the Commission, Madhavee Vemulapalli, would not be able to vote. All members of the Commission were present. At the Ethics Commission hearing on February 9, 2015 this hearing was continued to allow adequate time for Supervisor Cortese to respond to the allegations presented.

Respondent Dave Cortese was present for this hearing. The Complainant, Bui Dinh, was not present.

Hanson Bridgett LLP Investigator/Evaluator Steven Miller presented the report, responding to the three areas of concern brought forward by the Commission at the hearing on December 10, 2014, in which Mr. Miller was directed to: (a) ascertain communications between the organizers of the Event and Dave Cortese's staff; (b) obtain more information concerning expenditures associated with the Event; and (c) name Tam Nguyen as an additional Respondent to the Complaint, to the same extent as Dave Cortese.

The Investigator/Evaluator concluded, in the supplemental report dated February 2, 2014, that sufficient facts exist for the Commission to conclude that expenditures were made at the behest of each of the two Respondents, Supervisor Cortese and Councilmember Nguyen; therefore, contributions were made to each of the two Respondents and not reported by them in violation of the Municipal Code Section 12.06.910.

Chair Michael Smith swore in the Respondent. Supervisor Cortese testified that the allegations are false, and that neither he and/or any employee or member of the Cortese for Mayor campaign staff coordinated or participated in the planning of the Event. Supervisor Cortese responded to questions from the Commission. (See transcript for complete testimony.)

The Commission deliberated.

Motion: Vice Chair Rolanda Pierre Dixon moved that the Commission finds, based upon a preponderance of the evidence presented, that a violation of San Jose Municipal Code Section 12.06.910 has occurred in the case of Councilmember Tam Nguyen. Commissioner Chris Peacock seconded the motion.

Action: On a call for the question, the motion carried indicating concurrence with the Evaluator's report that a violation of the Municipal Code has occurred in the case of Councilmember Tam Nguyen. (3-0-0-1. Abstain: Vemulapalli.)

Motion: Vice Chair Rolanda Pierre Dixon moved that, due to sufficient mitigating circumstances, no penalties be imposed or further action taken. Commissioner Chris Peacock seconded the motion.

Action: On a call for the question, the motion carried. (3-0-0-1. Abstain: Vemulapalli.)

Vice Chair Rolanda Pierre Dixon requested that the Investigator/Evaluator obtain a sworn written statement from The-Vu Nguyen, Policy Aide for the Office of Supervisor Dave Cortese to clarify coordination and provision of lawn signs.

Motion: Vice Chair Rolanda Pierre Dixon moved that the hearing be continued at the next meeting of the Commission pending sworn written statement from The-Vu Nguyen. Commissioner Chris Peacock seconded the motion.

Action: On a call for the question, the motion carried, with the hearing to be continued. (3-0-0-1. Abstain: Vemulapalli.)

After some discussion, it was determined that the City Attorney should draft a Resolution on the Commission's Findings at the completion of the case, when all matters have been settled.

IV. Consent Calendar

- A. Approve the Minutes of September 10, 2014 – Regular Meeting
- B. Approve the Minutes of November 12, 2014 – Regular Meeting
- C. Approve the Minutes of December 10, 2014 – Regular Meeting
- D. Approve the Minutes of January 14, 2015 – Regular Meeting

Action: Upon motion by Vice Chair Rolanda Pierre Dixon, seconded by Chair Michael Smith and carried unanimously, the Minutes of September 10, November 12 and December 10, 2014 and January 14, 2015 were approved. (3-0-0-1. Abstain: Vemulapalli.)

V. Reports

- A. Chair –None.
- B. City Attorney – None.
- 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) - City Clerk Toni Taber, provided an update on campaign statement filings including the April 1 due date for Form 700.
 - 4. Elections update - None.
 - 5. Update on status of recruitment for open positions on the Ethics Commission – City Clerk Toni Taber indicated that since one available position remains for the Ethics Commission, the recruitment has been reopened. Interviews will be held at the City Council Meeting of April 14, 2015.
- D. Investigator/Evaluator – None.

VI. Old Business

- A. Status, review and possible action on Gift Ordinance and Frequently Asked Questions Sheet (City Attorney) – None.
- B. Status on Independent Evaluator/Investigator RFQ (Attorney/City Clerk)

Discussion: City Clerk Toni Taber indicated the RFQ release date of February 13, 2015, and its due date of March 13, 2015.

Action: No action required.

- C. Ethics Commission ad hoc Subcommittee update and possible action related to Subcommittee's composition, meeting schedule or dissolution (City Attorney)

Discussion: City Clerk Toni Taber reported on the graduate student intern working with the Clerk's Office to begin the study of multi-language independent expenditure committees, formation of political action committees, and getting youth to understand the importance of voting. She discussed the Knight Foundation's competition that could ideally help fund these outreach efforts.

Deputy City Attorney Arlene Silva corrected a statement made at the February 9, 2015 meeting. She indicated that, upon further review of the Municipal Code, it was determined that three affirmative votes are required for the Ethics Commission to take any action, and not just for making findings or imposing penalties.

Action: No action required.

VI. New Business – None.

VII. Public Comment

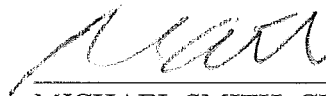
Former Chair of a predecessor to the Ethics Commission, Terry Reilly, spoke on the importance of education to the community to avoid further Title 12 issues.

VIII. Future Agenda Items and Adjournment

A specially scheduled meeting of the Ethics Commission will be arranged, with future agenda items to include:

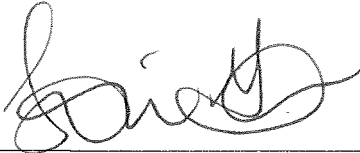
- Continuation of discussion regarding Bui Dinh complaint against Dave Cortese filed on October 14, 2014.
- Ethics Commission ad hoc Subcommittee update
- Approval of Meeting Minutes
- Review RFQ's received for Evaluator/Investigator
- Open Government training
- Prioritization of concerns regarding campaign and ethics regulations and policies (May 2015 meeting)
- Preparation of Work Plan (May 2015 meeting)

The meeting was adjourned at 8:05 p.m.



MICHAEL SMITH, CHAIR

ATTEST:
ELECTIONS COMMISSION SECRETARY



TONI J. TABER, CMC
CITY CLERK

Rmk-EthicsMIN-20150302

Attachment: Transcript of Hearing dated March 2, 2015, Reported by Nina Pavone, CSR, License Number 7802, Advantage Reporting Services.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Taken On March 2, 2015

CITY OF SAN JOSE ETHICS COMMISSION

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CONDENSED TRANSCRIPT

Advantage Reporting

ARS

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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: Monday, March 2, 2015 Time: 5:30 p.m. Location: SAN JOSE CITY HALL 200 E. Santa Clara Street City Hall Wing - Room W262 San Jose, California 95113</p> <p>Reported By: Nina Pavone, CSR License Number 7802</p> <p>#49344</p>	<p>Page 3</p> <p>1 PROCEEDINGS: 2 3 CHAIRMAN SMITH: It is Monday, February 9, 2015, 4 and this hearing for the City of San Jose -- 5 COMMISSIONER PIERRE-DIXON: March 2nd. 6 CHAIRMAN SMITH: You're right. Thank you. Did 7 I bring the wrong -- I updated the last one and I didn't 8 -- okay. 9 It is Monday, March 2nd, 2015, and this hearing 10 of the City of San Jose Ethics Commission is being held in 11 Room W262 of San Jose City Hall. All members of the 12 Commission are present. However, per procedure, as I 13 mentioned earlier, new member Madhavee Vemulapalli will 14 not vote on Commission decisions because she has not had 15 the opportunity to review the proceedings of previous 16 sessions of this hearing. 17 The Commission will conduct a second 18 continuation on a hearing on a complaint filed with the 19 City Clerk on October 14, 2014 by Bui Dinh alleging that 20 Dave Cortese Mayor 2014 Committee violated section 21 12.06.910 of the San Jose Municipal Code. 22 Specifically, the allegation was the Respondent 23 failed to report as contributions certain expenditures 24 allegedly made at the behest of the candidates. The City 25 Clerk notified and provided a copy of the complaint to the</p>
<p>Page 2</p> <p>1 2 APPEARANCES: 3 San Jose Elections MICHAEL SMITH, CHAIR 4 Commissions: ROLANDA PIERRE-DIXON 5 CHRIS PEACOCK 6 MADHAVEE VEMULAPALLI 7 Staff: ARLENE F. SILVA, 8 Deputy City Attorney 9 TONI TABER, 10 Deputy City Clerk 11 RUTH KRANTZ, 12 Deputy City Clerk 13 TOM GRAVES, 14 Assistant City Clerk 15 Independent Evaluator: HANSON BRIDGETT, LLP 16 BY: STEVEN D. MILLER, 17 Attorney at Law 18 425 Market Street 19 28th Floor 20 San Francisco, CA 94105 21 (415) 777-3200 22 Respondent: SUPERVISOR DAVE CORTESE 23 The Reporter: ADVANTAGE REPORTING SERVICES 24 BY: NINA PAVONE, CSR #7802 25 1083 Lincoln Avenue San Jose, CA 95125 (408) 920-0222</p> <p>--o0o--</p>	<p>Page 4</p> <p>1 Independent Evaluator on October 14, 2014 and the 2 Evaluator notified and provided a copy to the Respondent 3 on October 15, 2014. The Independent Evaluator's Report 4 and Recommendations were submitted to the City Clerk on 5 December 3, 2014, and copies were then provided to the 6 Complainant, the original Respondent and Commission 7 members and posted to the City website with the agenda for 8 a hearing held on December 10, 2014. 9 At the hearing, the Commission directed that the 10 complaint be amended to include Tam Nguyen as an 11 additional Respondent and directed the Evaluator to 12 conduct further investigation. The Evaluator subsequently 13 notified and provided a copy of the complaint to the 14 additional Respondent on December 12, 2014. 15 The Independent Evaluator's Supplemental Report 16 and Recommendations were submitted to the City Clerk on 17 February 2nd, 2015, and copies were then provided to the 18 Complainant, the Respondent and Commission members and 19 posted to the City website with the agenda for a 20 continuation of the hearing on February 9, 2015. At that 21 time, however, the Commission deferred the continuation of 22 the hearing until tonight because the Evaluator's 23 Supplemental Report and Recommendations had not been 24 delivered to the Respondents three business days in 25 advance of the hearing as required by procedure.</p>

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1 That was a mouthful.
2 On April 15th, 2014 the City Council adopted
3 Resolution 76954 which establishes the Commission's
4 regulations and procedures pertaining to investigations
5 and hearings. All parties to these proceedings have been
6 provided copies of the Resolution. The regulations and
7 procedures have been adopted in order to ensure the fair,
8 just, and timely resolution of complaints before the
9 Commission.
10 This hearing is open to the public. It is being
11 electronically recorded, and we have a court reporter with
12 us to compile a transcript. The formal rules of evidence
13 do not apply to this hearing, but all testimony will be
14 under oath or affirmation. The Complainant will be
15 treated like any other witness in providing evidence. The
16 Chair may compel the testimony of witnesses and may compel
17 the production of relevant documents to the Evaluator by
18 subpoena. Witnesses may be excluded at the discretion of
19 the Commission. Commission members may ask questions of
20 witnesses or the Evaluator when recognized by the Chair.
21 At this time I would like to have the
22 Complainant Bui Dinh, and the Respondent Dave Cortese, and
23 Tam Nguyen, or their representatives identify themselves
24 for the record.
25 MR. CORTESE: Dave Cortese.

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1 CHAIRMAN SMITH: Thank you. And I would also
2 like to have City staff and representatives of Hanson
3 Bridgett, the Commission's Independent Evaluator, please
4 identify themselves for the record.
5 MR. MILLER: Steven Miller.
6 MS. SILVA: Arlene Silva, Deputy City Attorney.
7 MS. TABER: Toni Taber, City Clerk.
8 MS. KRANTZ: Ruth Krantz, Deputy City Clerk.
9 MR. GRAVES: Tom Graves, Assistant City Clerk.
10 CHAIRMAN SMITH: Thank you. Under the
11 Commission's regulations and procedures, the Respondents
12 may submit a written response to the Report and
13 Recommendations. The response may contain legal
14 arguments, a summary of evidence, and any mitigating or
15 exculpatory information.
16 As of now, we have received two responses from
17 Dave Cortese, the first dated February 9, 2015, was an
18 e-mail as I recall; and then we received a letter today
19 dated March 2nd from Mr. Cortese.
20 Is there any other additional written response
21 from either Respondent that I'm not aware of? Nothing?
22 No? Okay. Thank you.
23 The Complainant or any interested party may also
24 submit a brief or written argument. And at this time, no
25 briefs or written arguments from the Complainant or any

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1 other persons have been received, at least not that I'm
2 aware of. Is that correct? Nothing else? Okay.
3 At this time I will recognize Steve Miller from
4 the Hanson Bridgett law firm to present the Independent
5 Evaluator's Report and Recommendations. And then after
6 that we'll hear from the Respondent and the Complainant.
7 So Mr. Miller.
8 MR. MILLER: Good even, Commissioners. Welcome
9 to our newest Commissioner. I look forward to meeting you
10 later on.
11 So as you mentioned, Chairman Smith, at your
12 December 10th hearing, you directed us to conduct further
13 investigation in three areas based on our December 2nd
14 report.
15 First you asked us to investigate more facts
16 regarding our earlier conclusion that the organizers of
17 what we're calling the event, this concert on September
18 21st, had coordinated with Supervisor Cortese. And in
19 particular, we had identified an individual in Supervisor
20 Cortese's office with whom we had had difficulty in
21 arranging an interview, and the Commission instructed us
22 to pursue this particular individual and conduct an
23 interview.
24 Second, the Commission directed us to find more
25 facts concerning the costs of the September 21st event,

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1 although you also cautioned us not to go crazy, but rather
2 to limit our investigations to a reasonable effort,
3 acknowledging that there were really many unknowns in line
4 with the discussion we had at our original -- in your
5 original hearing.
6 And then finally, the Commission directed us --
7 or the Commission named then Council member elect, now
8 Council member Tam Nguyen to be added as a Respondent and
9 directed us to conduct an investigation of the original
10 complaint in all its aspects, listing him as an additional
11 Respondent.
12 So our Supplemental Report, which we submitted
13 to you now over a month ago, but as you indicated was --
14 has been continued. I'll just go over some of the
15 highlights of that Supplemental Report.
16 First, we did reach out to -- or were successful
17 in reaching out to one of Supervisor Cortese's aids,
18 The-Vu Nguyen, and conducted an expansive interview with
19 him that is described in our report with some detail.
20 Our conclusion from that interview strengthened
21 our earlier conclusion that, in fact, there was
22 coordination between Supervisor Cortese's campaign and
23 Supervisor Cortese, and the planners of the so called
24 Event based on that interview, although that was --
25 further supported the conclusion we had already reached in

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<p style="text-align: center;">Page 9</p> <p>1 our original report. 2 Secondly, and I'm mindful of your reluctance to 3 engage in an open-ended investigation into what might have 4 been and probably is essentially unknowable facts 5 regarding every detail of every cent spent at this Event. 6 We did engage the services of a private 7 investigation firm, who I introduced to you. They were 8 here at the last meeting. They did a great job for you. 9 I offer them my hardy thanks. And they've identified some 10 additional non-monetary expenditures associated with the 11 Event. And so we now have a fuller, but I think by no 12 means, complete understanding of the dollar value 13 associated with the Complaint. 14 And then finally with regards to now Council 15 member Tam Nguyen, it appears undisputed that Council 16 member Nguyen coordinated with the Event organizers, and 17 that his actions at the Event constituted express 18 advocacy, such that as we -- 19 As a result of all the above, we conclude that 20 the expenditures associated with the Event should be 21 treated as made at the behest of candidates. And so both 22 Supervisor Cortese and Council member Nguyen should have 23 reported them as contributions; and not reporting those, 24 we believe to be a violation of Title 12. 25 As detailed in our report, it is extremely</p>	<p style="text-align: center;">Page 11</p> <p>1 can happen even under the best of circumstances. 2 Finally, I think I'll just anticipate a question 3 that might come up, which is that nothing in this 4 Supplemental Report causes us to reconsider our earlier 5 recommendation about the other complaint about the Event 6 organizers, in particular, now that the dollar value 7 associated with the Event has grown larger as we have 8 discovered more. 9 I thought I would just briefly mention that 10 those increased costs do not mean in our view that the 11 Event coordinators themselves failed to comply with Title 12 12 reporting requirements, and that's for two reasons: 13 The first is that those increased costs to the 14 extent they conceivably could have triggered some 15 reporting requirements, because of the number of 16 candidates present outside of your jurisdiction and 17 outside the City's jurisdiction, I don't think they would 18 have triggered City reporting rules. 19 And secondly, and really more importantly, 20 because of the coordination that we find exists, what 21 would otherwise be an independent expenditure reported by 22 this group of organizers who were not a committee but 23 could have been a committee. Because of the coordination, 24 those expenditures actually were contributions made at the 25 behest of the candidates and were probably -- should have</p>
<p style="text-align: center;">Page 10</p> <p>1 difficult to determine with any precision the amount that 2 such a contribution should have been reported as, and I'm 3 happy to discuss in more detail our thinking of how you 4 would go about ascertaining the proportional -- the 5 proportional aspects of the Event that were 6 get-out-and-vote Event as opposed to campaign express 7 advocacy and in further having to divide that express 8 advocacy amongst the candidates that are the officials 9 that within your jurisdiction, and it is not an easy task. 10 I believe all of that difficulty could have been 11 avoided had the candidates either not coordinated in the 12 first place or very simply reported dollar value 13 contribution as either their best guess, or they could 14 have worked with the Event planners to themselves 15 undertake the kind of investigation that you instructed us 16 to, to ascertain what the value of their contribution 17 should have been, and it is not a large number. There's 18 no suggestion that the dollar value exceeded some 19 contribution limit, and so there would be a relatively -- 20 would have been a relatively simple fix to what I 21 acknowledged to be a difficult situation, as is often the 22 case with these coordination examples where it is under 23 the law possible for coordination to take place without 24 the active ill will, I don't find any bad actions or 25 nefarious doings behind closed doors. But coordination</p>	<p style="text-align: center;">Page 12</p> <p>1 properly been reported by the candidates and not by the 2 Event organizers themselves. So in case you were 3 thinking, what about on that other issue, I thought I 4 would just raise that. 5 And that's with a brief overview. I'm happy to 6 answer questions. I know Supervisor Cortese is here. I'm 7 sure he's eager to address you. And if you would like me 8 to go into details now or to wait and answer questions 9 later, I'd be happy to do either. 10 CHAIRMAN SMITH: Well, why don't we take 11 questions now. You'll have another opportunity. 12 MR. MILLER: I'm happy to do which -- I didn't 13 want to get into the weeds right away, but I'm happy to -- 14 COMMISSIONER PIERRE-DIXON: I just want to be 15 sure that Supervisor Cortese was clear on everything in 16 his report. Do you need some additional information in 17 terms of the breakdown? 18 SUPERVISOR CORTESE: I don't think so. For the 19 record, I haven't received any discovery at all. There's 20 references to videotapes, interviews, transcripts of 21 interviews, and so forth. 22 In my phone interview with Mr. Miller, I told 23 him please produce any evidence that you think you have 24 that would indicate coordination between my campaign, my 25 committee, and this Event, because there hasn't been any.</p>

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1 And I was adamant about that repeatedly, at
2 least six times on the phone, and essentially defied him
3 to produce any such evidence. And if he had it, he should
4 produce it. I've received nothing to this date. I told
5 him I was representing myself. I'm an attorney.

6 So for the record, I'm happy to proceed any way
7 today to the disposition, and at least for today's
8 hearing, waive my right to discovery. But should this be
9 put over for any reason, I would like the opportunity to
10 review those documents and so forth.

11 What you're really asking me, I think, is am I
12 satisfied that I understand this presentation?

13 COMMISSIONER PIERRE-DIXON: Yes, correct.

14 SUPERVISOR CORTESE: And the answer to that is
15 yes.

16 CHAIRMAN SMITH: Any other --

17 MR. MILLER: And if I could just briefly say,
18 there was no discovery as such. I submitted a report with
19 a large number of exhibits, and I presume that that report
20 and its exhibits were provided you. But there is no -- I
21 have not kept hidden any --

22 CHAIRMAN SMITH: That's all any of us have is
23 the report, other than you have your notes and whatnot, I
24 assume. Okay. Any other -- I guess maybe I'll ask one
25 question.

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1 This whole thing is kind of murky, as we've
2 discussed before. What should have been a get-out-to-vote
3 Event, with the advertising to get-out-to-vote Event,
4 morphed into something a little over the line.

5 The essence of the -- the essence of the
6 coordination is that there was discussion about attending
7 this Event, which was at least in part an Event with
8 expressed advocacy, even though it was advertised at the
9 time as a get-out-to-vote Event. Is that right?

10 MR. MILLER: That is right. There are two steps
11 to my thinking. Are you speaking specifically about
12 Supervisor Cortese, or do you want me to address with
13 regards to Council member Nguyen as well?

14 CHAIRMAN SMITH: Let's talk about both of them.

15 MR. MILLER: I'm sorry?

16 CHAIRMAN SMITH: Let's talk about both of them.

17 MR. MILLER: Okay.

18 CHAIRMAN SMITH: I think the situations are a
19 little different in my mind. I think there was more
20 involvement on the one side.

21 MR. MILLER: The only reason why coordination is
22 an issue is because under the law, when there is
23 coordination, what would otherwise be an independent
24 expenditure is treated as a contribution made at the
25 behest of the candidate. There is nothing illegal or

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1 improper about coordination in and of itself. We talk
2 about coordination issue. What we're really talking about
3 is whether money spent is treated as an independent
4 expenditure reported by an independent committee or
5 whether it's treated as a contribution reported by a
6 candidate.

7 So I just want to make that clear. There's
8 nothing improper about coordination. Coordination under
9 the law -- and without looking at it, I'll -- I may not
10 get it exactly right, but there's a number of verbs
11 involved, cooperation, consultation, coordination, at the
12 request of -- as Supervisor Cortese has indicated in his
13 memo that I just saw a minute before I -- you opened your
14 hearing, just having a conversation or having advanced
15 notice is not necessarily enough. There has to be
16 cooperation, consultation, coordination at the request of
17 the candidate.

18 There is also a presumption. It's not the only
19 way to have coordination, but there is a presumption that
20 coordination occurs if -- and this I will read to make
21 sure I've gotten it right. If the Event -- if the
22 expenditure is, quote, based on information about the
23 candidate or committee's campaign needs or plans provided
24 to the expending person by the Committee.

25 So let's take that -- with that legal standard,

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1 let's take it one at a time. First with regard to Council
2 member Tam Nguyen, I believe the facts indicate first of
3 all that the presumption is clearly met. The Event
4 organizers based their expenditure, the Event itself, on
5 information about the candidate's plans provided by the
6 candidate.

7 They had the candidate signs. They knew that he
8 was going to be on stage singing and performing. They set
9 up a booth for him that was prominently displayed with his
10 signs. The schedule of the Event clearly indicated that
11 the Event organizers knew of his plans. And Council
12 member Nguyen in discussions with me was perfectly open
13 about the fact that he had a series of ongoing discussions
14 and conversations that included the Event planners, and
15 that it was his intention, in fact, that they would base
16 their planning of the Event on his needs and plans.

17 So I believe that presumption is met and not
18 rebutted. But even without that, the other string of
19 verbs, the fact that the Event was made in cooperation,
20 consultation, coordination or in concert with, at the
21 request or suggestion of, or with the expressed prior
22 consent of the candidate is also met.

23 With regard to Supervisor Cortese, I believe we
24 are -- I agree it's not quite as clear-cut in that
25 Supervisor Cortese -- I take him at his word that he did

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<p>1 not intend to coordinate with express advocacy Event; and 2 it is very likely that in good faith he believed this to 3 be a get-out-to-vote Event. However, there are a number 4 of facts that I think suggest to the opposite. 5 First of all, the invitation was made to his 6 policy aid, who handed the invitation to Supervisor 7 Cortese, and then interacted with the Event planners and 8 provided them with campaign signs. Again, indicating some 9 advance of decision. And those signs were featured 10 prominently on the proscenium of the stage, indicating 11 that the Event planners knew that Supervisor Cortese was 12 planning on attending. 13 That's further suggested by the fact that 14 Supervisor Cortese was introduced -- and by the way, I 15 should say that coordination can happen in the blink of an 16 eye. It doesn't require two months in advance. So that 17 it's my legal view that even standing to the side of the 18 stage and seeing a stage with signs that say "Cortese for 19 Mayor" -- I forget the exact language, but these campaign 20 signs, and hearing the introduction which you all heard on 21 the video said in English, "I now want to introduce the 22 next Mayor of the City of San Jose." That context in 23 addition to the advanced discussions with the policy aid I 24 think is also further indication that the Event and the 25 expenditure was with the express prior consent of the</p>	<p>1 this crossed the line from get-out-to-vote to express 2 advocacy. First of all, and not through any active doing 3 of Supervisor Cortese -- again, coordination can happen 4 without the active involvement. Event organizers made 5 special efforts not invite Supervisor Cortese's opponent, 6 now Mayor Liccardo, and even spoke at the Event as to how 7 important it was that the Vietnamese not support Mr. 8 Liccardo. Mr. Liccardo was not provided the same 9 interview that Supervisor Cortese had. 10 That is not a characteristic of a 11 get-out-to-vote Event. Rather, that is a characteristic 12 of express advocacy as that term -- and independent 13 expenditure as that term is defined, which I'll read to 14 you: 15 "An independent expenditure expressly advocates 16 the election or defeat of a clearly identified candidate, 17 or taken as a whole and in context, unambiguously urges 18 the particular result in an election." 19 And so I think, fact number one, the notable 20 absence of his opponent, I think the existence of the 21 campaign signs, as I mentioned, combined with the 22 introduction of Supervisor Cortese as the next Mayor of 23 San Jose, also meet that definition. 24 I agree, and as we heard in the video, and you 25 saw in the transcript, Supervisor Cortese did not, unlike</p>
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<p>1 candidate and was in cooperation, consultation, 2 coordination or in concert with. 3 Now all of that only matters -- well, maybe I'll 4 pause. Well, all that only matters if what was being 5 coordinated was an incident of express advocacy, because 6 you can coordinate all you want with a get-out-to-vote 7 Event and not have any problems at all. 8 So what I just described -- and I hope I'm be 9 responsive to your question. The first issue is the 10 coordination. In my view, it is an easy legal call, from 11 my perspective, that there was coordination under FPPC 12 guidance. 13 With regards to whether the Event was a 14 get-out-to-vote Event or express advocacy Event, I think 15 it is similarly an easy question with regards to Council 16 member Nguyen, who was riding around on a motorcycle 17 festooned with his campaign signs, was interviewed holding 18 his campaign signs. He had a booth where he was handing 19 out campaign information. He was on stage discussing the 20 virtues of his name. He acknowledged to us that he spoke 21 to the crowd and said "I'd be honored to get your vote." 22 This has all the classic hallmarks of express advocacy, 23 such that I believe it's an easy answer. 24 With regards to Supervisor Cortese, there are a 25 couple of facts that lead me again to the conclusion that</p>	<p>1 Council member Nguyen, get up on stage and say "vote for 2 me." Rather he engaged in a discussion of what he had -- 3 why he has helped the Vietnamese community in San Jose and 4 a history of his involvement in issues that were important 5 to members of the Vietnamese community, but it's not so 6 much the actual words that Supervisor Cortese said at the 7 Event, as much as the other factors that I just mentioned 8 that lead me to the conclusion that what was coordinated 9 was not a get-out-to-vote Event, but rather was an 10 incident of express advocacy and independent expenditure 11 as that term is defined in Title 12. 12 SUPERVISOR CORTESE: Can I interject a question? 13 CHAIRMAN SMITH: I don't think -- I don't think 14 it's appropriate to have a question at this point, is it? 15 You'll have a chance up here in a minute, and you can ask 16 that question as part of that. 17 SUPERVISOR CORTESE: I'll just make a statement 18 at that point. I'm very confused as to what he's talking 19 about, independent expenditures, which he said he wasn't 20 talking, or whether he's talking about coordinated 21 expenditures, which is something entirely different. He's 22 blurring those two in terms of the definition. So I hope 23 you're picking up on that. 24 CHAIRMAN SMITH: Well, he asked the question. 25 Go ahead.</p>

5 (Pages 17 to 20)

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1 MR. MILLER: I don't believe I'm blurring it.
2 There is an independent expenditure and there's a
3 contribution made at the behest of the candidate. And the
4 distinction between the two is a contribution -- an
5 expenditure made at the behest of the candidate is not an
6 independent expenditure. There are independent
7 expenditures, and there are expenditures made at the
8 behest of the candidate.

9 If an expenditure is -- an expenditure made at
10 the behest of a candidate is an expenditure that otherwise
11 would be an independent expenditure but for the fact that
12 it was made at the behest of the candidate. And what
13 makes a expenditure made at the behest of the candidate
14 under the law is coordination.

15 There is no defined legal term as coordinated
16 expenditure. There is either an independent expenditure
17 or an expenditure made at the behest of the candidate as a
18 result coordination.

19 CHAIRMAN SMITH: And if it is an independent
20 expenditure, there can't be coordination.

21 MR. MILLER: So if there's an independent
22 expenditure, by definition there has not been
23 coordination, because it is independent.

24 CHAIRMAN SMITH: Right. But there have been
25 cases where something is reported as an independent

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1 MR. MILLER: No.
2 SUPERVISOR CORTESE: That's what I'm asking you.
3 You just said now I'm going to take up Supervisor
4 Cortese's. You talked about Council member Nguyen. And
5 as you spoke about the allegations against me, you
6 inserted that same definition that you just read about
7 independent expenditures, and I'm not understanding why
8 you're bringing that up when -- as to the complaint
9 against me, there is no allegation, where you suggested
10 one, that there was independent expenditure made. In
11 fact, at the outset of this hearing, you said in case
12 you're wondering why there isn't an independent
13 expenditure allegation, and you explained that.

14 So I don't understand. To me, you're confusing
15 matters when you're entering definitions of things like
16 independent expenditure, which are not relevant to the
17 claim against me unless --

18 MS. SILVA: I'd like to -- we are having a
19 hearing here. Can you please address the Chair as opposed
20 to having communication between the two parties, please.

21 SUPERVISOR CORTESE: For the record, you can
22 indicate that all those comments I just made were
23 addressed to the Chair?

24 MR. MILLER: Can I say something? Would you
25 like me to respond?

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1 expenditure and they find it -- in fact, something came
2 before this Commission I think many years ago, probably
3 when Terry was here, where there was coordination between
4 a campaign consultant and an independent committee, and I
5 believe it was a finding that that was a no-no.

6 MR. MILLER: That is what we're talking about
7 here. The no-no that you described is not that there was
8 coordination. The no-no is a lot of money was spent and
9 no one reported it. So the question is -- is it the
10 committee supposed to report it? The answer to that is
11 yes, the committee reports it if it's an independent
12 expenditure.

13 CHAIRMAN SMITH: And the key there I think is
14 that it has to truly be independent if it's reported -- if
15 it's treated as an independent expenditure and is reported
16 as such.

17 MR. MILLER: The definition of independent
18 expenditure, which I just read, what I stopped reading is
19 the last phrase of this which says -- so it was
20 independent expenditure -- "expenditure made in express
21 advocacy or unambiguously urges the support of a
22 candidate, but which is not made at the behest of the
23 effective candidate."

24 SUPERVISOR CORTESE: Is that allegation being
25 made?

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1 CHAIRMAN SMITH: Yes, please.
2 MR. MILLER: I believe the Complaint filed on
3 October 14th naming Supervisor Cortese and his campaign as
4 the Respondent specifically and exclusively alleged that
5 Supervisor Cortese had failed to report as contributions
6 expenditures made at the behest of the campaign, at least
7 that was front and center of the exact allegation that we
8 were charged with investigating.

9 CHAIRMAN SMITH: Right.

10 SUPERVISOR CORTESE: So, Mr. Chair, no
11 independent expenditure?

12 CHAIRMAN SMITH: Right. That's correct in this
13 case, yes.

14 MR. MILLER: There was a second Complaint
15 alleging almost as an alternative that these various
16 members of the planners of the Event had spent money and
17 had failed to report it as an independent expenditure.

18 SUPERVISOR CORTESE: MR Chair, what's the
19 disposition of that Complaint?

20 CHAIRMAN SMITH: That was -- we found that that
21 was not the case, that they did not make an independent.

22 SUPERVISOR CORTESE: So, Mr. Chair, the issue of
23 independent expenditures is off the table?

24 CHAIRMAN SMITH: It is.

25 SUPERVISOR CORTESE: I'm just confused as to why

6 (Pages 21 to 24)

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1 Counsel is inserting that definition into the presentation
2 here with regard to the Complaint against me when there is
3 no allegation of independent expenditure, to the extent
4 there might have been my understanding this has already
5 been adjudicated.

6 CHAIRMAN SMITH: In the other case, that's true.
7 Okay.

8 Any further -- or you want to --

9 MR. MILLER: Only just to repeat that the reason
10 why the concept of an independent expenditure is relevant
11 is that in order to discover whether there are
12 expenditures made at the behest of a candidate, that is a
13 definition in the -- that concept is defined by the
14 absence of an independent expenditure. In other words, it
15 is an independent expenditure but for the fact that it is
16 made at the behest of the candidate. So it's not at
17 all -- the definition is not at all relevant in my mind.

18 CHAIRMAN SMITH: Okay. If there's nothing else,
19 let's move on and you'll have an opportunity.

20 COMMISSIONER PEACOCK: So for each campaign,
21 when did the line get crossed? I think you're saying the
22 line was crossed. There seemed to be earlier than one --
23 sort of where would be the -- where did it go from black
24 to white or white to black?

25 MR. MILLER: That's a great question,

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1 invitation included this more detailed discussion of the
2 plans and needs of the campaign itself.

3 But I also think there was a moment in time
4 shown on the video when Supervisor Cortese -- I don't know
5 how practical this is, but the law is not always perfectly
6 practical. But when he saw what was happening and he
7 could have walked away, and there was a second line at
8 that point too.

9 COMMISSIONER PEACOCK: And the information that
10 was available at the time of the acceptance of the event
11 that should have said, oh, this is a campaign Event was
12 what?

13 MR. MILLER: The information was available --
14 first of all, The-Vu Nguyen provided campaign signs, told
15 the campaign organizers that Supervisor Cortese was going
16 to attend. I think that's the answer to your question.

17 COMMISSIONER PEACOCK: I guess I'm not quite
18 there yet. So in other words, I'm putting -- I'll put
19 myself in Mr. Cortese's place. Okay, you want to go to
20 this Event. What are you saying that I knew or he knew at
21 that point when he said yes, that he should have known it
22 was a campaign Event?

23 MR. MILLER: Well, it's not so much that he knew
24 it was a campaign Event. It's that it turned out to be a
25 campaign Event. That's the unfortunate reality of these

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1 Commissioner Peacock. It's a difficult question, perhaps,
2 to answer with certainty. With regards to Council member
3 Nguyen -- and part of the reason why it's difficult to
4 answer with certainty is that I don't have a time machine
5 and I can't go back and really know exactly what happened.
6 But it does seem that there were in depth, detailed
7 discussions such that the line that you're asking whether
8 it was crossed, was crossed at some point. I believe
9 Council member Nguyen has suggested that his conversations
10 were in the weeks prior to the Event itself.

11 Again, one doesn't know that those -- that that
12 coordination would have crossed the line until one is at
13 the Event and sees that it was not a get-out-to-vote Event
14 but an express advocacy campaign Event.

15 So those are two moments in time that you have
16 to think about. With regards to Supervisor Cortese, it is
17 -- if I had to say -- again, I think there is a number of
18 lines, and I suppose it's the cumulative effect of those
19 lines.

20 In my earlier report, I was satisfied, and I
21 remain satisfied, that the line was crossed when
22 Supervisor Cortese both accepted the invitation, given
23 what subsequently appeared at the Event, and that
24 conclusion was supported by my follow-up interview with
25 The-Vu Nguyen, who indicated that the acceptance of the

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1 coordination proceedings, the way they happen and the way
2 FPPC Guidance works.

3 And this commission has dealt with this issue a
4 few years ago, if you recall the Jimmy Nguyen Complaint,
5 where it is also possible for coordination to occur
6 without malicious intent and only revealed as a result of
7 subsequent activities.

8 COMMISSIONER PEACOCK: No, I get the part of,
9 okay, I'm at the event, I see signs, go, wow, this may be
10 as Event. But what was the point of the decision to
11 attend that was known or should have been known or should
12 have been asked? It was, oh, by the way, they asked us
13 for some signs or --

14 MR. MILLER: Well, I'm not so sure that I know
15 that there was such a moment. I mean, if you and I -- if
16 you ask me to lunch and then I show up at lunch and it's a
17 campaign rally, the fact that we discussed where and when
18 the lunch was going to happen and what time I was going to
19 come, even though we didn't -- I didn't know that it was
20 going to be a campaign rally, I think you and I would have
21 coordinated in that campaign really.

22 COMMISSIONER PEACOCK: Yes, I guess -- I think
23 you say there were a couple of lines. One was sort of at
24 the Event. One was in the acceptance. So it's not
25 just -- the acceptance almost became retroactive, is that

7 (Pages 25 to 28)

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1 what you're saying in a sense?
2 MR. MILLER: No, I don't think I'm saying it's
3 retroactive. I guess what I'm trying to say is that there
4 was -- that there was coordination doesn't answer the
5 question of what was coordinated necessarily, and we
6 didn't know what was coordinated until the Event itself
7 happened.
8 COMMISSIONER PEACOCK: Okay.
9 CHAIRMAN SMITH: Let me ask a follow-up, and
10 then I'm not going to ask anymore questions for now,
11 because this triggered a thought. Say that when they were
12 organizing this they had contacted both Supervisor Cortese
13 and at the time Council member Liccardo, and both of their
14 campaigns sent campaign signs, as regards to that
15 particular race, would that still be considered
16 get-out-to-vote?
17 MR. MILLER: It's impossible to answer a lot of
18 these interesting hypotheticals.
19 CHAIRMAN SMITH: It kind of relates to the point
20 in time.
21 MR. MILLER: It depends on -- it depends on what
22 -- what each candidate said, what each candidate did. If
23 Supervisor -- if then Council member Liccardo was
24 interviewed -- was invited but introduced by saying here
25 is Liccardo but don't vote for him, that would be

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1 different.
2 CHAIRMAN SMITH: Right.
3 MR. MILLER: But if they introduced each
4 candidate as saying here's the next mayor --
5 CHAIRMAN SMITH: Let me --
6 MR. MILLER: It is a hypothetical.
7 CHAIRMAN SMITH: You're right. Let me ask more
8 generally. Say there's an event and it only relates to
9 one race, because this one was eight different races, and
10 eight different people handled differently. If it was a
11 get-out-to-vote Event for just one election, and all
12 candidates were invited, and all candidates were given the
13 interview to send campaign signs, and all of them were
14 introduced more or less the same, that would be a real
15 get-out-to-vote Event, right?
16 MR. MILLER: I would hope that the candidates --
17 the signs trouble me. I don't know to what extent they
18 trouble me unless I do a little more details, but this is
19 not just some volunteer put up signs. This was the Event
20 organizers put on the proscenium of the stage prominently
21 featured signs urging the election of specific candidates.
22 This is not just a volunteer activity. And then the video
23 shows the signs in multiple locations, and it's just a
24 different set of facts.
25 CHAIRMAN SMITH: Okay. I'm not going to ask

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1 anymore.
2 COMMISSIONER VEMULAPALLI: Do you have any idea
3 like how many people attended that Event and like how much
4 to your best knowledge was spent on the Event?
5 MR. MILLER: Your first question is how many
6 people attended the event? You mean in the audience?
7 COMMISSIONER VEMULAPALLI: Yes.
8 MR. MILLER: I do not know the answer to that.
9 We have seen a video, but it was a fluid Event that lasted
10 a number of hours and there were people who came and
11 didn't come. If I had to make a guess, it looks like
12 there were couple of hundred people there at any one time,
13 but I really don't know at all over the -- over the course
14 of the event.
15 And your second question was how much money was
16 spent in total at the Event? So that is a question that
17 has proved very difficult to answer. I think our first
18 investigation -- and if I get my numbers wrong, I'm
19 certain Commissioner Pierre-Dixon is going to correct me.
20 She has in the past.
21 COMMISSIONER PIERRE-DIXON: That's right.
22 MR. MILLER: Our first report found that as
23 reported by the organizers, there was \$2,670 in actual
24 funds spent, and that our supplemental investigation has
25 found that there were additional nonmonetary expenditures

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1 in the form of the musicians and their equipment and the
2 rental and the donation of the facility, such that the
3 dollar value moved up from that 2,000 something dollars to
4 between -- somewhere between \$10,760 and \$14,760. But
5 that number in and of itself is preliminary.
6 The folks who organized this Event, it was a
7 pretty disbursed bunch of people, and they did it in what
8 I would describe as a casual fashion, such that it would
9 take many, many hours of detailed investigation to try and
10 pin the exact dollar value with any precision.
11 COMMISSIONER VEMULAPALLI: So whoever attended
12 may not -- everybody can vote in my opinion, so we don't
13 actually know the exact number, like go-out-and-vote means
14 not everybody can vote, whoever attended that Event. So
15 know maximum contribution is like maybe \$250 per person.
16 So how many people attended? So if I look at it like --
17 COMMISSIONER PIERRE-DIXON: I think they came up
18 with a value of between 201 and \$276, which is a pretty
19 low amount.
20 CHAIRMAN SMITH: That's per candidate.
21 COMMISSIONER PIERRE-DIXON: That's per
22 candidate.
23 COMMISSIONER PEACOCK: One more question. So if
24 I'm a candidate and I've got a crazy schedule and I say
25 sure, I'll go to that Event, and I go believing it's a

8 (Pages 29 to 32)

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<p>1 get-out-to-vote Event and I get there and I see signs for 2 me, and I start to get introduced as the next whatever 3 office it is, at that point, I realize, hey, maybe this is 4 a campaign event. My options are, what, two things? One 5 is to say, sorry, got to go; or two, report it? 6 MR. MILLER: Yes. If I were your lawyer, I 7 would give you those two options. 8 COMMISSIONER PEACOCK: Okay. Thanks. 9 CHAIRMAN SMITH: Okay. So we'll move on then. 10 At this time, I would call the Respondents Dave Cortese or 11 Tam Nguyen, or -- and Tam Nguyen or the representatives to 12 come forward to present written or oral response. And 13 we'd appreciate it if you'd limit your comments to ten 14 minutes. And Mr. Cortese is the only Respondent here. So 15 if you would come forward. Please and raise your hand. 16 17 DAVE CORTESE, 18 being first duly sworn by the Chairman to tell the truth, 19 the whole truth, and nothing but the truth, testified as 20 follows: 21 CHAIRMAN SMITH: If you'd identify yourself, 22 please. 23 SUPERVISOR CORTESE: Dave Cortese, Santa Clara 24 County Supervisor, Former candidate for the Mayor of San 25 Jose.</p>	<p>1 using same definition of coordination that Mr. Miller 2 says -- or uses here. 3 The definition that he cited in the report 4 doesn't speak of retroactivity. It says there's an 5 expenditure that -- there's a presumption of an 6 expenditure that is made at the behest. I think we all 7 know what the word behest means. There's an asking. It's 8 not something that happens by default. There's an asking. 9 So this is straight from the report, FPPC Rule 10 18225.7. There's a presumption created, an expenditure is 11 made at the behest of a candidate if it is, quote, based 12 on information about the candidate or committee's campaign 13 needs or plans provided to the expending person by the 14 candidate or committee. 15 That's a much higher bar than showing up at an 16 event, walking up on a stage to give a general 17 get-out-to-vote campaign as a County Supervisor and having 18 an MC yell out whatever he said. That's not planning. 19 That's not at the behest. And I hope you all recognize 20 that. 21 You know, the word coordination has been used 22 countless number of times already this evening. Mr. 23 Miller has talked about how important that is. But it's 24 -- you have to take the whole sentence. It's coordination 25 with candidate or committee, not the scheduler at the</p>
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<p>1 CHAIRMAN SMITH: Thank you. 2 SUPERVISOR CORTESE: First of all, thank you. I 3 served on the City Council for the City of San Jose, and I 4 have a pretty good idea what you do. 5 In fourteen -- now fifteen years of public 6 service, including four elections in the City, this is the 7 first time I have appeared before this Commission. 8 Through several million dollars of campaign 9 contributions, navigating an equal amount of independent 10 expenditures and so forth, I've taken great pride in 11 abiding by the rules and living by the rules, while at the 12 same time exercising my obligation and my First Amendment 13 rights as an elected official to appear in open public 14 events, and to process those invitations through my office 15 without invoking campaign election problems in the 16 process. 17 So I think that we know what we're doing, and I 18 think we're pretty good at it. And that's why I've been 19 so adamant all along in terms of my interview with Mr. 20 Miller. 21 I'm equally adamant today. Not angry adamant. 22 There's absolutely no coordination with me, and I am the 23 Treasurer of the campaign, not just the candidate. The 24 Treasurer of the campaign. So I'm testifying under oath, 25 there is no coordination with this campaign. And I'm</p>	<p>1 County of Santa Clara that's responsible for scheduling my 2 County appearances at public events. 3 Now, keep in mind, if you're trying to get a 4 picture of this -- I appreciate the questions about how 5 many people and so forth. I was there for about 15 6 minutes. I didn't hear any other speeches that anybody 7 made, including Tam Nguyen. I was literally there for a 8 whirlwind moment, asked to get up on the stage and let 9 people know how important it is to show up and vote. And 10 I was out of there immediately. 11 That said, you have to picture that this is the 12 largest mall in Little Saigon, with a surface parking lot 13 that is acres large, acres. And that the surface parking 14 lot is essentially covered with cars and people milling 15 around and an event producer who is there every week at 16 this time of the year putting on concerts, has evidently 17 invited people to have an interlude during this concert 18 where there's a get-out-to-vote campaign. 19 My office -- County office received such an 20 invitation. I accepted the invitation. I did not 21 converse with my staff member, The-Vu Nguyen, about the 22 invitation. It was very straightforward. It was called a 23 Rock the Vote Event, and commonly understood in this 24 community if you're an elected official, that the 25 Vietnamese community put on a Rock the Vote event. It</p>

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1 generally means that they're trying to encourage, urge
2 people to show up and vote. It's typically an event with
3 music and dignitaries, officials, some campaigning, some
4 not campaigning, some who are in between campaigns, but
5 just simply urging people, much like the registrar of
6 voters would do, to get out and vote.

7 This was the nature of the invitation. It went
8 on my public calendar. We have the Sunshine Ordinance in
9 the County of Santa Clara. As part of that ordinance, we
10 have public calendars so we disclose events that are
11 County business.

12 There would be two reasons this would not show
13 up on my calendar, and it did, if it was perceived as a
14 political event or an election event. One, it would not
15 qualify as County business. So even though I could
16 over-disclose, I don't have to only disclose County
17 business. I could inadvertently or purposely put
18 something on there like a birthday party or something like
19 that, or a political event.

20 But there's a problem that you have with a
21 political event that you don't have with a birthday party,
22 and that is we have a very, very clear understanding, and
23 County Counsel has been very good about informing us as to
24 those ethics rules, but there needs to be a firewall
25 between political scheduling, campaign-related scheduling

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1 and non-County business scheduling. You can't have the
2 the same people handling both.

3 So an immediate decision is made when an
4 invitation comes in; is this County business, during a
5 campaign particularly, or did someone inadvertently invite
6 us to a political -- a campaign event or share information
7 about a campaign event with the County office when it
8 really should have gone to the campaign office.

9 During this period of time, we had a campaign --
10 we had a separate campaign office. We had nine employees,
11 including the campaign manager. I service treasure the
12 campaign. We raised -- during this election period, just
13 this period, approximately 1.5 million dollars.

14 We were not subject to a limit on spending. So
15 had we -- there would be no motivation to request any kind
16 campaigning event. But if there was, there was no
17 motivation not to disclose it in the first place. It
18 would not cause us to run into these limits. It could
19 just as easily be scheduled by the scheduler, the full
20 time people in the campaign office, rather than the County
21 office. No reason to do that.

22 What concerns me here, why would you -- first of
23 all, I respect the Commission. But secondly, I'm here
24 because this allegation has bothered me from the very
25 beginning because it really purports to interfere with my

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1 duties as an elected official by trying to construe
2 something that was absolutely scheduled and evaluated and
3 I think undisputed even by the investigator brought into
4 our attention as a get-out-to-vote, Rock the Vote, general
5 get-out-to-vote event.

6 I have to be able to attend those events as a
7 County supervisor. And there's really a concern that I
8 have here that if you retroactively need to suddenly start
9 claiming other people's expenditures at events that
10 they're having because somebody at the event puts up a
11 campaign sign or refers to you as a candidate or the next
12 Mayor, we're going down a slippery slope that in my
13 opinion has no end to it.

14 I will tell you that both candidates in this
15 race separately showed up at churches, at national night
16 out events, at people's homes, invited as elected
17 officials, one as Council member, one as supervisor. And
18 some of those homes had campaign signs on them, as people
19 are entitled to do. None of that makes those events a
20 campaign event.

21 But here, at least as to the allegations with
22 regard to me -- I can't speak to the facts around Council
23 member Nguyen, maybe this event was structured differently
24 and he was informed differently. Maybe he did. I wasn't
25 there for any speaking that he did. Maybe he did do

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1 speaking that was advocacy or as a candidate. He was not
2 an elected official, it's my understanding, at that time.
3 I don't know.

4 I only know that I show up as a County
5 Supervisor, just like I would at any number of events, a
6 Little League opening, National Night Out, a church event,
7 which I attended many and still do, sometimes on a daily
8 basis.

9 At what point am I responsible, or are we going
10 to start charging candidates with making a decision
11 retroactively because somebody walks up to you at the end
12 of a Catholic mass or at the end of the proceedings at the
13 Cathedral of Faith and says "you're my man." We can't do
14 that. We can't do that.

15 And I did think there's -- and I hope you won't
16 go down that path. But I think if the City thinks that's
17 the right way to interpret what happened here and indeed
18 says that they can regulate those kind of appearances that
19 are really a matter of my duties as an elected County
20 official, then I think we have First Amendment issues that
21 go well beyond anything that we've discussed today. And I
22 just want to put that out there.

23 And I want to say, since I'm testifying under
24 oath as a witness, this event, in fact, did have my
25 opponent's signs, and I will testify here under oath that

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1 his signs were present on this site, in this parking lot
2 and around the stage at a level 4 to 1. 4 to 1 minimum.
3 That's my estimate. I made that estimate when I arrived
4 at the event. I shared that estimate with my wife who was
5 with me at the event. And she inquired as to why his
6 signs were everywhere and mine weren't.

7 This is, again, an open public mall. Both
8 candidates had permission to have signs in this parking
9 lot, separate and apart from this one appearance that I
10 made for 15 minutes that day. Every day of the campaign
11 that there were signs out, all the way up to November 4th
12 and prior to this event, there were Cortese, Liccardo
13 signs on this site.

14 My opponent somehow bolstered out the number of
15 signs that he had before the event. I had several people
16 as I was walking out away from the stage grab me who
17 evidently were supporters, voters, and chastised me for
18 that. You know, you shouldn't let your opponent have more
19 signs here than you have.

20 But as I said, I wasn't there in a campaign
21 capacity. Nobody -- as I said in the letter, nobody --
22 none of those employees, contractors, consultant or
23 anybody employed or deployed by the campaign were in
24 attendance at that event.

25 The-Vu Nguyen was in attendance at the event,

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1 person who initially received the invitation on my staff
2 to communicate with me. We have a full time scheduler at
3 the County office. I did when I was a City Council member
4 as well.

5 That executive assistant is the repository. Her
6 desk is the repository for all invitations. No matter
7 which staff member receives them, they go to her. They're
8 taken at face value. They're then processed methodically
9 in five years and so forth. And they're brought forward,
10 and we go through those.

11 There was never any point in time with regard to
12 this Event and that process where anything appeared to me
13 or stood out to me or was communicated to me that it was a
14 political event for anybody, let alone me.

15 So my request is that given these facts that I'm
16 testifying to today, that you make the determination that
17 whatever happened there in terms of planning, in terms of
18 expenditures, in terms of anything with other candidates
19 for that matter, that nothing happened that was at the
20 behest of me or my political campaign at this event.

21 And that's -- I'll rest there. If there's any
22 questions, I'll be happy to answer them.

23 COMMISSIONER PIERRE-DIXON: I think my main
24 concern is -- Rolanda Pierre-Dixon speaking -- Mr. Nguyen
25 having possession of your signs and ability to give those

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1 which I will tell you is customary for him. He's been on
2 my staff for 11 years. It's rare that he would miss a
3 Vietnamese/American event in this community. His title in
4 my office is Community Outreach Coordinator. That's what
5 he does. Nevertheless, at this event, he wasn't
6 specifically tasking me or staffing me. He showed up at
7 the event unbeknownst to me that he was even going to be
8 there.

9 Commissioner, pretty much like you described,
10 there are numerous, numerous events that we have to
11 decipher and decide on every week. To this day, if you
12 look again at my public calendar, which is published every
13 Wednesday night, you will see that there's eight hours of
14 calendaring. Eight hours. I'm not candidate this week.
15 There's still eight hours of calendaring time that is
16 utilized at my County office with me present to go
17 through.

18 We have a three-ring binder that's about this
19 tall. I guess let the record show -- I'm not sure of that
20 size, but over six inches. One that's about half that
21 size and several folders, and they're always full. It's a
22 continuous process of as fast as you can get through some,
23 they backfill again. Of course, every day they're coming
24 in.

25 So this is the process. It doesn't require the

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1 to others for this Event. And so if you could explain to
2 us how that occurred.

3 SUPERVISOR CORTESE: Mr. Nguyen disputes that he
4 delivered any signs to that event. And I think the
5 misunderstanding may be that -- Mr. Nguyen may very well
6 be the volunteer who placed signs on that shopping center
7 weeks earlier. That's quite possible.

8 He disputes that. And frankly in the context of
9 the political campaign, it would be very unusual for the
10 campaign itself to deliver signs in advance to a political
11 event like this.

12 We have field coordinators. We have hundreds of
13 volunteers. We had 12,000 yard signs out during this
14 campaign, and to my knowledge we were never -- we were
15 never brought before this Commission for violating those
16 rules. So there were signs, as I said, all over the place
17 there.

18 His version of the facts -- and obviously that's
19 hearsay. I did my investigation; Mr. Miller did his -- is
20 that where -- because there weren't any signs delivered,
21 because he didn't do anything like that, that whoever was
22 there setting up the time, he believes grabbed signs that
23 were already in the yard in the parking lot there and
24 placed them where they thought they would be more visible.

25 You know, not only is that not something that

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1 was coordinated in advance of the campaign, it wasn't even
2 -- it certainly wasn't coordinated with my office. Nobody
3 asked me if they should do that, if indeed that's what
4 they did.

5 But again, I don't think anybody's alleging that
6 the rules around campaigns -- municipal rules around
7 campaign signs placed in a location were violated in any
8 way. It's pretty hard to stop people from expressing
9 themselves if they happen to have a sign with them.

10 But no. I'm testifying to you we did not
11 coordinate the delivery of any signs to that Event for
12 purposes of that Event.

13 CHAIRMAN SMITH: Any other questions of Mr.
14 Cortese?

15 COMMISSIONER PEACOCK: Just couple kind of small
16 ones. So I'm sure you get tons of mail that comes in.
17 Probably people who don't know -- they probably get a lot
18 of campaign invitations that come into the office because
19 people know that's Cortese's office, so I'll send it
20 there. So what's your process for saying, okay, this is
21 clearly political, this is County Supervisor?

22 SUPERVISOR CORTESE: Well, it's pretty easy to
23 tell. And it does happen occasionally. Usually it would
24 happen by e-mail. Somebody would send an e-mail. People
25 aren't always sophisticated to rules, and say something

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1 one did.

2 And as I said, I've been making those decisions
3 since 2001 over and over and over again. I've run -- this
4 was my ninth election I've run. So it's not as if through
5 naivete or default or accident or something like that that
6 we made a bad decision and allowed a campaign function to
7 stay in the County domain. We would make our best
8 decision at that time.

9 COMMISSIONER PEACOCK: I just imagine the human
10 cry if that did show up your public calendar, on your
11 County Supervisor website, that would just be --

12 SUPERVISOR CORTESE: It would raise the issue of
13 you can disclose that. There's nothing wrong with
14 disclosing that's where I'm going to be that day.

15 Somebody could -- a fair question to ask would be how did
16 it get on your County calendar. Somebody has to put that
17 there. And all of a sudden you have a public employee
18 engaging in campaign activity in theory.

19 COMMISSIONER PEACOCK: If you're trying to be
20 full disclosure, if you have a campaign event showing up
21 on your Supervisor calendar, that would not look good. So
22 obviously it would make sense why you don't.

23 SUPERVISOR CORTESE: Thank you. That's what I
24 was referring to earlier when I said there's no motivation
25 to run that risk or do that. There was no motivation to

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1 like, you know, you ought to come to this event, it would
2 be good for your campaign, something along those lines.
3 Or it's a political event and it would be good for you to
4 come out and speak about your campaign. That would be --
5 those words would immediately trigger that e-mail being
6 directed to me personally.

7 COMMISSIONER PEACOCK: Right.

8 SUPERVISOR CORTESE: Removed from the office
9 immediately. That's under our records, contention and our
10 policy that not only is that allowed to do, but that would
11 not be considered a County public record but would be
12 considered political invitation to try the further my
13 campaign.

14 It would then move in this case over to 1762
15 Technology Drive, about seven minutes away by car in my
16 folder and delivered to scheduler over there basically
17 with the information.

18 This -- evidently somebody inadvertently sent
19 this over to County office, not realizing you need to
20 contact them and circle back with me and let me know if
21 this is a worthwhile campaign event or political event for
22 me to attend.

23 Again, I laid out the reasons that such an event
24 would never show up on my public calendar. It would never
25 be allowed to work its way through the process, like this

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1 -- there would have been no motivation in our case to hide
2 an expenditure.

3 Again, you get if you look at our reports, and
4 I'm not suggesting that, but you will see many dozens of
5 in kind expenditures that we reported that would have been
6 at our behest asking somebody to organize a party on our
7 behalf, and we had to feed people, and that the
8 expenditure was -- for the event at our behest, we knew it
9 was something we need to get a receipt for and document
10 and it needs to show up on our 460 forms for reporting.

11 So a lot of this testimony you're hearing or the
12 report that you're hearing, you know is based on people's
13 testimony and circumstances, I suppose. But again, I
14 would hope that you will take into account that there are
15 no circumstances here that would have given rise to any
16 motivation to hide a campaign event out there.

17 CHAIRMAN SMITH: Other questions?

18 COMMISSIONER PEACOCK: Just one quick. So you
19 were saying that -- I understand that you go to lots of
20 events as a supervisor. So if somebody says, hey, here's
21 our next mayor, you can't not go because that happens
22 obviously.

23 SUPERVISOR CORTESE: I think Mr. Miller is
24 describing the situation -- by the way, for the record, I
25 haven't seen the videotape, but I'll take it at his word

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<p>1 that before -- as I was introduced evidently already on 2 the stage, that the MC said something about me being the 3 next Mayor of San Jose.</p> <p>4 Now, again, I'm there as a County official. I 5 didn't make -- I think we both stipulate to that. I did 6 not make a vote for Dave speech, a campaign speech. But 7 turning around and walking away off the stage without any 8 explanation to the audience is not -- it's just simply not 9 the real world. It's just not the role of a public 10 official to do that, or to publicly chastise people 11 because they are unsophisticated and made an honest 12 mistake. I can't charge the MC with knowing to say that 13 or not personally. But I certainly didn't encourage that 14 either, and I would not encourage that either under those 15 circumstances.</p> <p>16 COMMISSIONER PEACOCK: And would it be 17 appropriate to go to an event like that as a candidate or 18 wear your candidate's hat as opposed to your County 19 Supervisor hat?</p> <p>20 SUPERVISOR CORTESE: This is another area 21 that's -- all of you, I suppose, will have to wrestle with 22 not only tonight but in the future. If a candidate -- an 23 elected official shows up at an event that's otherwise a 24 public event, a Chamber of Commerce event, National Night 25 Out, Little League opening with a button that says vote</p>	<p>1 You have -- you need more evidence than that to tether 2 something that happened here to the campaign, and I'm just 3 telling you there is no evidence. That's why you don't 4 have it.</p> <p>5 You ought to do the investigator. They talk to 6 a lot of people. Probably -- sounds like he did. There's 7 just no evidence of a campaign committee field coordinated 8 agent, campaign manager or anybody else planning or trying 9 to orchestrate anything at this event. There's nothing 10 there except me showing up as a County Supervisor and 11 somebody blurring out something on the stage.</p> <p>12 COMMISSIONER PIERRE-DIXON: There is the 13 allegation that Mr. Nguyen provided the signs.</p> <p>14 SUPERVISOR CORTESE: I talked to Mr. Nguyen and 15 I asked him if he did that. It sounded completely out of 16 character. It's inconceivable that he could do that 17 legitimately on his own time as a volunteer.</p> <p>18 As I said, we had 12,000 signs out. And again, 19 you know, when you start getting into this realm of 20 campaign signs, is everybody who posts a campaign sign in 21 a store window that they pay rent for, or a front yard of 22 a house that they pay rent for, are they coordinating with 23 the campaign because they told you to put your sign up at 24 your behest and planning?</p> <p>25 COMMISSIONER PIERRE-DIXON: I'd say no, unless</p>
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<p>1 for me, is this -- there are the expenditures associated 2 with this event now at the elected official's behest 3 because of advocacy.</p> <p>4 I disagree with Mr. Miller on one point. I 5 agree with him that that be advocacy. I dispute that 6 that's planning the needs of the campaign with the 7 organizers ahead of time.</p> <p>8 I think the difference would be if the candidate 9 said I'm going the wear a button, can you get every Little 10 League coach to wear a button at that event as well 11 because I would really like that when I show up Saturday. 12 That's a big difference. But that's not what happened 13 here.</p> <p>14 In fact, funny, nobody from my campaign even 15 communicated orally or in writing that I know of, an 16 allegation of that. Even in the most generous view of the 17 report here, it's clear that there's no agent of the 18 campaign who communicated with these organizers.</p> <p>19 Is Mr. Nguyen an agent of mine? As an agent of 20 mine and as a Supervisor in Santa Clara County, from that 21 standpoint, every time he goes out, he's representing or 22 talks to somebody, he's representing the County of Santa 23 Clara. So he in the legal sense of the word rises to the 24 level of an agent. But how does that get imputed to be -- 25 how do you impute that relationship over to the campaign?</p>	<p>1 they were doing a store opening and inviting with your 2 signs. But I think that goes beyond what we have here. I 3 this think question is whether or not Mr. Nguyen did what 4 he should have properly done, which is just calendar an 5 event and be done with it.</p> <p>6 I think there was something else here that 7 causes us all to be in this room tonight, and we need to 8 get to the bottom of that. I'm not sure if you're aware 9 that we had to go back to this additional investigation, 10 because we could not get Mr. Nguyen to talk to us 11 initially. And that was a very big concern to me, because 12 I couldn't understand how come it was such a problem in 13 getting ahold of a County employee and getting them to do 14 it the second time around. So this is where really I'm 15 focusing on my thought process at this point.</p> <p>16 CHAIRMAN SMITH: If nothing else, we'll -- thank 17 you.</p> <p>18 SUPERVISOR CORTESE: Thank you.</p> <p>19 CHAIRMAN SMITH: We'll go back to -- let's see. 20 There's nobody here representing Mr. Tam Nguyen.</p> <p>21 COMMISSIONER PIERRE-DIXON: No.</p> <p>22 CHAIRMAN SMITH: So we will move on. 23 There is also no one here representing the 24 Complainant. Anyone else, interested persons? Mr. Riley, 25 no, you have nothing to say, okay.</p>

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1 So back to Mr. Miller, do you have any
2 additional comments and do we have any additional
3 questions? I have one question, but I'll wait.
4 MR. MILLER: I have -- I want to try to be
5 helpful to the Commission, and I just will make a few
6 comments very briefly, I promise.
7 First, I just want to emphasize that our report
8 in no way is alleging that there was any impropriety in
9 the behavior of anybody. There's no First Amendment
10 issue. There's no intent to constrain anyone's speech.
11 This really is a reporting issue. And the idea
12 that there is some slippery slope that would prevent folks
13 from exercising their First Amendment rights I think is
14 not really an issue.
15 The second point I'd like to make is that I
16 think with respect to Supervisor Cortese, it's perhaps a
17 little facetious to say that he showed up only as a
18 supervisor in what was a very heated election campaign
19 season.
20 And so I think it is incumbent on candidates to
21 be aware of and follow the rules, whether or not they
22 happen to also be elected officials. And I think
23 Supervisor Cortese has evidence that he's over his years
24 of public service his awareness of these rules.
25 The final thing I think I'll say is that -- to

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1 repeat, and I think you, Commissioner Peacock, nailed it
2 in some regards both in your question to me and in your
3 question to Supervisor Cortese regarding the scenario
4 which may well have happened in which a candidate believes
5 that he's been invited to a get-out-to-vote event. He's
6 unaware of an aid who has through telephone calls, e-mails
7 and actions -- and I spoke at length and pushed Mr. Nguyen
8 quite hard, and he was -- I'll be happy to discuss in more
9 detail my interview with him if you'd like, but a
10 candidate who was unaware of that, unaware of the nature
11 of the event, appears at an event and sees what the video
12 shows from the perspective of Mr. Cortese -- Supervisor
13 Cortese, excuse me, and hears what the video shows
14 Supervisor Cortese hearing.
15 There is a simple solution, which is not to walk
16 away, because I agree that is impractical. To make a
17 report of a \$250 contribution, and I think that's what the
18 rules would expect a candidate to do under those kinds of
19 unfortunate circumstances where you have this group of
20 citizens who crossed the line in this get-out-to-vote
21 event. Perhaps without the knowledge of Supervisor
22 Cortese himself but with the involvement of his staff and
23 with his knowledge even for a minute or half a minute
24 before this. So that's all. I will leave it at that.
25 CHAIRMAN SMITH: I've got two quick questions.

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1 First off -- the second one just flew out of my mind, but
2 it will come back.
3 I understand that -- am I correct in
4 understanding that Mr. Nguyen told you that he had
5 arranged to have the signs sent, contrary to what he told
6 Supervisor Cortese?
7 MR. MILLER: I don't know what he told
8 Supervisor Cortese. That's certainly what he told me, and
9 we had some conversation about it because it came
10 immediately after his explanation to me of his
11 understanding of the distinction between a campaign event
12 and a supervisorial event and his role and what his job
13 was to do.
14 When the campaign event came in, he was supposed
15 to pass that off to the campaign and not get involved.
16 He's -- I have a lot of respect for him. In my phone
17 conversation, he clearly indicated he was smart,
18 thoughtful, careful guy who understood the rules that he
19 was under.
20 CHAIRMAN SMITH: But nonetheless, he did tell
21 you that he arranged for signs to be sent.
22 MR. MILLER: Yes, and he was not able to
23 satisfactorily explain to me his thought process in doing
24 so when I asked him why that had happened.
25 CHAIRMAN SMITH: My second question just flew

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1 back into my mind. The introduction that we spoke of when
2 Supervisor Cortese came on stage, I believe it was
3 delivered in Vietnamese; is that correct?
4 MR. MILLER: No, I believe that is not correct.
5 CHAIRMAN SMITH: I can't remember.
6 MR. MILLER: The introduction from Barry Do was
7 in Vietnamese, but at the end of his Vietnamese speech,
8 which you had translated, he then broke into English and
9 said in English, which I find to be -- if it was in
10 Vietnamese, there's no way Supervisor Cortese would have
11 known. But he said in English now I will introduce the
12 next Mayor of the City of San Jose.
13 CHAIRMAN SMITH: Okay. Thank you.
14 Other questions of Mr. Miller.
15 COMMISSIONER PEACOCK: Would you tell a little
16 bit more about the conversation with Mr. Nguyen as in what
17 he said, like when were the signs delivered or just
18 anymore circumstances about that.
19 MR. MILLER: He was not altogether forthcoming
20 on details. He remembered some things -- I mean, part of
21 job as investigator is to judge credibility. And there
22 were aspects to my interview where, to be frank, I've had
23 some questions as to credibility, and I tried to allude to
24 that in my report.
25 So it was not clear to me -- I believe the

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<p>1 invite -- let's see if I can remember this myself. That 2 the invitation came in a few weeks before the event. And 3 then what would have been a matter of days before the 4 event, he noticed that the event had made it onto 5 Supervisor Cortese's calendar. 6 At that point, he reached out to Barry Do to 7 further arrange for the provision of signs. They had a 8 conversation as to whether or not Supervisor Cortese 9 requested a booth to be set up for him. And Mr. Nguyen -- 10 The-Vu Nguyen, not Tam Nguyen, said no, we don't want a 11 booth. And that was the conversation in which he arranged 12 for the signs to be provided to Barry Do's group who put 13 up the signs. 14 Now, the signs I'm talking about are not the 15 signs that any volunteer would just put up on the 16 surrounding area of the mall, but these are signs active 17 on the proscenium of the stage itself, directly below the 18 banner that said -- announced the title of the Event. 19 Next to the other candidates, sort of a row of -- for lack 20 of a better word, preferred candidate signs on the 21 proscenium of the stage itself. 22 CHAIRMAN SMITH: Okay. Other questions? 23 COMMISSIONER PIERRE-DIXON: No. 24 SUPERVISOR CORTESE: Mr. Chair. 25 CHAIRMAN SMITH: Yes.</p>	<p>1 to be put on -- on the stage. 2 So it's -- it doesn't make sense, and it doesn't 3 make sense with any of the other testimony that you've 4 received. And that's exactly why I asked him about it. 5 I'd be happy to help secure a sworn declaration 6 for him if you'd like to see that as to how -- to what his 7 role was or was not in providing campaign signs for the 8 event. 9 CHAIRMAN SMITH: Mr. Miller. 10 MR. MILLER: Just to make sure the record is 11 clear, Mr. The-Vu Nguyen did not tell me that he 12 specifically provided signs and directed that they be put 13 on the proscenium of the stage. That is not the substance 14 of my conversation. My conversation was that he arranged 15 for signs to be provided, that he acknowledged that he did 16 not want a booth. 17 He was not able to answer my question. And my 18 practice, at the end of these interviews is to go back and 19 repeat, make sure that I got it right and to offer 20 witnesses the opportunity to correct me. But -- so we 21 spent some time discussing what seems to me to be an 22 inconsistency between providing the signs and not 23 providing the booth. I have no way of knowing what signs 24 he provided or where they ended up being. All I know is 25 that there were signs on the proscenium.</p>
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<p>1 SUPERVISOR CORTESE: Can I direct a question 2 through you? 3 CHAIRMAN SMITH: Sure. 4 SUPERVISOR CORTESE: Mr. Miller said that ThepVu 5 Nguyen indicated that there wasn't a need or a want for a 6 booth, but he didn't say why. I think that's reflected in 7 your report. 8 MR. MILLER: Yes. 9 SUPERVISOR CORTESE: I think that also goes to 10 the credibility of Mr. Nguyen on this issue of whether or 11 not he provided signs for the event on the basis that he 12 had some knowledge that it was a campaign event. In your 13 report, it indicates that when interviewed on that issue, 14 he said no booth, right, because we don't want any 15 perception that it's a campaign event, paraphrasing the 16 report. 17 So you have to ask yourself, if he's quoted as 18 saying that, why would he provide signs for the event to 19 be put up on the stage? He doesn't want a booth off the 20 stage, but he's willing to provide signs, according to Mr. 21 Miller, specified to go on the stage. 22 He's implying that Mr. Nguyen provided not just 23 any campaign sign, but that these signs couldn't have been 24 just lawn signs that were picked up around the place, 25 around the event, but that he somehow directed the signs</p>	<p>1 In any event, I just would suggest this is a 2 little bit of a red herring in that, while important, it's 3 not dispositive in that again I believe that at the end of 4 the day, even absent that, even if the signs came from 5 somewhere else, I think the circumstances of the event 6 themselves are such that this matter could have had a 7 simple solution by just reporting contribution made at the 8 behest of the County. 9 COMMISSIONER PIERRE-DIXON: I think that's true, 10 but I think there has to be some evidence of coordination, 11 and my problem is that I don't see other than with these 12 signs. 13 Someone introducing you at an event, you never 14 have any control over that. I've been introduced as 15 President of the United States at some event. I don't 16 stop people from doing that. I get up and I change it 17 once I get an opportunity to say something. So I can't 18 lay anything on that. 19 But what I am concerned about is I know what the 20 County rules are. I know the what the City rules are. I 21 know how strict it is in terms of mixing those two things 22 together. It should never be done. 23 And for an employee to take it upon themselves 24 as far as signs is a major concern. That's why I'm asking 25 the question that I'm asking. And that's what everything</p>

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1 depends on as far as I'm concerned as a Commissioner.
2 SUPERVISOR CORTESE: Mr. Nguyen to my
3 knowledge -- he's been under my supervision for 11 years,
4 does not mix political activity during County hours. He
5 is a clocked employee. His timecards are public record.

6 When he's off the clock, he's allowed to
7 participate as a volunteer in campaigns. And that can be
8 my campaign. It can be any number of campaigns. And I
9 will tell you, he's participated in school board
10 campaigns. He's participated in -- been a candidate.
11 He's participated in school board campaigns, City Council
12 races and so on.

13 Yes, he knows the rules. There's no dispatch of
14 campaign signs from the 10th floor of the County office.
15 They don't exist there.

16 So even in the most generous interpretation of
17 what Mr. Miller thinks he heard where he had to clock out,
18 go get signs and deliver them, I believe if -- if you
19 want, we can get his point of view in a sworn declaration
20 or have him come before the Commission.

21 I believe what you will hear is that he did put
22 up signs on that site himself in advance of this Event --
23 far in advance of this event, and those signs stayed there
24 far after this event because they were signs that would
25 ordinarily be placed that were part of our sign

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1 an invitation comes into the office and says this is for a
2 campaign, so therefore I sent it to the campaign, I'm
3 technically on my County time doing it. Is that the same
4 thing as saying somebody wants signs and I say, oh, they
5 asked for signs? Is that --

6 COMMISSIONER PIERRE-DIXON: That could be a
7 problem.

8 COMMISSIONER PEACOCK: There's a difference
9 between two?

10 COMMISSIONER PIERRE-DIXON: Yes, there's a
11 difference between the two.

12 CHAIRMAN SMITH: What I think happened here --
13 I'm jumping ahead to the next thing but I might as well
14 say it while we're here.

15 This whole thing appears to me -- I can't speak
16 for the situation -- or I'm not going to speak for the
17 situation regarding Tam Nguyen, but as regards to
18 Supervisor Cortese, it appears that this was advertised as
19 a get-out-to-vote Event, and the organizers did something
20 else. And it perhaps wasn't apparent until that second
21 before stepping on stage or even 30 seconds after being on
22 stage. But it does appear that it was not advertised as a
23 campaign event. That's why it went on the calendar, et
24 cetera, et cetera, et cetera. Then it morphed into
25 something else.

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1 distribution.

2 And Mr. Nguyen's a first generation Vietnamese
3 American. He's clear I think. He's very competent at his
4 work at the County. But if you asked him, did you put
5 signs out there or get signs for that site in advance of
6 the event, the truthful answer is yes. That doesn't -- if
7 you ask him did you coordinate that with the organizers,
8 that's a different question.

9 COMMISSIONER PIERRE-DIXON: Of course it is.

10 CHAIRMAN SMITH: Just to clarify, Mr. Miller,
11 the report says -- let me find it here. Here it is. The
12 bottom of page 3, the last bullet, "Mr. Nguyen then spoke
13 again with Barry Do to tell him that Supervisor Cortese
14 would attend the Event." This is the key: "He arranged
15 to send campaign signs," which I don't interpret as maybe
16 he personally sent them. He could have called the
17 campaign office or done whatever. Is that -- there's a
18 difference between sending them and arranging in my mind
19 but --

20 MR. MILLER: I don't with the passage of time
21 recall the significance between that wording. I'd be
22 happy to go back and check my notes, but I don't have
23 that.

24 COMMISSIONER PEACOCK: To follow up, and this is
25 kind of to both of you, is there a difference between a --

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1 Anyway, if there's no further questions --

2 COMMISSIONER PEACOCK: I just have one last
3 question.

4 CHAIRMAN SMITH: Okay.

5 COMMISSIONER PEACOCK: Mr. Miller, it may
6 require Mr. Cortese. So Mr. Cortese made a point to talk
7 at the behest of. And as I'm rereading your memo, behest
8 of can almost be a passive thing, if I'm reading it
9 correct. Behest could be, hey, can you get me some stuff,
10 or it could be -- and then the campaign going, sure, we'll
11 get that, or the organization getting it for you. Or it
12 could be the organization who's reading it saying, oh, it
13 looks like they needed these things, we'll go ahead and do
14 that without specifically being asked. I don't know if
15 that's a good analogy.

16 MR. MILLER: If I understand your question, it
17 is correct that coordination can occur almost without the
18 knowledge of the candidate. It sounds counterintuitive,
19 but there is FPPC opinion letters on this very thing; that
20 if the event organizers in this case or those making the
21 expenditure are acting on the knowledge of the plans of
22 the candidate or in coordination, cooperation,
23 consultation, that string of verbs, doesn't involve the
24 active participation of the candidate.

25 It can be an unfortunate result that

16 (Pages 61 to 64)

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1 coordination occurs, and when that does, the law says that
2 that's a contribution, not an independent expenditure.
3 COMMISSIONER PEACOCK: And the specific behest
4 there is what we're talking about, right?
5 MR. CORTESE: Exactly.
6 COMMISSIONER PEACOCK: Mr. Cortese, I don't know
7 if you have any further thoughts.
8 SUPERVISOR CORTESE: You asked about behest. He
9 talked about coordination. He's been doing that all
10 night. But you have to have both. That's the elements.
11 You have to have both.
12 There's no evidence whatsoever that anybody from
13 our campaign, me included as candidate and Treasurer had
14 coordinated, first of all, a campaign -- wasn't aware of
15 the event to my knowledge unless somebody looked at my
16 calendar, my public calendar.
17 And two, obviously, clearly based on the
18 testimony, nobody from the campaign coordinated anything.
19 There was no campaign people. We have an event which I
20 won't tell you, that were more like 800 or 900 people
21 there in any given 30-minute period or 15-minute period
22 based on my estimation.
23 And we know it's a campaign event. We don't
24 send any field coordinators. We don't send anybody to
25 hand out literature. We don't send anybody to hand out

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1 signs to take home and put on their lawns.
2 It doesn't add up. It doesn't compute. That's
3 now how we campaign. That's not how my opponent
4 campaigns. That's not how anybody campaigns. So there
5 was no coordination with the campaign, and nothing was
6 done at the behest of the campaign. And you have to have
7 both of those going on at the same time. It's two
8 elements. You have to have them both.
9 And another thing that's unfair, when you ask
10 about behest, could that be a conversation with a campaign
11 that's passive or not, and the answer that you get is that
12 coordination can occur without intent. But behest can't
13 occur without intent. It requires somebody to expressly
14 -- it says rules are -- verbs are right in the report.
15 What a person has to do, it requires action. It
16 requires something to happen. Something to be expressed
17 by the candidate or committee. It's very clear. Not a
18 public employee of an elected official, but a candidate or
19 a committee has to plan, et cetera. Those words are in
20 there. I can refer to them again.
21 We just don't have that here. We just don't
22 have those elements here. We don't even have other
23 than -- unless you believe that I was -- that I somehow
24 coordinated or did something at the behest of the campaign
25 relative to this event -- there's not even another

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1 individual related to the campaign by definition.
2 So I'm just asking that we stick to this black
3 letter definition, because that's what I have to operate
4 under while I'm campaigning or while I'm serving as an
5 elected official.
6 CHAIRMAN SMITH: I have a follow-up for Mr.
7 Miller. Two questions. One is, it's my understanding
8 that behest and coordination are not two independent
9 things, but behest is part of the definition of
10 coordination.
11 And the second question at the same time is that
12 coordination with a candidate or a committee could be
13 through an intermediary who is not the candidate or the
14 committee. Is that correct?
15 MR. MILLER: Two answers to your question. The
16 first is -- and I'm going to just say one other thing in
17 advance of it. The concept of behest using a definition
18 of an independent expenditure, and it carves out from an
19 independent expenditure -- expenditures made at the behest
20 of the campaign.
21 Made at the behest of, you are correct, there is
22 not -- it is not a separate element coordination. And
23 made at the behest of means made under the control of or
24 at the direction of, in cooperation, consultation,
25 coordination or in concert with, at the request of,

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1 suggestion of, or with the prior consent of the candidate
2 or the committee.
3 So those different factors, any one of which is
4 enough to constitute made at the behest of. There is then
5 a presumption of what kind of behavior is presumed to be
6 made the behest of, but that presumption is not a
7 requirement. That is just an illustrated example of what
8 could be made at the behest of.
9 So then you're second question -- that's just
10 the law. That's just the legal standard.
11 Second question -- remind me of your second
12 question.
13 CHAIRMAN SMITH: As Supervisor Cortese said, in
14 coordination with a candidate or a candidate committee,
15 but couldn't that also be through an intermediary such as
16 Mr. Nguyen?
17 MR. MILLER: Yes.
18 CHAIRMAN SMITH: Okay.
19 Any other questions before we -- going once.
20 Okay.
21 Now it's time for the Commission to make its
22 decision. We have four options as follows:
23 Number one, the Commission may find that further
24 investigation is necessary. If so, it shall direct the
25 Evaluator to conduct further investigation and report back

17 (Pages 65 to 68)

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1 to the Commission.

2 Two, the Commission may find that there is
3 sufficient evidence to establish that no violation has
4 occurred.

5 Three, the Commission may find that there is
6 insufficient evidence to establish that a violation has
7 occurred. And those are -- there's a subtle difference
8 between those two, as we discussed before.

9 Four, the Commission may find, based on the
10 preponderance of the evidence from the entire record of
11 the proceedings, that a violation has occurred.

12 I'll open the floor for discussion on the case.
13 The Commission will need to make a finding for each
14 Respondent for each potential violation. Findings may be
15 made by a separate motion, one for each Respondent and/or
16 one for each potential violation of the Commission may be
17 in the one motion.

18 So basically we have two Respondents. So the
19 question is: Was there coordination between the
20 organizers of the event and Council member Nguyen? Was
21 there coordination regarding this event between the
22 organizing committee and Supervisor Cortese?

23 So discussion.

24 COMMISSIONER PEACOCK: We're doing these as two
25 separate questions?

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1 has a rather longstanding relationship with this
2 particular organizing group because he serves as their
3 attorney the last time they were here. So there is a
4 standing relationship, and it seems like he was involved
5 and as it was described in the report.

6 As involves Supervisor Cortese, my own feeling
7 is it's like coordination life. It appears to me that
8 under the strict definitions of the law, that there was
9 coordination, but totally inadvertent, unintentional,
10 backed into because the organizers of the Event had an
11 Event different than what they told him.

12 But it was -- there was campaign advocacy
13 nonetheless in my view. I think it would strengthen that
14 if we had something regarding Mr. Nguyen on his staff, but
15 I think -- I hate to say it, but I think there's -- I
16 think we have enough to show coordination even without
17 that, personally.

18 But unfortunately we've got three members who
19 can vote on this matter, so we aren't unanimous, we can't
20 come to any conclusion at all.

21 COMMISSIONER PEACOCK: I think I would agree
22 with you all on the -- related to Mr. Nguyen. I believe
23 we have enough to know. But I would support your request
24 to seek more information. I mean, I think these are
25 important things. People's reputations and integrity are

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1 CHAIRMAN SMITH: It's two separate questions,
2 but we can handle them all together. We can do one
3 motion. We can do two separate motions. We can discuss
4 it separately or together. However -- however you want to
5 do it.

6 COMMISSIONER PIERRE-DIXON: Well, I can start by
7 saying I think there is a violation as to Mr. Nguyen in
8 terms of showing up with campaign regalia on and on a
9 bike, et cetera. I don't think that's as big a concern
10 for me.

11 But I hate to say this, but I do have this
12 concern about this release of these signs, and I want
13 sworn documentation from The-Vu Nguyen that he did not
14 secure those signs. Other than that, I think we have a
15 serious problem.

16 CHAIRMAN SMITH: So what are you suggesting then
17 with regard to that?

18 COMMISSIONER PIERRE-DIXON: So the second one I
19 would say further investigation is needed, at least in my
20 mind.

21 CHAIRMAN SMITH: Other comments? I guess I
22 would say I agree with you as regards to Mr. Nguyen, Tam
23 Nguyen. I think the evidence is much clear on that case,
24 and I think it may be relevant.

25 We also know from previous complaints that he

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1 at stake. So I think it's important to -- if we have some
2 outstanding questions, to try to do that, to try to get
3 that answered.

4 CHAIRMAN SMITH: So let me ask one or the other
5 of the two of you, what -- depending on what answer came
6 back, how would you decide it once you have that answer,
7 if he says he did or didn't, how would that affect your
8 decision?

9 COMMISSIONER PIERRE-DIXON: If he said he did
10 not provide the signs, then I would find there was no
11 violation. If he says he did, then I think we have a
12 situation where there is a violation, but there's
13 mitigating circumstances, because we're talking about such
14 a miniscule amount of money. So I mean -- I'm still in
15 that area. I'm not talking about anything bigger than
16 that.

17 But I think we have to be really clear where
18 we're dealing with employees, that a worker in the public
19 domain, that they're not to use that time for any kind of
20 campaigning time. And that's a concern, and I want to be
21 clear on that.

22 If he swears it never happened, I'll have to
23 take that as evidence that he did not coordinate those
24 signs. For me, that is the biggest thing that shows
25 coordination, and I would find then that there was no

18 (Pages 69 to 72)

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<p>1 violation.</p> <p>2 COMMISSIONER PEACOCK: Just as each time we have</p> <p>3 discussed this or we've gotten -- I'm not prepared to say</p> <p>4 I think it's X or Y at this point.</p> <p>5 I guess I would say one reason why I think it is</p> <p>6 particularly important to get what you're asking for is,</p> <p>7 there had been a reluctance by him to talk. He did</p> <p>8 eventually talk. And I just think it's important to get</p> <p>9 the full -- his full story as we can on that. I just</p> <p>10 don't understand, well, I'm here or there.</p> <p>11 Each time we've learned a little bit more.</p> <p>12 Questions have been answered that I hadn't thought I had.</p> <p>13 So I would rather withhold judgment.</p> <p>14 CHAIRMAN SMITH: First off, I would agree. Even</p> <p>15 if we did find coordination -- I won't speak to Mr. Nguyen</p> <p>16 at the moment, but certainly with regards to Supervisor</p> <p>17 Cortese, I would recommend no penalties, because I think</p> <p>18 it's wholly -- I don't know if inadvertent is the right</p> <p>19 word, but something close to that.</p> <p>20 I would suggest that if we were going to go the</p> <p>21 route of getting a sworn statement from The-Vu Nguyen,</p> <p>22 that either getting a sworn statement and/or having him</p> <p>23 come here to speak to us, I think we also ought to get Mr.</p> <p>24 Do, because apparently Mr. Nguyen has told one version of</p> <p>25 the story to Supervisor Cortese and a different version of</p>	<p>1 that a violation of Municipal Code Section 12.06 has</p> <p>2 occurred, and I would make a further recommendation that</p> <p>3 we find --</p> <p>4 CHAIRMAN SMITH: With regard to Council member</p> <p>5 Nguyen?</p> <p>6 COMMISSIONER PIERRE-DIXON: Yes. And that we</p> <p>7 find further mitigating circumstances and take no further</p> <p>8 action.</p> <p>9 CHAIRMAN SMITH: Can we do that all in one</p> <p>10 motion, or do we need to -- normally we do the penalties</p> <p>11 as a separate motion, but can we do it as one?</p> <p>12 MS. SILVA: I would recommend doing it</p> <p>13 separately, so it would be cleaner.</p> <p>14 CHAIRMAN SMITH: Okay. So the motion is that we</p> <p>15 find that there is evidence of a violation regarding</p> <p>16 Council member Nguyen. Any discussion on that?</p> <p>17 COMMISSIONER PEACOCK: No.</p> <p>18 CHAIRMAN SMITH: All in favor?</p> <p>19 COMMISSIONER PEACOCK: I'll second.</p> <p>20 CHAIRMAN SMITH: No discussion. All in favor?</p> <p>21 Aye.</p> <p>22 COMMISSIONER PIERRE-DIXON: Aye.</p> <p>23 COMMISSIONER PEACOCK: Aye.</p> <p>24 CHAIRMAN SMITH: Any opposed? Okay, so that's</p> <p>25 three in favor, none opposed, and one extension.</p>
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<p>1 the story to Steve Miller, our investigator. And I would</p> <p>2 like to hear what the person says who he supposedly talked</p> <p>3 to and see if the two of them tell the same story or not.</p> <p>4 Because I mean, quite honestly, I don't know the</p> <p>5 man. I don't know that he has -- I don't want to impune</p> <p>6 his character, but he would have strong incentive to say</p> <p>7 no, of course I didn't.</p> <p>8 And I'd like to hear from the other side. Since</p> <p>9 this is a transaction that involves two people, I would</p> <p>10 like to hear from both sides if we were to go that route.</p> <p>11 COMMISSIONER PIERRE-DIXON: I'm satisfied with</p> <p>12 the sworn statement. I think he understands the</p> <p>13 significance of that.</p> <p>14 COMMISSIONER PEACOCK: Yes, the sworn statement.</p> <p>15 I wouldn't request to have Mr. Do also. But I think the</p> <p>16 sworn statement does sort of add --</p> <p>17 CHAIRMAN SMITH: Yes, it does. I think we need</p> <p>18 to -- let's -- I think we need two separate motions. We</p> <p>19 can maybe dispense at least part of this.</p> <p>20 So does somebody want to make a motion? Let me</p> <p>21 suggest that we have a motion regarding Tam Nguyen, since</p> <p>22 we seem to be in unanimity on that one.</p> <p>23 COMMISSIONER PIERRE-DIXON: There has been a</p> <p>24 violation. I move that the Ethics Commission finds that</p> <p>25 based upon the preponderance of the evidence presented,</p>	<p>1 Okay. On the other part, sounds like we need</p> <p>2 three regardless. So in that spirit, I will go along with</p> <p>3 my two comrades. Rather than have us sit here all night,</p> <p>4 try to get out of it two for one -- two to one split. So</p> <p>5 if one of you wants to make a motion.</p> <p>6 COMMISSIONER PIERRE-DIXON: My motion would be</p> <p>7 that we find there were mitigating circumstances and take</p> <p>8 no further action, and I can discuss that.</p> <p>9 CHAIRMAN SMITH: I'm sorry; we're still on</p> <p>10 findings.</p> <p>11 COMMISSIONER PIERRE-DIXON: Okay.</p> <p>12 CHAIRMAN SMITH: We'll go to penalties in a</p> <p>13 minute. I think the motion would be further investigation</p> <p>14 is necessary.</p> <p>15 COMMISSIONER PIERRE-DIXON: Oh, as to the second</p> <p>16 point, we've go to take care --</p> <p>17 CHAIRMAN SMITH: We want to take care of the</p> <p>18 findings.</p> <p>19 COMMISSIONER PIERRE-DIXON: As to the second</p> <p>20 individual involved, Council member Cortese, I would ask</p> <p>21 that we --</p> <p>22 CHAIRMAN SMITH: Supervisor.</p> <p>23 COMMISSIONER PIERRE-DIXON: Excuse me,</p> <p>24 Supervisor Cortese, ask and request a sworn document from</p> <p>25 Mr. The-Vu Nguyen in reference to the provision or</p>

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1 non-provision of signs, and that that be provided to the
2 committee -- Commission and discussed at the next hearing.
3 CHAIRMAN SMITH: Second.
4 COMMISSIONER PEACOCK: You said it was to get
5 the --
6 COMMISSIONER PIERRE-DIXON: Sworn statement.
7 COMMISSIONER PEACOCK: Did you want to give the
8 option of appearing here?
9 COMMISSIONER PIERRE-DIXON: No.
10 COMMISSIONER PEACOCK: I'll second that.
11 MR. MILLER: Could I make a -- question just to
12 clarify?
13 CHAIRMAN SMITH: Sure.
14 MR. MILLER: And you may want to ask from your
15 attorney your advice, but are you directing me to
16 investigate further and ask Mr. The-Vu Nguyen to provide
17 some written documentation.
18 COMMISSIONER PIERRE-DIXON: Yes.
19 MR. MILLER: Or are you subpoenaing him to
20 appear before you? I don't know that I have the authority
21 to compel a sworn written -- a sworn affidavit from him.
22 I suppose there is nothing that prevents me from asking
23 him.
24 COMMISSIONER PIERRE-DIXON: That's right.
25 MR. MILLER: And hoping that he cooperates. But

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1 just so you know, I have no power to compel his sworn
2 testimony.
3 CHAIRMAN SMITH: I think where it comes --
4 you're asking a similar question to what I was going to
5 ask: How are we going to do it?
6 I think the route we would go is we request that
7 if he doesn't provide it, you can come back and I can
8 authorize a subpoena. If it's required based on what the
9 Commission has determined they need, if we -- if this
10 motion passes and he doesn't comply, then under the
11 procedure, I can authorize a subpoena, and it doesn't have
12 to come back to a meeting or anything. You and I can --
13 MR. MILLER: I just want to make sure that
14 you're asking me --
15 CHAIRMAN SMITH: As long as there is sufficient
16 justification. In this case it's clear there would be
17 sufficient justification. And from what Mr. Cortese has
18 indicated -- Supervisor Cortese, I don't think we're going
19 to have a problem anyway.
20 SUPERVISOR CORTESE: What I offered to do on
21 behalf of my defense is secure a sworn declaration from --
22 that's what I offered to do if you want me to do that.
23 I'm happy to do that. If he won't provide it, you'll know
24 because it won't appear. Then you would have to judge
25 accordingly, I would assume.

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1 CHAIRMAN SMITH: I think it would be more proper
2 to go through the Evaluator.
3 MS. SILVA: Through the Evaluator, the
4 procedure -- it would be better for Steve to continue.
5 SUPERVISOR CORTESE: Through the Chair to
6 Counsel, am I allowed to call witnesses in my own defense?
7 MS. SILVA: I believe you are.
8 CHAIRMAN SMITH: You can have witnesses appear,
9 And we can also refuse to hear witnesses, not that we
10 would do it, but we have that right also, just so you
11 understand.
12 SUPERVISOR CORTESE: But I can call additional
13 witnesses to submit additional declarations if I choose?
14 CHAIRMAN SMITH: Yes.
15 MR. MILLER: And Commissioners, what I would do
16 is I would call -- I'm trying to think. This is a little
17 unusual, but the way I think I would approach this is I
18 would call Mr. The-Vu Nguyen and ask him if he would
19 consent to an interview, and we would have an interviewer.
20 I think I understand the questions that you
21 would want answered. And as a result of that, I would
22 write up what I took away from our interview and send it
23 to him and ask him to -- you tell me whether you need a
24 sworn under penalty of perjury or notarized or something.
25 But I would send him my takeaway from the interview and

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1 ask him to confirm in writing that it accurately reflects
2 what he said or else correct it. But in some form, submit
3 to me a signed statement, not necessarily sworn or under
4 oath. Not sure I know exactly what you want, but that's
5 how I think I would proceed.
6 COMMISSIONER PIERRE-DIXON: A sworn under oath
7 is what I want.
8 MR. MILLER: So you would like that, okay. So
9 that I would send him my notes, my takeaway and ask him to
10 go get that to -- at his own initiative, convert that to
11 an affidavit that would get notarized and sworn to. Okay,
12 I'll be happy to ask him to do that.
13 COMMISSIONER PEACOCK: Why not just have a
14 recorded transcript? Wouldn't that be easier than a
15 summary? Because if the summary goes to him, he goes
16 that's not quite what I said, he has to make adjustments.
17 MR. MILLER: You mean just to have a recorded
18 interview and then provide you with a transcript of the
19 interview.
20 COMMISSIONER PEACOCK: Wouldn't that be easier
21 than your summarizing and then providing him? Because if
22 he disagrees with --
23 CHAIRMAN SMITH: Well, I think Commissioner
24 Pierre-Dixon is looking for a sworn statement under
25 penalty of perjury, et cetera. That's a stronger thing

20 (Pages 77 to 80)

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<p>1 than just a recording of an interview.</p> <p>2 COMMISSIONER PEACOCK: But the statement, it</p> <p>3 would be a -- the statement would be basically Mr.</p> <p>4 Miller's summary which is approved by Mr. Nguyen.</p> <p>5 COMMISSIONER PIERRE-DIXON: Yes.</p> <p>6 MR. MILLER: Maybe -- sounds like you would want</p> <p>7 him to be -- one possible solution -- okay. Trying to</p> <p>8 figure out how this works. But perhaps the solution is to</p> <p>9 have him -- since you're going to need to have another</p> <p>10 hearing on this, this can't be done without your being</p> <p>11 here. If he were sitting here in front of you testifying</p> <p>12 under oath, I wonder, Commissioner Pierre-Dixon, would</p> <p>13 that -- that's -- you want something in writing?</p> <p>14 COMMISSIONER PIERRE-DIXON: I don't want another</p> <p>15 two and a half hours of gobbledegook. I want a sworn</p> <p>16 statement or affidavit that I did not provide those signs</p> <p>17 on that date for this event. And if that cannot be held,</p> <p>18 then we move from that point to subpoena and testimony.</p> <p>19 But I don't think we need to keep getting in the weeds on</p> <p>20 this, to use your term.</p> <p>21 MR. MILLER: Okay.</p> <p>22 MS. PIERRE-DIXON: We need to be very clear.</p> <p>23 MR. MILLER: I hear you loud and clear. I will</p> <p>24 endeavor to secure that for you.</p> <p>25 COMMISSIONER PEACOCK: You probably have -- are</p>	<p>1 COMMISSIONER PIERRE-DIXON: Aye.</p> <p>2 COMMISSIONER PEACOCK: Aye.</p> <p>3 CHAIRMAN SMITH: Any opposed? And one</p> <p>4 abstention. We can handle this. We're going to talk</p> <p>5 about the -- after this, we're going to have a meeting</p> <p>6 coming up sometime soon with two hearings, so we can do</p> <p>7 that as part of the same -- hopefully at the same meeting,</p> <p>8 do that at the same time.</p> <p>9 MS. SILVA: Is the Commission willing to</p> <p>10 dispense with the first issue with regards to Council</p> <p>11 member Nguyen?</p> <p>12 CHAIRMAN SMITH: Let's get that out of way.</p> <p>13 Yes, that's next.</p> <p>14 SUPERVISOR CORTESE: I'm going to leave since</p> <p>15 you've concluded withdraw me tonight.</p> <p>16 CHAIRMAN SMITH: Yes.</p> <p>17 SUPERVISOR CORTESE: I just need to know some</p> <p>18 procedural -- technical question, how I get a copy of the</p> <p>19 transcript of tonight's proceedings, which would include</p> <p>20 the motion, so I'm clear.</p> <p>21 MS. TABER: It usually takes us a few weeks</p> <p>22 before we actually get the transcript. But as soon as</p> <p>23 we -- it's about two weeks I think, and then we can e-mail</p> <p>24 that to you.</p> <p>25 SUPERVISOR CORTESE: When is the scheduled</p>
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<p>1 there specific questions that you want asked?</p> <p>2 COMMISSIONER PIERRE-DIXON: I've stated it.</p> <p>3 COMMISSIONER PEACOCK: Okay.</p> <p>4 CHAIRMAN SMITH: So the motion is that we do --</p> <p>5 basically it's further investigation, specifically the</p> <p>6 getting a sworn affidavit regarding the -- whether or not</p> <p>7 signs were provided or arrangements were made for signs to</p> <p>8 be provided.</p> <p>9 COMMISSIONER PIERRE-DIXON: Correct.</p> <p>10 MS. SILVA: If that cannot be secured, then we</p> <p>11 will proceed with getting a subpoena.</p> <p>12 COMMISSIONER PIERRE-DIXON: Correct.</p> <p>13 CHAIRMAN SMITH: Okay. So that was --</p> <p>14 COMMISSIONER PIERRE-DIXON: That's my vote.</p> <p>15 CHAIRMAN SMITH: You seconded the motion, or has</p> <p>16 it been seconded?</p> <p>17 COMMISSIONER PEACOCK: If I didn't, I will.</p> <p>18 CHAIRMAN SMITH: Okay. Discussion?</p> <p>19 I guess I'll just say I would -- this isn't all</p> <p>20 that important to me, but I think we need to have a</p> <p>21 decision, and the only way we're going to have a decision</p> <p>22 is three votes. So I'll go along with that. I'm not sure</p> <p>23 that it's necessary, but I'll go along with it, so that we</p> <p>24 can move forward. So all in favor?</p> <p>25 Aye.</p>	<p>1 hearing?</p> <p>2 CHAIRMAN SMITH: We have a meeting scheduled for</p> <p>3 April the 8th, but we may need to have a meeting before</p> <p>4 that, because we have two complaints related to the</p> <p>5 election being held on April 7th, and if possible, it</p> <p>6 would be good to have those complaints heard before the</p> <p>7 election.</p> <p>8 So it's a little indefinite. It would either be</p> <p>9 April 8th or possibly -- and that's what we're going to</p> <p>10 talk about next. Possibly I'm thinking like the week of</p> <p>11 March 23rd is a possibility, depending on whether reports</p> <p>12 are going to be available or not. But as soon as we</p> <p>13 figure it out, obviously we'd let you know.</p> <p>14 SUPERVISOR CORTESE: It sounds like the</p> <p>15 transcript would be ready in ample time.</p> <p>16 CHAIRMAN SMITH: It should be ready before that,</p> <p>17 yes, before the meeting.</p> <p>18 COMMISSIONER PEACOCK: And I may be out of town</p> <p>19 April 8th. That's Easter week.</p> <p>20 CHAIRMAN SMITH: Okay. That's another reason to</p> <p>21 the move it up. Okay, so --</p> <p>22 SUPERVISOR CORTESE: Thank you.</p> <p>23 (Supervisor Cortese left the hearing room.)</p> <p>24 CHAIRMAN SMITH: As regards -- we had a finding</p> <p>25 that there was a violation with regard to Council member</p>

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1 Nguyen.

2 So if the Commission finds the violation has
3 occurred, it must consider imposing orders and/or
4 penalties. In that case, we have four choices again.

5 The Commission may, number one, find mitigating
6 circumstances and take no further action. Two, issue a
7 public statement and a reprimand. Three, require
8 corrective action by a particular deadline. And/or four,
9 impose a civil penalty in accordance with Chapter 12.04 of
10 the San Jose Municipal Code.

11 And I think, Commissioner Pierre-Dixon, you were
12 starting to suggest that we --

13 COMMISSIONER PIERRE-DIXON: Yes, I would agree
14 with Hanson Bridgett and Mr. Miller that we -- that the
15 circumstances in this case would not justify I think a
16 more severe penalty.

17 We talked about a miniscule amount of money.
18 We're also talking about a situation where we've
19 unfortunately encountered this in the past with this group
20 not understanding what all the rules and regulations are.

21 And so my motion would be that we find
22 mitigating circumstances and take no further action.

23 CHAIRMAN SMITH: I'll second that. Any
24 discussion?

25 Okay. All in favor?

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1 COMMISSIONER PIERRE-DIXON: Aye.

2 COMMISSIONER PEACOCK: Aye.

3 CHAIRMAN SMITH: Aye. Any opposed? Okay. So
4 we've got 3, 0 and 1. Abstained.

5 COMMISSIONER VEMULAPALLI: Abstained.

6 CHAIRMAN SMITH: I don't think we need to state
7 the mitigating circumstances as part of the motion, do we?
8 We usually do but --

9 COMMISSIONER PIERRE-DIXON: I'll put a little
10 bit in terms. I don't think it was -- for me the
11 mitigating circumstances are I don't think people are
12 really clear on what the rules and regulations are. I
13 don't think that anyone came out here with a suggestion of
14 trying to circumvent the rules. I just don't think that
15 they are clear on the rules. And I don't think they were
16 trying to mislead the Commission in any way. And so I
17 would find that to be mitigating circumstance.

18 CHAIRMAN SMITH: Just for the record, and I
19 should have read over this before we did this, but I
20 didn't. The factors we're supposed to consider are:

21 Number one, the severity of the violation, which
22 in this case indicate are not that severe;

23 The presence or absence of any intention to
24 conceal, deceive or mislead;

25 Three, whether the violation was deliberate,

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1 negligent or inadvertent;

2 Four, whether the violation was an isolated
3 incident or pervasive enough to indicate a pattern of
4 disregard;

5 Five, whether Respondent has a prior record of
6 violations of City law relative to campaign, finance,
7 lobbying, conflicts of interest, or government ethics;

8 Six, the degree to which the Respondent
9 cooperated with the investigation;

10 And seven, whether or not corrective actions
11 were taken, if appropriate, in accordance with the
12 provisions of this Chapter.

13 I guess -- skipping over, that the one question
14 I was going to ask -- we're specifically not saying
15 anything about corrective action, like file or amended
16 report?

17 COMMISSIONER PIERRE-DIXON: Right.

18 CHAIRMAN SMITH: I think ordinarily I would --
19 in the past we've done that. We've instructed candidates
20 to file amended reports. In this case, the cost was so
21 difficult to pin down, I'm inclined not to pursue that but
22 just get it behind us.

23 COMMISSIONER PEACOCK: Can I ask? Basically if
24 we knew there was a cost, we would say basically do an
25 amended report.

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1 CHAIRMAN SMITH: Amended campaign finance
2 report. Yes, that's what we've typically done in the
3 past. I don't --

4 COMMISSIONER PEACOCK: We have to -- a ballpark
5 from the Evaluator. Should we not -- I'm just wondering,
6 is it better to have it on the record that I should
7 have --

8 COMMISSIONER PIERRE-DIXON: For me it's too
9 nebulous.

10 COMMISSIONER PEACOCK: That's fine.

11 CHAIRMAN SMITH: So much uncertainty. The 8515
12 business and how many candidates and were they all equal.

13 COMMISSIONER PEACOCK: Fair enough.

14 CHAIRMAN SMITH: What I should have done but I
15 didn't, but we will do together, we're supposed to certify
16 both for the finding and for the penalty, but I think we
17 can do one for both.

18 So upon adoption of both, the finding and the
19 penalty, ask each Commission member to vote and to certify
20 that you've either heard or read the testimony of the
21 hearing and reviewed all the evidence in the record by
22 affirming so certified. Commission Peacock?

23 COMMISSIONER PEACOCK: So certified.

24 CHAIRMAN SMITH: Commissioner Pierre-Dixon?

25 COMMISSIONER PIERRE-DIXON: So certified.

22 (Pages 85 to 88)

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<p>1 CHAIRMAN SMITH: And me, Commissioner Smith, so 2 certified. And one abstention. 3 And with that, I'll ask the question. I think I 4 know the answer, but I really should ask the question. 5 At any time, the Evaluator or the Commission may 6 refer the matter to another government agency or official 7 if the Commission determines that the agency or official 8 may more appropriately resolve the allegations in the 9 complaint or enforce the applicable provisions of law. A 10 copy of all information gathered must be sent by the City 11 Clerk's Office or City Attorney's Office to the agency or 12 official together with the referral. 13 The reason I bring this up, and I think I know 14 the answer, but I feel I ought to bring it up. There were 15 six candidates there in addition to the two that we're 16 talking about. 17 COMMISSIONER PIERRE-DIXON: Right. 18 CHAIRMAN SMITH: We have no jurisdiction over 19 those other six candidates, but the FPPC does. Does 20 anybody feel that we should think about forwarding this 21 business to the FPPC as regards the other six candidates? 22 COMMISSIONER PIERRE-DIXON: No. 23 CHAIRMAN SMITH: Okay. I wouldn't -- I don't 24 think I'd argue with that, but I feel I ought to at least 25 bring it up. I sort of have mixed feelings that, but I</p>	<p>1 amended at our direction to include Council member Nguyen. 2 MS. SILVA: So this resolution that you're 3 currently wanting me to prepare is going to just address 4 all the issues discussed today and then we're going to -- 5 CHAIRMAN SMITH: No, it would address the issues 6 with regard to Council member Nguyen only. I think that's 7 a better way to do it. We could also wait until we're 8 totally done with everything. 9 MS. SILVA: And no statement with regards to the 10 further investigation with regards to Supervisor Cortese? 11 CHAIRMAN SMITH: Right. That would be -- 12 COMMISSIONER PIERRE-DIXON: I think you'll have 13 to wait if they're combined. 14 MS. SILVA: Because if they're combined, you're 15 going to make me -- what happens when the findings come 16 after the sworn statement from Mr. The? 17 CHAIRMAN SMITH: That wouldn't affect anything 18 that we determined tonight now with regard to Council 19 member Nguyen, though. 20 COMMISSIONER PIERRE-DIXON: Would it all be in 21 one document? 22 CHAIRMAN SMITH: We can do it that way. In the 23 past -- I can't remember, but we've had complaints against 24 multiple unrelated Respondents. Have we done one 25 Resolution to address all of them, or have we done</p>
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<p>1 think I'm balanced there's nothing to be gained. 2 COMMISSIONER PEACOCK: I would say at this 3 point, no. Let's see how the final thing is resolved and 4 we may decide differently then. 5 CHAIRMAN SMITH: So one last thing before we 6 close the hearing: Under the Commission's regulations and 7 procedures, the Commission shall issue a decision by 8 Resolution. At this time, I would entertain a motion 9 directing the City Attorney to draft a Resolution of the 10 Commission's findings and penalties and authorizing the 11 Chair to approve and sign the Resolution. 12 And this Resolution would deal only with the 13 findings and penalties or lack thereof with regard to 14 Council member Nguyen, who would need a separate one. I 15 think we can go ahead and do a resolution now for Council 16 member Nguyen. And then depending on what we determine 17 with Supervisor Cortese, we can handle that at that time. 18 COMMISSIONER PIERRE-DIXON: Okay. 19 CHAIRMAN SMITH: So would somebody like to make 20 a motion? 21 MS. SILVA: I would like to clarify something. 22 So we want two separate -- because there were two separate 23 filings, is that correct, two separate complaints? 24 CHAIRMAN SMITH: No. We amended the -- the 25 Complaint was against Supervisor Cortese, and it was</p>	<p>1 separate ones? In this case, it was one -- it was the 2 same event, but it was two different people with two 3 different sets of circumstances. 4 MS. SILVA: I don't have experience or 5 historical knowledge. 6 COMMISSIONER PIERRE-DIXON: I think if it's the 7 same complaint, it should be one document. 8 CHAIRMAN SMITH: Okay, that's fine. So we will 9 not -- have no motion then. We'll hold off and we just 10 need to remember when we finally resolve this as regards 11 to Supervisor Cortese, that we propose a Resolution that 12 addresses the whole thing. 13 MS. SILVA: Right. 14 CHAIRMAN SMITH: Okay, that's fine. So with 15 that, the hearing is closed. And you can stop typing. 16 (Discussion off the record.) 17 18 19 20 21 22 23 24 /// 25 ///</p>

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1 CHAIRMAN SMITH: Let's go back on the record.
2 The question was asked as to whether the hearing is really
3 closed or whether --

4 MS. SILVA: You meant we're stopping for night,
5 I suppose.

6 CHAIRMAN SMITH: What I said was the hearing is
7 closed, but that probably wasn't correct. This session of
8 the hearing was closed, to be continued at a later date.
9 Now we're done.

10

11 (Whereupon, the hearing was adjourned at 7:45
12 p.m.)

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4 I, NINA PAVONE, C.S.R. #7802, do hereby certify:

5 That said hearing was taken down by me in
6 shorthand at the time and place therein named; and
7 thereafter reduced to computerized transcription under my
8 direction.

9 I further certify that I am not interested in
10 the outcome of this action.

11 Witness my hand this _____ day of
12 _____, 2015

13

14

15

16

17

NINA PAVONE
CSR No. 7802
State of California

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25

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