

MEETING MINUTES

December 10, 2014

I. Call to Order & Orders of the Day

Roll Call

PRESENT: Chair Michael Smith, Vice Chair Rolanda Pierre Dixon, Commission Members Linda Edgeworth and Chris Peacock (till 7 p.m.)

ABSENT: All Present.

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

OTHER: Noelia Espinola , Court Reporter with Advantage Reporting Services

Call to Order

The members of the San José Ethics Commission convened at 5:31 p.m. in Room W-262 of City Hall, 200 E. Santa Clara Street, CA 95113.

Orders of the Day

Action: Upon motion by Vice Chair Rolanda Pierre Dixon, seconded by Commissioner Linda Edgeworth and carried unanimously, the Commission approved the adoption of the December 10, 2014 agenda. (4-0.)

II. Closed Session - None

III. Hearings

A. Hearing on Complaint filed by Bui Dinh against Dave Cortese and Dave Cortese for Mayor 2014 filed October 14, 2014, alleging violations of Title 12 of the San Jose Municipal Code (Independent Investigator/Evaluator)

Document Filed: (1) Report from Hanson Bridgett LLP dated December 3, 2014 regarding Bui Dinh against Dave Cortese and Dave Cortese for Mayor 2014 Committee (Complaint Number One) 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) Letter from Complainant Bui Dinh, dated December 9, 2014 regarding Complaint Number 1 and 2 filed October 14, 2014. (3) CD: September 21, 2014 Musical Event Campaign, 24-minute version, provided by Bui Dinh.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present. This complaint alleges a violation by Dave Cortese and Dave Cortese for Mayor 2014 Committee; Complainant Bui Dinh alleges that the Respondent coordinated in the planning of a campaign event on September 21, 2014 (the Event) such that the expenditures made by those planning the Event were in fact made at Respondent's behest and should therefore have been reported as contributions by the Respondent.

Complainant Bui Dingh was present for this hearing.

The Evaluator Steve Miller presented his report, addressing his conclusion that sufficient facts exist that a contribution was made at the behest of the Respondent and not reported in violation of the Municipal Code. The Evaluator advised that given the expense that would be incurred in further investigation, given that Respondent did not actively participate in the planning of the Event, and given that the likely dollar value of any unreported contribution discovered through further investigation will be small, the recommendation was that the Commission take no further action and close the file on the matter.

The Commission discussed the details of the complaint and the report. Staff responded to Commission questions.

Chair Michael Smith swore in Complainant Bui Dingh. The Complainant provided testimony regarding the alleged violation and asked that this investigation be based on the uncut 24-minute video of the Event rather than the 16-minute video to clarify the nature of the event as a campaign event.

Chair Michael Smith swore in Witness Duc Lam. The Witness provided testimony and responded to questions from the Commission.

Motion: Chair Michael Smith moved that, based upon a preponderance of the evidence, a violation has occurred with regard to coordination between the candidate and the organizer for the Event resulting in a contribution that was not reported. Commissioner Edgeworth seconded the motion.

Action: On a call for the question, the motion failed. (0-4. Noes: Smith, Edgeworth, Pierre Dixon, Peacock.)

Motion: Chair Michael Smith moved that further investigation be conducted 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. Vice Chair Rolanda Pierre Dixon seconded the motion.

Action: On a call for the question, the motion carried unanimously, with the hearing to be continued to allow for further investigation. (4-0.)

Vice Chair Rolanda Pierre Dixon stressed the importance that everyone be aware of not crossing the line by engaging in express campaign advocacy when conducting GOTV events, so any such future violations may be prevented.

- B. Hearing on Complaint filed by Bui Dinh against Barry H. Do, Thien L. Huynh, Tho T. Nguyen, and Thu M. Hoang filed October 14, 2014, alleging violations of Title 12 of the San Jose Municipal Code (Independent Investigator/Evaluator)

Document Filed: (1) Report from Hanson Bridgett LLP dated December 3, 2014 regarding Bui Dinh against Barry H. Do, Thien L. Huynh, Tho T. Nguyen, and Thu M. Hoang (Complaint Number Two) addressing the alleged violation of Title 12.06.910 of the San José Municipal Code – Failure of Independent Committee to Report Expenditures. (2) Letter from Complainant Bui Dinh, dated December 9, 2014 regarding Complaint Number 1 and 2 filed October 14, 2014.

Commissioner Chris Peacock left the hearing at 7:00 p.m.

Discussion: The Evaluator Steve Miller presented his report, addressing his conclusion that, as in the first case presented, the organizers blurred the distinction between a Get Out the Vote (GOTV) effort and a campaign advocacy event, yet the requirement to form a Committee is triggered by making either \$1,000 in independent expenditures or \$10,000 in contributions, and the Evaluator finds no evidence to suggest that either of these two instances have occurred.

Chair Michael Smith swore in Respondent Barry H. Do. The Respondent provided testimony. He acknowledged his cooperation with the investigation and testified that all candidates were invited via public television to take part in the GOTV effort.

Vice Chair Rolanda Pierre Dixon stressed that the same manner of invitation must be extended to all candidates in a GOTV event with no exceptions and there should be no indication that one candidate is being promoted over another. The Respondent answered questions posed by the Commission.

Chair Michael Smith swore in Respondent Tho Nguyen Tan. The Respondent provided testimony and responded to questions from the Commission. Motion: Commissioner Linda Edgeworth moved that based on the evidence provided it should be concluded that there is no violation of the Municipal Code, that the Commission dismiss the complaint and close the case file. Vice Chair Rolanda Pierre Dixon seconded the motion.

Action: On a call for the question, the Evaluator's report was adopted, finding that based on the evidence provided no violation of the Municipal Code occurred, that the complaint be dismissed and that the file be closed. (3-0-1. Absent: Commissioner Peacock)

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

Chair Smith	So certified
Vice Chair Pierre Dixon	So certified
Commissioner Edgeworth	So certified
Commissioner Peacock	Absent

Action: Upon motion by Vice Chair Rolanda Pierre Dixon, seconded by Commissioner Linda Edgeworth and carried, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's Findings; and further, that the Commission authorize the Chair to approve and sign the resolution. (3-0-1.
Absent: Commissioner Chris Peacock)

- C. Hearing on Complaint filed by Carol Garvey filed October 29, 2014, alleging violations of Title 12 of the San Jose Municipal Code by Neighbors for Sam Liccardo for Mayor 2014. (Independent Investigator/Evaluator)

Document Filed: Report from Hanson Bridgett LLP dated December 3, 2014 regarding Carol Garvey versus Neighbors for Sam Liccardo for Mayor 2014 addressing the alleged violation of Title 12.06.910 of the San José Municipal Code – Disclosure of Campaign Contribution.

Discussion: The Evaluator Steve Miller presented his report, addressing his conclusion that no violation of the Municipal Code has occurred.

Ragan Henniger, representing Sam Liccardo for Mayor 2014 was present but offered no testimony. The Complainant was not present.

Motion: Vice Chair Rolanda Pierre Dixon moved that based on the evidence provided it should be concluded that there is no violation of the Municipal Code and that the Commission dismiss the complaint and close the case file. Commissioner Linda Edgeworth seconded the motion.

Action: On a call for the question, the Evaluator's report was adopted, finding that based on the evidence provided, no violation of the Municipal Code occurred, the complaint be dismissed and the file closed. (3-0-1. Absent: Commissioner Chris Peacock)

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

Chair Smith	So certified
Vice Chair Pierre Dixon	So certified
Commissioner Edgeworth	So certified
Commissioner Peacock	Absent

Action: Upon motion by Chair Michael Smith, seconded by Commissioner Linda Edgeworth and carried, the Commission moved to direct the City Attorney to draft a Resolution on the Commissions' Findings, and further, that the Commission authorizes the Chair to approve and sign the resolution. (3-0-1. Absent: Commissioner Chris Peacock)

IV. Consent Calendar

- A. Approve the Minutes of September 10, 2014 – Regular Meeting
Deferred to December 10, 2014
- B. Approve the Minutes of November 12, 2014 – Regular Meeting

Documents Filed: Draft Ethics Commission minutes for the November 12, 2014 meeting.

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, and seconded by Commissioner Linda Edgeworth and carried, the Commission approved the meeting minutes of November 12, 2014. (3-0-1. Absent: Chris Peacock.)

V. Reports

- A. Chair – Chair Smith reported on the resignation of Commissioner Leon Louie and the pending resignation of Commissioner Linda Edgeworth.
- B. City Attorney – None
 - 1. Legislative update
- C. City Clerk – City Clerk Toni Taber reported on the New Law Seminar she attended and announced that the recruitment for the vacancies on the Ethics Commission has been posted.
 - 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 offered that filing deadline is in January, and she will offer a full report in February.
 - 4. Elections update – City Clerk Toni Taber announced that a Special Election will be held in April for the District 4 Council Seat, and the nomination period opens on Monday, December 15, 2014.
- D. Investigator/Evaluator – None.

VI. Old Business

- A. Status, review and possible action on Gift Ordinance and Frequently Asked Questions Sheet (City Attorney)

Action: Item deferred to next meeting scheduled for January 14, 2014.

- B. Discussion, review and possible action on Open Government Legislation and the effects it will have on the Ethics Commission (City Attorney)

Documents Filed: Ordinances 29460 and 29461.

Action: Item deferred to next meeting scheduled for January 14, 2014.

- C. Status, discussion and possible action on extension of current contract for Independent Evaluator/Investigator and RFQ for new contract commencing July 1, 2015 (City Clerk/City Attorney)

Discussion: Extension of the contract to June 30 for Hanson Bridgett went to Council on December 9, 2014 and has been approved and signed.

Chair Michael Smith has provided editorial changes for the RFQ to Deputy City Attorney Arlene Silva, and she outlined additional changes provided by Commissioner Linda Edgeworth; once finalized, City Clerk Toni Taber, will continue the process with Purchasing. Interviews should be conducted no later than June 2015, since the contract starts July 1, 2015.

Motion: Chair Michael Smith moved approval of the RFQ including any additional editorial changes as determined by City Staff. Commissioner Linda Edgeworth seconded the motion.

Action: On a call for the question, the Evaluator/Investigator RFQ was approved as corrected, authorizing the City Attorney and City Clerk to make editorial corrections as required, was approved. (3-0-1. Absent: Commissioner Chris Peacock)

- D. Discussion, review and possible action on Form 500 language to ensure timely submittal

Documents Filed: Blank Form 500 and San Josè Municipal Code (SJMC) section 12.06.500 *et seq.*

Discussion: City Clerk Toni Taber indicated that Municipal Code language addressing the 14-day deadline for Form 500's for the special election will need to be addressed, since it now states they must be completed within 14 days of primary for candidates to be included in the run-off. The election is to be held on April 7th, and April 10 is the deadline for new ballot designations and candidate statements to be received by the Registrar of Voters.

Action: Item deferred to next meeting scheduled for January 14, 2014.

VII. New Business

A. Ad hoc subcommittee

Discussion: City Clerk Toni Taber discussed the possibility of working with City Clerk staff on a translation project to create outreach for Vietnamese community, although a certified translator would be required to comply with existing requirements.

Action: Item deferred to next meeting scheduled for January 14, 2014.

VIII. Public Comment – None.

IX. Future Agenda Items and Adjournment

The next regular meeting is Wednesday, January 14, 2015 at 5:30 p.m. in City Hall, Wing Room 262.

The following agenda items will be discussed at the January 14, 2015 Ethics Commission meeting:

- Continuation of discussion regarding Bui Dinh complaint against Dave Cortese filed on October 14, 2014.
- Continuation of discussion regarding establishment of an Ethics Commission ad hoc Subcommittee to explore opportunities for outreach to ethnic and specialized media regarding campaign and ethics regulations and policies per the Commission's FY2015 work plan
- Gift Ordinance and FAQs
- Open Government Legislation
- Approval of September 2014 Meeting Minutes
- Update on RFQ for Evaluator/Investigator
- Changes to Form 500 form/instructions and possible changes to SJMC

The meeting was adjourned at approximately 8:31 p.m.



MICHAEL SMITH, CHAIR

ATTEST:
ELECTIONS COMMISSION SECRETARY



TONI J. TABER, CMC
CITY CLERK

Attachment: Transcript of Hearings dated December 10, 2014, Reported by Noelia Espinola, CSR, License Number 8060, Advantage Reporting Services, No. 48766, pages 1 through 121.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Taken On December 10, 2014

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: Wednesday, December 10, 2014 Time: 5:33 p.m. Location: San Jose City Hall 200 E. Santa Clara Street City Hall Wing - Room W262 San Jose, CA 95113</p> <p>Reported By: Noelia Espinola, CSR License Number #8060</p> <p>#48766</p>	<p>Page 3</p> <p>1 2 APPEARANCES 3 4 The Reporter: ADVANTAGE REPORTING SERVICES BY: NOELIA ESPINOLA, 5 CSR #8060 1083 Lincoln Avenue 6 San Jose, CA 95125 (408) 920-0222 7 8 --o0o-- 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>Page 2</p> <p>1 2 APPEARANCES 3 4 San Jose Ethics Commission: MICHAEL SMITH, Chair ROLANDA PIERRE-DIXON, Vice-Chair 5 CHRIS PEACOCK (Complaint #1 only) LINDA EDGEWORTH 6 7 Staff: ARLENE F. SILVA Deputy City Attorney 8 9 TONI TABER, City Clerk 10 TOM GRAVES, Assistant City Clerk 11 12 Ruth Krantz Deputy City Clerk 13 14 Independent Evaluator: HANSON BRIDGETT, LLP BY: STEVEN D. MILLER, 15 Attorney at Law 425 Market Street 16 26th Floor San Francisco, CA 94105 17 (415) 777-3200 18 19 Also Present: Bui Dinh Duc Lam 20 Barry Do Hoang Lam 21 Thran Huynh, Videographer Tho Nguyen Tan, Photographer 22 Bryan Do Ragan Henninger 23 24 25 (Continued)</p>	<p>Page 4</p> <p>1 PROCEEDINGS 2 3 CHAIRMAN SMITH: We have three hearings 4 tonight. The first two are related but different. And 5 then a third one. We are about ready to go on record. 6 I have to just make sure that nothing gets left out in 7 describing the process and making sure people 8 understand what we're doing. I have a script that I've 9 made up that I try to follow closely. 10 Okay. It is Wednesday, December 10th, 2014, 11 and this hearing of the City of San Jose Ethics 12 Commission is being held in Room W262 of San Jose City 13 Hall. All members of the Commission are present. 14 The Commission will conduct a hearing on a 15 complaint filed on October 14th, 2014, by Bui Dinh 16 alleging that Dave Cortese and the Dave Cortese for 17 Mayor 2014 Committee violated Section 12.06.910 of the 18 San Jose Municipal Code. Specifically, the allegation 19 is that the respondent failed to report as 20 contributions certain expenditures allegedly made at 21 the behest of the candidate. The City Clerk notified 22 and provided a copy of the complaint to the Independent 23 Evaluator on October 14, 2014, and the Evaluator 24 notified and provided a copy to the respondent on 25 October 15, 2014. The Independent Evaluator's Report</p>

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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1 and Recommendations were submitted to the City Clerk on
2 December 3, 2014, and copies were then provided to the
3 complainant, respondents and commission members and
4 posted to the city web site with the agenda for
5 tonight's meeting.

6 On April 15, 2014, the City Council adopted
7 Resolution 76954, which establishes the Commission's
8 regulations and procedures pertaining to investigations
9 and hearings. All parties to these proceedings have
10 been provided copies of the Resolution. The
11 regulations and procedures have been adopted in order
12 to ensure the fair, just and timely resolution of
13 complaints before the Commission.

14 This hearing is open to the public. It is
15 being electronically recorded, and we have a court
16 reporter with us to compile a transcript. The formal
17 rules of evidence do not apply to this hearing, but all
18 testimony will be under oath or affirmation. The
19 complainant will be treated like any other witness in
20 providing evidence. The Chair may compel the testimony
21 of witnesses and may compel the production of relevant
22 documents to the Evaluator by subpoena. Witnesses may
23 be excluded at the discretion of the Commission.
24 Commission members may ask questions of witnesses or
25 the Evaluator when recognized by the Chair.

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1 response from the respondents.

2 Okay. The complainant or any interested
3 party may also submit a brief or written argument.

4 In this case, as of now, we have received a
5 written argument from Bui Dinh, the complainant. Do
6 all Commissioners and staff have a copy of that written
7 statement? Yes. It was received yesterday and
8 submitted -- e-mailed to commission members today.

9 Has the complainant or other parties been
10 provided a copy of the response?

11 And I guess we don't know that. Nobody is
12 here to represent?

13 MR. MILLER: I've communicated with the City
14 Clerk. I believe attempts were made to provide it. I
15 guess we don't know for sure whether they received it
16 or not.

17 CHAIRMAN SMITH: Okay. At this time I will
18 recognize Steve Miller from the Hanson Bridgett law
19 firm to present the Independent Evaluator's Report and
20 Recommendations.

21 MR. MILLER: Thank you. Good evening,
22 Commissioners.

23 This thing is blowing right in front of me.
24 So tell me either if you can't hear me or, conversely,
25 if I appear to be shouting because of the noise. But

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1 At this time I would like to have the
2 complainant, Bui Dinh, and respondent, Dave Cortese and
3 the Dave Cortese for Mayor 2014 Committee, or their
4 representatives, identify themselves for the record.

5 Is the complainant with us? No.

6 And is there anyone here representing
7 Mr. Cortese or his committee? No.

8 Okay. I would also like to have city staff
9 and representatives of Hanson Bridgett, the
10 Commission's Independent Evaluator, please identify
11 themselves for the record.

12 MR. MILLER: Steven Miller, Hanson Bridgett.

13 MS. SILVA: Arlene Silva, deputy city
14 attorney.

15 MS. TABER: Toni Taber, city clerk.

16 MS. KRANTZ: Ruth Krantz, city clerk.

17 MR. GRAVES: Tom Graves, assistant city
18 clerk.

19 CHAIRMAN SMITH: Thank you.

20 Under the Commission's regulations and
21 procedures, the respondent may submit a written
22 response to the Report and Recommendations. The
23 response may contain legal arguments, a summary of
24 evidence and any mitigating or exculpatory information.

25 I don't believe we have received any written

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1 it's quite noisy in my ears.

2 So we have two reports, although I will try
3 to help keep them separate for the purposes of our
4 hearings.

5 Thanks.

6 And, as you mentioned, Chairman Smith, the
7 allegation in this first complaint is that the
8 respondent, Supervisor Dave Cortese and his mayoral
9 campaign committee, coordinated with a group to promote
10 a campaign event such that the respondent was required
11 to report the expenses of that event as contributions
12 to his mayoral campaign.

13 And there are really three parts to this
14 allegation, and I think it's worth teasing them out for
15 you in my report. The first part to the allegation is
16 that there was, in fact, a campaign event, as suggested
17 in the allegation. The second is that there was
18 coordination in the planning and holding of that
19 campaign event. And the third is that there were
20 expenses associated with the event that required
21 reporting.

22 And each one of those three parts requires
23 some consideration, and I'll go through them with you
24 in turn. Feel free to stop and ask me questions
25 anytime if you'd like.

2 (Pages 5 to 8)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

<p style="text-align: center;">Page 9</p> <p>1 So, first, the suggestion is that there was a 2 campaign event. And that is not -- a "campaign event" 3 would be defined in Title 12 as an event that included 4 express advocacy or language or communications that 5 unambiguously urge a particular result in an election. 6 And then -- 7 COMMISSIONER PIERRE-DIXON: Excuse me. If I 8 might ask the staff. 9 MR. MILLER: Yes. 10 COMMISSIONER PIERRE-DIXON: I understand 11 there is filming and cameras, and I do not know who 12 this person is and have him identified. 13 Could you please tell us, for the record, who 14 you are. 15 MR. NGUYEN TAN: Me? 16 COMMISSIONER PIERRE-DIXON: Yes. 17 MR. NGUYEN TAN: I am Tho Nguyen Tan. 18 MR. MILLER: Commissioner Pierre-Dixon, they 19 are respondents to the other -- in the other hearing 20 that will come next. 21 CHAIRMAN SMITH: All right. So are you 22 ready? 23 COMMISSIONER PIERRE-DIXON: Did you get that 24 name, the second name? 25 I want that on the record. I don't like</p>	<p style="text-align: center;">Page 11</p> <p>1 2014, in the Grand Century Mall in San Jose, was 2 promoted as a "Get Out the Vote" event, not as a 3 campaign event including express advocacy that -- you 4 have in your -- as an appendix to the file to our 5 report, a flyer promoting the event that we had 6 translated, which is consistent with promoting a "Get 7 Out the Vote" event, what you may be familiar with -- a 8 term of a "Rock the Vote" event. It was a concert 9 featuring musical entertainment, designed to encourage 10 members of the Vietnamese community to turn out to 11 vote. Some of the promoters made speeches consistent 12 with a "Get Out the Vote" effort, urging people to go 13 to the polls and vote regardless of who they were 14 voting for. The important thing -- ah, just got a 15 little softer -- the important thing is to get out to 16 vote. So there was quite a lot of evidence to support 17 the contention that this was a "Get Out the Vote" 18 effort. 19 However, our investigation has also revealed 20 a number of activities that make it impossible for us 21 to conclude that it was purely a "Get Out and Vote" 22 effort, and there were instances of campaign advocacy 23 that we believe blurs the line between "Get Out the 24 Vote" and campaign advocacy, express advocacy. Whether 25 the line was crossed or not I will discuss in a moment.</p>
<p style="text-align: center;">Page 10</p> <p>1 anything filmed and taken. Although it's open to the 2 public, it needs to be on the record, like everything 3 else. 4 So you need to give our court reporter your 5 name. Do you have a card with your names on it? That 6 would be better, so it can be entered into the record. 7 Or give her a spelling. 8 MS. TABER: I hit "System Off." I'm trying 9 to get that to turn off. 10 MR. MILLER: I'll just wait for the 11 Commissioners to tell me to start up again. 12 CHAIRMAN SMITH: Okay. Is the court reporter 13 ready? 14 Mr. Miller. 15 MR. MILLER: Okay. The first issue, as I 16 mentioned, is -- the question is whether the event that 17 is at the center of this allegation was a campaign 18 event, meaning that it included communications that 19 were express advocacy, which is a very narrowly defined 20 term by the courts, as this Commission has experienced 21 on a number of occasions in the past; or in -- viewed 22 in context, contact unambiguously urged a particular 23 result in an election. 24 The facts that we have uncovered indicate 25 that this event, which was held on September 21st,</p>	<p style="text-align: center;">Page 12</p> <p>1 But some of the facts that we have discovered 2 that are included in the report -- there -- the event 3 was held on a stage. There was a proscenium of the 4 stage that included a message consistent with a "Get 5 Out the Vote" effort. But also on the proscenium were 6 campaign signs for a number of candidates, expressly 7 urging for their election -- wow, it really doesn't 8 want to shut off. There were numbers of candidates who 9 set up booths at the event. 10 There are photographs taken from a video that 11 you apparently now have behind you, although it was 12 just unplugged. But I believe the pictures are 13 sufficient to show campaign activities with express 14 advocacy in the form of campaign signs. There were -- 15 at least one candidate riding on a motorcycle, 16 festooned with campaign ads, sort of in the form of a 17 moving billboard, and speaking, holding up campaign 18 signs advocating his election. 19 There were campaign signs for the respondent 20 himself at the side of the stage at another point of 21 the video, on the proscenium itself on the stage, 22 indicating that there was some activity involved in 23 moving these signs around to different locations. The 24 video shows him -- the respondent speaking in a way 25 that would not amount to express advocacy but is</p>

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1 consistent with the "Get Out the Vote" effort. But
2 simultaneously the video shows him speaking next to his
3 campaign sign, urging his election.
4 And that's sort of a good example of the kind
5 of blurred effect I can -- I can try to explain to you.
6 The group promoting the event, again, in terms of
7 blurring the distinction, while on the one hand they
8 said, "This is an event to get out the vote; you can
9 vote for anyone," they also were very -- in my view,
10 they made specific efforts to invite specific
11 candidates whose -- whose candidacy they supported and
12 specifically not to invite one candidate in particular,
13 Mayor Candidate Sam Liccardo, whose efforts they did
14 not support.
15 They have presented a reason for not inviting
16 Mayor Liccardo -- Mayor-Elect Liccardo based on
17 concerns for his security. But news reports of the
18 event, not denied by this group and I believe to be
19 credible, would suggest, rather, that the desire to
20 hold this event was inextricably linked with the desire
21 to invite certain candidates, and a desire not to
22 invite Mayor Liccardo was associated more with their
23 support or lack thereof for his positions and his
24 candidacy, not with concerns for his safety.
25 Again, much of the event consisted of songs

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1 and speeches designed to get out the vote. Some
2 undefined -- or undefined at this time -- portion blurs
3 that line and included some instances of express
4 advocacy. The portion of that express advocacy that is
5 focused on express advocacy in support of the
6 respondent in this complaint is probably similarly
7 small. But, again, without a time machine or without
8 some further investigation that I'll get to in a
9 moment, it may be a little hard -- or it is hard for us
10 at this moment to tell you, with precision, where the
11 line is in this event with regards to express advocacy
12 in support of the respondent's campaign.
13 Yes, Commissioner Edgeworth.
14 COMMISSIONER EDGEWORTH: I was reading the
15 transcript of what transpired at this event. And based
16 on your comments and what I have been able to garner
17 from the report, do you know offhand if the myriad of
18 candidates for various races -- in any instance was
19 there an opposing candidate for the same race present,
20 or was there only one for each race?
21 MR. MILLER: To my knowledge, there was only
22 one for each race.
23 COMMISSIONER EDGEWORTH: Thank you.
24 MR. MILLER: Good point.
25 So that's the first issue is, was it a "Get

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1 Out the Vote" event or was it a campaign event? And we
2 believe that distinction is a blurry one at this point.
3 Second issue is whether there was
4 coordination or not. Remember, if this was -- yes,
5 sir.
6 COMMISSIONER PEACOCK: And what is it that
7 makes it blurry?
8 MR. MILLER: Is that it was a mixture. There
9 was a significant portion of this event that, in fact,
10 was a "Get" -- promoted a "Get Out the Vote" message.
11 The advertisements and flyers for it, many of the
12 speeches, the banner prominently featured at the top of
13 the stage, are all consistent with the "Get Out the
14 Vote" efforts. I don't mean that it's blurry in that I
15 can't tell which is which. I mean that it's blurry in
16 that they both happened in a way that blurred the
17 message.
18 COMMISSIONER PEACOCK: In this case, it's
19 possible you're a little bit pregnant?
20 MR. MILLER: Exactly. And it's very possible
21 that it is a message that contained both express
22 advocacy and "Get Out the Vote" message. When you
23 start talking about money, that becomes an important
24 discussion. And I'll get to that momentarily. Or now,
25 as you wish.

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1 Okay. So the next question, in my mind, is
2 the question of coordination. Because if this was a
3 purely "Get Out the Vote" effort, there was nothing to
4 coordinate. Coordination is only an issue as it
5 relates to campaign activities. In my view, this is
6 the simplest question from a legal perspective. The
7 standard for coordination is, among other things, that
8 there must be consultation between the person making
9 the communication and the candidate prior to the making
10 of the communication.
11 Here it is undisputed that the organizers of
12 this event reached out to invite the candidate, and the
13 candidate appeared at the event. Once he appeared,
14 he's standing there next to the stage. He's seeing
15 everything I just described to you. And he goes up on
16 stage and gives a speech. It seems to me
17 incontrovertible that there would be coordination.
18 The candidate may have believed that he was
19 invited to a "Get Out the Vote" event and may not have
20 known that this was an event to promote his candidacy.
21 But the law holds candidates to a very high standard,
22 to, for lack of a better word, police the nature of
23 these events. And the fact that he was invited, that
24 he was there, is sufficient, I think, almost without a
25 doubt, to establish coordination had -- if the event

4 (Pages 13 to 16)

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<p style="text-align: center;">Page 17</p> <p>1 was, in fact, a campaign event. 2 Yes, sir. 3 CHAIRMAN SMITH: I want to ask a question, 4 since we're doing that. A thought occurred to me this 5 afternoon as I was reading the memo that we got from 6 the complainant. What if Mayor-Elect Liccardo had also 7 been invited? Would the event be okay -- both 8 candidates would have violated the -- you know, what if 9 everybody who was running for every office in San Jose 10 was invited? Would they all be guilty of coordination? 11 MR. MILLER: If -- it could be. The issue 12 really comes to the -- the issue of coordination means, 13 if there was coordination, an expenditure that 14 otherwise would be an independent expenditure made by 15 an independent group is treated as a contribution made 16 at the behest of the candidate. 17 So I think the way to analyze your question, 18 if I might, is to follow the money, for lack of a 19 better word. And you take a total pie of the amount of 20 money spent on this event, and you would first have to 21 say, How much of that was spent -- to continue 22 Commissioner Peacock's pregnancy metaphor, how much was 23 spent on the "Get Out the Vote" effort and what portion 24 was spent on campaign advocacy? 25 You would then take that portion of campaign</p>	<p style="text-align: center;">Page 19</p> <p>1 Vote" efforts and if you also apportion some of it to 2 the candidates who are outside the jurisdiction of this 3 Commission, you are left with what I think, at the end 4 of the day, is almost undeniably going to be a very 5 small slice of the pie. 6 And once we reached that conclusion, we 7 stopped and said to ourselves, Do we want to -- in 8 order to define that slice of the pie with precision, 9 one would need to know exactly -- we need a lot more 10 information about the event and what -- how much of the 11 event was campaign advocacy, how much of the event was 12 "Get Out the Vote" effort. We would also then want to 13 know how to divide the campaign advocacy portion 14 amongst the candidates subject to your jurisdiction. 15 In my view, that effort -- I probably would 16 have recommended hiring an investigator to go out and, 17 as efficiently as possible, gather lots more facts. 18 But it seemed like we knew enough to come to you to see 19 whether you wanted to direct that further investigation 20 to define the pie, given the slice of the pie. 21 CHAIRMAN SMITH: Let me ask one more quick 22 follow-up question, and then I'll let you get back on 23 track. 24 What -- what about when the League of Women 25 Voters or a neighborhood association or somebody else</p>
<p style="text-align: center;">Page 18</p> <p>1 advocacy and apportion it among the candidates who 2 coordinated with the group. And how you apportion that 3 could be done in any number of ways. There's no legal 4 restriction. It's not dependent on whether they really 5 wanted one candidate or only just a little bit wanted 6 another, whether one candidate spent 20 minutes on 7 stage, another candidate spent two minutes on stage. 8 The classic example would be a mailer 9 featuring multiple candidates, in which case it's 10 easier to say, Your picture is a quarter of a mailer, 11 and your picture is only one-sixteenth of a mailer, so 12 your tag is only one-sixteenth of the cost. 13 In a fluid event like this concert, it's a 14 little harder to make that -- to proportion that. But 15 had -- my answer to your question -- this is a 16 long-winded answer, perhaps. But had Mayor-Elect 17 Liccardo been invited and attended, he would represent 18 one slice of the pie for purposes of deciding how much 19 money needed to be reported. 20 And maybe jumping the gun a little bit, but 21 based on what we know so far, the amount of money -- if 22 you take the total pie -- we don't know the total 23 amount that was spent. We know some amount of that. 24 But if you take that amount of money and separate out a 25 portion of it that was for legitimate "Get Out the</p>	<p style="text-align: center;">Page 20</p> <p>1 rents a hall and has an event where they invite all the 2 candidates to come and debate, they make speeches or 3 whatever? Does that mean that the League of Women 4 Voters should report contributions to all the 5 candidates who were invited to their event, in 6 accordance with the law? 7 MR. MILLER: The first thing is there are 8 exemptions for debates. But if the League -- so the 9 League of Women Voters usually hold debates, at which 10 it's expected that the candidates are going to be 11 advocating for themselves. But if the League of Women 12 Voters were to hold a "Get Out the Vote" event and it 13 turned into a series of advocacy issues, there could be 14 a problem. And there is certainly FPPC guidance 15 specifically on the cost of rental -- renting halls for 16 campaign speeches that were not designed to be campaign 17 speeches. 18 So it's a factual -- it's a factual issue. 19 It's not really a factual question presented here, 20 because this was not the League of Women Voters. 21 CHAIRMAN SMITH: I was thinking there is lots 22 of people who have events where they invite all the 23 candidates. And I'm thinking, does that mean all of 24 them should be -- anyway. 25 MR. MILLER: So I guess I'm really almost</p>

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1 through. I mean, my report is much lengthier. You
2 have some photographs to document some of what I've
3 said.

4 But our conclusion is that this was an event
5 that was a mixed event that probably included some
6 campaign advocacy, even for the respondent here, and
7 that there was coordination and that, therefore, there
8 is probably sufficient evidence for the Commission to
9 determine that there was a violation by the respondent
10 in failing to report a contribution made at his behest.

11 There are a number of problems with reaching
12 that conclusion because (a) it's very difficult,
13 without further investigation, to define with
14 specificity the dollar value.

15 It also, frankly, puts the respondent in a
16 little bit of a difficult spot because it's unclear
17 from whom he should report a contribution under these
18 circumstances. It's not the ordinary way in which
19 these sorts of events are usually handled by folks who
20 participate in the political process.

21 So I think our report is presented to you
22 with a number of options. One option is to leave no
23 stone unturned and direct further investigation to find
24 out what presently is still a little unknown in my
25 mind, which is the exact nature of the political part

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1 of the event and exact -- more information about the
2 money. And as I think I mentioned, if you do direct me
3 to do that, I would suggest that the most efficient way
4 to do that would probably be to work with an
5 investigator to find out that information.

6 The second option for you -- and so you would
7 hold off, pending further investigation. The second
8 option would be to find that, under the standards, you
9 have a preponderance of the evidence; you know enough
10 to find a violation. And the question would be what to
11 do about it. And that's for a later part of this
12 hearing is whether there are circumstances that
13 would -- you might want to take different sorts of
14 action. And I can make a recommendation to that effect
15 when you get there.

16 And the third option would be to say that
17 there is insufficient evidence at this point to say,
18 with enough certainty to reach your standard of a
19 preponderance of the evidence, despite everything I've
20 just said, and that it's not really -- you do not want
21 to direct further investigation, and you prefer just to
22 close the file on this matter without taking action.

23 It's a complicated intertwining of facts.
24 I'm trying to keep focused on the respondent in this
25 particular complaint. But I'm happy to entertain more

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1 questions, but maybe I'll leave it there.

2 CHAIRMAN SMITH: Okay. Additional questions?

3 COMMISSIONER PIERRE-DIXON: One, in terms of
4 looking at the expenditures and how much money was
5 spent and just trying to make a ballpark guess here,
6 you ended up thinking that perhaps it would be around
7 \$50 per candidate --

8 MR. MILLER: Yes, the basis for that was
9 based on the self-reporting by the members of the group
10 promoting this event. The -- not including the
11 additional nonmonetary contributions that I think
12 probably would have been there. And then based on a --
13 my best sense as to what portion of the event was a
14 campaign event. And, further, what portion of that
15 campaign event was attributable to the respondent here.

16 COMMISSIONER PIERRE-DIXON: Thank you.

17 MR. MILLER: But they are preliminary
18 numbers, guesswork, to be sure.

19 CHAIRMAN SMITH: Yes.

20 COMMISSIONER PEACOCK: In your last
21 paragraph, your recommendation -- your recommendation,
22 you said you would hope that the preliminary
23 conclusions already have educational value to the
24 Commission. What do you mean by that? Or what's the
25 relevance of that?

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1 MR. MILLER: Well, I think it's -- I think
2 it's important for the Commission to know about how an
3 event like this -- that an event like this took place
4 and how it was promoted and with what level of
5 informality it was handled. And I think that was my --
6 that's what I meant by that -- as you read it, it
7 sounds a little on the pedantic side, which was not my
8 intent. But I just felt it was important that you know
9 the facts that I discovered. And there's value just in
10 that, it seems to me.

11 Does that answer your question?

12 COMMISSIONER PEACOCK: Yes.

13 CHAIRMAN SMITH: Anything else?

14 Okay. I guess we still do not have anyone
15 here to represent the respondent or complainant in this
16 case; is that correct? So -- no one here to
17 represent --

18 MR. MILLER: Yeah.

19 MR. DINH: My name is Bui Dinh.

20 CHAIRMAN SMITH: Oh, okay. So you're the
21 complainant.

22 MR. DINH: Yeah.

23 CHAIRMAN SMITH: Okay. Would you come
24 forward, please. Up here so we can hear you better.
25 Sit right there at the table. Right up here would be

6 (Pages 21 to 24)

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<p>1 fine.</p> <p>2 MS. TABER: Sit right here.</p> <p>3 MR. DINH: Oh.</p> <p>4 CHAIRMAN SMITH: Sit right there. And if you</p> <p>5 would raise your right hand, please.</p> <p>6</p> <p>7 BUI DINH,</p> <p>8 being first duly sworn by the Chairman to tell the</p> <p>9 truth, the whole truth and nothing but the truth,</p> <p>10 testified as follows:</p> <p>11</p> <p>12 CHAIRMAN SMITH: Thank you. If would you</p> <p>13 state your name again, please.</p> <p>14 THE WITNESS: My name is Bui Dinh.</p> <p>15 CHAIRMAN SMITH: Okay. Thank you. You're</p> <p>16 under oath. Make a statement or --</p> <p>17 THE WITNESS: Yeah, everything on the report</p> <p>18 is -- I really agree with the report from the staff</p> <p>19 investigation. But the one thing I worry about the</p> <p>20 videotape investigated. Just say on the statement that</p> <p>21 it only 16 minutes something.</p> <p>22 CHAIRMAN SMITH: Right.</p> <p>23 THE WITNESS: But the original one is 24 --</p> <p>24 24 minutes and 16 -- 14 seconds.</p> <p>25 CHAIRMAN SMITH: Okay.</p>	<p>1 the complainant has it. I don't know anything about</p> <p>2 it. It might be interesting to find out.</p> <p>3 CHAIRMAN SMITH: Do you have anything else?</p> <p>4 THE WITNESS: Yes, just only the tape -- I'm</p> <p>5 worried about that one. Because, ultimately, they cut</p> <p>6 it off. I don't know who supply the video, 16-minute,</p> <p>7 to the investigator. But my original one is</p> <p>8 24.14 minutes.</p> <p>9 CHAIRMAN SMITH: Right.</p> <p>10 THE WITNESS: So that what I concern with,</p> <p>11 how -- both tape is different.</p> <p>12 CHAIRMAN SMITH: Right.</p> <p>13 THE WITNESS: But both tape from the one</p> <p>14 source, that it -- VietVungVinh, they play it. I saw</p> <p>15 different, so that's why. Because yesterday I submit</p> <p>16 the video. That's it.</p> <p>17 CHAIRMAN SMITH: Okay. And I believe you --</p> <p>18 as I understood your letter that you sent us, you</p> <p>19 summarized in there the key things that were in the</p> <p>20 24-minute that were not in the 16-minute?</p> <p>21 THE WITNESS: Yeah.</p> <p>22 CHAIRMAN SMITH: So, having read the -- what</p> <p>23 you wrote, we probably don't need to look at the</p> <p>24 24-minute video. That's my assumption.</p> <p>25 THE WITNESS: Yeah.</p>
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<p>1 THE WITNESS: I don't know why that one is --</p> <p>2 got -- cut it off. I wonder about that. That's why.</p> <p>3 CHAIRMAN SMITH: All right.</p> <p>4 Mr. Miller, do you have a -- he's wondering</p> <p>5 about the -- you referenced a 16-minute tape. And, as</p> <p>6 you know, in his written statement today, he said it</p> <p>7 was 24-minute.</p> <p>8 MR. MILLER: I went back to where I found the</p> <p>9 video, which was on YouTube. And there is a 16-minute</p> <p>10 video. I understand there is perhaps a longer video,</p> <p>11 but I haven't seen it. I've read the statements that</p> <p>12 the complainant has made, addressing the things that he</p> <p>13 says are missing from the 16 minutes. I'm not sure</p> <p>14 that they change, fundamentally, my report to you.</p> <p>15 There are aspects -- assuming the complainant</p> <p>16 is correct -- and I have no reason to doubt him --</p> <p>17 there are aspects of what he says is in the missing</p> <p>18 minutes that would reinforce the statement that this</p> <p>19 was a "Get Out the Vote" event, and there are aspects</p> <p>20 that would reinforce that this had some incidence of</p> <p>21 campaign advocacy. So it sounds like it would be</p> <p>22 consistent with my report that it was a mixture.</p> <p>23 But I don't have an explanation as to why the</p> <p>24 video I saw was 16 minutes, and I have no idea what</p> <p>25 this 24-minute video is or where it came from or how</p>	<p>1 CHAIRMAN SMITH: Because you've identified</p> <p>2 it.</p> <p>3 Okay. While you're here, does anyone have</p> <p>4 any questions?</p> <p>5 COMMISSIONER EDGEWORTH: Yes. Please clarify</p> <p>6 for me how you were -- became aware of the 24-minute,</p> <p>7 14-second video as opposed to the 16-minute. You --</p> <p>8 you were unable to -- the Evaluator was unable to find</p> <p>9 the 24-minute video. So where did you become</p> <p>10 acquainted with the 24-minute video?</p> <p>11 THE WITNESS: I got from the -- from the web</p> <p>12 site, from VietVungVinh.</p> <p>13 COMMISSIONER EDGEWORTH: And it was then</p> <p>14 later cut.</p> <p>15 THE WITNESS: The first one when it -- the</p> <p>16 event, it finished. They played that video,</p> <p>17 24.14 minutes.</p> <p>18 COMMISSIONER EDGEWORTH: I see. I see.</p> <p>19 THE WITNESS: So I got from that.</p> <p>20 COMMISSIONER EDGEWORTH: Okay.</p> <p>21 THE WITNESS: So that's why, when the report</p> <p>22 is coming -- I read it. Why -- they cut it off --</p> <p>23 almost eight minutes. So that is my question. I don't</p> <p>24 know why they cut it off. So that's why I just</p> <p>25 submitted the original one.</p>

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1 CHAIRMAN SMITH: Appreciate that.
2 COMMISSIONER EDGEWORTH: Thank you.
3 THE WITNESS: That's it.
4 MR. MILLER: And, if I might, I want to be
5 clear. The event was not -- was neither 16 minutes nor
6 24 minutes. This was a three or plus-hour event. So
7 one of the difficulties is that I'm basing what I know
8 about the event from interviews with people who were
9 there but also from watching what is obviously an
10 edited highlight reel. And now apparently -- it was
11 edited, apparently, twice. But I don't want to make --
12 I want to be clear that I don't represent that I saw
13 the entire three-hour video.
14 I did ask -- I did try to contact the web
15 site to see if they had a video. But I was -- in many
16 instances, was not able to receive a response -- or not
17 able to -- I did not receive a response to those
18 requests. Another instance in which, if you direct
19 going forward, perhaps an investigator would be an
20 efficient way to go.
21 COMMISSIONER PEACOCK: What types of efforts
22 did you make to get that?
23 MR. MILLER: E-mails and phone calls, with a
24 translator in case there was someone who answered the
25 phone who didn't speak English.

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1 CHAIRMAN SMITH: Okay. Anything else?
2 COMMISSIONER EDGEWORTH: I have several
3 questions, but I don't know what order we should -- how
4 you want --
5 CHAIRMAN SMITH: Who are they for? If
6 they're for the complainant --
7 COMMISSIONER EDGEWORTH: No.
8 CHAIRMAN SMITH: If there's anything else for
9 the complainant. Otherwise, he can go back to his
10 seat.
11 I think that's all. Thank you.
12 COMMISSIONER EDGEWORTH: Thank you very much.
13 CHAIRMAN SMITH: We also have -- before we
14 get into more detailed questions, perhaps we should see
15 if anyone else in the public has comments. And then we
16 can take questions.
17 Yes. You'll come up, please, and state your
18 name and... State your name, please.
19 MR. LAM: My name is Duc Lam.
20 CHAIRMAN SMITH: Okay. Raise your hand.
21
22 DUC LAM,
23 being first duly sworn by the Chairman to tell the
24 truth, the whole truth and nothing but the truth,
25 testified as follows:

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1 THE WITNESS: I do watch the 16-minute and
2 24-minute, and I see the difference is that --
3 24 minutes and the campaign event indication. It is --
4 organizer clearly said, I introduce the mayor, the new
5 mayor. It's clearly that campaign. It's not GOTV, Get
6 Out the Vote. So it clearly indicate that. So that
7 sort of mark in my mind.
8 A big one to know is how much is, cost. And
9 I saw very popular singer in there. Normally they
10 don't have no cost.
11 MR. MILLER: If you could speak a little
12 louder. I'm sorry. I just want to -- you know, in the
13 exact wrong place.
14 MS. TABER: No. I think it's the air
15 conditioning, and I can't shut it off.
16 MR. MILLER: Okay. That's fine. But if you
17 can speak a little louder, I would appreciate it.
18 THE WITNESS: Yeah, what I'm saying is that
19 the singer -- the singer over there, like two -- couple
20 of singers (inaudible) they never give a free singing.
21 So --
22 COMMISSIONER PIERRE-DIXON: Well, they didn't
23 say it was free, but they said there was a cost in
24 terms of travel. And then maybe they donated their
25 time. But certainly they had to pay them something.

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1 And what you're saying is that normally, when you hear
2 about these kind of singers, it's a big expense.
3 THE WITNESS: Yes, yes. Normally I don't
4 believe it is. So I think you should go farther and
5 find out the cost, really cost of this.
6 CHAIRMAN SMITH: Okay.
7 THE WITNESS: Because it's really campaign
8 event. Try to make it look like GOTV. What they try
9 to do is campaign. In there it is clearly -- they
10 compose the songs. They go to vote for mayor. And
11 they put the sign to show how strong the community
12 strength. They try to make it -- make -- I believe
13 they put -- this really IE, independent expenditure.
14 So -- but what I read to it, the complaint to
15 the Dave Cortese -- the second complaint regarding Dave
16 Cortese and the second complaint culmination. And I
17 really haven't seen Dave Cortese have any knowledge or
18 even campaign side involved in it. And people
19 authorize it, take certain name and put on the flyer.
20 And even I see sign -- even the sign
21 (inaudible). Even if they say something like "Vote for
22 Me" stuff. Even the sign -- the sign there -- what I
23 think is all of that -- the sign, the campaign sign, is
24 not -- I don't believe inform Dave Cortese sign got it
25 (inaudible). But organizer put it on.

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<p>1 So, to me, it's truly IE. So --</p> <p>2 CHAIRMAN SMITH: Thank you. Any questions</p> <p>3 for Mr. Lam?</p> <p>4 No. Thank you, sir.</p> <p>5 Anyone else wish to speak?</p> <p>6 Okay. If not, do you have -- we need to find</p> <p>7 a new room.</p> <p>8 MS. TABER: Well, in May we're moving. So we</p> <p>9 will have a new room.</p> <p>10 CHAIRMAN SMITH: Okay. Mr. Miller, do you</p> <p>11 have any additional comments? And then we'll go into</p> <p>12 questions.</p> <p>13 MR. MILLER: I suppose I have two comments.</p> <p>14 One is that this does present the unusual situation in</p> <p>15 which the candidate -- the coordination may not have</p> <p>16 been, for lack of a better word, deliberate or with</p> <p>17 intent to coordinate. But the case law and the FPPC</p> <p>18 citing is replete with examples of almost inadvertent</p> <p>19 coordination, where candidates are really held to a</p> <p>20 high standard.</p> <p>21 For instance, whether or not the candidate</p> <p>22 provided the campaign sign or not, as a matter of law,</p> <p>23 in my view, is not really relevant to the issue of</p> <p>24 whether this event was a campaign event or a "Get Out</p> <p>25 the Vote" event. The coordination occurred because</p>	<p>1 Edgeworth?</p> <p>2 COMMISSIONER EDGEWORTH: I think so. It's</p> <p>3 gotten sort of muddy from this perspective as well.</p> <p>4 In terms of the coordination, as I understand</p> <p>5 your report, everyone has agreed that Mr. Luu's</p> <p>6 participation really didn't exist.</p> <p>7 MR. MILLER: Correct. His conduct is not the</p> <p>8 source -- it does not lead to the conclusion that there</p> <p>9 was any coordination.</p> <p>10 COMMISSIONER EDGEWORTH: In view of your last</p> <p>11 comments about the higher level of responsibility for</p> <p>12 the candidate, candidates probably get invited to lots</p> <p>13 of things to appear, where there might be several</p> <p>14 candidates or not. Do we know whether he was aware</p> <p>15 that his opponent was not invited?</p> <p>16 MR. MILLER: We do not know that.</p> <p>17 COMMISSIONER EDGEWORTH: What would -- what</p> <p>18 would his behavior --</p> <p>19 MR. MILLER: Could I -- would you mind?</p> <p>20 Because I don't want -- I did ask him that question. I</p> <p>21 spoke to Supervisor Cortese. So I don't mean to</p> <p>22 suggest that -- it's that he doesn't know -- he had a</p> <p>23 limited memory of the circumstances that led to his</p> <p>24 being there and didn't recall much about what he did at</p> <p>25 the event as well.</p>
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<p>1 there was an invitation, and he attended. He saw what</p> <p>2 this event was. In my view, the way I read the</p> <p>3 interpretation of the coordination regulations, it's</p> <p>4 the candidate's responsibility to know when there's</p> <p>5 coordination -- when the line has been crossed.</p> <p>6 The other thing I will say is that when I</p> <p>7 mentioned earlier that it was perhaps difficult for the</p> <p>8 candidate to report the contribution because he didn't</p> <p>9 know from whom it would come, a thought occurred to me,</p> <p>10 which is that also, traditionally, could be considered</p> <p>11 part of the candidate's responsibilities. And when we</p> <p>12 get into the discussion of what you want to do next,</p> <p>13 you might direct the candidate to report a contribution</p> <p>14 and to find out -- you know, don't make -- don't use</p> <p>15 the city funds and direct the investigator to find out</p> <p>16 all of this information. Make the candidate uncover</p> <p>17 information sufficient to determine what kind of</p> <p>18 reporting he deems necessary. That might be an option</p> <p>19 to discuss.</p> <p>20 CHAIRMAN SMITH: Okay. I guess before we get</p> <p>21 into discussion of our options, if there is some</p> <p>22 questions. No opinions yet. Let's just get questions,</p> <p>23 and then we can go into discussion of where to go from</p> <p>24 there.</p> <p>25 You had some questions, Commissioner</p>	<p>1 I did try to speak to his aide, not his</p> <p>2 campaign aide but his supervisorial aide, who was</p> <p>3 identified as the person to whom the invitation was</p> <p>4 made. And Supervisor Cortese thought that that seemed</p> <p>5 likely, although he didn't confirm that. And I, again,</p> <p>6 despite significant -- I would describe as significant</p> <p>7 efforts, was not able to contact this fellow. That's</p> <p>8 the biggest surprise to me of this investigation.</p> <p>9 COMMISSIONER PEACOCK: Were not able to</p> <p>10 contact whom?</p> <p>11 MR. MILLER: The -- Supervisor Cortese's</p> <p>12 aide, staff -- supervisorial staff, not election staff,</p> <p>13 who was identified as the person to whom the invitation</p> <p>14 was extended for Supervisor Cortese to attend.</p> <p>15 COMMISSIONER PIERRE-DIXON: But not locate?</p> <p>16 MR. MILLER: Well, I know his name. I know</p> <p>17 his phone number. I know his e-mail address.</p> <p>18 COMMISSIONER PIERRE-DIXON: Never responded?</p> <p>19 MR. MILLER: He didn't call me back or e-mail</p> <p>20 me back.</p> <p>21 COMMISSIONER EDGEWORTH: What would -- what</p> <p>22 would Mr. Cortese's behavior have been to preclude any</p> <p>23 possibility that he would have been -- had a complaint</p> <p>24 filed against him for coordination for -- when he</p> <p>25 arrived?</p>

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1 MR. MILLER: That's a great question. And I
2 do sympathize with the predicament he would have been
3 in. But I suppose the advice that I would have given
4 him, if he had asked your question, is find out more
5 about this event before you got there. And once you
6 got there and you saw what I imagine he saw, not to
7 participate further. Or participate and report what --
8 there's nothing wrong -- there's nothing wrong with his
9 participation. There's nothing wrong with his being
10 there. All that would have been necessary would have
11 been to report a nonmonetary contribution. And
12 probably a very small one at that.

13 CHAIRMAN SMITH: Anything else?

14 MR. MILLER: And just one more thing is that
15 in my experience, in the vast majority of instances
16 when an event like this would happen, the promoters of
17 the event would be a committee that would report to the
18 candidates the nature of the contribution that should
19 be reported as -- you know, so a candidate -- while it
20 is most certainly the candidate's responsibility to
21 report a contribution, it is often the case that
22 in-kind contributions are disclosed to the candidate
23 and they don't have to put on their detective hat and
24 smooth it out.

25 COMMISSIONER EDGEWORTH: One final question.

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1 CHAIRMAN SMITH: Okay.

2 COMMISSIONER EDGEWORTH: Perhaps you can
3 clarify what constitutes "the behest of the candidate"
4 for such an expenditure.

5 MR. MILLER: Sure. So the term "made at the
6 behest of" is a defined term in an FPPC regulation.
7 And rather than say it wrong, I will quote it for you.
8 Which says "made at the behest of means made under
9 the control or at the direction of, in cooperation,
10 consultation, coordination, or concert with, at the
11 request or suggestion of," or "with the express, prior
12 consent of" the candidate. And the regulation -- that
13 is just a snippet of the regulation. There is -- it's
14 a much lengthier provision than that. But that's the
15 essence of it. And the word that was the key word here
16 is "consultation."

17 COMMISSIONER EDGEWORTH: Okay.

18 CHAIRMAN SMITH: Okay. Commissioner Peacock,
19 you had a question?

20 COMMISSIONER PEACOCK: Following up a little
21 bit. So, if I'm a candidate, I can go to a "Get Out
22 the Vote" event and speak, and that could be okay,
23 correct? I can say, it's important. Democracy is
24 great. Exercise your right.

25 If I'm a candidate and I go to an event and

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1 say -- "Get Out the Vote" event and say "Vote for me,"
2 that's -- that would likely be a violation, correct?

3 MR. MILLER: That is not a violation. All
4 that means is that what was a "Get Out the Vote" event
5 is -- now you've engaged -- it's now a campaign event
6 such that the money spent would be -- depending on
7 other facts, should be reported either by the group
8 making the expense or by you, as the candidate. If it
9 was coordinated, it would be made at your behest.

10 COMMISSIONER PEACOCK: So there's no
11 violation, saying "Vote for me." There's a violation
12 if I don't report it accordingly.

13 MR. MILLER: Yes, this allegation is a
14 failure to report. There's no suggestion that Mayor
15 Cortese's actions were in any way --

16 CHAIRMAN SMITH: Mayoral Candidate.

17 MR. MILLER: Excuse me. Mayoral Candidate
18 Supervisor Cortese's actions were in any way
19 inappropriate or anything wrong with holding a "Get Out
20 the Vote" event or with holding a combination "Get Out
21 the Vote" event and campaign advocacy event. The
22 actions themselves are okay. It's just how -- when
23 they're conducted in as blurred a way as this, it makes
24 the reporting challenging and difficult.

25 COMMISSIONER PEACOCK: Just a third thing to

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1 follow up on, what you were saying earlier. If I'm a
2 candidate and I show up at an event that I think is a
3 "Get Out the Vote" event and it's clearly a campaign
4 rally, then I need to think either (a) I shouldn't
5 participate or, if I'm going to participate, I need to
6 report?

7 MR. MILLER: Correct.

8 COMMISSIONER PEACOCK: Okay.

9 MR. MILLER: Exactly.

10 CHAIRMAN SMITH: Anything else?

11 COMMISSIONER EDGEWORTH: Do we -- we have
12 referenced in the materials of the master of ceremonies
13 promoting his candidacy. Do we have any evidence that
14 he -- or any indication that he himself asked for a
15 vote?

16 MR. MILLER: Supervisor Cortese?

17 COMMISSIONER EDGEWORTH: Uh-huh.

18 MR. MILLER: To the contrary. All the
19 evidence I have been able to obtain demonstrates that
20 he did not engage in express advocacy behavior on his
21 own behalf.

22 COMMISSIONER EDGEWORTH: So, based on the
23 documents and the information we have here, it is the
24 master of ceremonies who introduced him who, after he
25 left the stage, promoted him again -- well, touted it

10 (Pages 37 to 40)

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<p>1 as the person to vote for? 2 MR. MILLER: With one exception, which is -- 3 the fact that gives me the biggest pause is the speech 4 next to the sign that says -- that is undeniably 5 express advocacy. So I take back what I said, that 6 there was no -- nothing to suggest that the 7 candidate -- that the supervisor -- that the candidate, 8 Supervisor Cortese, engaged in express advocacy 9 himself, because I think there is an argument that -- 10 COMMISSIONER EDGEWORTH: Okay. 11 MR. MILLER: -- saying "The sky is blue" next 12 to a sign that says "Vote for Me" is express advocacy. 13 COMMISSIONER EDGEWORTH: Thank you. 14 MR. MILLER: But what I don't know is the 15 extent to which he -- I have no evidence that he 16 planned the placement of the signs or, as someone has 17 just testified, that it's possible that he didn't even 18 provide the signs. But there they were. 19 COMMISSIONER EDGEWORTH: Thank you. 20 COMMISSIONER PEACOCK: One last question. 21 How many campaigns has Mr. Cortese run? 22 MR. MILLER: I couldn't say. But I would -- 23 I know he -- his name is well known in San Jose. He's 24 been a City Council member, a supervisor -- I don't 25 know the answer to that.</p>	<p>1 motion, one for each respondent and/or potential 2 violation of the Commission -- or the Commission may 3 act in one motion. 4 I guess before we get into discussion, I 5 would like to make a comment. I'm really torn on this. 6 I really wish we could find that this wasn't an 7 independent expenditure, because I think that would put 8 the onus where it belongs, which is on the group that 9 organized this event rather than on the candidate. But 10 that's not the case. 11 So comments before -- or a motion? 12 COMMISSIONER PIERRE-DIXON: Well, I think my 13 comment would be that what I've read and seen and gone 14 over a couple more times since I've been sitting here 15 is insufficient evidence. I think there are too many 16 unanswered questions here. 17 I respect the speaker who came up second to 18 raise this concern about well-known singers in the 19 Vietnamese community showing up for free when, 20 obviously, those folks are very well known and probably 21 very expensive. We don't know what the expenditure was 22 on that, what the cost was. There were a lot of other 23 expenditures here that we don't know. We don't 24 understand the total expense of the coordination. 25 So at this point I don't feel that there is</p>
Page 42	Page 44
<p>1 CHAIRMAN SMITH: This is the second time he's 2 run for mayor. He ran for council twice. 3 MS. TABER: I think it's six. 4 CHAIRMAN SMITH: Supervisor twice. 5 COMMISSIONER PEACOCK: So this is not -- I 6 guess my point is, this is not -- 7 CHAIRMAN SMITH: Not his first rodeo. 8 COMMISSIONER PEACOCK: Right. 9 CHAIRMAN SMITH: Okay. Now it's time for the 10 Commission to make its decision. Commission has the 11 following options. One, Commission may find that 12 further investigation is necessary. If so, we shall 13 direct the Evaluator to conduct further investigations 14 and report back to the Commission. Commission -- two, 15 the Commission may find that there is sufficient 16 evidence to establish that no violation has occurred. 17 Three, the Commission may find that there is 18 insufficient evidence to establish that a violation has 19 occurred. And, four, the Commission may find, based on 20 preponderance of the evidence from the entire record of 21 the proceedings, that a violation has occurred. 22 I'll open the floor to commission discussion 23 on the case. The Commission will need to make a 24 finding for each respondent for each potential 25 violation. The findings may be made by separate</p>	<p>1 sufficient evidence here for me to make the kind of 2 decision that needs to be made. 3 In terms of looking at the amount of money 4 that we do know that was spent, if we break it down and 5 accept Mr. Miller's numbers, as you tried to work 6 through it, we're talking about perhaps \$50 to each 7 candidate. The State says it has to be at least a 8 hundred dollars before it's even reportable. And I 9 can't see saying a \$50 expenditure would result in us 10 hiring an investigator to spend thousands for a \$50 11 expenditure. So I'm really caught between a rock and a 12 hard place here. 13 But the Vietnamese community -- I understand 14 that you want to be involved in the political process. 15 We have gone over this before. You need to understand 16 what the requirements are in terms of having candidates 17 come. I think you did blur the lines here, and you 18 have to be more consistent and clear in what it is 19 you're doing when you're holding these kinds of 20 activities. 21 I think it's too much to expect a candidate 22 to look around and see every single person that's there 23 and whether or not their opponent is there. They may 24 rush in for a five-minute event, "Get Out the Vote." 25 They don't know whether the next candidate was not</p>

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1 there or was there.
2 So this has really left me with an inability
3 to make a total decision.
4 CHAIRMAN SMITH: Commissioner Peacock.
5 COMMISSIONER PEACOCK: I'm in agreement with
6 you on most of that. Where I'm going, though, is I
7 don't think we have enough decision to make -- enough
8 information to make a decision here.
9 And while the monetary value, I think, is
10 low, as you say, at the same time, this is a close
11 election. And in a close election a few votes here
12 could make a very big difference. It wouldn't matter
13 if it weren't a close election, but in this case it
14 very much was. And I think if we do nothing here, I
15 think, basically, the message is -- to future campaigns
16 is "Take a chance."
17 This does not seem like it was a hard one to
18 do the right way. But based on the information we
19 have -- and maybe if you're able to get -- to track
20 down some of these people who aren't responding to you
21 or we see more of this stuff, we may be able to know
22 and say, Okay. You know, we'll let this one go by.
23 But I think, based on what we know so far is we don't
24 know enough to be able to say, Let's push it aside.
25 MR. MILLER: May I make one small comment or

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1 disagreement so that the -- that there is an unusual
2 quirk in Title 12 of the San Jose Municipal Code that
3 requires reporting of contributions even less than a
4 hundred dollars.
5 COMMISSIONER PIERRE-DIXON: Of course.
6 MR. MILLER: So departure from state law. As
7 best as I can tell from looking at the history of that,
8 it is possibly an inadvertent departure from state law.
9 But there it is, nonetheless.
10 CHAIRMAN SMITH: San Jose tends to have lower
11 limits. I don't know exactly why, historically. But
12 it's not unusual in my experience.
13 I think the thing that troubles me is
14 apparently -- I agree that we don't know the details of
15 the event. We don't know the money. But it does
16 appear, as much as it pains me to say it, that it's
17 incontrovertible that there was coordination at the
18 very lowest way. And, in that regard, it appears that
19 there was a violation. We don't know the details of
20 it, but I -- I can't -- as much as I want to force
21 myself to say there wasn't, I can't.
22 So -- but then what do we do? Do we spend a
23 whole bunch of money trying to track down a hundred
24 dollars or -- and if we find a violation, what do we
25 do? I mean, when it comes to penalties -- I don't

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1 know. We can try --
2 COMMISSIONER EDGEWORTH: I guess I'm a little
3 confused. I'm not so convinced that coordination
4 existed. He got an invitation, and he went. That -- I
5 understand the narrow parameter that you've discussed
6 about what that means and what his responsibilities
7 might have been once he arrived and saw what was going
8 on. But I don't see a planning or a coordination in
9 advance. And both sides have agreed that even
10 Mr. Luu's involvement was really -- didn't really
11 exist. He didn't -- they even expressed disappointment
12 that he didn't participate to the extent. So I'm not
13 sure -- I'm not convinced that coordination existed.
14 Expenditure at behest of the candidate, I
15 think, is a little grayer for me. Because I believe
16 the organizers used the "Get Out to Vote" platform for
17 an advocacy campaign for specific candidates who they
18 specifically invited, while others they did not. I
19 think they're -- they have the responsibility of
20 guising this "Get Out to Vote," but their real intent
21 was to support specific candidates and allow them
22 opportunities to promote their candidacy with their
23 booths and those kinds of thing. And I think that's
24 where the line is grayer to me.
25 CHAIRMAN SMITH: I guess it's a matter of

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1 interpreting the law. We have the Evaluator's
2 interpretation of the law, that receiving and accepting
3 an invitation to an event that includes at least some
4 campaign advocacy constitutes coordination.
5 MR. MILLER: If I could respond. One thing
6 is that you seem to be making a distinction between
7 coordination and expenditure made at the behest of a
8 candidate. There is no distinction. That is the same
9 thing.
10 COMMISSIONER EDGEWORTH: That is the same.
11 MR. MILLER: "Coordination" is an informal
12 term for what is the legal term of art, which is an
13 expenditure made at the behest of a candidate. It is
14 not two separate standards. It is the same thing. So,
15 when there is coordination, that means there is an
16 expenditure made at the behest of the candidate.
17 COMMISSIONER EDGEWORTH: And I don't see that
18 here. I don't see a behest of the candidate to spend
19 money.
20 MR. MILLER: I respect that. I'm just
21 pointing out, that is the same thing.
22 COMMISSIONER EDGEWORTH: I appreciate the
23 clarification.
24 CHAIRMAN SMITH: Let me throw another -- City
25 Attorney, what's your interpretation of Title 12 and

12 (Pages 45 to 48)

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<p>1 FPPC in this regard? Do you concur with the Evaluator? 2 MS. SILVA: Yes, I'm consistent with what 3 Steve has said. 4 CHAIRMAN SMITH: Well, we've got our two -- 5 we've got our two legal eagles telling us that no 6 matter how much it pains us -- it pains me and, 7 obviously, it pains you also -- there was coordination, 8 which means this was not an independent expenditure, et 9 cetera. 10 COMMISSIONER EDGEWORTH: Is that what you're 11 saying? 12 MR. MILLER: That is precisely what I'm 13 saying. 14 COMMISSIONER EDGEWORTH: That there is behest 15 of the candidate, and there is coordination in this 16 case? 17 MR. MILLER: That is what I'm saying. Well, 18 no, I'm saying that to the extent you find that there 19 was -- that this event had a mixture of campaign 20 advocacy in with "Get Out the Vote," there was -- 21 CHAIRMAN SMITH: That also seems 22 incontrovertible, from the evidence we've been given. 23 MR. MILLER: -- there was coordination such 24 that the money at issue should have been reported as a 25 contribution made at the candidate's behest.</p>	<p>1 getting at. Yeah, that's what I was getting at. There 2 is not agreement on the interpretation in this 3 particular case. 4 CHAIRMAN SMITH: Can you expand on that? 5 MS. SILVA: The regulation, when I read the 6 definition of "behest" -- "the behest of" -- that's 7 what I'm in agreement with, consistent with the San 8 Jose Municipal Code. 9 CHAIRMAN SMITH: But you disagree with the 10 application -- 11 MS. SILVA: No, I don't -- no, no, no. I do 12 not have any interpretation. I don't have any 13 conclusions as to the facts of the case. That's the 14 Evaluator's position. 15 CHAIRMAN SMITH: Yeah, you're not supposed to 16 get involved with the facts of the case. 17 MS. SILVA: No. When I said I'm in 18 agreement, to the extent of the definitions -- 19 CHAIRMAN SMITH: With the definition. Okay. 20 But you have no stated opinion as to whether this 21 constituted -- 22 MS. SILVA: Coordination. 23 CHAIRMAN SMITH: -- coordination. Okay. 24 Good clarification. 25 COMMISSIONER PIERRE-DIXON: And looking at</p>
Page 50	Page 52
<p>1 COMMISSIONER EDGEWORTH: After the fact. 2 After the fact. 3 MR. MILLER: The two choices are that you can 4 decide it's an independent expenditure or it's a 5 contribution to the candidate because it's an 6 expenditure that is not independent but an expenditure 7 made at the candidate's behest. 8 COMMISSIONER EDGEWORTH: And as a safeguard 9 and as a responsible campaigner, he should have 10 recognized the lines were blurred and made a decision 11 on himself to make sure he reported some of it -- some 12 of the expenditure on his own reporting to show that he 13 was aware that it blurred the lines? 14 MR. MILLER: Well, I hate to say what he 15 should have done. But in these facts -- 16 COMMISSIONER EDGEWORTH: What he could have 17 done to protect himself. 18 MR. MILLER: -- in these facts, he should 19 have reported a nonmonetary contribution, if you follow 20 the analytical path that we're talking about. 21 MS. SILVA: I just want to clarify. I'm in 22 agreement with the definition that Steve has rendered, 23 again, but not with the factual interpretation, as -- 24 you know, as based on his investigation. 25 COMMISSIONER EDGEWORTH: That's what I was</p>	<p>1 the facts, I do not reach the level of coordination. I 2 don't see it here. 3 And I think a big missing piece is also the 4 aide to Cortese, who was never talked to, who I'm 5 taking -- or thinking that is perhaps also 6 Vietnamese-speaking and may be more in line with what 7 was going on inside here. There is too much 8 information that is missing. And I think that person 9 needs to be talked to as to what the candidate knew and 10 understood before he went. 11 And in your discussions with Mr. Cortese, he 12 was very vague in even remembering the event at all, 13 which I'm sure is not a story. I'm sure he had so many 14 going on. It's hard to keep them in line. But this 15 was set up by one of his staff members, who you have 16 not talked to, investigated or had any kind of 17 discovery. 18 CHAIRMAN SMITH: It looks like we've got two 19 choices. We either direct the Evaluator to go do some 20 more -- and we have to say exactly what we want him to 21 do, because it can mean the whole world -- or we say it 22 is a violation and we decide what the penalty is going 23 to be. 24 So somebody want to make a motion here? I 25 think -- of the four options, I think those are the</p>

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1 two. We don't -- we don't have a case where -- where
2 there was clearly no violation. We don't have a case
3 where there's insufficient -- well, I guess we can say
4 there's insufficient evidence. That would be punting,
5 to use the football analogy. We can find that there is
6 insufficient evidence to establish the violations
7 occurred, which would be kind of the same as directing
8 the -- the Evaluator to go do more, except in this case
9 we don't care for more additional information and just
10 let it drop.

11 MR. MILLER: Well --

12 CHAIRMAN SMITH: If you got something to say,
13 I would love to hear it.

14 MR. MILLER: I would like to offer a thought
15 as to why that might not be punting.

16 CHAIRMAN SMITH: Field goal.

17 MR. MILLER: Because you might find, as you
18 are saying, that there may be insufficient evidence.
19 But that the likelihood that further investigation will
20 result in important information that will result in a
21 change in what you want to do is so slim that it would
22 not be punting to say, it's insufficient evidence, and
23 let's not do anything. It is pragmatic. I'm just --

24 CHAIRMAN SMITH: Okay.

25 MR. MILLER: I guess -- I say that because

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1 it's not a campaign aide but, rather, an officeholder
2 aide.

3 MR. MILLER: So until last week I would have
4 answered your question with great certainty, that the
5 aide's actions would be imputed to the candidate and no
6 question. However, last week the FPPC issued an
7 enforcement action, without explanation, in which they
8 consider facts of coordination where the candidate was
9 ignorant of coordination that was conducted by a
10 campaign consultant. And they found facts that showed
11 coordination, lots of it -- much more, for lack of a
12 better word, nefarious than we're dealing with here --
13 and they took action against -- without explanation
14 and, frankly, unsupported by their own legal standard,
15 they took action against the consultants and were
16 silent as to the candidate.

17 So I could no longer answer your question
18 with any certainty as to what the FPPC would do. That
19 does not bind you one way or another, but it just is an
20 interesting wrinkle that happens to be the case this
21 week.

22 COMMISSIONER PEACOCK: And this person still
23 works in the supervisor's office?

24 MR. MILLER: Yes, that's my understanding.
25 And I should say that the fact that the event

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1 it's there in my report that that's, frankly, our
2 recommendation, that should you direct us to do more
3 investigation, our belief is that we will be coming
4 back to you with, at best, a -- as measured by dollar
5 value, at best, a small reporting error.

6 COMMISSIONER PEACOCK: I appreciate what
7 Mr. Miller said, but I have to say that to say that
8 being unable to talk to a campaign aide -- to me,
9 that's -- that's a fairly significant hole. It may be
10 that the discussion with that person, you know, turns
11 out to have a very simple answer. But I just don't
12 feel comfortable in saying that's a minimal thing. I
13 think there are more things to be found. That, in and
14 of itself, is reason enough to keep this going.

15 CHAIRMAN SMITH: Let me say, it's a
16 supervisorial aide, not a campaign aide, that we're
17 talking about.

18 MR. MILLER: That is an important
19 distinction.

20 CHAIRMAN SMITH: And so -- if the organizers
21 had a discussion with the supervisorial aide about this
22 event and what it was, et cetera, and the supervisorial
23 aide merely put it on the candidate's calendar and the
24 candidate saw it on his calendar and went to the event,
25 is that coordination? It was really the aide. And

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1 is listed on the supervisor's supervisorial calendar
2 strikes me as an indication -- and it's listed as "Rock
3 the Vote." That is evidence in support of the fact
4 that he thought of this that he was going to a "Get Out
5 a Vote" event. He did not have this -- it's on his
6 supervisorial schedule, not on his campaign schedule.
7 It's not a question of credit. But that's a fact that
8 seemed to me, when you see the blurring, that's on the
9 "Get Out the Vote" effort's side of the blur for sure.

10 COMMISSIONER PEACOCK: If someone wanted to
11 be above -- you can do that -- I'm not impugning
12 anybody in this case. But I think you could also know
13 I don't want this to be seen a certain way, and I can
14 put it on one calendar. I think which calendar it
15 shows up on, I don't think, automatically clears or
16 indicts anybody.

17 COMMISSIONER PIERRE-DIXON: What makes it
18 even further -- or more difficult for me is when you
19 receive a phone call from attorneys investigating a
20 matter that you are currently working for the
21 supervisor on, if you don't return those calls, it says
22 something else to me.

23 CHAIRMAN SMITH: Yeah.

24 MR. MILLER: It's the most -- well, I won't
25 say anything.

14 (Pages 53 to 56)

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<p>1 CHAIRMAN SMITH: I think we need a motion. 2 Somebody want to make one and let's see where it goes? 3 COMMISSIONER EDGEWORTH: Maybe we should 4 break it into pieces. Let's see how we feel about 5 whether there was coordination and if the candidate was 6 involved or not. 7 CHAIRMAN SMITH: Okay. 8 COMMISSIONER PIERRE-DIXON: I say there was 9 insufficient evidence as to coordination. 10 CHAIRMAN SMITH: You're asking for a straw 11 vote, or you want to make a motion -- a formal motion? 12 COMMISSIONER EDGEWORTH: Well, I mean, I 13 think we need to determine that before we can move on 14 to the next phase. But then -- 15 CHAIRMAN SMITH: Yeah, but -- of course, 16 somebody could make a motion that there was a violation 17 and there was coordination. And if it's voted down, 18 then it's voted down. If it passes, it passes. I 19 think that's probably better than trying to do a straw 20 poll. 21 Okay. Let me -- let me look at this a 22 second. Maybe I got to do something. 23 Okay. I will make a motion. See where this 24 goes. I move that the Ethics Commission finds that 25 based upon a preponderance of the evidence, that a</p>	<p>1 would be no further investigation, and we would go to 2 the penalty phase. 3 COMMISSIONER EDGEWORTH: There would be 4 another phase, what we do about it. 5 CHAIRMAN SMITH: In order to go interview 6 the -- 7 MR. MILLER: Can I add one small correction. 8 You are free to order more investigation only for the 9 purposes of the penalty phase. You have done that in 10 recent years. 11 CHAIRMAN SMITH: Oh, that's true. Yes, thank 12 you. 13 COMMISSIONER PEACOCK: I just believe -- 14 while I wouldn't necessarily disagree with the motion 15 that you made, I do feel like there's a significant 16 hole, significant question still needs to be answered. 17 So I think, whatever we do, some discussion with this 18 aide seems to me to be important to the disposition of 19 this case. 20 CHAIRMAN SMITH: Yeah, I agree with that. 21 The other thing I should mention, if this 22 motion were to pass sometime before we're done 23 tonight -- I don't know how we would do this exactly, 24 if it requires another complaint or just direction to 25 the Evaluator. I would think that we would need to ask</p>
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<p>1 violation of San Jose Municipal Code, 2 Section 12.06.910, has occurred with regard to 3 coordination between the candidate and the organizers 4 of this event and that this resulted in an in-kind 5 contribution that was not recorded. 6 Is that pretty much -- does that capture -- 7 MR. MILLER: Are you looking at me? 8 CHAIRMAN SMITH: Do you think that 9 captures -- I think I said it right. 10 MR. MILLER: Yes. 11 CHAIRMAN SMITH: Okay. Okay. So we have a 12 motion. Now, discussion on that motion? 13 MS. TABER: Is there a second? 14 CHAIRMAN SMITH: Oh, we have to have a 15 second. 16 COMMISSIONER EDGEWORTH: I'll second it. 17 CHAIRMAN SMITH: Okay. Good. For purposes 18 of discussion. 19 COMMISSIONER EDGEWORTH: For purposes of 20 discussion. 21 CHAIRMAN SMITH: Okay. So, now, should we 22 vote, or do we want to talk about it? 23 COMMISSIONER PEACOCK: Would approval of that 24 be the final say on this and not lead to further -- 25 CHAIRMAN SMITH: Okay. If this passes, there</p>	<p>1 the Evaluator to look into this situation as regards 2 Candidate Tam Nguyen for District 7 council because he 3 was also at the event. And according to the videos and 4 stuff, I saw he was more involved than Supervisor 5 Cortese was. And I don't think we can ignore that. So 6 that's kind of a fallout of this. I think we need to 7 look at another case as well. Anyway, that's just my 8 opinion. 9 So discussion? You can vote for it or you 10 can vote against it. Or, as was pointed out, if it 11 passes, we can still do the follow-up questioning as 12 part of the -- hold off on the penalty phase. 13 So any discussion? If not -- 14 COMMISSIONER PEACOCK: Your point about 15 Mr. Nguyen, I think, further adds to the open nature of 16 this. 17 CHAIRMAN SMITH: Yeah. 18 COMMISSIONER PEACOCK: With all due respect, 19 I would vote against this, not because of any lack of 20 respect. I think -- 21 CHAIRMAN SMITH: I might vote against it too. 22 I haven't decided. I just wanted to start the ball 23 rolling. I'm really torn. 24 So -- okay. We ready to vote? 25 COMMISSIONER PIERRE-DIXON: Sure.</p>

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1 CHAIRMAN SMITH: Flip a coin here. All in
2 favor of the motion.
3 (No response.)
4 CHAIRMAN SMITH: Opposed?
5 (All Commissioners raised a hand.)
6 CHAIRMAN SMITH: Everyone. Okay. We got
7 that. I vote against my own motion. It was unanimous,
8 for the record. Opposed.
9 Okay. So we've got three choices.
10 MS. TABER: I just never had that happen.
11 MS. SILVA: It's legal.
12 CHAIRMAN SMITH: Okay. Let's try another
13 one. Commission may find -- I move that the Ethics
14 Commission finds that further investigation is
15 required, and the Commission directs the Evaluator to
16 conduct further investigation and report back to the
17 Commission within 30 days. Specifically, I believe the
18 matter relates to the interactions with the
19 supervisorial aide, unless there are other matters.
20 COMMISSIONER PIERRE-DIXON: That would be the
21 main thing for me.
22 COMMISSIONER PEACOCK: I think that Mr.
23 Miller had said earlier if there was further
24 investigation -- something about the exact nature of
25 the political part of the event and the money. So are

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1 there other sort of open things? If I understood you
2 right, that those may be important things to delve into
3 a little deeper.
4 MR. MILLER: With regards to Mr. Cortese,
5 what I'm hearing is you're very interested in more
6 facts regarding the nature of the coordination in order
7 to give you a complete picture. If you decide that
8 there was coordination, you may want to direct me to
9 learn more about the event so that you'll know more
10 about what the money that needed to be reported was. I
11 don't know the extent to which that's important to you.
12 That is probably a more time-consuming investigation
13 than focusing on the nature of the coordination. And,
14 again, I just want your eyes to be open into what to
15 do.
16 I also -- a friendly request, given the
17 holidays. I am taking a two-week trip. And the idea
18 of reporting to you within 30 days -- depending on the
19 extent of the investigation you direct, I might beg a
20 few extra days, please.
21 COMMISSIONER EDGEWORTH: We have to be
22 cautious on how we proceed. Because we just voted that
23 there was not a preponderance of the evidence to
24 support a decision to find that there was coordination.
25 CHAIRMAN SMITH: We can always come back and

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1 vote again on it once we have additional information.
2 It doesn't -- unless attorney tells me otherwise, that
3 doesn't mean we can't have the exact same motion later.
4 MS. SILVA: No, because you are presented
5 with new facts.
6 CHAIRMAN SMITH: Correct. I think -- along
7 with one of the comments there, I personally think it
8 would be worthwhile to look maybe a little more into
9 the nature of the event. I like the idea that was
10 suggested earlier that we don't have to track down the
11 money. We just -- you know, if we go that route, say
12 the candidate should have reported it and it's up to
13 the candidate to figure out how much he should report
14 rather than us spending thousands of dollars of city
15 money trying to track down something that we may never
16 find. And I think that's probably tougher.
17 COMMISSIONER PIERRE-DIXON: I think it would
18 be wise to know how much was really spent. I think
19 that would be a good thing. However, if the city code
20 says that any expenditure is sufficient, then I don't
21 think we need to have a monetary value. I need to know
22 whether or not there was coordination, and at this
23 point I'm not clear. And I think, at a minimum, that
24 we need an interview to help me --
25 MR. MILLER: If I could have one more

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1 thought, which is the conversation with the aide
2 occurred -- you're wanting the aide's perspective. But
3 you have in the room possibly the person or persons to
4 whom the aide spoke, and you might want to inquire
5 about that conversation right now if you wanted to.
6 COMMISSIONER EDGEWORTH: Do we?
7 CHAIRMAN SMITH: We could.
8 COMMISSIONER PIERRE-DIXON: I prefer they be
9 added to the investigation with use of a qualified
10 interpreter.
11 MR. MILLER: Fine.
12 CHAIRMAN SMITH: Okay. Yeah, that's probably
13 a good idea.
14 Okay. So we have a motion. This time the
15 motion is directing further investigation. Any
16 discussion before we take a vote? Okay.
17 COMMISSIONER EDGEWORTH: Just that we want it
18 narrowly construed. We know the parameters of what
19 we --
20 CHAIRMAN SMITH: Yeah, the parameters would
21 be the conversation from both sides and a reasonable --
22 not an excessive amount of effort into the -- into more
23 of the nature of the event, et cetera.
24 COMMISSIONER PEACOCK: I was just asking --
25 you had earlier made reference to other candidates at

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<p>1 the event. Do you want that to be part of the motion? 2 CHAIRMAN SMITH: Thank you, yes. 3 Let me ask a procedural question. If we want 4 to expand it to include an additional respondent, do we 5 need -- last time this came up when Dennis was clerk. 6 Dennis -- the clerk's office initiated a complaint. 7 MS. SILVA: We fixed that in the Resolution. 8 CHAIRMAN SMITH: But I don't remember how we 9 fixed that. 10 MS. SILVA: I believe the investigators have 11 the authority. 12 CHAIRMAN SMITH: I was thinking that. Yeah, 13 I would -- I would suggest that that be included as a 14 third piece of evidence, to also investigate the same 15 situations we have looked at with regard to Candidate 16 Cortese with regard to Candidate Nguyen in District 7. 17 MR. MILLER: So City Attorney has asked me to 18 repeat a comment I made a moment ago -- I think you 19 understood it, but I'll repeat it at her request -- 20 which is that the people who had the conversation with 21 the aide are present in this room and could answer your 22 questions right now if you wanted to ask them those 23 questions. I think you understood that. 24 CHAIRMAN SMITH: Understood. And 25 Commissioner Pierre-Dixon said she preferred not to do</p>	<p>1 (No response.) 2 CHAIRMAN SMITH: Okay. It's unanimous. So 3 we do not need to do any more. So this -- basically, 4 the conclusion of this hearing is postponed. 5 MS. TABER: That was part of the motion, to 6 include Tam Nguyen? 7 CHAIRMAN SMITH: Oh. 8 MS. SILVA: Was that part of the motion? We 9 just want to clarify that it's clear that -- 10 CHAIRMAN SMITH: You know what? I don't even 11 know if the motion was seconded, now that we're talking 12 about the motion. Did anybody second the motion? 13 MS. TABER: I have Rolanda written down. Now 14 I'm not sure. 15 CHAIRMAN SMITH: Okay. It was my -- I didn't 16 mention it when I made the motion. We talked about it 17 subsequently. So -- 18 MS. TABER: You can make a friendly 19 amendment. And then if the seconder agrees, you can 20 add that to the motion. 21 CHAIRMAN SMITH: And then go back and revote? 22 MS. TABER: You don't have to. You can just 23 say that you're adding it. It's an amendment to the 24 motion. If the seconder agrees -- 25 CHAIRMAN SMITH: We've already voted.</p>
Page 66	Page 68
<p>1 that. I don't know what the rest of you -- since 2 there's four of us here. 3 COMMISSIONER EDGEWORTH: I think it would be 4 appropriate if we could ask the person. We could still 5 pursue further questions here through the Evaluator. 6 But if the person is here... 7 COMMISSIONER PEACOCK: I agree. 8 COMMISSIONER PIERRE-DIXON: I'm just 9 concerned about the difference of language and being 10 very clear, when you're talking about subjecting the 11 person to punishment -- no matter what kind of 12 punishment it is, we need to be all on the same page 13 about what is being said. And I don't think that's 14 clear today. 15 CHAIRMAN SMITH: So we should not -- 16 COMMISSIONER EDGEWORTH: No, we didn't vote 17 on it. I mean -- 18 CHAIRMAN SMITH: Through discussion, it's 19 obvious that -- 20 COMMISSIONER EDGEWORTH: I'll concede. I'll 21 concede. 22 CHAIRMAN SMITH: Okay. Okay. So the motion 23 is to -- further investigation. All in favor? 24 (All Commissioners responded Aye.) 25 CHAIRMAN SMITH: Opposed?</p>	<p>1 MS. TABER: We can revote. 2 CHAIRMAN SMITH: That's the question. Okay. 3 So, yeah, I would -- I would amend the motion 4 to have a third element of this. It would be -- the 5 two that I already mentioned, which is the nature of 6 the discussions with the aide; the second being the 7 nature of the event; the third being the circumstances 8 involving the additional candidate who was there -- San 9 Jose candidate who was there, investigated along the 10 same lines as we've done with regard to Candidate 11 Cortese. 12 COMMISSIONER PIERRE-DIXON: And I would 13 accept that amendment. 14 MR. MILLER: So, essentially -- 15 CHAIRMAN SMITH: The whole thing over again 16 with the other candidate. 17 MS. SILVA: And that's consistent with how we 18 had changed the Resolution to allow the Evaluator to be 19 able -- if facts were uncovered that potentially 20 involves another respondent, that the Evaluator notify 21 the clerk. 22 CHAIRMAN SMITH: Okay. So we got to revote. 23 All in favor? 24 (All Commissioners responded Aye.) 25 CHAIRMAN SMITH: Any opposed?</p>

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1 (No response.)
2 CHAIRMAN SMITH: So it's unanimous.
3 So, unless there is something else, we will
4 postpone the conclusion of this until -- I don't know.
5 It sounds like it's not going to be the January
6 meeting, but whenever -- to be determined.
7 COMMISSIONER PIERRE-DIXON: And I would like
8 to suggest that those further witnesses make yourself
9 available to the investigator so that we can get to the
10 bottom of this. I think it's fair for everyone to know
11 exactly what occurred here so we don't have this happen
12 again.
13 CHAIRMAN SMITH: Okay. Now we go on.
14 Commissioner Peacock has to leave.
15 COMMISSIONER PEACOCK: Based on my notice, I
16 have a family function. Happy holidays, everyone.
17 MS. TABER: Can we ask for a bathroom recess?
18 CHAIRMAN SMITH: Oh, sure. Go ahead.
19 (Commissioner Peacock exits Ethics Commission
20 hearing.)
21 (Recess taken.)
22 CHAIRMAN SMITH: Okay. We're ready for
23 Number 2. Okay. I'm going to start.
24 It is Wednesday, December 10th, 2014, and
25 this hearing of the City of San Jose Ethics Commission

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1 is being held in Room W-262 of the San Jose City Hall.
2 All members of the Commission are present except
3 Commissioner Peacock.
4 The Commission will conduct a hearing on a
5 complaint filed with the City Clerk on October 14,
6 2014, by Bui Dinh alleging that Barry Do, Thien Huynh,
7 Tho Nguyen Tan and Thu Huong, I believe, violated
8 Section 12.06.910 of the San Jose Municipal Code.
9 Specifically, the allegation is that the respondents
10 spent more than \$1,000 to advocate for mayoral
11 candidate Dave Cortese, triggering the obligation to
12 form an Independent Committee and subsequently file the
13 necessary campaign disclosures.
14 I'm not going to go through the rest of the
15 boilerplate as I normally do, because this is -- all
16 the people who are involved in this were here for the
17 previous hearing.
18 At this time I would like to have the
19 complainant, Bui Dinh, and the respondents or their
20 representatives identify themselves.
21 The complainant is not here. Are any --
22 MR. DO: We are respondents.
23 CHAIRMAN SMITH: Okay.
24 MR. DO: Mr. Thien Huynh and Barry Do.
25 CHAIRMAN SMITH: Okay. And Mr. Nguyen Tan is

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1 out in the hall somewhere?
2 MR. DO: Yes.
3 CHAIRMAN SMITH: And also there is a fourth
4 respondent.
5 MR. DO: She's not here.
6 CHAIRMAN SMITH: She's not here. Okay.
7 So -- okay. And I'm not going to bother with
8 having the staff identify themselves, because we did
9 that just a few minutes ago, an hour ago, on the other
10 hearing.
11 Under the Commission's regulations and
12 procedures, the respondent may submit a written
13 response to the Report and Recommendations. The
14 response may contain legal arguments, a summary of
15 evidence and any mitigating or exculpatory information.
16 And we did not receive anything from the
17 respondent, correct?
18 MS. TABER: Correct.
19 CHAIRMAN SMITH: Okay. The complainant or
20 any interested party may also submit a brief or written
21 argument.
22 And in this case, as the previous, we
23 received a written response from the complainant, which
24 we discussed in the previous hearing.
25 So at this time I'll recognize Steve Miller

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1 from Hanson Bridgett to present the Independent
2 Evaluator's Report and Recommendations.
3 MR. MILLER: Okay. So this complaint's
4 allegations are based on the exact same facts as the
5 hearing that we just conducted, but the focus is not on
6 the -- Supervisor Cortese's campaign but, rather, on
7 the group of people who held the September 21st event
8 and the allegations that they must have spent more than
9 \$1,000, which, under Title 12, triggers a requirement
10 that they form an Independent Committee and file
11 necessary campaign disclosure forms.
12 And as with the previous report, I think I'll
13 break this up into two separate issues that require
14 analysis. The first is, was this a "Get Out the Vote"
15 event -- effort or a campaign event? Did the
16 requirement to form a committee arises upon spending
17 over \$1,000 in independent expenditures, which are
18 related, as we just discussed, to express advocacy.
19 So, in other words, the obligation only arises to the
20 extent there was a campaign event and doesn't apply to
21 the "Get Out the Vote" efforts.
22 And then the second question is, did they
23 make over a thousand dollars in independent
24 expenditures to candidates in San Jose within your
25 jurisdiction, triggering the requirement to form an

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1 Independent Committee?
2 I imagine that you will have discussion and
3 perhaps may not accept our recommendations, based on
4 the conversation you just had. But the recommendations
5 in our report is that there are two reasons why we
6 think the facts do not indicate any violation by the
7 respondents here. The first is that because we perhaps
8 preliminarily -- but, nonetheless, we view the
9 proportional amount of this event that was "Get Out the
10 Vote" effort as being greater than the campaign amount.
11 We think it is likely that the amount of money that was
12 spent on the IE, independent expenditure, side of the
13 pie was less than a thousand dollars, therefore not
14 triggering the obligation to form a committee. Again,
15 that depends upon some of the discussion we already had
16 about the unusual nature of this event and the
17 difficulty in discerning and teasing out what portion
18 was a "Get Out the Vote" effort and what was not. But,
19 nonetheless, no matter how you slice the pie, in our
20 view, you are likely to arrive at a decision that there
21 was less -- at a conclusion that the facts will arrive
22 at a conclusion that there was less than a thousand
23 dollars on the independent expenditure side.
24 And second -- and here is where you may --
25 you may depart from my recommendation. Because we

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1 have -- had already concluded that there was
2 coordination with the candidate, all of those
3 expenditures, however much they were, even if they were
4 more than a thousand dollars, would be treated as
5 contributions to the campaign, not as independent
6 expenditures and, therefore, further reducing the
7 likelihood that there is -- that the \$1,000 of
8 independent expenditure threshold is reached.
9 And for both of those reasons we have
10 concluded that there was no violation under these --
11 unusual circumstances; nevertheless, no violation.
12 CHAIRMAN SMITH: Question: The City's rules
13 are if it's more than a thousand dollars, the
14 independent expenditure -- yeah. Finally. The sound
15 went down.
16 MS. SILVA: Closing the door.
17 CHAIRMAN SMITH: Okay.
18 MS. KRANTZ: General Services said they were
19 going to shut off the air-conditioner, so it could get
20 very hot in here.
21 CHAIRMAN SMITH: If it's more than a thousand
22 dollars, the independent expenditures, need to form a
23 committee. Or if during the preceding 12 months you
24 spent more than \$10,000 for all candidates for
25 contributions, that you got to -- you got to form a

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1 committee. It's not an Independent Committee but a --
2 I don't know. What kind of committee do you call it?
3 MR. MILLER: No, you are correct. There are
4 two aspects to the definitional threshold. One is the
5 independent expenditures of greater than a thousand
6 dollars, and the other is making contributions in the
7 amount of \$10,000 or more to a candidate or a
8 candidate-controlled committee. That makes you a
9 committee.
10 CHAIRMAN SMITH: Just a committee.
11 MR. MILLER: Whether your committee is an
12 Independent Committee is -- there are two types of
13 committees in San Jose. There are controlled
14 committees --
15 CHAIRMAN SMITH: Okay.
16 MR. MILLER: -- which are controlled by a
17 candidate, and there is everything else, which is an
18 Independent Committee.
19 CHAIRMAN SMITH: Now, the key question --
20 MR. MILLER: I'm sorry. I'm in the habit of
21 yelling.
22 CHAIRMAN SMITH: That's okay. We all have to
23 tone it down.
24 Do those same dollar amounts and concepts
25 apply to the FPPC regs?

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1 MR. MILLER: Yes. The difference -- a large
2 difference would be who the filing officer is and
3 whether it's a Title 12 violation or not. But those
4 same --
5 CHAIRMAN SMITH: The reason I'm -- I had a
6 thought this afternoon, that there were candidates --
7 there were two city candidates; Eastside Union School
8 Board candidate, I think; Evergreen College candidate;
9 and -- I don't know. There were five or six
10 candidates, I believe -- right? -- for different
11 jurisdictions. And it struck me that if we found -- if
12 someone like the FPPC looked at this and looked at the
13 total cost of the event for all candidates and all
14 jurisdictions and maybe also looked back 12 months and
15 found that this same group of people had done similar
16 things in other jurisdictions, that there might be an
17 issue at the state level.
18 MR. MILLER: So --
19 CHAIRMAN SMITH: That's beyond our --
20 because, you know, we only had one or two out of five
21 or six candidates that are in our jurisdiction.
22 There's a bigger issue than just San Jose -- City of
23 San Jose elections.
24 MR. MILLER: So, as I considered that
25 question, I believe that to have merit, if the amount

19 (Pages 73 to 76)

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1 of money on the independent expenditures side of the
2 pie exceeded \$10,000 --

3 CHAIRMAN SMITH: Not independent
4 expenditures.

5 MR. MILLER: I mean --

6 CHAIRMAN SMITH: The -- if we say it was
7 independent --

8 MR. MILLER: \$10,000 on the political
9 campaign advocacy. Whether they're independent
10 expenditures or contributions depends upon
11 coordination. But the first threshold would be that
12 the portion of the event that was not "Get Out the
13 Vote" effort would have to be greater than \$10,000. I
14 found no evidence to lead me to conclude that any
15 amount of further investigation would reach that
16 conclusion.

17 CHAIRMAN SMITH: You also didn't look
18 statewide at other possible events. It occurs to me,
19 given that at least some of the respondents don't
20 reside in San Jose, they may be active in politics in
21 other areas of the state. Just a thought.

22 Anyway, other questions?

23 COMMISSIONER PIERRE-DIXON: No.

24 CHAIRMAN SMITH: We can move on.

25 At this time I would call upon the

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1 community.

2 We -- on public television we did invite
3 everyone, including Mayor-Elect Sam Liccardo, publicly
4 on TV. However, this only exception that with
5 Mayor-Elect Sam Liccardo because he has a history of
6 conflict with the Vietnamese-American community before,
7 during the Little Saigon. So that's why we did invite
8 him, but we dare not to ask him to go up stage and
9 address the public because it will cause all the
10 commotion, and people were yelling and all of that. So
11 we did specifically mention that. However, we did not
12 limit him at all. We did publicly on television. We
13 asked everyone that can come and show.

14 So that's why you see that even the candidate
15 from school district and we even invite mayor of
16 Milpitas, Jose Esteves. Because those are the
17 candidate, including Mayor-Elect Sam Liccardo, used to
18 know our community. There's only one exception during
19 Little Saigon that Mayor-Elect Sam Liccardo have some
20 conflict with the Vietnamese community. Therefore, we
21 kind of limit him to go up stage. Because the minute
22 he go up stage, it will cause commotion and people will
23 start yelling. So that's the only reason.

24 But our main purpose on that day is strictly
25 we let the people know that these are the candidates

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1 respondents -- we have three of the respondents
2 present, Barry Do, Thien Huynh and Tho Nguyen Tan -- or
3 their representatives, to come forward and present any
4 written or oral response. Any of you wish to come
5 forward and speak?

6 MR. DO: Sure.

7 CHAIRMAN SMITH: Please state your name.
8 State your name please.

9 MR. DO: My name is Barry Do.

10 CHAIRMAN SMITH: Okay.

11
12 BARRY DO,
13 being first duly sworn by the Chairman to tell the
14 truth, the whole truth and nothing but the truth,
15 testified as follows:

16
17 CHAIRMAN SMITH: Okay. Mr. Do.
18 THE WITNESS: Chair Smith and Vice-Chair
19 Pierre-Dixon and Member Edgeworth, this morning I did
20 send an e-mail to your Commission and also to Attorney
21 Miller. I have to say the thankfulness that is very
22 detailed investigation because out of concern of the
23 complaint. And we fully cooperate with Mr. Miller
24 here. Because, basically, what we doing is really --
25 we want to get out the vote for the Vietnamese

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1 that have been working with our community, so let's
2 hear their issue, their side of it. And I always -- at
3 the end of my sentence, I never ask vote for him and
4 not vote the other. I always say, You hear what they
5 say. These are our friend. However, the final
6 decision is rest on you. Your vote. You can vote to
7 anyone that you want. These are -- we just present to
8 you the candidate to you, but it's your vote. And
9 that's publicly broadcast to everywhere. And that's my
10 public statement on that one.

11 So I'm glad that I have an opportunity here
12 to present in front of you. That is -- our main
13 purpose is really "Rock the Vote" or "Get Out the Vote"
14 for the Vietnamese.

15 And this is the first time we organize such a
16 campaign. We never done that before. This is the
17 first time, because of the -- because of the
18 excitement. A lot of young people get into the school
19 district and all of that. This is the first time we
20 see so many young people involved in the community.
21 And we see both Sam Liccardo and Dave Cortese -- both
22 are already involved with us. So this is very
23 exciting. So that's -- basically, we would like to get
24 out the vote for everyone.

25 So the complaint against us, I think that it

20 (Pages 77 to 80)

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<p>1 kind of split the hair too much. And most of the 2 complaint then -- the main complaint is actually using 3 the party line -- or the candidate line, because they 4 support Sam and they think we support Dave Cortese. So 5 they wasting everyone's time putting the complaint. 6 But we never think of that until the complaint present 7 to you and we got a letter from Attorney Miller. 8 But, basically, we did invite Mayor-Elect Sam 9 Liccardo. We did not discriminate him or anything like 10 that. But the complaint came out just because they 11 think that we completely advocate for Dave Cortese. 12 But that's not the case. Yes, Dave Cortese is more 13 friendly, but I never publicly or none of any of the 14 respondent say that you vote for Dave and not vote for 15 Sam. No, none of us say that. 16 And also that the main organizer, Mr. Thien 17 Huynh here, also -- his opening speech completely 18 translate and submitted to Attorney Miller, that his 19 last statement, Always your vote is final decision. We 20 do not tell you vote for whom. 21 And same thing. I'm verbally -- if you see 22 the video, I'm verbally saying that too. 23 So I'm glad that I have a chance here to 24 explain in front of you, face to face, and to work with 25 Attorney Miller on that case. Yeah.</p>	<p>1 CHAIRMAN SMITH: -- but I believe you said it 2 was Vietnamese language TV. 3 THE WITNESS: Vietnamese, yes. 4 CHAIRMAN SMITH: So chances are he didn't see 5 that. Or if he did, he didn't understand. 6 THE WITNESS: But the people support him, 7 that support all candidate, all know about that. The 8 Vietnamese -- 9 COMMISSIONER PIERRE-DIXON: But if you made a 10 phone call to Cortese's office, you should have made a 11 call to Sam's office. 12 THE WITNESS: I know. We did not make a 13 phone call -- 14 COMMISSIONER PIERRE-DIXON: If an invitation 15 was made to him, the same invitation should be made to 16 all candidates. 17 THE WITNESS: We did relay the invitation 18 message to the people that know Dave and know Sam. We 19 did relay that we invite everyone. And that was the 20 only exception, because we want to kind of -- not to 21 make him embarrassed. 22 COMMISSIONER PIERRE-DIXON: I'm saying no 23 exceptions. 24 THE WITNESS: Yes, I agree. 25 COMMISSIONER PIERRE-DIXON: That's all.</p>
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<p>1 COMMISSIONER PIERRE-DIXON: I think that 2 probably is correct, what you have stated. My concern 3 is that -- however, you have to understand, when you 4 talk about American jurisprudence, everyone must be 5 invited equally, the same. 6 MR. DO: Yes. 7 COMMISSIONER PIERRE-DIXON: Had you done 8 that, we wouldn't be here tonight. Mr. Liccardo may 9 have decided on his own not to come because of these 10 tensions. And what you could have done instead is say 11 everyone was invited, Mr. Cortese responded, and you 12 would be fine. 13 I want you to understand that you can't have 14 events with only certain candidates there. If you're 15 going to open it up for "Rock the Vote" or "Get Out the 16 Vote," everyone has to be invited. The same manner of 17 invitation. If it's a written invitation, a phone 18 call, or if it's on public TV, the same invitation goes 19 to every candidate. 20 THE WITNESS: We did. Yeah, we did. 21 CHAIRMAN SMITH: I think her point, though, 22 is that both -- all candidates for a particular 23 office -- and in this case of Mayor Candidate Liccardo, 24 there was a public announcement on TV, you said -- 25 THE WITNESS: Yes.</p>	<p>1 That's all I have. 2 CHAIRMAN SMITH: Okay. I guess the other -- 3 well, I guess I won't say anything. 4 Commissioner Edgeworth, do you have any 5 questions? 6 COMMISSIONER EDGEWORTH: Well, as I read the 7 memo that we got, the response to the 24-minute video 8 as opposed to the 16-minute video, it referred to lots 9 of references where the speaker who introduced the 10 guests and who dismissed them when they were finished 11 speaking, there tended to be statements, "This is our 12 new mayor," "This" -- there seemed to be very proactive 13 statements that would -- certainly, I think, a rational 14 person would think that -- or assume that that meant 15 that you should vote for this candidate. Because when 16 we talk about "This is our next mayor," "This is the 17 man that we, you know, need," that -- and those six or 18 seven minutes of video that we don't have -- we only 19 have the written -- you know, what was reported to have 20 been said during those times -- would definitely be 21 considered advocating for a specific candidate, 22 proactively asking people to vote for that candidate. 23 And I -- so I'm a little concerned that this 24 general attitude that "we only wanted to get out the 25 vote" didn't stay the theme for the whole thing. And</p>

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1 there was several references to those kinds of
2 comments, not just one slip of the tongue or -- you
3 know, in the excitement of the event, but there were
4 several.

5 And so I think -- I think vice-chairman's
6 comment is very appropriate, that it did turn out to be
7 a campaign event. A lot of it was just get out to
8 vote, and a lot of the music and everything had nothing
9 to do with voting at all. It was just to attract
10 people to attend.

11 But I wish I could understand -- and maybe
12 Mr. Cortese didn't understand what was being said,
13 because I understand some of those comments -- most of
14 them were in Vietnamese, which means he would not have
15 understood them either. And he may not have had first
16 hearing of what was being said about him, perhaps.

17 And -- but I think if you -- if the
18 references to the seven minutes of missing video on the
19 60-minute version is accurate, there was a lot of
20 campaigning going on for Mr. Cortese.

21 THE WITNESS: May I respond to that?

22 CHAIRMAN SMITH: Sure.

23 THE WITNESS: Okay. Sure. The complaint by
24 Mr. Miller is not quite painting the big picture. The
25 video -- like on the previous statement, where Attorney

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1 all of the school district trustee. I did it for all
2 of them. I said, "This is the next" -- like a kind
3 of -- really kind of very standard statement: Oh,
4 here. This is your next mayor right here, this is your
5 next school board trustee right here, and this is your
6 next mayor of Milpitas. That not the phrase I
7 (inaudible). But that doesn't mean that I say, Vote
8 for him and not vote for anyone. Because I did
9 conclude my statement that it's your vote. Your
10 decision is final decision.

11 CHAIRMAN SMITH: The event -- as I
12 understand, there were some campaign booths setup --

13 THE WITNESS: Yes.

14 CHAIRMAN SMITH: -- for some of the
15 candidates. I believe there was not one for
16 Mr. Cortese.

17 THE WITNESS: No, I -- when I invite all of
18 them, we did -- we invite all of them. We said, You
19 have completely freedom to bring your own booth and
20 register people to vote. So whoever come to your booth
21 to hear about your literature, this is your own desk to
22 communicate to people. So you are allowed to bring
23 your own desk. So if anyone don't bring their desk,
24 they decide. But we did tell all of them to bring --
25 even Mayor-Elect Sam Liccardo. Publicly, on TV, we

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1 Miller mentioned, the video showed the whole thing,
2 from A to Z. And if edit, cut short and all of that,
3 it's just that that is the video we volunteer. We --
4 because we did have a meeting with Attorney Miller
5 also. So we did show him -- we don't want to show him
6 A to Z all, because it's already been public on
7 YouTube. But we show him what he need to know about --
8 on the responding to like a -- like a -- what do you
9 say?

10 The -- we -- when we -- when I say the
11 reason, because Mr. Dave Cortese or Mayor, Milpitas,
12 Jose Esteves is very close personal of mine. We work
13 with him. We know him for a long time. So, of course,
14 I have a passion. I said, "This is the new mayor of
15 San Jose" or "This is the new mayor of Milpitas." I
16 say that.

17 But I never say that you have to vote for him
18 and not vote for anyone. And I always conclude my
19 statement with the whole audience that, please, no
20 matter what we introduce here, it's the point of your
21 vote is the last vote. Your decision -- not us -- is
22 to decide who is the best for your vote. That's why I
23 never kind of really advocate completely.

24 But I did it for both Mayor Jose Esteves, I
25 did it for Council Member Tam Nguyen, candidate, and

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1 said, He can bring his desk and his table to talk to
2 the people also.

3 CHAIRMAN SMITH: When the individual
4 candidates -- I assume that the candidates who showed
5 up, the school board and the community college board
6 and mayoral, et cetera --

7 THE WITNESS: District council member.

8 CHAIRMAN SMITH: -- that those individuals
9 were all invited by a specific one-on-one verbal
10 request or a letter. They didn't all show up just
11 because of the public -- the TV announcement? Like did
12 somebody call the candidate for Evergreen -- I think it
13 was -- well, whatever. The school district candidate.
14 Did someone call the -- contact that person directly
15 and invite them?

16 THE WITNESS: We -- first, of course, it's
17 public, because we announce --

18 CHAIRMAN SMITH: But beyond that.

19 THE WITNESS: Also, a lot of us in the
20 organizing community, if they know someone that know
21 that candidate, said, Relay that message to them and
22 invite them there. So we do all kind of invitation and
23 make sure that we reach out to them so they know
24 that --

25 CHAIRMAN SMITH: So there was a one-on-one

22 (Pages 85 to 88)

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<p style="text-align: center;">Page 89</p> <p>1 sort of --</p> <p>2 THE WITNESS: Yes. But not me directly.</p> <p>3 Maybe anyone that know them. They say, Oh, we heard</p> <p>4 that they're going to invite you and all of that.</p> <p>5 CHAIRMAN SMITH: Okay. And that included an</p> <p>6 opportunity to appear on the stage and to set up a</p> <p>7 booth?</p> <p>8 THE WITNESS: Yes. Yes.</p> <p>9 CHAIRMAN SMITH: Which -- okay.</p> <p>10 Any other questions for Mr. Do?</p> <p>11 Okay.</p> <p>12 THE WITNESS: Thank you.</p> <p>13 CHAIRMAN SMITH: Any of you others wish to</p> <p>14 say anything? Mr. Nguyen Tan?</p> <p>15 Okay. If you -- state your name for the</p> <p>16 record and --</p> <p>17 THE WITNESS: My name is Tho Nguyen Tan.</p> <p>18</p> <p>19 THO NGUYEN TAN,</p> <p>20 being first duly sworn by the Chairman to tell the</p> <p>21 truth, the whole truth and nothing but the truth,</p> <p>22 testified as follows:</p> <p>23</p> <p>24 CHAIRMAN SMITH: You may be seated.</p> <p>25 THE WITNESS: My statement today only cover</p>	<p style="text-align: center;">Page 91</p> <p>1 THE WITNESS: Newspaper, yeah. But not</p> <p>2 related to us.</p> <p>3 CHAIRMAN SMITH: I thought I saw something in</p> <p>4 the report that indicated that you had hired a</p> <p>5 videographer yourself, your group. Am I mistaken?</p> <p>6 THE WITNESS: No.</p> <p>7 CHAIRMAN SMITH: You did not hire a</p> <p>8 videographer?</p> <p>9 THE WITNESS: Yeah, no, never. You know,</p> <p>10 the -- even the article that some people write or the</p> <p>11 video, not only him. I think many. But we don't have</p> <p>12 that. Maybe they keep on -- you know, but the video --</p> <p>13 vietungvinh.com, they store like that. And we know</p> <p>14 that. We -- because, you know, we volunteer to let</p> <p>15 Attorney Mr. Miller know, but we -- they don't ask us.</p> <p>16 That's the reason.</p> <p>17 CHAIRMAN SMITH: Okay. All right. Do you</p> <p>18 have anything else?</p> <p>19 THE WITNESS: Yeah, that's it. I want to</p> <p>20 bring it up.</p> <p>21 CHAIRMAN SMITH: Okay. Questions?</p> <p>22 COMMISSIONER PIERRE-DIXON: Again, a comment</p> <p>23 that -- I want to be clear with the community that you</p> <p>24 understand, when you have these kinds of events, not</p> <p>25 only invite everyone but make sure you do not make</p>
<p style="text-align: center;">Page 90</p> <p>1 everything that Barry Do say to you already. But I</p> <p>2 want to impress some more thing about the (inaudible).</p> <p>3 We are not (inaudible). Because we -- on group invite</p> <p>4 not only the candidate. We -- we invite all the</p> <p>5 community. All the many people come there to -- we</p> <p>6 want to view the -- my -- part of meeting to make sure</p> <p>7 in the future we go to the mainstream. And because you</p> <p>8 see, on the -- from the school candidate, a lot of</p> <p>9 young people there. That totally, Attorney Mr. Miller,</p> <p>10 we have ten -- over ten candidate, included in the Mike</p> <p>11 Honda. That mean we invite -- we invite everyone.</p> <p>12 And then the second thing I want to note</p> <p>13 about, you know, the video -- the video say they 16 or</p> <p>14 24. Something like that. We are not concerned like</p> <p>15 that because we not order do like that. Okay. That's</p> <p>16 a form for express they do it. Maybe -- I don't know.</p> <p>17 Maybe they up the -- even -- you know, assume that it's</p> <p>18 true. But not -- not -- not different about a lot.</p> <p>19 Because, you know, on the article they write on the,</p> <p>20 you know, newspaper and you see it, everything we do we</p> <p>21 talk, and everything we -- we work with the attorney.</p> <p>22 The same do like that. That I want to let you inform</p> <p>23 like that.</p> <p>24 CHAIRMAN SMITH: The video -- you're saying</p> <p>25 the video was done by a news --</p>	<p style="text-align: center;">Page 92</p> <p>1 comments that sound like you're selecting one candidate</p> <p>2 over another. That's why we're sitting here tonight.</p> <p>3 THE WITNESS: Yes.</p> <p>4 COMMISSIONER PIERRE-DIXON: If you leave</p> <p>5 those kinds of things out of the discussion, you'll be</p> <p>6 fine.</p> <p>7 THE WITNESS: Yes.</p> <p>8 COMMISSIONER PIERRE-DIXON: But the fact that</p> <p>9 you put them in there has caused this problem. Do you</p> <p>10 understand?</p> <p>11 THE WITNESS: Yes. Thank you.</p> <p>12 COMMISSIONER EDGEWORTH: I guess my concern,</p> <p>13 over the video. It's always a concern when suddenly at</p> <p>14 some point key parts of a video or a tape or any other</p> <p>15 evidence or an article suddenly disappear. And I don't</p> <p>16 know who owns the tape. I don't know who posted on</p> <p>17 video -- on YouTube. I don't know who put a shortened</p> <p>18 version of it.</p> <p>19 But it seems at least one person is concerned</p> <p>20 that the portion that was deleted are the portions that</p> <p>21 talk about "This is our next mayor," "I want to</p> <p>22 introduce you to our new mayor." And that, to me,</p> <p>23 says, Vote for this man because he's going to be our</p> <p>24 new mayor. And I -- that's a common -- it's a very</p> <p>25 common campaign slogan. Our new mayor is this; our</p>

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1 next mayor is going to be him because you're going to
2 vote for him. So I think that's the concern about the
3 missing seven minutes is that it seems to be those
4 portions that are cut from the tape suddenly on
5 YouTube.

6 THE WITNESS: Okay. I can answer like this.
7 You know, doesn't matter the -- Bui Dinh, he say, I
8 have video, 24-minute, or the attorney, Mr. Miller,
9 receive only the 16-minute. We don't mind about that.
10 Because we don't make it. We don't know how to do it.

11 And sometime in my experience with my
12 community, I saw many times they put the 40-minute and
13 then they put the 50-minute. Then all after that they
14 can put the 30-minute. Depend what they do. Or they
15 want to cut up or they want to -- ten more for people
16 know something.

17 But the -- basically, nothing happened. On
18 the article with the -- you know, the newspaper, after
19 that (inaudible), nothing happened. You see on there,
20 we -- they -- you know, they write out everything the
21 same, from beginning to the end. Same like that.

22 CHAIRMAN SMITH: Okay. Anything else? Okay.
23 Thank you.

24 THE WITNESS: Thank you so much.

25 CHAIRMAN SMITH: Does anyone else wish to

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1 this -- I don't know -- my pronunciation is probably
2 wrong -- My Loi, which, I believe, is a Vietnamese
3 newspaper whose logo is on the video. And then the web
4 site from the video, this VietVungVinh, I believe is
5 how it's pronounced. And I've tried unsuccessfully to
6 locate the source of the video through either of those
7 sources.

8 But, admittedly, I reached a point in my
9 investigation when I realized, especially with the
10 timing necessary to submit a report in time for
11 tonight, that it was best to present you with a
12 preliminary investigation and not do the full
13 investigation. And now you have directed, so we will
14 go back and pursue this and try and locate the video.

15 COMMISSIONER EDGEWORTH: But we do have the
16 -- the dot-com address, web site, of this production
17 company.

18 MR. MILLER: Yes.

19 COMMISSIONER EDGEWORTH: Whoever is on this
20 video. So it should be fairly easy. And I'm sure,
21 through their network of contacts, they -- they can get
22 candidates from all places to come to an event through
23 public broadcast. They might be able to find out and
24 request that this be made available. And I think we
25 should pursue this web site and the name of the

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1 speak?

2 MR. MILLER: Could I -- through the Chair --
3 through the Chair, if I could --

4 CHAIRMAN SMITH: If you want to ask a
5 question.

6 MR. MILLER: Well, I'm wondering, before they
7 leave, if there's assistance that they could provide in
8 providing me with a copy of the three-hour video.

9 COMMISSIONER PIERRE-DIXON: Did somebody
10 video the whole thing?

11 MR. THO NGUYEN: We don't have it.

12 MR. MILLER: I asked them that question, and
13 they answered already.

14 MR. THO NGUYEN: We don't have it, and we
15 don't -- we don't order anyone who is. Only we
16 organize, bring the people, come to my event. And that
17 done. We take the pictures. Something like that.
18 And -- the people do it, not me.

19 CHAIRMAN SMITH: You do know who took the
20 24-minute one, you think?

21 MR. MILLER: No, I -- first I learned of the
22 24-minute video is when you did. I -- the only thing I
23 know is what's identified on the YouTube video, and I
24 have tried without success to locate. It seems that
25 there is two possible sources of the video. One is

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1 company.

2 MR. MILLER: Thank you.

3 CHAIRMAN SMITH: Okay. Does the -- do you
4 have any additional comments you wish to make,
5 Mr. Miller?

6 MR. MILLER: No.

7 CHAIRMAN SMITH: Okay. At this point, once
8 again, we need to make a decision. We have the same
9 options that we just talked about last time. The
10 Commission may find that further investigation is
11 necessary. Commission may find there is sufficient
12 evidence to establish that no violation has occurred.
13 Commission may find that there is insufficient evidence
14 to establish that violation has occurred. Or the
15 Commission may find, based on the preponderance of the
16 evidence from the entire record of the proceedings,
17 that a violation has occurred.

18 And I just -- I remembered something from the
19 last one. But that's okay.

20 So discussion.

21 COMMISSIONER PIERRE-DIXON: No.

22 CHAIRMAN SMITH: Somebody want to make a
23 motion? Or we can play that game again.

24 Let me -- before I -- I apologize for this,
25 but let me go back a minute and ask staff a question

24 (Pages 93 to 96)

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<p>1 about the previous hearing. 2 In the flurry of activity, I'm supposed to do 3 a certification of those who vote. We voted to ask for 4 additional information. I did not ask for a 5 certification. I don't think that poses a problem, 6 does it? Or does it? If we were -- if we had found a 7 violation, it would have been an issue. 8 MS. SILVA: You didn't have a close finding. 9 You actually just had direction for staff. So at this 10 point we're not at that level, where you need a 11 certification. We haven't closed it. 12 CHAIRMAN SMITH: Okay. Thank you. 13 So what are you guys thinking? Basically -- 14 COMMISSIONER PIERRE-DIXON: No violation. 15 CHAIRMAN SMITH: -- your recommendation is -- 16 MR. MILLER: My recommendation is that you 17 find no violation. 18 COMMISSIONER EDGEWORTH: No violation 19 occurred. 20 CHAIRMAN SMITH: Because -- 21 MR. MILLER: Because the requirement to form 22 a committee is triggered by making either \$1,000 in 23 independent expenditures or \$10,000 in contributions. 24 And I have found no evidence to suggest that either of 25 those two instances occurred, and I found no evidence</p>	<p>1 motion is that -- sufficient evidence to establish that 2 no violation has occurred and that the file of the 3 matter be closed without further action. 4 Discussion? 5 Okay. All in favor? 6 (All Commissioners responded Aye.) 7 CHAIRMAN SMITH: Opposed? 8 (No response.) 9 CHAIRMAN SMITH: None. Okay. So it's 10 unanimous for the three of us present. 11 And now we need to do a certification. So, 12 upon the adoption of the motion, I must ask each 13 commission member to certify that they have heard or 14 read the testimony at the hearing and have reviewed all 15 the evidence in the record by affirming "so certified." 16 Commissioner Edgeworth? 17 COMMISSIONER EDGEWORTH: I so certify. 18 CHAIRMAN SMITH: Commissioner Pierre-Dixon? 19 COMMISSIONER PIERRE-DIXON: I so certify. 20 CHAIRMAN SMITH: And I, Commissioner Smith, 21 so certify. 22 Orders and/or penalties. We found no 23 violation, so there are no penalties. 24 The next item on the agenda -- and I'm going 25 to bring up again something I mentioned earlier, and</p>
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<p>1 that leads me to think that further investigation will 2 alter that position. 3 CHAIRMAN SMITH: And that's even if we 4 factored in the in-kind -- like, you know, what 5 would -- what's the fair market value of using the 6 facility and the fair market value of the singers 7 and -- by the time you divide it up into all the 8 pieces, it still -- probably still wouldn't be over a 9 thousand dollars. 10 MR. MILLER: That was my conclusion. 11 CHAIRMAN SMITH: That was your conclusion. 12 Okay. I just want to be sure. 13 Okay. So -- 14 COMMISSIONER EDGEWORTH: Well, I can try to 15 make a motion. 16 COMMISSIONER PIERRE-DIXON: There you go. 17 Make a motion. 18 COMMISSIONER EDGEWORTH: I make a motion that 19 based on the evidence provided, that we conclude that 20 there is no violation of the Municipal Code and 21 recommend that the Commission dismiss the complaint and 22 close the case file. 23 COMMISSIONER PIERRE-DIXON: I would -- I 24 would second that. 25 CHAIRMAN SMITH: Okay. So we move -- the</p>	<p>1 that is the question of given that there were multiple 2 candidates from multiple jurisdictions, does anybody 3 think this is worth referring to the FPPC for them to 4 take a look at? It would require -- for them to find a 5 problem, it would require that the express -- what's 6 the phrase I want? 7 MR. MILLER: Independent expenditures? 8 CHAIRMAN SMITH: No, the part of it that is a 9 campaign event. You know, the total cost, the 10 apportioned cost for the campaign to "Get Out the 11 Vote," would have to exceed \$10,000 or that combined 12 with other events in the last 12 months would have to 13 exceed \$10,000. I just feel compelled to bring up the 14 question. 15 Quite frankly, even though we found no 16 violation, I'm very uncomfortable with this thing, 17 especially since we've seen at least two of the 18 respondents in this affair a year and a half ago for a 19 similar issue of doing things without being organized, 20 not keeping records. In that case the violation was 21 found against the candidate. But I just don't want to 22 see this again. 23 COMMISSIONER EDGEWORTH: I agree. 24 CHAIRMAN SMITH: Comments have been made 25 earlier. And I'm just wondering if it should be looked</p>

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1 at on a broader scope because it does involve more than
2 just City of San Jose elections. If it appears obvious
3 that it's not going to exceed \$10,000, then it's not
4 worth doing, I guess. But I just -- it doesn't feel
5 right to me to just totally drop it.

6 COMMISSIONER EDGEWORTH: I agree with you,
7 Mr. Chairman, that the use of a loose sort of group
8 with consistent membership in that group, as informal
9 as they want to be, repeat and come to the borderline
10 of violations more than on one occasion, have been
11 before this Commission more than once. And the story
12 sort of stays the same. And especially when it's the
13 same coordinators of the group.

14 It's time to become a committee, become a
15 lobbying group, do what you want to do. But formalize
16 it, because this is not acceptable. It's not
17 acceptable.

18 CHAIRMAN SMITH: So is there any interest at
19 all in forwarding this thing? Or are we -- just let it
20 go, with a recommendation to the group that if you're
21 going to do this in the future, that you organize a
22 committee and keep good records, and we don't want to
23 see you again in this context?

24 I'm not hearing anybody jumping up and down,
25 so I guess -- I guess we will pass on the idea of any

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1 the Evaluator show me the Resolution -- the recent
2 Resolution that we have from March 2014 relating to
3 referral to other enforcement agencies?

4 And let me read this, and maybe this could
5 focus the decision on your part. "At any time the
6 Evaluator or the Commission may refer the matter to
7 another government agency or official if the Commission
8 determines that the agency or official may more
9 appropriately resolve all allegations in the complaint
10 or enforce applicable provisions of law. A copy of all
11 information gathered must be sent by the City Clerk's
12 office or City Attorney's office to the agency or
13 official, together with the referral."

14 CHAIRMAN SMITH: So I think with regard to
15 the complaint that's filed, that's clearly within our
16 scope. Because the complaint only discussed one of the
17 two San Jose elections that were involved.

18 But the reason I bring up the idea of FPPC is
19 because there was also others. And, as indicated, we
20 bundle everything we've got and send it out with a
21 letter, if we were to do that.

22 I guess I'm thinking as I kind of -- thinking
23 out loud. I'm thinking we probably don't need to do
24 that here. I think we've made our point. And we move
25 on. Unless somebody wants to jump up and make a

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1 referral.

2 COMMISSIONER EDGEWORTH: I guess -- I'm not
3 sure what the nature of the referral would be. I'm a
4 little unclear as to what --

5 CHAIRMAN SMITH: The nature of the referral
6 would be, you know, we looked at something. The
7 amount -- you know, there were contributions not
8 reported. The amount related to San Jose elections --
9 City of San Jose elections did not exceed the threshold
10 for having to declare a committee. But the event in
11 question also included people from other jurisdictions,
12 and so maybe FPPC wants to look at it in a more global
13 sense and see if there's a violation.

14 COMMISSIONER EDGEWORTH: Are you recommending
15 that we write a letter?

16 CHAIRMAN SMITH: If we would do it, we would
17 basically -- I think we've done this before. We bundle
18 up everything we've got -- the reports and, I guess,
19 maybe other information from the Evaluator, but
20 basically the reports -- with a letter to the FPPC.
21 And, again, I'm not necessarily saying we need to do
22 this, but I just think it's something we ought to think
23 about.

24 Yes.

25 MS. SILVA: Can I, at this time, direct that

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1 motion.

2 COMMISSIONER PIERRE-DIXON: No, I -- we made
3 our point.

4 I also want to be clear -- and it was even
5 stated in here by Mr. Miller -- that we had a concern
6 that all parts of the community be involved in the
7 process and understand the rules. And I think we still
8 have to push ourselves, as a Committee, to put
9 something together for this community.

10 It's not being clear. You're not sure what
11 the rules are, and I want them to be clear. Because
12 you're going to get into serious trouble if this is not
13 straightened out.

14 I think we may have come to a meeting of the
15 minds tonight. But I would still like to have some
16 kind of forum where these issues are gone over again
17 and these members of the community are invited. So
18 that's what I would like to see, much more than a
19 referral to the FPPC --

20 CHAIRMAN SMITH: And we do have an item later
21 on the agenda dealing with that.

22 COMMISSIONER PIERRE-DIXON: Right.

23 CHAIRMAN SMITH: Okay. So, if that is the
24 case, I will declare this hearing closed.

25 Yes.

26 (Pages 101 to 104)

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<p>1 MS. SILVA: Direct the City Attorney to do 2 the -- 3 CHAIRMAN SMITH: Oh, yes. I'm sorry. I will 4 not declare this closed. Back off on that. I should 5 have looked at my script. Resolution, yes. 6 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 10 the Committee's findings and authorizing the Chair to 11 approve and sign the Resolution. 12 COMMISSIONER PIERRE-DIXON: So moved. 13 CHAIRMAN SMITH: Thank you. 14 COMMISSIONER EDGEWORTH: Second. 15 CHAIRMAN SMITH: Okay. All in favor? 16 (All Commissioners responded Aye.) 17 CHAIRMAN SMITH: Opposed? 18 (No response.) 19 CHAIRMAN SMITH: Okay. It's unanimous. 20 Thank you. 21 And now the next thing in my script is this 22 hearing is closed. 23 Thank you all. We have another hearing not 24 involving anybody in this room, I don't think. Thank 25 you all for being here.</p>	<p>1 2014. The Independent Evaluator's Report and 2 Recommendations were submitted to the City Clerk on 3 December 3rd, 2014, and copies were then provided to 4 the complainant, respondent and commission members and 5 posted to city web site with the agenda for tonight's 6 meeting. 7 I am going to skip over the boilerplate 8 because we've done it already tonight. 9 And then at this time I would like to have 10 the complainant, Carol Garvey, and the respondent, 11 Neighbors for Sam Liccardo for Mayor 2014, or their 12 representatives, identify themselves for the record. 13 Is anyone here representing -- yes. 14 MS. HENNINGER: My name is Ragan. I'm with 15 the respondent, Sam Liccardo. 16 CHAIRMAN SMITH: Thank you. What's your full 17 name? 18 MS. HENNINGER: Ragan Henninger. 19 CHAIRMAN SMITH: Oh, okay. Thank you. I 20 recognize the name. 21 Okay. So, under the Commission's regulations 22 and procedures -- oh, I'm not -- I'm not going to go 23 through the identification of staff because we've done 24 that earlier tonight. 25 Under the Commission's regulations and</p>
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<p>1 MR. DO: Thank you. 2 MR. THO NGUYEN: Thank you so much. 3 CHAIRMAN SMITH: Okay. Do we need a break, 4 or can we move on? 5 Is there anybody here involved in this third 6 one? Complaint filed by Carol Garvey. So we're ready 7 to go. 8 It is Wednesday, December 10th, 2014, and 9 this hearing of the City of San Jose Ethics Commission 10 is being held in Room W-262 at San Jose City Hall. All 11 members of the Commission are present except for 12 Commissioner Peacock. 13 The Commission will conduct a hearing on a 14 complaint filed with the City Clerk on October 29, 15 2014, by Carol Garvey alleging that Neighbors for Sam 16 Liccardo for Mayor 2014 violated Sections 12.06.1910 17 and 12.06.210 of the San Jose Municipal Code. 18 Specifically, the allegation is that Neighbors for Sam 19 Liccardo for Mayor 2014 failed to report the receipt of 20 a nonmonetary in-kind contribution and accepted a 21 campaign contribution in excess of the applicable 22 limit. The City Clerk notified and provided a copy of 23 the complaint to the Independent Evaluator on 24 October 29th, 2014, and the Evaluator notified and 25 provided a copy to the respondent on October 30th,</p>	<p>1 procedures, the respondent may submit a written 2 response to the Report and Recommendations. The 3 response may contain legal arguments, a summary of 4 evidence and any mitigating or exculpatory information. 5 We have not received any written response 6 from the respondent; is that correct? 7 MS. TABER: Correct. 8 CHAIRMAN SMITH: And the complainant or any 9 interested person may also submit a brief or written 10 argument. 11 And we have not received anything from the 12 complainants or anyone else that I know of. Also 13 correct? 14 MS. TABER: (Nods head up and down.) 15 CHAIRMAN SMITH: Okay. Thank you. 16 MS. TABER: Yes. 17 CHAIRMAN SMITH: Okay. At this time I will 18 recognize Steve Miller from the Hanson Bridgett law 19 firm to present the Independent Evaluator's Report and 20 Recommendations. 21 MR. MILLER: Okay. Thank you. 22 For the record, I'll present a relatively 23 short report. The facts here are undisputed. The 24 respondent's campaign and Vice-Mayor Nguyen, acting 25 through her former campaign manager, collaborated and</p>

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1 coordinated in the development of an e-mail that was
2 sent to approximately 500 people on Vice-Mayor Nguyen's
3 personal Gmail contacts e-mail list. The e-mail read
4 as if it came from Sam Liccardo, and Sam Liccardo's
5 e-mail address was listed as the "from" and the "reply
6 to" address. And the text of the e-mail was reviewed
7 and approved by Ms. Henninger, who is here, and by
8 Vice-Mayor Nguyen and was sent using a web-based e-mail
9 service called MailChimp, by which you upload an e-mail
10 address list and you upload an e-mail and you hit one
11 button and it sends it to everybody.

12 And this question -- these facts raised
13 through the application of campaign laws to 21st
14 century technologies in that ordinarily the provision
15 of an e-mail list might be considered a nonmonetary
16 contribution.

17 There are two independent reasons why, under
18 these facts, we think there is no violation of that --
19 of the Municipal Code and that that allegation is
20 incorrect. The first is that there is a recent -- and
21 by "recent" I mean two and a half years old --
22 regulation from the FPPC that defines a term called
23 "internet activities," which it exempts from the
24 definition of a contribution or an expenditure. And
25 that definition is not a perfect fit. It was probably

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1 adopted before there was such a thing as this MailChimp
2 software, so even it already is perhaps a little out of
3 date. It's not a perfect fit, but it's a pretty close
4 fit for the type of technology used here. In
5 particular, that regulation exempts the use -- the
6 provision, even for a nominal fee, of access to a
7 person's blog or web site. And so I think it applies
8 pretty well here.

9 A member of my team spoke informally and
10 anonymously to the FPPC, who advised, also informally,
11 that, if asked, it would likely opine that that
12 regulation does apply here. And that makes sense to
13 me.

14 And so our conclusion is that it is exempt
15 from the definition of a "contribution" because of that
16 regulation, which is imported into Title 12 by
17 Title 12's definitional structure.

18 But, second, even without that FPPC
19 exemption, it would only be an issue under Title 12 if
20 there was a nonmonetary contribution of any value at
21 all. And under the facts here, I think there is a
22 reasonable conclusion that this e-mail, in fact, has no
23 fair market value.

24 Vice-Mayor Nguyen represented to me that the
25 e-mail list was made up of friends, family, college

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1 buddies, some supporters. She thought less than half
2 of the members of the list lived in San Jose. There
3 was no effort to categorize or target the list in any
4 kind of way. She's never commercialized it before. In
5 her view, it has zero value. And it is certainly
6 ordinarily the case with nonmonetary contributions that
7 the person making the contribution reports to the
8 candidates the value. And so her interpretation of the
9 value of her e-mail list, I think, deserves some
10 weight.

11 Her campaign manager as well as
12 Vice-Mayor Nguyen -- he's also an expert in this field.
13 He's purchased e-mail lists before. He told me he
14 never -- he would never purchase an e-mail list like
15 this, that is not targeted in any way by registration
16 or zip code or area and that it would be worth less
17 even than the low end of the spectrum, if it had any
18 value.

19 And so even putting aside the FPPC
20 regulation, I think there is a fair argument that this
21 e-mail had no value and, therefore, did not need to be
22 reported as a nonmonetary contribution. Of necessity,
23 therefore, there was no exceeding of the campaign
24 threshold of \$1,100 because, to the extent there even
25 was a contribution here, it was of zero dollars.

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1 And, therefore, our conclusion is we don't
2 think the facts amount to a violation of Title 12.
3 CHAIRMAN SMITH: So say it was a situation
4 where the mailing list that Council Member Nguyen had
5 was a targeted list that she had used for one of her
6 campaigns. Either it was a particular zip code or it
7 was registered voters -- registered -- voters
8 registered as Democratic or whatever. Say she had that
9 laying around from her own -- for her own usage, and
10 she gave that e-mail distribution list to the Liccardo
11 campaign. And that list would have some more value.
12 Would that -- in your mind, would that still be -- not
13 constitute a violation because of the internet --
14 internet activities --

15 MR. MILLER: No, I think that would be a very
16 different set of facts that were not considered. The
17 sharing of a valuable e-mail list and the transferring
18 of that -- of the contents of that e-mail list, I
19 think, would be a very different set of facts.

20 CHAIRMAN SMITH: I was wondering, because
21 you -- as I understood your argument about -- or your
22 discussion of the internet activities exclusion, it
23 sounded like anything you did on the internet was
24 exempt, almost.

25 MR. MILLER: I understand your question

28 (Pages 109 to 112)

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<p style="text-align: center;">Page 113</p> <p>1 better now. Thank you. 2 I think the way I read that internet 3 activities exemption -- and there is a paucity of 4 guidance that has been -- most of the explanation and 5 guidance of it is actually from the proceedings that 6 led to its adoption, the memorandum discussing that 7 there's not been a lot of opportunity for the FPPC to 8 issue written guidance on it. But, first of all, it 9 describes -- the access to a web site or a blog of 10 nominal value is emphasized in the regulation. 11 And, second of all, I think there's a 12 difference -- a fundamental difference, as I read that 13 regulation, between accessing a personal e-mail list, 14 which -- the regulation, as I said, is not a perfect 15 fit. I'm analogizing access to a personal e-mail list 16 to accessing a personal blog, which is in the 17 regulation. But accessing a commercially valuable 18 politically prepared e-mail list does not seem to be 19 similarly analogous to letting you post something on my 20 blog. 21 And so, just to be clear, the facts you're 22 suggesting were not present here, but I don't think 23 they would meet either of the two tests that I'm 24 suggesting. 25 CHAIRMAN SMITH: I feel much better. Thank</p>	<p style="text-align: center;">Page 115</p> <p>1 Liccardo. It actually looks like that's his -- using 2 his address. But, in fact, it was Madison Nguyen's 3 campaign aide doing that. Former campaign aide. 4 In fact, what I can say, even though I'm not 5 sure it's a Title 12 issue, I'm -- the facts, as I 6 discovered, would indicate that this is not an e-mail 7 list that was stored on a city server. The process 8 that I described did not happen at City Hall, using 9 city equipment, by someone on the city payroll. It was 10 a mistake but nothing more than a mistake. 11 CHAIRMAN SMITH: Where -- basically, that 12 comes to the question of using government resources for 13 private purposes or for campaign purposes. What is it 14 a violation of, if there was a violation? Is it 15 state-level stuff? Is it -- 16 MS. SILVA: It's actually both included in 17 the City Council policies and the -- it's in the City 18 Council policies and, you know -- 19 COMMISSIONER EDGEWORTH: You can't use your 20 business address. 21 MS. SILVA: And I believe it's actually 22 listed in our -- in our Resolution, I believe. 23 CHAIRMAN SMITH: I thought it was a law 24 somewhere that you can't use -- because people have 25 gone to jail for using --</p>
<p style="text-align: center;">Page 114</p> <p>1 you. 2 MR. MILLER: I'm glad. 3 CHAIRMAN SMITH: Any other questions of 4 Mr. Miller? 5 COMMISSIONER PIERRE-DIXON: Well, I think 6 we're pretty clear on what happened here. But I am 7 concerned about the use of the City Hall address. 8 MR. MILLER: So I'll address that briefly. 9 First of all, I'm not sure that's a Title 12 issue. 10 But just for the record, the issue you're raising is 11 that at the bottom of the e-mail, it says to whoever it 12 was, from Sam Liccardo. And at the bottom it says -- I 13 can't remember if it said "Sam Liccardo," but it has 14 "200 East Santa Clara." Has the City Hall address. 15 And the explanation given to me for that was that the 16 MailChimp program requires -- yeah, that's right -- 17 requires you to list a hard U.S. mailing address. 18 COMMISSIONER PIERRE-DIXON: Right. 19 MR. MILLER: And Madison Nguyen's campaign 20 manager wanted to avoid using her personal address and 21 listed her work address. He acknowledged that was a 22 mistake. She admonished him not because this complaint 23 was raised but actually, prior to this complaint even 24 being made, she admonished him about doing that. It -- 25 because the e-mail appears to have come from Sam</p>	<p style="text-align: center;">Page 116</p> <p>1 MR. MILLER: There are a number -- I mean, 2 it's a gift of public funds, to use city resources for 3 a private campaign. There are probably a number of 4 reasons why it's a bad idea. 5 COMMISSIONER EDGEWORTH: In this case, 6 though, there was no city resources used. 7 CHAIRMAN SMITH: It's the appearance. 8 COMMISSIONER EDGEWORTH: Yeah, it's the 9 appearance. Because all it is is an address and name 10 on a printed page. There is no indication that it was 11 stationery or that it was, you know, the office 12 computer or office staff. 13 CHAIRMAN SMITH: Right. It's like -- 14 COMMISSIONER EDGEWORTH: On their time. 15 CHAIRMAN SMITH: When I was working for G.E., 16 they used to give us this thing every year about 17 antitrust. Because G.E., 40 years ago, was -- had a 18 big antitrust violation. And they would always say you 19 not only got to worry about actual violation, but you 20 got to worry about the appearance of violations. 21 Because you can get in just as much trouble for that. 22 COMMISSIONER PIERRE-DIXON: That's right. 23 CHAIRMAN SMITH: Anyway. Okay. So any other 24 questions of Mr. Miller before we -- 25 COMMISSIONER EDGEWORTH: I just think it's</p>

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<p style="text-align: center;">Page 117</p> <p>1 sort of unfortunate, in this day and age, that my 2 information could be passed around to anybody and it 3 has no value. I just want to go on the record for 4 that. And, believe me, in this last campaign I got 5 flooded with e-mails that I hated cluttering up my 6 address for campaign information. I resented it 7 terribly. To think that my name on any list has no 8 value whatsoever is a little insulting.</p> <p>9 MR. MILLER: Well, I would say your name on a 10 list probably has great value. The insult is to 11 Vice-Mayor Nguyen, that her personal list has no value.</p> <p>12 COMMISSIONER EDGEWORTH: You know what I 13 mean.</p> <p>14 CHAIRMAN SMITH: Okay. At this time I would 15 call upon the respondent, Neighbors for Sam Liccardo 16 for Mayor 2014, or their representatives to come 17 forward and present any written or oral response. Do 18 you wish to --</p> <p>19 MS. HENNINGER: We have no response.</p> <p>20 CHAIRMAN SMITH: Okay. Thank you.</p> <p>21 There is no one here representing the 22 complainant, so we will skip over that.</p> <p>23 There's no interested persons, I don't think, 24 here who want to say anything, so we'll skip over that.</p> <p>25 And we're back to Mr. Miller. You have -- I</p>	<p style="text-align: center;">Page 119</p> <p>1 Okay. All in favor? 2 (All Commissioners responded Aye.) 3 CHAIRMAN SMITH: Opposed? 4 (No response.) 5 CHAIRMAN SMITH: Okay. So that's unanimous. 6 And we need the certification. Ask each 7 Commission member to certify that you have heard or 8 read the testimony at the hearing and have reviewed all 9 the evidence on the record by affirming "so certified." 10 Commissioner Edgeworth? 11 COMMISSIONER EDGEWORTH: I so certify. 12 CHAIRMAN SMITH: Commissioner Pierre-Dixon? 13 COMMISSIONER PIERRE-DIXON: I so certify. 14 CHAIRMAN SMITH: And, me, Commissioner Smith, 15 so certify. 16 There are no orders or penalties because 17 there is no violation. 18 And I'm not going to forget it this time, 19 even though it's getting late. Resolution. Under our 20 regulations and procedures, the Commission shall issue 21 a decision by Resolution. At this time I would 22 entertain a motion directing the City Attorney to draft 23 a Resolution of the Commission's findings and 24 authorizing the Chair to approve and sign the 25 Resolution.</p>
<p style="text-align: center;">Page 118</p> <p>1 don't think you have anything else because you just 2 talked.</p> <p>3 MR. MILLER: I have nothing else to add. I 4 think my recommendation was that you find no violation, 5 dismiss the complaint and close the file on the matter.</p> <p>6 CHAIRMAN SMITH: Okay. And so we have our 7 same four options we talked about earlier: Further 8 investigation; sufficient evidence to establish that no 9 violation has occurred, which is the one that is being 10 recommended; find that there is insufficient evidence 11 to establish that a violation has occurred; or that, 12 based upon the preponderance of the evidence, a 13 violation has occurred.</p> <p>14 So I would entertain a motion.</p> <p>15 COMMISSIONER PIERRE-DIXON: I think I would 16 propose a motion that there was no violation of 17 Municipal Code and accordingly recommend the Commission 18 dismiss the complaint and close the file on this 19 matter.</p> <p>20 CHAIRMAN SMITH: Without further action.</p> <p>21 COMMISSIONER PIERRE-DIXON: Without further 22 action.</p> <p>23 COMMISSIONER EDGEWORTH: Second.</p> <p>24 CHAIRMAN SMITH: Okay. Moved and seconded. 25 Any discussion?</p>	<p style="text-align: center;">Page 120</p> <p>1 So moved. Somebody want to second? 2 COMMISSIONER EDGEWORTH: Second. 3 CHAIRMAN SMITH: Okay. Discussion? 4 No. All in favor? 5 (All Commissioners responded Aye.) 6 CHAIRMAN SMITH: Opposed? 7 (No response.) 8 CHAIRMAN SMITH: Okay. It's unanimous. 9 And this hearing is closed. 10 (Whereupon, the Ethics Commission hearing was 11 concluded at 8:09 p.m.) 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

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I, NOELIA ESPINOLA, do hereby certify:

That said hearing was taken down by me at the time and place therein named, and thereafter reduced to computerized transcription under my direction.

I further certify that I am not interested in the outcome of this hearing.

Dated: _____

NOELIA ESPINOLA, CSR #8060

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