

MEETING MINUTES

June 11, 2014

I. Call to Order & Orders of the Day

Roll Call

PRESENT: Chair Michael Smith, Vice Chair Rolanda Pierre Dixon, Commission Members Leon Louie and Chris Peacock

ABSENT: Commission Member Linda Edgeworth

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

OTHER: Noelia Espinola, Court Reporter with Advantage Reporting Services

Call to Order

The members of the San José Ethics Commission convened at 5:38 p.m. in Room W-262 of City Hall, 200 E. Santa Clara Street, CA 95113.

Orders of the Day

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, and seconded by Commissioner Leon Louie and carried, the Commission approved the adoption of the June 11, 2014 agenda. (4-0-1; Absent: Edgeworth.)

II. Closed Session - None

III. Hearings

- A. Hearing on Complaint filed by Tam Nguyen on May 2, 2014 alleging violations of the San Jose Municipal Code by Madison Nguyen for Mayor and Viet USA News. (Independent Investigator/Evaluator)

Document Filed: Report from Hanson Bridgett LLP dated May 30, 2014 regarding Tam Nguyen v. Madison Nguyen for Mayor, et al. Complaint filed May 2, 2014.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present except for Commissioner Edgeworth. This complaint alleges a violation by Councilmember Nguyen of Section 12.06.1010 of the San Jose Municipal Code. The Evaluator (Steven Miller), received a copy of the Complaint on May 2, 2014, and he notified the respondent on May 5, 2014. The report and recommendations were received by

the City Clerk on May 30, 2014, and copies were then distributed to the Respondents, Complainant, Commission Members, and posted to the City's website. Neither the Complainant nor the Respondents were present. The Evaluator presented the report, with the finding that no violations of the Municipal Code took place, and with a recommendation that the Commission close the file and take no further action.

Vice Chair Rolanda Pierre Dixon requested that the Evaluator furnish the name of the Translator for the record, and the Evaluator said that he would do so. Chair Smith asked that the name of the translator be included in the Evaluator's reports from now on.

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried, the Commission found that there was sufficient evidence to establish that no violation occurred. (4-0-1; Absent: Edgeworth.)

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 Louie	So certified
Commissioner Peacock	So certified
Commissioner Edgeworth	Absent

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried, the Commission moved to close the file in the matter with no further action. (4-0-1; Absent: Edgeworth.)

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, and seconded by Commissioner Leon Louie, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's Findings, and further, that the Commission authorizes the Chair to approve and sign the resolution. (4-0-1; Absent: Edgeworth.)

Vice Chair Pierre Dixon expressed concern regarding large segments of the population not being aware of rules and regulations as they pertain to elections. She asked the City Clerk to take note of the matter.

- B. Hearing on Complaint filed by Duc Lam on May 9, 2014 alleging violations of the San Jose Municipal Code by Van Le and Van Le for City Council 2014 Committee, candidate for Council District 7. (Independent Investigator/Evaluator)

Document Filed: Report from Hanson Bridgett dated May regarding Duc Lam v. Van Le, et al. Complaint filed May 9, 2014.

Discussion: Chair Michael Smith summarized the hearing procedures and opened the public hearing. All members of the Commission were present except for Commissioner Edgeworth. This complaint alleges a violation by Van Le and Van Le

for City Council 2014 Committee of Section 12.06.1010 of the San Jose Municipal Code. The allegation is that the respondents placed a magazine advertisement that did not contain the correct "paid for by..." disclaimer required by the Municipal Code. The City Clerk notified and provided a copy of the Complaint to the Evaluator on May 9, 2014, and the Evaluator notified and provided a copy of the Complaint to the Respondents on May 12, 2014. The Independent Evaluator's report and recommendations were submitted to the City Clerk on June 3, 2014, and copies were then provided to the Complainant, Respondents and Commission Members, and posted on the City's website. Neither the Complainant nor the Respondents were present. The Evaluator presented the report, with the finding that no violations of the San Jose Municipal Code took place, and with a recommendation that the Commission close the file and take no further action.

Commissioner Peacock requested clarification of prohibitions on election-related ads for candidates; including the expenditure classifications for those ads. Evaluator Steve Miller responded and answered Commission questions.

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried, the Commission found that there was sufficient evidence to establish that no violation occurred. (4-0-1; Absent: Edgeworth.)

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 Louie	So certified
Commissioner Peacock	So certified
Commissioner Edgeworth	Absent

Action: Upon a motion by Chair Michael Smith, and seconded by Vice Chair Rolanda Pierre Dixon and carried, the Commission moved to close the file in the matter with no further action. (4-0-1; Absent: Edgeworth.)

Action: Upon a motion by Vice Chair Rolanda Pierre Dixon, and seconded by Commissioner Leon Louie, the Commission moved to direct the City Attorney to draft a Resolution on the Commission's findings, and further, that the Commission authorizes the Chair to approve and sign the resolution. (4-0-1; Absent: Edgeworth.)

IV. Consent Calendar

A. Approve the Minutes of April 9, 2014 – Regular Meeting

Document Filed: Draft Ethics Commission minutes for the April 9, 2014 meeting.

Action: Approval of minutes for April 9, 2014 meeting deferred to the next meeting.

B. Approve the Minutes of May 14, 2014 – Regular Meeting

Action: Minutes of May 14, 2014 were not drafted in time for meeting. Approval deferred to next meeting.

V. Reports

- A. Chair - None
- B. City Attorney - None
 - 1. Legislative update
- C. City Clerk - None
 - 1. Legislative update
 - 2. Status of compliance with Commission resolutions
 - 3. Status report on filings (Form 700, Campaign Statements, Lobbyists)
 - 4. Elections update - None
 - a) Results of Primary Election
 - Document Filed: Contribution and Expenditure Report
 - b) Review and possible action on multi-language outreach resources for the citizens regarding San Jose Municipal Code Title 12.
- D. Investigator/Evaluator - None

VI. Old Business

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

Action: Continued to the meeting of July 9, 2014.

- B. Status, review and possible action on officeholder/candidate legal defense fund ordinance (City Attorney)

Action: Continued to the meeting of July 9, 2014.

- C. Discussion and possible action on reporting requirements from staff to Commission regarding filings (City Clerk)

Discussion: Chair Smith framed the discussion in terms of identifying and tracking what has been learned in terms of compliance as filings are processed. The City Clerk responded that the most interesting thing is the strategic late filings that have started to take place. Some filers now opt to pay the fine rather than disclose in a timely manner what has been raised and/or spent. Further, filings are much easier now that the City has instituted the new contract with Netfile. Filers may file any form at virtually any time they wish, which has resulted in more filings, and less fines for late filings. The late fines are \$10 per day up to the amount filers have in their account, or \$100, whichever is greater. Fining filers doesn't seem to have an impact. The Contribution and Expenditure Report ad placed in the newspaper regarding filers and amounts collected took the City Clerk and another staffer a full day to develop. The candidate information is fairly straightforward, but independent expenditures must be gone through individually, looking at each form filed. Chair Smith said that it

sounded like there were two issues for the Commission to take up: 1) strategic late filings; and 2) publishing the ad of funds raised. Chair Smith said he can't recall why the requirement for the ad was retained when Section 12.06.920 of the San Jose Municipal Code was last revised. City Clerk Taber said the newspaper ad should also be posted to our website, as well. Chair Smith said in all the years he has been doing this, he has never seen the ad. City Clerk Taber responded that the ad is in the Legal Publications section at the back of the paper. Evaluator Miller suggested that complaints about the actual late filing could be made to the Commission. Chair Smith responded that the Commission could fine late filers three times the amount of money involved, or \$5,000, whichever is greater. Chair Smith suggested that these two items should go on the Workplan for future consideration by the Commission. Commissioner Peacock recalled prior discussions about asking candidates to put links to the ad on their websites. Chair Smith suggested that ethics trainings for the media be placed on the Workplan as well. Vice Chair Pierre Dixon agreed with the suggestion. Finally, Chair Smith spoke about disclaimers on campaign signs, and asked why the City couldn't just adopt the same rules as the state as they pertain to campaign signs, and he suggested the issue also be placed on the Workplan.

Reporter Espiniola left the meeting at 6:17 p.m.

D. Discussion and possible action on revisions to the Ethics Commission Complaint Form (City Clerk)

Discussion: City Clerk Taber said the revision has already been instituted, and the checkboxes are helpful as well.

Evaluator Miller left the meeting at 6:35 p.m.

E. Discussion and possible action on FY 2013-14 Annual Report and FY 2014-15 Workplan (Chair)

Discussion: Chair Smith said he revised the last draft of the Workplan, which is now draft 1.2. He is satisfied with both the Annual Report and Workplan now, except that the Annual Report needs to be updated to reflect that the first bullet under Objective 1, the third bullet under Objective 2 and both bullets under Objective 6 were accomplished in June 2014. City Clerk Taber agreed. City Clerk Taber said that she would update the previously agreed upon schedule for reporting on compliance monitoring to add Lobbyist compliance information and would send a memo to the Commission with the updated schedule attached. She also noted that in September, she would start agendaizing the items enumerated in the compliance monitoring schedule. Commissioner Peacock suggested that a transmittal memo from the Chair to the Council via the Rules Committee would be in order. City Clerk Taber offered to draft the memo in cooperation with Chair Smith, with a summary of accomplishments for Commissioners to review in July.

Action: Upon a motion by Vice Chair Pierre Dixon, and seconded by Commissioner Leon Louie and carried, that the Commission approved the the Annual Report and Workplan as amended. Commissioner Peacock asked that issues surrounding ethnic media and the changing electronic media environment also be included in the Report. Chair Smith suggested that issues that arise throughout the year be placed on a list of issues (“Cecilia’s List”) for future action. Commissioner Peacock and Vice Chair Pierre Dixon both asked that outreach to ethnic and specialized media regarding campaign and ethics regulations and policies be put in Item 1 in the Workplan as a third bullet. Vice Chair Pierre Dixon accepted the amendment. (4-0-1; Absent: Edgeworth.)

Action: Upon a motion by Vice Chair Pierre Dixon, and seconded by Commissioner Leon Louie and carried, requested that a letter be sent to the Rules Committee in connection with the Final Report, and asked that the Chair be empowered to send said memo on behalf of the Commission. (4-0-1; Absent: Edgeworth.)

VII. New Business

- A. Discussion and possible action on “dark money” issue, regulations and policies. (City Clerk)

Discussion: Deputy City Attorney Arlene Silva raised some concerns about this issue, and the Commission agreed to await Commissioner Edgeworth’s return before taking up the matter.

VIII. Public Comment – None.

IX. Future Agenda Items and Adjournment

The next regular meeting is Wednesday, July 9, 2014 at 5:30 p.m. in City Hall, Wing Room 262.

The following agenda items will be discussed at the July 9, 2014 Ethics Commission meeting:

- Compliance Monitoring Schedule
- Gift Ordinance and Officeholder Reporting Requirements
- “Dark Money” (Old Business)

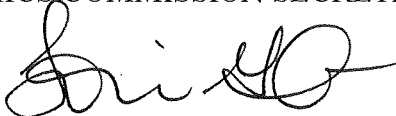
Chair Smith asked that Commissioners hold the meeting date of July 9, 2014 on their calendars, but advised them the meeting may be cancelled.

The meeting was adjourned at approximately 7:04 p.m.



MICHAEL SMITH, CHAIR

ATTEST:
ETHICS COMMISSION SECRETARY



TONI J. TABER, CMC
CITY CLERK

Attachment: Transcript of Hearing dated June 11, 2014, Reported by Noelia Espinola, CSR, License Number 8060, Advantage Reporting Services, No. 41408, pages 1 through 34.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Taken On June 11, 2014

CITY OF SAN JOSE ETHICS COMMISSION

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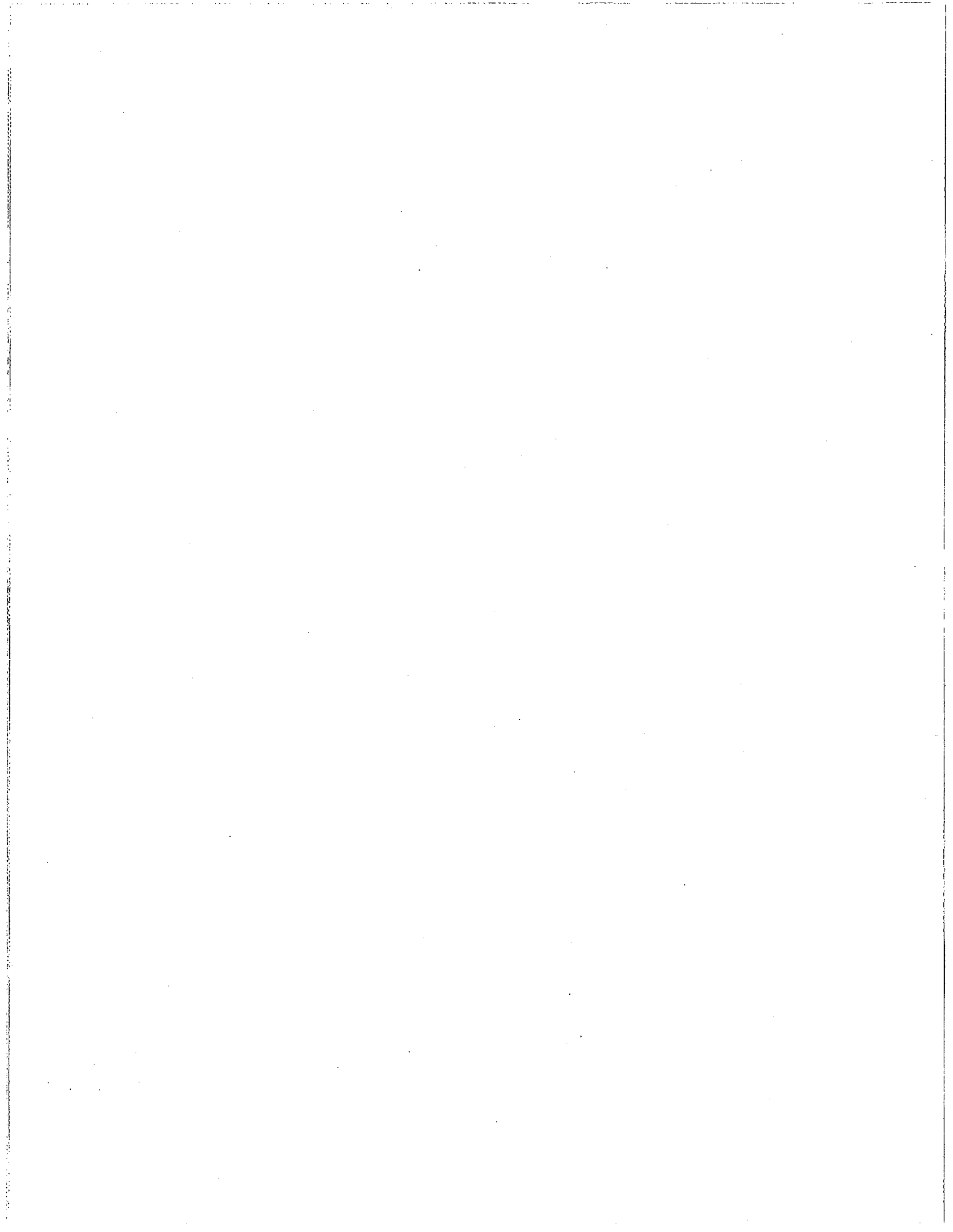
CONDENSED TRANSCRIPT

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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, June 11, 2014 Time: 5:48 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>#47898</p>	<p>Page 3</p> <p>1 PROCEEDINGS</p> <p>2 CHAIRMAN SMITH: The first one is -- and we</p> <p>3 still don't know who it was that was going to show up</p> <p>4 that we're potentially waiting for?</p> <p>5 MS. TABER: No, I can't remember.</p> <p>6 CHAIRMAN SMITH: Okay. Well, they've got 20</p> <p>7 minutes.</p> <p>8 MS. TABER: It was not a name I recognized,</p> <p>9 though, so it may have just been a witness.</p> <p>10 CHAIRMAN SMITH: Oh, okay.</p> <p>11 Okay. So the first one is the Tam Nguyen</p> <p>12 case. So we will start the hearing on that.</p> <p>13 It's Wednesday, June the 11th, 2014, and this</p> <p>14 hearing of the San Jose Ethics Commission is being held</p> <p>15 in Room W-262 of the San Jose City Hall. All members</p> <p>16 of the Commission are present except Commissioner</p> <p>17 Edgeworth.</p> <p>18 Commission will conduct a hearing on a</p> <p>19 complaint filed on May 2nd, 2014, by Tam Nguyen</p> <p>20 alleging that Madison Nguyen for Mayor Committee and</p> <p>21 Viet News USA violated Section 12.06.1010 of the San</p> <p>22 Jose Municipal Code. Specifically, the allegation is</p> <p>23 that the Respondents placed a newspaper advertisement</p> <p>24 that did not contain the correct "paid for by..."</p> <p>25 disclaimer required by the Municipal Code. The City</p>
<p>Page 2</p> <p>1</p> <p>2 APPEARANCES</p> <p>3</p> <p>4 San Jose Elections MICHAEL SMITH, Chair Commission: ROLANDA PIERRE-DIXON, Vice-Chair</p> <p>5 LEON LOUIE CHRIS PEACOCK</p> <p>6</p> <p>7 Staff: ARLENE F. SILVA Deputy City Attorney</p> <p>8</p> <p>9 TONI TABER, City Clerk</p> <p>10 TOM GRAVES, Assistant City Clerk</p> <p>11</p> <p>12 The Reporter: ADVANTAGE REPORTING SERVICES BY: NOELIA ESPINOLA, 13 CSR #8060 1083 Lincoln Avenue 14 San Jose, CA 95125 (408) 920-0222</p> <p>15</p> <p>16</p> <p>17 --o0o--</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 4</p> <p>1 Clerk notified and provided a copy of the complaint to</p> <p>2 the Independent Evaluator on May 2nd, 2014, and the</p> <p>3 Evaluator notified and provided a copy to the</p> <p>4 Respondent on May 5th, 2014. The Independent</p> <p>5 Evaluator's Report and Recommendations were submitted</p> <p>6 to the City Clerk on May 30th, 2014, and copies were</p> <p>7 then provided to the Complainant, Respondent and</p> <p>8 Commission members and posted to the City web site with</p> <p>9 the agenda for tonight's hearing.</p> <p>10 On April 5th, 2014, the City Council adopted</p> <p>11 Resolution 76954, which establishes the Commission's</p> <p>12 regulations and procedures pertaining to investigations</p> <p>13 and hearings. All parties to these proceedings have</p> <p>14 been provided copies of the Resolution. The</p> <p>15 regulations and procedures have been adopted in order</p> <p>16 to ensure the fair, just and timely resolution of</p> <p>17 complaints before the Commission.</p> <p>18 This hearing is open to the public. It is</p> <p>19 being electronically recorded, and we have a court</p> <p>20 reporter with us to compile a transcript. The formal</p> <p>21 rules of evidence do not apply to this hearing, but all</p> <p>22 testimony will be under oath or affirmation. The</p> <p>23 Complainant will be treated like any other witness in</p> <p>24 providing evidence. The Chair may compel the testimony</p> <p>25 of witnesses and may compel the production of relevant</p>

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<p style="text-align: center;">Page 5</p> <p>1 documents to the Evaluator by subpoena. Witnesses may 2 be excluded at the discretion of the Commission. 3 Commission members may ask questions of witnesses or 4 the Evaluator when recognized by the Chair. 5 At this time I would ask the Complainant 6 and/or Respondents or their representatives to identify 7 themselves for the record. 8 And I'll note that neither the Complainant 9 nor the Respondents are here. 10 Also identify City Staff and representative 11 of Hanson Bridgett, the Commission's Independent 12 Evaluator, who are here. And I'll do it since I know 13 you all. Steve Miller from Hanson Bridgett. Ariene 14 Silva, Deputy City Attorney. Toni Taber, City Clerk. 15 And Tom Graves, Assistant City Clerk. 16 Under the Commission's regulations and 17 procedures, the Respondents may submit a written 18 response to the Report and Recommendations. The 19 response may contain legal arguments, a summary of 20 evidence and any mitigating or exculpatory information. 21 We do not have -- I'm not aware of any 22 written response from the -- from the Respondent. Is 23 that correct? 24 MS. TABER: Correct. 25 CHAIRMAN SMITH: Okay. The Complainant or</p>	<p style="text-align: center;">Page 7</p> <p>1 respondent, despite it being identified as such. 2 We spoke to the candidate and to the 3 publisher of the newspaper. And we also engaged a 4 professional translator to provide us with copies of 5 translations of the various documents in question, all 6 of which were in Vietnamese. 7 And the results of those investigations, 8 pretty straightforward. What looks like -- the 9 complaint alleges that there was an advertisement. 10 But, in fact, the publisher printed what I would call a 11 commentary or an editorial, which started with clear 12 editorial remarks concerning two candidates, the 13 Complainant and the Respondent, and suggesting that the 14 newspaper was in favor of both of them. And followed 15 by that statement, underneath it, the publisher just 16 inserted a copy of an advertisement for the Respondent 17 that the Respondent had paid to run in other editions 18 of the newspaper but not -- had not paid for 19 advertisement to run in that particular issue. 20 So it turned out to be sort of a mixture of 21 things. Under the -- determined the candidate had 22 known about this. The candidate had not paid anything. 23 In fact, both the Respondent and the Complainant were 24 annoyed at being associated with each other, and both 25 complained to the newspaper publisher about its -- on</p>
<p style="text-align: center;">Page 6</p> <p>1 any other interested person may also submit a brief or 2 written argument -- I forgot to change that, but -- or 3 written argument. 4 And, again, we do not have any written 5 submittal by the Complainant or anyone else, as I 6 understand it. 7 Okay. The Commission's regulations and 8 procedures allow for the Independent Evaluator to 9 present the Report and Recommendations. At this time I 10 will recognize Steve Miller, from the Hanson Bridgett 11 law firm, to present the Report. The Recommendations 12 will be presented subsequently. 13 MR. MILLER: Okey-doke. Good evening. 14 So first point to mention is that the 15 complaint identified two respondents. And -- both the 16 Madison Nguyen committee as well as a newspaper. And 17 the complaint, as you indicated, alleges -- implicates 18 the disclaimer requirements -- "paid for by..." 19 disclaimer requirements newly added to the Municipal 20 Code. 21 And our first task was to determine, in 22 consultation with the City Attorney, that we're reading 23 the Municipal Code correctly in that these disclaimer 24 requirements do not apply to the newspaper itself. And 25 so we did not consider the newspaper to be a</p>	<p style="text-align: center;">Page 8</p> <p>1 its own initiative, lumping them together and 2 reprinting this ad. And they each felt that they had 3 been tarred unfairly with the brush of the other. 4 And the newspaper printed two retractions, 5 the first of which didn't satisfy one of -- the 6 Respondent, I believe. And so printed a second 7 retraction, both of which are offered both in their 8 Vietnamese original and in the translation. The 9 translations are quite flowery but confirm, in my view, 10 that the -- what I just described; namely, that the 11 candidate did not pay or know about the placing of the 12 alleged ad and that it wasn't an ad. It was part of a 13 commentary by the newspaper. 14 So, under your Code, the definition of an 15 "electioneering communication" to which these 16 disclaimer requirements attach are that it must be a 17 communication that was paid for. And then it says that 18 it does not apply to commentaries and editorials by 19 newspapers. 20 So I think, starting out with -- it's not 21 a -- we concluded it's not an electioneering 22 communication. Even had it been, the disclaimer 23 requirements on a candidate attach to electioneering 24 communications that are paid for by the candidate, and 25 that's indisputably not the case here. And so we</p>

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<p>1 concluded that this was not the sort of document to 2 which any disclaimer requirements attached. 3 And I'll pause -- that's sort of the end of 4 our investigation. We should move, then, on to the 5 recommendation phase, which I'll pause before getting 6 into. 7 CHAIRMAN SMITH: Any questions regarding what 8 we've heard so far? 9 COMMISSIONER PIERRE-DIXON: My only thing is 10 you used a professional translator, but I don't see a 11 name. I think since it's a public record, I think 12 it's -- 13 MR. MILLER: Oh. Okay. So the name of the 14 firm is California Translation Corporation, I believe. 15 And the particular fellow is actually a fellow who has 16 worked for us before. A year or so ago, there was 17 some -- there was a complaint involving the Jimmy 18 Nguyen campaign and involving, in fact, some of the 19 characters that appear in the story this evening. And 20 this was the same fellow who ably translated documents 21 before. I'm afraid I'm going to butcher his name when 22 I say it, but I'm happy to provide it for the record. 23 COMMISSIONER PIERRE-DIXON: I think we need 24 it for the record. 25 THE WITNESS: His first name is, I think,</p>	<p>1 and -- make sure it's four. Yeah, I was right. 2 The Commission may find that further 3 investigation is necessary. If so, we would direct the 4 Evaluator to conduct further investigation and report 5 back. 6 We may find that there is sufficient evidence 7 to establish that no violation occurred. If so, we 8 make that finding and announce that fact. 9 We may find that there is insufficient 10 evidence to establish violations occurred. If so, we 11 make that finding and announce that fact. 12 Or we may find that, on the preponderance of 13 the evidence, from the entire record of the 14 proceedings, that a violation has occurred. 15 And I would offer this comment, that it looks 16 like Number 2. 17 I'll open the floor to Commission discussion 18 on the case. We need to make a finding for each 19 Respondent, for each potential violation. We can do it 20 by separate motions, one for each Respondent and/or one 21 for each potential violation. 22 Anybody -- comments or motions or -- 23 COMMISSIONER PIERRE-DIXON: And Number 3, 24 there is insufficient evidence? 25 CHAIRMAN SMITH: Right. The difference</p>
Page 10	Page 12
<p>1 Trunc, T-r-u-n-c. And I should just stop there because 2 I can't recall exactly his last name. And rather than 3 be wrong, I'll just provide it to you later, if that's 4 all right. 5 COMMISSIONER PIERRE-DIXON: All right. Thank 6 you. 7 CHAIRMAN SMITH: I guess along with that, 8 probably in the future it would probably be a good idea 9 to include that in the report somewhere. 10 MR. MILLER: Understood. 11 CHAIRMAN SMITH: If no other questions, 12 normally we would go to the Respondent and the 13 Complainant, if they have got any comments, before they 14 get to the recommendation -- or other persons. But we 15 don't have anybody here. So let's go ahead with the 16 recommendation. 17 MR. MILLER: Well, as it turned out, we 18 concluded that there was no disclaimer requirement in 19 the first place. We concluded that there was, 20 therefore, no violation of the Municipal Code. And we 21 recommend that you close the file and take no further 22 action. 23 CHAIRMAN SMITH: Questions about that? 24 Okay. Okay. At this point it's time to make 25 a decision. We have four options. I'm looking ahead</p>	<p>1 between 2 and 3 is Number 2, we're sure that nothing 2 has occurred. And Number 3 is that there is 3 insufficient evidence. So that's why I said I think 4 it's Number 2. Because it seems completely clear that 5 there's not other evidence out there that would come 6 forward that would potentially -- 7 COMMISSIONER PIERRE-DIXON: All right. 8 CHAIRMAN SMITH: But you're a lawyer, so you 9 know better than I do. 10 COMMISSIONER PIERRE-DIXON: Just asking. 11 CHAIRMAN SMITH: If there's no questions or 12 comments, would someone like to make a motion? 13 Okay. I'll offer a motion. 14 COMMISSIONER PIERRE-DIXON: Go ahead. 15 CHAIRMAN SMITH: All right. I would move 16 that we find that there is sufficient evidence to 17 establish that no violation occurred by either of the 18 named respondents. Does that sound right? That's what 19 you basically recommend. 20 MR. MILLER: Yes, we don't even consider the 21 newspaper to even be a respondent at this point. But 22 they are identified as a respondent. It's certainly in 23 our view that they did not commit any violations of the 24 Municipal Code. 25 CHAIRMAN SMITH: Okay. So if -- somebody</p>

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<p>1 want to second, and then we can talk -- 2 COMMISSIONER PIERRE-DIXON: I would second 3 that motion. 4 CHAIRMAN SMITH: Thank you. 5 To your point, I think we -- since they were 6 named -- I understand that they shouldn't have been, 7 but they are. 8 MR. MILLER: I agree with you. 9 CHAIRMAN SMITH: So I think we have to -- 10 MR. MILLER: I agree with you. 11 CHAIRMAN SMITH: Any further discussion? 12 If not, we'll vote on the motion. All in 13 favor? 14 (All Commissioners present responded Aye.) 15 CHAIRMAN SMITH: Any opposed? 16 (No response.) 17 CHAIRMAN SMITH: Okay. So it's four in 18 favor, none opposed and one absent. 19 Okay. And then I got to do -- upon 20 certification of the motion, I have to ask each 21 Commission member to certify that you have heard or 22 read the testimony at the hearing and have reviewed all 23 the evidence in the record by affirming "so certified." 24 Commissioner Louie? 25 COMMISSIONER LOUIE: So certified.</p>	<p>1 COMMISSIONER PIERRE-DIXON: I'll second that. 2 CHAIRMAN SMITH: Okay. Thank you. 3 Any discussion? 4 Okay. If not, all in favor? 5 (All Commissioners present responded Aye.) 6 CHAIRMAN SMITH: Any opposed? 7 (No response.) 8 CHAIRMAN SMITH: Okay. So, again, it's four, 9 zero and one. 10 And do we have to -- we don't have to certify 11 again on that? Okay. Next time we'll do it a little 12 bit better. 13 And then we also need a motion that the 14 Commission directs the City Attorney to draft a 15 resolution on the Commission's finding and penalties -- 16 no penalties. On the Commission's finding and that the 17 Commission authorizes the Chair to approve and sign the 18 resolution. 19 COMMISSIONER PIERRE-DIXON: I would so move. 20 COMMISSIONER LOUIE: Second. 21 CHAIRMAN SMITH: Okay. Any discussion? 22 If not, all in favor? 23 (All Commissioners present responded Aye.) 24 CHAIRMAN SMITH: Any opposed? 25 (No response.)</p>
Page 14	Page 16
<p>1 CHAIRMAN SMITH: Commissioner Pierre-Dixon? 2 COMMISSIONER PIERRE-DIXON: So certified. 3 CHAIRMAN SMITH: Commissioner Peacock? 4 COMMISSIONER PEACOCK: So certified. 5 CHAIRMAN SMITH: And me, Commissioner Smith, 6 so certified. 7 Okay. We have not found any violations, so 8 penalties -- there are no penalties involved. 9 And I don't think we would be having anything 10 that would require us to -- or that would suggest that 11 we should refer anything to any other agency. 12 So I'm missing -- what I'm missing is -- we 13 talked about this last time -- the business about that 14 we close the file. And I thought I had added that for 15 my -- how did that escape me? Maybe I put it in the 16 wrong place. 17 Oh, okay. What I should have moved -- we'll 18 have to go back and have a second motion. What I 19 should have moved -- I got ahead of myself. That I 20 move that the Elections Commission find that there is 21 sufficient evidence to establish no violation has 22 occurred and that the file in this matter be closed 23 without further action. 24 So I'll make a second motion that the file in 25 this matter be closed with no further action.</p>	<p>1 CHAIRMAN SMITH: Again, that's four, zero and 2 one. 3 At this point the hearing is now closed. 4 So we can move on to the second hearing. 5 COMMISSIONER PIERRE-DIXON: My only 6 comment -- I do have a comment. 7 CHAIRMAN SMITH: Is this part of the hearing 8 or -- should I reopen? 9 COMMISSIONER PIERRE-DIXON: No, you don't 10 need to reopen. 11 In reference to the newspaper, they were 12 going to print a retraction. My -- but what I wanted 13 to understand: Did they understand what they did that 14 they should not have done, in terms of putting these 15 ads in the paper, in your conversation with them? 16 MR. MILLER: He understood that he had 17 annoyed both of the people identified in his ad. 18 The issue of the disclaimer -- because I had, 19 at that point, not -- determined that he was not a 20 respondent and, moreover, that the disclaimer rules did 21 not apply to him, I did not have a conversation with 22 him about that, to know what he thought about the 23 activity of just taking an ad and plopping it into a 24 newspaper. This issue will come up in a few moments, 25 in a slightly different scenario, where I think -- I do</p>

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<p style="text-align: center;">Page 17</p> <p>1 have some concerns about how that works. In this 2 particular case, as it seemed to be part of the 3 editorial piece and not actually a placing of an ad, I 4 did not discuss with him anything like that. 5 COMMISSIONER PIERRE-DIXON: All right. My 6 only concern is we have talked before about large 7 segments of our population not being aware of rules and 8 regulations. And certainly we've run up against this 9 before with the Vietnamese community. And when we have 10 a public -- we have a publication that is put out to 11 that community that then corrected, my concern is that 12 people are getting the wrong information in that 13 community. 14 So, Ms. Clerk, I don't know what we can do 15 about that, but that may be a matter of trying to 16 educate these individuals. Because I think it can 17 impact the elections as we go on further in this 18 process, as we have more members of the Vietnamese 19 community wanting to run for election and be involved 20 in office, if you have someone just sort of going off 21 the grid and then maybe potentially getting these 22 candidates in trouble for something that they didn't 23 have any knowledge of. 24 So I'm seeing this kind of become a 25 reoccurring theme. So I'm concerned about that.</p>	<p style="text-align: center;">Page 19</p> <p>1 provided to the Complainant, Respondent and Commission 2 members and posted on the City web site with the agenda 3 for tonight's meeting. 4 I'm not going to repeat -- I don't need to 5 repeat the material about 76954, et cetera, because 6 it's good. 7 And I'm not going to repeat the stuff about 8 this is open to the public, et cetera. We just 9 discussed -- and since there's no one here from the 10 public. 11 And I won't ask the Complainant or 12 Respondents to identify themselves because they're not 13 here. 14 And I don't think I need to reidentify City 15 Staff and representatives of Hanson Bridgett, because 16 we did that on the other hearing. 17 And, again, under our regulations, the 18 Respondent may submit a written response. And as in 19 the last case, we did not have anything in writing that 20 I'm aware of or anybody indicating otherwise. 21 Again, the Complainant or any interested 22 person may also submit a brief or written argument. 23 And we don't have anything there. 24 So we're back to the Independent Evaluator to 25 describe what --</p>
<p style="text-align: center;">Page 18</p> <p>1 MS. TABER: Point taken. 2 COMMISSIONER PIERRE-DIXON: All right. Thank 3 you. 4 CHAIRMAN SMITH: Okay. We can start with the 5 second hearing. 6 Okay. I'm going to repeal some but not all 7 of the front-end stuff. Again, it is Wednesday, 8 June 11, 2014, and this hearing of the City of San Jose 9 Ethics Commission is being held in Room W-262 in San 10 Jose City Hall. All members of the Commission are 11 present except Commissioner Edgeworth. 12 Commission will conduct a hearing on a 13 complaint filed on May 9th, 2014, by Duc Lam alleging 14 that Van Le and the Van Le for City Council 2014 15 Committee violated Section 12.06.1010 of the San Jose 16 Municipal Code. Specifically, the allegation is that 17 the Respondents placed a magazine advertisement that 18 did not contain the correct "paid for by..." disclaimer 19 required by the Municipal Code. The City Clerk 20 notified and provided a copy of the complaint to the 21 Independent Evaluator on May 9th, 2014, and the 22 Evaluator notified and provided a copy to the 23 Respondents on May 12th, 2014. The Independent 24 Evaluator's Report and Recommendations were submitted 25 to the City Clerk on June 3, 2014, and copies were then</p>	<p style="text-align: center;">Page 20</p> <p>1 MR. MILLER: Thank you. 2 So this is similar to the complaint we just 3 discussed and also similar to a complaint filed by the 4 same Complainant against the same Respondent that came 5 up last month. 6 And just a brief editorial comment as I'm 7 thinking about your comment of a moment ago. The 8 Complainant in both of these cases, but here in 9 particular, was a Respondent in an earlier complaint. 10 And I think there is at least one member of the 11 Vietnamese community who is now very aware of these 12 rules and is interested in -- 13 COMMISSIONER PIERRE-DIXON: Making sure we're 14 following them. 15 MR. MILLER: -- in compliance and making sure 16 that people follow. So I think the City Clerk's 17 efforts are very proved in that regard -- this is the 18 second from him in two months. 19 The facts are a little similar in that they 20 involve the same law, the disclaimer rules, the "paid 21 for by..." rules. And they involve what looks like an 22 advertisement. Again, we spoke to the Respondent and 23 to the owner of the magazine in question and engaged 24 the same translator whose name I will provide for you. 25 There's no question that this document would</p>

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<p style="text-align: center;">Page 21</p> <p>1 meet the definition of an election -- electioneering 2 communication. It looks like an ad. It urges people 3 to vote for the candidate. Unlike the first complaint, 4 there is no additional editorial component that would 5 give anyone looking at this any indication other than 6 that this is a campaign ad.</p> <p>7 However, what our investigation revealed to 8 my satisfaction -- I have no reason to doubt the 9 credibility of the folks I've spoken to -- the 10 candidate, the Respondent, had no knowledge of this 11 being placed. Didn't pay anything for it. And 12 identified this document as a flyer that she had handed 13 out a few months earlier at some events in the 14 Vietnamese community. And publisher confirmed that the 15 magazine took that flyer and just reprinted it in its 16 entirety.</p> <p>17 And so we reached the same conclusions that 18 we reached in the last complaint, which is that it is 19 not an electioneering communication because there was 20 no payment made for -- made for it. And that even had 21 there been, the Respondents didn't pay for it and so 22 it's not subject to the disclaimer requirements. And 23 the magazine is exempt from the requirements, and so 24 there essentially would be no disclaimer requirements. 25 Now, I will note one other interesting aspect</p>	<p style="text-align: center;">Page 23</p> <p>1 contribution? 2 MR. MILLER: That's exactly right. That's 3 exactly right.</p> <p>4 The result of that, I call to your attention, 5 is that there was in this magazine e -- what anyone 6 looking at it would think was an ad is a disclaimer 7 that's incorrect. And so the public has no way of 8 knowing who actually funded this. And I think that's 9 worth thinking about, and perhaps you may want to talk 10 about it.</p> <p>11 I think there are some, perhaps -- I know the 12 City Attorney may want to weigh in also -- there are 13 some First Amendment issues dealing with how you -- how 14 the -- how might one instruct the newspaper to put 15 appropriate disclaimers on it. And I think you quickly 16 get into some complex First Amendment issues. 17 Certainly beyond the scope of this complaint. I just 18 would flag this.</p> <p>19 And maybe I should restrain myself and get 20 back to the matter at hand, which is that we concluded 21 that there was no violation of the Municipal Code 22 because there were no disclaimer requirements that 23 attached to this particular document.</p> <p>24 CHAIRMAN SMITH: Okay. Any questions or 25 comments before we go on to recommendations?</p>
<p style="text-align: center;">Page 22</p> <p>1 of -- interesting, at least, to me and I hope to you -- 2 that there is -- even under the facts I just described, 3 there is an avenue by which one would have some 4 concern. The Code defines a contribution made at the 5 behest -- a contribution to include an expenditure made 6 by someone at the behest of the candidate. And so had 7 there been some kind of coordination or even 8 consultation or even knowledge by the candidate, if 9 the -- you know, the publisher had said, "Hey, I would 10 like to help you. Could I put this ad in my newspaper 11 and not charge you for it?" we might have a very 12 different set of facts, because that might be treated 13 as a contribution to the candidate by the magazine. 14 And those facts were the ones that came up a few years 15 ago in this Jimmy Nyugen affair that we discussed 16 earlier.</p> <p>17 But there was -- not only was there no 18 evidence that there was that kind of consultation; 19 there was evidence that there was no consultation. And 20 so I don't think there would be a need to treat the 21 expenditure as a contribution.</p> <p>22 CHAIRMAN SMITH: It would be an in-kind 23 contribution in that case? 24 MR. MILLER: Excuse me? 25 CHAIRMAN SMITH: It would be an in-kind</p>	<p style="text-align: center;">Page 24</p> <p>1 Yes.</p> <p>2 COMMISSIONER PEACOCK: One question. This is 3 sort of helping me clarify this. If I'm the publisher 4 and I find this ad, I don't coordinate with anybody and 5 put it in the paper, run it -- basically what we're 6 saying, this situation here.</p> <p>7 MR. MILLER: Right.</p> <p>8 COMMISSIONER PEACOCK: If I'm not the 9 publisher but I'm just an independent person, I go to 10 the paper and say, I would like to pay for this thing 11 to run -- the exact same thing -- and pay for it to be 12 included, is -- and, again, no coordination with the 13 candidate -- is there -- is that the same side of the 14 line or is that a different issue? 15 MR. MILLER: The newspaper is the same in the 16 two scenarios you just described.</p> <p>17 COMMISSIONER PEACOCK: Uh-huh.</p> <p>18 MR. MILLER: But you -- if you now are the 19 person who paid the newspaper to place the ad -- 20 COMMISSIONER PEACOCK: Right.</p> <p>21 MR. MILLER: -- you have now made an 22 expenditure. And depending on the amount of money you 23 have expended -- 24 COMMISSIONER PEACOCK: Right.</p> <p>25 MR. MILLER: -- you may have certain</p>

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<p>1 reporting obligations. 2 COMMISSIONER PEACOCK: Right. 3 MR. MILLER: And the money you have spent 4 would have to be treated as a contribution to the 5 candidate. 6 CHAIRMAN SMITH: Would it be or would it be 7 treated as an independent expenditure? 8 MR. MILLER: Could be. Depends on facts we 9 don't know. 10 CHAIRMAN SMITH: If you didn't -- If you 11 didn't talk to the candidate, as he described it -- 12 MR. MILLER: If there's absolutely no 13 consultation of any sort, I think you're right. It 14 would not be a contribution. It would be an 15 independent expenditure. 16 CHAIRMAN SMITH: And you would have to 17 register as an independent -- 18 MR. MILLER: Depending on the amount of money 19 that you -- 20 CHAIRMAN SMITH: Oh, it's only when it's 21 above a thousand or something that you have to 22 register? 23 MS. TABER: I'm not quoting amounts. But 24 they can file as a major donor. If there is an 25 individual person and it's the only money they're</p>	<p>1 below that threshold, I think there is also a category 2 of people for which the disclaimer requirements 3 technically would not apply. 4 COMMISSIONER PEACOCK: Okay. So if I'm the 5 publisher of the paper and I have that -- I'm foregoing 6 some income by doing that, correct? So I could sell -- 7 I don't care how big the space is. I could sell that? 8 MR. MILLER: Absolutely. 9 COMMISSIONER PEACOCK: And so I'm basically 10 making an in-kind contribution there, correct? 11 MR. MILLER: Except that these disclaimer 12 rules do not apply to newspapers. 13 COMMISSIONER PEACOCK: Right. 14 MR. MILLER: So the value that you are 15 foregoing is not, I think, relevant to the issue of 16 whether you need to put a disclaimer. 17 COMMISSIONER PEACOCK: I guess that what I'm 18 saying, though, is the -- I understand it's what the 19 newspaper runs, is one thing. But I, as the 20 publisher -- I'm essentially making an in-kind 21 contribution, correct, by doing that? 22 MR. MILLER: Yes. I do understand. So if 23 you -- if it costs \$5,000 to place an ad in your 24 newspaper and you are the publisher -- 25 COMMISSIONER PEACOCK: Right.</p>
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<p>1 giving, they can file -- I can't remember the name of 2 the form -- the number of the form, but they can file a 3 major donor form. 4 MS. SILVA: It's 461. 5 MS. TABER: 461. 6 MR. MILLER: So, again, in addition to that, 7 I think under your ordinance the disclaimer 8 requirements would apply -- well, now you raise an 9 interesting question. Because if you look -- let's 10 see. Why am I not finding -- 11 CHAIRMAN SMITH: That would have to identify 12 the person who paid. 13 COMMISSIONER PEACOCK: Uh-huh. 14 CHAIRMAN SMITH: Rather than the candidate. 15 MS. TABER: Right. 16 CHAIRMAN SMITH: They would have to have them 17 change the ad. 18 MR. MILLER: So you have -- your disclaimer 19 rules apply to election communications paid for by the 20 candidate and to electioneering communications paid for 21 by an independent committee. 22 MS. TABER: For whom the City Clerk is the 23 filing officer. 24 MR. MILLER: So to be an independent 25 committee, there is a dollar threshold. So if you were</p>	<p>1 MR. MILLER: -- and you print the candidate's 2 ad, you don't violate the disclaimer requirements 3 because there are no disclaimer requirements on the 4 newspaper. But, yes, you have made an independent 5 expenditure. That's why in your report you'll notice 6 that I mentioned that the value of the ad was -- \$25 is 7 what they had foregone, which would be below the 8 threshold where reporting of an independent expenditure 9 would be required. 10 CHAIRMAN SMITH: Is it below the point where 11 some disclaimer is required, though? 12 MR. MILLER: The disclaimer requirements do 13 not attach to dollar value, except in that they attach 14 to an independent committee. And you don't become an 15 independent committee until you pass over a dollar 16 threshold. Does that make sense? 17 CHAIRMAN SMITH: So they didn't need to print 18 any disclosure -- as distinguished from the previous 19 complaint, where it was clearly editorial because they 20 had some additional stuff -- 21 MR. MILLER: Right. 22 CHAIRMAN SMITH: -- In this case they just 23 printed the ad -- 24 MR. MILLER: I think -- this is where you 25 start getting into First Amendment issues. It's who's</p>

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<p>1 to say that that's not an editorial decision to do 2 that. 3 CHAIRMAN SMITH: But is this the one -- I've 4 forgotten from reading the two reports. Is this the 5 one where the disclaimer is there, but it's too small 6 to read, and it gives the FPPC number rather than the 7 address or -- 8 MR. MILLER: I think that's both -- that 9 describes both. 10 CHAIRMAN SMITH: Is that true for both? 11 Okay. 12 COMMISSIONER PEACOCK: But if there were a 13 higher dollar amount, then we could be talking about an 14 in-kind contribution -- 15 MR. MILLER: That's correct. 16 COMMISSIONER PEACOCK: -- Issue in this case 17 because of the 25. 18 MR. MILLER: That's exactly right. 19 COMMISSIONER PEACOCK: Thank you. 20 MR. MILLER: I'll also mention that there is 21 a requirement, I think, also not -- doesn't attach to 22 newspapers and outside the authority of the Elections 23 Commission, and it's not even in the Political Reform 24 Act, which has rules that get swept into your Code by 25 reference. But the Elections Code of California has a</p>	<p>1 the same situation, where we have sufficient evidence 2 to establish no violation has occurred. 3 So the motion would be -- since I'm reading 4 it, I'll just go ahead and make a motion. I move that 5 the Elections Commission find that there is sufficient 6 evidence to establish that no violation has occurred 7 and that the file in this matter be closed without 8 further action. And I should mention that that would 9 apply to both Respondents. 10 COMMISSIONER PIERRE-DIXON: I would second 11 that motion. 12 CHAIRMAN SMITH: Okay. Any discussion on the 13 motion? 14 If not, all in favor? 15 (All Commissioners present responded Aye.) 16 CHAIRMAN SMITH: Any opposed? 17 (No response.) 18 CHAIRMAN SMITH: Okay. It's, once again, 19 four-zero and one missing. 20 Okay. And I need to ask each of you to 21 certify that you have heard or read the testimony at 22 the hearing and have reviewed all the evidence in the 23 record by affirming "so certified." 24 Commissioner Louie? 25 COMMISSIONER LOUIE: So certified.</p>
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<p>1 requirement that advertisements in newspapers have to 2 say "political advertisement." But that is a -- it is 3 a requirement for which there is no remedy. There is 4 no enforcement mechanism. And so it just sort of sits 5 there in the statute book without, you know -- 6 MS. SILVA: Teeth. 7 MR. MILLER: Without teeth or much attention. 8 MS. SILVA: It's actually a recommendation to 9 the FPPC. 10 MR. MILLER: Oh. 11 MS. SILVA: It just says "recommended," 12 Elections Code. 13 MR. MILLER: Well, there you go. So they 14 recommend compliance with the Elections Code but lack 15 the ability to do anything about it. 16 CHAIRMAN SMITH: Are there any other 17 questions before we go to recommendations? 18 I think we're ready. 19 MR. MILLER: Okay. So our recommendation, 20 given that we found no violation of the Municipal Code, 21 is that you close the file on the matter and take no 22 further action, find no violations. 23 CHAIRMAN SMITH: Okay. So, according to our 24 options -- I don't need to read our options since we 25 talked about it last time. I think -- I think this is</p>	<p>1 CHAIRMAN SMITH: Commissioner Pierre-Dixon? 2 COMMISSIONER PIERRE-DIXON: So certified. 3 CHAIRMAN SMITH: Commissioner Peacock? 4 COMMISSIONER PEACOCK: So certified. 5 CHAIRMAN SMITH: And me, Commissioner Smith, 6 so certified. 7 There are no orders or penalties because we 8 closed the file. And no need to refer anything to 9 other agencies. 10 So at this point I would entertain a motion 11 that the Commission directs the City Attorney to draft 12 a Resolution of the Commission's findings and that the 13 Commission authorizes the Chair to approve and sign the 14 Resolution. 15 COMMISSIONER PIERRE-DIXON: I would so move. 16 COMMISSIONER LOUIE: I'll second. 17 CHAIRMAN SMITH: Okay. Thank you. 18 Discussion? 19 Okay. If not, all in favor? 20 (All Commissioners present responded Aye.) 21 CHAIRMAN SMITH: Any opposed? 22 (No response.) 23 /// 24 /// 25 ///</p>

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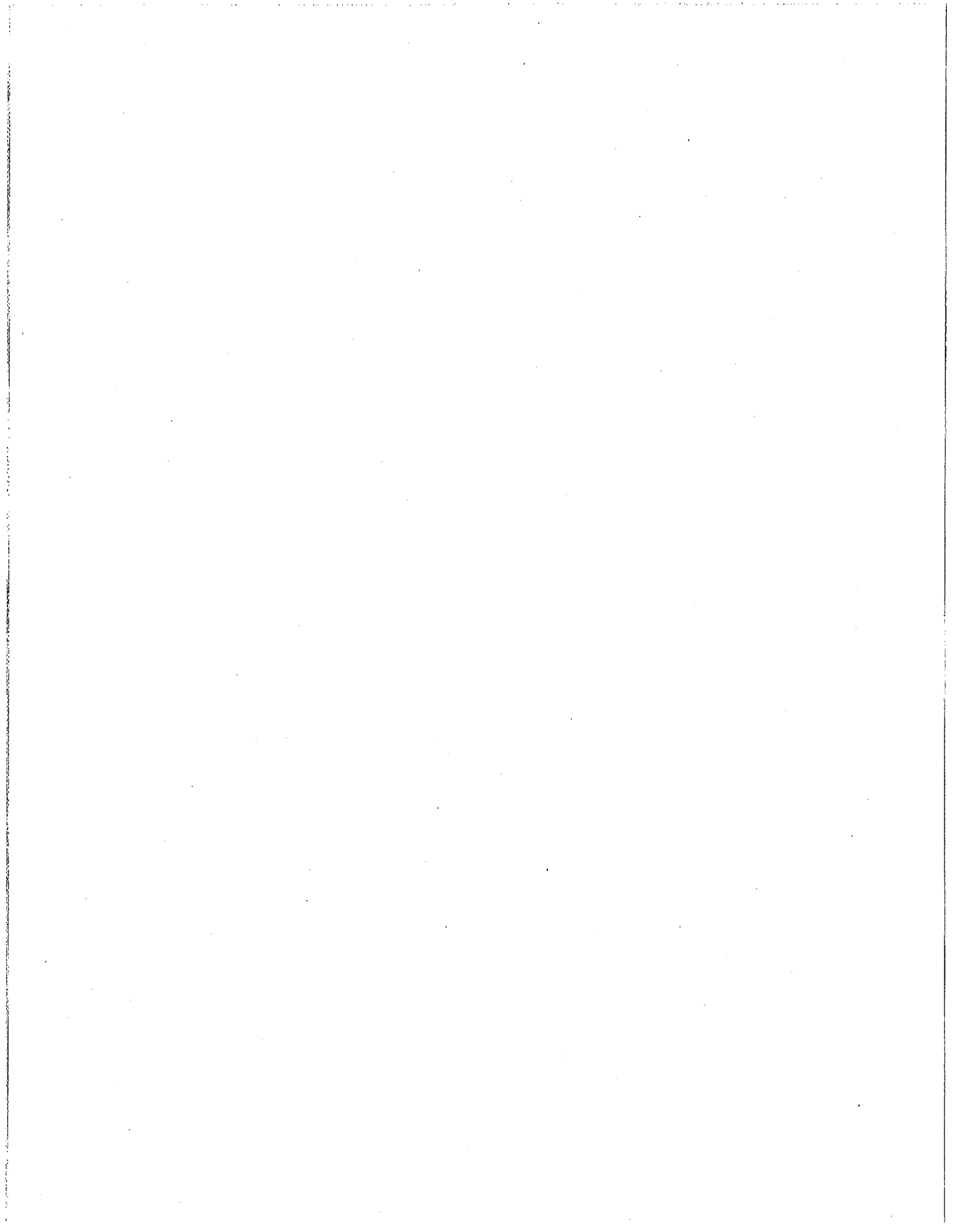
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1 CHAIRMAN SMITH: Okay. Once again, it's
2 four-zero-one.
3 And I will declare the hearing to be closed.
4 (Whereupon, Item III Hearings adjourned at
5 6:21 p.m.)
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2 I, NOELIA ESPINOLA, do hereby certify:
3 That said hearing was taken down by me at the
4 time and place therein named, and thereafter reduced to
5 computerized transcription under my direction.
6 I further certify that I am not interested in
7 the outcome of this hearing.
8
9
10

Dated: _____
11 NOELIA ESPINOLA, CSR #8060
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