Memorandum

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HANSON BRIDGETT MARCUS VLAHOS RUDY·LLP

TO: San Jose Elections Commission

FROM: Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP

DATE: June 8, 2007

RE: **Citizen Complaint**

Complainant: **Steve Lopez**

Respondents: **Oliverio for City Council Campaign, Sal Rubino**

Alleged Violations: **Contributions in Excess of Municipal Code Limits and Accepting Excess Contributions**

Complaint Filed: **February 27, 2007**

I. INTRODUCTION

Pursuant to a Citizen Complaint filed on February 27, 2007, we conducted an investigation to determine whether the Oliverio for City Council Campaign ("Oliverio Campaign" or "Campaign") violated Title 12 of the San Jose City Municipal Code ("Municipal Code") by accepting excessive contributions from several different contributors and whether those contributors violated the Code by making the contributions. In addition, we sought to determine whether the Oliverio Campaign failed to report a non-monetary contribution that it received by virtue of use of an office for a campaign event.[1]

II. EXECUTIVE SUMMARY

A. Alleged Excessive Contributions

Salvatore J. Rubino, Bonus Gaming, Classic Fighters Museum, and Valley View Packing each contributed $250.00 to the Campaign. There is some evidence that Mr. Rubino has an ownership interest in Bonus Gaming and Classic Fighters Museum. The evidence also shows Salvatore J. Rubino is the CEO of Valley View Packing. However, the evidence shows that the contribution from Valley View Packing was made by the Vice President of Valley View Packing.

[1] The investigation was conducted pursuant to Municipal Code §12.04.080 and City Council Resolution No. 72547.

1. Aggregation Rule

Under the Political Reform Act ("PRA"), contributions from a business entity are aggregated with the contributions of an individual if the individual making the contribution is the majority owner of the business entity or if the individual has authority to direct/control the contributions of the business entity (notwithstanding his/her ownership interest). Thus, if Contributor A makes a $250 contribution and Business A makes a contribution of $250, the two contributions would be aggregated – for a total contribution of $500 – if Contributor A owns more than 50% of Business A or if Contributor A has authority to direct the contributions of Business A.

Under this rule, it would appear that the contributions of Bonus Gaming and Classic Fighters Museum should be aggregated with Mr. Rubino's individual contribution if his ownership interest in the entities is more than 50% or he controls the contributions of the entities. However, the Fair Political Practices Commission ("FPPC") has interpreted the relevant section of the PRA regarding aggregation to exclude from the rule contributions from a business entity where the business is jointly owned in equal shares, or the authority to direct/control contributions is jointly exercised. Thus, if a business is owned 50-50 by two individuals and/or the two owners of a business jointly decide on contributions, under the PRA, each of the individuals may contribute to a candidate and the business may also contribute to the same candidate and none of the contributions will be deemed aggregated.

2. Conclusion

Because we have not been able to determine the exact nature of Mr. Rubino's ownership interest in Bonus Gaming and Classic Fighters Museum, and/or his control of the entities, we cannot determine whether those contributions violate the Municipal Code. On the other hand, because the contribution from Valley View Packing does not appear to have been directed by Mr. Rubino, we believe that this contribution does not violate the Municipal Code.

We are recommending that the Elections Commissions conduct a hearing with respect to the Bonus Gaming and Classic Fighters Museum contributions.

B. Alleged Acceptance of Excessive Contributions

The evidence fails to show that the Campaign was aware of facts indicating that the contribution from Salvatore J. Rubino was required to be aggregated with any other contribution at the time it accepted the contribution. In the course of our investigation and upon learning of the potential problem with the contributions from Bonus Gaming, Classic Fighters Museum, and Valley View Packing, the Campaign decided to return the contributions of the businesses. As this return of contributions was effected in accordance with the Municipal Code, we are recommending that the Elections Commission dismiss this allegation of the Complaint.

C. Non-Monetary Contribution

The evidence fails to sustain the allegation that the Campaign received any financial support or in-kind support for an event held at the office of Sal Rubino. On the contrary, the evidence shows that the Campaign paid for refreshments that were provided at the event and that under the applicable definition of a "contribution," the Campaign was not required to report a non-monetary contribution for use of the office space.

Accordingly, we are recommending that the Elections Commission dismiss this allegation of the Complaint.

III. COMPLAINT/ALLEGATIONS

A copy of the Complaint is attached as **Exhibit A**. The Complaint alleged violations of the contribution provisions of the Municipal Code, in particular that certain contributors made excess contributions to the Oliverio Campaign and that the Oliverio Campaign failed to report a non-monetary contribution.

IV. JURISDICTION OVER THE COMPLAINT AND DETERMINATION AS TO CAUSE FOR INVESTIGATION

Both Mr. Rubino and the Oliverio Campaign were notified of the allegations and presented with a complete copy of the Complaint on February 28, 2007. (**Exhibit B**)

Pursuant to a review of the Complaint and the relevant statutory provisions, the Evaluator determined that the Complaint alleged violations of the Municipal Code. Specifically, to the extent that Mr. Rubino was either a majority owner of any of the entities or exercised exclusive authority to direct the contributions of the entities, the contributions constituted a potential violation of §§12.06.540 of the Municipal Code. In addition, to the extent that the provision of office space for a fundraiser might constitute a non-monetary contribution to the Oliverio Campaign, the Campaign was obligated to report the contribution. To the extent that the Oliverio Campaign failed to do so, it could be in violation of §§12.06.270 of the Municipal Code.

V. FACTUAL SUMMARY

A. Contributions

1. Documentation of the Contributions

The disclosure reports show the following contributions to the Oliverio Campaign:

Sal Rubino - $250
Valley View Packing - $250[2]
Bonus Gaming - $250
Classic Firefighters - $250

(Exhibit C)

A review of the actual contribution checks indicates that although each of the checks is drawn on a different account, each of the checks for these contributions appears to be signed by the same individual. **(Exhibit D)** Also, the contribution from "Sal Rubino" is drawn on a checking account in the name of "Salvatore J. Rubino." We also reviewed the disclosure reports filed by the campaign, and determined that the contribution from Valley View Packing was made by its Vice President. (**Exhibit C**, p. 49) In our contact with the company and review of public documents, we determined that "Salvatore J. Rubino" is the CEO of Valley View Packing. It is likewise our understanding that Salvatore A. Rubino is the father of Salvatore J. Rubino. Salvatore Rubino, Sr. is to our understanding the Vice President of Valley View Packing.

2. Relationship Between the Contributors

As reflected in the Complaint, Bonus Gaming Services, Inc. is a company that appears to be located at the same offices as Valley View Packing and the other contributor, Classic Fighters Museum, Inc. Salvatore J. Rubino is listed as the agent for service of process for Bonus Gaming; the agent for Classic Fighters Museum is "Sal Rubino." In the course of our investigation we discovered that a Salvatore J. Rubino races classic fighter planes.[3]

3. The Campaign's Acceptance of the Contributions

The Campaign's treasurer described the procedures by which the Campaign accepted contributions. Under those procedures, donors were required to provide information to identify

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[2] This contribution is from the "VP [Vice President]" of Valley View Packing.
[3] In our initial conversation with Mr. Rubino, Sr. he indicated the possibility of some confusion or miscommunication with his son concerning the contributions and indicated he would look into the matter. We exchanged missed calls with him in attempting to follow-up on the matter. Subsequently, we wrote to him requesting clarification of the ownership of the entities and authority to direct the expenditures of the entities. We also sought to speak with Salvatore J. Rubino regarding the matter. Despite numerous attempts, we were not able to speak with either to resolve these questions.

the source of the contribution, including information that related to the employment of the person making the contribution. Based on this information that the Campaign received in conjunction with these contributions, it did not believe any problem existed with respect to the individual contribution of Mr. Rubino or the businesses.

In the course of the investigation we advised the Campaign of our concerns regarding the contributions from Valley View Packing, Bonus Gaming and Classic Fighters Museum. As the Campaign had not expended all of the contributions that it had collected and was concerned with the potential appearance of an impropriety, the Campaign decided to return the contributions. **(Exhibit E)**

B. February 17, 2007 Event

On February 17, 2007, the Campaign held an event at offices located at 1764 The Alameda. These offices are used by the Rubinos and one or more of the businesses with which they are associated. The Campaign treasurer stated that the Campaign paid for refreshments provided at the event and that the Rubinos did not contribute to the cost of any of the refreshments. **(Exhibit F)**

VI. LEGAL AUTHORITY

Relevant legal authority related to this investigation is found in the Municipal Code, the Political Reform Act (California Government Code §85000 et seq.), and the California Code of Regulations.

A. Municipal Code

The Municipal Code contains the following provisions relevant to this investigation:

1. 12.04.150 Precandidacy contributions.

No person shall be found in violation of this chapter for having made, solicited or accepted any contribution in excess of the limits prescribed herein, provided that the excess contribution was made, solicited or accepted at a time when the person was not a candidate for the elective city office subject to the limitation, and within thirty days of his or her becoming a candidate either:

A. The amount of contribution in excess of the prescribed limitation was refunded to the donor; or

B. The amount of contribution in excess of the prescribed limitation was donated to the general fund of the city, earmarked to defray the costs of municipal elections.

2. **12.06.010 Definitions.**

The following definitions used in this chapter shall have the meanings set forth below. Except as otherwise provided here, the terms and provisions of this chapter shall be interpreted in accordance with the applicable definitions and provisions of the Political Reform Act of 1974, as amended (Government Code Section 81000 et seq.) and the regulations of the California Fair Political Practices Commission, as amended.

3. **12.06.270 Contribution limitations to city council candidates.**

No person, other than the candidate in aid of himself or herself, shall make nor shall any person solicit or accept any contribution in aid of and/or opposition to the nomination or election of a candidate for city council which will cause the total amount contributed by such person to the candidate and any controlled committee of such candidate to exceed one hundred dollars per election, except as provided in Part 5 of this chapter.

4. **12.06.500 Voluntary campaign expenditure limits program.**

Each candidate participating in the voluntary campaign expenditure limits program shall comply with and receive all the benefits of the provisions of this chapter.

5. **12.06.540 Campaign contribution limits.**

Candidates who participate in the voluntary campaign expenditure limits program shall be entitled to collect contributions in the following amounts:

A. The total contributions per election made by any person to any council candidate participating in the voluntary campaign expenditure limits program or to the controlled committee of that candidate shall not exceed a total of more than two hundred fifty dollars in the aggregate.

B. The total contributions per election made by any person to any mayoral candidate participating in the voluntary campaign expenditure limits program or to the controlled committee of that candidate shall not exceed a total of more than five hundred dollars in the aggregate.

B. Political Reform Act

The Political Reform act (California Government Code §85000 et seq.) contains the following provision relevant to this investigation:

Section 85311

(a) For purposes of the contribution limits of this chapter, the following terms have the following meanings:

(1) "Entity" means any person, other than an individual.
(2) "Majority owned" means an ownership of more than 50 percent.

(b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual.

(c) If two or more entities make contributions that are directed and controlled by a majority of the same persons, the contributions of those entities shall be aggregated.

(d) Contributions made by entities that are majority owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person, unless those entities act independently in their decisions to make contributions.

C. FPPC Regulations

The regulations of the Fair Political Practices Commission Code[4] contains the following provision relevant to this investigation:

1. 18215. Contribution.

. . .

(c) Notwithstanding any other provision of this section, the term "contribution" does not include:

. . .

(3) A payment made by an occupant of a home or office for costs related to any meeting or fundraising event held in the occupant's home or office, if the total cost of the meeting or fundraising event is $500 or less, exclusive of the fair rental value of the premises.

2. 18215.1. Contributions; When Aggregated.

(a) Definitions. For purposes of determining when contributions are aggregated under the provisions of this title:

(1) "Entity" means any person, other than an individual;
(2) "Majority owned" means an ownership of more than fifty percent.

(b) The contributions of an entity whose contributions are directed and controlled by any individual shall be aggregated with contributions made by that individual and any other entity whose contributions are directed and controlled by the same individual;

(c) If two or more entities make contributions that are directed and controlled by a

[4] Set forth at 2 California Code of Regulations ("CCR").

majority of the same persons, the contributions of those entities shall be aggregated;

(d) Contributions made by entities that are majority owned by any person shall be aggregated with the contributions of the majority owner and all other entities majority owned by that person, unless those entities act independently in their decision to make contributions.

VII. FACTUAL FINDINGS AND ANALYSIS OF ISSUES

The facts in this matter are generally straightforward. Determining whether there has been a violation of the Municipal Code is primarily a legal question: Did the Contributors make contributions in accordance with Municipal Code requirements and did the Oliverio Campaign accept contributions in accordance with the Municipal Code requirements?

A. Does the Political Reform Act require that the contribution of Salvatore J. Rubino be aggregated with contributions from Valley View Packing?

No.

The Political Reform Act requires the aggregation of contributions in three circumstances, only two of which are relevant here. First, a contribution made by an entity must be aggregated with the contributions of the majority owner of that entity. (Govt. Code 85311; 2 CCR 18215.1) Second, regardless of majority ownership, the contributions of an entity must be aggregated with that of any individual who has the authority to "direct and control" that entity's contributions. (*Ibid.*) "Majority owned" is statutorily defined to mean an ownership of more than fifty percent. (*Ibid.*, emphasis added)

The FPPC, the body charged with implementing the Political Reform Act, has issued a number of advice and opinion letters interpreting the aggregation statute and regulation. (*See, e.g., Fechner Advice Letter*, No. I-03 -263; *Rossi Advice Letter*, No. I-93-211; *Bagatelos Advice Letter*, No. I-90-457.) **(Exhibit E)** These advice and opinion letters can be distilled into two rules applicable here:

- First, if two owners of an entity each possesses a fifty percent ownership interest, there is therefore no "majority owner" and neither owner's contributions should be aggregated with the contributions of the entity.

- Second, if two fifty/fifty owners exercise joint and equal control over the expenditures and contributions of the entity, neither owner has the necessary authority to "direct and control" the entity's contributions and there is again no aggregation of either owner's contributions with that of the entity.

In this instance, our initial conversation with Mr. Rubino Sr. indicates that he made a contribution in the name of Valley View Packing, acting as its Vice President. Although it

appears the check may have been signed by Mr. Rubino Jr., the information submitted with the contribution is consistent with Mr. Rubino Sr.'s account as it lists only Mr. Rubino Sr., the Vice President of Valley View Packing. There is no record of Mr. Rubino Sr. making an individual contribution that might be aggregated with that of Valley View Packing. We therefore believe the evidence supports the conclusion that the Valley View Packing contribution was proper.

B. Does the Political Reform Act require that the contribution of Salvatore J. Rubino be aggregated with contributions from Bonus Gaming and Classic Fighters?

There is insufficient evidence to make this determination.

Our conclusion here is tentative in that the records regarding Bonus Gaming and Classic Fighters Museum do not conclusively establish Salvatore J. Rubino's ownership or control over the businesses' contributions. The signature on the check suggests the requirement of aggregation in that it appears Mr. Rubino Jr. made these contributions in addition to an individual contribution. Furthermore, there is some evidence of control or ownership that would invoke the aggregation rule. Accordingly, pending determination at the hearing of the relevant facts, this allegation should not be dismissed.

C. Did the Oliverio Campaign comply with Municipal Code requirements regarding contributions?

Although the above discussion concludes that certain of the contributions may be subject to the aggregation rule, we do not find evidence that the Campaign was aware of facts precluding acceptance of the contributions. Under the Municipal Code the campaign may return a contribution, even where accepted improperly initially, within 30 days without penalty.

We find no evidence that the Oliverio Campaign knowingly accepted a precluded contribution or that it was negligent with respect to its acceptance of the contribution. As the contributions were returned in accordance with the Municipal Code, we find that the evidence fails to sustain a violation of the Municipal Code by the Campaign.

D. Did the Oliverio Campaign receive a non-monetary contribution with respect to the February 17, 2007 event?

No.

The evidence shows that the campaign paid for the refreshments provided at the event. Moreover, the evidence also shows that the cost of items provided at the event was less than $500.00. Under the definition of "contribution" there is no requirement to report the office space provided for the event as a non-monetary contribution. (See Exhibit G, p 2-2)

VIII. RECOMMENDATIONS

A. Contributions by Salvatore J. Rubino, Valley View Packing, Bonus Gaming and Classic Fighters Museum

We recommend that the Elections Commission conduct a hearing to determine the relationship between Mr. Rubino and the entities to determine whether the evidence indicates a violation of the aggregation rule.

B. Acceptance of Contributions by the Oliverio Campaign

As the Oliverio Campaign has taken steps to promptly return the precluded contribution, we also recommend that the Elections Commission dismiss the Complaint and close the file in this matter without further action.

C. Non-Monetary Contribution Based on the February 17, 2007 Event

We recommend that the Elections Commission dismiss the Complaint and close the file in this matter without further action.

Respectfully submitted,

Mike Moye/jm

Joan L. Cassman
M. D. Moye
Steven Miller

ATTACHMENTS TO REPORT OF INVESTIGATION

- **Exhibit A -** Citizen Complaint Form, dated February 27, 2007
- **Exhibit B -** Letters from Hanson, Bridgett, Marcus, Vlahos & Rudy, LLP, to Oliverio Campaign and S. Rubino, dated, February 28, 2007, re: Notification to Respondent
- **Exhibit C -** Excerpt of the FPPC Form 460 filed by the Oliverio Campaign, for the period ending September 30, 2006
- **Exhibit D -** Copies of Checks received by the Oliverio Campaign
- **Exhibit E -** Letters from Oliverio Campaign Returning Contributions
- **Exhibit F -** Receipt from February 17, 2007 event
- **Exhibit G -** Excerpt from Campaign Disclosure Manual 2