

Memorandum

TO: San Jose Elections Commission

FROM: Hanson Bridgett

DATE: June 18, 2008

RE: Citizen Complaint

Complainant: **Lan Nguyen**

Respondent: **Minh Duong City Council Campaign**

Alleged Violations: **Illegal Campaign Communication**

Complaint Filed: **May 28, 2008**

I. INTRODUCTION

Pursuant to a Complaint filed on May 28, 2008, we conducted an investigation to determine whether Minh Duong or the Minh Duong for City Council Campaign, or any other entity, violated Title 12 of the San Jose City Municipal Code ("Municipal Code") by sending a communication in the form of a mailer entitled "Vietnamese and Candidates with Vietnamese Ancestry" ("the Mailer") without identifying the person or entity who paid for the communication. In addition, although not directly alleged in the Complaint, we sought to determine whether the Mailer was sent at the behest of the Duong campaign, which might indicate that the cost of the Mailer should be counted as a contribution to the Duong campaign. Finally, we address the Complaint's allegation that the advertisement/mailer contains false and misleading information.

II. EXECUTIVE SUMMARY

We have found no evidence to sustain the allegation that there has been a violation of the Municipal Code. The Municipal Code requires disclosure of the source of a mailer only where the mailer is sent by a person or entity not a candidate or representing a candidate and when the content expressly urges support for or opposition to a candidate (such support is presumed when the source of the mailer is the candidate him or herself or a committee controlled by the candidate). The Municipal Code does not require disclosure of the source of a communication, like this one, that does not expressly urge support for or opposition to a particular candidate.

V. FACTUAL SUMMARY

On or about May 6, John Vu, a financial consultant who lives in Fremont, sent out the Mailer.¹ Mr. Vu states that he sent the Mailer to all registered voters in District 8 that he thought were Vietnamese-Americans based upon their surnames.

As Exhibit D indicates, the Mailer presents a series of statements:

- The demographics of District 8.
- The demographics of the candidates for City Council in District 8.
- The amount of money the candidates have raised, and how much each candidate has contributed to his or her own campaign.
- Minh Duong and Lan Nguyen's position on appointed or elected political bodies.
- Mr. Nguyen's support from members of the Vietnamese community.
- Van Lee's experience in organizing.
- The Candidates' positions regarding the naming of "Little Saigon" or the "Saigon Business District."
- "Political Commentators say that Rose Herrera and Minh Duong are the two leading candidates."
- A candidate only needs 4,000 votes to win the primary and it is likely that voter turnout will therefore be the determining factor.

The Mailer concludes by urging voters of Vietnamese descent to vote and also concludes with the comment, "the question is can we cast a vote for a person that wants to represent the community, but does not follow the will of the community."

The Mailer nowhere indicates who wrote or paid for it. The Commission's investigator, by tracking the postal permit used to send the Mailer, determined that the Mailer was sent by Mr. Vu. The return address on the Mailer is "Tin Nguoi Viet," which can be translated as either "The Vietnamese News," or "Trust in Vietnamese." Mr. Vu asserts that he intended the latter meaning, and that in fact this is the name of an independent expenditure committee that he controls. Indeed, the Secretary of State lists "Tin Nguoi Viet" as a registered Committee. Mr. Vu's intended meaning is also corroborated by our investigation, which has not revealed the existence of an organization called "The Vietnamese News." In addition, the return address includes a post office box that does not exist, and a zip code that does not match the type of post office box used.²

¹ As indicated in **Exhibit B**, the Mailer is in Vietnamese. We prepared an English translation of the Mailer, included at **Exhibit D**. Both the Respondent and the Complainant were given an opportunity to review the translation and comment as to its correctness. Neither offered any comments.

² As indicated in **Exhibit E**, the Investigator found Mr. Vu evasive on the issue of the incorrect return address and concluded that Mr. Vu intended to hide the source of the Mailer. While we do not necessarily dispute the Investigator's conclusion, we do not find that it alters our conclusion. Because the Mailer is not a communication that expressly urges support for or opposition to a particular candidate, it does not trigger any disclosure requirements under the Municipal Code. As to the possibility that the

rebates not extended to the public generally or the granting of discounts or rebates by television and radio stations and newspapers not extended on an equal basis to all candidates for the same office; the payment of compensation by any person for the personal services or expenses of any other person, if such services are rendered or expenses incurred on behalf of a candidate or committee without payment of full and adequate consideration; and the transfer of anything of value.

B. Volunteer personal services; payments made by an individual for his or her own travel expenses if such payments are made voluntarily without any understanding or agreement that they shall be directly or indirectly repaid to him or her; or independent expenditures made by independent committees are not deemed to be contributions for purposes of this chapter.

2. 12.06.130 Independent expenditure.

"Independent expenditure" shall mean an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate, or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election, but which is not made to or at the behest of the affected candidate or committee. An expenditure that is made to or at the behest of a candidate or controlled committee is not an "independent expenditure."

Any expenditure in aid or in opposition to a council or mayoral candidate which is not an "independent expenditure" is deemed to be a contribution to that candidate, subject to the limitations of this chapter.

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. 12.06.1000 Disclosure Requirements for Candidate Mass Mailings

A. In addition to the requirements set forth in California Government Code Section 84305, any candidate or committee for City elective office that pays for a mass mailing with funds raised for the candidate's campaign must print, display or incorporate the following words in not less than 12 point type and in a color or print which contrasts with the background so as to be easily legible anywhere within the communication or mailing: "Paid for by" immediately followed by the name, address and city of that candidate or committee. A post office box may be stated in lieu of a street address if the candidate's address is a matter of public record with the City Clerk. If the sender of a mass mailing is a controlled committee, the

so as to be clearly audible and understood by the intended public and otherwise appropriately conveyed for the hearing impaired.

B. For purposes of this Section, the term "campaign advertisement" means:

1. More than two hundred (200) substantially similar pieces of campaign literature distributed within a calendar month, including but not limited to mailers, flyers, facsimiles, pamphlets, and door hangers;
2. Posters, yard or street signs, billboards, and similar items;
3. Television, cable, satellite and radio broadcasts; and
4. Newspaper, magazine, and similar advertisements.

B. Political Reform Act.

The Political Reform Act (California Government Code §81000 *et seq.*) contains the following provisions relevant to this investigation:

1. Govt. Code 82041.5.

"Mass mailing" means over two hundred substantially similar pieces of mail, but does not include a form letter or other mail which is sent in response to an unsolicited request, letter or other inquiry.

2. Govt. Code 84305.

(a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.

(b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.

(c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a).

implication, dependent upon individual perception of those facts, is sufficient to constitute express advocacy.

For instance, the comment "the question is can we cast a vote for a person that wants to represent the community, but does not follow the will of the community" might be characterized to support Mr. Duong, who, according to the mailer was in favor of naming the Vietnamese business district "Little Saigon" while Mr. Nguyen was allegedly supported by those who opposed the "Little Saigon" designation. Indeed, Mr. Duong acknowledges that he himself understood the Mailer to support his candidacy.

But the Mailer only puts forth the alleged facts of support for or against the "Little Saigon" designation without urging support for or opposition to a candidate on that basis. If one were against such a name, the Mailer might well have been read as expressing support for Mr. Nguyen. In addition, the Mailer states that Mr. Nguyen was supported by Henry Le, Ngai Nguyen, and Liem Nguyen. While support from prominent members of the Vietnamese community in San Jose might be controversial, it could have been helpful to the Complainant's campaign if read by people who valued the opinions of the three named supporters.

Consequently, we conclude that because the Mailer is essentially a summary of statements presented as facts, the possible insinuation of support or opposition does not trigger Section 12.06.1010's disclosure requirement.

C. Is the Mailer a Campaign Advertisement Subject to Section 12.06.1020's Disclosure Requirements.

No.

Section 12.06.1020 only applies to a campaign advertisement that "urges support for or opposition to one or more candidates for City elective office[.]" We assume that the Mailer was sent to more than 200 people and is therefore a "campaign advertisement."

It is not entirely clear whether the requirement in Section 12.06.1020 that a mailer "urge support for or opposition to" a candidate is different from the legal standard of "express advocacy" discussed above. In any event, as noted above, we do not find that the content of the Mailer constitutes express advocacy.

Furthermore, we do not find that the Mailer was "urging" support for or against a candidate. The Mailer urges participation in the election, and arguably does so for the purpose of generally supporting Vietnamese-American candidates, but does not identify any one candidate to be supported or opposed.⁴ At most, there exists the possible implication of such support. We do not find that such an implication, even assuming it exists, is sufficient to trigger Section 12.06.1020's disclosure requirements.

⁴ For the one non-Vietnamese-American candidate identified in the mailer, there is no statement of support or opposition to her candidacy.

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ATTACHMENTS TO REPORT OF INVESTIGATION

- EXHIBIT A** **The Complaint**
- EXHIBIT B** **The Mailer**
- EXHIBIT C** **Letter to Minh Duong**
- EXHIBIT D** **Translation of the Mailer**
- EXHIBIT E** **The Investigator's Report**

**EXHIBITS ARE AVAILABLE
FOR VIEWING IN THE
OFFICE OF THE CITY CLERK**