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January 16, 2009

San Jose Elections Commission
City of San Jose
200 E. Santa Clara Street
San Jose, CA 95113

Re: Complaint Against McEnery / Urban Markets, LLC

Dear Commission Members,

I am writing concerning the complaint filed against my clients, Tom McEnery, John McEnery IV and Urban Markets, LLC by Attorney James McManis on behalf of his anonymous client, John Doe.

While we understand that this complaint has been referred to an evaluator by the City Clerk under the Rules and Regulations set forth to your Commission, we would like to bring to your attention a certain fundamental issue which we think should be addressed, even prior to receiving any recommendation from the evaluator. That issue is as follows:

To what extent should the Commission give credence to or even refer for evaluation an anonymous complaint filed against a private citizen, which on its face is a blatant and personal attack against that citizen by a person who refuses to identity himself ?

The City of San Jose Lobbying Ordinance, specifically Sect. 12.12 et al, does not directly allow for or make reference to the filing of an "anonymous complaint" under that code section. Sect. 12.12.610 states that "Any person may file a complaint with the City Clerk alleging a violation of this Chapter with the Elections Commission." A "person" is defined under 12.12.200 as meaning "any individual, business entity, trust, corporation, association, committee, or any other organization or group of persons acting in concert." While the lobbying ordinance does not make mention of an anonymous complaint, and arguably thereby does not allow such a

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filing, Resolution 72547, which sets forth the general regulations and procedures for the San Jose Elections Commission, does allow for the filing of a general anonymous complaint, but states that "in this situation the complainant must state good cause for anonymity." (emphasis added) It also adds that "The evaluator and the Commission may consider the anonymous nature of the complaint and the reasons given for anonymity in their consideration of such complaint." In fact, on the actual form used by the complainant, it is made clear that the Board will take the fact of anonymity and or failure to verify into consideration in deciding whether or not to even investigate the complaint.

In review of the Complaint on file in this matter, it is apparent from the onset that the Complainant here has failed to meet even a minimal burden of showing "good cause" for the anonymity. The only reason cited in the Complaint is the language "fear of retaliation." In support of that alleged fear, the complainant alleges on page 3 of the Complaint that "Tom McEnery himself has been described in an article printed in the San Jose Mercury News as the most powerful person in San Jose." Of course, the article quoted is an article written over 18 years ago at a time when Mr. McEnery was in fact the Mayor of this City. It is almost absurd that such perceived power of Mr. McEnery would still exist 18 years later and after three mayors have sat in that seat since Mr. McEnery. It is even more absurd for this to be used as the only basis for establishing the "good cause" needed for anonymous filing.

Certainly the Council, in setting forth the rules for the filing of an anonymous complaint, did not have in mind a complaint such as this, being filed by a person whose only reason for anonymity is to protect the true motive of filing the complaint, or perhaps as the recent editorial in the San Jose Mercury News noted, it was for "fear of embarrassment."

This anonymous person is not in fear of being fired by Mr. McEnery whose family run business has only one full time employee, of any economic retaliation or any other legitimate reason one might file anonymously. He or she simply does not want to acknowledge his or her identity and therefore allow the commission and the public to gain an insight into the real purpose for this filing.

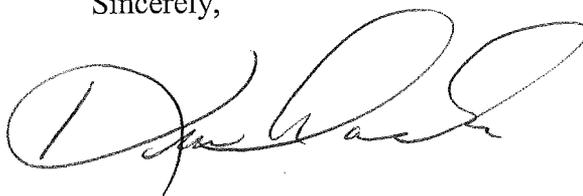
It is ironic that in filing this complaint this "John Doe" pays lip service to a "need for transparency" in government yet won't accept the most basic form of transparency, i.e. revealing the identity of who is behind the allegations.

In conclusion, we would ask that the Commission not allow itself to be used as a political forum for an anonymous complaint such as this by giving credence to this anonymous complaint or any other such complaints in the future. At minimum, there should be procedures set in place to review the acceptance of any anonymous complaint brought forth to the Commission before it is referred to an independent evaluator. Prior to any referral for evaluation, the Commission or some third party should make a decision as to whether "good cause" for such an anonymous filing has been met.

In this case the complainant has failed to meet his burden to show good cause for such anonymity. Based upon that fact alone, the complaint should be dismissed and no further evaluation should be required.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Kenneth J. Machado, Jr.", written in a cursive style.

Kenneth J. Machado, Jr.
Attorney At Law

KJM/md

CC: Clients
Hanson Bridgett, LLP / Attn: M. D. Moye

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January 22, 2009

VIA EMAIL

Kenneth J. Machado, Jr.
33 North San Pedro Street
San Jose, CA 95110

Re: ***Complaint Before the City of San Jose Elections Commission***
Respondent: John McEnery IV, Tom McEnery, Urban Markets LLC
Nature of Complaint: Violation of Lobbyist Ordinance
Complaint Filed: December 8, 2008
Complainant: Anonymous

Dear Mr. Machado,

The City of San Jose Elections Commission ("Commission") has retained our firm pursuant to Chapter 12.04.080 of Title 12 of the San Jose Municipal Code ("Municipal Code") to serve as Evaluator for the above-referenced Complaint. As your letter to the Commission of January 16, 2009 concerns procedural matters related to the Complaint and to our duties as Evaluator, the City Attorney has requested that we provide a response to you.

The Commission's procedures are set forth in Resolution No. 72457 ("the Resolution"). Paragraphs E.4 and F.2 of the Resolution provide that "every" complaint shall be forwarded to the Evaluator and that the Evaluator shall review each complaint to determine if an investigation should be conducted. Our review includes determining compliance with procedural requirements of the Municipal Code and the Resolution as well as applying the standard set forth under paragraph F.2 of the Resolution. Under the Commission's established procedures, the Chair is informed of the filing of a complaint and is advised generally as to the status of pending investigations, but the Commission does not review the complaint until we file a report either recommending against an investigation or upon conclusion of an investigation.

In this instance, we determined that the Complaint alleged specific facts, which if proven, would be a violation of the Municipal Code. We also determined that the Complaint substantially complied with the applicable procedural requirements. Accordingly, we have commenced an investigation and anticipate filing a report of our findings with the Commission.

As you note, the Complaint was filed "anonymously" in that the name of the complainant was not provided. As neither the Municipal Code, nor the Resolution require a complainant to have personal knowledge of the facts purporting to underlie the complaint, the identity of the complainant typically does not impact the decision as to whether an investigation is warranted.¹ Rather, the filing of an anonymous complaint raises the question of whether an adequate

¹ For example, any person could file this same complaint, listing themselves as the complainant. Because, as noted above, the Complaint meets the substantive requirement for conduct of an investigation, an investigation would be required; thus, the anonymity of the complainant, in and of itself, is insufficient reason to forego an investigation.

investigation can be conducted. Consequently, as part of our evaluation we consider the extent to which the complainant appears to have personal, and/or exclusive, knowledge of facts relevant to the complaint that could impede the investigation or cause the investigation to be incomplete because a key witness - the complainant - could not be questioned. Similarly, we would consider the likelihood that the opportunity to evaluate the credibility of the complainant is a necessary element in resolving disputed evidence. To the extent either of these issues is raised, the next step would be to determine whether "good cause" for anonymity of the complainant exists such that protection of the identity of the complainant outweighs any potential prejudice to the impartiality of the investigation or the parties to the matter.

In this instance, the nature of the allegations indicate the identity of the complainant is not essential to a complete investigation that is fair and impartial. The Complaint alleges no violation that appears to depend upon the personal or exclusive knowledge of the complainant; in fact, the allegations are premised largely on objective facts ascertainable from public records and third-party interviews. We do not foresee any circumstance where obtaining information directly from the complainant would be critical to this investigation. Although the "motive" behind the filing of a complaint may relate to the credibility of a witness who purports to have personal knowledge of facts relevant to the complaint, that is not the case here. In sum, the identity of the complainant in this matter is not essential to conducting the investigation and to providing the Commission with a complete factual record for consideration of the merits of the Complaint.

As our evaluation concludes that an investigation is warranted, your proposals concerning the Commission's procedures can be addressed to the Commission in conjunction with its review of our report in this matter, or separately, as provided for under the Municipal Code. Likewise, the issue posed by the question in the first part of your letter concerning the identity of the complainant can be addressed to the Commission at the time it considers the report in this matter.²

Let me know if you have any questions concerning the foregoing.

Very truly yours,



M. D. Moye

cc: San Jose City Attorney
San Jose City Clerk
Chair, San Jose Elections Commission

² Paragraph E.6 of the Resolution provides that "[t]he Evaluator and the Commission may consider the anonymous nature of the complaint, and the reasons given for anonymity in their considerations of such complaint."