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March 25, 2009

VIA HAND DELIVERY

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

Re: Complaint Against Tom McEnery, John McEnery IV, and Urban Markets LLC

Dear Members of the San Jose Elections Commission:

As you are aware, our office represents John Doe, the anonymous complainant who filed the above-referenced complaint. We are writing in response to the letter sent you, dated March 19, 2009, by Kenneth J. Machado, Jr., Esq., counsel for respondents. Mr. Machado did not copy us on this correspondence, as is customary. We received it from Ms. Lee Price.

Without citing any authority to support his position, Mr. Machado claims that "a finding of good cause for anonymity should have been made by someone, either the Commission, a sub-committee of the Commission or some third party" before investigation of the complaint. He then goes on to request, also without any supporting authority or evidence, that at the regular Commission hearing in April, "the Commission make a finding that good cause for anonymity has not been shown and therefore this complaint should go no further and be dismissed." This transparent attempt by Mayor McEnery to avoid a hearing on the merits of the complaint against him should be rejected.

First, it is important to note that in communicating with the Commission regarding a matter where our office represents the complainant, Mr. Machado did not provide us with a copy of his letter. The Rules of Professional Conduct, however, make it inappropriate to have ex parte communications with a tribunal about a pending matter, without notifying the opposing side. (See Rules Prof. Conduct, Rule 5-300.) We therefore request that the Commission direct Mayor McEnery and his counsel to copy our office on all future communications regarding this matter.

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Moreover, Resolution No. 72547 makes clear that the Commission is not granted the authority to halt an investigation, or to make a finding of "no good cause" for anonymity of a complainant, before the Evaluator completes his investigation and submits a written report. In addition, the Resolution does not allow for the dismissal of a complaint for purported lack of "good cause" for anonymity.

Section E4 provides that a complaint "may be filed anonymously, but in this situation, the complainant must state good cause for anonymity." This section further 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." In other words, the Evaluator and the Commission may consider whether there is good cause for anonymity as a factor in evaluating the merits of the complaint. This section does not provide that a complaint may be dismissed if good cause for anonymity allegedly does not exist. On the contrary, doing so would result in the Commission's ignoring blatant violations of the City's laws—such as occurred here. Once violations have been brought to the attention of the Commission—as was done here—the Commission is obligated to enforce the City's ordinance under Section 12.04.070A of the Municipal Code. The Commission may not shirk its duty simply because it does not know the identity of the complainant.

The Commission should also note that Resolution No. 72547, sections F2 and F6, grant the Evaluator the authority to "review every complaint to determine whether sufficient cause exists to conduct a preliminary investigation." Having taken into consideration the "reasons given for anonymity in [ ] consideration[ ] of such complaint", "[i]f sufficient cause is found by the Evaluator... the Evaluator shall conduct an investigation." (Emphasis added.) In other words, it is the Evaluator—not the Commission--that has the authority to determine whether to conduct an initial investigation, taking into consideration the anonymous nature of the complaint and the reasons given therefor. The Commission cannot change this procedure, without a proper amendment to the Resolution, made by the San Jose City Council. (SJMC § 12.04.080A.)

In this case, the Evaluator reviewed the complaint, considered its anonymous nature, and determined that "the Complaint alleged specific facts, which if proven, would be a violation of the Municipal Code." The Evaluator further determined that "[t]he 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

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ascertainable from public records and third-party interviews." (See Letter from M. D. Moye dated January 22, 2009, copy enclosed.)

The Evaluator's assessment is correct. The Complaint, and its subsequent supplemental complaint, allege that since 2007, Urban Markets and Tom and John McEnery, have been lobbying Mayor Chuck Reed and his staff, members of the City Council, City Manager Debra Figone, Redevelopment Agency Executive Director Harry Mavrogenes and other high-ranking City Officials, to secure taxpayer resources, including money and City Officials' time, to fund personal projects. In doing so, the McEnerys and their company failed even to register as lobbyists until May, 2008, after the City was essentially ready to enter into an Exclusive Negotiations Agreement.

Even after registering, Respondents continued to fail to file quarterly reports or to disclose most of their contacts with City Officials as required by the City ordinance. Each and every allegation in the complaint and its supplement is fully documented by City Official calendars, emails, correspondence and other documents that are all a matter of public record. It is telling that in complaining to the Commission how unfair it all is, neither Mayor McEnery nor his attorney, Mr. Machado, have made any attempt to refute the substantive allegations made. This failure is understandable. They have no defense, thus the distracting claims about "anonymous complaints" and the "need for reform."

We request that the Commission take no action with respect to this case until the investigation is completed and a report has been submitted by the Evaluator.

It is our understanding that the Commission has called a special meeting set for March 25, 2009, at 5:30 p.m. The agenda for the special meeting includes an item to "[e]stablish a subcommittee to consider procedures for anonymous complaints." Based on the agenda item, it does not appear that the Commission intends to discuss our client's complaint, or the respondents' request in their lawyer's March 19 letter. Also, pursuant to Government Code section 54956, the Commission cannot discuss or take any action with respect to this matter, without proper public notice.

Therefore, we do not intend to appear at this special meeting. We do plan to attend the Commission's next regularly scheduled meeting on April 8.

Thank you.

Very truly yours,

McMANIS FAULKNER

JAMES MCMANIS

MARWA ELZANKALY

JM: ME:hw

cc: Kenneth J. Machado, Jr., Esq. (*via facsimile and electronic mail)*
M.D. Moye, Esq. (*via facsimile and electronic mail)*
Lisa Herrick, Esq. *(via facsimile and electronic mail)*

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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."