

MEMORANDUM

TO: San Jose Elections Commission

FROM: Hanson Bridgett LLP

DATE: July 12, 2010

RE: Citizen Complaint

Complainant: **Robert Sandoval**

Respondent: **Minh Duong / Minh Duong for Council Committee**

Alleged Violations: **Violation of the Campaign Ordinance: Filing
Inaccurate/Incomplete Campaign Reports**

Complaint Filed: **May 19, 2010**

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I. INTRODUCTION

Pursuant to a complaint filed on May 19, 2010 ("Complaint")¹, we have conducted an investigation to determine whether Minh Duong/Minh Duong for Council Committee (collectively "Respondent") violated Title 12 of the San Jose City Municipal Code ("SJMC" or "Municipal Code").² The Complaint alleges that Respondent failed to resolve a campaign debt in accordance with the requirements of the Municipal Code.

As explained in more detail below, we conclude that the evidence sustains the allegation. In addition, as a result of this violation and other evidence uncovered in the course of our investigation we have concluded that the evidence sustains other violations of the Municipal Code.

II. EXECUTIVE SUMMARY

Respondent entered into an agreement with Imprenta Communications Group ("ICG") for campaign consulting services. The agreement provided that Respondent would pay ICG \$5,000 in three installments (February 15, April 1 and May 1, 2008) for consulting fees. ICG later billed Respondent \$5,250 and \$17,209 for costs not covered by the consulting fees. The evidence shows that Respondent terminated the agreement some time in May 2008; Respondent paid ICG a total of \$5000 for campaign consulting services. Respondent terminated his campaign committee on June 30, 2008; thereafter, he filed no additional campaign reports and made no further payments to ICG.

A. The Evidence Shows that Respondent Incurred an Expense That Was Not Resolved by the End of the Campaign and Remains Unresolved.

Respondent was required to disclose its transactions with ICG on FPPC Form 460 both as expenditures when payments were made and as accrued expenses when an obligation to pay ICG arose, but payment had not yet been made. Respondent disclosed its payment to ICG, but did not report accrued expenses. Respondent was required to report any accrued expenses until resolved by payment or forgiveness. The evidence shows undisputed expenses to ICG that were not reported as accrued expenses; applicable law requires that a candidate continue to report accrued expenses until resolved. This did not occur. We recommend that the Commission find these facts to constitute violations (failure to report accrued expenses on pre-election reports; failure to file additional reports).

Although there is a current dispute between Respondent and his former consultant, the evidence demonstrates Respondent was aware of a demand for money by ICG that had not been resolved at the time his campaign terminated. Under the Municipal Code, Respondent was required to resolve this debt within six months of the election. Unresolved debts may be treated as contributions (dating back to the time the debt was incurred) in certain circumstances; an unresolved debt that is treated as a contribution after the fact in this manner is subject to the campaign contribution limits. The evidence shows the debt was not paid, forgiven or abandoned. The evidence also indicates Respondent acknowledges some portion of the

¹ The Complaint is attached hereto as **Exhibit A**.

² The investigation was conducted pursuant to Municipal Code §12.04.080 and City Council Resolution No. 75260.

claimed debt and did/does not intend to pay disputed amounts. From this evidence, the Commission may conclude, and we recommend that the Commission find, that Respondent did not satisfy its obligation to resolve the debt as required by the Municipal Code. However, as there is insufficient evidence – due to the pending litigation, in which Respondent may be found to owe no debt to ICG – to determine the precise nature of Respondent’s liability to ICG, we recommend the Commission defer disposition of this item.

B. The Evidence Shows that Respondent Did Not Accurately Report Campaign Expenditures and Terminated the Campaign Committee Without Resolving Items that Should Have Been Disclosed.

As noted above, Respondent was required to disclose its transactions with ICG on FPPC Form 460 both as expenditures when payments were made and in certain instances as accrued expenses. The evidence shows that at one point Respondent attempted payment of the amount owed to ICG, but this payment was not finalized. There is also evidence that Respondent received a loan that was reported as required by law. However, there was no further report as to the status of this loan. As a result, there was a discrepancy in the final report of disposition of campaign contributions and evidence that the campaign did not dispose of all of its contributions or – as noted above – resolve all of its debts. We recommend that the Commission find that these facts constitute a violation (inaccurate statement).

Respondent terminated the campaign committee before these discrepancies were resolved. Under applicable state law, the committee should not have been terminated given these circumstances. Furthermore, as a result of terminating the committee, Respondent did not continue to file disclosure reports to resolve open issues (related to both disposition of contributions and expenditures). Accordingly, we recommend the Commission find that these facts demonstrate violations of the Municipal Code.³

III. COMPLAINT/ALLEGATIONS

A copy of the Complaint is attached as **Exhibit A**. The Complaint alleged that Respondent had a debt outstanding that had not been resolved in accordance with the Municipal Code.

In the course of our investigation, we determined that the Complaint raised the following issues related to the allegation in the Complaint:

- failure to report accrued expenses;
- improper, inaccurate or false campaign reports (FPPC Form 460) and/or failure to file campaign reports⁴; and
- improper termination of a campaign committee.⁵

³ The allegation in the Complaint, and the related allegations, concerned Respondent’s 2008 campaign. We were advised of potential issues regarding the timely filing of campaign reports related to Respondent’s 2010 campaign for office and reviewed that matter as well. (**Exhibit J**) The evidence shows that Respondent has corrected issues related to his 2010 campaign and the City Clerk has imposed corrective action to address the untimely reporting. Based on these facts we are not recommending further action regarding the 2010 campaign.

⁴ See footnote 3.

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

A. Evaluation of the Complaint.

Respondent was notified of the allegations and presented with a complete copy of the Complaint on May 21, 2010. (**Exhibit B**) Pursuant to a review of the Complaint and the relevant statutory provisions, we determined that the Complaint and the supplemental issues alleged violations of the Municipal Code.

Specifically, to the extent Respondent was involved in litigation over a debt from his 2008 campaign and facts demonstrated that some debt was outstanding, the Municipal Code requires that the debt be resolved or that campaign reports be filed to track the status of expenditures related to the debt. In addition, if the evidence demonstrates that a campaign committee has not expended all contributions or resolved outstanding debts, the committee should not be terminated and it should continue to report on the status of its contributions and expenditures as required by law.

These allegations constituted a potential violation of §§12.06.540 and 12.06.910, and Title 12, Chapter 6, Part 7 of the Municipal Code.

B. Conduct of the Investigation.

Our investigation encompassed interviews of the Respondent,⁶ and the City Clerk. We also reviewed documents on file with the City Clerk and additional documentation provided by the witnesses.

V. SUMMARY OF RELEVANT FACTS

A. ICG's Claim of Money Owed by Respondent for Campaign Consulting Services.

On January 19, 2008, Respondent entered into a Memorandum of Understanding ("MOU") with Imprenta Communications Group ("ICG"), through its principal Russell Wong, to provide "professional consulting services" to the Minh Duong for Council Committee. (**Exhibit E**) The MOU set forth a "scope of services" that included:

- ICG would "conceive, write, design, develop, and produce all campaign literature and direct mail pieces";
- "ICG shall manage printing and production of mail pieces"; and

⁵ This is an issue of potential violation of the Political Reform Act. We address this issue only to the extent that it presents an issue of potential violation of the Municipal Code as well.

⁶ We sought to interview the attorney representing the Respondent's former campaign consultant, but as of the filing of the report that interview is pending. We do not anticipate that that interview will alter the findings and conclusions.

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- "ICG shall assist MD campaign with field targeting and GOTV program as necessary."

The MOU further provided for Respondent to pay a fee of \$15,000 in three equal installments (February 15, April 1 and May 1) for these services. The set fee did not include "printing, postage, graphics, translation, or production of mail or collateral materials." The MOU was terminable by either party upon written notice. If the MOU was terminated, Respondent agreed to "pay ICG the prorata share of compensation earned by ICG up until the time of termination together with any additional budgeted expenses incurred by ICG."

Respondent made the first installment payment under the MOU. Respondent did not make any other payments to ICG specifically covering the installment fee.

In mid May, Respondent became concerned that he was not being provided adequate services by ICG as the election approached and he contacted Mr. Wong to address his concerns. Respondent was not satisfied with the response from Mr. Wong and was particularly concerned that Mr. Wong was on vacation during what Respondent believed to be a critical juncture in the campaign. Respondent terminated the agreement at this point. Though the MOU required that written notice of termination be given, Respondent did not give that notice.

On May 18, 2008, ICG invoiced Respondent's campaign for \$5,250 for "Design Fee- 3 mailers." (**Exhibit F(1)**) The invoice referenced a biography and issue statements in Vietnamese and English as well as several "free" items/services. Respondent states that he did not receive this invoice.⁷ Respondent also denies discussing these items with ICG or giving his approval for expenses to be incurred for these items.

On June 10, 2008, ICG sent another invoice to Respondent in the amount of \$17,209. This invoice references \$5000 for "consulting fee," \$3375 for "design fee" related to two GOTV⁸ items and a doorhanger, approximately \$5300 for printing related to those three items, \$2653.75 for "phoning – live ID calls to voters," and \$791.56 for a "Final Voter Data Bill." (**Exhibit F(2)**). Respondent also states that he did not receive this invoice or give his approval for these expenses.⁹

In June, after the election, Respondent met with Mr. Wong. Respondent states that at the meeting a demand was made for payment of money owed to ICG. Respondent paid \$18,834 by check to Mr. Wong. Respondent does not recall why this amount was paid, reiterating that at the time he does not recall having received any invoices; he cites this number based on having reviewed his campaign disclosures and noting a payment to ICG in this amount. (**Exhibit H(3), p. 8**) A few days after the meeting, Respondent states that he stopped

⁷ Respondent stated that he did not receive any invoices from ICG until after the lawsuit was filed. Respondent states that he does not have any correspondence from ICG and that his records from the campaign were lost during a move after the election.

⁸ "Get Out The Vote"

⁹ These are the only two invoices that Respondent is now aware of constituting money that is allegedly owed to ICG. The MOU provided that the consulting fee would be invoiced to Respondent, but there is no evidence of separate invoices for the third installment; the "consulting fee" entry on the June invoice is undated. The invoices are marked "Minh4" and "Minh5" suggesting the invoice number. In the lawsuit filed by ICG, the company alleges that it is owed \$22,459 – the same amount of these two invoices – indicating any other invoices submitted to Respondent are not in dispute.

payment on the check. Respondent stated that he did not have further correspondence with or make any other payments to ICG.

ICG filed the lawsuit in Santa Clara County Superior Court on January 8, 2010.

B. Respondent's Campaign Committee Reports.

1. Expense and contribution reports (FPPC Form 460).

Respondent filed a first pre-election report for the period January 1- March 17, 2008 on March 24, 2008. (**Exhibit G(1)**) In this report, Respondent discloses a payment of \$5000 to ICG during the period, coded as "CNS" for "campaign consultants." (**p. 17**) A Schedule F – Accrued Expenses was not filed with this report. (**Exhibit I**)

On May 22, 2008, Respondent filed a second pre-election statement covering the period March 18-May 17, 2008. (**Exhibit G(2)**) Respondent does not report any expenditures to ICG on this report; there is also no Schedule F filed with this report. On Schedule B of the report, Respondent discloses a loan in the amount of \$20,000 to himself. (**p. 8**)

On September 22, 2008, Respondent filed a termination statement covering the period May 18-June 30, 2008. (**Exhibit G(3)**)¹⁰ Respondent reports an expenditure to ICG on this report in the amount of \$18,834. (**p. 8**) There is no Schedule F filed with this report. In the summary at the beginning of the report (**p. 3**), Respondent discloses the following information:

Beginning Cash Balance:	\$33,975.70
Cash Payments:	\$33,975.70
Ending Cash Balance:	\$ 0,00

A Schedule B is filed with report and contains the following information:

Loans received this period:	\$ 0
Loans repaid or forgiven this period:	\$ 0
Net change this period:	\$ 0

(**p. 6**)

2. Statement of Organization.

On September 22, 2008, Respondent also filed an FPPC Form 410 Statement of Organization. (**Exhibit H**) The form indicates that it is a "termination" statement. The effective date of the termination is reflected as June 30, 2008.

¹⁰ This report was ultimately filed well after the deadline. Respondent initially attempted to file a report that was rejected due to discrepancy obvious on the face of the form.

VI. LEGAL AUTHORITY

Relevant legal authority related to this investigation is found in the Political Reform Act, FPPC Regulations and the Municipal Code.

A. Political Reform Act ("PRA") and FPPC Regulations.

The following provisions of state law are relevant to this investigation:

1. **PRA § 82007. Candidate.**

"Candidate" means an individual who is listed on the ballot . . . or who receives a contribution or makes an expenditure An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214.

2. **PRA § 82013. Committee.**

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year;

(b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees. A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section 84214.

3. **PRA § 82025. Expenditure.**

"Expenditure" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. "Expenditure" does not include a candidate's use of his or her own money to pay for either a filing fee for a declaration of candidacy or a candidate statement prepared pursuant to Section 13307 of the Elections Code. An expenditure is made on the date the payment is made or on the date consideration, if any, is received, whichever is earlier.

4. PRA § 84101. Statement of Organization; Filing.

(a) A committee that is a committee by virtue of subdivision (a) of Section 82013 shall file with the Secretary of State a statement of organization within 10 days after it has qualified as a committee. . . .

5. PRA § 84103. Statement of Organization; Amendment.

(a) Whenever there is a change in any of the information contained in a statement of organization, an amendment shall be filed within 10 days to reflect the change. The committee shall file the original of the amendment with the Secretary of State and shall also file a copy of the amendment with the local filing officer, if any, with whom the committee is required to file the originals of its campaign reports pursuant to Section 84215.
. . . .

6. PRA § 84104. Recordkeeping.

It shall be the duty of each candidate, treasurer, and elected officer to maintain detailed accounts, records, bills, and receipts necessary to prepare campaign statements, to establish that campaign statements were properly filed, and to otherwise comply with the provisions of this chapter. The detailed accounts, records, bills, and receipts shall be retained by the filer for a period specified by the commission. However, the commission shall not require retention of records for a period longer than the statute of limitations specified in Section 91000.5 or two years after the adoption of an audit report pursuant to Chapter 10 (commencing with Section 90000), whichever is less.

7. PRA § 84200. Semi-Annual Statements.

(a) Except as provided in paragraphs (1), (2), and (3), elected officers, candidates, and committees pursuant to subdivision (a) of Section 82013 shall file semiannual statements each year no later than July 31 for the period ending June 30, and no later than January 31 for the period ending December 31.
. . . .

8. PRA § 84200.5. Preelection Statements.

In addition to the campaign statements required by Section 84200, elected officers, candidates, and committees shall file preelection statements as follows:
. . . .

(b) During an even-numbered year, all candidates not specified in subdivision (a) who are being voted upon on the first Tuesday after the first Monday in June or November, their controlled committees, and committees primarily formed to support or oppose those candidates or a measure being voted upon on the first

Tuesday after the first Monday in June or November of an even-numbered year shall file the preelection statements specified in subdivision (a) of Section 84200.7 in the case of a June election, or subdivision (b) of Section 84200.7 in the case of a November election.

9. PRA § 84200.7. Time for Filing Preelection Statements for Elections Held in June or November of an Even-Numbered Year.

(a) Preelection statements for the June election period shall be filed as follows:

(1) For the period ending March 17, a statement to be filed no later than March 22. However, for a special election called after March 17, or for which the period for filing nomination documents, as defined in Section 333 of the Elections Code, ends after March 17, a preelection statement for the period ending 45 days before the election shall be filed no later than 40 days before the election.

(2) For the period ending 17 days before the election, a statement to be filed no later than 12 days before the election. All candidates being voted upon in the June election, their controlled committees, and committees formed primarily to support or oppose a candidate or measure being voted upon in the June election shall file this statement by guaranteed overnight delivery service or by personal delivery.

10. PRA § 84211. Contents of Campaign Statement.

Each campaign statement required by this article shall contain all of the following information:

(g) If the cumulative amount of loans received from or made to a person is one hundred dollars (\$100) or more, and a loan has been received from or made to a person during the period covered by the campaign statement, or is outstanding during the period covered by the campaign statement, all of the following:

- (1) His or her full name.
- (2) His or her street address.
- (3) His or her occupation.
- (4) The name of his or her employer, or if selfemployed, the name of the business.
- (5) The original date and amount of each loan.
- (6) The due date and interest rate of the loan.
- (7) The cumulative payment made or received to date at the end of the reporting period.
- (8) The balance outstanding at the end of the reporting period.

(9) The cumulative amount of contributions

11. PRA § 84212. Forms; Loans.

The forms promulgated by the Commission for disclosure of the information required by this chapter shall provide for the reporting of loans and similar transactions in a manner that does not result in substantial overstatement or understatement of total contributions and expenditures.

12. PRA § 84213. Candidate Verification.

A candidate and state measure proponent shall verify his or her campaign statement and the campaign statement of each committee subject to his or her control. The verification shall be in accordance with the provisions of Section 81004 except that it shall state that to the best of his or her knowledge the treasurer of each controlled committee used all reasonable diligence in the preparation of the committee's statement. This section does not relieve the treasurer of any committee from the obligation to verify each campaign statement filed by the committee pursuant to Section 81004.

13. PRA § 84214. Termination.

Committees and candidates shall terminate their filing obligation pursuant to regulations adopted by the Commission which insure that a committee or candidate will have no activity which must be disclosed pursuant to this chapter subsequent to the termination. Such regulations shall not require the filing of any campaign statements other than those required by this chapter. In no case shall a committee which qualifies solely under subdivision (b) or (c) of Section 82013 be required to file any notice of its termination.

14. PRA § 84216.5. Loans Made by a Candidate or Committee.

A loan of campaign funds, whether or not there is a written contract for the loan, made by a candidate or committee shall be reported as provided in Section 84211.

15. PRA § 89519. Use of Surplus Campaign Funds.

(a) Upon leaving any elected office, or at the end of the post election reporting period following the defeat of a candidate for elective office, whichever occurs last, campaign funds raised after January 1, 1989, under the control of the former candidate or elected officer shall be considered surplus campaign funds and shall be disclosed pursuant to Chapter 4 (commencing with Section 84100).

(b) Surplus campaign funds shall be used only for the following purposes:

(1) The payment of outstanding campaign debts or elected officer's expenses.

(2) The repayment of contributions.

(6) The payment for professional services reasonably required by the committee to assist in the performance of its administrative functions, including payment for attorney's fees for litigation which arises directly out of a candidate's or elected officer's activities, duties, or status as a candidate or elected officer, including, but not limited to, an action to enjoin defamation, defense of an action brought of a violation of state or local campaign, disclosure, or election laws, and an action from an election contest or recount.

16. FPPC Regulation § 18216. Enforceable Promise to Make a Payment.

(a) A person who makes an enforceable promise to make a payment to or at the behest of a candidate or committee makes a contribution to the candidate or committee, except to the extent the person receives full and adequate consideration, and unless it is clear from the surrounding circumstances that the enforceable promise is not made for political purposes.

(b) A person makes an "enforceable promise to make a payment," as that term is used in subdivision (a), if he or she:

(7) Promises in writing to make a payment for specific goods or services, and the candidate or committee, based on the promise, expends specific funds or enters into an enforceable contract with a third party.

(c) A person does not make an "enforceable promise to make a payment," as that term is used in subdivision (a), if he or she signs a pledge card or similar document, agrees to make installment payments through wire transfer, credit card transaction, debit account transaction or similar electronic payment or otherwise agrees, orally or in writing, to make a future payment except as provided in subdivision (b).

(d) A candidate or committee shall report receipt of an enforceable promise to make a payment using the forms furnished by the Commission. This reporting shall be consistent with the requirements for reporting of contributions contained in chapter 4 (commencing with section 84100) of title 9 of the Government Code.

17. FPPC Regulation § 18215. Contribution.

(a) A contribution is any payment made for political purposes for which full and adequate consideration is not made to the donor. A payment is made for political purposes if it is:

(1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or

(2) Received by or made at the behest of the following or any agent thereof:

(A) A candidate;

(B) A controlled committee;

(C) An official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or

(D) An organization formed or existing primarily for political purposes, including, but not limited to, a political action committee established by any membership organization, labor union or corporation.

(b) The term "contribution" includes:

(1) Any payment made to a person or organization other than a candidate or committee, when, at the time of making the payment, the donor knows or has reason to know that the payment, or funds with which the payment will be commingled, will be used to make contributions or expenditures. If the donor knows or has reason to know that only part of the payment will be used to make contributions or expenditures, the payment shall be apportioned on a reasonable basis in order to determine the amount of the contribution.

There shall be a presumption that the donor does not have reason to know that all or part of the payment will be used to make expenditures or contributions, unless the person or organization has made expenditures or contributions of at least one thousand dollars (\$1,000) in the aggregate during the calendar year in which the payment occurs, or any of the immediately preceding four calendar years.

(2) A candidate's own money or property used on behalf of his or her candidacy.

(3) Any goods or services received by or behested by a candidate or committee at no charge or at a discount from the fair market value, unless the discount is given in the regular course of business to members of the public.

18. FPPC Regulation § 18400. Required Recordkeeping for Chapter 4.

(a) Maintenance of Documents

A candidate, treasurer, and elected officer has a duty to maintain detailed accounts, records, bills, and receipts as necessary to prepare campaign statements and comply with the provisions of Chapter 4 (commencing with

Section 84100) of the Act. This duty includes maintenance of detailed information and original source documentation, as follows:

(1) For a contribution received or other receipt of less than \$25, or an expenditure made of less than \$25:

(A) The accounts and records shall contain a continuous computation of campaign account balances, and include a listing reflecting the dates and daily totals of the contributions, other receipts, or expenditures on the dates of the contributions, other receipts, or expenditures.

(B) The original source documentation shall consist of all bank statements, check registers, check stubs, bank or passbooks, and any other records reflecting a continuous computation of campaign account balances in any savings or checking account, money market account, certificate of deposit, credit card account, or any other campaign account, in any bank or other financial institution.

(4) For an expenditure of \$25 or more, or a series of payments for a single product or service totaling \$25 or more:

(A) The accounts and records shall contain the date the expenditure was made (or, for an accrued expense, the date the goods or services were received), the amount of the expenditure, the full name and street address of the payee, and a description of the goods or services for which each expenditure was made. If the person or vendor providing the goods or services is different from the payee, the accounts and records shall also contain the same detailed information for that person or vendor. For an expenditure that is a contribution to another candidate or committee, or an independent expenditure, the records shall also contain the cumulative amount of the contributions to, or independent expenditures to support or oppose, each candidate, committee, or ballot measure.

(B) The original source documentation shall consist of cancelled checks, wire transfers, credit card charge slips, bills, receipts, invoices, statements, vouchers, and any other documents reflecting obligations incurred by the candidate, elected officer, campaign treasurer, or committee, and disbursements made from any checking or savings account, or any other campaign accounts, in any bank or other financial institution. In lieu of cancelled checks, the original source documentation may consist of copies of cancelled checks that contain a legible image of the front and back of the cancelled check, provided the copy was obtained from the financial institution.

(b) Retention of Documents

(1) A filer, as defined in Section 82026, has a duty to retain the accounts, records, bills and receipts, and other original source documentation required to be maintained pursuant to subdivision (a).

(2) A filer shall maintain the accounts, records, bills and receipts, and original source documentation for a period of four years following the date the campaign statement to which they relate is filed. However, in the case of an elected state officer serving a four-year term, the records for campaign statements filed during the first year following his or her election must be kept for five years following the date the campaign statement to which they relate is filed.

Comment: In addition to other recordkeeping requirements in the Act or applicable regulations, candidates and committees shall keep the records required in Regulation 18428 regarding contributions from affiliated entities. Additional recordkeeping requirements for candidates for the Legislature and statewide elective office are found in Regulation 18536 concerning the transfer and attribution of contributions, and Regulation 18540 concerning the allocation of expenditures to the primary, general, special or runoff election for purposes of the voluntary expenditure limits.

19. FPPC Regulation § 18404. Termination of Candidate's and Committees' Filing Requirements.

(b) Recipient Committees. A treasurer of a committee which qualifies pursuant to Government Code Section 82013(a) may terminate the committee's status as a committee, only by completing the termination section on the Form 410 (Statement of Organization) declaring, under penalty of perjury, that the committee:

(1) Has ceased to receive contributions and make expenditures and does not anticipate receiving contributions or making expenditures in the future;

(2) Has eliminated or has declared that it has no intention or ability to discharge all of its debts, loans received and other obligations;

(3) Has no surplus funds; and

(4) Has filed all required campaign statements disclosing all reportable transactions.

(c) Filing of Committee Terminations.

As specified in Government Code Section 84101(a), the committee shall file the original of the statement of organization declaring the committee's termination with the Secretary of State, and shall also file a copy of the statement of organization with the local filing officer, if any, with whom the committee is required to file the originals of its campaign reports pursuant to Section 84215.

(d) Candidates and Officeholders.

Pursuant to Government Code Section 82007, a candidate (which term includes an officeholder) is obligated to file campaign statements under the Act until his or her status as a candidate is terminated. An officeholder must file campaign statements required under the Act during the entire time the individual holds office. The filing obligations of a candidate or officeholder terminate as follows:

(1) Candidates or Officeholders with Committees. The filing obligations of a candidate or officeholder who has one or more controlled committees terminate when the individual has terminated all his or her controlled committee(s) and has left office.

20. FPPC Regulations § 18421.6. Reporting Accrued Expenses.

(a) Accrued expenses (excluding loans) owed by a recipient committee which remain outstanding shall be reported on each campaign statement until extinguished.

(b) An accrued expense (excluding a loan) shall be reported as of the date on which the goods or services are received, except that any obligation incurred for a regularly recurring administrative overhead expense (e.g., rent, utilities, phones, campaign workers' salary) shall not be reported as an accrued expense before the payment due date. If the exact amount of a debt or obligation is not known, the report shall state that the amount reported is an estimate. Once the exact amount is determined, the committee shall either amend the report(s) containing the estimate or indicate the correct amount on the report for the reporting period in which such amount is determined. Note: Authority cited: Section 83112,

21. FPPC Regulation § 18431. Reporting of Expenditures by an Agent or Independent Contractor.

(a) The following expenditures, and all similar expenditures, when made by an agent or independent contractor, including any vendor or subvendor, on behalf of or for the benefit of a candidate or committee, must be reported under Section 84303. Expenditures not of the types included below do not have to be reported. Expenditures that must be reported include all of the following:

(1) Expenditures to any person, other than an employee of the agent or independent contractor, for expert advice, expert analysis, or campaign management services, including but not limited to analysis, advice, or management services in connection with any of the following:

(A) Development of campaign strategy.

- (B) Campaign management.
- (C) Design or management of campaign literature or advertising.
- (D) Campaign fund raising.

(2) Expenditures to any person, other than an employee of the agent or independent contractor, who furnishes the candidate or committee with products or services that show how the campaign is conducted, including but not limited to expenditures for any of the following:

- (A) Printed campaign literature.
- (B) Advertising time or space.
- (C) Campaign buttons and other campaign paraphernalia.
- (D) Surveys, polls, signature gathering and door-to-door solicitation of voters.
- (E) Facilities, invitations, or entertainment for fundraising events.
- (F) Postage for campaign mailings.

(3) Any of the following types of expenditures:

- (A) To the candidate.
- (B) To any person for the personal use of the candidate, or his or her family.
- (C) That are gifts to any person.
- (D) To or on behalf of any other candidate or committee.
- (E) To printers of mass mailings.

(F) To any person who transfers funds to any other person for expenditures reportable under this regulation.

(G) For any commission, finder's fee or rebate provided to any person in connection with any expenditure reportable under this regulation if the commission, finder's fee or rebate is inconsistent, in either manner or amount, with customary industry practice.

(b) Expenditures made directly from a candidate's or committee's account, charged to the candidate's or committee's credit, credit card, debit card or charge card, are not considered expenditures by an agent or independent contractor reportable under Section 84303. These expenditures shall be reported under Section 84211, and candidate or committee payments to a credit card, debit card or charge card company shall be reported and itemized as

specified in Regulation 18421.9.

(c) An expenditure required to be reported by Section 84303 must be reported by the candidate or committee at the same time and in the same manner and detail as required under Section 84211 for the candidate's or committee's direct expenditures.

(d) An agent or independent contractor who makes an expenditure on behalf of or for the benefit of a candidate or committee that is required to be reported under Section 84303 shall make known to the candidate or committee all the information required for reporting the expenditure under Section 84211. A subagent or subvendor may make the report required by this subdivision to his or her principal, who shall then report the expenditure to the committee or candidate. An agent or independent contractor shall report all expenditures required to be reported under Section 84303 no later than three working days prior to the time the campaign statement reporting the expenditure is required to be filed, except that an expenditure that must be reported under Sections 84203 or 84204 shall be reported to the candidate or committee within 24 hours of the time it is made.

B. Municipal Code.

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

1. 12.06.050 – Contribution

A. "Contribution" means:

1. Any payment, loan, forgiveness or postponement of a loan, payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, or it is clear from the surrounding circumstances that the contribution is not made for political purposes.

2. An expenditure benefiting a candidate or committee made at the behest of a candidate, candidate controlled committee or elected officeholder is a contribution to the candidate, committee or elected officeholder unless full and adequate consideration is received for making the expenditure.

2. 12.04.13.00 – Findings.

A. The commission, by resolution, shall issue formal findings based on a preponderance of the evidence from the entire record of the commission's proceedings.

B. No finding of violation shall be made unless the person alleged to have committed the violation has been notified of the alleged violation and provided a copy of the regulations and procedures of the commission.

C. If the elections commission finds a violation of this title, the commission may:

1. Find mitigating circumstances and take no further action;
2. Issue a public statement or reprimand; or
3. Impose a civil penalty in accordance with this title.

3. 12.04.110 – Civil penalties.

A. Civil penalties shall be imposed by resolution of the commission.

B. Except as otherwise specified in Title 12, the commission may impose penalties of up to five thousand dollars (\$5,000) for each violation or three times the amount which a person or respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater.

C. If any civil penalty imposed by the commission is not timely paid, the city clerk shall refer the debt to the director of finance for collection.

4. 12.06.540 – Campaign contribution limits.

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

A. Until December 31, 2010, 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 must not exceed a total of more than two hundred fifty dollars (\$250) in the aggregate.

5. 12.06.710 – Deadline for debt retirement.

A. No money can be collected for debt retirement after the end of the campaign contribution collection period as set forth in Section 12.06.290.

B. A candidate must retire all campaign-related debts, including loans, within six months after the date of the election.

C. A campaign-related debt, including any loan, which remains unpaid more than six months after the election is deemed to have been a campaign contribution which was accepted at the time the debt was incurred.

D. It is a violation of this section to forgive all or part of a loan or debt which is owed to the person by a candidate and which exceeds the applicable contribution limitations. Forgiveness of a loan or debt shall not be deemed to include the failure to collect the loan or debt where there have been substantial attempts, in good faith, to collect the monies owed and such efforts have proved unsuccessful. In such case, a candidate is

not exonerated from violations of this chapter if an outstanding loan or debt exceeds the contribution limitations.

6. 12.06.720 – Surplus campaign funds.

Any remaining campaign funds in excess of expenses incurred for allowable expenses as specified under the Political Reform Act, shall be deemed to be surplus campaign funds. Within ninety days after withdrawal, defeat, or election to office, the surplus campaign funds shall be returned to the contributors on a pro rata basis, or turned over to the general fund.

7. 12.06.910 – Statements and reporting requirements.

A. Each candidate, candidate controlled committee and independent committee receiving contributions or making expenditures in a City election must file with the City Clerk campaign disclosure statements in the form and at the times required by Chapter 12.06 and the Political Reform Act. The campaign disclosure statements must show the total amount of contributions accepted and expenditures made, including independent expenditures. The campaign disclosure statements may be completed on forms required to be filed by the regulations of the fair political practices commission so long as such forms are completed in sufficient detail to comply with the requirements of this chapter. The campaign disclosure statements must contain a declaration by the candidate or controlled committee treasurer that the candidate or committee has not accepted nor solicited any campaign contribution in violation of the requirements and limitations of this chapter.

B. When listing contributions, each candidate and candidate controlled committee receiving contributions or making expenditures in a city election must itemize all contributions accepted during the campaign contribution collection periods specified in this chapter including all amounts less than one hundred dollars (\$100).

C. The first and second campaign statements must be filed at the times prescribed for pre-election statements by the Political Reform Act as well as any other times prescribed in Chapter 12.06, for candidates, candidate controlled committees and independent committees for whom the city clerk is the regular filing official. If the city clerk is not the regular filing official for an independent committee receiving contributions and making expenditures in a city election, the independent committee must file campaign statements with the city clerk in accordance with this chapter.

D. Once an independent committee whose primary filing official is not the city clerk has filed a campaign disclosure statement with the city clerk, the committee must also file with the city clerk, within two business days, copies of campaign disclosure statements filed by the committee with its regular filing official for the previous twelve months.

E. Once an independent committee whose primary filing official is not the city clerk has filed a campaign disclosure statement with the city clerk, from that date forward, that committee's campaign disclosure statements must be filed with the city clerk in the form and at the times required by Chapter 12.06, the California Political Reform Act and the

California fair political practices commission until the committee terminates or has not received contributions or made expenditures, including independent expenditures, in an election in the City of San José for four years.

F. If any person files a campaign disclosure statement after any deadline imposed by this chapter, the city clerk must fine the person ten dollars (\$10.00) per day, starting the day after the filing deadline, until the statement is filed; however, no liability may exceed the cumulative amount of reported contributions or expenditures, or \$100, whichever is greater. The city clerk may reduce or waive the fine if he or she determines that the late filing was not willful and that enforcement will not further the purposes of this chapter.

C. Elections Commission Regulations.

Resolution 75620 contains the following provisions relevant to this investigation:

1. K. ADMINISTRATIVE ORDERS AND PENALTIES

1. If the Commission finds a violation, the Commission may:
 - a. Find mitigating circumstances and take no further action;
 - b. Issue a public statement or reprimand;
 - c. Impose a penalty in accordance with Chapter 12.04 of the San Jose Municipal Code.

2. The votes of at least three Commission members are required to impose orders and penalties for a violation. In order to vote to impose any order or penalty for a violation, every Commissioner must certify that he or she has heard (either in person or by listening to a recording) or read the transcript of the testimony.

3. In determining if penalties should be imposed for violations of Title 12 of the Municipal Code and the amount of any such penalties, the Commission shall consider all the relevant circumstances surrounding the case including:
 - a. The severity of the violation;
 - b. The presence or absence of any intention to conceal, deceive, or mislead;
 - c. Whether the violation was deliberate, negligent or inadvertent;
 - d. Whether the violation was an isolated incident or pervasive enough to indicate a pattern of disregard for this Chapter;
 - e. Whether the Respondent has a prior record of violations of City law relating to campaign finance, lobbying, conflicts of interest, or governmental ethics;
 - f. The degree to which the Respondent cooperated with the investigation;
 - g. Whether or not corrective actions were taken, if appropriate, in accordance with the provisions of this Chapter.

2. **L. REFERRALS TO OTHER ENFORCEMENT AGENCIES**

At any time, the Evaluator or the Commission may refer the matter to another government agency or official if the Commission determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered must be sent by the City Clerk's Office or City Attorney's Office to the agency or official together with the referral.

VII. FACTUAL FINDINGS AND ANALYSIS OF ISSUES

A. **Does the Evidence Sustain the Allegation that Respondent Did Not Report Accrued Expenses Accurately?**

Yes.

There is no question that as of the time the first pre-election statement was filed, Respondent was aware of a future obligation to pay fees to ICG. That awareness alone is adequate basis for reporting the accrued expense (in the amount of \$10,000) on Schedule F of that first statement. Thereafter, Respondent should have continued to report the unpaid fees on a Schedule F. Respondent was not relieved of the obligation to report on this expense until the debt had been extinguished. (See FPPC Regulation §18421.6)

The analysis of the other amounts asserted by ICG is not as straightforward, but leads to the same result. The obligation to report an accrued expense arises at such time as services are performed or an invoice is received. In this instance, there is a dispute raised by Respondent as to whether he actually received the May or June invoices for additional services. There is also some dispute as to whether or not Respondent was liable for any of those charges, even if he had notice of them by way of the invoices.¹¹ In analyzing this issue, we need not resolve these underlying disputes.

The undisputed evidence shows that there would have been an obligation to report the two invoices as accrued expenses beginning with the report for the period ending June 30; as both invoices are dated after May 17, 2008, there would not have been an obligation to include them on the second pre-election report. Respondent never reported any accrued expenses owed to ICG. However, in early June, Respondent was aware of an obligation asserted by ICG of more than \$18,000; this point is not in dispute given his attempt to pay this obligation by

¹¹ In reviewing the invoices and the MOU, it seems obvious that certain of the items on the invoice are or arguably were services that ICG agreed to perform as part of the scope of services. There is also a question of whether Respondent agreed to the services identified in the invoice. The MOU does not appear to grant unfettered discretion to incur costs in the name of Respondent, and Respondent clearly disputes agreeing to or having notice of the services ICG alleges that it performed. These issues will be resolved in the pending litigation, so there is no requirement to attempt to resolve them here.

check.¹² Accordingly, we believe the evidence supports the conclusion that Respondent should have been aware of an accrued expense and reported it. (See **Exhibit D(1)**)

B. Does the Evidence Sustain the Allegation that Respondent Was Required to Revise, but Failed to Revise the Termination Statement Causing the Statement on File To Be False or Misleading?

Yes.

Significantly, the termination Form 460 gives the impression that the campaign spent all of the money that it received, had no loans outstanding, and had no debts yet to be paid. As discussed in the other sections of this report, this representation was contrary to the actual state of affairs. At the time Respondent filed the termination Form 460, there was no evidence to show that the debt with ICG had been resolved. Respondent, himself, had stopped payment on the check and the course of discussion with ICG could not have lead to the conclusion that it was abandoning the debt.

C. Does the Evidence Show Respondent Did Not Dispose of All Campaign Contributions and Resolve All Campaign Expenditures By June 30, 2008?

Yes.

The termination Form 460 purports to show that the campaign expended all of the money that it received as contributions. However, the evidence is undisputed that Respondent did not make a payment of \$18,834 to ICG as reported. Deducting this amount from the expenditures shows a campaign balance as of June 30, 2008 of \$18,834. Because Respondent did not file any subsequent statements, there is no evidence to demonstrate the disposition of these funds.¹³ There is evidence to suggest that this amount reflects no more than a substantial part of the money that Respondent loaned to his campaign, but the nature of the discrepancy precludes assuming that conclusion.

D. Is there Evidence that Respondent Owed Money to ICG As Of June 30, 2008 and December 31, 2008?

Yes.

Respondent states that he made only one payment to ICG under the MOU. Respondent also states that the agreement with ICG was not terminated until some time after May 1, 2008. By the time of this termination, Respondent owed ICG the April 1 installment as a minimum and some indeterminate prorata amount for whatever work had been performed up to the time of termination. It may also be the case that Respondent was liable for some portion of the costs asserted by ICG in the May and June invoices (this issue to be decided in the pending

¹² The background of this amount is unclear. Respondent has no records to show how he understood \$18,834 to be the amount owed to ICG; the figure does not equate to the two invoices that were outstanding at the time. Given that Respondent did not report any amount of the debt in question as an accrued expense, the precise figure is not particularly significant in that Respondent.

¹³ Respondent stated that he has no records from his campaign bank account and that he has no access to the records as the bank that he used for the account has since closed.

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litigation), but setting aside that dispute, it is evident that Respondent had not paid all of the fees under the MOU that were not in dispute.

The June invoice included an item in the amount of \$5000 for "consulting fee" which appears to relate to the fees due under the MOU.¹⁴ Initially, Respondent's payment of \$18,834 would have extinguished this obligation. However, in stopping payment on the check, Respondent still has not paid ICG anything more than \$5000 for the first installment. Consequently, the evidence indicates that at a minimum Respondent still owes ICG for the second \$5000 installment.

That amount was due and owing as of June 30, 2008. Respondent has not made any other payments to ICG; thus, at least that amount remains unpaid to ICG.

E. **Did Respondent Have a Loan Outstanding As Of June 30, 2008 and December 31, 2008?**

Yes.

By the preceding analysis, Respondent also failed to satisfy the requirements of SJMC 12.710.B by not reporting the disposition of the loan taken on May 15, 2008. The second pre-election statement discloses the loan and notes it as a contribution to the campaign. Respondent's termination statement does not include a Schedule B and does not otherwise account for payment on the loan.

Consequently, by the record, Respondent has not demonstrated that the loan was repaid or forgiven. This evidence indicates a violation of SJMC 12.06.710.B.

F. **Is There An Amount Respondent is Required to Treat as a Contribution to the Campaign Under Municipal Code Section 12.06.710?**

Inconclusive.

SJMC 12.06.710.B provides that a "candidate must retire all campaign-related debts, including loans, within six months after the date of the election." A loan not retired "is deemed to have been a campaign contribution which was accepted at the time the debt was incurred." Based on the foregoing, the evidence shows that Respondent had an outstanding debt in violation of the Municipal Code. However, for the purposes of determining what if any amount is "deemed to have been a campaign contribution," the evidence is inconclusive. As discussed above, there appears to be a minimum amount that Respondent owes to ICG. However, even that amount is subject to the claims and defenses that would be asserted in the pending litigation. To the extent that Respondent asserts that the entire agreement with ICG was void and the committee bears no liability to ICG and would prevail on such a defense, a court could find that Respondent owes nothing to ICG. Accordingly, there would be no amount

¹⁴ This entry tends to support the notion that the MOU/agreement between Respondent and ICG terminated before its completion, notwithstanding the lack of written notice. Insofar as ICG did not assert and has not asserted payment of the entire scheduled consulting fee, it would appear that it treated the MOU terminated as described by Respondent.

to treat as a contribution. Along the same lines, if Respondent does not prevail, it is not certain what amount a court might find to be due and owing to ICG.

The uncertainty is significant in that any outstanding debt deemed to constitute a contribution may raise issues as to whether Respondent exceeded any applicable contribution limits.¹⁵ In light of these uncertainties, the evidence as to a violation is inconclusive.¹⁶

Likewise, we are unable to conclude the precise impact of the unpaid loan. The record demonstrates that this loan was made by the candidate from personal funds. As noted above, because of the discrepancy related to the unpaid \$18,834 expense to ICG, arguably the campaign had \$18,834 on hand as of June 30, 2008. Presumably, this amount might have been used to repay the loan, leaving a balance of \$1,166. It seems likely that the balance would have been "forgiven" as it was the personal funds of the candidate. In the absence of additional evidence, we cannot draw a conclusion on this point.¹⁷

G. Was Respondent Required to Continue to File Form 460 After June 30, 2008?

Yes.

A candidate is relieved of the obligation to file campaign disclosures only upon termination of his/her campaign committee. (See PRA §§ 82007 and 84214) Although Respondent purported to terminate the campaign committee on June 30, 2008, the evidence demonstrates that at that time, Respondent had not satisfied the requirements of FPPC Regulation 18404. As noted in the discussion in Sections VII.A-C above, Respondent had not demonstrated that all campaign funds had been disposed of and all debts had been resolved as of June 30, 2008. In addition, the May 15, 2008 loan to the campaign remained outstanding in that there was no report that it had been paid or forgiven. Respondent was obligated to report on these items until extinguished. (See, PRA §§ 82007, 84211(g), 84212, and 84216.5; FPPC Regulations §§ 18404(b) and (d), 18421.6; SJMC §12.06.910)¹⁸

¹⁵ For example, Respondent's campaign collected over \$82,000 in contributions (including a \$20,000 loan of Respondent's own money) in the campaign. Obviously adding \$18,000 as a contribution from ICG raises an issue as to individual contribution limits; but it also calls into question whether the voluntary spending limits for the campaign were observed.

¹⁶ We note that a candidate may resolve a debt by simply stating an intention or inability not to pay the amount in question. There is evidence that Respondent did not intend to pay any amount to ICG – at least not any amounts for third party services – and on that basis could claim that there was no debt due or owing as of June 30, 2008. This straightforward approach is complicated, however, by the Form 460 filed by Respondent to terminate the committee. This form not only shows the expense to ICG, but indicates payment, wholly inconsistent with an argument that the debt did not exist or that there was no intention to pay. Because this inconsistency is raised by Respondent's own actions and no steps have been taken to clarify the record on this point, the preponderance of the evidence indicates a potential violation.

¹⁷ As such time as Respondent amends his disclosures or files new disclosures to address the loan, a determination can be made as to whether there are outstanding issues on this point.

¹⁸ Based on the foregoing, semi-annual reports would have been due to cover the periods ending December 31, 2008, June 2009, December 31, 2009 and June 30, 2010 (deadline for filing the latter report is August 2, 2010).

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. Summary of Conclusions.

Our conclusions as to each allegation are set forth in **Attachment A**.

B. Recommendations.

In filing the termination statement on June 30, 2008, Respondent should have:

- Avoided reporting the \$18,834 payment to ICG; Respondent knew that this payment had not been made.
- Reported the outstanding fees to ICG (\$5,000) and so much of the remainder of the \$18,834, if any, that he acknowledged that he owed on Schedule F - and continued to track those entries by filing semi-annual Form 460s until resolved.
- Filed a Schedule B to reflect re-payment or forgiveness of the loan incurred on May 15, 2008.
- Postponed terminating the committee until these issues were resolved.

Had these steps been followed, there would be no basis to find a violation of the PRA or the Municipal Code. As these steps were not taken, the facts and evidence lead to the conclusions set forth below.

1. **We recommend that the Elections Commission find:**

- a. Failure to resolve debt in accordance with the Municipal Code (Title 12, Chapter 6, Part 7).
 - (1) The evidence indicates Respondent owed money to Imprint Communications Group as of June 30, 2008.
 - (2) The debt remained unresolved as of December 31, 2008.
 - (3) The amount of the debt is uncertain pending disposition of the litigation pending in Santa Clara Superior Court.
 - (4) The Commission should defer disposition of this allegation until such time as the litigation between ICG and Respondent is resolved.
- b. Respondent failed to file an accurate first pre-election statement (FPPC Form 460).
 - (1) The evidence shows that Respondent failed to report the two installment payments under the MOU with ICG as accrued expenses.

- (2) The Commission should consider further action to be taken with respect to this violation in light of further findings set forth below.
- c. Respondent failed to file an accurate second pre-election statement.
- (1) The evidence shows that Respondent failed to report one or more installment payments under the MOU with ICG as accrued expenses.¹⁹
 - (2) The Commission should consider further action to be taken with respect to this violation in light of further findings set forth below.
- d. Respondent filed a false or misleading termination statement.
- (1) Unreported accrued expenses (installments under MOU).
 - (a) The evidence shows that Respondent failed to report one or more installment payments under the MOU with ICG as accrued expenses.²⁰
 - (b) The Commission should consider further action to be taken with respect to this violation in light of further findings set forth below including, but not, limited to requiring Respondent to file an amended Form 460 and such other disclosures as are necessary to explain the disposition of these items.²¹
 - (2) Unreported accrued expenses (May 18 and June 10 invoices).
 - (a) The evidence shows that Respondent failed to report these

¹⁹ As discussed in Section VII.A & D, the evidence indicates Respondent was obligated to pay ICG a proportionate amount of the second installment for work performed before the agreement was terminated. Pending disposition of the lawsuit, Respondent is potentially liable for the third installment (i.e., if a court were to find that the agreement was not terminated) as well; if so, that payment should also have been reflected as an accrued expense.

²⁰ See footnote 18.

²¹ To the extent that Respondent had paid the amount to ICG (\$18,834) reflected in the report, there would have been no accrued expense to report as the evidence shows that that amount was the total amount due and owing to ICG. We also find a violation with respect to the report of that payment (see Section VII.B). In our view, if Respondent is found to have violated the Municipal Code with respect to that item, it would be duplicative to find this violation as well. Accordingly, the Commission should adopt the finding under this section or dismiss this item and adopt the findings/recommendation under Section VIII.B1.d.3. below.

invoices as accrued expenses.²²

- (b) The Commission should consider further action to be taken with respect to this violation in light of further findings set forth below including but not limited to requiring Respondent to file an amended Form 460 and such other disclosures as are necessary to explain the disposition of these items.²³

(3) Reported expenditure payment of \$18,834.

- (a) The evidence shows that Respondent reported this payment on the Form 460 and did not file any reports amending or modifying this information.
- (b) The evidence also shows that Respondent tendered a check in this amount for the payment, but later stopped payment on the check and made no other payments to ICG. Thus, the evidence shows that this amount was not paid before the Form 460 was filed and Respondent should have been aware of the discrepancy because of the action he had taken to stop payment.
- (c) The Commission should consider further action to be taken with respect to this violation in light of further findings set forth below including, but not limited to, requiring Respondent to file an amended Form 460 and such other disclosures as are necessary to explain the disposition of these items.

(4) Summary showing that Respondent expended all of the contributions received and had no cash on hand as of the end of the filing period.

- (a) The evidence shows that Respondent did not spend \$18,834 of the money in the campaign account (see preceding section).
- (b) Respondent should have been aware of this discrepancy (see preceding section).
- (c) The evidence also shows that Respondent had a loan outstanding in the amount of \$20,000 and had not reported that the loan was paid or forgiven.

²² Respondent disputes having received these invoices. However, the evidence demonstrates that he was aware of ICG's claim for reimbursement of expenditures made on behalf of the campaign by virtue of the attempted payment to ICG of \$18,834. Consequently, we are able to conclude that Respondent was aware of the claims by ICG during the reporting period, and as such, was required to report them as accrued expenses. (See Section VII.A above).

²³ See footnote 21.

- (d) The Commission should consider further action to be taken with respect to this violation including, but not limited to, requiring Respondent to file an amended Form 460 and such other disclosures as are necessary to explain the disposition of these items.
- e. Respondent failed to file semi-annual statements to account for unexpended contributions and outstanding expenses.
- (a) As set forth in Sections VIII.B.1.a. and VIII.B.1.d. above, Respondent had unresolved expenses, unexpended contributions, and an outstanding loan after the time he filed his last semi-annual statement.
 - (b) The evidence also shows that Respondent did not file semi-annual statements²⁴ to account for these unresolved items.
 - (c) The Commission should consider further action to be taken with respect to this violation in light of the other findings, including but not limited to requiring Respondent to file disclosures as are necessary to explain the disposition of these items.
- f. Respondent terminated his campaign committee in violation of the PRA and Municipal Code.
- (a) Respondent terminated his campaign committee effective June 30, 2008.
 - (b) As set forth in Sections VIII.B.1.a. and VIII.B.1.d. above, Respondent had unresolved expenses, unexpended contributions, and an outstanding loan as of this date.
 - (c) The Commission should consider 1) referring the matter to the FPPC for investigation, or 2) further action to be taken

²⁴ Statements would have been required for the six-month periods ending December 31, 2008, June 30, 2009, December 31, 2009 and June 30, 2010.

with respect to this violation in light of the other findings.²⁵

2. Based on the foregoing findings, we recommend that the Elections Commission conduct a hearing to:

- a. Adopt the findings as set forth in this Report and its Attachments.
- b. Adopt the recommendations as set forth above.

Respectfully submitted,



M. D. Mbye

²⁵ The Municipal Code does not contain express provisions regarding the termination of a campaign committee (with the exception of the provisions under Title 12, Chapter 6, Part 7, addressed above). The PRA sets forth specific requirements applicable to termination of a committee. In conjunction with terminating the campaign committee under the PRA, Respondent filed an FPPC Form 410. Municipal Code Section 12.06.910 requires candidates to file reports in accordance with the requirements of the PRA. Accordingly, terminating the campaign committee improperly constitutes a violation of this Municipal Code provision. As we are recommending that the Commission consider referring this item to the FPPC for investigation if the findings and recommendations of this Report are adopted, the Commission should note that taking corrective action with respect to this item may interfere with further investigation by the FPPC. Accordingly, the Commission should refrain from taking corrective action if it finds that referral to the FPPC is appropriate.

ATTACHMENTS/EXHIBITS TO REPORT OF INVESTIGATION

- **Attachment A** - Summary of Investigative Findings

- **Exhibit A** - Citizen Complaint, dated May 19, 2010, including Exhibit.
- **Exhibit B** - Letter from Hanson Bridgett LLP, to Minh Duong, dated, May 21, 2010, re: Notification to Respondent
- **Exhibit C** - Letter from Hanson Bridgett LLP, to Robert Sandoval, dated, May 21, 2010, re: Complaint
- **Exhibit D** - FPPC Advice Letters
 - (1) 92-478 re: Effective Date of Expenditure
 - (2) 97-309 re: Debt Guarantee
- **Exhibit E** - Memorandum of Understanding, dated January 19, 2008, between Imprenta Communications Group, Inc. and Minh Duong for San Jose City Council (Minh Duong)
- **Exhibit F** - Invoices: Imprenta Communications Group to Minh Duong for Council Committee
 - (1) May 18, 2008 (\$5,250)
 - (2) June 10, 2008 (\$17,209)
- **Exhibit G** - FPPC Form 460 - Campaign Disclosure Statement
 - (1) First Pre-Election Statement, filed March 24, 2008
 - (2) Second Pre-Election Statement, filed May 22, 2008
 - (3) Termination Statement, filed September 22, 2008
- **Exhibit H** - FPPC Form 410 - Statement of Organization (Recipient Committee), filed September 22, 2008
- **Exhibit I** - Sample Schedule F and Instructions (FPPC Form 460)
- **Exhibit J** - Letter from City Clerk to Minh Duong for City Council 2010, dated June 14, 2010, re: Minh Duong for Council -2010, Committee ID: 1326731, Notice of Late Filing of Late Contribution Reports (Form 497) and Penalty Assessed; Notice of Incomplete Amendment of Second Pre-election Statement Form 460

Memorandum To:
San Jose Elections Commission
July 12, 2010
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Attachment A - Summary of Investigative Findings

SUMMARY OF VIOLATIONS (DUONG COMPLAINT)

	EVENT	DATE	REPORTING OBLIGATION	DUONG REPORT	COMMENT
1.	MOU with ICG: three \$5000 installments (Feb 15, Apr 1 and May 1)	1/19/08	Report on first pre-election statement (460): - Schedule E (payment to be made on Feb 15) - Schedule F (second and third payments are accrued expenses)	First pre-election statement filed: - Sched. E shows \$5000 payment to ICG - Sched. F not filed	- Violation (unreported accrued expense)
2.	Second ICG installment due, but not paid ¹	4/1/08	Report on: - Second pre-election statement: report accrued expense (\$5000) on Sched. F - Semi-annual report (6/08): report accrued expense (\$5000) on Sched. F	- Report filed; no Sched. F - Report filed; no Sched. F	- Violation (unreported accrued expense) - Violation (unreported accrued expense) - Additional Violation (Form 460 should have been filed until item resolved) [see item 6 below]

¹ As we discuss in Section VII.D of the Report, the evidence indicates the MOU was terminated before the third installment became due. Accordingly, we do not find that there was an obligation to continue reporting an accrued expense for the third installment. As we conclude the agreement was terminated, the obligation for the third installment was extinguished – not forgiven – and, therefore, there is no reason to treat that installment as a contribution to the campaign.

3	Invoice for \$5250	5/18/08	Report on: - Semi-annual report (6/08): report accrued expense (\$5000) on Sched. F	- Report filed; no Sched. F	- Violation (unreported accrued expense) - Additional Violation (Form 460 should have been filed until item resolved) [see item 6 below]
4.	Invoice for \$17,209	6/10/08	Report on: - Semi-annual report (6/08): report accrued expense (\$5000) on Sched. F	- Report filed; no Sched. F	- Violation (unreported accrued expense) - Additional Violation (Form 460 should have been filed until item resolved) [see item 6 below]
5.	Payment of \$18,834: a. Reported on semi-annual statement b. Respondent acknowledges stopping payment of check for this payment c. Form 460 showed no cash on hand as of 6/30 as a result of this payment	6/12/08 [date appx.]	- Report on semi-annual report; amend report if changes occurred prior to date of next report - If reported as a payment, amend prior report or update in subsequent filing to delete payment - Also, amend report to show adjustment to cash on hand	- Reported on termination report; no amendment filed; no further report filed - No amendment or subsequent reports filed - No amendment or subsequent reports filed	- Violation (false/ misleading report as change occurred prior to report being filed) - [same as above] - Violation (false/misleading report as 6/30 Form 460 showed all cash having

	<p>d. No action to address apparent excess of \$18,834</p> <p>e. Unresolved loan</p>		<ul style="list-style-type: none"> - Surplus contributions are to be returned to contributors within 90 days of the end of the campaign or deposited in the general fund if not returned - Loan transactions are to be reported on Schedule B; loans must be resolved within six months of election 	<ul style="list-style-type: none"> - Filed report is inaccurate 	<p>been expended, but should have shown a balance of \$18,834)</p> <ul style="list-style-type: none"> - Violation (failure to dispose of surplus campaign funds) - Violation (misleading report) - Violation (see above) - Additional Violation (Form 460 should have been filed until item resolved) [see item 6 below]
6.	Duong Campaign Committee terminated	6/30/08	<ul style="list-style-type: none"> - File termination Form 410 	<ul style="list-style-type: none"> - Report filed 	<ul style="list-style-type: none"> - Violation (committee may not be terminated if cash is on hand [see item 5c above] or debts have not been resolved [see item 5b above]) - Violation (failure to file semi-annual reports; semi-annual reports must be filed until committee is terminated properly)

7.	Outstanding debt after election ²		<ul style="list-style-type: none"> - Report as necessary on Form 460 - Resolve within 6 months - Treat as contribution if not resolved 	<ul style="list-style-type: none"> - Not reported (see above) - Not resolved - Not treated as a contribution 	<ul style="list-style-type: none"> - Violations as indicated above - Violation³ - Potential Violation - Additional Potential Violation (to the extent that the amount to be treated as a contribution exceeds the contribution limits, a further violation has occurred)
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² As we discuss in Section VII.C-F of the Report, the exact amount of the debt cannot be determined precisely at this time. Mr. Duong acknowledges that some if not all of the second \$5000 installment was owed to ICG; ICG alleges it is due the full amount of the installment and additional expenses incurred (an additional \$17,459). The exact amount of the debt will be determined in the litigation between Mr. Duong and ICG; accordingly, our findings on this issue are tentative.

³ Substantial evidence supports treating this item as a violation although the exact amount of the debt is not determined. Insofar as Mr. Duong acknowledges some amount owed on the second \$5000 installment, there is sufficient evidence for the Commission to conclude that a debt existed.

EXHIBITS A – J
ON FILE IN
OFFICE OF THE
CITY CLERK