

TO: San Jose Elections Commission

FROM: Hanson Bridgett LLP

DATE: January 7, 2011

RE: Second Supplemental Report of Investigation

Complainant: **Thomas Nguyen**

Respondents: **Ma Doan Trang, Hoang The Dan, Nguyen Khoi, Uong Thien Tang, Charlie Ly, Kim An, Robert Sandoval, et al.**

Alleged Violations: **Violation of the Campaign Ordinance: Failure to Register as a Committee; Failure to File Campaign Reports**

Complaint Filed: **October 7, 2010**

I. INTRODUCTION

On November 8, 2010 we filed a Report of Investigation ("Report") regarding the complaint filed on October 7, 2010 ("Complaint") referenced above. In a hearing on the Complaint and Report on December 1, 2010, the Commission sustained the findings and recommendations of the Report in part. The Commission determined that the evidence failed to sustain the allegation of a violation based on radio programs that aired on Que Hong Radio and adopted the recommendation to dismiss that allegation. As to the additional allegation of newsletters produced and distributed in violation of the Municipal Code, the Commission directed further investigation based on new evidence submitted by the Complainants.

We have concluded our investigation of the new evidence and have determined that the new evidence does not change the findings, conclusions and recommendations set forth in our original Report. Accordingly, we are recommending that the Commission dismiss this allegation and close the file in this matter.

II. ADDITIONAL EVIDENCE/INFORMATION

A. The Additional Copies of the Quan Tam Cong Dong Newsletter.

At the December 1 hearing, the Complainant provided originals of two additional editions of the Quan Tam Cong Dong newsletter that had circulated in District 7 communities during the

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2008/2009 recall election. The two newsletters were substantially similar to the first newsletter, reviewed in the early part of the investigation, in terms of the content and the apparent support of Councilmember Nguyen and opposition to the proposed recall. The additional newsletters also included the same/similar advertising panels purporting to urge a “no” vote in the March 3, 2009 election.

These copies of the newsletters also showed clearly a logo for the “Committee for Concerned Citizens” (“C.C.C.”) on the first page of each of the newsletters. (see Exhibits D and O, attached to our prior reports in this matter) It was also evident that the copy of the first edition of the newsletter reviewed in the investigation also bore the C.C.C. logo.

B. The Committee for Concerned Citizens.

On November 19, 2008, the C.C.C. filed a “Statement of Organization Recipient Committee” (FPPC Form 410) with the San Jose City Clerk. (**Exhibit P(1)**) The C.C.C.’s Form 410 identified Phi Tran as the organization’s assistant treasurer and stated that the organization was a Primarily Formed Committee opposing the recall of Councilmember Madison Nguyen.¹ The C.C.C. filed an amended Form 410 on December 4, 2008, indicating the organization had qualified as a committee as of December 2008. (**Exhibit P(2)**)

On January 23, 2009, the C.C.C. filed a Recipient Committee Campaign Statement (FPPC Form 460). (**Exhibit P(3)**) This Form 460 shows that the C.C.C., expended \$1900 in December 2008 to print and to circulate three newsletters. (Exhibit P(3), pp. 9-12)

We contacted Ms. Tran, the assistant treasurer for C.C.C. and she explained that the organization created and distributed three newsletters or newspapers during the period of the recall election opposing the recall and supporting Councilmember Nguyen. Ms. Tran stated that the newsletters were paid for from a contribution to the C.C.C. and the content was provided by the C.C.C. Ms. Tran reviewed each of the copies of the newsletters provided by the Complainants and confirmed that these were copies of the three newsletters produced and distributed by the C.C.C.²

C. “Thăng Bờm News” Newspaper.

At the December 1 hearing, we were also provided with copies of four editions of a newspaper titled “Thăng Bờm News.” These newspapers were not provided by the Complainant, but rather, supporters of Councilmember Nguyen. These supporters complain

¹ There are five types of campaign committees reported on Form 410: “Primarily Formed,” “Controlled,” “General Purpose,” “Sponsored,” and “Small Contributor.” A Primarily Formed Committee exists to support or to oppose a candidate or measure. This type of organization indicates which candidate or measure it supports or opposes. A “General Purpose” committee does not support or oppose a particular measure in a single election; accordingly, the form requires a description of the committee’s intended activity. In this instance, the C.C.C. also filled in information indicating it sought to “oppose recall, promote community participation, [and] clarify deceitful actions.” Although there was no requirement to fill out this section of the form, we do not find the additional information to be misleading or confusing.

² The C.C.C. terminated its registration effective December 3, 2009. (**Exhibit P(4)**)

that the articles/content of the newspaper oppose the candidacy of Councilmember Nguyen and should be treated the same as the Quan Tam Cong Dong Newsletter.

III. ANALYSIS OF THE ADDITIONAL INFORMATION

A. The New Evidence Regarding the Quan Tam Cong Dong Newsletters Demonstrates That No Violation Has Occurred.

The Complainant alleged that these newsletters constituted express advocacy and that the group responsible for printing them should have registered as a committee, reported the expenditure and reported any contributions received by the committee. (See Exhibit M(1), p. 5) The evidence demonstrates all of these requirements were met.

The evidence shows that the newsletters in question were produced and distributed by a group that had registered as a campaign committee - the C.C.C. In addition, the evidence shows that the C.C.C. disclosed its expenditure for the newsletters by filing the required Form 460. The C.C.C. also disclosed the contributions it received, supporting that expenditure, in accordance with the requirements of the Municipal Code. In addition, the newsletter itself identifies the C.C.C. on the face of the newspaper.³ In light of the foregoing, we find no evidence of a violation as asserted by the Complainant or a violation of the requirements of the Municipal Code to disclose campaign activity and expenditures relative to these newsletters.

B. The New Evidence Regarding the Thăng Bờm News Newspaper Fails to Demonstrate a Violation.

The evidence shows that the Thăng Bờm News newspaper is published on a weekly basis. The newspaper maintains business offices throughout the Bay Area and a website: thangbommagazine.com. The newspaper includes reports on state, local, national and international news as well as a wide variety of commercial advertisements. The newspaper is published in Vietnamese and includes sections covering politics, social/entertainment matters (fashion, food, etc.), and sports.

Given the foregoing, the content of Thăng Bờm News newspaper, even content that constitutes express advocacy for or against a specific candidate or ballot measure, does not constitute campaign activity and the cost of producing the newspaper does not constitute an expenditure subject to the reporting requirements of the Municipal Code. The regulations (FPPC Regulations Section 18255(b)) defining "expenditures" for purposes of the Municipal Code provide:

(4) Notwithstanding the provisions of this subsection, the term expenditure does not include costs incurred for communications which expressly advocate the nomination, election or defeat of a clearly identified

³ There is no express requirement under the Municipal Code for this type of committee to use particular language to identify its sponsorship of campaign activity. Part 10 of the Municipal Code, requiring disclosure/identification of certain "electioneering communications" applies only to "communication, for which payment is made, that refers to a clearly identified candidate for mayor or city council of the City of San José." (See §12.06.1000)

candidate or candidates or the qualification, passage or defeat of a clearly identified measure or measures by:

(A) A regularly published newspaper, magazine or other periodical of general circulation which routinely carries news, articles and commentary of general interest. (emphasis added)

Consequently, we have determined that the content of the Thăng Bờm News newspaper does give rise to registration or disclosure obligations under the Municipal Code.

IV. CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, we conclude:

- The evidence establishes that the C.C.C. published the newsletters identified by Complainants. The evidence also establishes that with respect to the newsletters, the C.C.C. satisfied its registration and disclosure obligations under the Municipal Code.
- The evidence establishes that the publication of the Thăng Bờm News newspaper does not constitute an expenditure under the Municipal Code.

Accordingly, we recommend:

- The Commission adopt these supplemental findings and conclusions.
- The Commission dismiss the allegations related to the Quan Tam Cong Dong newsletters and Thăng Bờm News newspaper.
- The Commission close the file in this matter.

Respectfully submitted,



M. D. Moye
Joan L. Cassman

EXHIBITS TO SECOND SUPPLEMENTAL REPORT OF INVESTIGATION

- **Exhibit P-**
 - (1) FPPC Form 410 – Registration for Committee for Concerned Citizens
 - (2) FPPC Form 410 – Amended Registration for Committee for Concerned Citizens
 - (3) FPPC Form 460 – C.C.C. Pre-Election Disclosure Statements
 - (4) Secretary of State Information Sheet.

Evaluator's Report
Complainant: Thomas Nguyen
Complaint Filed: October 7, 2010

EXHIBITS ARE ON FILE
IN THE OFFICE OF
THE CITY CLERK