

MEMORANDUM

TO: San Jose Elections Commission

FROM: Hanson Bridgett LLP

DATE: October 30, 2012

RE: Citizen Complaint
Complainant: **Martin Monica**
Respondents: **Jimmy Nguyen for Council 2012, Kerry Hillis**
Alleged Violations: **Campaign Contribution — Improper Coordination**
Complaint Filed: **October 16, 2012**

I. INTRODUCTION

A complaint was filed with the San Jose Elections Commission ("Commission") on October 16, 2012 ("Complaint") alleging violation of Title 12 of the San Jose Municipal Code ("Municipal Code") by Respondents Jimmy Nguyen, the "Vote Jimmy Nguyen City Council" committee, and Kerry Hillis. (**Exhibit A**) Under authority of San Jose City Council Resolution No. 75640 ("Resolution"), we conducted an evaluation of the Complaint to determine whether cause existed to conduct an investigation. As discussed below, we have determined that the Complaint does not set forth facts sufficient to warrant an investigation by the Commission. We are recommending, therefore, that the Commission dismiss the Complaint and close its file in the matter.

II. COMPLAINT/ALLEGATIONS

The Complaint alleges improper coordination between the Jimmy Nguyen for Council 2012 campaign and an Independent Expenditure Committee, the "Committee for Safe San Jose Neighborhoods – Support Nguyen for City Council" (the Committee). In particular, the Complaint alleges the following:

1. The Committee is controlled by the San Jose Police Officers Association SJPOA.
2. In September, 2012, Kelly Hillis was the communications director of the (SJPOA).
3. On September 19, 2012, Mr. Hillis made a video of a public appearance made by Councilmember Rose Herrera.
4. On October 3, 2012, audio from that videotape was included in a mailer produced by the Santa Clara County Government Attorney's Association.
5. By virtue of his position with the POA, Mr. Hillis must have had general inside non-public knowledge of "strategies and workings" of the Committee.

6. At some point in October, 2012, Mr. Hillis left his employment, or in some fashion reduced his involvement with the POA, and has recently been seen frequently with the candidate in public. The Complaint's assumption is that he is therefore working in some capacity for the Nguyen campaign.

7. The Complaint concludes that Mr. Hillis' general knowledge of the Committee's tactics and strategies, as well as his involvement in the making of the referenced video, when shared with the Nguyen campaign as part of Hillis' recent involvement with the campaign, constitutes improper coordination between the campaign and the Committee in violation of the Municipal Code and State law.

III. STANDARDS/PROCEDURE FOR EVALUATION OF THE COMPLAINT

The Commission's jurisdiction extends to investigation of complaints alleging violations "only if the complaint identifies the specific alleged violations which form the basis for the complaint and contains sufficient facts to warrant a formal investigation." (Municipal Code §12.04.080(B)) The Commission Regulation further provides that "[t]he Evaluator shall review every complaint to determine whether sufficient cause exists to conduct a preliminary investigation." (Resolution No. 75640 para. F.2) The Evaluator may proceed with an investigation if the "complaint identifies specific facts, which if proven, would be a violation of the Municipal Code." (*Id.*)

We conducted our evaluation of the Complaint in the context of the statutory requirements of the Municipal Code and reasonable interpretation of the statutory provisions. Under paragraph F.5 of the Commission Regulations, a recommendation by the Evaluator that the Complaint does not warrant investigation is referred to the Chair and the Chair may place the matter on the agenda for the Commission to consider the Evaluator's recommendation.

The Nguyen campaign was notified of the allegations and presented with a complete copy of the Complaint on October 18, 2012.¹ (**Exhibit B**)

IV. DETERMINATION OF PRELIMINARY EVALUATION AS TO CAUSE FOR INVESTIGATION

The Complaint does not cite a specific section of Title 12 that has been violated. It is clear, however, that the heart of the complaint involves the prohibition against coordination between candidates and independent committees. This prohibition implicates Title 12 of the Municipal Code because such coordination under some circumstances can require the treatment of an expenditure by a committee as a contribution to a candidate. As discussed below, we think that even if the facts alleged in the Complaint were proved, they would not constitute a violation of the Municipal Code. Our preliminary evaluation therefore indicates that sufficient cause does not exist to conduct any further investigation.

¹ Diligent efforts to provide Mr. Hillis, the other named Respondent, with a copy of the Complaint, were unsuccessful. As our recommendation is that the Commission dismiss the Complaint without further investigation, the Evaluator's inability to notify Mr. Hillis does not implicate any required procedures. Should the Commission determine not to follow this recommendation and instead direct us to investigate further, continued efforts should be made to ensure that Mr. Hillis is provided appropriate notice of the Complaint.

A. Statutory/Regulatory Framework

1. San Jose Municipal Code § 12.02.020

Words and phrases used in this title shall have the meanings and be interpreted in the same manner as words and phrases used in the Political Reform Act of 1974 as amended and the regulations issued pursuant thereto, unless otherwise expressly provided or unless the context otherwise requires.

2. San Jose Municipal Code § 12.06.010

The following definitions used in this chapter shall have the meanings set forth below. Except as otherwise provided here, the terms and provisions of this chapter shall be interpreted in accordance with the applicable definitions and provisions of the Political Reform Act of 1974 as amended (Government Code Section 81000 et seq.) and the regulations of the California fair political practices commission, as amended.

3. San Jose Municipal Code § 12.06.050

Contribution means 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.

4. San Jose Municipal Code § 12.06.1010(H)

Any communication, other than a communication to members of an organization, made at the behest of a candidate is a contribution to that candidate and is subject to the limits and prohibitions specified in Chapter 12.06 of the San Jose Municipal Code.

5. Government. Code § 82031

"Independent expenditure" means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

6. FPPC Regulations, § 18225.7

(a) "Made at the behest of" means made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of. Such arrangement must occur prior to the making of a communication described in Government Code section 82031.

(b) Expenditures "made at the behest of" a candidate or committee include expenditures made by a person other than the candidate or committee, to fund a communication relating to

one or more candidates or ballot measures "clearly identified" as defined at Title 2, California Code of Regs. section 18225(b)(1), which is created, produced or disseminated,

(1) After the candidate or committee has made or participated in making any decision regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication, or

(2) After discussion between the creator, producer or distributor of a communication, or the person paying for that communication, and the candidate or committee, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, the result of which is agreement on any of these topics.

(c) An expenditure is presumed to be made at the behest of a candidate or committee if it is:

(1) Based on information about the candidate's or committee's campaign needs or plans provided to the expending person by the candidate or committee, or

(2) Made by or through any agent of the candidate or committee in the course of the agent's involvement in the current campaign, or

(3) For a communication relating to a clearly identified candidate or ballot measure when:

(A) The person making the expenditure retains the services of a person who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for that same election, or

(B) The communication replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate or committee.

(d) An expenditure is not made at the behest of a candidate or committee merely when:

(1) A person interviews a candidate on issues affecting the person making the expenditure, or

(2) The person making the expenditure has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents, or

(3) The person making the expenditure has made a contribution to the candidate or committee, or

(4) The person making the expenditure is responding to a general, non-specific request for support by a candidate or committee, provided that there is no discussion with the candidate or committee prior to the expenditure relating to details of the expenditure, or

(5) The person making the expenditures has invited the candidate or committee to make an appearance before the person's members, employees, shareholders, or the families thereof,

provided that there is no discussion with the candidate or committee prior to the expenditure relating to details of the expenditure, or

(6) A person informs a candidate or committee that the person has made an expenditure, provided that there is no other exchange of information, not otherwise available to the public, relating to details of the expenditure, or

(7) An expenditure is made at the request or suggestion of the candidate or committee for the benefit of another candidate or committee.

(e) Notwithstanding any other provision of this section, if two or more committees exchange information between or among themselves, subsequent expenditures by each committee shall not, merely by reason of that exchange, be considered to be "made at the behest of" the other committee(s), where the committees are (i) all general purpose committees, (ii) all committees primarily formed to support or oppose the same candidate or candidates, or (iii) all committees primarily formed to support or oppose the same measure or measures.

(f) Throughout this section the terms "candidate" and "committee" include their agents, when the agent is acting within the course and scope of his or her agency. The term "expenditure" refers to a payment defined as an "expenditure" by Government Code section 82025 and Title 2, California Code of Regs. section 18225. A determination that an expenditure has been "made at the behest of" a candidate or committee does not establish that the expenditure is a "contribution" as defined by Government Code section 82015 or Title 2, California Code of Regs. section 18215. However, expenditures governed by Title 2, California Code of Regs. section 18550.1 may be treated as contributions pursuant to the provisions of that section.

B. The Complaint Does Not Allege Facts That Would Constitute a Violation of the Municipal Code.

Title 12 of the Municipal Code and the FPPC regulations interpret the issue of improper coordination through the lens of whether an expenditure was made "at the behest of" a candidate. An expenditure made at the behest of a candidate is treated as a contribution to that candidate. (Municipal Code 12.06.050; 12.06.1010) The fundamental question posed by our preliminary evaluation is whether the facts of the Complaint, if proved, would meet the legal standard of constituting an expenditure made at the behest of the candidate. We think there are three fundamental reasons why the answer to this question is no.

First, a contribution made "at the behest" of a candidate requires (1) an expenditure over which (2) there was some coordination. There are no allegations in the Complaint of specific expenditures that, even if coordinated, would implicate Title 12 of the Municipal Code. The alleged contact between Hillis and the Campaign, even if true, happened after any identified expenditure. The October 3 mailer certainly constitutes an expenditure (though it was apparently made by a group other than the Committee), but it occurred before there is any suggestion in the Complaint of involvement between Mr. Hillis and the Nguyen campaign. Accordingly, common sense dictates that this expenditure could not have been "at the behest" of the campaign.

Second, the definition of “made at the behest of” under Section 18225.7(a) uses the following language expressly to state that improper coordination must occur prior to a specific communication that triggers the alleged violation: “Such arrangement must occur prior to the making of a communication described in Government Code section 82031.” That code section defines an “independent expenditure.” Other than the October 3 mailer, which as discussed above occurred before any alleged coordination took place, the facts of the Complaint, even if true, do no more than suggest a general transfer of knowledge when Mr. Hillis allegedly moved from a position with the Committee to a position with the Campaign and do not satisfy the specificity required by the applicable regulations and the procedures governing the investigation process for complaints filed with Elections Commission under the Resolution.

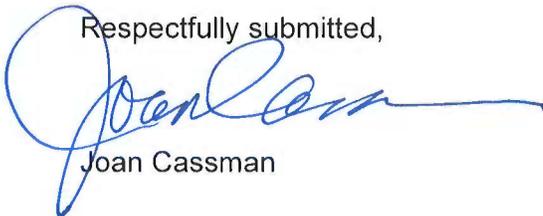
Finally, Regulation 18225.7(d)(4) and (6) go one step further and clarify definitively that the transfer of general knowledge of strategy and tactics is not sufficient to constitute any violation. Under Regulation 18225.7(d), an expenditure would not be considered made at the behest of the candidate merely because a person involved with an expenditure shares information with the candidate about past activity so long as there is no sharing of any other non-public information regarding a specific expenditure. Moreover, 18225.7(d) is in the form of a “safe harbor” provision — namely, it states what is not a violation but does not specify that the opposite is always a violation. In other words, 18225.7(d) instructs that the mere act of Hillis’ sharing information about past Committee activity — if true as alleged — does not by itself constitute a violation, and that even if such sharing occurred, more facts of specific expenditures linked to prior coordinated activities would be needed to constitute a violation under Title 12 of the Municipal Code. Such additional facts are not presented in the Complaint.

V. CONCLUSIONS AND RECOMMENDATIONS

Based on the foregoing, we find no cause to conduct an investigation, as we conclude that the Complaint fails to allege facts sufficient to sustain a potential violation of the Municipal Code for which the Commission has jurisdiction to act. Accordingly, we recommend that the Commission:

- a. Adopt the Evaluator's opinion as set forth above and approve the recommendation against conducting an investigation of the Complaint.
- b. Close the file in this matter without further action.

Respectfully submitted,



Joan Cassman

EXHIBITS TO EVALUATOR'S REPORT

- **Exhibit A** - Citizen Complaint, dated October 16, 2012
- **Exhibit B** - Letter to Respondent dated October 18, 2012

Exhibit A

Citizen Complaint, Dated October 16, 2012



CITY OF SAN JOSE
SAN JOSE ELECTIONS COMMISSION
COMPLAINT FORM

File this form with the Office of the City Clerk
200 East Santa Clara Street
San José, CA 95113
Telephone: 408-535-1260; Fax: 408-292-6207

Your Name* Martin Monica

Address PO Box 1306 Santa Clara, ca 95052

Telephone (Home) Area Code(408) 634-3776 (Work) Area Code ()

Your name, address and phone number are required. If you wish to remain anonymous, you may call the Elections Commission Anonymous Complaint Hotline at 408-975-ANON (2666) Certain Restrictions apply.

1. Nature of Complaint

Campaign

Gift Ordinance

Lobbyist

Revolving Door

2. Who is the person or persons you are complaining about? (Please provide name(s) and address(es); business and residence, if known.)

Kerry Hillis

Jimmy Nguyen

vote Jimmy Nguyen City Council 2012 FPPC #1344095

3. Describe complaint. State all facts as specifically as possible. (Attach additional pages as necessary.)

See attachment

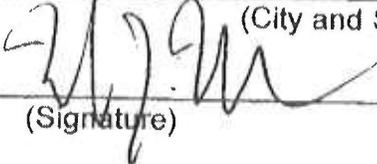
4. Names and Addresses of potential witnesses, if known:

5. Additional Information:

6. Documentation: Please attach copies of any available documentation regarding the violation.

VERIFICATION

I certify under penalty of perjury under the law of the State of California that the above statements are true and correct.

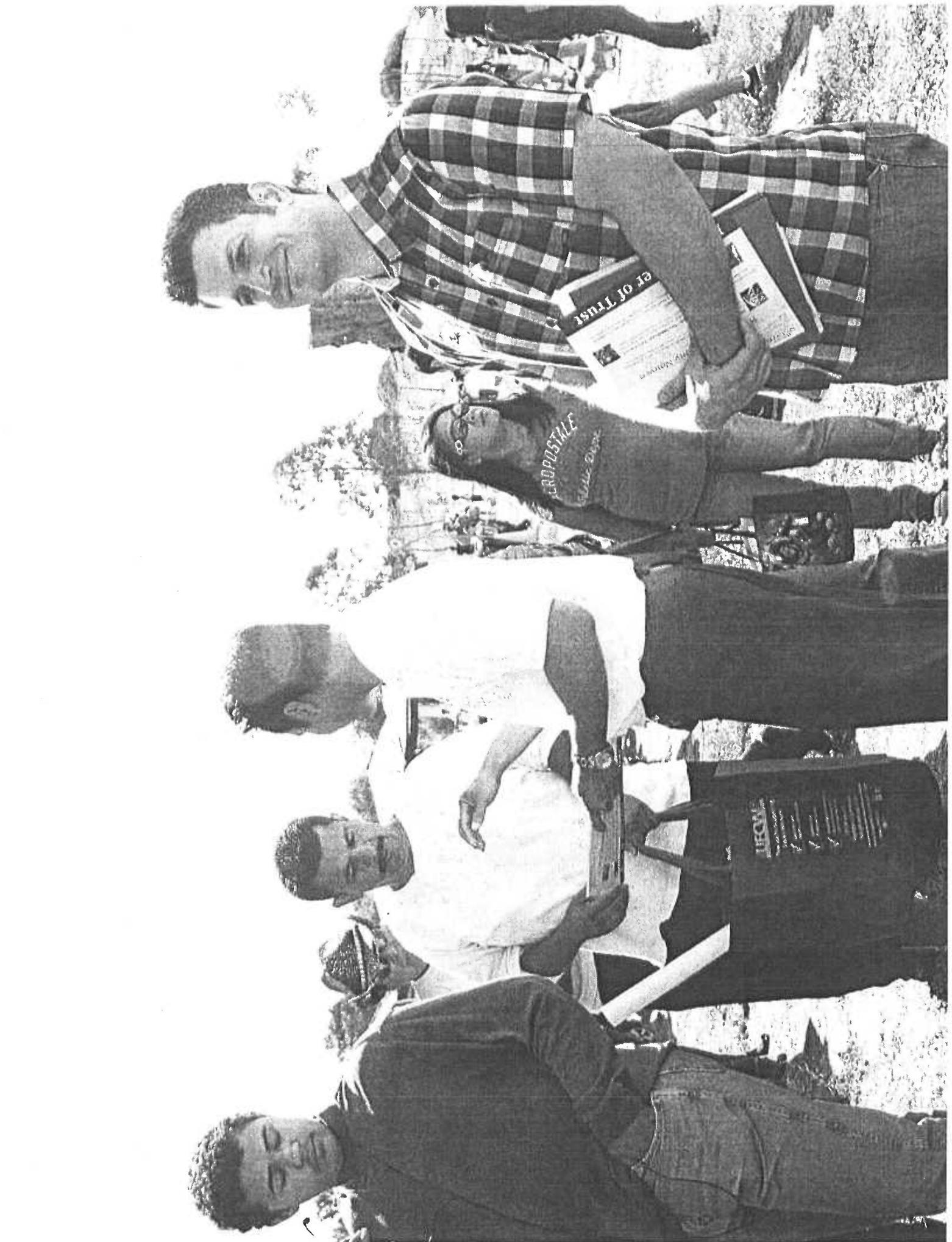
Executed 10-16-12 at San Jose California
(Date) (City and State)

(Signature)

This complaint is about a serious pattern of communication and coordination between the campaign of Jimmy Nguyen, "Vote Jimmy Nguyen City Council 2012" (FPPC #1344095) and the campaign being run by the San Jose Police Officer's Association against Jimmy's opponent, Rose Herrera, under the guise of an independent committee named "Committee for Safe San Jose Neighborhoods- Support Nguyen for City Council" (FPPC ID# 1351811). A quick check of the Cal-access.sos.gov website hosted by the California Secretary of State shows that this committee, in fact, lists their contact phone number as the main phone number for the San Jose Police Officers Association headquarters; obviously this committee is maintained and funded primarily by the SJPOA.

Facts that have come to my attention that show this obvious violation of the law:

- 1) In September 2012, Kerry Hillis was the editor of the SJPOA newsletter, the Vanguard, and also published articles online on the Protect San Jose website <http://protectsanjose.com/>. He was a paid member of the leadership of the POA and as their communications director would obviously be party to the strategies and workings of the campaign committee that they organized against Rose Herrera and for Jimmy Nguyen.
- 2) On September 19, 2012, Mr. Hillis attended the forum on Public Safety held by Councilmember Rose Herrera at Most Holy Trinity Church and set up and operated a video camera at the back of the room to record the proceedings.
- 3) On October 3rd, audio from that videotape of the Public Safety Forum appeared on attack mailings against Rose Herrera, ostensibly mailed by ANOTHER independent group (the Santa Clara County Government Attorney's Association). This shows that Mr. Hillis was actively working on the independent campaigns against Rose Herrera as of September 19th.
- 4) Recently, Mr. Hillis' name has been removed from the October issue of the Vanguard and he has been seen constantly with Mr. Jimmy Nguyen throughout District 8 (see attached photograph of Hillis and Nguyen at Day in The Park on October 6th). He has attended Candidate forums and events in which Mr. Nguyen participated, and has acted as a "handler" for the candidate (see attached screenshot of Mr. Hillis and Mr. Nguyen on Channel 5 CBS News October 15th.)
- 5) CONCLUSION: if Mr. Hillis worked for independent committees formed to deliberately campaign AGAINST Rose Herrera (and campaign for Jimmy Nguyen) and then "took leave" to work directly with Mr. Nguyen on his campaign on a daily basis he took his knowledge of the tactics and strategy of the POA Campaign (and other independent committees) with him; it is completely unreasonable to expect that he would not use this knowledge on Mr. Nguyen's campaign; therefore this constitutes direct communication and coordination between the campaign of Mr. Jimmy Nguyen and supposedly "independent" committees formed to support him and fight his opponent. This is completely illegal under State election law and San Jose City regulations, and constitutes a serious campaign violation that **must be stopped immediately.**

Sincerely,
Martin Monica



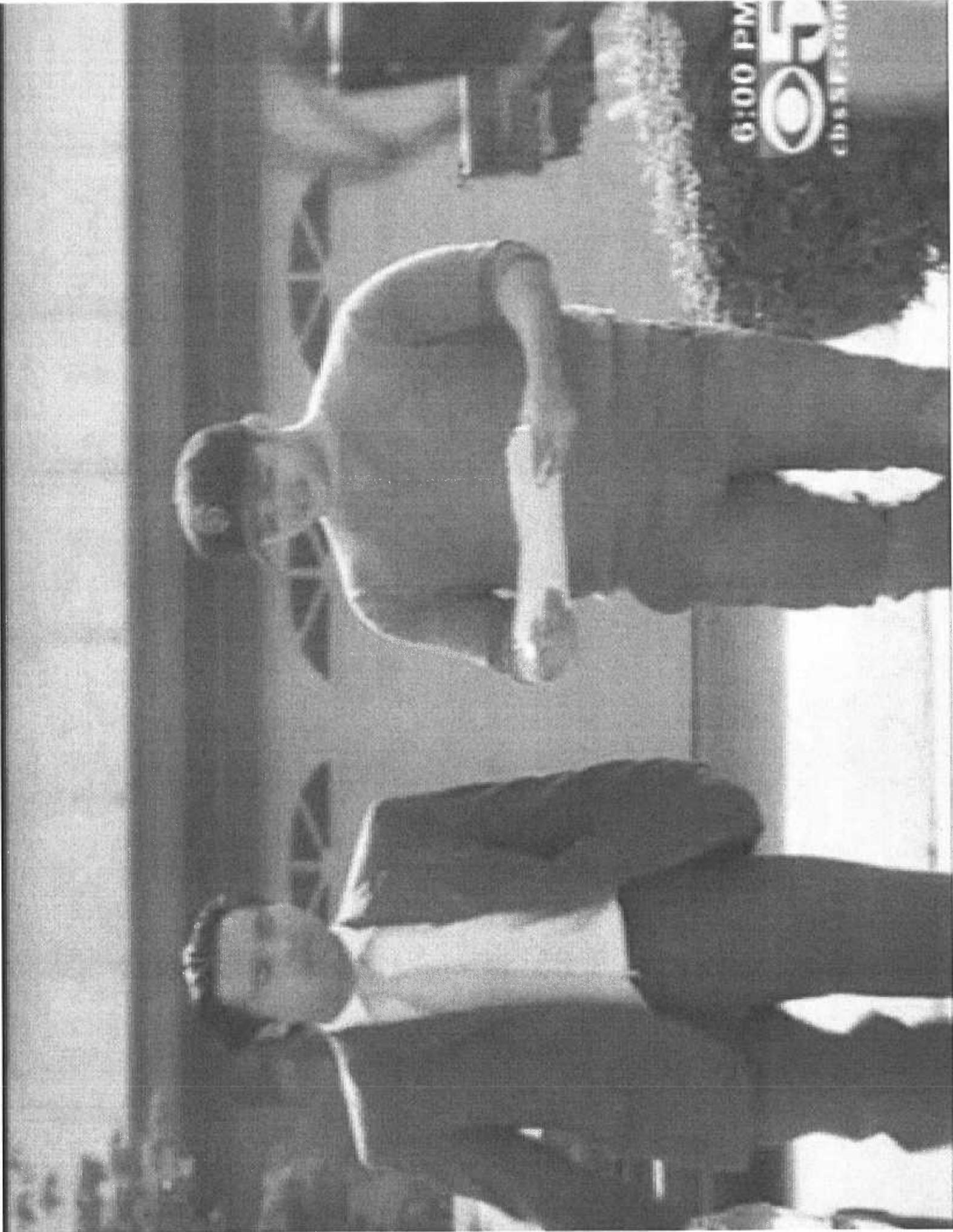


Exhibit B

Letter to Respondent, Dated October 18, 2012

JOAN L. CASSMAN
PARTNER
DIRECT DIAL (415) 995-5021
DIRECT FAX (415) 995-3414
E-MAIL jcassman@hansonbridgett.com



October 18, 2012

Jimmy Nguyen
c/o Jimmy Nguyen City Council 2012
4848 San Felipe Rd, #150
San Jose, CA 95135

Re: **Complaint Before the City of San José Elections Commission**
Respondent: Jimmy Nguyen
Nature of Complaint: Independent Expenditure in Violation of Municipal Code—
Improper Coordination
Complainant: Martin Monica

Dear Mr. Nguyen:

As you know from earlier correspondence with my partner Mike Moye, the City of San José has retained our firm pursuant to Chapter 12.040.080 of Title 12 of the San José Municipal Code to serve as Evaluator for the Elections Commission and we have been assigned the above-referenced Complaint. A copy of the Complaint is attached.

We are conducting a preliminary investigation of the allegations of the Complaint. Mike will be out of the office for the next few weeks but we would nevertheless like to speak with you or your representative soon for further information on this matter. [REDACTED]

[REDACTED] We thank you for your email of October 17th from Angela Kuo to Mike Moye. My colleague Steven Miller will contact Ms. Kuo shortly to set up a time to discuss [REDACTED]. The Elections Commission desires to expedite [REDACTED] in order to close the matters before the election.

At this point, there are no specific documents we would like to review or obtain copies of regarding this Complaint [REDACTED]. But we may well have such requests in the future and appreciate in advance your cooperation.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Joan L. Cassman".

Joan L. Cassman