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8 Attorneys for Respondents Advantage Towing Company Inc. and Aymen Arekat

9 **CITY OF SAN DIEGO ETHICS COMMISSION**

10 In re the Matter of:) Case No.: 2013-15
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12) **RESPONDENTS' HEARING BRIEF**
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ADVANTAGE TOWING COMPANY INC.,
AYMAN AREKAT,

Respondents.

18 **I.**

19 **INTRODUCTION**

20 The Commission asserts that Respondents Advantage Towing Inc. and Aymen Arekat
21 violated the San Diego Municipal Code by making straw man donations and making donations in
22 excess of \$500.00. The claim is that Mr. Arekat asked Advantage employees to make donations
23 to the campaigns of Nathan Fletcher, Bonnie Dumanis and Carl DeMaio and further not only told
24 the employees Advantage would reimburse them, but did so.
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II.

THE APPLICABLE LAW

San Diego Municipal Code section 27.2935 provides:

(a) It is unlawful for an individual to make, or for a candidate or controlled committee to solicit or accept, a contribution that would cause the total amount contributed by that individual to the candidate and the candidate's controlled committee to exceed \$500 for any single election for a City Council district office, or to exceed \$1,000 for any single election for the office of Mayor or City Attorney.

San Diego Municipal Code section 27.2943 provides:

(a) It is unlawful for any person to make directly or indirectly a contribution in a name other than the name by which that person is identified for legal purposes.

(b) It is unlawful for any person to make directly or indirectly a contribution in the name of another person.

(c) It is unlawful for any person to make directly or indirectly a contribution in his or her or its name of:

(1) anything belonging to another person; or

(2) anything received from another person on the condition that it be used as a contribution.

San Diego Municipal Code section 27.2950 provides:

(a) It is unlawful for a candidate or controlled committee, or any treasurer thereof, or any other person acting on behalf of any candidate or controlled committee, to solicit or accept a contribution from any person other than an individual or a political party committee for a City candidate election.

(b) It is unlawful for a person other than an individual or a political party committee to make a contribution to a candidate or controlled committee for a City candidate election.

San Diego Municipal Code section 27.2991 provides:

(a) Any person who violates any part of this division, or who counsels, aids, abets, advises, or participates with another to commit any such violation, is guilty of a misdemeanor and is subject to the penalties set forth in chapter 1 of

1 this code, or if the matter is pursued by the Enforcement Authority as an
2 administrative matter, any person found in violation is subject to the
administrative penalties provided for in chapter 2, article 6, division 4.

3 (b) In addition to being subject to the penalties set forth in chapter 1 of this code,
4 any person found guilty of violating sections 27.2935 or 27.2950, or both,
5 shall be required to forfeit the amount received in violation of this division
6 and pay over these funds to the City Treasurer for deposit in the City's
7 General Fund.

8 Finally, *San Diego Municipal Code* section 26.0440 provides:

9 (a) The maximum fine for any violation of Governmental Ethics Laws is \$5,000.
10 The actual fine imposed for any violation may range from zero (\$0) to five
11 thousand dollars (\$5,000), in accordance with the Commission's assessment
12 of the severity of the violation.

13 III.

14 ISSUES WITH THE JUDGE'S FINDINGS

15 The claims made by the Commission are that improper straw man donations were made
16 by persons employed or associated with Advantage Towing and that donations were made by
17 Advantage Towing in violation of the Municipal Code. The claims have been a moving target
18 for Respondents. Initially, the Commission claimed that donations made by Ayman Arekat, the
19 sole shareholder of Advantage Towing and his wife were violations. The Commission now
20 claims the alleged improper donations are as follows:

| 21 Donator | 22 Status | 23 Candidate | 24 Date | 25 Amount |
|---------------------------|--|-----------------|----------|-----------|
| 26 1. Seror Mikha | 27 Former Employee of Advantage Towing | Nathan Fletcher | 12/28/11 | \$500.00 |
| 28 2 Mohammed Mohammed | Former Employee of Advantage Towing | Nathan Fletcher | 12/28/11 | \$500.00 |
| 3. Zyad Raheem | Former Employee of Advantage Towing | Nathan Fletcher | 12/28/11 | \$500.00 |

| | | | | | |
|----|----------------------|--|-----------------|----------|----------|
| 1 | 4. Husam Shabat | Former Employee of Advantage Towing | Nathan Fletcher | 12/28/11 | \$500.00 |
| 2 | 5 Yazid Iriqat | Former Employee of Advantage Towing/ Brother of Ayman Arekat | Nathan Fletcher | 12/28/11 | \$500.00 |
| 3 | 6. Shaheen Shaheen | Employee of Advantage Towing | Nathan Fletcher | 12/28/11 | \$500.00 |
| 4 | 7. Manal Asad | Employee of Advantage Towing | Bonnie Dumanis | 1/19/12 | \$500.00 |
| 5 | 8. Wasan Kudhair | Wife of former Mohammed | Bonnie Dumanis | 1/19/12 | \$500.00 |
| 6 | 9. Mohammed Mohammed | Former Employee of Advantage Towing | Bonnie Dumanis | 1/19/12 | \$500.00 |
| 7 | 10 Shaheen Shaheen | Employee of Advantage Towing | Bonnie Dumanis | 1/19/12 | \$500.00 |
| 8 | 11. Dina Ziada | Wife of former employee Mohammed Ziada | Bonnie Dumanis | 1/19/12 | \$500.00 |
| 9 | 12. Mohamed Ziada | Former Employee of Advantage Towing | Bonnie Dumanis | 1/19/12 | \$500.00 |
| 10 | 13. Yazid Iriqat | Former Employee of Advantage Towing/ Brother of Ayman Arekat | Bonnie Dumanis | 3/17/12 | \$500.00 |
| 11 | 14. Husam Shabat | Former Employee of Advantage Towing | Bonnie Dumanis | 3/17/12 | \$500.00 |
| 12 | 15. Manal Asad | Employee of Advantage Towing | Carl DeMaio | 10/05/12 | \$500.00 |

23 The allegations of the complaint are that "Ayman Arekat" asked each of these persons to
24 make the donations and that each made the donation "with the understanding they would be
25 reimbursed by Advantage Towing." Both acts are a supposed violation of *San Diego Municipal*
26 *Code* section 27.2943.

1 The Petitioner also claims that in fact the donations were made by Advantage Towing, a
2 supposed violation of *San Diego Municipal Code* section 27.2950.

3 With the exception of Seror Mikha, Zyad Raheem and Mohamed Ziada, the Commission
4 has nothing but circumstantial evidence to support its claims. The claim against Respondents is
5 based upon the fact that Advantage wrote checks to some of these employees near or at the time
6 of their donations. The testimony of every single witness in this case was that there was never
7 any reimbursement or agreement to reimburse.
8

9 At this stage of the proceedings Advantage will not challenge the findings of the
10 Administrative Judge regarding the credibility of the witnesses. At the same time, the
11 Commission should not ignore overriding facts that cannot be questioned based upon the
12 evidence before the Commission.
13

14 First, the Judge's findings regarding donations made by Yazid Iriqat are simply
15 unsupportable even by way of circumstantial evidence. The testimony of Mr. Iriqat was that he
16 himself had full authority to take from Advantage Towing any money he wished to take as
17 compensation or a loan.
18

19 Contrary to the findings of the Judge, the payments made to Mr. Iriqat from a
20 circumstantial evidences standpoint do not support a finding he was being reimbursed for
21 donations when he received checks other than through payroll.

22 For instance, the claim is that Mr. Iriqat was specifically reimbursed for a donation made
23 on March 7, 2012 in the sum of \$500.00. In this case there is no corresponding check to Mr.
24 Iriqat in this amount. The only check issued to Mr. Iriqat at this time was a check in the sum of
25 \$800.00 Mr. Iriqat himself testified he wrote to himself on March 8, 2012.
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1 The Commission should also note that the evidence included many similar checks paid to
2 Mr. Iriqat during the time periods at issue that do not match up with any alleged donations. For
3 instance, in 2012 Mr. Iriqat received non payroll checks for \$5000.00 on April 7, 2012, \$500.00
4 on June 6, 2012, \$1000.00 on October 5, 2012 and \$2,500.00 on November 13, 2012. The same
5 is true for the year 2011. Other than the alleged check on December 20, 2011, Mr. Iriqat issued
6 himself check for \$5,000.00 on January 18, 2011 and \$3,000.00 on August 20, 2011. In light of
7 this to find that Mr. Iriqat was reimbursed for any donations is simply not supported by even the
8 circumstantial evidence.
9

10 It also should be noted that given the undisputed fact Mr. Iriqat could write himself a
11 check from Advantage at any time he wished, finding he was reimbursed for donations sets a
12 very bad precedent. Saying he was reimbursed because he took money from Advantage near the
13 time of donations is like saying a business owner reimburses himself when he takes money he is
14 entitled to from his business and uses it to make a donation. A claim even the Commission's
15 counsel baked off on with regard to Mr. Arekat and his wife. The same should be true with
16 regard to Mr. Iriqat.
17

18 In addition to Mr. Iriqat, the evidence does not in any way support a finding that
19 Mohammed Mohammed and his wife Wasan Kudhair were ever promised or actually reimbursed
20 for donations. Mr. Mohammed was adamant in both his conversations with the Commission's
21 investigators and in his declaration that he himself mad the donations attributed to him and his
22 wife and that he was never reimbursed for doing so. Similarly, there is nothing before the
23 Commission in the form of testimony that Husam Shabat was ever reimbursed for his donations.
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IV.

THE PROPOSED FINE IS EXCESSIVE

In this matter the Administrative Judge has recommended a fine of \$160,000.00. This fine is excessive under the circumstances.

Section 26.0440 of the San Diego Municipal Code provides in relevant part

(a) The maximum fine for any violation of Governmental Ethics Laws is \$5,000. The actual fine imposed for any violation may range from zero (\$0) to five thousand dollars (\$5,000), in accordance with the Commission's assessment of the severity of the violation.

San Diego Municipal Code section 26.0438 provides in part:

(f) For each finding of a violation of Governmental Ethics Laws, the Commission shall vote on the penalty to be imposed. In determining the penalty to be imposed, the Commission shall consider all of the relevant circumstances surrounding the matter, including, but not limited to:

(1) the severity of the violation; and

(2) the presence or absence of any intention to conceal, deceive, or mislead; and

(3) whether the violation was deliberate, negligent, or inadvertent; and

(4) whether the Respondent demonstrated good faith by consulting the Commission staff for written advice, and such written advice does not constitute a complete defense; and

(5) whether the violation was an isolated incident or part of a pattern, and whether the violator has a prior record of violations of Governmental Ethics Laws; and

(6) the existence of any Mitigating Information; and

(7) the degree to which the Respondent cooperated with Commission staff by providing full disclosure, remedying a violation, or assisting with the investigation.

1 The first problem with the proposal is that the proposed fine is in excess of the
2 Commission's authority. As noted above, the Municipal Code provides: "(a) The maximum fine
3 for **any** violation of Governmental Ethics Laws is \$5,000." (Emphasis added). The ordinance
4 does not state \$5,000.00 per violation or \$5,000.00 for each violation. It clearly states the
5 maximum fine for "any" violation is \$5,000.00. The Commission does not have the power to
6 order a fine in excess of \$5,000.00 under the ordinance.
7

8 Even if it assumed the Commission's authority is in excess of the express provisions of
9 the ordinance, the second problem with the proposed fine is that it treats single instances of
10 alleged violations as multiple violations. In this case there are actually only 5 total possible
11 violations as to the donations made to each candidate. For instance, there was a single violation
12 on December 28, 2011, in terms of alleged violation of Municipal Code section 27.2950 not six
13 as proposed by the Commissions counsel. The same is true for the alleged violations on January
14 19, 2012 and March 17, 2012. Each is a single violation of that section, not multiple violations.
15

16 Third, the proposed fine is improperly punitive in that it seeks to treat each donation as
17 being made by Advantage in violation section 27.2950 and seeks to characterize the very same
18 donations as a separate violation of section 27.2943. Under the facts of this case it would be
19 improper to charge Advantage with violations of both sections.
20

21 Finally, as noted above there is no evidence to support the claims of violations with
22 regard to the donations of Yazid Iriqat and the evidence of a violation related to Mr. Iriqat is
23 missing.
24

25 Assuming the Commission does have the power to issue a fine in excess of \$5,000.00 and
26 assuming the maximum fine in this case should be not more than \$55,000.00. If the Commission
27

1 looks at the evidence concerning donations made by Mohammed Mohammed, his wife and
2 Husam Shabat, the maximum fine should be \$40,000.00.

3 V.

4 **CONCLUSION**

5 The findings of the Administrative law judge are based upon a dubious assessment of the
6 evidence. This is particularly true with regard to the donations made by Yazid Iriqat,
7 Mohammed Mohammed, his wife and Husain Shabat. N fines should issue for these violations.
8

9 Even if a fine is found appropriate the Commission's counsel is overreaching in seeking
10 payment of \$160,000.00 in fines. Particularly given the weak nature of the evidence, the
11 attempts by the Commission to overreach its authority with regard to Ayman Arekat, his wife
12 and brother in seeking fines for their donations and the fact every employee will say they were
13 not reimbursed and were not told they would be reimbursed.
14

15 Dated: April 7, 2016

STEPHEN F. LOPEZ ESQ APC

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18 By: _____
19 Stephen F. Lopez, Attorneys for Respondents
20 Advantage Towing Company Inc. and Aymen
21 Arekat
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1 **PROOF OF SERVICE**

2 I, the undersigned, declare that I am over the age of 18 years and not a party to the case; I am employed in
3 the County of San Diego, California, where the mailing occurs; and my business address is 600 B Street Suite 2230,
4 San Diego California, 92101. I further declare that I am readily familiar with the business' practice at my place of
5 business for collection and processing of correspondence for mailing with the United States Postal Service; and as
6 applicable that the correspondence shall be deposited with the United States Postal Service that same day in the
7 ordinary course of business.

8 On April 7, 2016 I served the following document(s):

9 RESPONDENTS' HEARING BRIEF

10 on the following persons/attorneys:

| | |
|--|---|
| Gary Winuk City of San Diego Ethics Commission' 1010 Second Ave Suite 153 San Diego CA 92101 GWinuk@murphyaustin.com | Attorney for: City of San Diego Ethics Commission |
|--|---|

11 I then sealed each envelope and, with postage thereon fully pre-paid,

12
13 **BY MAIL:** By placing a true copy of each document in a separate envelope addressed to each addressee,
14 respectively, this same day and at my business shown above, I placed each for deposit in the United States
15 Postal Service, using First Class or Priority Mail following ordinary business practices.

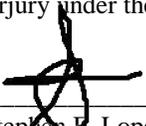
16 **BY PERSONAL DELIVERY:** I personally hand delivered to each addressee leaving said envelope with
17 either the addressee directly or another person at that address authorized to accept service on the
18 addressee's behalf.

19 **BY FACSIMILE TRANSMISSION:** In addition to service by mail, as set forth above, the counsel or
20 interested party authorized to accept service, by whose name an asterisk (*) is placed, was also forwarded a
21 copy of said document(s) by facsimile transmission at the telefax number corresponding with his name.
22 The facsimile machine I used complied with 22C rule 2003(3) and no error was reported by the
23 machine. Pursuant to CRC rule 2005(I) , I caused the machine to print a transmission record of the
24 transmission, a copy of which is attached to this declaration.

25 **XX BY EMAIL:** By transmitting a copy via e mail to Gary Winuk, an attorney who has previously consented
26 to service by email at GWinuk@murphyaustin.com.

27 I declare under penalty of perjury under the laws of the State of California that the
28 foregoing is true and correct.

Executed on April 7, 2016



Stephen P. Lopez