

1 RICHARD DOYLE, City Attorney (#88625)
NORA FRIMANN, Assistant City Attorney (#93249)
2 KATHRYN ZOGLIN, Senior Deputy City Attorney (#121187)
MARK VANNI, Deputy City Attorney (#267892)
3 Office of the City Attorney
200 East Santa Clara Street, 16th Floor
4 San José, California 95113-1905
Telephone Number: (408) 535-1900
5 Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

6 Attorneys for CITY OF SAN JOSE

ENDORSED

2014 AUG -4 3:51

Dave Taber, Clerk of the Superior Court
County of Santa Clara
By: J. CAO-NGUYEN
City Clerk

7
8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
9 UNLIMITED CIVIL JURISDICTION

11 TONI TABER, in her official capacity as
City Clerk for the City of San Jose,

12 Plaintiff,

13 v.

14 DAVE CORTESE,

15 Defendant.

Case Number: **114CV268872**

**COMPLAINT FOR DECLARATORY
RELIEF**

(Priority Requested)

17
18 **INTRODUCTION**

19 1. Toni Taber, the City Clerk for the City of San Jose ("City"), in her official
20 capacity, files this action seeking a declaration relieving her of her ministerial duty to transmit
21 Defendant Dave Cortese's name as a participant in the City's Volunteer Campaign Spending
22 Limits Program (hereafter "Program") to the Santa Clara County Registrar of Voters
23 ("Registrar").

24 **PARTIES**

25 2. Plaintiff Toni Taber brings this action in her official capacity as the City Clerk for
26 the City of San Jose. At all times mentioned herein, she is the City Clerk.

27 3. The Office of City Clerk is established under section 804 of the City Charter.
28 (True and correct copies of all cited sections of the City Charter are attached as **Exhibit 1.**)

1 Subsection (f) of Section 804 states that the City Clerk has charge of all City elections. In
2 addition, Elections Code section 320 defines an "elections official" to include a city clerk
3 having jurisdiction over elections within a city.

4 4. Defendant Cortese is a candidate for Mayor of the City of San Jose. He ran in
5 the primary election on June 3, 2014. He is a candidate in the run-off election to be held on
6 November 4, 2014.

7 JURISDICTION

8 5. The office of the San Jose City Clerk is located in the City of San Jose, Santa
9 Clara County. Plaintiff Taber is employed by the City of San Jose as its City Clerk.

10 6. Defendant is running for office in the City of San Jose and filed forms with the
11 City Clerk's Office. Plaintiff is informed and believes that Defendant resides in the City of San
12 Jose, Santa Clara County.

13 7. The Court has jurisdiction over this matter pursuant to section 1060 of the Code
14 of Civil Procedure, Elections Code section 13071, and the Court's equitable jurisdiction.

15 ALLEGATIONS

16 8. On November 4, 2014, registered voters living in the City of San Jose will vote
17 in a run-off election to determine who will be the City's next Mayor.

18 9. Section 1602 of the City Charter states that "[e]xcept otherwise provided by
19 ordinance hereafter enacted, all municipal elections shall be held in accordance with the
20 provisions of the Elections Code of the State of California, as the same now exists or may
21 hereafter be amended, for the holding of elections in cities, insofar as the same are not in
22 conflict with this Charter."

23 10. Under the San Jose Municipal Code (SJMC), candidates for elected office in
24 the City may participate in the Program, which places a cap on their campaign spending.
25 (SJMC Chapter 12.06, Part 5.) The voluntary expenditure limit for the current mayoral run-off
26 race is \$794,342.68 as established by City Council resolution. (True and correct copies of all
27 cited sections of the SJMC are attached as **Exhibit 2.**)

28 ///

1 11. Those candidates who participate in the program will have a diamond (◆)
2 designation next to their name on the ballot, ballot pamphlet, and sample ballot prepared by
3 the Registrar. (SJMC § 12.06.550.)

4 12. Candidates must file an expenditure ceiling statement (Form 500) with the City
5 Clerk stating whether they will or will not participate in the Program. (SJMC § 12.06.510 (A).)
6 Candidates must submit separate Form 500s for the primary and run-off election. They must
7 submit the Form 500s to the City Clerk before accepting or receiving any campaign
8 contributions. (*Id.*)

9 13. Candidates who participated in the Program during the primary election, but do
10 not want to participate in the Program for the run-off election, may opt out within fourteen
11 days of the primary election. (SJMC § 12.06.510(C).)

12 14. The purpose of the fourteen-day deadline is to give candidates time to decide
13 whether to participate while still notifying the public and potential donors of the candidate's
14 choice early on in the campaign.

15 15. During his campaign for the City's June 3, 2014 primary election, Defendant
16 participated in the Program.

17 16. On June 17, 2014, Defendant submitted a Form 500 to the City Clerk stating
18 that he wanted to participate in the Program for the 2014 run-off election. Defendant
19 submitted a 2010 version of the Form 500. (Defendant's June 17, 2014 Form 500 is attached
20 as **Exhibit 3**.) Defendant filed this Form 500 after the primary election and before the
21 fourteen-day deadline.

22 17. On July 25, 2014, Defendant submitted an amended Form 500 to the City Clerk
23 in which he indicated that he wanted to opt-out of the Program for the 2014 run-off election.
24 Defendant used the 2013 Form 500, the current version, to inform the City Clerk of this
25 amendment. The only substantive difference between the 2010 form and the current form is
26 the option to check a box stating "**I elect to opt out** of the voluntary campaign expenditure
27 ceiling program for the run-off election to be held on ___/___/___." (Defendant's July 25, 2014
28 Form 500 is attached as **Exhibit 4**.)

1 18. Plaintiff rejected Defendant's amended Form 500 because he submitted it on
2 July 25, 2014, which was 52 days after the primary election. The SJMC requires that
3 candidates file the Form 500 within fourteen days after the primary election. (SJMC §
4 12.06.510(C).) Thus, Defendant's amended Form 500 was untimely.

5 19. On information and belief, Defendant objected to the City Clerk rejecting his
6 amended Form 500. Plaintiff is informed and believes that Defendant does not want to
7 participate in the Program; he does not want the diamond designation next to his name on
8 the ballot, ballot pamphlet, and sample ballot; and he does not intend to adhere to the
9 Program's expenditure cap.

10 20. The City Clerk is responsible for transmitting to the Registrar for publication the
11 names of those candidates who choose to participate in the Program so that the Registrar
12 may place a diamond designation next to their names on the ballot, ballot pamphlet, and
13 sample ballot. The deadline for the City Clerk to submit this information to the Registrar is
14 Friday, August 8, 2014.

15 21. Violations of SJMC sections 12.06.500, *et seq.*, are referred to the City's Ethics
16 Commission, which is established under SJMC Chapter 12.4. The City's Ethics Commission
17 has enumerated powers, including issuing reprimands or civil penalties, but it does not have
18 the authority to amend ballot designations.

19 22. Under section 13107(b)(1) of the Elections Code, no elections official shall
20 accept a designation that would mislead the voter. The purpose of the "Elections Code[]" is to
21 insure accurate designation of candidate upon the ballot in order that an informed electorate
22 may intelligently elect one of the candidates." (*Andrews v. Valdez* (1995) 40 Cal.App.4th 492,
23 495.)

24 23. Section 204 of the City Charter also states that "[t]he citizens of San Jose
25 expect and must receive the highest standard of ethics from all those in the public service.
26 City officers and employees must be independent, impartial and responsible in the
27 performance of their duties and accountable to the members of the public."

28 ///

EXHIBIT 1

SECTION 204. City Government - Ethics.

The citizens of San José expect and must receive the highest standard of ethics from all those in the public service. City officers and employees must be independent, impartial and responsible in the performance of their duties and accountable to the members of the public.

Added at election November 6, 1990

SECTION 804. Office of City Clerk.

The office of City Clerk is hereby established. The City Clerk shall have the following powers and duties:

- (a) Attend all regular and special meetings of the Council, unless prevented by illness or physical incapacity or unless his or her absence has been authorized by the Council; and keep an accurate record of the proceedings of the Council;
- (b) Keep a record of all ordinances of the City, and of all written resolutions adopted by the Council, in such manner that the information contained therein will be readily accessible to the public. To each ordinance contained in such record he or she shall annex or attach his or her certificate stating (1) that it is the original copy of such ordinance or, if the ordinance contained in his or her record is not the original copy, that it is a true and correct copy of the ordinance, and (2) if the ordinance was one required by law to be published, that it has been published pursuant to law;
- (c) Keep all other records of Council proceedings and of his or her office in such manner that the information contained therein will be readily accessible to the public until such time as any of them are destroyed in accordance with State law;
- (d) Be custodian of the seal of the City;
- (e) Administer oaths or affirmations and take affidavits and depositions in connection with or pertaining to City affairs or business; and certify copies of official records of his or her office;
- (f) Have charge of all City elections;
- (g) Be responsible for the publication of all official advertising of the City; and
- (h) Perform such other duties consistent with this Charter as may be required of him or her by the Council.

Except as may be otherwise provided by the Council, the City Clerk shall be under the direction and supervision of the Council.

Amended at election June 7, 1994

SECTION 1602. Election Procedure.

Except as otherwise provided by ordinance hereafter enacted, all municipal elections shall be held in accordance with the provisions of the Elections Code of the State of California, as the same now exist or may hereafter be amended, for the holding of elections in cities, insofar as the same are not in conflict with this Charter.

EXHIBIT 2

Part 5
VOLUNTARY SPENDING LIMITS PROGRAM

Sections:

- 12.06.500 Voluntary campaign expenditure limits program.
- 12.06.510 Voluntary campaign expenditure limits.
- 12.06.520 Voluntary campaign expenditure limits - Transfers of campaign funds.
- 12.06.530 Expenditure limits.
- 12.06.540 Reserved.
- 12.06.550 Notification to voters.

12.06.500 Voluntary campaign expenditure limits program.

Each candidate participating in the voluntary campaign expenditure limits program shall comply with and receive all the benefits of the provisions of this chapter.

(Ords. 25445, 26440.)

12.06.510 Voluntary campaign expenditure limits.

A. Each candidate shall file a separate expenditure ceiling statement for the primary election or special primary election and general or special run-off election with the city clerk, indicating whether or not he or she will participate in the voluntary campaign expenditure limits program for each election before accepting or receiving any campaign contributions.

B. Each candidate who has filed an expenditure ceiling statement indicating participation in the program shall be subject to the expenditure limits set forth in Section 12.06.530.

C. Any candidate who declined to accept the expenditure ceiling statement in Section 12.06.530 but who, nevertheless, did not exceed the voluntary expenditure limits in the primary election or special primary election may file an amendment to the expenditure ceiling statement, accepting participation in the voluntary campaign expenditure limits program for the general or special run-off election, within fourteen days following the primary or special primary election and receive all the benefits of the program specified in this chapter. Any candidate who participated in the voluntary campaign expenditure limits program during the primary or special primary election may file to opt out of participation in the voluntary campaign expenditure limits program for the general or special run-off election, within fourteen days following the primary or special primary election.

D. Expenditures for purposes of the expenditure limits shall include in-kind or non-monetary contributions.

(Ords. 25445, 25942, 26440, 29310.)

12.06.520 Voluntary campaign expenditure limits - Transfers of campaign funds.

A. Campaign funds collected for the primary municipal election or collected for the run-off municipal election by candidates who voluntarily participate in the voluntary campaign expenditure limits program shall not be transferred to any ballot measure committee.

B. Campaign funds collected for the primary municipal election by candidates who voluntarily participate in the voluntary campaign expenditure program shall not be transferred to the candidate's run-off municipal election campaign. Remaining campaign funds after the primary municipal election shall be deemed to be surplus campaign funds and shall be distributed in accordance with the provisions of this chapter.

(Ords. 26024, 26440.)

A. The expenditure limits shall be set at:

1. Seventy-five cents per resident of the city for candidates for the office of mayor; and
2. One dollar and twenty-five cents per resident of the district for candidates for council office.

B. The number of residents of the city and each council district shall be based on census data supplied by the director of the department of planning, building and code enforcement and adjusted by the percentage increase in residents as determined by population data provided by the State of California, Department of Finance, City/County population estimates.

C. On November 1, 2011, the city clerk must:

1. As applicable, determine the cost of each candidate's statement of qualifications printed in the ballot pamphlet as established by the Santa Clara County Registrar of Voters for the last mayoral and/or council district election.
2. Determine the bulk mailing rate (C24 basic automation letter) as set forth on U.S. Postal Service Form 3602-R (or other comparable form), multiply the rate by the numbers of residents in the city and each council district and multiply the resulting amounts by .4.
3. Recommend that the city council adopt a resolution, as set forth in Subsection E. below, adding the cost of each candidate's statement established in Subsection C.1. and the bulk mailing rate calculation established in Subsection C.2. to each expenditure limit calculated pursuant to Subsection A.

D. Beginning September 1, 2013, and thereafter on September 1 of each odd numbered year, the city clerk must:

1. Determine whether the cost of living, as shown on the Consumer Price Index (CPI) for all items (with a base period of 1982-1984 = 100) for all urban consumers in the San Francisco-Oakland-San José area as published by the U.S. Department of Labor, Bureau of Statistics, has increased during the "base period" as defined in this section. The base period for the first adjustment (September 1, 2013) will be the CPI reported for the months of December 2010 and June 2013. For the second adjustment (September 1, 2015), the base period will be the CPI reported for the months of December 2010 and June 2015. The base period for subsequent adjustments will be December 2010 to June for odd-numbered years. If the CPI has increased for the applicable base period, the city clerk must multiply the expenditure limits established in Subsection A. by the percentage increase for the base period. If the calculation results in an amount that is higher than the previously established expenditure limit(s) when rounded to the nearest five cents, the city clerk will then increase the corresponding expenditure limit(s) established in Subsection A. by the percentage increase rounded to the nearest five cents. In the event the CPI is no longer published, the clerk shall use as a reference another index published by either the State of California or a federal department or agency that is charged with the responsibility of measuring the cost of living in the geographical area that includes the City of San José.

2. As applicable, determine the cost of each candidate's statement of qualifications printed in the ballot pamphlet as established by the Santa Clara County Registrar of Voters for the last mayoral and/or council district election.

3. Determine the bulk mailing rate (C24 basic automation letter) as set forth on U.S. Postal Service Form 3602-R (or other comparable form), multiply the rate by the numbers of residents in the city and each council district and multiply the resulting amounts by .4.

4. Recommend that the city council adopt a resolution, as set forth in Subsection E. below, adding the cost of each candidate's statement established in Subsection D.2. and the bulk mailing rate calculation established in Subsection D.3. to each expenditure limit calculated pursuant to Subsections A. and D.1.

E. The City Council shall review the amounts of the expenditure limits and any recommendation about the limits from the city clerk and adopt a resolution, no later than December 1 of each odd-numbered year, beginning in December 2011, specifying the expenditure limits.

F. No candidate who files an expenditure ceiling statement participating in the voluntary campaign expenditure limits program shall make any campaign expenditure above the limits set forth in the expenditure limits resolution.

(Ords. 25445, 25942, 26440, 28985.)

12.06.540 Reserved.

program.

(Ords. 25445, 26440.)

EXHIBIT 3

Expenditure Ceiling Statement

Please type or print in ink.

RECEIVED
San Jose City Clerk
2014 JUN 17 PM 1:41
AT OTC

CITY OF SAN JOSE
ELECTION
FORM 500

Amendment, check only if applicable

I Candidate Information:

NAME OF CANDIDATE

DAVE CORTESE

DAYTIME TELEPHONE NUMBER

408 283-9140

FAX NUMBER

408 532-7765

MAILING ADDRESS

PO Box 51707 San Jose CA 95151

DISTRICT NUMBER, IF APPLICABLE

4221 Littlewoods Way San Jose 95135

OFFICE SOUGHT

SAN JOSE MAYOR

OFFICE JURISDICTION (Check one box)

State

City of San Jose

County of _____

Multi-County _____

II Declaration Pursuant to San José Municipal Code Title 12, Part 5, Sections 12.06.500 – 12.06.560

Date of Election: 11/03/14

(Election Date)

(Check one box)

I accept the voluntary expenditure ceiling for the election stated above.

I will not transfer campaign funds collected for the primary to any ballot measure committee.

Date of General Election - if applicable: 11/03/14

(Election Date)

(Check one box)

I accept the voluntary expenditure ceiling for the election stated above.

I will not transfer campaign funds collected for the election stated above to any ballot measure committee.

I do not accept the voluntary expenditure ceiling for the election stated above.

I do not accept the voluntary expenditure ceiling for the election stated above.

III Ceiling Threshold: [Check applicable box(es)]

I reached 65% of the expenditure ceiling on: _____

(month, day, yr)

I exceeded 75% of the expenditure ceiling on: _____

(month, day, yr)

IV Verification:

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

Executed on June 13th

(month, day)

2014

(year)

Signature

[Signature]

(Candidate)

EXHIBIT 4

VOLUNTARY CAMPAIGN EXPENDITURE CEILING STATEMENT
RECEIVED
San José City Clerk
2014 JUL 25 PM 2:58

**CITY OF SAN JOSÉ
FORM 500**

Amendment

1. Candidate Information

NAME OF CANDIDATE: Dave Cortese
TELEPHONE NUMBER: (408) 283-9140
EMAIL ADDRESS: dave@davecortese.com
MAILING ADDRESS: P.O. Box 51707 San Jose, CA 95151
STREET: _____ CITY: _____ ZIP CODE: _____
OFFICE SOUGHT: Mayor of City of San Jose
DISTRICT, IF APPLICABLE: _____

2. Candidate Declaration - Pursuant to San José Municipal Code Title 12, Part 5, Sections 12.06.500 – 12.06.560:

(Check one box)

- I accept the voluntary campaign expenditure ceiling for the election to be held on: / /
I understand that I am subject to the expenditure limits set forth in SJMC 12.06.530. I hereby declare that I have not received or accepted any campaign contributions from others and that I will not transfer campaign funds collected during the campaign contribution collection period to my runoff campaign (if applicable), or to any ballot measure committee.
- I do not accept the voluntary campaign expenditure ceiling for the election to be held on: / /
- I elect to opt out of the voluntary campaign expenditure ceiling program for the run-off election to be held on 11/04/14.

3. Verification:

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on July 24, 2014 Signature [Signature]
(Month, Day) (Year) (Candidate)