

Government Tort Claim

Per California Government Code § 910, Randolph Hom submits the following Government Tort Claim.

Name and post office address of the claimant

Randolph Hom
P.O. Box 2681
Castro Valley, CA 94546

Post office address to which the person presenting the claim desires notices to be sent.

Adam Zapala c/o Cotchett, Pitre & McCarthy, LLP
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Burlingame, CA 94010
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Date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted.

The City of Cupertino with the participation of Barry Chang, terminated and/or engaged in an adverse action upon Mr. Hom on May 11, 2018, because he had engaged in protected activity - opposing practices believed to be unethical and illegal. Mr. Hom's termination was a retaliatory discharge in violation of the California employment laws (Gov. Code Section 12940(h) *et seq.* and other applicable provisions). The City of Cupertino's conduct also violated California Labor Code section 1102.5, and caused intentional and negligent infliction of emotional distress. Finally, the City's conduct constituted retaliation for exercising Mr. Hom's free speech rights under the federal and California constitutions. There may be additional causes of action that come to light as our investigation progresses.

Mr. Hom was hired as the City Attorney on January 4, 2016. Between that date and his ultimate termination/adverse employment action, the City approved the renewal of Mr. Hom's contract twice, and each time he passed performance reviews with flying colors. Mr. Hom has had a number of successes at the City, including successfully defending the City from a number of lawsuits. The City ultimately terminated (and/or engaged in an adverse employment action against) Mr. Hom because he expressed legal opinions and opposed conduct that conflicted with the agenda of certain City councilmembers, including Barry Chang, to push a \$3 billion plus SB35 Application by Sandhill Development for the redevelopment of the Vallco Mall ("Application"). Mr. Hom and other legal counsel affiliated with the Cupertino City Attorney's Office ("CAO") had preliminarily concluded that the development plan was unlawful for a variety of reasons, including but not limited to, its inconsistency with the City's General Plan.

On April 24, 2018, Mr. Hom emailed David Brandt, City Manager, and Aarti Shivastava, Assistant City Manager and Director of Community Development, regarding his concerns about the Vallco project for their "immediate consideration and action."

On April 27, 2018, Mr. Hom and other legal counsel, spoke with representatives from the City about the proposed development. They again relayed the deficiencies in Sandhill's

Application, and again implored the City to be honest with Sandhill about them. In response, City councilmember Barry Chang angrily sent a series of text messages to Mr. Hom, telling him not to send anything to Sandhill or its attorneys, Morrison & Foerster ("Mofo") regarding the Application's deficiencies. Mr. Chang told Mr. Hom to meet him at his office the next day, where Mr. Chang arrived irate. Mr. Chang berated Mr. Hom about his opposition to the Sandhill project on legal grounds.

Mr. Chang returned to Mr. Hom's office a few hours later and informed Mr. Hom that if his whistleblowing conduct continued, he would have no choice but to put Mr. Hom up for a performance review and that he would see to his termination. Mr. Chang explained he had already obtained the necessary votes from two other councilmembers to terminate Mr. Hom should his opposition continue. Chang called Mr. Hom an "obstructionist" and claimed councilmember Rod Sinks hated him [Hom] "because he is Chinese, Mr. Sinks hates the Chinese, and never wanted him in the City Attorney position in the first place." Finally, Mr. Chang admitted to having multiple "off the record" meetings with the developer/attorneys at Mofo to discuss Vallco, and claimed he and other City representatives had been meeting with them for years.

At a May 7, 2018 meeting with Mofo, Mr. Hom and other legal counsel again presented their views to the Mofo attorneys that the development plan was non-compliant. The attorneys from both entities agreed to discuss internally and reconvene later in the week, on Thursday, May 10, 2018. Instead, Mofo cancelled the meeting without explanation. Mr. Hom was terminated the very next day by being placed on administrative leave.

In addition to the foregoing, Mr. Hom also opposed various Brown Act violations during his time at the City. The Brown Act states that City councilmembers shall not, outside an authorized meeting, "use a series of communications of any kind ... to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body." Gov. Code Section 54952.2(b)(1). Mr. Hom learned that some City councilmembers engaged in *ex parte* discussions with the developer/developer's attorneys about the Sandhill Application on numerous occasions. These communications occurred during the sensitive time period between submission of the application and the deadline upon which the City would approve it. But more than that, the friendly relationship between the developer/developer's attorneys and the City's representatives/councilmembers has flourished for over a decade.

Mr. Hom learned of many more unethical/illegal discussions and meetings, between: Mr. Brandt, Ms. Shrivastava and developer/Mofo; Mr. Chang and other councilmembers/City representatives and developer/Mofo over many years both related to Vallco and Apple 2 campus in Cupertino (also represented by Mofo); various upper level City staff and councilmembers and Sandhill representatives concerning developer-friendly amendments to the City's General Plan in December 2014. These amendments were enacted, at Sandhill's request.

Mr. Hom also actively opposed conduct that violated the Cupertino Municipal Code ("Code"), which arms the City Attorney with the responsibility to approve all contracts. *See* Code Section 2.18.020. Mr. Hom came to learn that City staff regularly entered into, renewed or revised contracts without CAO approval. As but one example, a renewed contract with Verde Design contained an attachment regarding insurance requirements. That attachment decreased the City's Comprehensive General Liability limits by half, from \$2 million per occurrence and \$4 million aggregate, to \$1 and \$2 million, respectively. This agreement was not prepared or approved by the

CAO. Mr. Hom repeatedly vocalized his opposition to a variety of similar improprieties, and his whistleblowing in that regard was a substantial reason for his termination.

In reaction to Mr. Hom consistently voicing his opposition to the City's illegal or unethical conduct as described above, he was terminated on May 11, 2018. Mayor Darcy Paul telephoned Mr. Hom with news that the City Council voted 3-2 to terminate his employment. Mr. Hom was terminated to muzzle his legal opinions to bring the City and development projects into compliance with the law.

A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim.

Mr. Hom suffered substantial financial loss and continues to suffer substantial financial loss well in excess of \$10,000. Mr. Hom, therefore, is not required to state an exact amount of damages, as those damages will be proved (and provided to the City) after discovery and expert testimony about his financial loss. The case will be an unlimited civil action.

Present Causes of Action¹

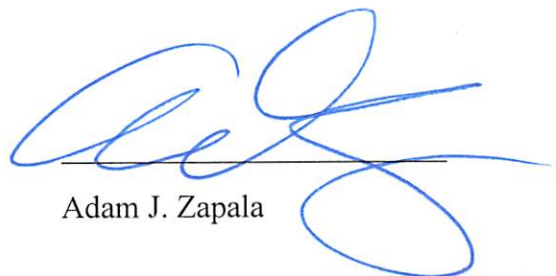
- (1) Retaliatory discharge for engaging in protected activity in violation of Cal. Gov. Code § 12940(h) and other applicable provisions;
- (2) Retaliatory discharge for engaging in protected activity in violation of 42 U.S.C. §2000e-3(a) and other applicable provisions;
- (3) Retaliatory discharge in violation of Cal. Labor Code § 1102.5;
- (4) Retaliatory discharge in violation of the First Amendment and the California Constitution (Art. 1, § 2);
- (5) Intentional infliction of emotional distress;
- (6) Negligent infliction of emotional distress; and
- (7) Other causes of action arising out of the same incidents, occurrences, events, or common nucleus of operative facts.

The name or names of the public employee or employees causing the injury, damage, or loss, if known.

- City of Cupertino councilmember Barry Chang;
- The City of Cupertino City Council, including but not limited to all members of the Council.

Signed:

10/22/18



Adam J. Zapala

¹ Plaintiff reserves the right to include additional causes of action based on continued investigation and the facts giving rise to this dispute.

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