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11 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

12 In the Matter Of,

Case No. 14F-001-AAG

13 TOM HORNE, Tom Horne for Attorney
14 General Committee (SOS Filer ID 2010
00003); KATHLEEN WINN, Business
15 leaders for Arizona (SOS Filer ID 2010
00375)

**TRIAL MEMORANDUM RE:
HEARSAY**

(Honorable Tammy Eigenheer)

16
17 While hearsay is sometimes admissible in administrative hearings, that is not always so.
18 In *Reguero v. Teacher Standards and Practices Commission*, 315 Or. 402, 822 P.2d 1171
19 (1991), the Court stated:

20 Even where hearsay is sufficiently reliable to be admissible and
21 might be relied on when the consequences of the decision would
be minor, that same hearsay might not be relied on when the
22 consequences of the decision would be a profound impact on, for
example, the ability of an individual to pursue a chosen profession.
23 312 Or. P.2d at 1183.
24

1 In the County Attorney's Order, Page 24, the County Attorney orders the following:

2 If Horne, Winn, the Horne Campaign, and/or BLA fail to take the
3 ordered corrective action within twenty days, this Office will issue an
4 Order Assessing a Civil Penalty pursuant to A.R.S. § 16-924(B). The
violation of the contribution limits carries a civil penalty of three times
the amount of money of the violation.

A.R.S. § 16-905(J). (Order p. 24, emphasis added).

5 The amount of the remedies specified at pages 22-23 of the Order is \$397,374. If Respondents
6 were unable to pay that within the 20 days of the final Order as specified in the above quotation, then they
7 would be facing a penalty of approximately \$1.2 million. This is certainly "a profound impact" of
8 any individual, and "hearsay might not be relied on when the consequences of the decision
9 would be a profound impact...." *Reguero supra.* at 1183.

10 In addition, there are other factors to be considered in determining whether hearsay
11 should be admissible. This includes "whether the statements are signed and sworn to as opposed
12 to anonymous, oral, or unsworn. *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980). In our
13 case, the hearsay that the County proposes to use is neither signed nor sworn to. In *Reil v. United*
14 *States*, 197 Ct. Cl. 542, 456 F.2d 777 (1972), the Court also referred to "signing, swearing, etc."
15 as factors relevant to the admissibility of the hearsay.

16 The hearsay the County is offering also has major indicia of unreliability. The memos by
17 the FBI Agents are not truthful representations of what the witnesses said to them. We know this
18 because the witness Greg Tatham recorded his conversation with the FBI Agents, without their
19 knowing it. Consequently, they felt free to misrepresent what was said in their memo, without
20 realizing there was a recording to contradict them. The recording shows that Greg Tatham
21 stated: "So Tom is talking to a lot of people to try and figure out the best way to move an asset
22 and roll it into something else. So, to answer your question directly, I'm not sure that he was
23 discussing this with any other brokers. All I know is that he typically runs all of his deals, you
24 know, he refers to me to review whatever deals he is considering even if I'm not involved in any

1 commission or representation”, indicating that it made sense to him that Horne would have
2 sought advice from others, including Kathleen Winn, on his real estate transaction. But the FBI
3 Agents wrote the following: “Tatham was not aware of Horne ever consulting with Kathleen
4 Winn for real estate advice on the sale of the property. Winn was not involved in the transaction
5 of the sale of 1515 N. 7th Avenue, Phoenix, AZ”. This was a flat out misrepresentation of what
6 Tatham had said.

7 In addition, the transcripts of the interviews show strong signs of having been edited to
8 exclude statements that were favorable to Horne. For example, at pages 43-45 of the Heap
9 transcript, Grehoski says: “You know, we heard that Tom is supposed to be, ah, honest to a
10 fault.” But that testimony by witnesses does not appear in any of the transcripts. It must have
11 been edited out.

12 In addition, in *Peters v United States* 187 Ct.Cl. 63,408 F.2d 719 (1969), the Court stated:

13 The degrees of probative force and reliability of hearsay evidence
14 are infinite in variation, and its use by administrative bodies, ex
15 necessitate, must in part of governed by the relative unavailability
16 of other and better evidence.

17 None of the witnesses whose hearsay the County seeks to use would have been
18 unavailable to call as witnesses in this case.

19 Unreliability, and availability of better evidence, are important factors. But the major
20 factor here is “profound impact.” Hearsay is often admissible in Administrative Hearings, but
21 the impact of typical administrative hearings is minor compared with the \$400,000 or possible
22 \$1.2 million involved here. Few Court cases, where hearsay is excluded, have as great an impact
23 as the \$400,000 or possible \$1.2 million sought here. Here the impact on the individuals is so
24 profound that it is manifestly unfair to permit the County to submit hearsay, which deprives
parties of the opportunity to cross examine the original source of the alleged information.

1 RESPECTFULLY SUBMITTED this 10th day of February, 2014.

2
3 /s/ Michael D. Kimerer

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1 **ORIGINAL** of the foregoing
electronically filed with the Office of
2 Administrative Hearings on this 10th day
of February, 2014, to:

3 Honorable Tammy Eigenheer
4 Administrative Law Judge
ARIZONA OFFICE OF ADMINISTRATIVE
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7 **COPIES** of the foregoing served via OAH
8 electronic filing this 10th day of February, 2014, to:

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