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ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

In the Matter of Charges Against ROSS MIRKARIMI, Sheriff, City and County of San Francisco.	**MAYOR'S REQUEST FOR CROSS-EXAMINATION AND OBJECTIONS TO EXPERT DECLARATION**

The Mayor requests cross-examination of Michael Hennessey. In addition, the Mayor has the following objections to testimony contained in the Hennessey Declaration.

I. IT IS IRRELEVANT THAT AUTHORITIES DID NOT FILE OFFICIAL MISCONDUCT CHARGES AGAINST DIFFERENT SHERIFFS AT DIFFERENT TIMES UNDER DIFFERENT OFFICIAL MISCONDUCT LAWS FOR DIFFERENT CONDUCT – AND EVEN IF THESE DISCRETIONARY CHARGING DECISIONS HAD SOME MINIMAL RELEVANCE, IT WOULD CONSUME AN UNDUE AMOUNT OF TIME TO COMPARE THEM WITH THE PRESENT CASE

With regard to the first full paragraph on page 2 of the Hennessey declaration, which begins, "I am aware of two elected California county sheriffs…," the Mayor objects to the entire paragraph except for the last sentence ("Neither California law…"). The basis of the objection is relevance, and alternatively undue consumption of time, Evid. Code § 352. The objected-to testimony discusses the fact that authorities chose not to file official misconduct charges against San Francisco Sheriff Richard Hongisto in 1977 or Sacramento Sheriff Robbie Waters in 1984.

Whether or not charges were filed against these officials has no relevance for the present case. Charging decisions are discretionary. Under each of the three different official misconduct laws applicable to these three different cases, the decision whether to file official misconduct charges was discretionary.[1] *See* Current S.F. Charter § 15.105(a) ("Such officer *may* be suspended by the Mayor…."; emphasis added) (Sheriff Mirkarimi); Former S.F. Charter § 8.107 (1977) ("Any elective officer … *may* be suspended by the mayor…"; emphasis added) (Sheriff Hongisto); Gov. Code § 3060 (grand jury "may" make an accusation) (Sacramento Sheriff Waters). Discretion means that a decision not to charge does *not* mean no official misconduct occurred. These discretionary charging decisions made in other cases, based on different conduct and made under different laws and different circumstances, do not have a tendency to prove whether or not Sheriff Mirkarimi's conduct in this case was "official misconduct" under the current Charter provision. They are therefore irrelevant. Evid. Code § 210 ("'Relevant evidence' means evidence … having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.").

Moreover, under Evidence Code § 352, any conceivable relevance of these other cases is outweighed by the time it would take to illustrate the differences between those cases and Sheriff Mirkarimi's. For example, Sheriff Hongisto found himself in contempt of court for acting consistently with the policy of the City and County of San Francisco to protect the International Hotel for low-income housing purposes, and engaging in a political act of civil disobedience. The differences between Sheriff Hongisto and Sheriff Mirkarimi are obvious – Sheriff Mirkarimi was

[1]Under narrow circumstances not present here, it can be mandatory to charge official misconduct. Under current S.F. Charter § 15.105(c), when an elected officer is convicted of a *felony* involving moral turpitude, the Mayor "*must* immediately remove from office." S.F. Charter § 15.105(c) (emphasis added). Here, however, removal was not mandatory, because Sheriff Mirkarimi was convicted of a *misdemeanor* involving moral turpitude. *Donley v. Davi*, 180 Cal.App.4th 447 (2009) (use of force in special relationship involves moral turpitude); *People v. Rodriguez*, 5 Cal.App.4th 1398 (1992); *see also Padilla v. State Personnel Bd.*, 8 Cal.App.4th 1136, 1141 (1992) (probation conditions relevant to moral turpitude determination). The removal of Sheriff Mirkarimi would have been *mandatory* under the 1977 Charter provision, which made no such distinction between felonies and misdemeanors, and simply required removal upon "conviction of a crime involving moral turpitude." Former S.F. Charter § 8.107.

not furthering any policy of the City and County of San Francisco when he falsely imprisoned his wife. Nevertheless, illustrating the many differences in the governing law and facts of these different cases would consume an undue amount of time, compared to any conceivable relevance they might have.

II. MICHAEL HENNESSEY'S BACKGROUND AS A NON-PEACE OFFICER IS IRRELEVANT TO THIS CASE, WHICH INVOLVES EVALUATION OF SHERIFF MIRKARIMI'S CONDUCT, NOT HIS BACKGROUND

With regard to the second full paragraph on page 2 of the Hennessey declaration, which begins with: "With regard to what other public safety executives may state about the qualifications that one must have ….", the Mayor objects to the entire paragraph. The objected-to testimony discusses how Mr. Hennessey was elected and re-elected to the office of Sheriff even though he was not a peace officer. The objected-to testimony also claims that "other public safety executives" "generally" thought that this rendered Mr. Hennessey unqualified for the office of Sheriff. This testimony is irrelevant and lacks foundation.

This testimony is irrelevant to these official misconduct proceedings, because these proceedings are about Sheriff Mirkarimi's *conduct*, not whether he met the minimum qualifications for office. The Charges do not allege that Sheriff Mirkarimi committed official misconduct by not being a peace officer or otherwise lacking the minimum qualifications for office. They certainly do not allege that Michael Hennessey was unqualified to be Sheriff.[2] Rather, the Charges allege wrongful *conduct* by Sheriff Mirkarimi. Wrongful conduct and lacking minimum qualifications are two different things. The official misconduct definition pertains to conduct: "Official misconduct means any wrongful *behavior* by a public officer in relation to the duties of his or her office, willful in its character, including any failure, refusal or neglect of an officer to perform any duty enjoined on him or her by law, or *conduct* that falls below the standard of decency, good faith and right action impliedly required of all public officers and including any violation of a specific conflict of

[2] And he never was unqualified to be Sheriff. The provision of law discussed by Mr. Hennessey, Government Code § 24004.3, contained a subdivision (b) that permanently "grandfathered" any Sheriff holding office as of January 1, 1989.

interest or governmental ethics law." S.F. Charter § 15.105(e) (emphasis added). Even the most qualified elected officers are required to refrain from wrongful behavior or substandard conduct.

Finally, Mr. Hennessey's broad statements about what "other public safety executives" "generally" thought of Mr. Hennessey's background in 1988, when Government Code section 24004.3 was enacted, are irrelevant and lack foundation.

III. MICHAEL HENNESSEY'S GENERAL STATEMENTS ABOUT THE "LAW ENFORCEMENT COMMUNITY" AND "WHAT A COUNTY'S VOTERS MAY BELIEVE OR WANT" ARE IRRELEVANT AND LACK FOUNDATION

The Mayor objects to the third full paragraph on page 2 of the Hennessey declaration, which states: "The 'law enforcement community' can be a very closed and insular society that believes it 'knows best,' irrespective of what a county's voters may believe or want."

This statement is irrelevant. This statement states a possibility, about how the "law enforcement community" "can" be "closed and insular." This statement is general and does not reference any specific view of the law enforcement community that Mr. Hennessey is addressing. It does not even state an opinion about whether the "law enforcement community" is, in fact, being "closed and insular" in regard to this case. As such, it has no probative value.

In regard to the phrase, "what a county's voters may believe or want," the subject matter is outside of Mr. Hennessey's expertise. And again, given the generality of this statement and the fact that it is not applied to any issue in the case, the statement is irrelevant to any disputed fact of consequence to this action.

DATED: June 22, 2012

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