**CONFIDENTIAL**

July 19, 2017

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**Re: Case Nos. 17017.CF; 17026.CF; 17027.CF – Requests for Reconsideration**

Dear Messrs. :

On June 19, 2017, on behalf of your respective clients [“Contributor”] and [“Political Committee 1”] , you requested that the Board reconsider its Advisory Opinion and vacate its Probable Cause finding in Case 17017.CF (both the opinion and notice were issued on June 1, 2017). Then, on June 27, you submitted requests for reconsideration in Cases 17026.CF and 17027.CF, which involve contributions Contributor made in 2016 and 2017 to the authorized political committees of two (2) other City elected officials. On July 5, you submitted a revised request in Case 17017.CF. The issues in all these requests are identical, so we address them all in this letter.

**Executive Summary.** The Board has carefully considered the arguments and additional facts presented in your requests. For the reasons explained below, the Board voted to deny the requests at its July 19, 2017 meeting. Thus, the Board’s probable cause findings in Cases 17017.CF, 17026.CF, and 17027.CF, that there were violations of §2-156-445(a) of the Governmental Ethics Ordinance (the “Ordinance”), by virtue of contributions made by Contributor’s affiliates to the committees of the three (3) City elected officials in 2016 and 2017 (and by the committees’ acceptance of these contributions) becomes final.

The Board again advises you and your clients that, pursuant to §2-156-445(d) of the Ordinance, your clients can erase this violation by operation of law by effecting timely refunds of the excess amounts contributed, i.e. before Tuesday, August 1, 2017. Should they choose to effect refunds, per our advice, please provide us with evidence that they were effected.

**The Board’s Opinion and Probable Cause Finding**. In brief, the Board determined that: (i) several affiliates of Contributor were “seeking to do business” with the City, as defined in §2-156-445(a) of the Ordinance, by being named, in documents transmitted to and approved by City Council in January and February 2017, as potential concessionaires or subtenants at a Chicago airport; (ii) these businesses are “affiliated companies” with the other of Contributor’s businesses that contributed in excess of $1,500 to Committee 1 in 2017, within six (6) months of the airport matter’s pendency before City Council; and (iii) therefore, Contributor and Committee 1 each violated §2-156-445(a) of the Ordinance. That section limits contributions at $1,500 per calendar year to any elected City official (or the official’s authorized political committee) from persons “seeking to do business” with the City (and others).

**Your Requests for Reconsideration.** Rule 3-8 of the Board’s Rules and Regulations provides that a request for reconsideration of a Board opinion must contain:

“an explanation of material facts or circumstances that were not before the Board in its deliberations on the opinion… [and that] if the Board finds that [such] material facts or circumstances do not alter its decision, it shall deny the request and so notify the person requesting the reconsideration.”

Your requests do present facts not before the Board when it issued its June 1 advisory opinion and notices of probable cause on June 1 and June 19. Specifically, Contributor has presented a Letter of Intent (“LOI”) between its Affiliate #14 and [another entity, “L”] . As reflected in the LOI, L is the intended licensee of Contributor’s intellectual property (the three business concepts, that is), and the entity that would play an important role in assembling a comprehensive response to the Department of Aviation’s Request for Proposals to develop food and beverage concessions at a Chicago airport. The LOI is dated 2015, and appears to have been agreed to by an agent of Affiliate #14 in 2016. In explaining the LOI, Contributor’s request states:

“[t]he Board incorrectly assumed that [the three affiliated companies of Contributor] are business entities that will be operated by Contributor and [would be] ‘subtenants’ at the Chicago Airport. In fact, Contributor will license the concepts of [these three businesses] to a third party not affiliated with Contributor so that the third party can operate its own [businesses] at the Chicago Airport. In other words, Contributor is not seeking to do business with the City at this airport but will simply license the [concepts of the three businesses] to a third party that is not affiliated with Contributor.”

Contributor’s request further states (and Committee 1’s affirms) that Contributor would not be a subtenant, nor would any of Contributor’s affiliated companies. Instead, Contributor would be a licensor of its “Licensed Concepts,” the owner and licensor of intellectual property, but will not invest capital, hire or control employees, or have an equity interest in the operating company, or share in the profits of the enterprise. Contributor’s responsibilities will be limited to advising on the supply of proprietary plans and drawings, signage, and training. Contributor’s request further states:

“[n]otably, [Affiliated company #14 and L ] have not entered into a final brand license agreement, and therefore, it is not even clear at this point whether the [names and intellectual property of the three (3) Contributor afffiliates] will be used at all at the Chicago airport.”

Contributor also argues that the:

“Board’s determination was based upon these [names and intellectual property of the three (3) affiliated Contributor businesses ] occupying the role of a subtenant and therefore occupying an operational role. Factually this is not the case, therefore, there were not affiliated Contributor entities seeking to do business with the City.”

Finally, Contributor argues, its role as a licensor is vastly different from the role of a subtenant under the “CRAMLA” (the Airport Concession Redevelopment and Management Lease Agreement), the document that was transmitted to and approved by City Council , because the LOI provides that L , not Contributor , will bear the costs of design, construction, etc., while the sample sublease in the CRAMLA provides that the subtenant must bear the responsibility of the costs for the design, construction, etc. of the retail or restaurant premises. Hence, it argues, neither the Contributor nor its affiliates were “subtenants.”

**Analysis**. The narrow issue again before the Board is whether Contributor or any of its affiliated companies – either any of the Contributor’s affiliated businesses named in the documents submitted to City Council (including the “CRAMLA,” – or, from the newly-presented facts, Contributor’s Affiliate #14 [[1]](#footnote-1) – “had any matter that was pending before the City Council … in the six months prior to the date of the contribution if that matter involved … concession agreements.”

The LOI itself answers this question on its face. Its initial sentence states the intention of Contributor/Contributor’s affiliate #14 and L :

“to enter into a definitive brand license agreement … for the development and operation of a [business] concession at [a Chicago airport.”

¶1 continues:

“As part of its proposal, L will include no less than 5 business concepts currently operated by Contributor , an affiliate of [Contributor’s affiliate #14], featuring Contributor’s proprietary trade names, trademarks, trade dress, know-how and unique operating system.”

The Board recognizes that the LOI also states, in ¶2a, that L (not Contributor ) will own and operate the businesses and be solely responsible to pay for all third party costs of design, construction, equipment and operations. This is a point both Contributor and the Committee 1 stress in their requests. Further, the Board recognizes that, as both the Committee and Contributor argue, none of the three “Licensed Concepts” would actually have the status as subtenants. This is a new fact that was not before the Board when it issued its advisory opinion or probable cause findings.

However, in ¶2b, the LOI reflects the parties’ agreement that L will pay Contributor’s affiliate #14 monthly royalties equal to a certain percentage of the businesses’ gross revenues. Moreover, per ¶¶2 c – h, Contributor’s affiliate #14 will in effect act as a franchisor: it will provide assistance on architectural plans, signage, design and training, and “shall have customary approval rights over the businesses generally, including, but limited to, menus, design, layout and use of [Contributor’s] proprietary trade names, trademarks, trade dress, know-how and unique operating system.” Further, in ¶5, Contributor’s affiliate #14 agrees to provide information and assistance to aid in L’s preparation of its RFP response, and to attend meetings and hearings with L and other licensors as part of the RFP process, and promote L’s response.

Finally, after ¶9, the LOI states:

“We believe the proposed relationship between L and [Contributor’s affiliate #14] will be viewed favorably and welcomed by [the airport] and by the traveling public. As such, this letter represents an important opportunity to enhance Licensor’s brand value and future potential.”

From this LOI document, the Board concludes that, by entering into this LOI, Contributor and its affiliate Contributor’s affiliate #14, intended, fully 13 months before the CRAMLA was ever presented to City Council, to have a presence at this Chicago airport, to build brand recognition, and to derive revenues from sales to the traveling public – even though the Contributor chose to license its trademarks, trade dress, etc. to L or a sublicensee, and not to own and operate the businesses that would operate under its trademarks, etc. at this Chicago airport and even though Contributor is not an owner of L or of the master concessionaire at the airpoert . The point is that Contributor’s and Contributor’s affiliate #14’s interests in having a presence at this Chicago airport was central, but the form that presence took was secondary. We recognized this in our June 1 advisory opinion, where we wrote (on page 7) that:

“the Ordinance must be read to include the retail businesses and restaurants named in documents transmitted to the City Council for its approval, because it is these businesses and restaurants, not the master concessionaire, , that have “brand recognition” and will showcase the concession plan that the City envisions for its airports.”

The fact remains that three (3) businesses affiliated with Contributor *were* identified in documents transmitted to City Council, whether as intellectual property, or as brick-and-mortar establishments. This very same identification and recognition of Contributor’s, trademarks, trade dress etc. is precisely what Contributor , L, [the master concessionaire] , and then the Department of Aviation, the City Council, and finally, as expected, the traveling public, would rely on, and this recognition played a critical role in the City Council’s approval of the CRAMLA in the first place. That these business names or concepts would, if approved, be licensed, and not operated by Contributtor itself, was not relevant to the City Council’s decision – the City Council did not even know who the ultimate operators/licensees of Contributor‘s “Licensed Concepts” would be. This was precisely the intention of the Contributor, L , and the master concessionaire and the Department of Aviation: by naming brands with which the traveling public is familiar (not the names of the eventual licenses/operators), the chances of being approved by City Council vote were increased. Would the City Council members have been swayed against the master concessionaire’s proposal by knowing that the Contributor (and possibly other named concessionaires) would not itself own and operate these businesses, but was instead licensing them? That question also answers itself: does the public care whether McDonald’s restaurants are franchised, and actually owned and operated by area franchisees? The argument that the Contributor or its affiliates would not actually own the businesses, and would not contractually be subtenants, is far outweighed by the totality of undeniable facts: the Contributor intended to introduce a brand presence for itself at this airport explicitly to increase its brand recognition, and intended to exert the “customary” control over the operating businesses at this airport to protect its brand, trademarks, and reputation. Contributor is the owner of the trademarks, trade dress, etc., and all good (or bad) will) generated by its brands’ presence at this airport would redound to the Contributor – not to the unknown licensees.

For the Board to conclude, as the Committee 1 and the Contributor urge, that Contributor did not have a matter pending before City Council involving concession agreements because it chose to license its trademarks, trade dress, and brand recognition, and not itself own and operate the businesses (this in essence is the argument made in the Requests for Reconsideration) – and ignore the fact that three (3) of Contributor’s affiliated companies were explicitly named in documents transmitted to and approved by City Council, whether as businesses or as “concepts” – would allow form to triumph over substance in a way the political contribution restrictions in the Ordinance do not countenance. It would also ignore the fundamental rationale behind franchising and licensing, which is that, to the Department of Aviation, the City Council, and the traveling public, there is no substantive difference between a company-owned store and a franchised store, owing to the operational control the franchisor or licensor exerts over its franchisees’ or licensees’ operations in order to protect its trademarks, intellectual property, brand, and reputation. The same is true here. There can be no doubt that the Contributor was the true party-in-interest in these licensing transactions, and stood to gain or lose by having its trademarks, recognized brands, trade dress, etc. present at this Chicago airport.

We thus conclude that the Contributor “had” a matter pending before City Council involving concession agreements in the six (6) months prior to its affiliates’ various contributions to contributions to Committee 1 and its affiliates’ various contributions to the committees of two (2) other City elected officials.[[2]](#footnote-2)

**Determination**. For the foregoing reasons, the Board voted at its July 19, 2017 meeting to deny the request for reconsideration submitted by the Contributor and Committee 1 . The Board therefore determines that the Contributor was seeking to do business with the City as that phrase is defined in the Ordinance, thus the Contributor and the committees of the three (3) elected City officials that received combined political contributions in excess of $1,500 from the Contributor or its affiliated companies within six (6) months of the CRAMLA’s pendency in City Council violated §2-156-445(a) of the Ordinance.

The Board again advises the parties to effect a timely refund of the excess amounts contributed within 10 calendar days of this letter, that is, before Tuesday, August 1, 2017, thereby erasing the violations by operation of law.

We sincerely appreciate the opportunity to address these new facts, and your time in preparing these thorough requests for reconsideration.

Sincerely,

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William F. Conlon

Chair

1. From the facts presented, we conclude that Contributor’s affiliate #14is an affiliated company of Contributor; Contributor is also identified as an “affiliate of” Contributor’s affiliate #14 in ¶1 of the LOI, although we use the term “affiliate” in the specific way contemplated by the Ordinance. [↑](#footnote-ref-1)
2. We will notify the treasurers for the other City elected officials of our finding as well. [↑](#footnote-ref-2)