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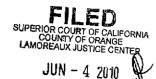
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ALAN CARLSON, Clerk of the Court

BY: W. ELLIS DEPUTY

### SUPERIOR COURT OF CALIFORNIA COUNTY OF ORANGE

In the Matter of the Petition of Fullerton Observer to Have the Standing of Fullerton Observer as a Newspaper of General Circulation Ascertained and Established.

#### CITY OF FULLERTON,



Contestant,

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#### THE FULLERTON OBSERVER,

Respondent.

Case No. 30-2010-00357417-PR-OP-LJC

OBJECTION TO PETITION TO ASCERTAIN AND ESTABLISH STANDING AS A NEWSPAPER OF GENERAL CIRCULATION [GOVERNMENT CODE § 6022]; DECLARATION OF BEVERLY WHITE IN SUPPORT THEREOF

Date: June 7, 2010 at 9:00 am

Dept: L73

The City of Fullerton alleges:

- 1. The City of Fullerton ("City") is a municipal corporation duly organized and existing under the laws of the State of California.
- 2. The standing of the Fullerton Observer ("Petitioner" or "Observer") as a newspaper of general circulation, as defined in Government Code section 6000, for the City of Fullerton, California, be denied for the reasons stated below.

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#### INTRODUCTION

Petitioner is seeking adjudication as a newspaper of general circulation under Government Code<sup>1</sup> section 6000. "The impact of becoming a newspaper of general circulation ... is significant" because certain legal notices, such as probate and foreclosure notices, "must be published in a newspaper of general circulation....<sup>2</sup>" As a result, the legislature has provided two sets of criteria for being adjudicated a newspaper of general circulation, section 6000 and 6008.

Petitioner is seeking adjudication under section 6000 which requires that the newspaper be "published for the dissemination of local or telegraphic news and intelligence of a general character, which has a bona fide subscription list of paying subscribers, and has been established, printed and published at regular intervals in the State, county, or city where publication, notice by publication, or official advertising is to be given or made for at least one year preceding the date of the publication, notice or advertisement." Petitioner's petition should be denied for three reasons:

 The Petition Should Be Denied Because The Observer Is Not Both Printed And Published In The City Of Fullerton As Required By Section 6004.5 Of The Government Code.

Under section 6004.5, one of the primary requirements for a newspaper to be adjudged a newspaper of general circulation is that the newspaper be "both printed and published in one and the same town or city." It is important to note that these requirements are distinct<sup>3</sup> and that this requirement has been held to be reasonable and constitutional<sup>4</sup>.

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All subsequent references are to the Government Code.

<sup>&</sup>lt;sup>2</sup> In re Motz (2005) 127 Cal.App.4th 836, 838-839; see also section 6040 ["Whenever any official advertising, notice, resolution, order, or other matter of any nature whatsoever is required by law to be published in a newspaper, such publication shall be made only in a newspaper of general circulation."]

<sup>3</sup> See Section 6005

<sup>&</sup>lt;sup>4</sup> See Application of Monrovia Evening Post (1926) 199 Cal 263, 269-270.

The petition fails to establish that this requirement is met; in addition, the City has reason to believe the Observer is not actually printed in Fullerton and, as a result, the Observer fails to meet the statutory definition of a newspaper of general circulation.

"Printed" is defined in section 6003 as "the mechanical work of producing it, that is the work of typesetting and impressing type on paper...." The Court of Appeals has clarified this definition as the "general mechanical means of multiplying copies of a newspaper.... "Thus, "printing" means the act of reproducing copies of the newspaper.

The City is requesting that the petition be denied on the grounds that the Observer is not printed in Fullerton as required by sections 6000 and 6004.5. While the City does not know where the physical act of duplicating copies of the Observer takes place, *Petitioner has admitted that the Observer is not printed in Fullerton*.

In an email to Fullerton's City Clerk on February 16, 2010, regarding where the Observer was printed, Petitioner stated that "[w]e have to go out of town and in fact use the same out of town printer as the city has been using." (See attached Declaration of Beverley White). Based on this admission, the petition should be denied since it is clear that the Observer does not meet the requirements of section 6000 and 6004.5 in that it is not actually printed in the Fullerton.

In addition, the petition itself is insufficient on its face to establish that the Observer meets the printing requirement under section 6000. Petitioner claims that it meets the printing requirement because "the mechanical work of producing the newspaper has been performed in Fullerton....<sup>6</sup>" But this statement fails to establish that the Observer is "printed" in Fullerton.

Petitioner's statement fails to establish that the Observer is reproduced, i.e.

"printed", in the City of Fullerton. Petitioner has simply restated the codified language,
but fails to set forth any specific facts to demonstrate that multiple copies of the Fullerton

<sup>&</sup>lt;sup>3</sup> In re New-Ledger (1967) 255 Cal.App. 2d 211, 215.

<sup>&</sup>lt;sup>6</sup> Petition pg. 3, ln 6.

Observer are actually produced in the City of Fullerton. Petitioner fails to state the name and address of the printing company or other information to ascertain the exact location that printing occurs. This is essential information that is needed in order to make a determination of whether the Observer qualifies as a newspaper of general circulation under section 6000.

In sum, the City requests that the Court deny Petitioner's request to have the Observer declared a newspaper of general circulation on the grounds that Observer fails to meet the requirements of section 6000 and 6004.5 since it is not printed in the City of Fullerton.

### The Petition Should Be Denied Because The Observer Is Not Published At Regular Intervals As Required By Section 6000

Another essential requirement under section 6000 is that the newspaper seeking to be declared a newspaper of general circulation be "printed and published at regular intervals...." While section 6000 does not state explicitly how often a newspaper needs to printed and published to meet this requirement, section 6008 sheds light on the legislature intent regarding this issue.

Section 6008 is an alternative method for being declared a newspaper of general circulation. It does not require that the newspaper be printed and published in the same city, but it does contain other requirements such as a substantial distribution list of paid subscribers. One of the common requirements between section 6000 and 6008 is the requirement that the newspaper be published at regular intervals. In fact, section 6008(a) states that the newspaper must be "published at regular intervals of *not less than weekly....*" Since both section 6000 and 6008 contain the requirement that a newspaper

<sup>&</sup>lt;sup>7</sup> Emphasis added.

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of general circulation must be published at regular intervals, it is logical to look at section 6008's weekly interval requirement as the minimum requirement for section 6000 as well.

Thus, based on this analysis, the petition should be denied because the Observer is only printed and published "as a bi-monthly newspaper on Monday every other calendar week (except only once in January, July and August).<sup>8</sup>"

Even if the Court disagrees and finds that the stated language in section 6008 should not be applicable to section 6000, the petition should still be denied on the grounds that the Observer is not printed and published at regular intervals because the Observer's is not printed and published often enough for persons or entities to meet their legal noticing requirements.

For example, if the Observer were found to be a newspaper of general circulation, the City would be required by law to publish public hearing notices<sup>9</sup> in the Observer and would not be able to hold those hearings without this notice. The City's ability to conduct public hearings would be seriously restricted because of the Observer's limited publication schedule, specifically during the months that the Observer is only published once a month. It is highly unlikely that the Legislature would intend for a local agency to have to plan its legislative agenda around a bi-monthly/monthly newspaper publication schedule.

In sum, the petition should be denied because the Observer in not published at least once a week which is, arguably, the required interval for publication. Even if this one week interval is found to be inapplicable, the petition should still be denied on these grounds since a bi-monthly/monthly publication schedule is simply not often enough for persons or entities to fulfill their legal noticing requirements.

Petition Pg. 3, Ln. 8-9.

Section 65090 states that "When a provision of this title requires notice of a public hearing to be given pursuant to this section, notice shall be published pursuant to Section 6061 in at least one newspaper of general circulation within the jurisdiction of the local agency which is conducting the proceeding at least 10 days prior to the hearing, or if there is no such newspaper of general circulation, the notice shall be posted at least 10 days prior to the hearing in at least three public places within the jurisdiction of the local agency." (Emphasis added.)

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### The Petition Should Be Denied Because The Observer Does Not Have A Bona Fide List Of Paying Subscribers

Section 6000 requires that a newspaper of general circulation have a "bona fide list of paying subscribers." A bona fide subscription list has been defined as "a real, actual, genuine subscription list which shall contain only the names of those who are in good faith paying regularly for their subscriptions.<sup>10</sup>"

The Petitioner states it meets this requirement because "the newspaper has a bona fide subscription list of paying subscribers numbering 598 in Fullerton, 11" but closer examination shows that this is not entirely accurate. According to Petitioners own declaration, "the Observer is free 12" and, therefore, by implication its readers do not pay for the newspaper. However, the Observer's website indicates that it will mail the newspaper to Fullerton residents for \$25 per year. One can only assume that the "paying subscribers" that Petitioner is referring to are 598 Fullerton residents that are paying to have the Fullerton Observer mailed to their homes. But this does not mean that these people are bona fide subscribers as required by section 6000.

As stated previously, the Observer is a free publication; no one has to pay for the newspaper itself. The 598 Fullerton residents that Petitioner is referring to are not paying for the Observer; they are paying for the postage to have it mailed to their homes. As a result, they are not bona fide subscribers as contemplated by section 6000.

#### CONCLUSION

In conclusion, the petition to have the Observer declared a newspaper of general circulation should be denied for three reasons. First, the Observer does not meet the requirement of section 6004.5 it is not printed and published in the City of Fullerton. Second, the Observer is published bi-monthly/monthly, therefore it does not meet the

<sup>&</sup>lt;sup>10</sup> In re Herman (1920) 183 Cal. 153, 164-165.

<sup>&</sup>lt;sup>11</sup> Petition Pg. 2, Ln. 25-26.

<sup>&</sup>lt;sup>12</sup> Declaration of Sharon Kennedy Pg. 2, ln. 20.

requirement that a newspaper of general circulation be printed and published at regular intervals. Finally, the Observer's petition should be denied because the 598 Fullerton residents that Petitioner is referring to are not subscribers since they are not actually paying for the Observer; they are paying for the postage to have it mailed to their homes.

#### PRAYER

The City prays that the Observer's petition be denied and that the City be awarded such other and further relief as the Court may deem proper.

Dated: June 3, 2010

Respectfully submitted, JONES & MAYER

Jeremy J. Rytky Attorneys for City of Fullerton