

Exhibit O – Independent Hearing Decision and Order

**OFFICE OF THE INDEPENDENT
ADMINISTRATIVE HEARING OFFICER
CITY OF FRESNO, CALIFORNIA**

In the Matter of a Public Hearing on the
Determination of Whether Appellant Bauer's
Auto Wrecking & Towing, 103 North Thorne
Avenue, is to be Reinstated to the Current
Towing Services Agreement

**DECISION AND ORDER
OF
ADMINISTRATIVE HEARING
OFFICER**

March 30, 2023

On February 27, and March 8, 2023, at Fresno City Hall room 2165A, a public hearing was conducted to determine whether Bauer's Auto Wrecking & Towing, located at 103 North Thorne Avenue ("Appellant" "Bauer's", "Ed Mason", or "Mr. Mason"), is to be reinstated to the current Tow Services Agreement ("TSA") administered by the Fresno Police Department, Tow Unit ("Police Department", "FPD", "Tow Unit", or "City").

I. PRIOR HEARINGS AND DECISIONS

A. Termination from 2018 TSA: The appeal hearings on the termination of Appellant's tow company, "Bauer's Wrecking and Towing" from the 2018 TSA were held on March 10, and 29, 2022. The "Decision and Order of the Administrative Hearing Officer" ("May 24 Decision") was issued on May 24, 2022. In the "May 24 Decision", the Hearing Officer determined that the "Termination of the City of Fresno Non-Exclusive Tow Service Agreement" ("Notice of Termination") dated February 3, 2021, issued to Appellant by the City of Fresno Police Department Tow Unit be dismissed, and pursuant to Section 23 of the "Tow Services Agreement" fully executed by both parties on April 26, 2018, reasonable Attorney Fees and legal expenses be awarded to Appellant in an amount subject to proof. The Hearing Officer also expressly reserved the right to determine the amount and the method of awarding "make-up tows" as requested in Appellant's "prayer" found in his Counsel's "Closing Statement" if after "good faith" negotiations the parties could not agree as to this issue. As to both the awarding of attorney's fees and the determination of the number of "make-up tows", or in the alternative the monetary equivalent of the appropriate number of "make-up tows", both parties were to meet and confer in good faith to attempt to come to an agreement as to both issues. Only if the parties after good faith efforts of specifically defined periods of time could not come to an agreement on those issues could they request that the Hearing Officer schedule a hearing to allow the parties to argue the issues to the Hearing Officer and to allow the Hearing Officer to issue a decision regarding those issues.

The Hearing Officer also directed the parties in the “May 24 Decision” to meet and confer in good faith regarding the issue of whether Appellant would be reinstated onto the current TSA.

As with the two other issues, the Hearing Officer determined that if, after the parties' good faith efforts an agreement could not be reached, they could request that the Hearing Officer schedule a hearing to allow the parties to argue the issue of reinstatement, and to allow the Hearing Officer to issue a decision regarding that issue. At the December 13 hearing, the Hearing Officer stated that the parties had agreed that the current hearing would be limited to the determination of the award of attorney's fees, and the determination of monetary compensation for missed tows that would have been assigned to Appellant had they not been terminated from the TSA. The issue of whether Appellant would be included in the current TSA (the TSA Appellant from which Appellant was terminated had expired and replaced with a new TSA).

After several meetings and protracted negotiations, the parties were not able to agree on either the amount of "reasonable" attorney's fees, or the number of "make-up tows" (or the monetary value of the "make-up" tows, as requested by Appellant). Because of this failure by the parties, they requested that a hearing on the two issues be conducted by the Hearing Officer.

B. Attorney's Fees and "Make-Up" Tows: The hearing for the issues of reasonable attorney's fees and "make-up" tows was held on December 13, 2022. Prior to the hearing, both parties submitted briefs relating to calculations of "reasonable" attorney's fees and the monetary value of "make-up" tows, along with responses to the briefs, and replies to the responses. After review of the documentary and testimonial evidence the Hearing Officer issued his "Decision and Order" regarding the two issues on January 10, 2023 ("January 10 Decision"). In the "January 10 Decision", the Hearing Officer awarded the sum of \$41,037.00 to Appellant for legal services rendered to Appellant by his legal counsel Bradley K. Boulden as of the date of the issuance of the "January 10 Decision", which were due and payable no later than 30 calendar days from the date of the "January 10 Decision". The Hearing Officer also reserved the right to determine and award any remaining attorney's fees to Appellant pursuant to Section 23 of the April 26, 2018 TSA for any future legal services rendered by his legal counsel for the remaining issue of reinstatement of Appellant to the current TSA, should the parties not be able to come to agreement on that issue. Further, the Hearing Officer found that the requested "lodestar" multiplier for the attorney's fees of "1.2" was not applicable, as Appellant's counsel provided his services under a "fixed fee agreement". As to the issue of "make-up" tows, the Hearing Officer awarded no "make-up" tows nor the "monetary value" of any "make-up" tows, as he determined that the language of the TSA limited any damages Appellant may receive, if any, solely to reinstatement to the TSA.

The parties then agreed to have the Hearing Officer conduct a final hearing in order to determine whether the terms of the TSA would allow reinstatement of Appellant to the current TSA which took effect after the 2018 TSA expired on April 16, 2021.

II. FINDINGS

At the February 27 and March 6, 2023 hearings regarding reinstatement of Appellant to the

current TSA, the Police Department was represented by Co-Counsels Deputy City Attorney Jennifer Nguyen-Bui and Deputy City Attorney Daniel Casas. Police Officer Dalen Richards and Kim Manriquez, Records Supervisor, Fresno Police Department also appeared as witnesses on behalf of the Police Department Tow Unit. Appellant Edward Mason, Owner/Operator of "Bauer's Auto Wrecking and Towing" ("Bauer's", "Appellant", "Tow Operator") was also present, and represented by Bradley K. Boulden, Esq., Law Offices of Brad Boulden.

As directed by the Hearing Officer under the May 24 Decision and Order, both parties provided briefs or memoranda of points and authorities in support of their positions as to the issue of Appellant's reinstatement to the current TSA.

The City's brief entitled, *"Memorandum of Points and Authorities in Opposition to Bauer's Claim That it is Entitled to an Automatic Extension of the Parties' Expired Tow Service Agreement"* ("City's Brief") submitted on February 20, 2023 was marked as "City Exhibit #A".

Appellant's brief entitled, *"Bauer's Brief in Support of its Request for Immediate Reinstatement on Current, Extended 2018 TSA and One Subsequent TSA, and Attorneys' Fees and Costs and Make-Up Tows or the Monetary Value Thereof Following the FPD's Failure to Adhere to the Decision Awarding Reinstatement Due to an Ill-Alleged Expiration of the TSA and Ill-Alleged Assertion That the FPD did not have to Place Bauers on Rotation After the TSA was Extended on April 17, 2021"* ("Appellant's Brief") submitted on February 21, 2023 was marked as "Appellant's Exhibit #1".

Subsequent to the February 27, 2023 hearing, and as agreed to by the Hearing Officer, Appellant's counsel submitted a supplemental brief entitled, *"Bauers' Reply/Supplemental Brief to City's Brief and in Support of its Request for Immediate Reinstatement on Current, Extended 2018 TSA and One Subsequent TSA, and Attorneys' Fees and Costs and Make-Up Tows or the Monetary Value Thereof Following the FPD's Failure to Adhere to the Decision Awarding Reinstatement Due to an Ill-Alleged Expiration of the TSA and Ill-Alleged Assertion That the FPD did not have to Place Bauers on Rotation After the TSA was Extended on April 17, 2021"* ("Appellant's Supplemental Brief") submitted on March 1, 2023 was marked as "Appellant Exhibit #2".

The City did not file a response to Appellant's Supplemental Brief.

The Parties' briefs and responses will be summarized and analyzed below.

A. February 27, 2023 Hearing: At the February 27 hearing, prior to the formal presentation by the parties of their respective cases, the Hearing Officer elicited argument regarding Appellant's counsel Brad Boulden's request via email to the Hearing Officer and City on February 21, 2023 to submit both audio and video evidence as part of Appellant's presentation at the February 27, 2023 hearing. In summary, Mr. Boulden stated that he wished to submit four separate "excerpts" of either audio or video statements or testimony

that Appellant believed supported his arguments in favor of immediate reinstatement to the current TSA. In their email response to Mr. Boulden's request, the City objected to the introduction of the "excerpts" based on relevance. The Hearing Officer then determined that prior to the formal presentation of Appellant's case, he would hear argument regarding the relevance of the "excerpts" and then determine whether they would be played, and then whether they would be entered into evidence.

At the February 27 hearing, in response to the Hearing Officer's question, Mr. Boulden stated that the four audio/video "excerpts" he requested to submit were:

1. (Audio): 12/13/22 Testimony of FPD Records Supervisor Kim Manriquez, Hearing Audio Pt. 1, 23:15 – 23:25 (Later marked as "Appellant Exhibit #3A")
2. (Audio): 12/13/22 Testimony of Appellant Ed Mason, Hearing Audio Pt. 1, 1:29:09 – 1:32:24. Appellant Mason testified that on occasion, the Police Department had him sign the "signature page" of a new TSA prior to approval of the new TSA by Council, and before receiving a copy of the approved, final version of the TSA. (Later marked as "Appellant Exhibit #3B")
3. (Video): 10/9/14 City Council Meeting (32:19 – 33:57), re Agenda Item 1E (TSA) Questions from Councilmember Sal Quintero to Lt. Anthony Dewall from Tow Unit re amendment to TSA to allow tow companies on TSA to sell tow business to "Close Family Members" (defined). (Later marked as "Appellant Exhibit #3C")
4. (Video): 4/19/18 City Council Meeting (3:58:43 – 4:20:46), re two Agenda Items; (1) approving 2018 TSA; and (2) to amend FMC to lower number of tow companies on tow list from 30 to 20. Mention of lowering then-current number on towing list solely by "attrition". (Later marked as "Appellant Exhibit #3D")

Mr. Boulden also requested to submit a fifth "video excerpt" of a 2020 City Council meeting at which a separate "TSA" having to do with amendment of the FMC affecting the Non-Exclusive Towing Services Agreement relating to the towing of vehicles involved in Police Department cases (that particular "TSA" commonly referred to as the "Evidence TSA"), and not the "TSA" at issue (commonly referred to as the "Non-Exclusive Franchise TSA"). However, Mr. Boulden represented that the Police Department representative for this Agenda Item, then-Captain Andy Hall also mentioned at that time that the "Non-Exclusive Franchise TSA", and in response to a question from one of the Councilmembers, explains that with the "Non-Exclusive Franchise TSA", other than "attrition", the only other means of removing a tow company from the tow list is to discover a violation of the TSA by the particular tow company, and if appealed, and after the hearing the Hearing Officer confirms the violation, the tow company is removed from the tow list. However as explained in greater detail below, this "video excerpt" is not submitted in the interest of time, and its information is included in Appellant's "Supplemental Brief" (Appellant's Exhibit #2).

Mr. Boulden argued that all four of the "excerpts" (three being video of Fresno City Council meetings on various dates in which relevant issues involving Tow Service Agreements were discussed with Council members and representatives of the Police Department Tow Unit) were found by Mr. Boulden on the internet and were therefore "public record" and should be allowed to be played and entered into evidence.

The Hearing Officer then allowed the City to make their argument against submission of the "excerpts", Deputy Casas argued that, as stated in their pre-hearing brief (City Exhibit #A), the sole issue to be determined by the Hearing Officer in this hearing was whether the terms of the relevant TSA, executed in 2018 required the City Police Department to "renew" Appellant and the 2018 TSA, thus reinstating them to the current Tow List. Deputy Casas testified that any other issue Appellant attempted to submit to the Hearing Officer for consideration and determination would therefore be irrelevant.

In response to the City's arguments, Mr. Boulden stated that he believed that the City had neglected the State laws that allow for the trier's interpretation of contract language when the language contained in an agreement is ambiguous. Mr. Boulden argued that Appellant believes that the TSA contains "numerous" examples of ambiguity, and extrinsic evidence such as these "excerpts" would support those arguments.

Mr. Boulden also then made his first request to file a "reply" to the City's "response" to his pre-hearing brief; arguing that the request for immediate reinstatement was in effect a "motion", with the City's pre-hearing brief in effect a "response" to that "motion", and therefore he should be allowed to then file a "reply" to that "response". Mr. Boulden then stated that he had already prepared a 13 page "supplemental" brief that would act as a "reply".

Mr. Boulden then argued that the Hearing Officer as an administrative Hearing Officer had even more latitude regarding evidentiary issues than did a Superior Court or Appellate Court Judge. Mr. Boulden argued that an administrative Hearing Officer could accept and consider evidence that may be considered hearsay in a regular court of law, and because the Hearing Officer is both "judge and jury" in this case, can determine what is relevant, and could consider extrinsic evidence that will reasonably lead to relevant evidence. Mr. Boulden argued that the "excerpts" would establish that the City had made certain "promises" to the tow operators over many years and many different versions of the TSA regarding renewal of their inclusion on TSA extensions and new TSA's which support Appellant's argument regarding Appellant's belief that he should be immediately reinstated on the current TSA.

Deputy Casas then objected to the submission of any "supplemental" brief or "reply" to the City's brief. Deputy Casas argued that the Hearing Officer's direction regarding briefs was that all briefs were to be submitted no later than seven calendar days prior to the February 27 hearing date. Mr. Boulden argued that while that was true, the Hearing Officer did not preclude the submission of replies or responses to the pre-hearing briefs.

The Hearing Officer then stated that he believed that the City's argument both in their pre-

hearing brief and in oral argument at the hearing regarding the issue of Bauer's reinstatement to the TSA is too narrow. The Hearing Officer stated that he agreed with the City's argument that the 2018 TSA under which the Police Department terminated Appellant, and under which all issues under appeal were analyzed, and all Decisions issued by the Hearing Officer were based, did not **require** Appellant to be reinstated to the TSA, it also did not **preclude** the Hearing Officer from reinstating Appellant to the current TSA. The Hearing Officer stated that in fact, the 2018 TSA specifically provided that the sole damage that could be awarded to tow company under the 2018 TSA was reinstatement. So the Hearing Officer determined that the City's argument that the issue to be determined at the hearing was solely whether the 2018 TSA required reinstatement of Appellant was too narrow, and the Hearing Officer had the power to determine whether Appellant could be reinstated to the current TSA through the "sole damage" language found in the 2018 TSA.

The Hearing Officer also stated that he would not be "re-visiting" the issue of awarding of "make-up" tows or the awarding of the "monetary value" of "make-up" tows, as provided in Appellant's pre-trial brief (Appellant's Exhibit #1). The Hearing Officer stated that the issue had been thoroughly analyzed in his previous "Decision and Order" (issued January 10, 2023). In summary, Mr. Boulden argued that he believed the issue of reinstatement to the TSA was a "new appeal" and section "27(a)" and paragraph 9 of the associated "Scope of Work" would allow for the awarding of "make-up" tows, or the "monetary value" of "make-up" tows, notwithstanding the Hearing Officer's January 10, 2023 Decision and Order.

Deputy Casas disagreed, arguing that the issue of the awarding of "make-up" tows, or the "monetary value" of "make-up" tows was "res judicata", and Appellant's only remedy was to file a petition for writ of administrative mandamus, pursuant to CCP §1094.6.

The Hearing Officer stated that if Appellant had any additional argument regarding the awarding of "make-up" tows, or the "monetary value" of "make-up" tows, those arguments should have been included in the pre-hearing briefs and oral arguments in the prior hearings dealing specifically with those issues. However, the Hearing Officer stated he would allow a brief argument regarding those issues in Mr. Boulden's closing statement and would review the arguments found in the pre-hearing brief submitted for this particular case.

As to the relevance of the "excerpts", Mr. Boulden stated that the three videos, which are all excerpts of City Council meetings on various dates relating to Tow Service Agreements to establish not only the ambiguity in the language in the TSA (the example provided by Mr. Boulden was that the Tow Companies in the TSA are designated as "Contractors" yet in some documents pertaining to Appellant, his Tow Company is designated as "Tow Company"), as well as establishing a pattern of "past performance" (Mr. Boulden's example: all tow companies in "good standing" on previous TSA's are included in subsequent TSA's, even though there is no such language in the TSA itself), and also that any reduction in the number of tow companies on the tow list, when the tow list is reduced by amendment to the FMC is accomplished solely by "attrition", and not by removal of tow companies in "good standing" by the Police Department. Mr. Boulden also argued that the "legislative history"

related to the agenda items discussed in the Council meeting “excerpts” establish that the clear intent of the Police Department regarding reduction of the number of tow companies on the tow list when amending the FMC was to do so only by “attrition” which includes removal “for cause”. Further the Council meeting “excerpts” establish that the 2018 TSA is actually a five-year agreement, and not a three-year agreement with two one-year extensions as alleged by the City, which disputes the City’s argument that the 2018 TSA was expired, and Appellant could not have been reinstated to the same TSA from which he was wrongfully terminated. Mr. Boulden argued that the promises established by the “excerpts” to be submitted that reduction of the tow list would be by “attrition” only, and that all tow companies on the existing tow list would be included on the tow list of a new TSA were well established and relied upon by Appellant and all tow companies. Mr. Boulden argued that because of these well-established promises and Appellant’s and other tow companies’ reliance on those promises, to allow the Police Department to renege on those promises would be completely unfair.

In response to Mr. Boulden’s statements, Deputy Casas argued that Mr. Boulden’s statements were not evidence, but merely arguments, and requested that the Hearing Officer require that Mr. Boulden provide an offer of proof regarding the relevancy of the audio and video “excerpts” to Appellant’s case.

The Hearing then asked Mr. Boulden if he believed that the video “excerpts” relating to the various Council meetings he requested to submit provided evidence in which statements made by Police Department staff in response to Councilmembers’ questions would support the arguments made by Mr. Boulden not only in his statements, but also in his pre-hearing briefs, regarding the length of the 2018 TSA, the issue of reduction of the Tow List solely by “attrition”, and the issue of keeping those tow companies already on a TSA Tow List on the Tow List of a “new” or “extended” TSA. Mr. Boulden stated that the video and audio “excerpts” he wished to submit would establish and support those very arguments.

The Hearing Officer then determined that he would allow the playing of the audio and video “excerpts” to allow him to decide their “relevancy”. The Hearing Officer stated that he believed that Mr. Boulden’s arguments established that at least preliminarily the “excerpts” would support Appellant’s arguments, but he would only be certain after reviewing them. The Hearing Officer stated that after reviewing them, he would decide as to their relevancy, and then whether they would be submitted into evidence. The Hearing Officer also stated that he did not believe that as to the video, viewing the video was crucial, and all he really needed to review was the audio. After some discussion, both parties agreed. It was decided that the audio and video “excerpts” would be viewed at the proper time during Appellant’s presentation.

Prior to opening statements, Deputy Casas lodged several objections to Appellant Ed Mason’s Declaration in support of Mr. Boulden’s pre-hearing brief included in “Appellant Exhibit #1” (“Mason Declaration”, or “Declaration”). Deputy Casas objected to paragraph #3 regarding Mr. Mason’s declaration that he had

confirmed the information testified to in the body of the Declaration with “numerous towing companies”. Deputy Casas based his objections on hearsay, lack of foundation, and as the “numerous tow companies” were not specifically identified (according to the Declaration, “based on a fear or reprisal and retribution by the FPD”), it deprived the City of their right to cross-examine those tow companies allegedly making the statements. In response, Mr. Boulden stated he had a “confidential declaration” from a tow operator which would support those arguments provided in the Mason Declaration which he received late last week. Mr. Boulden stated that he had included the “confidential declaration” in the “Supplemental Brief” he offered to submit to the Hearing Officer in an “in camera” review and with the assurance that the Hearing Officer would not reveal the identity of the declarant.

The Hearing Officer then sustained the City’s objection as to Declarant Mason’s statement that he had confirmed the information testified to in the body of the Declaration with “numerous towing companies”, and withheld his decision on whether to hold an “in camera” review of the “confidential declaration” provided as part of the “Supplemental Brief” until he made a decision as to whether the “Supplemental Brief” would be allowed to be submitted for review and possible entering into evidence.

Deputy Casas then objected to the entry of Paragraph #5 of the “Mason Declaration” into evidence as to the first two letters of “Attachment A” on the grounds of hearsay. After some discussion among the Counsels and the Hearing Officer, the Hearing Officer determined that he would hold his decision regarding Deputy Casas’ objection as to the first document in “Attachment A” to allow Mr. Boulden to provide foundation for the submission of the document. As to the second document, Deputy Casas’ objection was overruled.

Deputy Casas then requested that in lieu of allowing the entry of “piecemeal” individual pages of the 2018 TSA as alluded to in Paragraph 6 of the “Mason Declaration”, that the Hearing Officer take “judicial notice” of the entire 2018 TSA document as already entered into evidence in a previous hearing (“City Exhibit #2”) for the sake of consistency. Mr. Boulden stated he had no issue with the City’s objection and stipulated that in lieu of the entry of just the noted pages, the entire 2018 TSA would be entered into evidence for this hearing as well.

Deputy Casas then objected to the entry of the last sentence of Paragraph #9 of the “Mason Declaration” into evidence, which reads:

It is my understanding that some towing companies helped [then Captain Andy] Hall discern that he could cut the rotational tow list to 20 and still provide the necessary towing services for the City.

Deputy Casas objected on the grounds of hearsay. The Hearing Officer stated that the testimony provided in the sentence most likely would be provided by one or more of the audio or video “excerpts” to be played and submitted by Appellant. The Hearing Officer then sustained the City’s objection to the last sentence of Paragraph #9.

Deputy Casas then objected to the entry of Paragraph #10 of the "Mason Declaration" into evidence as "conclusory". Deputy Casas argued that the statements made in the last two sentences of Paragraph #10 were conclusory:

Towers were told that if they were on the rotational tow list at the end of (or the expiration) of one TSA, you were automatically invited on the upcoming TSA. This promise was part of an overall understanding and intimations that [then Captain Andy] Hall made to the towers and had been in existence for well of a decade, as mentioned above.

Deputy Casas argued that these statements may be supported by evidence provided in Appellant's audio and video "excerpts", but there was no such supporting evidence found in the Declaration and were therefore conclusory.

The Hearing Officer noted that he recalled that Mr. Boulden's pre-hearing brief contained a citation to that evidence as part of the 2018 Council meeting, he would be submitting as part of his audio or video "excerpts". The Hearing Officer sustained Deputy Casas' objection as to the last two sentences of Paragraph #10.

Deputy Casas then objected to the entry of Paragraph #13 of the "Mason Declaration" into evidence. Again, Deputy Casas argued that these statements may be supported by evidence provided in Appellant's audio and video "excerpts" or through direct testimony from Mr. Mason, but there was no such supporting evidence found in the Declaration, and were therefore conclusory.

The Hearing Officer sustained Deputy Casas' objection as to Paragraph #13.

Deputy Casas then objected to the entry of Paragraph #15 of the "Mason Declaration" into evidence regarding the absence of tow operators in the audience at the 2014 and 2018 City Council meetings (to be submitted as part of the video "excerpts") regarding issues involving the 2014 and 2018 TSA's. Again, Deputy Casas argued that these statements may be supported by evidence provided in Appellant's audio and video "excerpts" or through direct testimony from Mr. Mason, but there was no such supporting evidence found in the Declaration and were therefore conclusory.

The Hearing Officer stated that the testimony provided in Paragraph #15 most likely would be provided by one or more of the audio or video "excerpts" to be played and submitted by Appellant and/or testimony from Mr. Mason. The Hearing Officer then sustained Deputy Casas' objection to Paragraph #15.

Deputy Casas then objected to the entry of Paragraph #18 of the "Mason Declaration" into evidence regarding the information regarding the amendment of FMC §1706(e). Again, Deputy Casas argued that these statements may be supported by evidence provided in Appellant's audio and video "excerpts" or through direct testimony from Mr. Mason, but there was no such supporting evidence found in the Declaration and were therefore conclusory.

The Hearing Officer stated that the testimony provided in Paragraph #15 most likely would be provided by one or more of the audio or video "excerpts" to be played and submitted by Appellant and/or testimony from Mr. Mason. The Hearing Officer then sustained Deputy Casas' objection to Paragraph #18.

Deputy Casas then objected to the entry of Paragraph #19 of the "Mason Declaration" into evidence regarding Mr. Mason's recollection of signing an "Application" for the 2018 TSA. Again, Deputy Casas argued that these statements may be supported by evidence provided in Appellant's audio and video "excerpts" or through direct testimony from Mr. Mason, but there was no such supporting evidence found in the Declaration and were therefore conclusory.

The Hearing Officer overruled Deputy Casas' objection, stating that unlike the objections in the previous Paragraphs, this statement was a recollection regarding records from his business, and not something that would be public record, or would be available from the audio or video "excerpts" to be submitted in the hearing.

Then the Hearing Officer then allowed for opening statements from the parties.

In his opening statement on behalf of the Appellant, Mr. Boulden stated that because of the delay in receiving the police report regarding the incident upon which Appellant's Tow Company was first suspended and then terminated from the 2018 TSA, an appeal could not be submitted, even though the investigation into the incident by the FPD had been completed and the Police Report finalized two months prior to Appellant receiving it after requesting it. This delay, and the delay in reviewing and determining the issues that would make up the appeal has delayed the appeal process and has kept Appellant off the TSA, resulting in a substantial loss of revenue to Appellant, despite the continuing costs borne by Appellant for running his tow business. Mr. Boulden stated that even after all the delays due to scheduling of all necessary parties, the COVID-19 pandemic and other factors resulting in an appeal process lasting over a year, Appellant is informed during another "phase" of the appeal that they will not be reinstated on the current TSA, as it is the FPD's position that the 2018 TSA (under which Appellant's termination was affected) has expired and reinstatement is no longer possible. Mr. Boulden argued that Appellant believes that when the Hearing Officer determined that Appellant was "wrongfully terminated" from the 2018 TSA, the FPD "purposefully delayed" the appeal to allow for the alleged expiration of the 2018 TSA in order to prevent or not be required by the terms of the 2018 TSA to reinstate the Appellant to the FPD tow list for the current Non-Exclusive Franchise Tow Services Agreement. Mr. Boulden argued that the TSA appeal process required by the FPD itself is inherently unfair, as a tow company terminated from a TSA is taken off the tow list immediately and must stay off the tow list until the appeal process is completed, and a decision by the Hearing Officer is issued, no matter what how long a time period it may take for that process to conclude. Mr. Boulden stated that had the FPD been required to keep Appellant or any appealing tow company on the tow list with an appeal pending the appeal process would have been shorter. Mr. Boulden also argued that prior to the first appeal hearings and even prior to the submission of

the request for appeal, Appellant requested to meet with the FPD in good faith to attempt to resolve first the suspension of Appellant and then the termination of Appellant from the 2018 TSA as required by the TSA, but the FPD refused to do so. Mr. Boulden stated that the only negotiations between the parties occurred when directed by the Hearing Officer in his first "Decision and Order" and was limited solely to the issues of attorney's fees and "make-up" tows or the "monetary value of "make-up" tows. Mr. Boulden noted that the incident that led to Appellant's tow company being terminated from the 2018 TSA, Appellant's Son, a felon at the time of the incident, using a firearm to protect and assist his Father (Appellant) subdue a person who allegedly was breaking into stored vehicles in Appellant's tow yard, has since been reduced from a felony to a misdemeanor as originally charged by the Fresno County District Attorney's Office. Mr. Boulden argued that had Appellant been provided the police report promptly after it was completed, and had FPD agreed to meet with Appellant and Mr. Boulden and they had requested, then both Appellant and Mr. Boulden believed that FPD would not have terminated Appellant, but because the police report was not provided until 3 months after it was completed, and no meeting between Appellant, Mr. Boulden, and the FPD Tow Unit took place, the termination was issued. Mr. Boulden again noted that instead of informing he and Appellant that Appellant would not be reinstated on the TSA at the time of they allege the 2018 TSA "expired" (April of 2021), they make that contention at the end of the first hearing on the appeal of the termination approximately 11 months after the initial notice of Appellant's termination from the 2018 TSA. Mr. Boulden argued that to allow the FPD to make that assertion as late as they did would be inequitable. Mr. Boulden further argued that the Hearing Officer has the authority to reinstate Appellant regardless of the FPD's assertion, even if he believes the 2018 TSA has expired as asserted by the FPD because the terms and conditions of the "current" TSA are identical to the 2018 TSA, including the "damages clause" limiting the sole damages an Appellant can collect to "reinstatement to the TSA". Mr. Boulden pointed out the only difference between the "current" TSA and the 2018 TSA is the increase in fees provided to those tow companies under section 27(a). Mr. Boulden argued that the Hearing Officer could decide in Appellant's favor under section 27(a) regarding reinstatement to the TSA, as it was not at issue in the first appeal hearing, and was therefore not argued, reviewed, or considered, and no determination based on section 27(a) was issued by the Hearing Officer. Mr. Boulden argued that the FPD assertion that the 2018 TSA was expired and therefore Appellant could not be reinstated was an attempt by the FPD to circumvent the Hearing Officer's decision to dismiss the FPD's Notice of Termination of Appellant, and the Hearing Officer should not allow the FPD to do so. Mr. Boulden argued that Appellant has been on the TSA tow list for approximately 35 years and has never been terminated from a TSA. Mr. Boulden argued that in all that time, the FPD has never removed a tow company from the TSA other than because of attrition, and has never before claimed that a tow company could not be reinstated on a TSA because that particular TSA had expired, and the evidence Appellant would submit in this hearing will establish the FPD's long-standing "promise" to the tow companies on the tow list that they would not be removed from the tow list unless it was "for cause", or unless in the case of the reduction of the number of tow companies contained in the tow list by amendment of the FMC that number is reduced voluntarily by attrition. Mr. Boulden argued that FPD's assertion that the 2018 TSA under which Appellant was terminated has expired is incorrect.

Therefore, FMC §9-1706(e) which provides no vested rights to tow companies under a TSA and does not guarantee placement on "subsequent" TSA's is inapplicable in Appellant's case. Mr. Boulden argued that he believes that the TSA is a "take it or leave it" agreement and is therefore an "adhesion" contract. Mr. Boulden stated that the evidence submitted will establish that some of the key provisions of the TSA, most notably section 27(a) is ambiguous, and can be interpreted under the law by noting the FPD's past "course of performance", which supports Appellant's interpretation of section 27(a). Mr. Boulden argued that Appellant is unaware of any tow company in good standing not included or added onto a new or "extended" TSA by the FPD. As to the "termination" versus "extension" of the 2018 TSA, Mr. Boulden stated that the evidence provided by Appellant will establish that the "video excerpts" of the Council meetings will show that some of the "actions" taken by the FPD relating to the TSA's involved were actual termination of the prior TSA and approval of a new TSA, but as to the 2018 TSA, those action items had only to do with "amendments" to the 2018 TSA, and not to termination of the 2018 TSA and replacement by a "subsequent" TSA. Mr. Boulden also stated that the Staff Report of the action item for the Council Meeting regarding the FPD's request to amend the FMC to reduce the number of tow companies on the tow list from 30 to 20 (4/5/18) includes the statement that the reduction from 30 to 20 will be accomplished on by retirement, resignation, or removal for breach of the TSA, and not be failing to include any tow company in good standing on a "subsequent", "amended", or "extended" TSA. Mr. Boulden adds that the fact that the 2018 TSA is a "five-year agreement" is also included in the 4/5 or 4/18/18 Council staff report and is discussed by then-Captain Hall and the Councilmembers at the public hearing on the agenda item. Mr. Boulden also stated that FPD Records Clerk Kim Manriquez testified at the December 3, 2022 appeal hearing that the reduction of the number of tow companies on the 2018 TSA tow list from 30 to 20 was done by "attrition". Mr. Boulden stated that these are the reasons why Appellant was "blindsided" by the statement made almost 11 months after the notice of termination was issued that Appellant would not be reinstated on the TSA when the Hearing Officer had dismissed the Notice.

In his opening statement on behalf of the City and FPD Tow Unit, Deputy Casas argued that while the Police report cited by Mr. Boulden regarding the investigation of the incident upon which Appellant was eventually terminated was issued in January, 2021, Appellant was not terminated until May of 2021. Deputy Casas stated that while the term, "attrition" is not used in the TSA, it is utilized in the FMC and is used in the "disjunctive" form; included as an example of how a tow operator can be removed from the tow list (or in essence from the TSA). Deputy Casas stated that the term "attrition" can be defined as simply a reduction of a number of things. And the causes of the reduction can be virtually anything, including, in the case of the TSA voluntary as well as involuntary removal of a tow operator from the TSA. Deputy Casas argued that whether Appellant received the Police report regarding the incident before or after the termination is irrelevant as the termination and appeal of the termination occurred after the January report was issued. Deputy Casas stated that the Hearing Officer in his May 24, 2022 "Decision and Order" determined that the City and Police Department did not violate section 28A of the 2018 TSA, and therefore acted "in good faith" in relation to Appellant when attempting to informally resolve the dispute informally. Deputy

Casas also stated that the May 24, 2022 "Decision and Order" determined that the 2018 TSA had expired and that there was no evidence Appellant had requested an extension of the 2018 TSA from the FPD. Deputy Casas argued that the 2018 TSA was an integrated agreement which by its terms superseded any discussions, allegations, promises, or representations made by the parties prior to the execution of the TSA. Deputy Casas then noted the Hearing Officer's words contained in the May 24, 2022 "Decision and Order" in which the Hearing Officer noted that in cross-examination of Appellant Ed Mason he testified that he had legal counsel to assist him when he read and signed the 2018 TSA, and was aware by his signature to the TSA of all terms and conditions of the TSA including those having to do with damages and appeals. Deputy Casas again stated that by his signature on the 2018 TSA, Appellant intended to be bound by its terms and conditions. Deputy Casas noted that under the terms of the 2018 TSA all terms and conditions are contained within the TSA, and no other terms and conditions, promises or other amendments would be binding on either party unless agreed to by mutual consent, or as otherwise provided under the TSA. Further, Deputy Casas noted that the terms of the 2018 TSA provided for each party to mutually waive any ambiguity in the TSA, and waived any right to hold that ambiguity against the other. Deputy Casas argued that the law clearly holds that any party who signs an agreement that states he has read, understood, and agrees to be held to all terms and conditions in the agreement is estopped from claiming that the provisions of the agreement do not reflect the party's intent and understanding [cite omitted]. Deputy Casas stated that despite Appellant's claim, the 2018 TSA was a three-year agreement which may be extended two additional years. Deputy Casas stated that those extensions could only be achieved with the mutual consent of the parties. Deputy Casas argued that there was no mutual consent to extend the 2018 TSA past the initial three-year time period, and should Appellant wish to revise, rescind or reform the 2018 TSA, Appellant has chosen the wrong forum, and should seek redress through the City "Risk Management" claims procedure, or in the alternative, in a court of equity. Deputy Casas argued that there was no dispute that State law and specifically State Franchise law authorizes the City and specifically the Police Department to grant or not grant tow service franchises to tow operators for those services. Deputy Casas noted that FPD Police Policy Manual §510.3 authorizes the Police Chief or his designee to determine the number of companies to perform tow services for the Police Department. Deputy Casas also asserted an objection to the submission by Appellant of any evidence outside of the issue of whether they should be reinstated to the current TSA.

The Hearing Officer then provided Mr. Boulden the opportunity to make Appellant's presentation. Prior to calling his witness, Mr. Boulden stated that under Section 27A of the 2018 TSA, the term of the agreement is for three years to be terminated solely by the City but may be extended by the mutual consent of the "parties". Mr. Boulden argued that the term "parties" as provided in section 27A of the TSA is not defined and is therefore ambiguous and subject to interpretation with the assistance of extrinsic evidence. Mr. Boulden then noted that the third sentence in Section 27A identifies the tow operators as "Contractors", and that the election by the City and the "Contractors" (plural) to not extend the TSA, or on expiration of the final one-year extension (if so extended) to continue towing services on the (now expired) TSA on a temporary basis indicates that the "consent" required for the election in the

third sentence of Section 27A is the consent of all tow operators involved in the TSA, and not each individual tow operator as a separate entity. Mr. Boulden argues that this inconsistency adds to the ambiguity of the TSA thus allowing for the submission of extrinsic evidence to assist the Hearing Officer in clarifying its meaning. Mr. Boulden also argued that the language allowing the "temporary continuation of tow services" after the TSA had expired in Section 27A is further evidence that the 2018 TSA was in fact not a three-year agreement, but a five-year agreement. Mr. Boulden stated that his witness, Edward Mason, owner of "Bauer's Auto Wrecking and Towing" ("Bauer's") will testify that when discussing the terms and conditions of the 2018 TSA prior to the approval of the TSA by the Council and final execution of the TSA, the Police Department representatives in meetings with the tow operators including Appellant provided information to the operators consistent with Appellant's contentions. Mr. Boulden contended that the Hearing Officer could utilize the information provided in the "Legislative Information" (also alluded to by the Hearing Officer as a "Staff Report") provided in "Appellant Exhibit #1" for the various Council meetings to be submitted relating to issues involving the 2018 TSA in front of the Council for approval (e.g. "Appellant Exhibit #1", Attachment "A") to assist him in determining the "intent" or "meaning" of some or all of the disputed terms of the 2018 TSA.

At that point, the Hearing Officer allowed Mr. Boulden to play an audio "excerpt" from the December 13, 2022 appeal hearing. Specifically, a portion of the testimony of FPD Records Supervisor Kim Manriquez relating to the FPD's policy regarding reduction of tow operators from the tow list (Appellant Exhibit #3A). Before the "excerpt" was played, Ms. Manriquez was sworn in, and in response to Mr. Boulden's questions, Ms. Manriquez testified that although she recalled using the word "attrition", she did not recall using it when testifying regarding the method of adding and removing tow operators to and from the FPD tow list. After the "excerpt" was played, it was confirmed that Ms. Manriquez did testify that the reduction of the tow list to the current number of 20 (subject to FMC §9-1707) would take place by "attrition". Ms. Manriquez also testified that the phrase "attrition" could include many forms of "removal".

The Hearing Officer then allowed Deputy Casas to cross-examine Ms. Manriquez regarding her December 13, 2022 hearing testimony regarding her use of the phrase "attrition" in the excerpt played. In response to Deputy Casas question, Ms. Manriquez testified that she did include voluntary and involuntary removal as part of her definition of "attrition". Further Ms. Manriquez testified that during her time working with the Tow Unit, she was aware of two tow operators in good standing on the TSA that were not offered either extensions on a then-current TSA, or invited to be placed on the subsequent TSA when the prior TSA had expired: "Mel's Towing", and "Sierra Towing". Ms. Manriquez testified that both "Mel's Towing" and "Sierra Towing" were at one time represented by Mr. Boulden.

The Hearing Officer then allowed Mr. Boulden to follow up with any questions he may have for Ms. Manriquez. In response to Mr. Boulden's question, Ms. Manriquez confirmed that both "Mel's Towing", and "Sierra Towing" were not terminated from the TSA, but were not invited on the subsequent TSA.

At that time, Deputy Casas stated that he had documents establishing that Mr. Boulden as legal counsel for both "Mel's Towing" and "Sierra Towing" had submitted appeals on their behalf to appeal the Tow Units decision to not include them in the subsequent TSA.

Mr. Boulden then stated that both appeals were withdrawn prior to any appeal hearing being conducted, as both towing operators subsequently decided they did not wish to be included in the subsequent TSA.

[NOTE: *For purposes of full disclosure, it was discovered that at the time the appeals of both "Mel's Towing" and "Sierra Towing" were submitted, the Hearing Officer was employed by the City of Fresno, City Attorney's Office, and was assigned to represent the Tow Unit in both cases. As stated by Mr. Boulden, both Appellants withdrew their requests for appeal prior to any appeal being conducted. Both parties at the present appeal were made aware of this issue, and no objections to the Hearing Officer being the trier of the present appeal were lodged by either party.*]

The Hearing Officer then confirmed with Ms. Manriquez that her testimony was that at the time of the expiration of one TSA, and the initiation of the subsequent TSA, both "Mel's Towing" and "Sierra Towing" were in "good standing" with the Tow Unit but were not asked to sign on to the subsequent TSA.

Mr. Boulden, legal counsel for both "Mel's Towing" and "Sierra Towing" at the time this issue had occurred disputed Ms. Manriquez' testimony. Mr. Boulden recalled that in the case of "Mel's Towing", the termination occurred because he did not maintain adequate staff on his premises as required under the TSA. Mr. Boulden stated that to his recollection, "Sierra Towing" was terminated for numerous violations of the TSA, but could not recall the specific violations themselves. Mr. Boulden also recalled that in the case of "Mel's Towing", the owner retired and moved out of the country. As to "Sierra Towing", Mr. Boulden recalled that the owner subsequently sold the business, and therefore found no need to pursue the appeal further.

In response, Deputy Casas stated that it was not the City's position that "Mel's Towing" or "Sierra Towing" had never been penalized by the Tow Unit for breach of the terms and conditions of the TSA that they were a party to, but that at the time of the expiration of the TSA, they were in good standing, and were not asked to sign on to the subsequent TSA.

It was then determined by the documents provided by the City that Mr. Boulden submitted a request for appeal regarding "Sierra Towing" not being "renewed" on the 2011 TSA from the 2007 TSA (which expired in November of 2011) on July 14, 2011. As to "Mel's Towing", no copy of the request for appeal could be located, but an opposition to the submission of the request for appeal (based on the same reason as "Sierra Towing's" request) was filed by the Hearing Officer when he was employed by the City Attorney's Office (with a scheduled appeal hearing date of December 21, 2011) because the submission was untimely pursuant

to FMC §1-407(b).

In response to Deputy Casas question to Ms. Manriquez regarding the disposition of “Mel’s Towing” appeal, Ms. Manriquez testified that she was not aware of how “Mel’s Towing” appeal was settled.

In response to a question from the Hearing Officer, Ms. Manriquez testified that the decision to invite or not invite a tow company to sign a subsequent TSA lies with the “Lieutenant” supervising the Tow Unit. Ms. Manriquez testified she could not remember who the supervising Lieutenant was at the time the decision not to include “Mel’s Towing” and “Sierra Towing” on the 2011 TSA was made, but it was either Lieutenant (Tim) Garner, or Capt. (Andrew) Hall.

The Hearing Officer then stated that he believed he had all the information he needed to make a ruling on the City’s objection to the video “excerpt” of Ms. Manriquez’ testimony on December 13, 2022. The Hearing Officer stated that he found the “excerpt” to be relevant and overruled the City’s objection (and subsequently, the “excerpt” was marked, “Appellant Exhibit #3A”).

Mr. Boulden then argued that under the law, unless specifically defined, the words contained in a contract are to be simply interpreted. Mr. Boulden stated that the meaning of “attrition” as used in the 2018 TSA is not defined and as the Tow Operators understood it to mean, and as described by the Police Department in their meetings with the Tow Operators when new or extended TSA’s were discussed meant the reduction of numbers (of tow operators) through resignation, retirement, or debt. Mr. Boulden argued that because this was the definition always provided (and therefore promised) to the tow operators throughout the years, that definition should be implemented for purposes of interpretation of the TSA, and therefore should be the only reasons, other than removal for cause, a tow operator not be included, invited, or “renewed” on a subsequent or extended TSA.

Mr. Boulden then played testimony from the December 13, 2022 appeal hearing, this time from Appellant Ed Mason. Mr. Boulden stated that this audio “excerpt” was submitted to support Appellant’s argument that Mr. Mason never testified that he had retained legal counsel prior to his review and signing of the 2018 TSA as claimed by the City and as determined by the Hearing Officer in the May 24, 2022 “Decision and Order”. This audio “excerpt” was subsequently marked and identified as “Appellant Exhibit #3B”.

In the testimony (see above for the specific time and location of the recorded testimony for “Appellant Exhibit #3B”), Mr. Mason testified that “at the time of the signing of the 2011 and 2018 TSA’s, he was aware of and agreed to abide by the terms and conditions of both TSA’s. There was no testimony regarding the issue of whether he had retained or received the counsel of an attorney regarding the terms and conditions of the TSA’s prior to the signing of the TSA’s as claimed by Deputy Casas, and as determined by the Hearing Officer in the May 24, 2022 “Decision and Order”. Upon request by Mr. Boulden, Mr. Mason was then sworn in

for “live” testimony at the present appeal hearing.

In response to Mr. Boulden’s questions, Mr. Mason testified that he did not recall being asked at the December 13, 2022 hearing whether he had retained legal counsel to advise him regarding the terms and conditions of either the 2011 or 2018 TSA, nor did he ever retain legal counsel for that purpose. Mr. Mason testified that he never retained legal counsel to review or advise him regarding the FPD TSA’s because they are “take it or leave it” agreements, so he did not believe it would be to any advantage to hire legal counsel. Mr. Mason testified that normally the FPD and tow operators would have a meeting regarding any changes included in a new, amended, or extended TSA, and the supervising Lieutenant would explain to the tow operators what he believed the changes meant. Mr. Mason testified that he did not recall any of the explanations from the supervising Lieutenant relating to changes in “legal” terms. Mr. Mason testified that with few exceptions, tow operators were not given a final, Council approved TSA prior to signing the TSA. Mr. Mason testified that normally they were given a draft version of the TSA to review and comment on at the meeting, and then were either emailed the signature page or contacted to come to the Police Department Tow Unit office by a certain date and time to sign the “signature page” of the TSA in order to allow the Tow Unit to go in front of the City Council and inform them that the TSA had already been signed by all tow operators prior to Council approval of the TSA. Mr. Mason testified that the tow operators would receive a final, copy of the TSA executed by the FPD only after the Council had approved the TSA. Mr. Mason testified that the tow operators were never certain that the draft TSA’s they reviewed and the signature pages they signed prior to the Council’s approval of the final draft of the TSA were the same documents. Mr. Mason testified that he was informed by members of the tow unit that meaning of the language of the third sentence of section 27A of the 2018 TSA regarding termination of the TSA:

If either the City or Contractors elect not to extend the Contract, or upon expiration of the final one-year extension term, the Contractor shall aid the City in continuing uninterrupted, the requirements of the contract, by continuing to perform on a temporary basis, uninterrupted, the requirements of the contract, by continuing to perform on a temporary basis when specifically requested to do so in writing by the Chief of Police or his/her designee, for the specified term not to exceed twelve months. [emphasis added]

Mr. Mason testified that he was told that the meaning of the phrase “If either the City or Contractors [plural]”, meant that this section, specifically the language addressing termination of the TSA, or the election not to extend the TSA was applicable to all the tow operators on the TSA, and not just to an individual tow operator. Mr. Mason testified that he also believed that the termination language found in Section 7 of the 2011 and 2018 TSA’s, specifically the “mutual termination” language:

...[E]ither party may terminate after thirty (30) days written notice without cause, unless otherwise specified.

Applied to all the tow contractors, and not to any individual tow contractor. Mr. Mason also testified that he was informed by the Tow Unit Supervising Lieutenant at one of the informational meetings he attended regarding a new or extended TSA that this particular language was included in the TSA in the event that the FPD wanted to terminate a TSA so they "could go in another direction". Mr. Mason testified that until the "current" TSA he had always been part of the new TSA, or included in the extension of the then-current TSA over the 35 years he had been providing towing services for the FPD. Mr. Mason was then asked to review the document identified in "Appellant Exhibit #2, as "Attachment E", "Written Notification to Terminate Current Tow Service Agreement", dated November 22, 2011 from the Fresno Police Department, signed by then-Police Chief Jerry Dyer, and addressed to Appellant, "Bauer's Auto Wrecking and Towing" ("11/22/11 Termination Notice"). Mr. Mason testified and confirmed that he believed the language of the 11/22/11 Termination Notice terminating the then current 2007 TSA 30 days after the date of the Notice was authorized under Section 7 of the TSA. Mr. Mason then was asked to review the document included with "Appellant Exhibit #2" as "Attachment F", "City of Fresno Non-Exclusive Franchise Tow Agreement", dated November 1, 2014, unsigned. Mr. Mason also testified and confirmed that he believed the language in the first paragraph of "Attachment F" was authorized under Section 7 of the TSA. Mr. Mason testified that he believed the language included in "Attachment F" meant that the TSA itself, and not his company had been terminated.

Mr. Boulden then discussed FMC §9-1707(e), which states:

(e) No Tow Truck company shall accrue any vested rights as a result of being a party to a Non-Exclusive Franchise Tow Agreement, nor will any Tow Truck company be guaranteed placement on subsequent Non-Exclusive Franchise Tow Agreements for the Fresno Police Department. All applicants for any subsequent Non-Exclusive Franchise Tow Agreement will be reviewed and considered for inclusion at the time of the issuance of the subsequent Non-Exclusive Franchise Tow Agreement. Tow Truck company owners may be subject to an interview process and an inspection prior to approval. Tow truck companies currently on the Police Department rotation list who are in good standing, will receive priority reinstatement status on subsequent Non-Exclusive Franchise Tow Agreements for the Fresno Police Department.

Mr. Boulden stated that Appellant agreed that no tow company would accrue any vested rights as legally defined, and that Bauer's could be removed from the TSA by "attrition". However, Mr. Boulden argued that it is Appellant's position that although the subsection also does not guarantee rights to be included in a "subsequent" TSA, the "current" TSA is not a "subsequent" TSA as claimed by the City, but an extension of the 2018 TSA to five years, and not three years as claimed by the City. Mr. Boulden argued that Appellant's position is supported by the "Staff Report" of one of the Council Meetings for which a video "excerpt" would be submitted at a later time in the hearing.

Mr. Mason then testified that he had reviewed the "Staff Reports" for the agenda items in 2018 relating to the 2018 TSA; specifically the April 19, 2018 Council Meeting and the

agenda items in which the 2018 TSA was approved, and FMC §9-1707 was amended to reduce the minimum/maximum number of tow operators on the tow list from 30 to 20 (Appellant Exhibit #1, Attachment "C"). Mr. Mason testified that he was familiar with the portion of that "Staff Report" relating to the reduction of the number of tow operators from 30 to 20, and the "promise" that the reduction would be achieved solely by "attrition". Mr. Mason testified that during all the meetings he participated in with the FPD Tow Unit in which the issue was discussed, the Tow Unit representatives in the meeting always told the tow operators that whether the TSA was to be extended or renewed, all tow operators currently on the tow list and in good standing at the time of the extension or renewal would be maintained or "renewed" on the subsequent TSA, and any necessary reduction would occur only by "attrition". Mr. Mason testified that his understanding of "attrition" is that the tow operator would be removed due to the operator going out of business, retirement, or otherwise cease towing as a business. Mr. Mason testified that it was his belief that the Tow Unit's agreement that a tow operator could sell his tow business to a designated "close relative" and still have that business keep its place on the Tow List and TSA was evidence of FPD's promise that the Tow List when reduction was necessary would only be reduce through "attrition".

Mr. Boulden then played the 10/9/14 City Council Meeting (32:19 – 33:57), re Agenda Item 1E (TSA) Questions from Councilmember Sal Quintero to Lt. Anthony Dewall from Tow Unit re amendment to TSA to allow tow companies on TSA to sell tow business to "Close Family Members" (defined) (Appellant Exhibit #3C). In the video, in response to Councilmember Sal Quintero's question Tow Unit representative Lt. Anthony Dewall states that the Tow Unit has "tentative unanimous approval" of those tow operators then on the tow list for the changes proposed both to the amendment to the FMC lowering the minimum/maximum number of tow operators on the tow list from 30 to 20, and the changes to the then-current TSA re sale or transfer of a tow company to a "Close Family Member". In response to another question from Councilmember Quintero, Lt. Dewall states that the Tow Unit has managed to reduce the current number of tow operators on the Tow List "by attrition" but was currently still six operators over the desired number of 20. The Hearing Officer then stated that Appellant Exhibit #3C was entered into evidence.

Mr. Mason then testified that he was familiar with the sections in the TSA and attached "Scope of Work" that listed the various ways a tow operator could be terminated "for cause", or suspended for (2018 TSA, "Attachment A- Scope of Work", Sections 30-31, 33).

After protracted discussion between the Hearing Officer and the parties, the fourth "excerpt", 4/19/18 City Council Meeting (3:58:43 – 4:20:46), re two Agenda Items; (1) approving 2018 TSA; and (2) to amend FMC to lower number of tow companies on tow list from 30 to 20, mention of lowering then-current number on towing list solely by "attrition" (Appellant Exhibit #3D), was stipulated to by the City, and entered into evidence. The video was not played at the hearing.

It was also determined at that time that Appellant's Supplemental Brief would be allowed to

be submitted to both the Hearing Officer and the City. The Hearing Officer then stated that the City would have seven calendar days to submit a response to the Supplemental Brief should they wish to do so, with the understanding that they may object to any argument provided by Appellant in the brief and cite any statutory or caselaw in support, or cite any evidence already submitted in this case. However, the Hearing Officer stated that the City may not submit any new arguments based on Appellant's Supplemental Brief, and must limit their response to those issues and arguments provided in Appellant's Brief. It was also determined by the parties that a new hearing date would be required. It was then determined that the hearing would be continued to Wednesday, March 8, 2023, at 9:30 A.M.

B. March 8, 2023 Hearing: At the March 6 hearing, the Police Department was represented by Co-Counsels Deputy City Attorney Jennifer Nguyen-Bui and Deputy City Attorney Daniel Casas. Police Officer Dalen Richards and Kim Manriquez, Records Supervisor, Fresno Police Department also appeared as witnesses on behalf of the Police Department Tow Unit. Appellant Edward Mason, Owner/Operator of "Bauer's Auto Wrecking and Towing" ("Bauer's", "Appellant", "Tow Operator") was also present, and represented by Bradley K. Boulden, Esq., Law Offices of Brad Boulden.

Prior to the start of the cross-examination of Appellant Ed Mason, the Hearing Officer stated that he had determined to accept Appellant counsel's "Supplemental Brief", which was submitted to the Hearing Officer and the City by Mr. Boulden via email on Wednesday, March 1, 2023 at approximately 4:00 P.M. The Hearing Officer confirmed with Deputy Casas that the City had received a copy of the "Supplemental Brief". The Hearing Officer also confirmed that the City would have seven calendar days to reply to the Brief. [As noted above, the City did not submit a reply to the "Supplemental Brief."] Upon request of Deputy Casas, the Hearing Officer then again confirmed that he believed the issue to be determined was not limited to whether under the TSA the City was required to reinstate Appellant to the TSA, but also included the issue of whether as part of the damages allowed under the TSA (in fact, as the sole damage language provided in the TSA) reinstatement to the TSA could be awarded by the Hearing Officer.

Additionally, the City requested that the Hearing Officer take judicial notice of Fresno Police Department Policy 510.3- "Towing Services", which states in pertinent part:

The City of Fresno Contracts with established tow companies to tow vehicles for the Department. The Chief of police or designee retains sole discretion in determining the selection of and total number of companies authorized to tow vehicles for the Department.

In response to the Hearing Officer's question, Deputy Casas stated that the section is relevant in that it "codifies" FPD's sole discretion in determining the number of tow companies to be included on the tow list for any TSA.

Mr. Boulden opposed the City's request, arguing that section 510.3 was not included in any TSA, nor was the section provided to the tow operators at any time. Mr. Boulden also argued

that section 510.3 does not preclude the Police Department from making a promise to the tow operators to make any required reductions in the number of tow companies on the tow list strictly by "attrition" as the Appellant has contended; rendering section 510.3 irrelevant. The Hearing Officer stated that he would make the determination as to whether he would take judicial notice of section 510.3 at the end of the hearing.

At that time, Deputy Casas was allowed to cross-examine Appellant Ed Mason. The Hearing Officer reminded Mr. Mason that he had been sworn in at the last hearing and was still under oath. In response to Deputy Casas' questions, Mr. Mason testified that he had been a part of the Police Department towing services for over 30 years. Mr. Mason testified that "Bauer's" has been in the wrecking business since approximately 1957, but began towing services in approximately 1984 or 1985. Mr. Mason testified that the company has a website, but the website relates strictly to the wrecking yard, and not the towing services. Mr. Mason testified that he also provides towing services for the Fresno County Sheriff's Office ("SO") and the California Highway Patrol ("CHP"). Mr. Mason testified that his company does not provide tows to private citizens. Mr. Mason testified that he has provided towing services for the CHP and Fresno SO approximately as long as he has provided towing services to the FPD. Mr. Mason testified that he uses the same "towing equipment" (i.e., tow trucks, etc.) for each of the agencies he provides tow services for. Mr. Mason testified that he also uses the "towing equipment for his wrecking business. Mr. Mason testified that more equipment is necessary to perform towing services than for the wrecking business. Mr. Mason testified that the tow services contracts with the CHP and Fresno SO are between his company, "Bauer's Auto Wrecking and Towing" and the particular law enforcement agency. Mr. Mason testified that very recently, the towing services agreements have been annual, and he meets with the representatives of the CHP on an annual basis regarding any changes made. Mr. Mason testified that as to the Fresno SO, he signed an agreement in 1985, and has been providing services on that same agreement since then. Mr. Mason testified that it is his understanding that as long as a tow company is in "good standing" with Fresno SO, you will continue to provide towing services for them. Mr. Mason testified that he never felt forced to sign any of the law enforcement agencies' tow services contracts. Mr. Mason testified that as to the CHP, a representative meets with the tow operators prior to the signing of a new agreement to discuss the "major points" of the new agreements. Mr. Mason testified that the CHP provides a final draft of the tow services agreement prior to signing the agreement. Mr. Mason testified that the FPD would provide drafts of the TSA and conduct meetings with the tow operators to discuss the draft TSA, but would sometimes require the tow operators to sign the TSA prior to the final draft being approved by the City Council, or even reviewed by the tow operators. Mr. Mason testified that the time to review a TSA was shorter than the time given by the CHP to review a draft of their tow services agreement. Mr. Mason testified that as to the FPD TSA, you could talk to the FPD about any objections you may have regarding any language in the TSA, but the only "effective" method of objecting to a section in a proposed TSA or amendment to the TSA was to speak to the City Council at a council meeting.

At that time Deputy Casas submitted a one page document that was a portion of the minutes

from the August 16, 2005 City Council meeting regarding the "10:30 A.M. Hearing of the Police Department To Car Rotation Program", specifically Item #1 "Bill No. B-85: Amending the Fresno Municipal Code Relating to the Program", and Item #2, "Bill No. B-86: Granting Certain Towing Operators a Non-Exclusive Franchise to Participate in the Program". (Later marked as "City Exhibit #B"). Deputy Casas stated that he had highlighted the portion of the document indicating that Appellant Mr. Mason had attended the hearing and spoken to the Council in support of both the Bills, except for the "new department fee structures". Deputy Casas stated that he submitted "City Exhibit #B" to support the City's position that Mr. Mason had the opportunity to voice his opposition to any part of the TSA to the City. Mr. Boulden had no objection, although he did not see any relevance to the document.

Mr. Mason testified that he did recall speaking to a local television reporter in 2011 regarding a change in the TSA fee structure he was not in agreement with. Mr. Mason also recalled that when his comments were reported on the station's newscast, he was called in to Lt. Andy Hall's office and "chewed out" for those comments. Deputy Casas submitted a two-page document entitled, "Fresno PD Streamlines Vehicle Impound Rules", dated Tuesday, December 27, 2011, and ask that it be entered in to evidence to support the City's argument that Mr. Mason had the opportunity to voice his opposition to any section of the TSA he disagreed with. The Hearing Officer denied the City's request on the grounds that the document was cumulative, and unlike "City Exhibit #B" which was evidence that Mr. Mason had an opportunity to voice his opinion on the TSA to the Council who had the authority to amend, approve or disapprove those changes, this document only established that Mr. Mason had a First Amendment right to free speech as did any person whether they were a signatory to the TSA or not.

Mr. Mason testified while the tow operators could go to the Council or contact their representative Councilmember regarding their concerns over the TSA, for the most part, the tow operators were required to sign the amended or renewed TSA prior to the TSA going to the Council for approval. Mr. Mason testified that he and other tow operators contacted the Tow Unit regarding changes to the TSA they disagreed with, but there were never any changes made regarding their concerns or requests with the language or sections they disagreed with. Mr. Mason testified that the "usual" response from the Tow Unit to a request for a change to language or a section they wanted changed was, "no change, take it or leave it". Mr. Mason testified that as to the CHP tow services agreement, the "mechanism" to register comments or opposition to the language or sections of the tow services agreement is more effective than the mechanism in place for the FPD TSA's.

Mr. Mason was then asked to review paragraph 7 of the 2018 TSA, entitled "Termination". In response to Deputy Casas' questions, Mr. Mason testified that he is aware of the language in Section 7 allowing either party to terminate the TSA with 30 days' notice. Mr. Mason testified that the Tow Unit had consistently informed the tow operators that the language in Section 7 of the TSA was necessary in order for the FPD to more easily terminate the TSA with all the tow operators and replace it with a new TSA. Mr. Mason testified that the tow operators were told by representatives of the Tow Unit that the termination language contained in Section 7

applied to the termination of the TSA with all tow operators, and not just individual tow operators. Mr. Mason testified that he was aware of Section 20 of the 2018 TSA entitled, "Terms and Conditions", and that he was aware that by signing the TSA he indicated that he had read and agreed to all terms and conditions of the TSA. The parties then stipulated that the same language was present in the 2011 and 2014 TSA's, which Mr. Mason testified he also signed. Mr. Mason testified that pursuant to Section 27(A) of the 2018 TSA entitled, "Additional Terms and Conditions- Term of Agreement" he understood the length of the TSA to be five years. Mr. Mason testified that he believed that at certain times it was identified as a three-year agreement, and at other times it was identified as a five-year agreement. Mr. Mason testified that the language in Section 27(A) stated the TSA was a three-year agreement with the possibility of two one-year extensions, but he was led to believe by the FPD Tow Unit that the TSA was a five-year agreement. Mr. Mason testified that he was never told he wasn't in "good standing" during the term of the 2018 TSA. Mr. Mason testified that during the 2018 TSA. Mr. Mason testified that every time a TSA was extended or amended, he was required to sign a document to that effect.

Deputy Casas then submitted a document entitled "First Amendment to Agreement", dated December 19, 2017, and signed by Mr. Mason, Chief of Police Jerry Dyer, Cindy Bruer, Deputy City Clerk, and a Deputy City Attorney whose signature is not decipherable. The document was subsequently marked as "City Exhibit #C" and entered into evidence. In response to Deputy Casas' questions, Mr. Mason testified that he believed the document was an extension of the 2011 TSA. Mr. Mason testified that signed extensions similar to "City Exhibit #C" were required by the Tow Unit, but only "recently". Mr. Mason testified that when he first contracted with the Tow Unit to provide tow services, he was not required to sign an extension to a Tow Services Agreement when the "current" agreement had expired. Mr. Mason also testified that extension documents are not required by the CHP or the Fresno SO. Mr. Mason testified that the language found in Section 1 of the document regarding termination reinforced his belief that either party to the TSA could terminate their participation in the TSA with 30 days' notice, and that a tow operator could be terminated for "cause" as provided in the original TSA. Mr. Mason testified that he agreed that the removal of a tow company by the Tow Unit from the tow list would be considered a reduction of the tow list, and that would be a "form of attrition". Mr. Mason testified that although not in the TSA, the tow operators were informed by representatives of the Tow Unit in numerous meetings that should the rotational tow list need to be reduced, it would be reduced "solely by attrition". Mr. Mason testified that he did not believe that a reduction in the rotational tow unit through a termination "for cause" counted as "attrition". Deputy Casas then stated he had no further questions for Mr. Mason.

After a short recess, the Hearing Officer allowed Mr. Boulden a re-direct examination of Mr. Mason. In response to Mr. Boulden's questions, Mr. Mason testified that he believed the issue for this particular portion of his appeal was his belief that the FPD promised he and the other tow operators that they would be included on any new or extended TSA if they were in "good standing" with the Tow Unit. Mr. Mason testified that he and the tow operators were also told that should the rotational tow list need to be reduced, then it would only be reduced

through "attrition" which he believed meant through retirement, death, sale of the tow business to a non-authorized family member, or termination from the TSA "for cause". Mr. Mason testified that he was never told by FPD that "attrition" would include removal from the rotational tow list for no reason other than simple reduction to achieve the reduced number required under the FMC. Mr. Mason testified that he is not aware of any tow company in good standing removed from the tow list. Mr. Mason testified that the last time he recalled the FPD informing the tow operators that the tow list would be reduced only by "attrition" was at the last meeting with the tow operators prior to the approval of the 2018 TSA. Mr. Mason testified that information was provided by Capt. Andy Hall in a meeting with the tow operators at the Police Department. Mr. Mason testified that he believes the information regarding "reduction only be attrition" was provided by Capt. Hall either "a few weeks" prior to the receipt of a draft of the 2018 TSA, or at the time the 2018 TSA was taken to the City Council for approval. Mr. Mason testified that the information was provided to the tow operators in response to their concerns when they were told that the number of tow operators on the rotational tow list was to be reduced from 30 to 20 beginning with the 2018 TSA. Mr. Mason testified that he did not object to the reduction of the number of tow operators on the rotational tow list because of Capt. Hall's promise that the reduction of the number of tow operators on the list from the then number of 28 to 20 would only be achieved by "attrition", which he believed meant solely through retirement or death of a tow operator, transfer of a tow business to a "non-authorize" relative, or termination from the TSA "for cause". Mr. Mason testified that he did not appear at the April 19, 2018 City Council meeting at which the 2018 TSA was approved and FMC §9-1707 was amended to reduce the number of tow operators on the rotational tow list from 30 to 20 (Appellant Exhibit #1, Attachment "C") because of the information regarding "attrition" provided by Capt. Hall at the tow operators meetings prior to April 19. Mr. Mason testified that the language in the "Executive Summary" (Id.) regarding the method of reducing the then current number of tow operators on the rotational tow list (29) to the amended number of 20, solely through "attrition, resignation, or through termination by breach of the Agreement" was consistent with the information provided by Capt. Hall at the meetings with the tow operators regarding the 2018 TSA and section 9-1707 amendment prior to the April 19 Council meeting. Mr. Mason testified that in 2022 he and Mr. Boulden had a meeting with Councilmember Luis Chavez who was on the Council in April, 2018, and voted on the two agenda items relating to the approval of the 2018 TSA and amendment of FMC §9-1707 at the April 19, 2018 Council meeting. Mr. Mason testified that Councilmember Chavez informed him that he felt that the "Staff Report" was very important, and it allowed him to ask questions of the Police Department representative based upon the information provided him in the "Staff Report". Mr. Mason testified that Councilmember Chavez told he and Mr. Boulden that his vote of approval for both action items was based on the "Staff Report" and the answers to the questions from Capt. Hall at the April 18 Council meeting. Mr. Mason testified that he and the other tow operators on the rotational tow list in 2014 were also told they would be included on the new TSA if they were still in "good standing" at the time the new TSA was approved by the Council and executed. Mr. Mason testified that the tow operators were also told in 2014 that when a reduction in the number of tow operators on the rotational tow list was reduced (under the 2014 TSA), that reduction would take place only through "attrition" as he believed it to be defined in 2018. Mr.

Boulden then had Mr. Mason review "Appellant Exhibit #2, Attachment "F" entitled, "City of Fresno Non-Exclusive Franchise Tow Service Agreement", a one-page document dated November 1, 2014. Mr. Mason testified that the second paragraph in the document notified all tow operators receiving the document that the "current Non-Exclusive Franchise Tow Service Agreement" would be terminated on December 27, 2014. Mr. Mason testified that to his knowledge all tow operators in good standing in the TSA terminated on December 27, 2014, including his company, "Bauer's Auto Wrecking and Towing" was "renewed" on the subsequent TSA. Mr. Mason testified that he and the other tow operators were required to fill out an application provided by the FPD Tow Unit for the subsequent TSA due to the 2014 amendment to FMC §9-1706, which added subsection (e) (Id). Mr. Mason testified that he had not been required to fill out an application for a new TSA for "quite a while". Mr. Mason testified that he did not have to fill out an application for the 2018 TSA. Mr. Mason testified that he was aware that a tow operator could be terminated from the TSA for violation or breach of certain sections of the TSA. Mr. Mason testified that the tow operators were informed that the information in subsection (e) added to FMC §9-1706 in 2014 regarding the non-accrual of vested rights applied only to new tow operators added to the TSA, and not those tow operators on the rotational tow list on the then-existing TSA. The parties then stipulated to the entry of Attachment "D" of "Appellant Exhibit #1" which was a "Staff Report" regarding chiefly the amendment to FMC Chapter 9, Article 17 allowing the sale or transfer of an existing tow business on the rotational tow list to an "immediate family member" as defined in FMC §3-101(e). Mr. Mason testified that the fact that the promise that reduction of the number of tow operators on the rotational tow list would be reduced only by "attrition", and that all tow operators in "good standing" would be included in any subsequent or extended TSA was made by Capt. Hall gave the promise "reliability". Mr. Mason testified that prior to being terminated from the TSA his company averaged 55-60 tows per month. Mr. Mason testified that he averages approximately 5-6 tows per month from the CHP, and approximately 1 per month for the Fresno SO. Mr. Mason testified that he has not reduced the amount of towing equipment he keeps for his towing business since he has been terminated from the FPD's rotational tow list, has maintained the same amount of insurance, and has not reduced his towing service staff, even though he has lost a significant amount of his towing business because he has not been reinstated to the FPD TSA after the FPD's "Notice of Termination" was dismissed by the Hearing Officer in May, 2022. Mr. Mason testified that he has also spent a significant amount of money hiring an attorney to represent him in the appeal.

At that point, the parties recessed for lunch and reconvened at 1:00 p.m., and continued with Mr. Boulden's redirect examination of Mr. Mason. In response to Mr. Boulden's questions, Mr. Mason testified that he reviewed Section 27(A) in the 2018 TSA prior to signing the TSA. Mr. Mason testified that he believed that the language contained in Section 27(A) was the first time the language appeared in a TSA. Mr. Mason testified that as to the language in 27(A) relating to the length of the TSA, the tow operators were informed by the FPD that the TSA was a five-year agreement and that the language regarding the two one-year extensions was to allow for any necessary fee adjustments. Mr. Mason testified that the tow operators were informed by the FPD that in general, Section 27(A)'s termination language was provided

to allow for the PD to terminate the TSA as to all tow operators and not to terminate a single tow operator. Mr. Mason testified that he believed this explanation to be true because the language in Section 27(A) specifically stated that the contract could be terminated by the mutual consent of the City and the contractors (plural) and not a single contractor. Mr. Mason testified that because this explanation came from "Deputy Chief" Andy Hall, who at the time was the Supervisor of the Tow Unit, he believed he could rely on that explanation as being accurate and reliable. Mr. Boulden then asked to review Section 7 of the 2018 TSA, entitled, "Termination". Mr. Mason testified that the City or FPD never provided him with 30 days' notice of termination of the TSA pursuant to Section 7. Mr. Mason testified he was never provided a one-page "extension" document to sign as he had been provided in other TSA's when those TSA's were extended. Mr. Mason testified that he was not aware he would not be reinstated to the current TSA until it was mentioned in passing at the appeal hearing regarding his company's "Notice of Termination". Mr. Mason testified that he was aware under Section 7 of the 2018 TSA he could be terminated for cause, and that he had no vested right to stay on the TSA, but he would stay on the TSA and subsequent TSA's if he maintained his "good standing" because he was told so by the FPD; specifically Deputy Chief Andy Hall.

Mr. Boulden then asked the Hearing Officer to note Attachments "E" and "F" from "Appellant's Exhibit #2 which are letter from the Fresno Police Department to Appellant "Bauer's Auto Wrecking and Towing" dated November 22, 2011, and November 1, 2014, respectively. Mr. Mason then testified that he received these letters from the Police Department notifying him that the 2007 TSA (Attachment "E"), and 2011 TSA (Attachment "F") were to be terminated pursuant to Section 7 in each of the respective TSA's. Upon objection by Deputy Casas, Mr. Boulden stated that these documents were submitted to establish that testimony by Mr. Mason regarding the information given to the tow operators on how the termination authority included in Section 7 was to be used by the FPD was consistent in both TSA's prior to the 2018 TSA. Deputy Casas' objection was overruled by the Hearing Officer. Mr. Mason testified that he has seen a copy of the proposed TSA to be presented to the City Council for approval at a date to be determined, and he is aware that there has been a meeting with the tow operators on the current rotational tow list and the Tow Unit regarding the proposed TSA. Mr. Mason again testified that does not recall ever receiving the final, Council approved draft of the TSA prior to being required to sign the single signature page of the renewed TSA or the extension of the current TSA. Mr. Mason testified that the only sure way of knowing that the TSA that a tow operator has "agreed" to (by signing the signature page prior to the Council approving the TSA) is to compare the "final" draft provided by the Tow Unit after the Council has approved the TSA and they receive a copy of the TSA and a fully executed signature page.

In response to the Hearing Officer's request, Deputy Bui checked on the City of Fresno website (www.fresno.gov) to determine whether the proposed TSA being circulated to those tow operators currently on the rotational tow list, and that was sought to be approved by the Council was currently listed on the next Council meeting (at the time of the hearing, the next Council meeting would have been March 9, 2023). Deputy Bui stated that the approval of the

"renewed" TSA was not listed on the March 9 agenda.

Mr. Mason testified that his understanding of the term, "attrition" as provided by Deputy Chief Andy Hall did not include simply not being included in a subsequent TSA (as long as the tow operator continued to be in "good standing"). Mr. Boulden stated that he had no further questions for Mr. Mason.

The Hearing Officer then allowed Deputy Casas to ask Mr. Mason some "follow-up" questions. In response to Deputy Casas' questions, Mr. Mason testified that the November 22, 2022 letter to "Bauer's Auto Wrecking and Towing" from the Tow Unit regarding the Termination of the 2007 TSA (Appellant Exhibit #2, Attachment "E") was referencing the 2007 TSA. Mr. Mason testified that he believed that the pertinent sections of the FMC relating to the TSA should work in tandem with the TSA. Mr. Mason testified that he believed that the pertinent FMC sections relating to the TSA should be consistent with the language of the TSA itself. Mr. Mason testified that FMC §9-1706(e) (no vested right for tow operator to be included on a subsequent or extended TSA) was part of the TSA (2014 and 2018). Mr. Mason testified that until he was terminated at the time of the 2018 TSA that is the subject of the appeal, he was never told that he was not in "good standing" with the FPD Tow Unit. Mr. Mason testified that he was subject to fines in 2019 for minor violations of the TSA. Mr. Mason testified that there was a problem with his liability insurance, but it was not his fault, and there was a miscommunication, and his policy was eventually accepted by the City's Risk Management Department. Mr. Mason testified that he was fined in 2020 when an employee reported to a tow request with "alcohol on his breath". Mr. Mason then testified that he did recall more frequent price (fee) changes under the 2018 TSA than under prior TSA's. Mr. Mason testified that under Section 19 of the "Scope of Work" in the 2018 TSA, the PD's towing and storage rates would mirror the CHP rates (usually set on an annual basis). Mr. Mason testified that he did not believe the tow business suffered a loss of business due to the COVID-19 pandemic. Mr. Mason testified that he did purchase a new tow truck in 2019, but only as a replacement for an older tow truck, not as an additional truck. Mr. Mason testified that he did not recall the 2018 TSA when approved being described as a "Three-year Agreement" in the "Staff Report" for the approval of the agreement (Appellant Exhibit #1, "Declaration of Edward Mason", Attachment "C"), or that Council President Esmerelda Soria referred to the 2018 TSA at the April 19, 2018 City Council meeting regarding the approval of the 2018 TSA as a "three-year" agreement. Mr. Mason testified that he could not express his objections regarding any of the terms and conditions of any of the TSA's to the Chief of Police because the Chief of Police would not meet with him. Mr. Mason testified that the majority of his objections or questions would be handled by Officer Richards, or on occasion, Deputy Chief Andy Hall. Mr. Mason testified that for the 2018 TSA, Deputy Chief Hall informed the tow operators that he wanted the 2018 TSA signature page signed prior to the TSA being taken to the City Council for approval so that he could inform the Council that the tow operators "were on board" with the TSA. Mr. Mason testified that the "Staff Report" for the approval of the 2018 TSA (Appellant Exhibit #1, "Declaration of Edward Mason, Attachment "C") stated in the "Executive Summary" section of the "Staff Report" stated that the three-year 2018 TSA allowed for "two, one-year extensions", making the 2018

TSA a five-year agreement. Mr. Mason testified that he was aware that the two one-year extensions had to be agreed to by both parties in order to be executed. Deputy Casas stated he had no further questions for Mr. Mason.

At that time, the Hearing Officer allowed Deputy Casas to cross-examine Appellant, Mr. Mason. In response to Deputy Casas' questions, Appellant testified that for each of the TSA's he signed with the Police Department, he was told what the terms and conditions of the TSA were going to be, and he had the option of signing or not signing the TSA. Appellant testified that in some instances, an extension of the previous TSA was required to be signed if the new TSA was not yet completed. Appellant was then asked to review the TSA dated December 27, 2011 (City Exhibit #C) [**NOTE: In the interests of full disclosure, and as discussed at this point in the hearing, it was noted that the December 27, 2011 TSA was executed on behalf of the City of Fresno by the Hearing Officer, Michael D. Flores who was then employed by the City of Fresno as a Deputy City Attorney. All parties stated that they were aware of this fact and did not believe that the Hearing Officer was prejudiced in any way due to this fact.**] Appellant testified that he did sign the Agreement and agreed to abide by the terms and conditions of the Agreement (City Exhibit #C, p. 8). Appellant was then asked to review the TSA dated December 28, 2014 (City Exhibit #D). Appellant testified that he did sign that Agreement and agreed to abide by the terms and conditions of the Agreement (City Exhibit #D, p. 8). Appellant was then asked to review the April 16, 2018 TSA (City Exhibit #2). Appellant testified that he did sign the Agreement and agreed to abide by the terms and conditions of the Agreement (City Exhibit #2, p. 8). Appellant testified that he was aware of at the time of signing of the 2011, 2014, and 2018 TSA's of those Sections found in "Attachment A" of all three TSA's entitled "Hearing/Appeal", in which any tow operator which appeals a suspension in excess of 30 days from the tow list pursuant to Chapter 1, Article 4 of the Fresno Municipal Code, and after the hearing, a decision is made finding that there were no grounds for the suspension, the Appellant is limited to reinstatement to the tow list as damages, and that no other compensation or consideration will be allowed (City Exhibit #C, p. 17; City Exhibit #D, p. 18; City Exhibit #2, Sect. 34, p. 20). Deputy Casas stated he had no further questions for Appellant.

The Hearing Officer allowed Mr. Boulden to ask follow-up questions to Mr. Mason. In response to Mr. Boulden's questions, Mr. Mason testified that he did not recall discussing Section 19 of the "Scope of Work" of the 2018 TSA relating to the setting of towing and storage fees being linked to those set by the CHP, with the Tow Unit. Mr. Mason testified that he did recall discussing section 27(A) of the 2018 TSA with the Tow Unit, however. Mr. Mason testified that he understood one of the reasons the two one-year extensions relating to the 2018 TSA to be included was for possible tow and storage fee adjustments. Mr. Boulden stated he had no further questions for Mr. Mason.

In response to the Hearing Officer's question, Mr. Mason testified that after signing a signature page for either an extension of an existing TSA, or for a new TSA, and then after receiving the final Council approved version of the new or amended TSA, he never reviewed the final version to determine what if any language was different from the draft version of the

same document he had been given prior to the final version provided to the City Council for approval. Mr. Mason testified that he believed that since he had already signed the agreement, he could not change anything even if the final, Council approved version of the agreement was significantly different than the draft he was given to review.

The City then began their presentation, and called their first witness, Officer Dalen Richards ("Officer Richards"). The Hearing Officer reminded Officer Richards that he had been sworn in at the February 27 hearing and was still under oath. In response to Deputy Casas' questions, Officer Richards testified that he has been in the Tow Unit as a Tow Coordinator for approximately nine years. Officer Richards testified that once the City Attorney's Office approved draft of a new or extended/amended TSA was provided by the City Attorney's Office to the Tow Unit, that draft would be provided to the tow operators for review and a meeting scheduled and held with the tow operators for comment. Officer Richards testified that he could not recall specifically how far in advance each draft of an extended/amended or new TSA was provided to the tow operators prior to being presented to the City Council for approval, but the Tow Unit's policy was to provide the draft to the tow operators at least one month prior to presentation to the Council for approval. Officer Richards testified that he did not recall Mr. Mason contacting him regarding any objections to the draft of the 2018 TSA. Officer Richards testified that the policy of requiring the tow operators to sign the signature page of the TSA prior to taking the TSA or extension/amendment to the City Council for approval began with the 2018 TSA. Officer Richards testified that after Council approval, the final approved draft would be signed by the Chief of Police and sent to the City Clerk for signature and final execution. Then a copy of the fully executed TSA would be sent to the tow operators. Officer Richards testified that the terms of the TSA required each tow operator to be provided a fully executed copy of the TSA. Officer Richards testified that after being given a copy of a draft TSA, the Tow Unit scheduled a meeting with the tow operators to go over any changes or additions to a new or extended/amended TSA, and to allow the tow operators to comment on those changes or additions. Officer Richards testified that the tow operators could also contact the Tow Unit with questions, and those questions they could not answer, they would be passed to the Tow Unit Supervisor. Officer Richards testified that during his time assigned to the Tow Unit he attended the majority of the meetings regarding the new or amended/extended TSA's. Officer Richards testified that primarily he and Kim Manriquez would coordinate the scheduling of these meetings and would be responsible for handing out any information at the meetings, and well as making sure all tow operators who attended the meetings sign in on the sign-in sheet. Officer Richards testified that the tow operators could comment or raise objections on the contents of the TSA's at the meeting, or by letter, email, phone call, or other method if they desired to. Officer Richards testified that he believes Mr. Mason was provided a copy of the 2018 TSA. Officer Richards testified that he does not recall Mr. Mason raising any objections to the 2018 TSA in a meeting or in any other manner. Officer Richards testified that when a new TSA was to be implemented, the tow operators were provided an "application packet" to be filled out and provided back to the Tow Unit. Officer Richards testified that he did not recall whether the "application packet" was required when an existing TSA was being extended or amended. Officer Richards testified that he did recall requiring the tow operators to sign a "one-page document" for

extensions of an existing TSA. Officer Richards testified that he recalled requiring the tow operators to provide current business licenses and proof of current liability insurance for new TSA's but did not recall of those requirements applied to extensions of current TSA's. Officer Richards testified that any requirement regarding valid liability insurance was required to be submitted to the City's Risk Management Department. Officer Richards testified that he did not recall whether a "local background check" of the owner of the tow company was required for an extension of an existing TSA, but was required for a new TSA. Officer Richards testified that he was aware that there were cases of tow operators in "good standing" on an expiring TSA not "invited" to join the new TSA. Officer Richards testified that he was not aware of any tow companies in "good standing" who were not included in an extension or amendment of a current TSA. Officer Richards testified that he was not aware of a Tow Unit policy that a tow operator was "automatically" made part of an extension/amendment of a current TSA. Officer Richards testified that under the "First Amendment to the [2014 Tow Services] Agreement" (City Exhibit #C), the City could not force Appellant to perform tow services for the Tow Unit, the Appellant could not force the City to keep the Appellant on the TSA, and either Appellant or the Tow Unit could terminate the TSA with 30 days' notice to the other. Officer Richards testified that he did not recall Mr. Mason requesting an extension of the 2018 TSA for his tow company. Officer Richards testified that any such request for extension would have been sent to his Supervisor. Deputy Cases stated he had no further questions for Officer Richards.

Mr. Boulden was then allowed the opportunity to cross-examine Officer Richards. In response to Mr. Boulden's questions, Officer Richards testified that the Tow Unit provided 30 days' notice to the tow operators regarding the expiration of the 2018 TSA. Officer Richards testified that he did not provide Mr. Mason with that 30-day notice. Officer Richards testified that the drafts of the extensions to the 2018 TSA were provided to the tow operators prior to the time the extensions took effect. Officer Richards testified that the extensions were not provided at the time of the approval of the 2018 TSA. Officer Richards testified that the extension of the 2014 TSA (City Exhibit #C) does not mention that the extension must be mutual to be effective. Officer Richards testified that he was not aware when the draft of the newest TSA (not yet approved by City Council) ("2023 TSA") was sent to the tow operators. Officer Richards testified that he believed the FPD was requiring tow operators to sign the "2023 TSA" by March 9, 2023. Officer Richards testified that there may not be one month for the tow operators to review and comment on the "2023 TSA" prior to their requirement to sign the document.

At that point, Mr. Boulden requested to submit documents to impeach the testimony of Officer Richards regarding the "standing" of two tow operators at the time of the expiration of the 2007 TSA and the start of the 2011 TSA. Mr. Boulden stated that the documents would show that the two tow operators in which testimony was given that Mel's Towing and Sierra Towing were in "good standing" at the time of the expiration of the 2007 TSA and not allowed to join the 2011 TSA was not supportable by the evidence. The Hearing Officer stated that the testimony Mr. Boulden wished to impeach was not given by Officer Richards but by Records Supervisor Kim Manriquez at the February 27, 2023 hearing in response to a question from

the Hearing Officer. After some discussion, it was determined by documents provided by the City that both "Mel's Towing" and "Sierra Towing" while both had histories of suspensions and fines during the time of the 2007 TSA, both were performing tow services under the 2007 TSA, and therefore were considered in "good standing" at least 60 days prior to the expiration of the 2007 TSA. After reviewing the City's documents, the Appellant's documents, and statements from Mr. Boulden indicating that his belief that both "Mel's Towing" and "Sierra Towing" were reinstated on the 2007 TSA only 30 days prior to its expiration was made in error, the Hearing Officer ruled that he would withhold his decision until he could review the documents provided by both parties in more detail. *[NOTE: In the interests of full disclosure, and as discussed at this point in the hearing, it was noted that in the appeal hearings of both Mel's Towing and Sierra Towing in which they appealed the Tow Unit's decision to exclude them from the 2011 TSA the City of Fresno was represented by the Hearing Officer, Michael D. Flores who was then employed by the City of Fresno as a Deputy City Attorney. All parties stated that they were aware of this fact and did not believe that the Hearing Officer was prejudiced in any way due to this fact. It should also be noted that neither appeal was completed and both tow company owners withdrew their appeals prior to a decision being issued by the Hearing Officer assigned to the cases.]* Mr. Boulden stated that he had no further questions for Officer Richards.

Deputy Casas stated he had no questions for Officer Richards on re-direct examination.

In response to the Hearing Officer's questions, Officer Richards testified that the requirement that the tow operators sign a new TSA prior to Council approval comes from the City Council. Officer Richards testified that there is no requirement that a signature be obtained from the tow operators for extensions of an existing TSA. Officer Richards testified that when tow operators are provided drafts of new TSA's or drafts of amended TSA's they are required to sign acknowledgements of receipt of those drafts so that the Tow Unit has a record of receipt from all the tow operators.

Deputy Casas then called Kim Manriquez as a witness. The Hearing Officer reminded Ms. Manriquez that she was still under oath. In response to Deputy Casas' questions, Ms. Manriquez testified that when the first extension of the 2018 TSA expired in April of 2021, Appellant did not contact Ms. Manriquez to ask for an extension of the 2018 TSA. Ms. Manriquez testified that when the second extension of the 2018 TSA expired in April of 2022, Appellant did not contact Ms. Manriquez to ask for an extension of the 2018 TSA. Deputy Casas stated that he had no further questions for Ms. Manriquez.

The Hearing Officer then allowed Mr. Boulden to cross-examine Ms. Manriquez. In response to Mr. Boulden's questions, Ms. Manriquez testified that she did not handle the extensions for the 2018 TSA, so she was not aware whether the other tow operators requested the first and second extensions of the 2018 TSA or whether the extensions were provided by the FPD.

The Hearing Officer then asked the parties for their closing statements.

In his closing statement for Appellant, Mr. Boulden in summary stated that Appellant believes that the Hearing Officer in his initial "Decision and Order" when dismissing the Tow Unit's "Notice of Termination" against "Bauer's Auto Wrecking and Towing" also reinstated Appellant back onto the TSA, but the Police Department refused to do so. Mr. Boulden stated that the FPD is attempting to use the fact that the 2018 TSA has expired to say that they do not have to reinstate Appellant because he was never part of the current TSA. Mr. Boulden stated that under Chapter 1, Article 4, the Hearing Officer has great latitude to accept evidence not usually allowable in a civil matter and can expand the scope of the hearing should he feel the need to. Mr. Boulden stated that one of the main issues of this particular portion of the case is that the promise made by the Police Department to all tow operators regarding the removal of any tow operator from the rotational tow list only by "attrition", which means removal solely by retirement, death, sale of the business to persons that do not meet the definition of "close family member" as required by the FMC, or removal from the rotational tow list for "cause" (which would be for violation of one of the terms and conditions listed as a "major violation" in the TSA warranting termination from the TSA), and was confirmed by the statements made to the Council by Deputy Chief Hall, and was contained in the April, 2018 "Staff Report" approved by the City Attorney's Office. Mr. Boulden stated that this promise was also confirmed by the testimony of Ms. Manriquez in her testimony at the February 27, 2023 hearing. Mr. Boulden stated that the evidence regarding the promise made by FPD regarding removal from the rotational tow list solely by "attrition" renders the issue of whether "Mel's Towing" and "Sierra Towing" were removed from the TSA for poor performance, or they were simply not invited to be included in the 2018 TSA unimportant. It is the long-standing promise made by the FPD regarding removal from the rotational tow list solely by "attrition" that is the major focus of Appellant's case. Mr. Boulden argued that the term, "attrition" never included removal of a tow operator from the rotational tow list simply because a tow operator in "good standing" was not "invited" to be a part of a new TSA. Mr. Boulden that Appellant's beliefs were further confirmed by the fact that the FPD provided no evidence contradicting Appellant's definition of "attrition". Mr. Boulden pointed out that Appellant was invited back to every TSA for the 35 year period of time he had towed for the FPD, and was never told he wasn't in "good standing" except for the termination from the TSA under appeal, and dismissed by the Hearing Officer. Mr. Boulden argued that even after the Hearing Officer dismissed the "Notice of Termination" issued by the FPD, the Tow Unit did not notify Appellant that he would not be reinstated to the current TSA until 14 months after the appeal was filed, and even then only notified Appellant orally at the end of one of the appeal hearings. Mr. Boulden noted that the City argued that Appellant didn't request an extension when the 2018 TSA expired, but Appellant at the time was terminated from the TSA by the Tow Unit and did not receive the notice of termination in 30 days as did all tow operators then on the 2018 TSA by virtue of the fact that Appellant had been terminated from the 2018 TSA and was therefore not to receive any notices regarding the TSA. Mr. Boulden argued that even FMC §9-1706(e) which when initially adopted reduced the number of tow operators on the rotational tow list from 30 to 20 includes language which states that tow operators who were then on the current TSA "in good standing, will receive priority reinstatement status on subsequent Non-Exclusive Franchise Tow Agreements". Further, Deputy Chief Hall, in response to a question from a

councilmember at the council at which the FMC section was amended stated that the reduction of the rotational tow list down to the stated 20 would take place solely through "attrition" (City Exhibit #3D). As to the length of the 2018 TSA (three years vs. five years), Mr. Boulden argued that in the tow operator's meetings, the TSA was always discussed by both the tow operators and the Tow Unit Supervisors as a five-year agreement. Further, Mr. Boulden argued that the language of Section 27(A) established that it was placed in the TSA to allow the Tow Unit to terminate the TSA in order to implement a new/subsequent TSA when required. Mr. Boulden also argued that Appellant should be reinstated under the "promises" made by the Tow Unit both to the tow operators in their meetings and the statements made to Councilmembers regarding the reduction of the number of tow operators on the rotational tow list from 30 to 20 solely by "attrition" under the theory of "promissory estoppel" (more thoroughly presented in "Appellant's Exhibit #1", Section V). Mr. Boulden argued that although the issue of "make-up" tows or the monetary value of "make-up" tows through the TSA agreement has been decided by the Hearing Officer, should the Hearing Officer determine that Appellant be reinstated to the TSA under the theory of "promissory estoppel", damages are allowed to be awarded "to do justice", and the Hearing Officer would have great discretion to award "make-up" tows or the monetary value of "make-up" tows should he believe justice warrants. Mr. Boulden noted that because FPD argued that Appellant failed to ask for an extension of the 2018 TSA even though they were not notified of the termination of the TSA, Appellant has formally requested that they be reinstated on the soon to be approved 2023 TSA. In summary Mr. Boulden argued that evidence submitted by the Appellant, the lack of contradictory evidence by the FPD, and justice and equity require that Appellant be immediately reinstated on the current TSA.

On behalf of the Police Department Tow Unit, Deputy Casas in summary argued that for purposes of promissory estoppel, Mr. Mason testified that he suffered no "expenses" as a result of the 2018 TSA. Mr. Mason testified that he did purchase a new tow truck, but not to expand his tow business fleet, but to replace a truck that no longer complied with California State law. Deputy Casas also pointed out that although the term "attrition" was used by many people during the course of drafting, discussing and answering questions regarding the 2018 TSA, the TSA itself never mentions or uses the term "attrition" in the body of the 2018 TSA itself or in the FMC. Deputy Casas requested that the Hearing Officer note Mr. Mason's testimony in which he admitted recognizing the language in the 2018 and prior TSA's in which it was clearly stated that he and all other tow operators who were parties to those TSA's had no vested rights, including rights to be included on subsequent TSA regardless of whether they were in "good standing". Deputy Casas noted that the Hearing Officer in his prior "Decision and Orders" determined that the FPD acted in "good faith" with Appellant when dealing with Appellant in regard to the dispute and subsequent appeal at issue, and that the Hearing Officer also determined that the 2018 TSA did expire prior to the appeal. Deputy Casas argued that the 2018 TSA was a three-year, fully integrated agreement, with language that clearly stated that the terms and conditions of the agreement would supersede any and all warranties and other terms and conditions discussed and not included within the agreement itself and which by signing, Appellant agreed he read, understood and agreed to abide by all terms and conditions contained in the agreement. Deputy Casas noted that there

is language in the 2018 TSA allowing either party to terminate their part in the TSA with 30 days' notice to the other, and that with mutual consent of the parties, two one-year extensions, thereby confirming that the 2018 TSA is in effect a three-year agreement with two one-year extensions. Deputy Casas reminded the Hearing Officer of the language in the 2018 TSA as well as the 2011, and 2014 TSA's in which the parties negotiated its terms "at arms' length" and with knowledge of the issues, and additionally waived the right to assert any law or caselaw decision allowing one party's use of an ambiguity in the agreement against the other including the use of extrinsic evidence (2018 TSA, Section 24). Deputy Casas also noted that by signing the TSA, Appellant read, understood and agreed to all terms and conditions contained in the TSA (2018 TSA, Section 20) and that Appellant had been represented by knowledgeable counsel, or knowingly declined to seek such counsel (2018 TSA, Section 24). Deputy Casas noted that FMC 9-1706(e) like the language contained in the TSA did not include any guarantees that any tow operators would be included in any subsequent TSA, and that every tow operator by their signature on the 2018 TSA was aware that any oral promise otherwise was not enforceable unless specifically included in the language of the 2018 TSA. Deputy Casas argued that like "Mel's Towing" and "Sierra Towing" at the end of the 2014 TSA, Appellant was not included in the current TSA as the FPD was allowed to do under its discretion authorized by the language in the 2018 TSA. Deputy Casas argued that many of Appellant's arguments constitute a request for reformation of the terms of the 2018 TSA, and if so, then Appellant has chosen the wrong forum, and must do so in a court of equity. In conclusion Deputy Casas argued that the terms and conditions of the 2018 TSA must be upheld, especially those that limit the interpretation of the terms and conditions of the TSA to the language of the agreement itself, which clearly states that no and that no extrinsic evidence could be considered to interpret the terms and conditions of the agreement, and no law or caselaw decision could be asserted to assert an ambiguity against either party. Therefore, Appellant's request to be reinstated onto the current TSA should be denied.

The Hearing Officer and Counsel then discussed the identification of the Memorandum/Briefs of both parties. The Hearing Officer stated that to be consistent with the other "phases" of the appeal, he was inclined to start the identification marking over again at the beginning, and not continue it in sequence with those exhibits submitted by the parties in the initial appeal hearing on the issue of whether Appellant should have been terminated from the TSA and the "second phase" regarding attorney's fees and "make-up" tows. The parties did not object to the Hearing Officer's statement. So, the parties' exhibits as they related to the issue of reinstatement to the TSA in the present hearing would be marked and entered into evidence in the following manner:

For Appellant: The document entitled, "*Bauer's Brief in Support of its Request for Immediate Reinstatement on Current, Extended 2018 TSA and One Subsequent TSA, and Attorneys' Fees and Costs and Make-Up Tows or the Monetary Value Thereof Following the FPD's Failure to Adhere to the Decision Awarding Reinstatement Due to an Ill-Alleged Expiration of the TSA and Ill-Alleged Assertion That the FPD did not have to Place Bauers on Rotation After the TSA was Extended on April 17, 2021*" ("Appellant's Brief") submitted on February

21, 2023 would be marked as “Appellant Exhibit #1” and entered into evidence.

Mr. Boulden’s supplemental brief entitled, *“Bauers’ Reply/Supplemental Brief to City’s Brief and in Support of its Request for Immediate Reinstatement on Current, Extended 2018 TSA and One Subsequent TSA, and Attorneys’ Fees and Costs and Make-Up Tows or the Monetary Value Thereof Following the FPD’s Failure to Adhere to the Decision Awarding Reinstatement Due to an Ill-Alleged Expiration of the TSA and Ill-Alleged Assertion That the FPD did not have to Place Bauers on Rotation After the TSA was Extended on April 17, 2021”* (“Appellant’s Supplemental Brief”) submitted on March 1, 2023 was marked as “Appellant Exhibit #2”.

Subsequent to the March 8, 2023 appeal hearing, the Hearing Officer informed the parties by email on March 8 that the video/audio “excerpts” submitted by Appellant’s counsel Mr. Boulden were marked and entered into evidence as follows:

- (Audio): 12/13/22 Testimony of FPD Records Supervisor Kim Manriquez, Hearing Audio Pt. 1, 23:15 – 23:25 was marked as “Appellant Exhibit #3A” and entered into evidence.
- (Audio): 12/13/22 Testimony of Appellant Ed Mason, Hearing Audio Pt. 1, 1:29:09 – 1:32:24. Appellant Mason testified that on occasion, Police Department had him sign the “signature page” of a new TSA prior to approval of the new TSA by Council, and before receiving a copy of the approved, final version of the TSA was marked as “Appellant’s Exhibit #3B” and entered into evidence.
- (Video): 10/9/14 City Council Meeting (32:19 – 33:57), re Agenda Item 1E (TSA) Questions from Councilmember Sal Quintero to Sgt. DeWald(?) from Tow Unit re amendment to TSA to allow tow companies on TSA to sell tow business to “Close Family Members” (defined) was marked as “Appellant’s Exhibit #3C” and entered into evidence.
- (Video): 4/19/18 City Council Meeting (3:58:43 – 4:20:46), re two Agenda Items; (1) approving 2018 TSA; and (2) to amend FMC to lower number of tow companies on tow list from 30 to 20. Mention of lowering then-current number on towing list (30 to 20) solely by “attrition” was marked as “Appellant’s Exhibit #3D” and entered into evidence.

For the City: The City’s brief entitled, *“Memorandum of Points and Authorities in Opposition to Bauer’s Claim That it is Entitled to an Automatic Extension of the Parties’ Expired Tow Service Agreement”* (“City’s Brief”) submitted on February 20, 2023 was marked as “City Exhibit #A” and entered into evidence.

The one-page document provided by the City (Deputy Casas) of the August 16, 2005 City Council meeting regarding the 10:30 A.M. items “Bill No. B-85-Amending the Fresno

Municipal Code Relating to the [Tow Car Rotation] Program”, and Bill Not. B-86, “Granting Certain Towing Operators a Non-Exclusive Franchise to Participate in the [Tow Car Rotation] Program” was marked as “City Exhibit #B” and entered into evidence.

The one-page document provided by the City (Deputy Casas) entitled, “First Amendment to Agreement” of the December 28, 2014 TSA, extending the TSA on a “month-to-month” basis was marked as “City Exhibit #C” and entered into evidence.

The 2011, 2014, and 2018 TSA’s all previously entered into evidence in the other “phases” of the appeal were not entered into evidence in this “phase” of the appeal, but the Hearing Officer stated that he would take “judicial notice” of all three TSA’s for purposes of drafting the “Decision and Order” for this “phase” of the appeal. The Hearing Officer also stated that he would also take “judicial notice” of his prior “Decision and Orders” in the other two “phases” of the appeal; May 24, 2022 (Termination from the 2018 TSA), and January 10, 2023 (Attorney’s Fees and “Make-Up” Tows).

The submission of “Fresno Police Department Policy Manual”, Policy No. 510, “Vehicle Towing Policy” was rejected by the Hearing Officer, and not entered into evidence.

As to the documents (one-from each party) regarding the disciplinary actions relating to “Mel’s Towing” and whether “Mel’s Towing” was in “good standing” under the 2007 TSA at the time of its expiration, the Hearing Officer stated that he would decide it’s relevance at a later time and include that decision in his “Decision and Order” for this “phase”. If used the City’s document would be marked as “City Exhibit #D”, and the document for Appellant would be marked as “Appellant Exhibit #4”.

The Hearing was then adjourned at approximately 4:25 P.M.

III. THE PARTIES’ BRIEFS

Prior to the first appeal hearing on the TSA reinstatement issue held on February 27, 2023, both parties submitted briefs outlining their arguments on their positions.

1. Appellant’s Brief- Appellant’s pre-hearing brief entitled, “*Bauer’s Brief in Support of its Request for Immediate Reinstatement on Current, Extended 2018 TSA and One Subsequent TSA, and Attorneys’ Fees and Costs and Make-Up Tows or the Monetary Value Thereof Following the FPD’s Failure to Adhere to the Decision Awarding Reinstatement Due to an Ill-Alleged Expiration of the TSA and Ill-Alleged Assertion That the FPD did not have to Place Bauers on Rotation After the TSA was Extended on April 17, 2021*” was submitted on March 1, 2023 and entered into evidence as “Appellant Exhibit #1”.

In summary, Appellant’s chief argument posited that despite the City and FPD’s contention that the last TSA Appellant was a party to, the 2018 TSA, contained language clearly stating that no tow operator who was a party to the TSA achieved any vested rights in the TSA,

including automatic “renewal” of subsequent TSA’s or extensions of current TSA’s, there had been a long standing history of “promises” made to the tow operators on the rotational tow list by authorized representatives of the Tow Unit (of which Appellant had been a part for approximately 35 years), that if and when a new TSA was implemented, or, as in the case of the implementation of the 2018 TSA the number of tow operators on the rotational tow list was lowered from 30 to 20, the sole method of removing tow operators from the rotational tow list to achieve the lower number would be by “attrition” (Appellant Exhibit #1, Section I “Summary of Appeal and Introduction”, p. 1). In the brief, Appellant noted that the “promise” was made not only to the tow operators in numerous meetings with Tow Unit representatives when TSA were either to be terminated an renewed, extended or in some way amended, but the “promise” of tow operator removal from the rotational tow list solely by “attrition” was confirmed by Tow Unit or FPD representatives to sitting City Council members in various council meetings in 2014, 2018, and 2020, and included in the “Executive Summary” portion of the Staff Reports for agenda items related to TSA’s in Council meetings held on April 19, 2018, and October 9, 2014 (Id., pp. 3-4; “Declaration of Edward Mason”, Attachment “C”, pp. 1-3, Attachment “D”, pp. 1-3). Appellant’s Brief also noted that during the December 12, 2022 appeal hearing, Tow Unit Records Supervisor/Towing Coordinator Kim Manriquez testified that in 2014 when FMC §9-1706(e) was amended to reduce the number of tow operators on the rotational tow list from 30 to 20 (at the time of the approval by Council of the amendment, the number of tow operators was 26), she recalled that the Tow Unit policy was to be that reduction of the then number of 26 tow operators to 20 would occur solely by “attrition” (Id., p. 2).

Appellant’s Brief argued that these promises were relevant and enforceable against the FPD Tow Unit notwithstanding the limiting language regarding vested rights, and the unenforceability of any terms, conditions, or promises discussed or made outside the TSA and not specifically included in the 2018 TSA (and discussed in greater detail in the summary of the City’s Brief below) under the doctrine of “promissory estoppel” (Id., Section V, pp. 18-19). Appellant’s Brief also noted that even though the Hearing Officer’s “Decision and Order” dated January 10, 2023 denied his request for “make-up” tows or the monetary value of “make-up” tows, the Hearing Officer could award the same as damages under Section 9 of the 2018 TSA (Appellant Exhibit #1, p. 5) and under “promissory estoppel” (Id., Section V, p. 19).

Appellant’s Brief also disputes the City and FPD’s contention that 2018 TSA was a three-year agreement that had expired by the time the Hearing Officer’s Decision and Order in May of 2022 dismissing the Tow Unit’s “Notice of Termination” against Appellant had been issued and therefore Appellant could not be reinstated on an expired TSA. Appellant argues that in fact, the 2018 was in fact a five-year agreement as it was extended (Appellant Exhibit #1, p. 5), and the Tow Unit did not “notify” Appellant that they would not be reinstated (even if they prevailed on the first “phase” of their appeal: the dismissal of the “Notice of Termination”) until the hearing on that issue. Appellant argued that the delay in bringing the appeal to hearing (approximately one year) and the “detrimental reliance” by Appellant in believing that should he prevail he would be reinstated to the TSA (maintaining towing equipment, personnel,

insurance, etc.) would preclude the City and the FPD Tow Unit from refusing to reinstate Appellant (Appellant Exhibit #1, p. 4). Appellant also argued that these actions breached the City and FPD Tow Unit's covenant of good faith and fair dealing (Ibid; Section IV, p. 17).

2. City/FPD Tow Unit's Brief- The City/FPD Tow Unit's brief entitled, "*Memorandum of Points and Authorities in Opposition to Bauer's Claim That it is Entitled to an Automatic Extension of the Parties' Expired Tow Service Agreement*" was submitted on February 20, 2023 and entered into evidence as "City Exhibit #A" ("City's Brief").

In summary, the City's Brief's major contention was that there were several sections or paragraphs in the 2018 TSA that made it very clear no tow operator including Appellant had any vested rights in any extensions or amendments to current TSA's or inclusion in any subsequent TSA's, and that the language of the TSA made it clear that all "warranties, restrictions, promises, or other undertakings..." not specifically included in writing in the TSA would be valid or binding on the City unless put in writing by the City (City Exhibit #1, p. 3, citing 2018 TSA, Section 2). The City also noted Section 24 of the 2018 TSA which stated that the TSA had been negotiated "at arm's length" between the parties who were "sophisticated and knowledgeable in the matter dealt with..." in the TSA, and had been represented by competent counsel or "knowingly declined to seek such counsel despite being encouraged and given the opportunity to do so." (Ibid). The City's Brief also pointed out that Section 24 of the 2018 TSA expressly waived for both parties the implementation of California Civil Code §1654 that requires the interpretation of any ambiguities in an agreement against the party that drafted the agreement. The City's Brief contended that these sections in the 2018 TSA and the language found in the TSA in which Appellant stated that he had read and understood all terms and conditions of the agreement would negate the enforceability of any "promise" made orally by any representative of the FPD Tow Unit regarding "automatic" inclusion in an extension of an existing TSA or the inclusion of a tow operator in a subsequent or "renewed" TSA (Id., pp. 3-4).

As to the length of the 2018 TSA, the City contended that the language of the TSA under Section 27(A) clearly stated that the TSA was a "three-year" agreement with that could be extended by two one-year extensions only by "mutual consent of both parties" (Id., p. 4). The City's Brief also noted that the Hearing Officer determined that the 2018 TSA "had expired" and included that determination in the May 24, 2023 "Decision and Order" (Ibid). The City's Brief also noted that FMC §9-1706(e), amended in 2014 states that tow operators on the rotational tow list do not "...accrue any vested rights as a result of being a party to a Non-Exclusive Franchise Tow Agreement, nor will any Tow Truck company be guaranteed placement on subsequent Non-Exclusive Franchise Tow Agreements for the Fresno Police Department." (Id., p. 5).

The City's Brief then contended that Appellant's Brief "demands" were tantamount to a request for a "rewriting" or "reformation of the terms and conditions of an executed, integrated agreement" (Id., p. 6), and that these "demands" were in fact a request for contract reformation; an equitable remedy. The City contended that should Appellant wish for contract

reformation, they had chosen the wrong forum and should seek that remedy in a court of equity (Id., pp. 6-7). The City also argued that pursuant to FMC §§1-403 and 1-409, the Hearing Officer's review authority was limited to "...questions of law and admissibility of evidence." (Ibid).

3. Appellant's Reply/Supplemental Brief- Subsequent to the February 27, 2023 appeal hearing (the first hearing relating to the issue of Appellant's reinstatement on the TSA), Appellant submitted an additional brief entitled, "*Bauers' Reply/Supplemental Brief to City's Brief and in Support of its Request for Immediate Reinstatement on Current, Extended 2018 TSA and One Subsequent TSA, and Attorneys' Fees and Costs and Make-Up Tows or the Monetary Value Thereof Following the FPD's Failure to Adhere to the Decision Awarding Reinstatement Due to an Ill-Alleged Expiration of the TSA and Ill-Alleged Assertion That the FPD did not have to Place Bauers on Rotation After the TSA was Extended on April 17, 2021*" ("Appellant's Supplemental Brief") submitted on March 1, 2023 ("Appellant Reply"). This document was marked as "Appellant Exhibit #2" and entered into evidence.

In summary, Appellant's Reply argued that the City's contention that the Hearing Officer had determined in his May 24, 2022 "Decision and Order" that the 2018 TSA had expired was mere dicta, and that the issue of whether the TSA had expired had yet to be determined by the Hearing Officer (Appellant Exhibit #2, p. 1). Appellant also argues that the language found in Section 27(A) of the TSA, specifically the use of the terms "parties" in one sentence, "contractor" in another sentence, and "contractors" in another renders this section ambiguous, which subjects the determination of its true meaning (as it applies to the determination of whether the TSA is a three-year or five-year agreement) to the use of extrinsic evidence (Id., pp. 3-4).

Appellant also contends in the Reply that the language found in Paragraphs 30-34 dealing with the types of "breaches" or "violations" subject to termination of a tow operation from the TSA supports his belief that removal of a tow operator in "good standing" from the rotational tow list would occur solely through "attrition" (Id., p. 5). And that language, the "promises" made to the tow operators and confirmed by Tow Unit representatives to City Councilmembers in various council meetings (Appellant Exhibit #3B-D), and the "course of performance" between the tow operators and Tow Unit support Appellant's contention that no tow operators in "good standing" had ever been removed or not allowed to participate in a subsequent TSA (Ibid).

Appellant's Reply also disputes the City's arguments that the City acted "in good faith" by not attempting to resolve this particular dispute informally as required to under Section 28A of the TSA, and by arguing that Appellant testified that he read, understood, and agreed to the terms and conditions of the 2018 TSA, when all he testified to was that he read and agreed to the terms and conditions of the TSA (Id., p. 7). Appellant also disputed the City's statement that Appellant testified he had hired legal counsel before or at the time of the signing of the 2018 TSA (Ibid).

Appellant's Reply also disputes the City's characterizing Appellant's request for reinstatement to the TSA as a contract reformation, and contends that the appeal on this issue is merely an interpretation of the language of the TSA, a necessary review of extrinsic evidence to cure some ambiguities found in the TSA, and an analysis of "past performance" and promises provided by the FPD Tow Unit under the doctrine of "promissory estoppel" (Id., pp. 8-9).

Appellant's Reply argues that the language in FMC §9-1706(e) giving tow operators in "good standing" currently on the rotational tow list "priority reinstatement status on subsequent Non-Exclusive Franchise Tow Agreements" supports Appellant's contention that those tow operators in "good standing" would be removed from the rotational tow list only by "attrition", and would be automatically included on a subsequent TSA (Id., p. 10). Appellant also again provides evidence from the testimony of Kim Manriquez and those "excerpts" from the various City Council meetings (Appellant Exhibit #3A-D) to support the "promise" from the FPD that no tow operator on the rotational tow list in "good standing" would be removed from the list other than by "attrition" (Id., pp. 10-12).

Appellant's Reply also noted that although the Hearing Officer's January 10, 2023 "Decision and Order" denied Appellant's request for "make-up" tows, or in the alternative, the "monetary value" of "make-up" tows, they could be awarded as damages under the doctrine of "promissory estoppel" (Id., pp. 12-13).

IV. ISSUES ON APPEAL

The sole issue to be determined under the final "phase" of the appeal is whether Appellant "Bauer's Auto Wrecking and Towing" should be immediately reinstated to the FPD Tow Unit's rotational tow list under the current Non-Exclusive Franchise Tow Services Agreement ("TSA").

While there was a great deal of both testimonial and documentary evidence relating to numerous issues of law from both parties in support of and opposition to the reinstatement of Appellant to the current TSA, the Hearing Officer believes that the positions of the parties can be narrowed down to two basic arguments.

A. City Argument: In summary, the City argues that all terms and conditions of the TSA, including all rights, responsibilities, warranties, promises, and methods to mediate, arbitrate, or determine disputes, cure ambiguities, or interpret the meaning of those terms and conditions of the TSA are to be found solely within the language of the TSA itself. Further, the City argues that when Appellant and all participating tow operators signed the 2018 TSA (the TSA on appeal here), they, by the terms of the TSA acknowledged that they read, understood, and agreed to abide by all the terms and conditions of the TSA they had just signed onto. The City noted numerous sections in the 2018 TSA that included language that, upon signing of the 2018 TSA by the parties, limited the terms and conditions of the TSA, including "restrictions, promises, warranties, or undertakings" to those that were in the body of the TSA itself (2018 TSA, Section 2). The Section went on to say that "No exceptions,

alternatives, substitutes or revisions [of the TSA] are valid or binding on the City unless authorized by City in writing (Ibid). One of the few exceptions to the City's "exclusivity" argument was their citing of FMC §9-1706(e) in response to Appellant's argument that there had been numerous promises by the Tow Unit to not only the tow operators but also confirmation to various City Councilmembers over a number of years that tow operators already on the Rotational Tow List would only be removed (and therefore "automatically" added to the tow list of a new TSA) by "attrition". The City noted that FMC §9-1706(e) stated that a tow operator would not "accrue any vested rights as a result of being a party to a Non-Exclusive Franchise Tow Agreement, nor will any Tow Truck company be guaranteed placement on subsequent Non-Exclusive Franchise Tow Agreements". Section 3 of the TSA states that "no oral understanding or agreement not incorporated [into the TSA] shall be binding on either of the parties...".

As to the Appellant's argument that some of the language in a few of the sections of the TSA (primarily Section 7 regarding termination of the TSA, and Section 27(A) regarding the term of the TSA) were ambiguous and required extrinsic evidence to clarify and therefore determine the true intent of the parties, the City noted the language of Section 24 which stated that "...any rule or law (including California Civil Code section 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the party that has drafted it is not applicable and is waived." In keeping with this argument, the City cited California Civil Code §1636 which limits the ascertaining of the parties' intent in an agreement to the "writing alone, if possible". The City supports this particular point by noting that Appellant Ed Mason testified that he had read all sections of the 2018 TSA, understood all sections (2018 TSA, Section 20), was represented by legal counsel when he signed the 2018 TSA (Id., Section 24) (these two points in the testimony are disputed by Appellant), and agreed to all the terms and conditions of the 2018 TSA. It is important to note that while Appellant disputes that he testified that he understood all terms and conditions of the 2018 TSA, and that he had retained legal counsel to represent or consult with him regarding the signing of the TSA, he did not dispute that he signed the 2018 TSA and agreed to all the terms and conditions, which would include all the Sections of the TSA cited by the City limiting the terms and conditions of the TSA their amendment and their method of interpretation to the language contained in the TSA itself.

As to Appellant's contention that the 2018 TSA was a "Contract of Adhesion" (Appellant Exhibit #1, pp. 12-13, 14, 16), the City did not provide a detailed defense other than to assert a general denial that the 2018 TSA met the definition of a "Contract of Adhesion".

B. Appellant's Argument- "Promissory Estoppel": As mentioned above, Appellant's chief argument is that despite the language contained in the 2018 TSA limiting all terms and conditions and interpretation of those terms and conditions (with a few exceptions in the FMC) to the language found in the TSA itself, the promises made by Tow Unit representatives both to the tow operators over a lengthy period of time, and confirmed by Tow Unit representatives to various Councilmembers in council meetings relating to TSA extensions, "renewals", or amendments to the FMC regarding the amount of tow operators on

the rotational tow list, limiting removal of tow operators in “good standing” from the tow list solely to “attrition” should be honored, and to ignore them would be an “injustice”. This argument can be chiefly analyzed through the doctrine of “promissory estoppel”.

A finding of liability under the doctrine of promissory estoppel requires that there be:

1) A promise, which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and; 2) which does induce such action or forbearance; and 3) is binding if injustice can be avoided only by enforcement of the promise. (Walker v. KFC Corp., 515 F. Supp. 612 (S.D. Cal. 1981); citing, Restatement 2d Contracts section 90, Tent. Draft Nos. 1-7, (1973); Aronowicz v. Nellys Inc., 30 Cal. App. 3d 27, (1972).

The elements of a promissory estoppel claim are “(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.” (US Ecology, Inc. v. State of California (2005) 129 Cal.App.4th 887, 901; Joffe v. City of Huntington Park (2011) 201 Cal.App.4th 492, 513; see also Aceves v. U.S. Bank N.A. (2011) 192 Cal.App.4th 218, 225.)

1. Promise Clear and Unambiguous in its terms: In Appellant’s case, the promise at issue is the promise of removal of tow operators from the Rotational Tow List solely by “attrition”. Although the term, “attrition” was never specifically defined in the 2018 TSA (in fact, the term “attrition” is not used in the TSA; only in the FMC), the examples most commonly used by both counsel during the hearings were death of the tow operator, retirement of the tow operator, sale of the tow operator to a party not included in the definition of “immediate family” as found in FMC §3-101(e) and approved in writing by the Chief of Police (2018 TSA, Sect. 15), or termination from the TSA for breach of any term or condition in the TSA which termination was provided as a penalty for such breach.

As detailed above, Appellant provided a great deal of documentary as well as testimonial evidence regarding this promise. Testimony from Appellant/Owner of Bauer’s Ed Mason established that there had been a long standing promise from the various Supervisors of the FPD Tow Unit as far back as 2004, and especially in 2014 when FMC §9-1706(e) was amended to reduce the number of tow operators on the Rotational Tow List from 30 to 20 that reduction of the Tow List to the desired number would be accomplished solely by “attrition”. Appellant submitted video and audio evidence in support of this argument. Video of City Council meetings in 2014 and 2018 in which some Councilmembers asked the representative of the Tow Unit questions regarding the TSA which at the time was the subject of an agenda item confirmed to those Councilmembers that reduction of the Rotational Tow List would be accomplished only by “attrition”. Appellant also provided audio of testimony from FPD Records Supervisor and member of the Tow Unit Kim Manriquez during the December 13, 2022 appeal hearing confirming that it had been the policy of the Tow Unit to reduce the number of tow operators on the Rotational Tow List solely by “attrition” in the past (Appellant Exhibit 3A-D). Appellant also provided copies of letters from the FPD during the time Police

Chief Ed Winchester (no date provided on letter), and another letter dated June 21, 2005 confirming in writing that reduction in the Rotational Tow List would be accomplished solely by "attrition" (Appellant Exhibit #1, "Declaration of Edward Mason", Attachment "A"), and portions of the "Executive Summary" of Staff Reports or "Executive Details" for Council Meetings held on April 4, 2018 (Id., Attachment "C"), and September 17, 2014 (Id., Attachment "D") in which the FPD Tow Unit confirmed to the City Council that reduction in the Rotational Tow List would be accomplished solely by "attrition".

2. Reliance on the Promise by Appellant: Though no specific financial figures were provided by Appellant, Bauer's Owner Ed Mason testified that even when he was notified that his tow business was suspended, and then terminated from the 2018 TSA, and even during the long period of time during the on-going appeal (almost two years), he has continued to maintain the same amount of towing equipment, insurance (as required by the FPD Tow Unit pursuant to the TSA), tow business personnel (despite the loss of the majority of his towing income), and all other aspects of the towing operation of his business. Appellant testified that although he had towing agreements not only with the FPD, but also with the California Highway Patrol ("CHP") and the Fresno County Sheriff's Department ("Fresno S.O."), the greatest portion of his towing income came from his agreement with the FPD. In the appeal hearing, Mr. Mason testified that prior to being terminated from the TSA his company averaged 55-60 tows per month for the FPD, approximately 5-6 tows per month from the CHP, and approximately 1 tow per month for the Fresno S.O. Appellant also argued that he was never informed by the Tow Unit during the time his termination was under appeal he would not be reinstated to the TSA should he prevail on his appeal. Appellant pointed out that the first time he was informed that he would not be reinstated on the TSA was orally at the March 29, 2022 appeal hearing regarding the appeal of the "Notice of Termination" issued to Appellant, almost 14 months after the "Notice of Termination" was issued. Appellant argues that the Tow Unit's failure to inform him that he would not be reinstated also evidences his belief that he would be reinstated if he prevailed, and in reliance maintained the "status quo".

3. "Reasonable" and "Foreseeable" Reliance of Promise by Appellant: In providing guidance as to how this element is interpreted, the California courts have held:

The element of reasonable and foreseeable reliance is satisfied if the promisor, in making the promise, deliberately intended to induce the plaintiff's reliance on such promise. (West v. Hunt Foods, Inc. (1951) 101 Cal.App.2d 597, 605).

As to this element, Appellant argued that in many instances over a long period of time, the FPD Tow Unit when beginning (or "renewing") a new TSA, would provide a "draft" of the particular TSA to the tow operators prior to a scheduled meeting for their review, and then conduct the scheduled meeting to allow the tow operators to ask questions and make comments on the draft TSA. Then, prior to being provided the final, approved draft of the TSA, the tow operators were required to sign a "signature page", thus allowing the Tow Unit representative to inform the City Council when the approval of the new TSA was on the Council agenda, to inform the Council that the FPD Tow Unit already had the approval of the

tow operators participating in the TSA, and allowing the City Council to believe that those tow operators had given their “tacit” approval to the final draft. Appellant Ed Mason testified that this process was in place for a great number of years. In fact, Mr. Mason testified that he frequently was given only the “signature” page, while being informed that the final draft was not yet completed. Mr. Mason testified that for the most part, he was given the final completed TSA only when it had been approved by the City Council, and fully executed (signed) by the City Attorney’s Office, Chief of Police, and City Clerk. This testimonial evidence along with the evidence regarding the “promise” made by various representatives of the FPD Tow Unit to both the tow operators over a period of years, and to those City Councilmembers who asked the Tow Unit representatives during the staff presentations relating to extensions or “renewals” of TSA’s or amendments of the FMC relating to TSA Rotational Tow Lists certainly can be characterized as evidence that the Tow Unit by their promises over an extended period of time that reduction of the Rotational Tow List would be reduced solely by “attrition” an “inducement” for early signing of the extended or “renewed” TSA’s over the years, so the Tow Unit could go to the City Council for approval of a “renewal” of a TSA or FMC amendment relating to a TSA and inform the Council that the participating tow operators were already in agreement. It can be easily argued with the evidence submitted that the Tow Operator’s reliance on such a “promise” was “reasonable”, and because the evidence establishes that the Tow Unit provided this “promise” not only to the tow operators over an extended period of time, but also confirmed it to the City Council, the Tow Unit should have foreseen the tow operators’, and specifically Appellant’s reliance on that “promise”.

4. Appellant Injured by Reliance on the Promise: “The party asserting the estoppel must be injured by his reliance on the promise.” (Aceves v. U.S. Bank N.A. (2011) 192 Cal.App.4th 218, 225.) In Appellant’s case, as testified to, he has maintained the same level of towing equipment, towing personnel, liability insurance as required by the Tow Unit TSA, and all other expenses required to operate under the FPD Tow Unit’s TSA. As testified to, Appellant’s towing business has not performed a single tow for the FPD since being terminated by the “Notice of Termination” on February 3, 2021, over two years ago, despite the “Notice of Termination” being dismissed by the Hearing Officer through the “Decision and Order” issued on May 24, 2022. Although no evidence has been provided by Appellant as to “lost profits” recoverable under the doctrine of “promissory estoppel” as held by Walker v. KFC Corp., supra, and cited by Appellant in his closing statement, Appellant did provide an extremely detailed breakdown of “lost” or “make-up” tows in a prior brief submitted for the “second phase” of the appeal. For this element, calculation of the “injury” could arguably be determined by looking at the number of tows theoretically “lost” from the time of the issue of the May 24, 2022 “Decision and Order” dismissing the “Notice of Termination” to the present.

C. City/FPD Defense: The City has consistently argued that regardless of the statements from the Tow Unit Supervisors over the extended period of time regarding the removal of tow operators from the Rotational Tow List being accomplished solely by “attrition”, all terms and conditions of the TSA, including all rights, responsibilities, warranties, promises, and methods to mediate, arbitrate, or determine disputes, cure ambiguities, or interpret the meaning of

those terms and conditions of the TSA are to be found solely within the language of the TSA itself. Further, the City has argued that when Appellant and all participating tow operators signed the 2018 TSA (the TSA on appeal here), they, by the terms of the TSA acknowledged that they read, understood, and agreed to abide by all the terms and conditions of the TSA they had just signed onto. The City noted numerous sections in the 2018 TSA that included language that, upon signing of the 2018 TSA by the parties, limited the terms and conditions of the TSA, including “restrictions, promises, warranties, or undertakings” to those that were in the body of the TSA itself (2018 TSA, Section 2). The Section went on to say that “No exceptions, alternatives, substitutes or revisions [of the TSA] are valid or binding on the City unless authorized by City in writing (*Ibid*). The City noted that Section 3 of the TSA states that “no oral understanding or agreement not incorporated [into the TSA] shall be binding on either of the parties...”. The City also pointed out that FMC §9-1706(e) states that a tow operator would not “accrue any vested rights as a result of being a party to a Non-Exclusive Franchise Tow Agreement, nor will any Tow Truck company be guaranteed placement on subsequent Non-Exclusive Franchise Tow Agreements”. To bolster their argument, the City cited California Civil Code §1636 which limits the ascertaining of the parties’ intent in an agreement to the “writing alone, if possible”. The City contended that while Appellant disputed that he testified he understood all terms and conditions of the 2018 TSA, and that he had retained legal counsel to represent or consult with him regarding the signing of the TSA, he did not dispute that he signed the 2018 TSA and agreed to all the terms and conditions, which would include all the Sections of the TSA cited by the City limiting the terms and conditions of the TSA their amendment and their method of interpretation to the language contained in the TSA itself.

So in essence, the City argues that while the “promise” made by the Tow Unit that no tow operator would be removed from the Rotational Tow List other than for reasons included under the definition of “attrition” was orally made, unless such language was included in the body of the TSA, it was not enforceable. Further, the City argues that Appellant, and every tow operator by signing the TSA acknowledged that they understood this term and condition, agreed to abide by this term and condition, and acknowledged that no language guaranteeing placement on a subsequent TSA was included in any TSA. Further the City provided testimony from Records Supervisor Kim Manriquez that she was aware of two tow operators in “good standing” at the time of the transition from the 2014 TSA to the 2018 TSA who were not made part of the 2018 TSA; “Mel’s Towing”, and “Sierra Towing”. Appellant’s counsel Brad Boulden, who represented both tow companies disputed the testimony, arguing that both tow companies had histories of numerous instances of violations of the 2014 TSA and were suspended and fined for those violations, but could not establish that *at the time of the transition of the 2014 to 2018 TSA* the two tow companies were not in “good standing” with the FPD Tow Unit, when they were not “invited” to participate in the 2018 TSA.

The City/FPD’s defense to Appellant’s assertion that they should prevail based on the doctrine of “promissory estoppel” would then seem to be that because of the language in the 2018 TSA and to some extent language in the pertinent sections of the FMC that all terms and conditions of the TSA, including all rights, responsibilities, warranties, promises, and

methods to mediate, arbitrate, or determine disputes, cure ambiguities, or interpret the meaning of those terms and conditions of the TSA are to be found solely within the language of the TSA itself, the oral promises relied upon by Appellant as their basis for reinstatement on the current TSA could not have been relied upon by Appellant, and so that "reliance" by the Appellant was neither "reasonable" nor "foreseeable" and therefore not actionable under the doctrine of "promissory estoppel".

D. Analysis: It is the Hearing Officer's opinion that both parties' arguments regarding this issue have merit. While it is true that the TSA and most Non-Exclusive Franchise Agreements in general are weighted greatly in favor of the drafter (in this case, and in all cases of governmental franchise agreements the drafter is the governmental agency), the majority of case law decisions have upheld even those sections that most people would consider onerous and perhaps even egregious, such agreements continue to be entered into and upheld in courts of law. In Appellant's case, he testified that through most of the 35 years he has been performing towing services for the FPD under various TSA's, for the most part, he and the other participating tow operators have had little or no "influence" in what is contained in the TSA. Owner of "Bauer's Wrecking and Towing", Ed Mason testified that there are always scheduled meetings between the tow operators and the FPD Tow Unit when a TSA is ending a new TSA is set to begin, or when an existing TSA is to be amended, or extended, and comments and questions are always solicited from the tow operators, but rarely if ever are the comments, objections, suggestions, or requests regarding the terms and conditions of a TSA ever taken into consideration or incorporated into a TSA. Mr. Mason testified numerous times that a TSA is basically a "take-it-or-leave-it" proposition. Mr. Mason testified that other than the addition of a provision regarding the sale or transfer of a tow company on the rotational tow list to an "immediate family member" as defined in the FMC being allowed to stay on the rotational tow list after transfer of ownership, no significant request for amendment or addition to the TSA from the tow operators has ever been incorporated into any TSA. And yet, even though Mr. Mason who was and clearly is at a disadvantage when it comes to knowledge and experience in the "art" of the drafting of franchise agreements, and who testified that the City and the Hearing Officer mistakenly stated in prior hearings that he was represented and was advised by legal counsel when reviewing and agreeing to sign the 2018 TSA, did nonetheless sign the 2018 and all prior TSA's extensions of prior TSA's and amendments of TSA's; most if not all containing language clearly stating that by his signature he acknowledged that he had *read, understood, and agreed to abide by all the terms and conditions of the TSA to which he affixed his signature*. And by doing so, he acknowledged that he was aware and agreed (at least as to the 2018 TSA) that no oral promises, warranties, or other amendments to the terms and conditions of the TSA would have any legal effect unless either agreed to by both parties in writing (termination or extension), or amendment of the TSA (agreement by the City in writing). So while there is overwhelming evidence that representatives from the FPD provided oral "assurances" that reduction and/or removal of tow operators from the rotational tow list could be accomplished solely by "attrition" whether the term "attrition" included or did not include all the "scenarios" listed in the evidence submitted by the parties, but inconsistently applied to the term itself, Appellant and all the tow operators, by virtue of their

signatures on the 2018 TSA knew or should have known that any *oral* “assurances” made to them regarding reduction or removal from the Rotational Tow List were not binding on the City or FPD by virtue of the language contained in the 2018 (and previous) TSA.

The Hearing Officer also agrees with Appellant’s argument in general that many of the sections of the 2018 TSA (which are similar if not identical in language and impact to sections found in the 2011 and 2014 TSA’s) which are complex, are arguably subject to more than one meaning, and cannot be easily interpreted or understood by a person not educated or experienced in drafting or analyzing franchise agreements. However, *by his signature*, Appellant waived his right to request or demand “interpretation of any ambiguities in this Agreement” to be held against the drafter of the TSA; namely the City (2018 TSA, Section 24). So for this issue, the Hearing Officer believes that the admission of “extrinsic” evidence to assist in explaining any “ambiguity” violates the language of Section 24 of the TSA.

While the Hearing Officer believes that the language of the 2018 TSA precludes Appellant from successfully arguing his case as to the oral “assurances” given directly to the tow operators, *the Hearing Officer believes that the same language in the 2018 TSA does not apply to those same oral “assurances” given to the City Council during the Council meetings relating to agenda items regarding TSA’s and the written comments regarding methods of removal of tow operators from the Rotational Tow List contained in the “Executive Summary” portions of the “Legislative Detail” Reports.* It is the Hearing Officer’s belief that a strong argument can be made by Appellant that the language contained in the 2018 TSA limiting any promises, warranties, amendments, etc. solely to those within the body of the TSA or agreed to by the City in writing applies strictly to the FPD Tow Unit and the Tow Operators. It is important to note that those same promises or “assurances” given to the tow operators regarding removal from the Rotational Tow List solely by “attrition” were not only given orally to the City Council during Council meetings regarding TSA extensions, “renewals” or FMC amendments regarding the number of tow operators on the Rotational Tow List, but also were provided *in writing* within the “Executive Summary” sections of “Legislative Detail” Reports for Council meetings held in 2014, and 2018 (Appellant Exhibit 3C-D; Appellant Exhibit #1, “Declaration of Edward Mason”, Attachment “C”, and Attachment “D”). Arguably, the letters from the FPD during the time Police Chief Ed Winchester (no date provided on letter), and another letter dated June 21, 2005 confirming *in writing* that reduction in the Rotational Tow List would be accomplished solely by “attrition” (Appellant Exhibit #1, “Declaration of Edward Mason”, Attachment “A”) satisfy the requirement of Section 2 of the 2018 TSA (“No exceptions, alternatives, substitutes or revisions are valid or binding on City *unless authorized by City in writing*”).

In summary, the arguments of both parties have their merits and their weaknesses. While it is clear that the FPD Tow Unit made oral promises to the tow operators regarding the method of removal from the Rotational Tow List that contradicts the language directly relating to that issue in the TSA, it is equally clear that all tow operators who signed the TSA were informed that by signing the TSA they read, understood, and agreed to abide by the terms and conditions of the TSA, which plainly stated that the only enforceable promises, warranties,

amendments, etc., were to be found exclusively in the written language of the TSA itself. However, the FPD “stretched the bounds of reason” and consistently, over a long period time assured the tow operators that they would be removed from the Rotational Tow List only by “attrition”, and confirmed these assurances to the City Council both orally and in writing seemingly to assuage any of the Council’s concerns regarding whether the tow operators in good standing on the Rotational Tow List would be unfairly removed, and to convince the Council that the tow operators were in agreement with the TSA then in front of the Council for approval (whether it be for extension, “renewal” or amendment), in the hope that the Council would be by this fact, persuaded to approve it.

And while frankly, the Hearing Officer has little authority to influence the content of the TSA, or the process of “negotiation” between the FPD and the tow operators, perhaps if the tow operators are unhappy with the TSA negotiation process, they should approach the City Council as a group and formally request that the Council review that process. It is possible that the City Council could provide a “new perspective”, which could result in less of what appears to the Hearing Officer to currently be somewhat of an adversarial relationship, and create a more cooperative one.

E. Other Issues:

“Contract of Adhesion”- Appellant asserts that the 2018 (and previous) TSA are “contracts of adhesion”, alleging that Appellant and other tow operators frequently were provided only the signature page of a new, extended or amended TSA, prepared by the City Attorney’s Office, and required to sign prior to approval of the new, extended, or amended TSA by the City Council and before reviewing the final draft (Appellant Exhibit #1, pp. 12-13, 14, 16).

In California, the State Supreme Court has defined a contract of adhesion as: *(1) a standardized contract (2) imposed and drafted by the party of superior bargaining strength (3) that provides the subscribing party only the opportunity to adhere to the contract or reject it.* (Szetela v. Discover Bank (2002), 97 Cal.App.4th, 1094, 1097, citing Armendariz v. Foundation Health Psychcare Services, Inc. (2000), 99 Cal.Rptr.2d., 745)

Black’s Law Dictionary defines the adhesion contract, or contract of adhesion, as a *“[s]tandardized contract form offered to consumers of goods and services on essentially ‘take it or leave it’ basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms.”* (Blacks Law Dictionary (West 5th Ed. 1979), p. 38).

The Tow Unit’s TSA’s do certainly meet some of the criteria found in contracts of adhesion. However, it is important to remember that contracts of adhesion are not prima facie unenforceable, although some terms and conditions can be found to be so. To be found unenforceable the appellant must show that the contract (or section of the contract being challenged) is “unconscionable” and must satisfy certain criteria including:

- Contract language or phrasing that non-lawyers may not understand
- Imbalance in the obligations imposed on the signee
- The exploitation of those who are uneducated, illiterate, or underprivileged
- Extreme inequality in bargaining or economic power
- Contract provisions inconsistent with a signee's reasonable expectations
- The potential for unfair surprise
- Lack of good faith
- Lack of notice

While it could be argued that some of the criteria is met in the Tow Unit's TSA's (e.g. contract language that non-lawyers may not understand), some of the other criteria is not satisfied (e.g. exploitation of the uneducated, illiterate, or underprivileged; lack of notice). It is the Hearing Officer's opinion that while the terms and conditions of the TSA are for the most part "dictated" by the FPD, and in essence the TSA is a "take-it-or-leave-it" agreement for the tow operators, it cannot be said that the tow operators have absolutely no input into the terms and conditions of the TSA, and there are provisions for appeal and notice of changes, termination of the TSA, as well as extension, and amendment of the TSA. The Hearing Officer does not believe that the TSA as currently drafted can be characterized as a "contract of adhesion".

F. Damages:

1. Section 34- Damages- While Appellant's argument based on oral promises to either the tow operators, or the City Council whether analyzed under the doctrine of "promissory estoppel" or not is complex and subject to strong attack by the City's arguments, it seems to the Hearing Officer that a much simpler basis upon which Appellant may be reinstated to the current TSA is through Section 34 of the 2018 TSA. As discussed in some detail in the January 10, 2023 "Decision and Order", Section 34 of Attachment "A" "Scope of Work", of the 2018 TSA entitled "Hearing/Appeal", states in pertinent part:

*Notwithstanding any provision within Chapter 1, Article 4 of the FMC, any person who appeals a suspension in excess of thirty (30) days, or a termination of the TSA shall not be entitled to placement on the Tow Rotation List or to participate in tows until such time as any appeal hearing has been concluded and the Administrative Hearing Officer finds that no grounds for a suspension in excess of thirty (30) days, or a termination of the TSA has been established. **Tow Operator's remedy shall be limited to reinstatement on the tow rotation list in such case and no other compensation or consideration will be allowed.*** [emphasis added]

While as of the issuance of this "Decision and Order" (and as has been in dispute and argued in great detail by both parties orally and in writing), the 2018 TSA has expired. Notwithstanding whether the 2018 TSA expired prior to or after the "Notice of Termination" was dismissed by the Hearing Officer, or whether Appellant failed to request an extension of the 2018 TSA as the City argues was required under the terms and conditions of the 2018

TSA, the plain language of the TSA regarding reinstatement to the "Tow Rotation List" under Section 34 does not specifically state whether such reinstatement must be to the "Tow Rotation List" then in effect under the TSA then in effect, or the "Tow Rotation List" in effect when such damage award was made by the Hearing Officer pursuant to Section 34. There is no definition of the "Rotational Tow List" in the TSA at least as to which "Tow Rotational List" a tow operator is to be "reinstated" to when the sole awarded allowed under the TSA is actually awarded. Using the "Plain Meaning Rule" for contract law in California (derived primarily from California Civil Code §1644) the Hearing Officer believes that the term "Tow Rotation List" as employed in Section 34 refers to the "Tow Rotational List" currently in effect at the time the damage award of "reinstatement to the TSA" under Section 34 is awarded. To reinstate a tow operator to a "Tow Rotational List" that is no longer in effect is in fact no reinstatement. It is a pointless gesture, and in essence no damage award at all.

Therefore, it is the Hearing Officer's decision to reinstate Appellant to the current TSA and the current "Rotational Tow List" pursuant to Section 34 of the 2018 TSA as the sole award of damages available for prevailing on his Appeal regarding the "Notice of Termination" issued by the Fresno Police Department Tow Unit, dated February 3, 2021. Such reinstatement will also include the TSA currently being finalized and prepared for approval by the City Council.

2. "Make-Up Tows"- As to Appellant's request for damages in the form of "make-up" tows or in the alternative the "monetary value" of "make-up tows" (Appellant Exhibit #1, pp. 20-21; Appellant Exhibit #2, pp. 12-13), that request is denied for the same reasons provided in Section IV, 2 (A)-(D) of the January 10, 2023 "Decision and Order". Appellant's reinstatement to the current TSA is based on Section 34 of the 2018 TSA, and not on the doctrine of "promissory estoppel".

3. Attorney's Fees- Pursuant to the 2018 TSA, the prevailing party in a legal action to enforce a term, covenant or condition in the TSA would be eligible to recover attorney's fees from the other party:

If either party is required to commence any proceeding or legal action to enforce any term, covenant or conditions of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable Attorney's fees and legal expenses. (2018 TSA, Section 23 "Attorney Fees", p. 5)

Because Appellant has prevailed as to the issue of reinstatement to the current TSA, he is awarded reasonable attorney's fees pursuant to Section 23 for all relevant, compensable activity by his Attorney Brad Boulden regarding the issue of reinstatement to the TSA subject to proof. As to hourly rate, Appellant will be compensated at the rate charged by his Attorney Brad Boulden from the time Appellant was informed by the Fresno Police Department Tow Unit orally at the appeal hearing conducted on December 13, 2022 that he would not be reinstated to the current TSA, to the present.

V. DECISION and ORDER

For the reasons provided above, the Hearing Officer finds as follows:

1. As to the documents (one-from each party) regarding the disciplinary actions relating to “Mel’s Towing” and whether “Mel’s Towing” was in “good standing” under the 2007 TSA at the time of its expiration; with the Appellant’s document tentatively marked as “Appellant Exhibit #4”, and the City’s document tentatively marked as “City Exhibit #D”, both documents are found not to be relevant, and are excluded.
2. For the reasons provided in Section IV, “Issues on Appeal”, Subsection F(1) of this “Decision and Order”, and Section 34 of the “Tow Services Agreement” fully executed by both parties on April 26, 2018, Appellant is to be reinstated to the current “Tow Services Agreement” and related “Rotational Tow List” within 14 calendar days of the date of the issuance of this “Decision and Order”. The Fresno Police Department Tow Unit will utilize the 14-day period to confirm with Appellant that his towing operation, doing business as “Bauer’s Auto Wrecking and Towing” meets all standards and other requirements pursuant to the current Tow Services Agreement and all applicable Fresno Municipal Code, State, and Federal laws, and for both parties to fully execute all necessary documents to carry out this order. Further, Appellant shall be included in the Tow Services Agreement presently being prepared for review, approval by the City Council, and execution by the Fresno Police Department, participating Tow Operators, and the City.
3. For the reasons provided in Section IV, “Issues on Appeal”, Subsection F(3) of this “Decision and Order”, and Section 23 of the “Tow Services Agreement” fully executed by both parties on April 26, 2018, Attorney’s Fees are awarded to Appellant for all relevant, compensable activity by his Attorney Brad Boulden regarding the issue of reinstatement to the TSA, subject to proof. As to hourly rate, Appellant will be compensated at the rate charged by Attorney Brad Boulden from the time Appellant was informed by the Fresno Police Department Tow Unit orally at the appeal hearing conducted on December 13, 2022 to the present. Additionally, said attorney’s fees are due and payable no later than thirty (30) calendar days from the date either Appellant or Attorney Boulden provides written invoices or other proof satisfactory to the City and/or FPD for such fees. Any payment of the attorney’s fees awarded herein paid after the 30 days shall be charged an additional ten percent (10%) interest on the outstanding amount due on the 31st day.
4. Both parties are directed to be diligent and use their best efforts in good faith to execute all tasks necessary to carry out and complete the Hearing Officer’s directives found in paragraphs 2 and 3 above within the time periods provided. Should both parties after good faith efforts fail to carry out and complete said directives with the given time period, the parties are directed to meet and make a good faith attempt to come to a mutually agreeable new or alternative deadline agreement in which to carry out and complete those directives. Should these efforts not result in an agreement, then the parties may jointly request in writing that the Hearing Officer consider argument from both parties and determine a new/extended

deadline for compliance with Hearing Officer's directives found in Paragraphs 2 and 3 above, and the possible awarding of any damages should he find that either party did not act in good faith when attempting to meet the original deadlines imposed by this "Decision and Order" pursuant to the 2018 TSA and/or FMC §1-410(e).

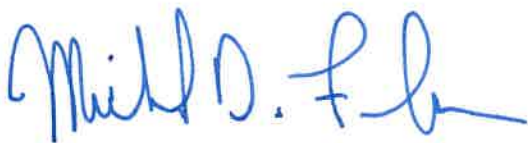
5. Pursuant to the reasons provided in Section IV "Issues on Appeal", Subsection F(2) above, the Hearing Officer denies Appellant's request for "make-up" tows or in the alternative the "monetary value" of the "make-up" tows for the time his company "Bauer's Auto Wrecking and Towing" was suspended and terminated from the "Tow Services Agreement" fully executed by both parties on April 26, 2018 until the present.

6. Pursuant to Fresno Municipal Code §1-410(e), the Hearing Officer expressly reserves jurisdiction on all issues necessary in making decisions or determinations involving any subsequent requests for appeals regarding the final disposition of the orders provided in paragraphs 2 and 3 above. The Hearing Officer also reserves the right to select the process under which any proceeding regarding the determination of a new or extended deadline for carrying out the Hearing Officer's directives as provided in paragraphs 2 and 3 above shall be conducted; including but not limited to limiting the presentations of parties' arguments solely to the submission of briefs and/or declarations, with no oral testimony to be allowed or considered.

NOTICE OF THE RIGHT TO APPEAL THIS DECISION

This is a final administrative decision as to what has herein been decided and ordered. The parties have ninety (90) days from the date of this Decision and Order to file a petition for a writ of administrative mandate of this Decision and Order, pursuant to Code of Civil Procedure section 1094.6. The appealing party may wish to seek the advice of an attorney in this regard.

Dated: March 30, 2023



Michael D. Flores
Independent Administrative Hearing Officer

PROOF OF SERVICE

I, the undersigned declare:

I am a citizen of the United States over the age of eighteen years. I am employed as an independent contractor of the City of Fresno; my business address is 2600 Fresno Street, Fresno, California 93721.

On **March 30, 2023**, I caused to be served the foregoing documents described as **Decision and Order- Reinstatement on Current TSA** on the interested parties to the within action by placing the original/a true copy thereof, enclosed in a sealed envelope, addressed as stated on the attached mailing list, as follows:

- ☐ (BY CERTIFIED) I am "readily familiar" with the City's practice of collection and processing correspondence for certified mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Fresno, California in the ordinary course of business.
- ☒ (BY FIRST CLASS MAIL) I am "readily familiar" with the City's practice of collection and processing of correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully paid at Fresno, California in the ordinary course of business.
- ☐ (BY PERSONAL SERVICE) I delivered such document by hand to the interested parties.
- ☐ (BY POSTING) I posted the foregoing Notice and Order at the property located at:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on or about March 30, 2023, at Fresno, California.



Michael D. Flores

Subject: **CASE/CITATION/- TSA/ Decision and Order- Reinstatement on Current TSA**

Mailed To:
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