

**Memorandum  
Fair Political Practices Commission**

**To:** FPPC Chair Ravel, and Commissioners Garrett, Eskovitz, Montgomery and Rotunda

**From:** Zackery P. Morazzini, General Counsel  
Heather M. Rowan, Commission Counsel

**Subject:** Pending Litigation

**Date:** December 13, 2012

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***ProtectMarriage.Com et al. v. Bowen et al.***

On January 9, 2009 in the United States District Court for the Eastern District of California, plaintiffs ProtectMarriage.com - Yes on 8, a Project of California Renewal and National Organization for Marriage California - Yes on 8, Sponsored by National Organization for Marriage filed this action. It is a “defendants class action” lawsuit against defendants responsible either for enforcement of the Act, or maintenance and publication of the campaign reports at issue in this case (including the Commission, Attorney General, Secretary of State and various district and city attorneys).

Plaintiffs challenge the Act’s campaign disclosure requirements on contributions to ballot measure committees as unconstitutional. They cite a variety of adverse actions against persons who supported Proposition 8, which was on the November 2008 ballot, alleging that some of these persons were identified through campaign contribution information made public as required by the Act’s campaign reporting and disclosure provisions. The Complaint seeks to permanently enjoin the future disclosure of all of plaintiffs’ contributors, expunge the records of all of plaintiffs’ past contributors, and to invalidate as unconstitutional the Act’s \$100 disclosure threshold for contributors to ballot measure committees, the Act’s requirement for post-election disclosure of contributors to ballot measure committees, and the Act’s failure to purge the records of contributors to ballot measure committees after the election. In all counts, plaintiffs seek declaratory and injunctive relief, and an award of attorney’s fees.

On August 25, 2011 Plaintiffs served a Motion for Summary Judgment. Defendants served their Response and a Cross-Motion on September 15, 2011. District Judge Morrison C. England, Jr. heard argument on these cross-motions on October 20, 2011. At the conclusion of the hearing Judge England announced that he was inclined to grant Defendants’ Motion for Summary Judgment, and to deny Plaintiffs’ Motion. On November 4, 2011 the Court served its Memorandum and Order, and entered final Judgment in favor of Defendants.

On December 2, 2011 Plaintiffs appealed the District Court’s Judgment. The briefing before the Ninth Circuit Court of Appeals has been completed; no hearing date has been announced.

***Fair Political Practices Commission v. United States Postal Service***

On January 12, 2012, the Commission staff filed a complaint in the United States District Court for the Eastern District of California against the USPS under the Freedom of Information Act. The matter arises out of the Enforcement Division's attempt to obtain records from the USPS that are pertinent to an investigation regarding an alleged violation of the mass-mailing provisions of the Act.

As part of the investigation, staff issued a subpoena to USPS, requesting the number of pieces of mail sent out under a bulk mail permit held by Mr. Eisen, a candidate subject to a recall election. The USPS refused to comply with the subpoena, and treated it like a FOIA request. Ultimately, the USPS denied staff's request for records, asserting such information is exempt under various FOIA exemptions. Staff pursued the administrative appeal procedures, to no avail.

On October 9, 2012, FPPC staff argued the cross motions for summary judgment before Judge Burrell. One week later, Judge Burrell issued an opinion granting the FPPC's motion for summary judgment and denying the USPS's motion. Two weeks after that date, on October 31st, 2012, proposed intervenor filed an appeal of the district court's opinion as well as a motion for emergency stay pending appeal. FPPC staff opposed that motion on standing grounds. Both the district court and the Ninth Circuit denied the motion to stay. The Ninth Circuit additionally mandated that the proposed intervenor, Mr. Eisen, show cause as to why he has standing to appeal by November 12, 2012. No documents have been filed as of this writing.

FPPC staff filed a motion for attorney fees in the district court. That motion will be heard on February 4, 2013.

***Tony Dane v. Fair Political Practices Commission***

Tony Dane, a respondent in an Enforcement Division case, filed a motion to quash an enforcement division subpoena in a Las Vegas, Nevada court that was issued to Wells Fargo Bank. FPPC then filed a motion to compel production in Sacramento Superior Court and prevailed in both cases. Tony Dane then sued the FPPC in Nevada for malicious prosecution and abuse of process. On June 14, 2012 the Nevada judge dismissed the malicious prosecution claim, but declined to dismiss the abuse of process claim on the basis that Dane had alleged ill will (essentially that the FPPC was out to get him based upon his political beliefs). The judge ruled that under the state's loose "notice pleading" standards this was sufficient to preserve that cause of action. The FPPC filed an answer and will be scheduling a hearing on a dispositive motion in the near future.

***Shong-Ching Tong v. Fair Political Practices Commission***

On February 10, 2012, Shong-Ching Tong ("Tong") filed a petition for writ of administrative mandamus against the Fair Political Practices Commission, seeking relief from the Commission's Decision and Order in Case No. 10/449. A status conference is scheduled for December 19, 2012.