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7
8 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
9 STATE OF CALIFORNIA

10 In the Matter of

11
12 TIM FOLEY,

13 Respondent

) FPPC No.: 10/117

)
) RESPONDENT TIM FOLEY'S MOTION TO
) VACATE DECISION AND TO ALLOW
) RESPONDENT TO FILE A NOTICE OF
) DEFENSE; POINTS AND AUTHORITIES
) IN SUPPORT OF MOTION; and
) DECLARATION OF ALAN GREGORY
) WONDERWHEEL,
)

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16 _____ (Government Code Section 11520(c))

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18 Respondent TIM FOLEY hereby requests that the FAIR POLITICAL PRACTICES
19 COMMISSION (FPPC, "Agency" or "Commission") vacate its decision of January 28, 2011;
20 based on Respondent's default and allow Respondent to file a Notice of Defense requesting an
21 administrative hearing in the matter.
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23 This motion is made on the grounds of mistake, inadvertence, surprise, or excusable
24 neglect by Respondent's attorney, the interests of justice, and the protection of due process, and
25 is supported by the accompanying Memorandum of Points and Authorities, the Declaration of
26 Alan Gregory Wonderwheel and the documents in the file of this matter.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL SUMMARY

On or about June 2, 2010 the FPPC opened an investigation against Respondent alleging violations of the Political Reform Act (the Act) found in Government Code Section 81000 et seq. The FPPC initiated an administrative action and issued a probable cause report and order. On or about August 11, 2010, Roman G. Porter, Executive Director of the FPPC, issued an ex parte finding of probable cause and ordered the issuance of an Accusation against Respondent.

Respondent's attorney did not respond to the Accusation by filing a Notice of Defense within the statutory time limit which resulted in the request by the enforcement division of the FPPC for a Default Decision and Order.

The Request for Default by the enforcement division was placed on the FPCC November 12, 2010 meeting agenda as a consent item. Respondent and Respondent's attorney appeared at the meeting and requested to be heard and were allowed to speak. Respondent and Respondent's attorney requested that the FPPC not make a decision based on Respondent's default of timely filing of a Notice of Defense. Respondent requested the Commission to allow the filing of the Notice of Defense before a default decision was made so that an administrative hearing could go forward and be held on reasonable notice to the parties.

At the meeting on November 12, 2010, Respondent made an offer of proof that were an administrative hearing to be held that Respondent would offer evidence opposing the charges and in mitigation of any penalty. Mr. Foley presented a copy of his personal check involved in the matter showing only the personal name of the candidate with no reference to any election campaign, thus indicating Mr. Foley's lack of knowledge about the purpose of the payment. In addition, Respondent referenced his medical condition as a mitigating factor.

1 The FPPC did not make a decision at the November 12, hearing and instead continued the
2 matter "until the December meeting so that the respondent could submit medical evidence of his
3 illness." (California FPPC, Minutes of Meeting, Public Session, November 12, 2010, page 2.)

4 The December meeting was cancelled and all matters were continued to the January meeting of
5 the Commission.
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7 At the Commission's January 28, 2011, meeting Mr. Foley was unable to attend
8 personally due to his physical medical condition. Mr. Foley had presented a letter from his
9 current treating psychiatrist, Virginia Ellen Hofmann, M.D., indicating that in her professional
10 opinion Mr. Foley's mental illness and medication management in 2006 likely had an effect on
11 his cognitive function.

12 The Commission's discussions of the request not to enter a default were primarily
13 concerned with whether the Respondent has presented sufficient evidence on the merits of the
14 case. Respondent's attorney informed the Commission that Respondent was not asking for the
15 Commission to decide the merits of the case but was asking for an administrative hearing in
16 which the evidence could be presented in a coherent and organized manner with doctor's
17 testimony under examination and cross examination to determine its ultimate value. Instead, the
18 individual Commissioner's stated that they were not convinced by the letter from Mr. Foley's
19 treating psychiatrist that the psychiatrist would have any relevant testimony to present.
20 Respondent's attorney indicated that the purpose of an administrative hearing with due process
21 protections was to establish whether or not the evidence was relevant.

22 The Commission refused to grant Respondent's request file a Notice of Defense and
23 made its decision to enter a default without allowing Respondent to file a Notice of Defense and
24 without granting an administrative hearing.

25 Respondent has been waiting for the Commission's service of the Notice of the Default
26 Decision but to date has not been served any notice.

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1 **II. LAW AND ARGUMENT**

2 Government Code Section 11520 (all further references to statute are to the California
3 Government Code unless stated otherwise) subdivision (c) provides that the agency may vacate a
4 default decision and grant a hearing on good cause, and states in part:
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6 As used in this subdivision, good cause includes, but is not limited to, any of the
7 following:

- 8 (1) Failure of the person to receive notice served pursuant to Section 11505.
9 (2) Mistake, inadvertence, surprise, or excusable neglect. ¹

10 **1. THE FPPC SHOULD SET ASIDE THE DEFAULT DECISION FOR THE
11 GOOD CAUSE THAT IT RESULTED FROM RESPONDENT'S ATTORNEY'S
12 MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLIGENCE.**

13 Government Code Section 11520(c) defines "good cause" to include mistake,
14 inadvertence, surprise, or excusable neglect. This standard uses the same language as Code of
15 Civil Procedure (CCP) Section 473(b) to "relieve a party or his or her legal representative from a
16 judgment, dismissal, order, or other proceeding taken against him or her through his or her
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20 ¹ Government Code Section 11520. (a) If the respondent either fails to file a notice of defense or to appear at the
21 hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and
22 affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the
23 respondent to establish that

24 the respondent is entitled to the agency action sought, the agency may act without taking evidence.
25 (b) Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed
26 decision is issued, has discretion to grant a hearing on reasonable notice to the parties. If the agency and
27 administrative law judge make conflicting orders under this subdivision, the agency's order takes precedence. The
28 administrative law judge may order the respondent, or the respondent's attorney or other authorized representative,
or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the
respondent's failure to appear at the hearing.

(c) Within seven days after service on the respondent of a decision based on the respondent's default, the
respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The
agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this
subdivision, good cause includes, but is not limited to, any of the following:

- (1) Failure of the person to receive notice served pursuant to Section 11505.
(2) Mistake, inadvertence, surprise, or excusable neglect.

1 mistake, inadvertence, surprise, or excusable neglect.”² While Section 11520(c) provides that
2 the agency’s decision to vacate a default is discretionary, the public policy of have a final
3 decision in a controversy based on the merits is of such great importance that in a judicial
4 proceeding the legislature has provided in CCP Sec. 473(b) that setting aside a judgment is
5 mandatory when the judgment results from a default that is caused by the attorney and the
6 motion is accompanied by an attorney’s sworn affidavit attesting to his or her mistake,
7 inadvertence, surprise or neglect.
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10 There is no basis for the omission in Section 11520(c) (of the legislative language of
11 CCP 473(b) requiring that setting aside the default is mandatory when based on the attorney’s
12 failure) to be construed as a prohibition preventing the FPPC from adopting the same standard as
13 its own procedure in similar circumstances. In the interests of justice and due process, the FPPC
14 should apply the same standard for its agency default decisions. When a default is entered by
15 failure to submit the Notice of Defense in a timely manner and prevents the scheduling of the fair
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18 ² Code of Civil Procedure 473(b) The court may, upon any terms as may be just, relieve a party or his or her legal
19 representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her
20 mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of
21 the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be
22 made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding
23 was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or
24 right to possession of real or personal property, without extending the six-month period, when a notice in writing is
25 personally served within the State of California both upon the party against whom the judgment, dismissal, order, or
26 other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her
27 attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and
28 that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure
shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the
notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit
or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this
section, the court shall, whenever an application for relief is made no more than six months after entry of judgment,
is in proper form, and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence,
surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will
result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client,
unless the court finds that the default or dismissal was not in fact caused by the attorney’s mistake, inadvertence,
surprise, or neglect. The court shall, whenever relief is granted based on an attorney’s affidavit of fault, direct the
attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section
shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

1 hearing of the Accusation against the Respondent, if the default resulted from the attorney's
2 failure then the Respondent should be allowed their "day in court" to present their case at a fair
3 administrative hearing. In such circumstances the FPPC's refusal decide the matter based on the
4 merits is an abuse of discretion by the FPPC by denying Respondent a fair hearing due to the
5 conduct of his attorney.
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7 As shown by the attached Declaration of Alan G. Wonderwheel, the default of
8 Respondent to timely file a Notice of Defense was the result of his attorney's mistake,
9 inadvertence, or excusable neglect. For that reason the FPPC should set aside the decision based
10 on the default and allow Respondent the opportunity to present his defense in a formal
11 administrative hearing using the evidentiary procedures of law including allowing testimony
12 under oath and the presentation of other evidence in a coherent manner.
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15 **2. THE COMMISSION INCORRECTLY INTERPRETED THE MEANING OF**
16 **"MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLIGENCE" IN**
17 **SECTION 11520(c).**

18 In deciding whether to order a default, the Commission's deliberations focused only on
19 Respondent's attorney's neglect and whether or not the neglect was "excusable." However, the
20 Commission completely ignored the other indicated reasons of "mistake" and "inadvertence" for
21 allowing respondent to file a late Notice of Defense before a default has been ordered.

22 Section 11520 (c) states good cause includes, *but is not limited to*, "(2) Mistake,
23 inadvertence, surprise, or excusable neglect." Each is a separate and independent basis for a
24 finding supporting vacating the default decision.

25 The word "mistake" means "Some unintentional act, omission, or error arising from
26 ignorance, surprise, imposition, or misplaced confidence. A state of mind not in accord with
27 reality." (*Black's Law Dictionary*, Sixth Edition. West Publishing Co. 1990, p. 1001.) A mistake
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1 is "a wrong action or statement proceeding from faulty judgment, inadequate knowledge, or
2 inattention." (*Merriam-Webster Dictionary*, [http://www.merriam-
4 webster.com/dictionary/mistake?show=1&t=1298315355](http://www.merriam-
3 webster.com/dictionary/mistake?show=1&t=1298315355)) Here Respondent's Attorney
5 committed the mistake of the wrong action of failing to timely file the Notice of Defense
6 proceeding from the faulty judgment of his own abilities to organize his paper work and keep the
7 case on track. The mistaken act of failing to file the Notice of Defense was an unintentional act
8 omission and error arising from Respondent's misplaced confidence in his own memory.

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10 The word "inadvertence" means "Heedlessness; lack of attention; want of care;
11 carelessness; failure of a person to pay careful and prudent attention to the progress of a
12 negotiation or a proceeding in court by which his rights may be affected" (*Black's Law
13 Dictionary*, Sixth Edition. West Publishing Co. 1990, p. 759.) and also means "a result of
14 inattention" (*Merriam-Webster Dictionary*, [http://www.merriam-
16 webster.com/dictionary/inadvertence](http://www.merriam-
15 webster.com/dictionary/inadvertence)) Here, Respondent's attorney has demonstrated without
17 contradiction that the failure to timely file the Notice of Defense was a result of his inadvertence,
18 inattention, carelessness and failure to pay prudent attention to the progress of the within
19 enforcement action. To rectify this inadvertence, Respondent's Attorney requested that the
20 Commission not decide on a default and instead put the enforcement case back on track for an
21 administrative hearing.

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23 In Section 11520(c), the word "excusable" only appears as a modifier of the word
24 "neglect," yet the Commission's comments indicated that they were applying the word
25 "excusable" in all cases to read the statute as requiring "excusable mistake" and "excusable
26 inadvertence." This resulted in the error of the Commission in refusing to allow Respondent to
27 file the timely Notice of Default, and would now be an additional error if the Commission does
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1 not vacate the default decision. Whether or not Respondent's neglect was or was not
2 "excusable," it is uncontradicted that both mistake and inadvertence were present in
3 Respondent's unintentional failure to file the Notice of Defense and are legitimate bases to now
4 vacate the default pursuant to Section 11520(c).
5

6 The Commission's position of ignoring mistake and inadvertence amounts to an
7 unwritten policy that effectively strikes out the words "mistake" and "inadvertence" from
8 Section 11520. By adopting a policy that so narrowly construes the grounds for "good cause"
9 either to not enter a default or to vacate a default, the Commission is subverting the legislative
10 purpose of Section 11520 in a manner analogous to *Gibson v. Unemployment Ins. Appeals Bd.*,
11 (1973) 9 Cal.3d 494, in which the Unemployment Ins. Appeals Board's interpretation of "good
12 cause" for filing a late appeal was so limited as to constitute a policy with the outcome that
13 "Without deciding the merits of the issue, the referee dismissed the appeal on the ground that
14 neither inadvertent clerical error nor press of business could constitute good cause for the late
15 filing of an appeal." (*Id* at p. 497.) The Supreme Court rejected the board's narrow interpretation
16 of "good cause" as an abuse of discretion.
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19 **3. THERE IS NO PREJUDICE TO THE ENFORCEMENT DIVISION OF THE**
20 **COMMISSION IF THE DEFAULT DECISION IS VACATED.**

21 Here there is no prejudice to the Enforcement Division's case against Respondent Foley
22 if the default is prejudiced. The enforcement division has completed its investigation and has
23 been ready to proceed with the enforcement action. Only six months have passed since August
24 2010 when the Commission made a finding of probable cause. Two months of that time were
25 caused by the Commission's continuance of the agenda item between its November 2010
26 meeting and its January 2011 meeting. If the Commission had granted the Respondent's request
27 in November 2010 to not enter a default and allow the filing of the Notice of Defense it is
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1 possible, if not likely, that the administrative hearing would have been conducted already. The
2 Enforcement Division simply and plainly has no possible basis to claim prejudice against their
3 case if the default is vacated and an administrative hearing is scheduled.
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5 **4. THE DEFAULT DECISION SHOULD BE SET ASIDE FOR THE GOOD**
6 **CAUSE THAT IT RESULTED FROM RESPONDENT'S GOOD FAITH**
7 **RELIANCE ON HIS ATTORNEY**

8 As a separate basis from Respondent's Attorney's "mistake, inadvertence, surprise, or
9 excusable neglect", the FPPC may vacate the decision on the good cause of Respondent Foley's
10 mistake, inadvertence, surprise, or excusable neglect. Here, the default of Respondent was due
11 to the failure of his attorney to timely filing the Notice of Defense. Any mistake, inadvertence,
12 surprise, or excusable neglect of Respondent Foley consisted in relying in good faith upon his
13 attorney to act in a timely manner. Respondent was surprised by the default, as his attorney had
14 not informed him of the failure to timely file the notice. It is an abuse of its discretion for the
15 FPPC to refuse to vacate the decision based on default when Respondent Foley has the good
16 cause that his mistake, inadvertence, surprise, or excusable neglect was grounded on his good
17 faith reliance upon his attorney. Respondent Foley has relevant and substantial defenses and
18 evidence of mitigation to the allegations of violation of the Act.
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21 **5. THE DEFAULT DECISION SHOULD BE SET ASIDE BECAUSE THE FPPC**
22 **DECISION WAS AN ABUSE OF ITS DECRETION BY PREJUDGING THE**
23 **OUTCOME OF A FAIR HEARING CONDUCTED WITH A NEUTRAL**
24 **HEARING OFFICER.**

25 A. The Commission Prejudged The Merits Of The Evidence.

26 At both November 12, 2010, and January 28, 2011, meetings of the FPPC, the FPPC
27 allowed Respondent and Respondent's attorney to speak to the question of whether or not the
28 default decision should be entered based on the failure to file the Notice of Defense in a timely
manner. However, the FPPC abused its discretion in deciding the enforcement action, based

1 solely as a matter of default, by considering *and prejudging* the merits of the case without
2 providing Respondent the opportunity to present his case in the formal atmosphere and conduct
3 of an administrative hearing before an administrative law judge as neutral hearing officer where
4 evidence could be presented in a formal manner with the procedural protections and safeguards
5 for its consideration.
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7 On November 12, 2010, prior to hearing from the Respondent's attorney and
8 Respondent, the FPPC asked it's Chief of Enforcement counsel, Gary S. Winuk, to state the case
9 against Respondent. Mr. Winuk proceeded to make an argumentative presentation of the merits
10 of the case against Respondent. Respondent's attorney stated that it was inappropriate to argue
11 the merits of the case at that place and time of a Commission meeting, as it was a default item on
12 the meeting agenda and not a noticed hearing, and that Respondent was requesting that the
13 agency exercise its discretion under Section 11520(b) "*before a proposed decision is issued*
14 (emphasis added)" and to grant an administrative hearing to Respondent so that a real hearing
15 could be conducted.
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18 Instead of making a decision at its November meeting, the Commission continued the
19 consideration of the agenda item "until the December meeting so that the respondent could
20 submit medical evidence of his illness." (California FPPC, Minutes of Meeting, Public Session,
21 November 12, 2010, page 2.). Respondent submitted the evidence of his illness to the next
22 meeting of the Commission on January 28, 2011, in the form of a letter from Respondent Foley's
23 treating psychiatrist, Virginia Ellen Hofmann, M.D., addressed to her patient Mr. Foley, that
24 concluded by stating "My recommendation to the Fair Political Practices Commission is to
25 consider the impact that [Mr. Foley's] mental illness and medication management likely had on
26 [Mr. Foley's] cognitive function." However, instead of taking this as an offer of proof that there
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1 was relevant evidence to be considered at an administrative hearing, the Commission's
2 comments were that the evidence **contained only in the letter itself** was insufficient to
3 determine an alternative outcome on the merits.
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5 By refusing to receive the letter of Respondent Foley's mental illness as an offer of
6 proof and instead taking it as the whole and complete evidence that the doctor could present at a
7 hearing, the Commission abused its discretion in two important ways. First, it considered and
8 judged evidence on the merits of the case at the stage of deciding a default at a Commission
9 meeting, without the procedural safeguards of a fair administrative evidentiary hearing, and
10 second, the Commission acted as if an offer of proof letter stating that Respondent Foley suffered
11 from a mental illness and medication management that likely affected his cognitive function at
12 the time of the events under investigation were the evidence of the doctor itself. Several of the
13 commissioners stated that the doctor's letter did not convince them that there was any defense.
14 The Commission thus abused its discretion by taking the letter from a doctor to her patient given
15 as an offer of proof the fact of his "mental illness" as the total evidence the doctor could possibly
16 give on the question of how his mental illness and medication management likely impacted his
17 "cognitive function." Determining what the evidence would show is exactly the reason for an
18 administrative hearing where the doctor can be examined under oath. At this stage of the
19 proceeding, the Commission should have given great deference to the "recommendation" of the
20 psychiatrist Dr. Hofmann and allowed an administrative hearing, as the doctor recommended, "to
21 consider the impact that [Mr. Foley's] mental illness and medication management likely had on
22 [Mr. Foley's] cognitive function."
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1 The Commission conducted a haphazard inquiry into the merits of Respondent's case
2 thus prejudging the outcome before the case could be presented to an administrative law judge as
3 a neutral hearing officer.
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5 Additionally, by using circular reasoning that prejudged the outcome of a possible
6 administrative hearing, several FPPC Commissioners stated that they did not want to grant an
7 administrative hearing because they were convinced that Respondent could do no better at an
8 administrative hearing than the decision the FPPC was then making based on the default. Since
9 under the proposed default decision Respondent was being fined at the full amount of five
10 thousand dollars (\$5,000.00) for the single count, there was no reasonable basis to believe that
11 Respondent, if given the opportunity to present his side of the story to a neutral hearing officer,
12 would not have been able to achieve at least some reduction of the full amount of the fine, if for
13 no other reason than for establishing the fact of the mitigating factors that the enforcement
14 division were ignoring in its request for the full amount of the fine.
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17 The FPPC's position, that a relatively brief and informal presentation at a public
18 meeting on a consent calendar imposing a decision based on a default equates to a full and fair
19 hearing before an impartial hearing officer who is able to hear testimony and receive evidence in
20 an orderly fashion, is a prejudicial abuse of its discretion to grant a fair hearing. The FPPC
21 prejudged the possible evidence without giving Respondent the requested fair hearing where she
22 could present his evidence according to rules of procedure and evidence.
23

24 B. The Commission's Decision Showed Bias

25 The Commissioners were not acting as neutral hearing officers as several stated at the
26 November meeting that if they were to grant a hearing that their own counsel's work on the
27 default documents would have been "wasted." The FPPC thus decided the question not on basis
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1 of why Respondent's default should not be decided, but by considering the so-called "wasted
2 effort" that would be caused to the enforcement division by not issuing the default decision.

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4 Neither Section 11520(b) nor (c) allows for the Commission to consider the enforcement
5 attorney's efforts in their decision with one exception: if the default was of the kind where the
6 Notice of Defense had been filed and the administrative hearing had been scheduled, then the
7 Commission could order that their enforcement attorney's work could be compensated as a
8 condition of granting the relief. There is no provision for considering the enforcement
9 attorney's efforts on default of the failure to file the Notice of Defense. Bu the prejudice shown
10 in considering the enforcement attorney's efforts as a reason to not allow an administrative
11 hearing to be held, the Commission shows the lack of fair play and neutrality that it has as a body
12 in considering such matters when the enforcement division is not seen as a separate body but as
13 the FPPC's own attorneys. Thus the FPPC was acting as both prosecutor and jury by the
14 commissioners' failing to conduct themselves in a neutral manner when considering the question
15 of Respondent's request and giving preferential and prejudicial concern to the enforcement
16 division.
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19 While the Respondent is thankful that the FPPC allowed his attorney and himself to
20 speak to the Commission at its meetings, that presentation was not a fair hearing and the
21 Commission did not give the Respondent a fair hearing of his entire case under any meaning of
22 that term. Respondent's attorney told the Commission that he came to request that the
23 Commission not enter a default and instead to grant a fair hearing by allowing the Respondent to
24 file his Notice of Defense. The Commission then allowed the enforcement division's counsel to
25 claim that there would be no point to a hearing because the Respondent was guilty. The
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1 Commission agreed, thus prejudicing Respondent without a fair hearing and imposing an
2 outrageous penalty.

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4 **6. THE DEFAULT DECISION SHOULD BE SET ASIDE BECAUSE THE FPPC**
5 **POLICY OF NOT ALLOWING THE GRANTING OF HEARINGS AT THE**
6 **DEFAULT STAGE IS AN ABUSE OF DISCRETION BY REFUSING TO**
7 **IMPLEMENT GOVERNMENT CODE SECTION 11520.**

8 Government Code section 11520(b) provides in part "Notwithstanding the default of
9 the respondent, the agency or the administrative law judge, before a proposed decision is issued,
10 has discretion to grant a hearing on reasonable notice to the parties." A default may occur before
11 a hearing is scheduled, as in the present case, by failing to return a Notice of Defense or after a
12 hearing is scheduled by not appearing at the hearing. Section 11520(b) states that if the default is
13 due to a failure to appear at the scheduled hearing that the administrative law judge may order
14 the respondent, or the respondent's attorney or both to pay reasonable expenses incurred by
15 another party as a result of respondent's failure to appear at the hearing. Thus even when a
16 respondent does not appear at a scheduled hearing the code contemplates that the default may be
17 vacated and a new hearing granted.

18
19 In this present matter there was no scheduled hearing so there was no expense incurred
20 by failing to appear at a hearing.

21 However, the Commissioners stated that if they were to allow Respondent to appear at
22 their FPPC meeting and request that the default decision not be made and request instead that a
23 hearing be granted, then **any other respondent could come to their meetings and request the**
24 **same thing.** This shows an abuse of discretion by the Commission by deliberately adopting an
25 unwritten policy of refusing to not decide defaults at the Section 11520(b) stage and refusing to
26 vacate defaults at the Section 11520(c) stage for fear that other Respondents would also come
27 before the Commission asking it to exercise its discretion under Section 11520(b) or 11520(c).
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1 The Commissioners stated that they did not want to establish "a precedent" of allowing default
2 proceedings to be terminated and a hearing granted instead because such a precedent would open
3 the floodgates of requests from other respondents both with and without attorneys. The
4 Commission clearly stated that they do not acknowledge the validity of granting hearings after a
5 default thus taking a prejudicial position on the implementation of Section 11520.
6

7 The Commission stated that had only previously granted relief from default upon the
8 recommendation of its enforcement division when the Respondent had entered into a stipulated
9 agreement with the enforcement division as an alternative to default. The Commission has no
10 precedent of granting relief from default in order to conduct an administrative hearing. Thus the
11 unwritten policy of the Commission is that it will conclude any previously defaulted matter only
12 by stipulation, and it will not allow a fair hearing to conclude a previously defaulted matter. This
13 policy is an abuse of discretion that is contrary to the purpose and intent of Section 11520.
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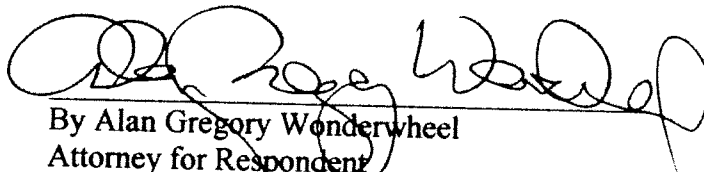
16 By its clear and plain language, Section 11520 provides the avenue for defaulting
17 respondents to request that an administrative hearing on the merits be granted after a default,
18 either pursuant to Section 11520(b) before the agency decides the default or pursuant to Section
19 11520(c) to vacate the default decision. Yet by their own argument, unwritten policy, and past
20 practice, the Commission does not believe that ever granting a hearing at the default stage is
21 warranted if there is no recommendation by its own Enforcement Division based on an
22 admission of guilt by stipulation from the Respondent, for fear that other Respondents would
23 come to the Commission asking for the same relief. This is the classic example of abuse of
24 discretion by refusing to exercise the discretion.
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1 **III. CONCLUSION**

2 This motion is accompanied by a Notice of Defense and Respondent's attorney's declaration of
3 mistake, inadvertence, surprise, or excusable neglect. For each and all the foregoing stated
4 reasons, Respondent respectfully requests that the decision based on default be vacated and that
5 Respondent be granted a fair hearing pursuant to Section 1150(c) and that Respondent's Notice
6 of Defense submitted herewith be deemed filed and served in order to give fair notice of the
7 hearing.
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11 Dated: February 21, 2011

12 
13 By Alan Gregory Wonderwheel
14 Attorney for Respondent
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19 **DECLARATION OF ALAN GREGORY WONDERWHEEL**

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21 I, ALAN GREGORY WONDERWHEEL, declare as follows:

22 1. I am an attorney at law duly admitted to practice, and I am the attorney for
23 Respondent TIM FOLEY. I have personal knowledge of the facts set forth herein, except as to
24 those stated on information and belief and, as to those, I am informed and believe them to be
25 true. I am competent to testify, and if called upon to testify, could and would testify as set forth
26 herein. I make this declaration in support of Respondent's Motion to Set Aside the Default
27 proceedings.
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1 2. This FPPC proceeding arises from the actions of Respondent allegedly related to
2 the election campaign of City of Cotati Council Member John Guardino in the election of
3 November 7, 2006, and the FPPC's investigation alleging that Respondent's actions violated the
4 Political Reform Act (the Act) found in Government Code Section 81000 et seq..
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6 3. In the conduct of its proceeding the FPPC issued a Probable Cause Order
7 resulting in an Allegation being issued that required a timely response by Respondent executing
8 a Notice of Defense to prevent a default.
9

10 4. As Respondent's counsel I should have prepared and filed the Notice of Defense
11 in a timely manner but failed to do so due to my own mistake, inadvertence, or excusable
12 neglect.
13

14 5. I am a sole practitioner attorney who is representing Respondent on a pro bono
15 basis and through my own mistake and inadvertence, inattention, carelessness and failure to pay
16 prudent attention to properly manage this case and to carefully calendar the events needed to
17 return the Notice of Defense in a timely manner the time for filing the notice elapsed. The notice
18 from the FPPC was put on a stack of papers and buried and in my inattention and unintentionally
19 forgotten. The omission in filing the Notice of Defense was an unintentional act and error on my
20 part arising from misplaced confidence in my own memory and attention. In addition, my client
21 Respondent Foley had not been informed of the deadline for filing the Notice of Defense so the
22 Respondent did not know to inquire about it and remind me.
23

24 6. Respondent Foley has relevant and substantial defenses to the allegations of
25 violation of the Act which Respondent would present should Respondent be allowed to have the
26 administrative hearing contemplated by the Act.
27
28

1 7. Prior to the meeting where the request to make a decision based on Respondent's
2 default was placed on the consent calendar, I contacted Bridgette Castillo, Commission Counsel,
3 Enforcement Division, to request that the default decision request be taken off calendar and
4 Respondent be allowed to file the Notice of Defense. Ms. Castillo informed me that once the
5 meeting agenda was set she did not have the authority to remove it from the agenda.
6

7 8. I attended the FPPC meeting on November 12, 2010, and requested orally and in a
8 written motion that pursuant to Government Code Section 11520(b) the Commission terminate
9 the default proceeding and grant an administrative hearing by allowing Respondent to file the
10 Notice of Defense.
11

12 9 The FPPC did not make a decision at the November 12, hearing and instead
13 continued the matter "until the December meeting so that the respondent could submit medical
14 evidence of his illness." (California FPPC, Minutes of Meeting, Public Session, November 12,
15 2010, page 2.)
16

17 10. The FPPC Commissioners stated at the November meeting that they believed if
18 they granted Respondent's request that other defaulting respondents could and would come with
19 similar requests to grant hearings after default and that they did not want to establish "a
20 precedent" of doing this.
21

22 11. The December meeting of the FPPC was cancelled and Respondent Foley's
23 default matter was continued to the agenda of the January 28, 2011, meeting. Respondent Foley
24 was unable to attend due to his poor physical condition. Respondent Foley presented a letter to
25 the Commission addressed to Mr. Foley from his treating psychiatrist Virginia Ellen Hofmann,
26 M.D., doing practice at The Permanente Medical Group, Inc., indicating that in her professional
27 opinion Mr. Foley's mental illness and medication management in 2006 likely had an effect on
28 his cognitive function. Dr. Hofman concluded her letter addressed to her patient Mr. Foly by
stating, "My recommendation to the Fair Political Practices Commission is to consider the

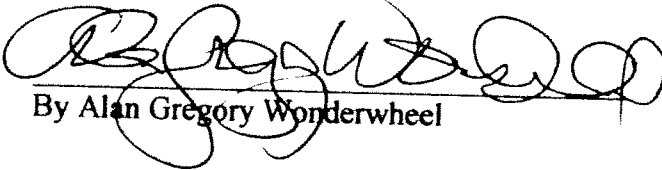
1 impact that your mental illness and medication management likely had on your cognitive
2 function.” This letter was offered to the Commission as evidence of the fact of his “mental
3 illness” and as an offer of proof that there is further evidence that could and would be submitted
4 at an administrative hearing.

5 12. At the January 28, 2011, meeting I informed the Commission that I was having
6 difficulty getting the cooperation of Respondent Foley’s previous physician and that if an
7 administrative hearing was held then I would have additional power to subpoena his previous
8 doctor.

9 13. The Commissioners at the January meeting again stated that they were basing
10 their decision on the request of the enforcement division to enter Respondent’s default in large
11 part on the question of the merits of the case and their claim that Respondent had not presented
12 evidence at the meeting. In addition at least on Commission stated that any neglect must be
13 “excusable” using the criteria of Section 11520(c) instead of 11520(b), and even then stated that
14 to be excusable neglect must be from some external cause such as accident or injury, thus
15 effectively striking out the words “mistake” and “inadvertence” from Section 11520.
16
17

18 I declare under penalty of perjury under the laws of the State of California that the
19 foregoing facts are true and correct.

20 Executed this 21st day of February 2011 at Santa Rosa, California.

21
22
23 
24 By Alan Gregory Wonderwheel
25
26
27
28