

1 GARY S. WINUK (SBN 190313)
Chief of Enforcement
2 NEAL P. BUCKNELL (SBN 190327)
Senior Commission Counsel
3 **FAIR POLITICAL PRACTICES COMMISSION**
428 J Street, Suite 620
4 Sacramento, CA 95814
Telephone: (916) 322-5660
5 Facsimile: (916) 322-1932

6 Attorneys for Complainant

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

10
11 In the Matter of:

OAH No. 2011030835

FPPC No. 10/449

12
13 SHONG-CHING TONG,

**OPENING BRIEF OF THE ENFORCEMENT
DIVISION OF THE FAIR POLITICAL
PRACTICES COMMISSION RE: PROPOSED
DECISION OF ADMINISTRATIVE LAW
JUDGE ERIC SAWYER**

14
15 Respondent.

16
17 **I. INTRODUCTION**

18 On October 26, 2011, Administrative Law Judge (“ALJ”) Eric Sawyer (of the Los Angeles Office
19 of Administrative Hearings) issued a proposed decision imposing an administrative penalty in the amount
20 of \$5,250 against the above-named respondent.

21 On November 3, 2011, the Legal Division of the Fair Political Practices Commission
22 (“Commission” or “FPPC”), caused a copy of the proposed decision to be served on the Enforcement
23 Division and Respondent Shong-Ching Tong. (The proposed decision is attached hereto as Exhibit A.)

24 Pursuant to California Code of Regulations, title 2, section 18361.9, the Enforcement Division
25 submits this opening brief and respectfully recommends that the Commission adopt the proposed
26 decision of the ALJ for the reasons discussed below.

27 ///

28 ///

1 **II. DISCUSSION**

2 **A. Summary of the Case**

3 This matter was heard before the ALJ on September 13 and 14, 2011, in Los Angeles, California.
4 The FPPC was represented by Neal Bucknell, Senior Commission Counsel, Enforcement Division.
5 Respondent Shong-Ching Tong (“Respondent”) attended the hearing and was represented by his attorney,
6 Stefan Robert Pancer.

7 In this case, Paul Cheng was a candidate for Arcadia City Council in the election that was held on
8 April 13, 2010.

9 Mr. Cheng also is an attorney. In the scope of his practice, he filed a lawsuit against a business in
10 the San Gabriel Valley area. Respondent became involved with helping to defend the defendants in that
11 lawsuit, and Respondent campaigned against Mr. Cheng in connection with the Arcadia City Council
12 election. (See Ex. A, p. 2.)

13 In January 2010, Respondent believed that he had reached a settlement agreement with Mr.
14 Cheng regarding the lawsuit mentioned above. The terms included the following: (i) Mr. Cheng would
15 dismiss the lawsuit in exchange for a \$5,000 payment from Respondent; (ii) Respondent would stop
16 campaigning against Mr. Cheng; and (iii) Respondent would help Mr. Cheng win the election. However,
17 the settlement was not finalized. Mr. Cheng withdrew from the case, and Respondent continued his
18 campaign against Mr. Cheng. (See Exhibit B hereto, which comprises the second of two mass mailings
19 in this case, and which was admitted into evidence at the hearing. Ex. B includes a letter from
20 Respondent dated March 25, 2010, in which Respondent admits to the foregoing facts surrounding the
21 settlement negotiations.)

22 On or about March 15 and April 6, 2010, Respondent made independent expenditures totaling
23 approximately \$2,800 and \$6,575, respectively, for two “Don’t Vote for Cheng” mailers. Both mailers
24 cast Mr. Cheng in a negative light and expressly advocated his defeat, stating words such as, “Do Not
25 Give Your Vote to Paul Cheng.” The first mailer was sent to 60% of the voters from the previous city
26 election, or about 6,000 people. The second mailer was sent to approximately 26,000 people, using the
27 services and bulk permit of another person. (See Ex. A, p. 2.)

28 ///

1 Ultimately, Mr. Cheng was defeated in the election, and this case arose as a result of a complaint
2 that was filed with the FPPC by a member of Mr. Cheng’s staff. (Ex. A, p. 4.)

3 At the hearing, Respondent was charged with the following violations of the Political Reform Act
4 (the “Act”):¹

5 COUNT 1: On or about March 15, 2010, Respondent made independent expenditures
6 totaling approximately \$2,800 in opposition to an Arcadia City Council
7 candidate (for the city election that was held on April 13, 2010), but
8 Respondent failed to report the expenditures by filing a preelection
statement (Form 461) on or before the due date of April 1, 2010, in
violation of Sections 84200.5, subdivision (g)(2), and 84200.8.

9 COUNT 2: Regarding the independent expenditures described in Count 1 above,
10 Respondent also failed to report the expenditures by filing a supplemental
independent expenditure report (Form 465) on or before the due date of
April 1, 2010, in violation of Section 84203.5.

11 COUNT 3: On or about April 6, 2010, Respondent sent a mass mailing in opposition to
12 an Arcadia City Council candidate (for the city election that was held on
13 April 13, 2010) without displaying the name, address, and city of the sender
on the outside of each piece of mail, in violation of Section 84305,
subdivisions (a) and (b).

14 COUNT 4: On or about April 6, 2010, Respondent made independent expenditures
15 totaling approximately \$6,575 for the mass mailing described in Count 3
16 above, but Respondent failed to report these expenditures by filing a late
independent expenditure report (Form 496) on or before the due date of
April 7, 2010, in violation of Section 84204.

17 COUNT 5: Regarding the independent expenditures described in Count 4 above,
18 Respondent also failed to report the expenditures by filing a semi-annual
statement (Form 461) on or before the due date of August 2, 2010, in
19 violation of Section 84200, subdivision (b).

20 COUNT 6: Regarding the independent expenditures described in Count 4 above,
21 Respondent also failed to report the expenditures by filing a supplemental
independent expenditure report (Form 465) on or before the due date of
August 2, 2010, in violation of Section 84203.5.

22 Lynda Cassady, Chief of the Technical Assistance Division of the FPPC, testified as an expert
23 witness at the hearing. She explained the difference between campaign statements and reports, making it
24 clear that it is important to file both in order to facilitate public access to information. Whereas campaign
25

26 ¹ The Act is contained in Government Code sections 81000 through 91014. All statutory
27 references are to the Government Code, unless otherwise indicated. The regulations of the Commission
28 are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All
regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise
indicated.

1 statements such as Form 461's are designed to be "looked up" by the name of the major donor or
2 independent expenditure committee, campaign reports such as Form 465's and 496's are designed to be
3 "looked up" by the name of the candidate or ballot measure supported or opposed. Also, Ms. Cassidy
4 testified that Respondent could have called the FPPC for free advice and/or visited the FPPC website for
5 additional information, if Respondent had questions about his filing obligations.

6 Following a two-day hearing, the ALJ found that Respondent did in fact commit all six of the
7 violations set forth above. (Ex. A, p. 6.)

8 Also, the ALJ found that in June 2010, an investigator with the Enforcement Division of the
9 FPPC explained to Respondent what documents needed to be filed in this case, and the investigator sent
10 Respondent copies of the applicable forms along with related instructions. Additionally, the investigator
11 described the resources that were available to the Respondent should he have questions. (See Ex. A, p.
12 4.)

13 After speaking with the investigator, Respondent attempted to late-file the missing forms, but
14 what he submitted was incorrectly filled out and incomplete. Among other deficiencies, Respondent
15 failed to provide required information regarding the identities of payees who assisted him with the mass
16 mailings in question—effectively allowing the payees to remain anonymous. (See Ex. A, pp. 4-5.)

17 The Commission's investigator, and later, the prosecutor of this case, tried to contact Respondent
18 regarding the above-described deficiencies and other matters related to this case, but Respondent ignored
19 them. By or about July 2010, after a settlement offer had been sent to Respondent by the prosecutor,
20 Respondent became gravely offended and enraged for reasons that are not entirely clear. It was not
21 established that the Commission's staff did anything to warrant Respondent's refusal to cooperate.
22 Although Respondent insisted that all communications be in writing, Respondent still failed to respond to
23 the Enforcement Division. This included a refusal to comply with an investigative subpoena. Also,
24 Respondent refused to submit any corrections to the documents that ultimately were submitted to the
25 Arcadia City Clerk's office for filing, and Respondent otherwise refused to cooperate any further with
26 Commission staff. (See Ex. A, p. 5.)

27 ///

28 ///

1 Although Respondent’s violations started out as inadvertent or negligent, he ultimately made a
2 *deliberate* decision not to comply with the Political Reform Act when asked to do so by the Enforcement
3 Division. (Ex. A, p. 7.)

4 At one point during the hearing, Respondent admitted to receiving a letter from the Enforcement
5 Division with the probable cause report. The letter, which is attached hereto as Exhibit C and which was
6 admitted into evidence at the hearing, included blank forms and instructions. In the letter, Respondent
7 was warned that if he did not correct his filing deficiencies by properly completing and filing the
8 enclosed forms, the Enforcement Division would ask for a higher penalty at the hearing pursuant to
9 Regulation 18361.5, subdivision (d). (That regulation authorizes the Commission and the ALJ to
10 consider—when determining the amount of a penalty—whether a violator, upon learning of a reporting
11 violation, voluntarily filed amendments to provide full disclosure.)

12 During cross-examination at the hearing, Respondent testified that he threw the forms and
13 instructions in the trash. Thereafter, undersigned counsel asked words to the effect, “When you threw
14 them in the trash, did it occur to you that I might ask for a higher penalty at the hearing?”

15 In response, Respondent screamed words to the effect, “I don’t care how high the penalty is!”

16 Accordingly, the proposed decision of the ALJ imposed a penalty of \$5,250. In so doing, the ALJ
17 stated (in Ex. A, pp. 7-8):

18 12A. During the hearing, Complainant requested a fine of \$1,000
19 be imposed for each of the six violations. Based on the circumstances, that
20 request is reasonable, with one exception. Count three of the Accusation
21 pertains to Respondent’s failure to include his identification information on
22 the outside of the April mass mailer. That was purely a technical violation.
Moreover it would have been clear to anyone who read the mailer that
Respondent was responsible for sending it. There was no way for
Respondent to correct that violation once it happened. Thus, a fine of \$250
is warranted for that violation.

23 12B. However, the other five counts are a different matter.
24 Although Respondent’s initial violations were inadvertent, he thereafter
25 failed to fully correct them, even after advice and information sent to him
26 from Commission staff. After he initially cooperated, Respondent later
completely ignored staff contacts. He could have easily corrected his
deficient filings, but refused to do so. Under these circumstances, a fine of
\$1,000 for each of those five violations is warranted.

27 ///

28 ///

1 **B. Enforcement Division’s Position**

2 Regulation 18361.9 requires the Enforcement Division to submit this opening brief but does not
3 mandate its contents. Rather, subdivision (b)(1) of that regulation provides that the Enforcement
4 Division *may* address the following matters in its opening brief:

5 **1. Whether the facts stated in the proposed decision are consistent with the evidence**
6 **presented.**

7 The ALJ did a very good job of summarizing most of the evidence that was admitted at the
8 hearing, with the following exceptions:

9 **a. The proposed decision should include a more specific finding regarding**
10 **Respondent’s willful refusal to provide full disclosure in this case—even after**
11 **he was provided with forms and instructions by the Enforcement Division.**

12 At one point during the hearing, Respondent admitted to receiving a letter from the Enforcement
13 Division with the probable cause report. (Ex. C.) The letter, which was admitted into evidence at the
14 hearing, included blank forms and instructions. In the letter, Respondent was warned that if he did not
15 correct his filing deficiencies by properly completing and filing the enclosed forms, the Enforcement
16 Division would ask for a higher penalty at the hearing pursuant to Regulation 18361.5, subdivision (d).
17 (That regulation authorizes the Commission and the ALJ to consider—when determining the amount of a
18 penalty—whether a violator, upon learning of a reporting violation, voluntarily filed amendments to
19 provide full disclosure.)²

20 ///

21 ///

23 ² Also, the letter stated, “[P]lease bear in mind that where the forms call for the names and
24 addresses of payees, you are required to provide the names and addresses of the vendors (and in some
25 cases subvendors) who received payment for the design, printing, addressing, mailing (including
26 postage), etc. of your mass mailings. It is insufficient simply to list yourself as the payee or simply to list
27 a description of each mass mailing as the payee.” Additionally, the letter stated, “[P]lease bear in mind
28 that where the forms call for descriptions of the payments/expenditures relative to each payee, you are
required to describe the goods or services provided by each payee. It is insufficient simply to list a
general description of each mass mailing without including a description of the goods or services
provided by each payee in furtherance of the mass mailing.”

1 During cross-examination at the hearing, Respondent testified that he threw the forms and
2 instructions in the trash. Thereafter, undersigned counsel asked words to the effect, “When you threw
3 them in the trash, did it occur to you that I might ask for a higher penalty at the hearing?”

4 In response, Respondent screamed words to the effect, “I don’t care how high the penalty is!”

5 **b. The proposed decision omits certain, important background information**
6 **regarding the circumstances surrounding and leading up to the mass mailings**
7 **in this case.**

8 As stated in the proposed decision, the candidate in this case, Mr. Cheng, also is an attorney. In
9 the scope of his practice, he filed a lawsuit against a business in the San Gabriel Valley area.

10 Respondent became involved with helping to defend the defendants in that lawsuit, and Respondent
11 campaigned against Mr. Cheng in connection with the Arcadia City Council election. (See Ex. A, p. 2.)

12 However, the proposed decision omits reference to important background information, which was
13 established at the hearing. Specifically, in January 2010, Respondent believed that he had reached a
14 settlement agreement with Mr. Cheng regarding the lawsuit mentioned above. The terms included the
15 following: (i) Mr. Cheng would dismiss the lawsuit in exchange for a \$5,000 payment from Respondent;
16 (ii) Respondent would stop campaigning against Mr. Cheng; and (iii) Respondent would help Mr. Cheng
17 win the election. However, the settlement was not finalized. Mr. Cheng withdrew from the case, and
18 Respondent continued his campaign against Mr. Cheng. (See letter from Respondent dated March 25,
19 2010, which is included in Ex. B.)

20 **c. Ideally, a summary of the expert testimony of Lynda Cassady, Chief of the**
21 **Technical Assistance Division of the FPPC, should have been included in the**
22 **proposed decision.**

23 Lynda Cassady, Chief of the Technical Assistance Division of the FPPC, testified as an expert
24 witness at the hearing. She explained the difference between campaign statements and reports, making it
25 clear that it is important to file both in order to facilitate public access to information. Whereas campaign
26 statements such as Form 461’s are designed to be “looked up” by the name of the major donor or
27 independent expenditure committee, campaign reports such as Form 465’s and 496’s are designed to be
28 “looked up” by the name of the candidate or ballot measure supported or opposed. Also, Ms. Cassady

1 testified that Respondent could have called the FPPC for free advice and/or visited the FPPC website for
2 additional information, if he had questions about his filing obligations.

3 **d. The proposed decision states that Mr. Cheng was an incumbent (Ex. A, p. 2),**
4 **but he was not an incumbent.**

5 This is a minor error—but worth mentioning for clarification purposes.

6 **2. Whether the proposed decision contains an accurate statement and/or application of**
7 **the law.**

8 The Enforcement Division does not take issue with the proposed decision in this regard

9 **3. Whether there is additional material evidence that could not, with reasonable**
10 **diligence, have been discovered and presented at the administrative hearing.**

11 No such evidence is known to exist.

12 **4. Which of the dispositions provided for in Government Code section 11517 is**
13 **recommended by the Enforcement Division and why.**

14 Government Code section 11517, subdivision (c)(2), provides that within 100 days of the
15 Commission’s receipt of the proposed decision, the Commission may do any of the following:

- 16 • Adopt the proposed decision in its entirety.
- 17 • Reduce or otherwise mitigate the proposed penalty and adopt the balance of the proposed
18 decision.
- 19 • Make technical or other minor changes in the proposed decision and adopt it as the decision.
20 However, action by the Commission in this regard is limited to “a clarifying change or a
21 change of a similar nature that does not affect the factual or legal basis of the proposed
22 decision.”
- 23 • Reject the proposed decision and refer the case back to the ALJ to take additional evidence
24 and prepare a revised, proposed decision.
- 25 • Reject the proposed decision, and decide the case upon the record, including the transcript, or
26 upon an agreed statement of the parties, with or without taking additional evidence. (By
27 stipulation of the parties, the Commission may decide the case upon the record without

28 ///

1 including the transcript.) If the Commission chooses this option, all of the following
2 provisions apply:

3 (i) A copy of the record shall be made available to the parties. The Commission may
4 require payment of fees covering direct costs of making the copy.

5 (ii) The Commission itself shall not decide the case without affording the parties the
6 opportunity to present either oral or written argument before the Commission itself. If
7 additional oral evidence is introduced before the Commission itself, no Commission
8 member may vote unless the member heard the additional oral evidence.

9 (iii) The authority of the Commission itself to decide the case in this regard includes
10 authority to decide some but not all issues in the case.

11 In this case, the Enforcement Division recommends that the Commission adopt the proposed
12 decision in its entirety. Although the ALJ omitted certain factual matters from the proposed decision—as
13 described above—these matters are not necessary to support the ALJ’s proposed penalty of \$5,250.
14 However, it is hoped that the Commission will bear these matters in mind should Respondent come
15 before the Commission and ask for a reduced penalty.

16 **5. Any other issue the Enforcement Division determines to be relevant.**

17 Attached hereto as Exhibit D is a copy of *Tong v. McMahon* (1998) 145 F.3d 1341, which
18 documents that at least one federal court has imposed a vexatious litigant order against Respondent. At
19 the hearing, this was offered into evidence because it tends to show that Respondent, a non-lawyer, has
20 more familiarity with the litigation process than your average non-lawyer, and he should have known
21 better than to deliberately refuse to comply with the Political Reform Act after the Enforcement Division
22 sent him forms and instructions. Also, Respondent’s vexatious litigant history evidences a certain degree
23 of legal experience, which is consistent with Respondent helping to defend the defendants in the civil
24 action that Mr. Cheng filed against the business in the San Gabriel Valley. (Ex. A, p. 2.) As stated
25 above, this legal experience extended to Respondent entering into settlement negotiations with Mr.
26 Cheng on behalf of the defendants. These facts all show that Respondent is or should be quite familiar
27 with how settlement negotiations work, and when the Enforcement Division offered to settle this case

28 ///

1 with Respondent in July 2010, there was no legitimate reason for Respondent to view the Enforcement
2 Division's settlement offer as harassment. (See Ex. A, p. 5.)

3 Although the ALJ excluded the case of *Tong v. McMahon* (1998) 145 F.3d 1341 and stated that it
4 was more prejudicial than probative, the Enforcement Division takes the position that—for the reasons
5 stated above—Respondent's vexatious litigant history falls into the category of "Any other issue the
6 Enforcement Division determines to be relevant [for purposes of this opening brief]." (Regulation
7 18361.9, subd. (b)(1)(E).)

8 **II. CONCLUSION**

9 For the foregoing reasons, it is respectfully submitted that the Commission should adopt the
10 ALJ's proposed decision in its entirety.

11
12 Dated: _____

FAIR POLITICAL PRACTICES COMMISSION

13
14
15 By: _____

16 NEAL P. BUCKNELL
17 Senior Commission Counsel
18 Attorney for Complainant
19
20
21
22
23
24
25
26
27
28