FAIR POLITICAL PRACTICES COMMISSION
ENFORCEMENT DIVISION

MEMORANDUM

To: Chairman Schnur, Commissioners Garrett, Hodson, Montgomery & Rotunda

From: Gary S. Winuk, Chief of Enforcement
Bridgette Castillo, Commission Counsel, Enforcement Division

Subject: Enforcement Division Response to Motions to Vacate Default Decisions
In the Matter of Michelle Berman, FPPC No. 10/115 and
In the Matter of Adrienne Lauby, FPPC No. 10/116

Date: November 22, 2010

Background

On Friday November 19, 2010 at 4:15 p.m., Motions to Vacate the Default Decisions on behalf of Michelle Berman, FPPC No. 10/115, and Adrienne Lauby, FPPC No. 10/116, were submitted to the Commission personally by Alan Wonderwheel. Mr. Wonderwheel delivered the documents to the FPPC before receiving service of the default, but the Enforcement Division staff accepted the motion despite this procedural error rather than forcing Mr. Wonderwheel to re-submit at the appropriate time.

Respondents' Request for Relief

Mr. Wonderwheel requests relief, based on Government Code section 11520, which states:

> 11520. (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that the respondent is entitled to the agency action sought, the agency may act without taking evidence.
>
> (b) Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued,

has discretion to grant a hearing on reasonable notice to the parties. If the agency and administrative law judge make conflicting orders under this subdivision, the agency's order takes precedence. The 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.

Mr. Wonderwheel requests the default decisions for both Respondents, Michelle Berman and Adrienne Lauby, be vacated and the Enforcement Division be directed to accept the untimely Notice of Defense for each Respondent and allow them to have a hearing before an Administrative Law Judge.

Enforcement Division Responses to Respondent's Law and Argument

Respondent's Argument 1:

Mr. Wonderwheel requests the Commission to vacate the default decision due to his "mistake, inadvertence, surprise or excusable neglect." This issue was considered by the Commission before issuing the default decision at the November 12, 2010 Commission hearing.

Mr. Wonderwheel contends that it is an "abuse of discretion" by the FPPC to deny his request, based on California Code of Civil Procedure (CCP) 473 (b), which requires a court to vacate a civil default judgment upon a showing of good cause, which includes the mistake, inadvertence, surprise or excusable neglect of a respondent's attorney. However, CCP 473 (b) is inapplicable to the proceedings of the FPPC, which are governed by the Administrative Procedures Act (APA) at Government Code Section 11370 et seq. The APA provides the Commission, in Section 11520 with the discretion as to whether or not to grant a hearing for good cause when a respondent is in a default setting.

Further, no new facts have been presented by Mr. Wonderwheel since the November 12, 2010 hearing, where the Commission considered these issues before approving a default decision.

Respondent's Argument 2:

Mr. Wonderwheel requests that the default decisions be vacated due to his client's "mistake inadvertence, surprise or excusable neglect" due to their good faith reliance on his duty to timely file a Notice of Defense on their behalf under Government Code Section 11520. Similar to his argument in *Respondent's Argument 1*, Mr. Wonderwheel argues that it is an "abuse of discretion" by the FPPC to refuse to vacate the decision. Once again, Section 11520 provides, in subsection (c), that the FPPC retains the **discretion** to vacate a default decision, if good cause is shown. The Commission is not required to and may exercise its judgment as to whether or not to grant the motion. The Commission considered the facts and arguments presented at the November 12, 2010 hearing and did not grant Respondents' request at that time before approving a default decision for each Respondent.

Further, no new facts have been presented by Mr. Wonderwheel since the November 12, 2010 hearing on this issue.

Respondent's Argument 3:

Mr. Wondewheel contends that the FPPC further abused its discretion by "prejudging the outcome of a fair hearing before a neutral hearing officer." He contends that the FPPC should have limited its discussion at the November 12, 2010 hearing solely to his request to have his clients be granted a hearing before an Administrative Law Judge.

However, Mr. Wonderwheel completely misunderstands the character of the proceedings which the Commission was undertaking. The item that was on the Commission's agenda was whether to approve, modify or disapprove the proposed default decision and order and accompanying exhibit for FPPC Cases No. 10/116 (Lauby) and FPPC 10/115 (Berman).

Mr. Wonderwheel presented his remarks during the public comment period of his client's default agenda items, where he requested the default decisions not be entered. However, under Government Code Section 11520, a motion to vacate a default judgment is not timely filed until after the default decision is entered. Thus, although the Commission generously discussed Mr. Wonderwheel's issues related to his misconduct in failing to represent his clients competently, the issue at hand was the default decision and proposed penalty itself.

In considering the issue as properly placed on the agenda, the Commission had the authority under Section 11520 (a) to take action based upon the respondents' express admissions or upon other evidence. The Commission properly took action based on the Respondent's express admissions, the evidence detailed in the Exhibit, the Respondent's own public comments at the Commission hearing, and the evidence presented by the Enforcement Division. The Commission, although not required to, further generously allowed Mr. Wonderwheel, Ms. Berman and Ms Lauby to provide any documents or statements they wished. Neither provided any exculpatory evidence or statement of any type. Both were permitted to present any mitigation factors they wished for the Commission's consideration.

Mr. Wonderwheel's motion tries to turn the November proceedings on their head by suggesting that, because of his misconduct, the Commission hearing should have been altered, with no notice to either the public or the FPPC staff, to discuss his untimely motion only and not consider the properly scheduled agenda item. The Commission rightly considered the item as placed on the agenda and, in its discretion, also considered Mr. Wonderwheel's request. The Commission then took action well within its authority.

Additionally, the Respondents had months to provide the Enforcement Division with any exculpatory or mitigating evidence and have failed to do so. They also have had the intervening period between the November and December Commission hearings to provide such information and have failed to do so.

Respondent's Argument 4:

Mr. Wonderwheel contends that the default decision should be set aside because the FPPC "abused its discretion" by establishing a policy that does not allow the granting of hearings at the default stage for any reason. However, he makes completely false statements about the Commission's position and "policy" with regard to the exercise of its authority and discretion under Section 11520.

At the November 12, 2010 hearing the Commission exercised its discretion in these two cases to not allow Respondents a hearing due to the failure of their attorney to file their Notice of Defense within the timeframe established by the APA. The Commission did not vote on, give direction to staff or make any statement that no future requests for a showing of good cause under Section 11520 would be considered, or that such a policy existed or would be considered. Any statements made simply identified the need of the Commission to be cognizant of treating similarly situated respondents consistently and fairly as one factor in the decision-making process.

In fact, the Enforcement Division at the September 2010 hearing requested a default agenda item be pulled from the agenda in order to provide an Administrative Hearing for the Respondent in that case. However, the factual circumstances involved there, a question as to whether respondent received proper notice of the hearing, were different from those at issue here. The Commission has thus demonstrated by its actions

that it does not have a blanket policy of rejecting any requests for hearings for default items on the agenda, but rather properly exercises its discretion consistent with the APA.

Enforcement Division Recommendation

While the Commission has the discretion to vacate the Default Decisions, the Enforcement Division recommends that these requests be denied for the reasons previously detailed.

Alan Gregory Wonderwheel
131-A Stony Circle, Suite 500
Santa Rosa, CA 95401
Ph. 707-696-7253
Fax: 707-578-219=84

Attorney for Respondent

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of	FPPC No.: 10/116
ADRIENNE LAUBY, Respondent	RESPONDENT ADRIENNE LAUBY'S MOTION TO VACATE DECISON AND TO ALLOW RESPONDENT TO FILE A NOTICE OF DEFENSE; POINTS AND AUTHORITIES IN SUPPORT OF MOTION; and DECLARATION OF ALAN GREGORY WONDERWHEEL, (Government Code Section 11520(c))

Respondent ADRIENNE LAUBY hereby requests that the FAIR POLITICAL PRACTICES COMMISSION (FPPC, "Agency" or "Commission") vacate its decision of November 12, 2010, based on Respondent's default and allow Respondent to file a Notice of Defense requesting an administrative hearing in the matter.

This motion is made on the grounds of mistake, inadvertence, surprise, or excusable neglect by Respondent's attorney, the interests of justice, and the protection of due process, and is supported by the accompanying Memorandum of Points and Authorities, the Declaration of Alan Gregory Wonderwheel and the documents in the file of this matter.

//

//

//

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 Accusation against Respondent. Respondent's attorney did not respond to the Accusation by filing a Notice of Defense within the statutory time limit resulting 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 and instead before the proposed decision was issued based on the default, to grant an administrative hearing on reasonable notice to the parties. At the meeting on November 12, 2010, the FPPC denied Respondent's request not to issue a decision based on the default and entered its decision without allowing Respondent to file a Notice of Defense and without granting an administrative hearing.

II. LAW AND ARGUMENT

Government Code Section 11520 (all further references to statute are to the California Government Code unless stated otherwise) subdivision (c) provides that the agency may vacate a default decision and grant a hearing on good cause, and states in part:

> 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]

---

[1] Government Code Section 11520. (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and

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

Government Code Section 11520(c) defines "good cause" to include mistake, inadvertence, surprise, or excusable neglect. This standard uses the same language as Code of Civil Procedure (CCP) Section 473(b) to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."[2] While Section 11520(c) provides that

---

affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that
the respondent is entitled to the agency action sought, the agency may act without taking evidence.

(b) Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties. If the agency and administrative law judge make conflicting orders under this subdivision, the agency's order takes precedence. The 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.

[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 representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and 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,

the agency's decision to vacate a default is discretionary, the public policy of have a final decision based on the merits is of such great importance that in a judicial proceeding the legislature has provided in CCP Sec. 473(b) that setting aside a judgment is mandatory when the judgment results from a default that is caused by the attorney and the motion is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect.

There is no basis for the omission in Section 11520(c)--of the legislative language of CCP 473(b) requiring that setting aside the default is mandatory when based on the attorney's failure--to be construed as a prohibition preventing the FPPC from adopting the same standard as its own procedure in similar circumstances. In the interests of justice and due process, the FPPC should apply the same standard for its agency default decisions. When a default is entered by failure to submit the Notice of Defense in a timely manner and prevents the scheduling of the fair hearing of the Accusation against the Respondent, if the default resulted from the attorney's failure then the Respondent should be allowed their "day in court" to present their case at a fair administrative hearing. In such circumstances the FPPC's refusal decide the matter based on the merits is an abuse of discretion by the FPPC by denying Respondent a fair hearing due to the conduct of her attorney.

As shown by the attached Declaration of Alan G. Wonderwheel, the default of Respondent to timely file a Notice of Defense was the result of her attorney's mistake, inadvertence, or excusable neglect. For that reason the FPPC should set aside the decision based on the default and allow Respondent the opportunity to present her defense in a formal

---

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.

administrative hearing using the evidentiary procedures of law including allowing testimony under oath and the presentation of other evidence in a coherent manner.

2. THE DEFAULT DECISION SHOULD BE SET ASIDE FOR THE GOOD CAUSE THAT IT RESULTED FROM RESPONDENT'S GOOD FAITH RELIANCE ON HER ATTORNEY

As a separate basis, the FPPC may vacate the decision on the good cause of Respondent's mistake, inadvertence, surprise, or excusable neglect. Here, the default of Respondent was due to the failure of her attorney to timely filing the Notice of Defense. Any mistake, inadvertence, surprise, or excusable neglect of the Respondent consisted in relying in good faith upon her attorney to act in a timely manner. Respondent was surprised by the default as her attorney had not informed her of the failure to timely file the notice. It is an abuse of its discretion for the FPPC to refuse to vacate the decision based on default when the Respondent has the good cause that her mistake, inadvertence, surprise, or excusable neglect was grounded on her good faith reliance upon her attorney. Respondent has relevant and substantial defenses and evidence of mitigation to the allegations of violation of the Act.

3. THE DEFAULT DECISION SHOULD BE SET ASIDE BECAUSE THE FPPC DECISION WAS AN ABUSE OF ITS DECRETION BY PREJUDGING THE OUTCOME OF A FAIR HEARING BEFORE A NEUTRAL HEARING OFFICER.

At the November 12, 2010 hearing of the FPPC, the FPPC allowed Respondent and Respondent's attorney to speak to the question of whether the decision should be entered based on the default. However, the FPPC abused its discretion in deciding the matter based on default by considering ***and prejudging*** the merits of the case without providing Respondent the

opportunity to present her case in the formal atmosphere and conduct of an administrative hearing before an administrative law judge as neutral hearing officer.

Prior to hearing from the Respondent's attorney and Respondent, the FPPC asked it's Chief of Enforcement counsel, Gary S. Winuk, to state the case against Respondent. Mr. Winuk proceeded to make an argumentative presentation of the merits of the case against Respondent. Respondent's attorney stated that it was inappropriate to argue the merits of the case at that place and time as it was a default item on the FPPC's meeting agenda and not a hearing and that Respondent was requesting that the agency exercise its discretion before a proposed decision was issued to grant an administrative hearing to Respondent.

Instead, the FPPC did not limit its discussion to the good cause for granting a hearing and conducted a haphazard inquiry into the merits of Respondent's case thus prejudging the outcome before the case could be presented to an administrative law judge as a neutral hearing officer. The Commissioners were not acting as neutral hearing officers as several stated that if they were to grant a hearing that their own counsel's work on the default documents would have been "wasted." The FPPC thus decided the question not on basis of the good cause of Respondent's default but by considering the so-called "wasted effort" that would be caused to the enforcement division by not issuing the default decision. This shows the lack of fair play and neutrality the FPPC has as a body in considering such matters when the enforcement division is not seen as a separate body but as the FPPC's own attorneys. Thus the FPPC was acting as both prosecutor and jury by the commissioners' failing to conduct themselves in a neutral manner to consider the question of Respondent's request and giving preferential and prejudicial concern to the enforcement division.

Additionally, using circular reasoning that prejudged the outcome of a possible administrative hearing, several FPPC Commissioners stated that they did not want to grant an administrative hearing because they were convinced that Respondent could do no better at an administrative hearing than the decision the FPPC was then making based on the default. Since under the proposed default decision Respondent was being fined at the full amount of five thousand dollars ($5,000.00) for the single count, there was no reasonable basis to believe that Respondent, if given the opportunity to present her side of the story to a neutral hearing officer, would not have been able to achieve at least some reduction of the full amount of the fine, if for no other reason than for establishing the fact of the mitigating factors that the enforcement division were ignoring in its request for the full amount of the fine.

The FPPC's position, that a relatively brief and informal presentation at a public meeting on a consent calendar imposing a decision based on a default equates to a full and fair hearing before an impartial hearing officer who is able to hear testimony and receive evidence in an orderly fashion, is a prejudicial abuse of its discretion to grant a fair hearing. The FPPC prejudged the possible evidence without giving Respondent the requested fair hearing where she could present her evidence according to rules of procedure and evidence.

While the Respondent is thankful that the FPPC allowed her attorney and herself to speak to the Commission at its November 2, 2010, meeting, that presentation was not a fair hearing and the Commission did not give the Respondent a fair hearing of her entire case under any meaning of that term. Respondent's attorney told the Commission that he came to request that the Commission not enter a default and instead to grant a fair hearing by allowing the Respondent to file her Notice of Defense. The Commission then allowed the enforcement division's counsel to claim that there would be no point to a hearing because the Respondent was

guilty. The Commission agreed, thus prejudicing Respondent without a fair hearing and imposing the full amount of possible fines.

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

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

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

However, the Commissioners stated that if they were to allow Respondent to appear at their FPPC meeting and request that the default decision not be made and request instead that a hearing be granted, then any other respondent could come to their meetings and request the same thing. This shows an abuse of discretion by the Commission by deliberately adopting a policy of refusing to exercise its discretion for fear that others would also come before the Commission asking it to exercise its discretion under Section 11520(b) or 11520(c). The Commissioners

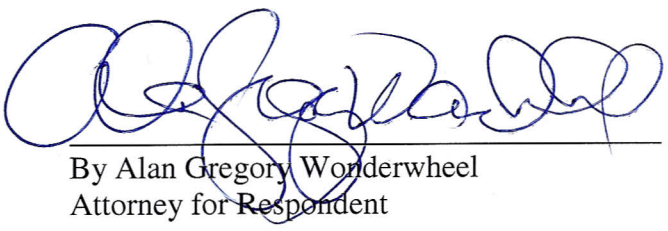
stated that they did not want to establish "a precedent" of allowing default proceedings to be terminated and a hearing granted instead because such a precedent would open the floodgates of requests from other respondents both with and without attorneys. The Commission clearly stated that they do not acknowledge the validity of granting hearings after a default thus taking a prejudicial position on the implementation of Section 11520..

By its clear and plain language, Section 11520 provides the avenue for defaulting respondents to request that a hearing be granted after a default. Yet by their own argument, the Commission does not believe that ever granting a hearing at the default stage is warranted other wise others would come to the Commission asking for the same relief. This is the classic example of abuse of discretion by refusing to exercise the discretion.

III. CONCLUSION

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

Dated: November 19, 2010



By Alan Gregory Wonderwheel
Attorney for Respondent

DECLARATION OF ALAN GREGORY WONDERWHEEL

I, ALAN GREGORY WONDERWHEEL, declare as follows:

1. I am an attorney at law duly admitted to practice, and I am the attorney for Respondent ADRIENNE LAUBY. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. I am competent to testify, and if called upon to testify, could and would testify as set forth herein. I make this declaration in support of Respondent's Motion to Set Aside the Default proceedings.

2. This FPPC proceeding arises from the actions of Respondent related to the election campaign of City of Cotati Council Member John Guardino in the election of November 7, 2006, and the FPPC's investigation alleging that Respondent's actions violated the Political Reform Act (the Act) found in Government Code Section 81000 et seq..

3. In the conduct of its proceeding the FPPC issued a Probable Cause Order resulting in an Allegation that required a timely response by Respondent executing a Notice of Defense to prevent a default.

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

5. I am a sole practitioner attorney who is representing Respondent on a pro bono basis and through my own mistake or neglect I have failed to properly manage this case and to calendar the events needed to return the Notice of Defense in a timely manner. The notice from the FPPC was put on a stack of papers and buried and unfortunately forgotten. I was not in

adequate communication with my client and the Respondent who was not informed of the deadline for filing the Notice of Defense so the Respondent did not know to inquire about it.

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

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

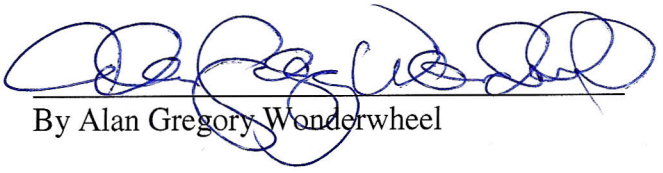
8. I attended the FPPC meeting and requested orally and in a written motion that pursuant to Government Code Section 11520(b) the Commission terminate the default proceeding and grant a hearing by allowing Respondent to file the Notice of Defense.

9 The FPPC denied the request to grant a hearing before it issued it decision based on the default and instead issued its decision of default as requested by its enforcement division.

10. The FPPC Commissioners stated that they believed if they granted Respondent's request that other defaulting respondents could and would come with similar request to grant hearings after default and that they did not want to establish "a precedent" of doing this.

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

Executed this 19th day of November, 2010 at Sacramento, California.



By Alan Gregory Wonderwheel

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of	) NOTICE OF DEFENSE
	) (Pursuant to Gov. Code § 11506)
ADRIENNE LAUBY,	)
	) FPPC Case No. 10/116
Respondent(s).	)
	)
	)
	)

Adrienne Lauby, a Respondent named in the above entitled proceeding, hereby acknowledges receipt of the Accusation, a copy of the Statement to Respondent, a copy of Government Code Sections 11506, 11507, 11507.3, 11507.5, 11507.6, 11507.7 and 11508, and two copies of a *NOTICE OF DEFENSE*.

Pursuant to Government Code Section 11506, subdivision (a), you may file this *NOTICE OF DEFENSE* requesting a hearing on the grounds listed below. Failure to file this *NOTICE OF DEFENSE* shall constitute a waiver of your right to a hearing. If you waive your right to a hearing, you may file a statement of mitigation by separate letter that will be considered by the Commission in assessing any penalties for the violations alleged in the Accusation.

If you wish to file a *NOTICE OF DEFENSE*, please check **all** applicable grounds for the *NOTICE OF DEFENSE*, complete the remainder of the form, and mail to the Commission within fifteen (15) days of receipt of the Accusation.

GROUNDS FOR NOTICE OF DEFENSE

☑ 1) I request a hearing;

☑ 2) I object to the Accusation upon the ground that it does not state acts or omissions upon which the agency may proceed;

☐ 3) I object to the form of the Accusation on the ground that it is so indefinite or uncertain that I cannot identify the transaction that is the subject of the Accusation or prepare my defense;

☐ 4) I admit the Accusation in whole or in part (check box "a" or "b");

☐ a) I admit the Accusation in whole.

☑ b) I admit the Accusation in part as indicated below:

Admit paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 24
Deny all other paragraphs.

☑ 5) I wish to present new matter by way of defense;

☐ 6) I object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation of the Fair Political Practices Commission would result in a material violation of another regulation enacted by another department affecting substantive rights.

Dated: 11-11-10

/S/
ADRIENNE LAUBY

Adrienne Lauby
Print Name

7 Kingston Way
Mailing Address

Cotati CA 94931
City, State, Zip

FPPC No.: 10/116

PROOF OF SERVICE

I, the undersigned, declare that I am and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action; I am a citizen of the United States of America; I reside in Sonoma County, California; and my business address is 111 Santa Rosa Ave. Suite 406, Santa Rosa CA 95404.

On the dated indicated below, I served the foregoing/attached:

RESPONDENT ADRIENNE LAUBY'S MOTION TO VACATE DECISON AND TO ALLOW RESPONDENT TO FILE A NOTICE OF DEFENSE; POINTS AND AUTHORITIES IN SUPPORT OF MOTION; and DECLARATION OF ALAN GREGORY WONDERWHEEL,

X By placing a true copy thereof enclosed in a sealed envelope, with the postage thereon fully prepaid, in the United States mail, in a mailbox regularly maintained by the United States Postal Service, at Sacramento, California, addressed as set forth to the persons named below.

_____ By facsimile telecopier transmission of a true copy thereof to the person named below at the telephone number as set forth below.

X By personally delivering a true copy thereof to the person named below, or their agent for service, at the address as set forth below.

_____ By causing a true copy thereof to be delivered to the person named below at the address as set forth by and/or through the services of :

_____ Federal Express

____ United States Express Mail.

- Service to:
- Fair Political Practices Commission
  428 J Street, Suite 800
  Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on 11/19, 2010, at Sacramento, California.

Alan Gregory Wonderwheel
Attorney at Law

GARY S. WINUK
Chief of Enforcement
BRIDGETTE CASTILLO
Commission Counsel
FAIR POLITICAL PRACTICES COMMISSION
428 J Street, Suite 620
Sacramento, CA 95814
Telephone: (916) 322-5660
Facsimile: (916) 322-1932

Attorneys for Complainant

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of ADRIENNE LAUBY, Respondent.	FPPC No.: 10/116 DEFAULT DECISION AND ORDER (Government Code Sections 11506 and 11520)

Complainant Roman G. Porter, Executive Director of the Fair Political Practices Commission, hereby submits this Default Decision and Order for consideration by the Fair Political Practices Commission at its next regularly scheduled meeting.

Pursuant to the California Administrative Procedure Act,[1] Respondent Adrienne Lauby ("Respondent") has been served with all of the documents necessary to conduct an administrative hearing regarding the above-captioned matter, including the following:

1. An Order Finding Probable Cause;
2. An Accusation;
3. A Notice of Defense (Two Copies);
4. A Statement to Respondent; and,
5. Copies of Sections 11506, 11507.5, 11507.6 and 11507.7 of the Government Code.

[1] The California Administrative Procedure Act, which governs administrative adjudications, is contained in sections 11370 through 11529 of the Government Code.

Government Code section 11506 provides that failure of a respondent to file a Notice of Defense within fifteen days after being served with an Accusation shall constitute a waiver of respondent's right to a hearing on the merits of the Accusation. The Statement to Respondent, served on Respondent, explicitly stated that a Notice of Defense must be filed in order to request a hearing. Respondent failed to file a Notice of Defense within fifteen days of being served with an Accusation.

Government Code Section 11520 provides that, if the respondent fails to file a Notice of Defense, the Commission may take action, by way of a default, based upon the respondent's express admissions or upon other evidence, and that affidavits may be used as evidence without any notice to the respondent.

Respondent Adrienne Lauby violated the Political Reform Act as described in Exhibit 1, which are attached hereto and incorporated by reference as though fully set forth herein. Exhibit 1 is a true and accurate summary of the law and evidence in this matter. This Default Decision and Order is submitted to the Commission to obtain a final disposition of this matter.

Dated: 10/29/10

Roman G. Porter
Executive Director
Fair Political Practices Commission

ORDER

The Commission issues this Default Decision and Order and imposes an administrative penalty of $4,500 (Four Thousand Five Hundred Dollars) upon Respondent Adrienne Lauby, payable to the "General Fund of the State of California."

IT IS SO ORDERED, effective upon execution below by the Chairman of the Fair Political Practices Commission at Sacramento, California.

Dated: Nov 15, 2010

Dan Schnur, Chairman
Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

At all relevant times, Respondent Adrienne Lauby ("Respondent") was a campaign volunteer in Cotati City Council Member John Guardino's November 7, 2006 campaign. John Guardino was a candidate for Cotati City Council in the November 7, 2006 election. The controlled committee for John Guardino's November 7, 2006 campaign was Friends of John Guardino ("Committee"). In this matter, Respondent was given $300 in cash by another volunteer of the Committee and asked to make a contribution in this amount in her name. On or about September 4, 2006, Respondent contributed this $300 to the Committee. Respondent failed to disclose that the money used to pay for this contribution had been received from another person.

This matter arose out of a pro-active investigation by the Fair Political Practices Commission ("Commission"). This matter relates to Commission case numbers 09/739, 09/774, 10/115, 10/117, and 10/505.

For the purposes of this Default, Decision and Order, Respondent's violation of the Political Reform Act (the "Act")[1] is stated as follows:

COUNT 1: Respondent Adrienne Lauby, acting as an agent or intermediary, made a contribution on behalf of another person, such that the identity of the donor was not reported, in violation of sections 84301 and 84302 of the Government Code.

PROCEDURAL HISTORY

When the Fair Political Practices Commission (the "Commission") determines that there is probable cause for believing that the Act has been violated, it may hold a hearing to determine if a violation has occurred. (Section 83116.) Notice of the hearing, and the hearing itself, must be conducted in accordance with the Administrative Procedure Act (the "APA").[2] (Section 83116.) A hearing to determine whether the Act has been violated is initiated by the filing of an accusation, which shall be a concise written statement of the charges specifying the statutes and rules which the respondent is alleged to have violated. (Section 11503.)

Included among the rights afforded a respondent under the APA, is the right to file the Notice of Defense with the Commission within 15 days after service of the accusation, by which the respondent may (1) request a hearing, (2) object to the accusation's form or substance or to the adverse effects of complying with the accusation, (3) admit the accusation in whole or in part, or (4) present new matter by way of a defense. (Section 11506, subd. (a)(1)-(6).)

[1] The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission 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.

[2] The Administrative Procedure Act is contained in Government Code Sections 11370 through 11529.

The APA provides that a respondent's failure to file a Notice of Defense within 15 days after service of an accusation constitutes a waiver of the respondent's right to a hearing. (Section 11506, subd. (c).) Moreover, when a respondent fails to file a Notice of Defense, the Commission may take action based on the respondent's express admissions or upon other evidence, and affidavits may be used as evidence without any notice to the respondent. (Section 11520, subd. (a).)

A. Initiation of the Administrative Action

Section 91000.5 provides that "[t]he service of the probable cause hearing notice, as required by Section 83115.5, upon the person alleged to have violated this title shall constitute the commencement of the administrative action." (Section 91000.5, subd. (a).) Section 83115.5 provides in pertinent part:

> No finding of probable cause to believe this title has been violated shall be made by the Commission unless, at least 21 days prior to the Commission's consideration of the alleged violation, the person alleged to have violated this title is notified of the violation by service of process or registered mail with return receipt requested .... Notice to the alleged violator shall be deemed made on the date of service, the date the registered mail receipt is signed, or if the registered mail receipt is not signed, the date returned by the post office.

Section 91000.5 provides that no administrative action pursuant to Chapter 3 of the Act, alleging a violation of any of the provisions of the Act, shall be commenced more than five years after the date on which the violation occurred. In accordance with Sections 83115.5 and 91000.5, the Enforcement Division initiated the administrative action against Respondent in this matter by serving her with a Report in Support of a Finding of Probable Cause (the "Probable Cause Report") on July 12, 2010. (See Certification of Records ("Certification") filed herewith, Exhibit A, and incorporated herein by reference.)[3] The Probable Cause Report was served by certified mail. (See Certification, Exhibit A - 1.) Therefore, the administrative action commenced on July 12, 2010, the date Respondent was served the Probable Cause Report, and the five year statute of limitations was effectively tolled on this date. (Sections 83115.5; 91000.5.)

As required by Section 83115.5, the packet served on Respondent contained the cover letter to the Probable Cause Report, advising that Respondent had 21 days in which to request a probable cause conference and/or to file a written response to the Probable Cause Report. (See Certification, Exhibit A - 2.) Respondent neither requested a probable cause conference nor submitted a written response to the Probable Cause Report.

[3] On June 15, 2010, the Enforcement Division was informed that the Respondent had retained counsel. All documents herein were served on the Respondent through her attorney.

B. Ex Parte Request for a Finding of Probable Cause

Since Respondent failed to request a probable cause conference or submit a written response to the Probable Cause Report by the statutory deadline, the Enforcement Division submitted an Ex Parte Request for a Finding of Probable Cause and an Order that an Accusation be Prepared and Served to Executive Director Roman G. Porter. (See Certification, Exhibit A - 3.) Respondent was sent copies of these documents via U.S. Mail.

On August 11, 2010, Executive Director Roman G. Porter issued an Order Finding Probable Cause. (Certification, Exhibit A - 4.)

C. The Issuance and Service of the Accusation

Under the Act, if the Executive Director makes a finding of probable cause, he or she must prepare an accusation pursuant to Section 11503 of the APA, and have it served on the subject of the probable cause finding. (Regulation 18361.4, subd. (e).) Section 11503 provides:

> A hearing to determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned shall be initiated by filing an accusation. The accusation shall be a written statement of charges which shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules. The accusation shall be verified unless made by a public officer acting in his official capacity or by an employee of the agency before which the proceeding is to be held. The verification may be on information and belief.

Section 11505, subdivision (a) requires that, upon the filing of the accusation, the agency shall: 1) serve a copy thereof on the respondent as provided in Section 11505, subdivision (c); 2) include a post card or other form entitled Notice of Defense which, when signed by or on behalf of the respondent and returned to the agency, will acknowledge service of the accusation and constitute a notice of defense under Section 11506; 3) include (i) a statement that respondent may request a hearing by filing a notice of defense as provided in Section 11506 within 15 days after service upon the respondent of the accusation, and that failure to do so will constitute a waiver of the respondent's right to a hearing, and (ii) copies of Sections 11507.5, 11507.6, and 11507.7.

Section 11505, subdivision (b) set forth the language required in the accompanying statement to the respondent.

Section 11505, subdivision (c) provides that the Accusation and accompanying information may be sent to the respondent by any means selected by the agency, but that no order adversely affecting the rights of the respondent shall be made by the agency in any case unless the respondent has been served personally or by registered mail as set forth in Section 11505.

On August 11, 2010, the Executive Director issued an Accusation against the Respondent in this matter. In accordance with Section 11505, the Accusation and accompanying information, consisting of a Statement to Respondent, two copies of a Notice of Defense Form, copies of Government Code Sections 11506 through 11508, were personally served on Respondent through her attorney on August 30, 2010. (See Certification, Exhibit A - 5.)

Along with the Accusation, the Enforcement Division personally served Respondent with a "Statement to Respondent" which notified her that she could request a hearing on the merits and warned that, unless a Notice of Defense was filed within fifteen days of service of the Accusation, she would be deemed to have waived the right to a hearing. Respondent did not file a Notice of Defense within the statutory time period.

As a result, on October 19, 2010, Commission Counsel Bridgette Castillo sent a letter to Respondent advising that this matter would be submitted for a Default Decision and Order at the Commission's public meeting scheduled for November 12, 2010. A copy of the Default Decision and Order, and this accompanying Exhibit 1 with attachments, was included with the letter. (See Certification, Exhibit A - 6.)

SUMMARY OF THE LAW

An express purpose of the Act, as set forth in Section 81002, subdivision (a), is to ensure that receipts and expenditures in election campaigns are fully and truthfully disclosed, so that voters may be fully informed, and improper practices may be inhibited. The Act, therefore, establishes a campaign reporting system designed to accomplish this purpose of disclosure.

Section 81002, subdivision (a) of the Act provides that "receipts and expenditures in election campaigns shall be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited." Timely and truthful disclosure of the source of campaign contributions is an essential part of the Act's mandate.

Section 84301 provides that no contribution shall be made by any person in a name other than the name by which such person is identified for legal purposes. Section 84302 provides that no person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing both the name of the intermediary and the contributor. (Section 84302; regulation 18432.5.) Regulation 18432.5 states that a person is an intermediary for a contribution if the recipient of the contribution "would consider the person to be the contributor without the disclosure of the identity of the true source of the contribution."

SUMMARY OF THE FACTS

Michelle Berman, a volunteer for the Committee, received a $1,000 cash contribution for the Committee from George Barich. At all relevant times, a City of Cotati local ordinance

imposed a $350 contribution limit on campaign contributions made to candidates for elected office. Ms. Berman divided the $1,000 cash contribution between several intermediaries. Respondent was one of the intermediaries.

Respondent was given $300 cash of the $1,000 cash contribution and asked by Ms. Berman to use this money to make a contribution to the Committee in her own name. Respondent made a $300 contribution in the form of a personal check to the Committee in her name without disclosing that the money had been received from another source. Respondent did not report either Michelle Berman or George Barich as the donor of the contribution to the Committee. A contribution of $300 was reported, on a campaign contribution ledger maintained by the Committee, as having been received on September 4, 2006, from Respondent.

The Committee later filed an amendment to the above mentioned statement covering the period of August 11, 2006, through September 30, 2006, which indicates that Mr. Barich was the true source of the $1,000 contribution received on September 4, 2006. This amendment named the Respondent as an intermediary.

Respondent, acting as an agent or intermediary, made a contribution on behalf of another person, such that the identity of the donor was not reported, in violation of Sections 84301 and 84302.

CONCLUSION

This matter consists of one count of violating the Act, which carries a maximum administrative penalty of five thousand dollars ($5,000) per count.

In determining the appropriate penalty for a particular violation of the Act, the Enforcement Division considers the typical treatment of a violation in the overall statutory scheme of the Act, with an emphasis on serving the purposes and intent of the Act. Additionally, the Enforcement Division considers the facts and circumstances of the violation in context of the factors set forth in Regulation 18361.5, subdivision (d)(1)-(6): the seriousness of the violations; the presence or lack of intent to deceive the voting public; whether the violation was deliberate, negligent, or inadvertent; whether the Respondent demonstrated good faith in consulting with Commission staff; and whether there was a pattern of violations.

Campaign money laundering is one of the most serious violations of the Act, as it denies the public of information about the true source of a candidate's financial support. Therefore, the typical administrative penalty in a campaign laundering case has historically been at or near the maximum penalty per violation, depending on the circumstances of the violation.

Aggravating Factors

The City of Cotati campaign contribution limit is $350. Respondent intentionally violated the Act by concealing from the public knowledge of the true source of contribution, and helped willfully violate local campaign contribution limits.

Mitigating Factors

None.

Penalty

Therefore, based on the particular facts and circumstances of this matter, an administrative penalty of Four Thousand Five Hundred Dollars ($4,500) is appropriate.

MEMORANDUM

To: Chairman Schnur, Commissioners Garrett, Hodson, Montgomery & Rotunda

From: Gary S. Winuk, Chief of Enforcement

Subject: **Response to Comment Letter from Olson, Hagel & Fishburn LLP regarding Agenda Items 4 and 5**

Date: January 26, 2011

On January 24, 2011, Deborah Caplan and Richard Rios of Olson, Hagel & Fishburn (Respondents' attorneys) sent a comment letter to the Commission asserting they are now the attorneys of record for Respondents Michelle Berman and Adrianne Lauby for the Motions to Vacate Default Decisions and Order (Motions to Vacate) that are before the Commission at the January 28, 2011 Commission hearing. Rather than file a Amended Motions to Vacate, Respondents' attorneys chose to simply provide a comment letter. Nonetheless, the Enforcement Division provides the following responses to the points raised in their comment letter:

Response 1: Superior Court Action and Staff's Position on Motion

Respondents completely mischaracterize the Enforcement Division position with regard to both the Superior Court action and the Motion to Vacate. The Enforcement Division is filing a demurrer to the Respondent's Superior Court action because it was filed under an inapplicable Government Code section and also because the Respondents had not yet exhausted their administrative remedies, i.e. not heard their Motion to Vacate before the Commission.

Respondents accuse the Enforcement Division of stating in Superior Court that remedies were still available to Respondents administratively, but then arguing to the Commission that the issue is already resolved. This is, at best, a mischaracterization of the Enforcement Division's position.

Our position to the Commission with regard to the Motions is that it is properly filed and should be given full consideration by the Commission, but the Division's **recommendation** is that no new facts have emerged to warrant the granting of the Motions.

As the Commission is aware, Respondents' improperly attempted to file the Motion to Vacate before the Commission even entered a Default Decision at the November hearing. Despite this, the Commission generously considered the points made by Respondents in making its decision about whether or not to enter into the Default. The present Motions should be considered on their merits, but it is once again the Division's recommendation that it be denied, not that the remedy is unavailable.

Response 2: Staff Did Not Respond to Mr. Wonderwheel's Settlement Offer and Mitigation

Respondents' contention that the Enforcement Division staff did not respond to Respondents' settlement offer and mitigation is completely false. The Enforcement Division made settlement offers regarding the cases. Mr. Wonderwheel, the other attorney representing the Respondents, made a counter-offer to settle the case. The Enforcement Division rejected the counter-offer presented by Respondents telephonically shortly after it was received because the offer presented was far below the settlement range identified by the Enforcement Division.

Additionally, the Enforcement Division considered the mitigation as presented by Respondents, but did not believe it to warrant a significant reduction in the proposed penalty. The violations committed by Respondents, campaign money laundering, is one of, if not the most serious violations of the Act and were done deliberately by Respondents to circumvent the purpose of the Act and deceive the public. In this case, even if it is true that Respondents cooperated with the investigation, it does not necessarily serve as a mitigating factor to this type of violation.

Response 3: Notice of Default Was Only Served on Counsel and Service Was Deficient

Respondent criticizes the Enforcement Division for only serving Respondents' attorney with the Notice of Defense and Default Notice. This criticism is inappropriate, however, as California State Bar Rules of Conduct require that if a party is represented by counsel, opposing counsel may not contact them directly, but rather must communicate through the other party's attorney. To imply we should have done otherwise suggests we should have violated State legal ethics requirements.

Respondent further criticizes the Enforcement Division by stating that the service of the Default notice was somehow deficient, citing Government Code section 11505. However, Government Code section 11505 only requires that Accusations be provided to Respondents through personal service. It makes no mention whatsoever of service of defaults. The Enforcement Division personally served the Accusation on Respondents, as was acknowledged in the Motion to Vacate prepared by Mr. Wonderwheel, who states that "The notice from the FPPC was put on a stack of papers and buried and unfortunately forgotten." To suggest now that the Notice was insufficient

is disingenuous at best, as even Respondents concede they were served with the Accusation. Further, since Respondents and their counsel were present at the default hearing in November, it can be conclusively presumed that they received notice of the proposed default.

Response 4: Refusal to Allow Respondents a Hearing Would Constitute Abuse of Discretion

Respondents contend that refusal to grant the Motions to Vacate would serve as an abuse of discretion by the Commission. However, Government Code Section 11520 specifically provides that vacating a default decision is an act that is at the discretion of the Commission, even upon a showing of good cause. This recognizes that Administrative proceedings are designed to be less formal than civil or criminal proceedings. To make the argument that the Commission has the discretion to deny a request for a new hearing, but that any use of this discretion is an abuse of it per se flies in the face of the plain meaning of the statute.

Response 5: November Meeting Was Legally Inadequate

Respondents contend that the November hearing on the default items were legally inadequate and that Respondents were "unaware of the nature of the proceeding" and that "nothing in the notice for that meeting would have alerted them to the possibility that they were to be prepared to submit any and all mitigating or exculpatory evidence."

This statement demonstrates a lack of review of the Administrative Procedures Act on the part of Respondents. Government Code Section 11520, which deals specifically with defaults, states that the agency may take action, if the respondent fails to file a notice of defense, based upon the respondent's express admissions or upon other evidence, or upon written affidavit. This gives the Commission discretion to consider any "other evidence" it wishes to make a default determination.

A reading of the default statute in the Administrative Procedures Act in preparation for the November hearing, or for the comments to the Motion to Vacate contained in the letter at issue here would plainly inform Respondents and their counsel that a default item considered by the Commission allows for the receipt of "other evidence," if permitted by the Commission.

At the November hearing, the Commission very generously allowed Respondents the ability to make any statements they wished and present any documents they wished in support of their arguments. Respondents' attorney brought numerous documents to the hearing, which were received by the Commission, completely contradicting their argument that they did not know the nature of the hearing and were unprepared to make their presentations. Additionally, Respondents had well over a year to provide the FPPC any exculpatory information in their

possession, but failed to do so. Since the Respondents make the point in their letter that their "full cooperation" should be considered as a mitigating factor, the fact that they allegedly have further information in their possession indicates that this statement may be less than genuine and should not be considered a fact in mitigation.

Response 6: Petitioners Were Not Afforded the Act's Procedural Protections

The contention that the Respondents were not afforded the Act's procedural protections is false. They were afforded all the protections of the Act but did not avail themselves of it. They did not request a probable cause hearing, and did not timely file a Notice of Defense but were presented with properly served notices for each. Further, they did not provide any exculpatory or mitigating evidence at the November hearing, which was conducted fully in accordance with the Administrative Procedures Act, despite being personally present and given an open microphone to make any points about the case they wished.

Administrative law is designed to provide Respondents the ability to have access to a fair, but expedited and less formal resolution process. Respondents received full access to this process. However, they have provided no facts, either in writing or orally, either in person or through the now three different attorneys who have served as their counsel, as to any exculpatory or mitigating facts that would warrant a hearing before an administrative law judge at this stage.

Ultimately, an administrative hearing would only provide a recommendation to the Commission which the Commission could then accept or reject or accept new evidence to consider a change in recommendation. Respondents continue to provide only assertions that they have exculpatory or mitigating evidence while continuously not providing it to the Commission despite many opportunities to do so.

Response 7: Fines Are Disproportionately High

Respondent contends that the fines imposed on Respondents were disproportionately high. They cite two recent examples to allegedly demonstrate this contention. However, their use of these examples is grossly misleading.

In FPPC Case No. 08/074 (Serco Management Services) the Commission did indeed accept a stipulated agreement for $3,000 per count for violations of Section 84301. What Respondents fail to mention, however, is that in that case Serco Management Services self reported the violations, without which the FPPC would likely never have become aware of them, and took action against their own employee who had committed the violations without their knowledge. This is very different from the circumstances at issue here, where Respondents intentionally violated the Act and did not voluntarily report their violations.

Respondents also use FPPC Case No. 99/783 (Flaherty) as another example because of the $2,000 penalty imposed by the Commission in 2003 for a default violation of Section 84301. We completely agree that this case is a good example to help guide the Commission's actions in this case as the Respondents' attorneys fail to mention that in that case, due to the date of the offense, the maximum fine the FPPC was authorized to impose was $2,000 a count. Thus, in that case, as here with respect to Respondent Berman, the Commission recognized that because this is the most serious type of violation of the Act, a maximum fine should be imposed. Respondent Lauby, in fact, received a less than maximum fine of $4,500.

More appropriate are recent examples such as FPPC Case No. 09/694 (Anderson), which imposed a **stipulated** fine of $4,000 per count for money laundering violations, and FPPC Case No. 07/467 (Copeland) which imposed a **default** penalty of $5000 for a money laundering violation. Both of these case have been approved by the Commission within the past 18 months.

Conclusion

The Respondents attorneys have made a number of misleading, false and unconvincing assertions in their letter that should be rejected out of hand. The Enforcement Division continues to recommend denial of the Motions to Vacate.