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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of: CHRIS NORBY, NORBY FOR SUPERVISOR, and BETTY PRESLEY, Respondents.	OAH No. 2011050957 FPPC No. 09/773 **THE ENFORCEMENT DIVISION'S REPLY TO RESPONDENTS' RESPONSE TO THE ENFORCEMENT DIVISION'S OPENING BRIEF RE: PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGE RALPH DASH**

I. INTRODUCTION

Pursuant to California Code of Regulations, title 2, section 18361.9, the Enforcement Division submitted an opening brief regarding the proposed decision of Administrative Law Judge ("ALJ") Ralph Dash (of the Los Angeles Office of Administrative Hearings) in this case.

Thereafter, Respondents submitted a brief in response to the Enforcement Division's opening brief. However, Respondents' brief is inaccurate and misleading in several respects. Additionally, Respondents' brief mischaracterizes the Enforcement Division's recommended procedural course of action. In the process, the Legal Division incorrectly is depicted as a biased branch of the Enforcement Division, incapable of conducting an impartial audit of the record.

As discussed in more detail below, and for the reasons set forth in the Enforcement Division's opening brief, it is respectfully submitted that insofar as Respondent Chris Norby is concerned, the Commission should reject the proposed decision of the ALJ and decide this case upon the record.

II. DISCUSSION

The Enforcement Division and the Respondents are in agreement that the committee and treasurer should be dismissed because they do not appear to have been responsible for Respondent Chris Norby's actions. Accordingly, this brief only addresses the proposed decision insofar as Respondent Chris Norby is concerned. (Respondent Chris Norby hereafter is referred to as the Respondent.)

A. Respondent's brief is inaccurate and misleading in several respects.

1. A review of the record by the Commission and/or the Legal Division will *not* deprive Respondent of the ability to have the fact finder hear the oral testimony and assess the credibility of witnesses.

Respondent argues, "A decision on the written record alone, including the transcript, would also deprive Norby of the ability to have the fact finder *hear* the *oral* testimony and assess the credibility of witnesses, including himself." (Respondent's response brief, p. 12, ll. 26-28. Emphasis added.) This is disingenuous.

Ordinarily, a court reporter's transcript would constitute the record of an administrative hearing, but in this case, Respondent waived the court reporter and stipulated to an audio recording instead. After the hearing, for a small fee of $30, the Enforcement Division obtained a CD from the Office of Administrative Hearings. The CD contained the audio files for the entire hearing as well as a media player for easy playback on a computer. The audio record of the entire hearing is four hours in length and is of exceptional quality. The testimony of the witnesses can be heard as clearly as if the listener were in the hearing room. Also, the recording itself was time-stamped, and the exact time of day is continuously displayed by the media player during playback, making it easy for any interested parties to cite portions of the record by hour, minute, and second.

Accordingly, there is no merit to Respondent's contention, as stated above, that a review of the record would "deprive Norby of the ability to have the fact finder *hear* the *oral* testimony and assess the credibility of witnesses, including himself."

2. Respondent's counsel admits that his characterization of witness testimony from last year's hearing is based upon his recollection/notes and "should not be taken as verbatim excerpts from the transcript." On the other hand, the Enforcement

Division's characterization and quotation of witness testimony is based upon a careful review of the audio record, which was conducted for the sole purpose of ensuring the accuracy of the opening brief.

Respondent argues, "It should be noted that the briefs at this stage are prepared without the benefit of the transcript, which the FPPC has not requested yet. Characterizations of the testimony, therefore, are based on the best recollections and notes of counsel on both sides, and . . . should not be taken as verbatim excerpts from the transcript." (Respondent's response brief, p. 5, ll. 17-20.) This is inaccurate.

Respondent and his counsel may not have ordered a copy of the audio record, but the Enforcement Division did so, and no part of the Enforcement Division's opening brief was drafted without a careful review of the audio record for accuracy. Accordingly, each and every instance where Respondent disagrees with the Enforcement Division's summary of the evidence should be viewed with skepticism, and such disputes easily can be resolved by a simple review of the audio record of the hearing.[1]

3. Respondent's counsel implies that the Enforcement Division omitted relevant information from the opening brief, but the information in question actually is harmful to Respondent's case.

Respondent's counsel admits that his client did not spend many daytime hours at the Fullerton A Inn because his client was busy doing other things. This is undisputed. (Respondent's response brief, p. 7, ll. 10-19.) Respondent's counsel goes on to imply that most of his client's time was spent at the Fullerton A Inn in the evening, and he further implies that this should have been stated in the opening brief. (Respondent's response brief, p. 7, ll. 13-17.) However, Respondent spent only three nights at the inn (Respondent's response brief, p. 6, l. 20), and if reviewed, the audio record will reflect that Respondent spent the other nights at the home of one of his ex-wives. As Respondent put it, her place

[1] The audio record has not been provided to the Commission, yet, because the Government Code provides for a bifurcated process. If the Commission accepts the Enforcement Division's recommendation that the proposed decision of the ALJ should be rejected and decided upon the record, the next step would be to order a copy of the transcript, and the Commission would have 100 days from its receipt of the transcript to issue its final decision. (Gov. Code, § 11517, subd. (c)(2)(E)(iv).) In such case, it may be appropriate to treat the audio record as the transcript since this would address Respondent's concerns about the listener being able to hear the oral testimony to help assess the credibility of witnesses.

was so comfortable, he would fall asleep watching television. In other words, there is substantial evidence to show that Respondent spent very little time at the Fullerton A Inn, which is inconsistent with Respondent's claim that he conducted a homeless study there.

4. Respondent incorrectly claims that the Enforcement Division's case primarily relies upon the article from the Los Angeles Times.

Respondent argues that the Enforcement Division's case primarily relies upon the article that was published in the Los Angeles Times. (Respondent's response brief, p. 5, ll. 3-5.) This is not true. In addition to the article, there is a tremendous amount of evidence to support the charge that Respondent violated the personal use restrictions of the Political Reform Act. For example, a review of the record will reveal that:

- ❖ Respondent checked into the Fullerton A Inn the same day that his marriage ended.
- ❖ He was undergoing an "unfortunate personal situation" at the time (see Respondents' Brief for Administrative Hearing, relevant excerpt attached to the Enforcement Division's opening brief as Ex. B, p. 7, l. 14), and he admitted at the hearing that his living situation was "indeterminate."
- ❖ Although Respondent charged his campaign committee for one week of lodging at the Fullerton A Inn, he spent only three nights at the inn.
- ❖ That week, while he allegedly was conducting a homeless study at the inn, he actually was dining in other cities, working at his county supervisor job, and staying at the home of one of his ex-wives, where he would fall asleep watching television.
- ❖ Respondent admits that he took no active steps to prepare for his alleged homeless study.
- ❖ Seven months after his alleged homeless study, Respondent was caught by the Los Angeles Times. This prompted him to reimburse his committee, amend his campaign statements, and type, for the first time, five pages of notes about his alleged homeless study. Respondent testified that the typewritten notes were based upon his observations and handwritten notes that he had made earlier, but the alleged handwritten notes never were offered into evidence, and no explanation for their absence has been provided.
- ❖ Nothing was typed up or published about Respondent's alleged homeless study until after he was caught by the Los Angeles Times—more than seven months after his alleged study.
- ❖ Respondent admitted that he never made any recommendations to further pursue the issue of homelessness in his jurisdiction after his alleged homeless study.

All of these facts are in addition to the contents of the Los Angeles Times article—in which Respondent is quoted as admitting to the very violation with which he is charged in this case.

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5. It is inaccurate and misleading for Respondent to claim that Ms. Chai's home was available to him at the time he checked into the Fullerton A Inn.

Respondent contends that he did not need to stay at the Fullerton A Inn during the first week of August 2007 because one of his ex-wives, Charlotte Chai, had made her home available to him. Respondent and Ms. Chai divorced in approximately 2001. Evidence was introduced that in August 2007, Ms. Chai was on vacation in China. Respondent Norby had driven her to the airport—where she gave her house key and garage door opener to Respondent for house-sitting purposes. (See Proposed Decision, Ex. A to Enforcement Division's opening brief, p. 6, finding 9.) Respondent testified that during the week of his alleged homeless study, he spent only three nights at the Fullerton A Inn, and the rest of the nights he spent at Ms. Chai's house because it was more comfortable.

However, the record is devoid of an important fact. It never was established that Ms. Chai's home was available to Respondent Norby at the time he checked into the Fullerton A Inn on August 1, 2007, which is when he paid in advance for one week. The most likely sequence of events is that Respondent Norby did not drive Ms. Chai to the airport and receive her house key until some time *after* he checked in at the inn and paid in advance. This would be consistent with Respondent Norby's testimony that he spent only three nights at the inn, and the rest of the nights he slept at Ms. Chai's house because it was a much nicer place to stay.

The audio record has something to say about this that is not found in the ALJ's proposed decision.

On this subject, Respondent Norby testified *exactly* as follows (at 1:54 p.m. on the day of the hearing), "I, I, I think I, I drove them to the airport …the first day that I checked in. It was either that, I think it was that day, and so when I got back from the airport…well it, this was a long, long time ago, but I did stay there a couple of those nights I know at least." (Ellipses indicate pauses in testimony—not omission of text.)

Also, on this subject, Ms. Chai testified by telephone that she was traveling for the entire month of August 2007, but when she was questioned about what specific dates Respondent Norby would have stayed at her house, she testified that it was four years ago and she could barely remember.

Respondent argues that the above-described testimony of himself and Ms. Chai, as recounted by the Enforcement Division, was "quoted apparently from some counsel's memory in the Enforcement

Division's opening brief." (Respondent's response brief, p. 9, ll. 8-9.) This is not correct. The testimony was quoted directly from the audio record, and based upon the testimony, it is clear that Respondent and Ms. Chai could not recall exactly when Respondent drove Ms. Chai to the airport.

A plane ticket, passport, or the like could have cleared up this issue, but Respondent offered no such items into evidence. Such a failure to produce stronger evidence should not be dismissed lightly.

6. It is inaccurate and misleading for Respondent to claim that his marital home was a feasible place to stay at the time he checked into the Fullerton A Inn.

Respondent contends that his lodging expense had nothing to do with his marital difficulties, and he could have stayed at home that week. However, this is disingenuous.

In the Los Angeles Times article, Respondent refers to the term the "doghouse." He and Mrs. Norby did in fact get divorced, and their Marital Settlement Agreement reflects that they separated on the same day that he checked into the Fullerton A Inn (August 1, 2007, which is when he paid in advance for one week). It is beyond dispute that Respondent Norby was undergoing an "unfortunate personal situation" at the time. (See Respondents' Brief for Administrative Hearing, relevant excerpt attached to the Enforcement Division's opening brief as Ex. B, p. 7, l. 14.) Also, Respondent Norby admitted at the hearing that his living situation was "indeterminate."

Although Respondent personally signed the above-described Marital Settlement Agreement, he now claims that the date of separation in the document was not accurate. Such a denial merely shows that Respondent is willing to contradict himself, when necessary—which goes to a lack of credibility.

Also, Respondent relies heavily upon the portion of the Los Angeles Times article that states that his then-wife did not ask him to leave. However, the Marital Settlement Agreement reflects that Respondent is the one who filed for divorce—not his then-wife. This would suggest that Respondent's then-wife did not, in fact, want him to leave, but he no longer considered it feasible to live with her—which is why he checked into the Fullerton A Inn and later filed for divorce.

7. It is disingenuous for Respondent to claim that his then-wife was away on a four-day retreat during the week of his alleged homeless study.

Respondent claims that his then-wife was away on a four-day retreat when he checked into the Fullerton A Inn. (See Proposed Decision of ALJ, Ex. A to the Enforcement Division's opening brief, p.

6, finding 8. Also, see Respondent's response brief, p. 6, ll. 8-9.) Respondent relies upon this to contend that he could have stayed in his own home—since his then-wife was gone on a four-day retreat during the week of his alleged homeless study.

However, this is disingenuous. The audio record reflects that this four-day retreat started "a few days" before August 1, 2007—such that Respondent's then-wife would be returning around the same time that Respondent checked into the Fullerton A Inn. Specifically, the audio record reflects that on the day of the hearing, at 3:04 p.m., respondent testified as follows about his then-wife (with emphasis added): "She was actually out of the house. As I said, she was gone *before* August 1st, 2007. She was on this retreat. So if you're saying on January, July 31st did we have an argument or that day, uh, she, she was, *she was gone for a few days at the time that I went to the motel*." In other words, Respondent checked into the motel around the same time that his then-wife was scheduled to return from her retreat—so as not to be home when she returned. (A "few" is more than a "couple," and the retreat was only a four-day retreat.)

8. Respondent argues that the burden of proof should have been addressed in the Enforcement Division's opening brief, but this argument lacks merit.

Respondent suggests that the Enforcement Division improperly failed to address the burden of proof in this case. (Respondent's response brief, p. 4, ll. 6-27.) However, the proposed decision of the ALJ did an excellent job of stating that the Enforcement Division has the burden of proving its case by a preponderance of the evidence—which is another way of saying: more likely than not. (Proposed Decision, Ex. A to the Enforcement Division's opening brief, p. 9.)

Beginning on page 16 of its opening brief, the Enforcement Division listed its specific disputes with the proposed decision's statement of the law—and the burden of proof was not in dispute. Rather, the Enforcement Division takes issue with the proposed decision's inaccurate and incomplete findings of fact, which led to an erroneous conclusion by the ALJ.

Accordingly, Respondent's argument that the Enforcement Division should have spent more time discussing the burden of proof is misplaced. If the proposed decision contained an accurate and complete summary of facts, it would be clear that the Enforcement Division met its burden of proof by a preponderance of the evidence.

9. Essentially, Respondent argues that the Los Angeles Times article should be disbelieved in its entirety, but this argument lacks merit.

Respondent now denies the accuracy of the Los Angeles Times article, but at the hearing of this matter, he "did 'not remember' *if* he told the reporter that he 'was there [at the motel] for personal stay' as the article quoted him as saying." (Proposed Decision, Ex. A to the Enforcement Division's opening brief, p. 9, finding 12. Emphasis added.) Respondent either admitted his violation to the Los Angeles Times, or he did not. The Los Angeles Times says Respondent *did* make such an admission. Respondent says he cannot remember *if* he made such an admission—which is the same thing as saying that he *might* have made the admission. Accordingly, there is no reason to disbelieve that Respondent admitted to the Los Angeles Times that his stay at the Fullerton A Inn was for personal stay. Respondent admits it is possible, and the Los Angeles Times says that it did happen.

Primarily, the ALJ gave little weight to the Los Angeles Times article because he did a drive-by inspection of the Fullerton A Inn and determined that the reporter's characterization of the inn as a "bed and breakfast" was unfair. (See Proposed Decision, Ex. A to the Enforcement Division's opening brief, p. 6, fn. 6.) However, this fails to take into account that in the very next paragraph after referring to the inn as a "bed and breakfast," the reporter used a quote from Respondent Norby to describe the inn as a "resident motel" that charged "by the week." In any case, this one issue is not sufficient reason to disbelieve the *entire* article, especially since Respondent testified that he could not remember *if* he admitted his wrongdoing to the reporter—whereas the reporter recounted that Respondent *did* make such an admission.

As for the ALJ's drive-by inspection of the inn, this came up at the end of the hearing. The ALJ stated, with emphasis added:

> Alright, now, tomorrow, since we have this scheduled and I have the time, although we won't be taking any testimony and there will be no reporter, I'm going to do a *drive-by* of this, uh, Fullerton Inn or lodge. It's been called a couple different things, and that was just based on my concern about the description of it as a bed and breakfast in the LA Times article. . . . I'll do the, uh, view of the motel tomorrow. *I'm not going to go in and inspect rooms or anything like that. I'm just going to drive by and maybe drive around the neighborhood, um, but, uh, uh, I, I won't be interviewing or talking to anyone so there's no need for a reporter.*

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Considering the limited nature of the ALJ's inspection of the inn (drive-by only, no inspection of rooms "or anything like that," and no interviewing of anyone), there was insufficient basis for the ALJ to conclude that the Fullerton A Inn was a "home for transients." (See Proposed Decision, Ex. A to the Enforcement Division's opening brief, p. 6, fn. 6.) At most, the ALJ reasonably could have concluded that the Fullerton A Inn was a motel and not a bed and breakfast. To the extent that the ALJ went beyond the stated parameters of the drive-by inspection to make a specific finding that the inn was a "home for transients,"[2] it is important to note that the ALJ's inspection took place nearly four-and-a-half years after Respondent stayed at the inn, and there was a complete lack of foundation to establish that the inn was in the same condition, or had the same clientele, four-and-a-half years after Respondent stayed there.

In any case, Google Maps Street View shows that the inn is not nearly so bad as the ALJ describes. (See Google Maps Street View print-out attached hereto as Exhibit D and submitted pursuant to Cal. Code Regs., tit. 2, § 18361.9, subd. (b)(1)(E), as "Any other issue the Enforcement Division determines to be relevant.")

10. Respondent asserts that a review of the record would be improper because the ALJ's personal observation of Respondent's demeanor/credibility as a witness would be lost during the review process. This is a red herring.

Respondent asserts that review of the record would be improper because it would not be possible for the reviewer to observe the credibility of witnesses. (Respondent's response brief, p. 13, ll. 1-13.) Taken to an extreme, this argument would prevent agency review of a proposed decision in virtually every case (since it is rare for an administrative hearing to have no witnesses). Clearly, the California Legislature did not intend such a result. Otherwise, it would not have enacted Government Code section 11517, subdivision (c)(2)(E), which allows an agency to review, and if necessary, completely rewrite a proposed decision based upon a *written* transcript. Obviously, such a review cannot include personal observation of the demeanor of witnesses, which means that the issue is a red herring.

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[2] The ALJ simply could not have determined that the Fullerton A Inn was a "home for transients" without conducting interviews—something which the ALJ stated he was not going to do.

In any case, there is an audio record of the hearing, which would allow the reviewer to hear the testimony of witnesses. Also, two of the witnesses, Ms. Chai and Special Investigator Janet Seely, testified by telephone, so a reviewer would be in just as good of a position to evaluate the credibility of these witnesses as was the ALJ.

11. Respondent argues that prosecution of this case is unwarranted because the amount of his lodging expense was only $340. However, this argument overlooks Respondent's attempts to conceal his own wrongdoing as well as the public harm that arises from the wrongful nature of personal use violations.

Respondent contends that prosecution of this case shows a "remarkable lack of perspective" by the Enforcement Division because the amount of money involved is small. (Respondent's response brief, p. 13, ll. 20-24.) To a certain degree, this argument appears to have worked on the ALJ, but the Enforcement Division respectfully submits that the Commission should treat this as a serious violation for two reasons.

First, Respondent tried to conceal his wrongdoing. After the article was published in the Los Angeles Times, Respondent typed, for the first time, five pages of notes about his alleged homeless study to support stories that he caused to run in an email newsletter to his constituents and a local newspaper. Respondent testified that the typewritten notes were based upon his observations and handwritten notes that he had made earlier, but the alleged handwritten notes never were offered into evidence, and no explanation for their absence has been provided. The Enforcement Division respectfully submits that the handwritten notes never existed because Respondent's alleged homeless study was a sham. Rather than take responsibility for his actions, Respondent has taken steps to avoid prosecution.

Second, the public harm with respect to personal use violations is that they erode public confidence in our system of campaign contributions. In fact, *the restrictions on personal use are the only thing separating campaign contributions from bribery*. Without the restrictions on personal use, campaign contributions could be used for any purpose whatsoever. For this reason, violations involving personal use of campaign contributions are some of the most serious violations of the Political Reform Act, and even when a small amount is involved (such as $340), prosecution is warranted.

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12. Respondent argues that the time invested by the ALJ and the attorneys for the parties would be wasted if the proposed decision were rejected and rewritten by the Commission. This is not true.

Contrary to Respondent's brief, the time invested by the ALJ and the attorneys for the parties will not have been a waste if the Commission rejects and rewrites the proposed decision. The ALJ, the parties, and their attorneys worked together to create a record of the hearing. The ALJ ruled on objections of counsel, testimony of witnesses, and the admissibility of exhibits. The ALJ even personally questioned witnesses. All of this allowed for the creation of a record, which can now be reviewed by the Commission and/or the Legal Division.

B. Respondents' brief mischaracterizes the Enforcement Division's recommended procedural course of action. In the process, the Legal Division incorrectly is depicted as a biased branch of the Enforcement Division, incapable of conducting an impartial audit of the record.

Respondent argues that the Enforcement Division's recommended course of action is an attempt by staff to "retain control of the decision . . . by leaving the matter essentially in the hands of staff who have already recommended a decision against him." (Respondent's response brief, p. 2, ll. 19-22.)

This is incorrect. The Enforcement Division has pointed out that the Commission *may* delegate the Legal Division to review the record (including all briefs and exhibits as well as the transcript and/or audio CD of the hearing) and draft a revised decision to be considered by the Commission.

It is a mischaracterization for Respondent to claim that the Legal Division already has recommended a decision against him. The Legal Division is separate from the Enforcement Division—for good reason. Frequently, members of the Legal Division are required to carry out sensitive matters on behalf of the Commission, including, but not limited to, presiding *over* the Enforcement Division at probable cause conferences. Accordingly, the Legal Division is in the perfect position to act as an independent, objective fact finder to review this case in full and prepare a revised decision for the Commission's consideration.

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C. The Enforcement Division's recommended course of action is a straightforward procedure that is authorized and governed by Government Code section 11517, subdivision (c)(2)(E).

The Government Code contemplates that an agency's decision to reject a proposed decision ordinarily is made *before* the agency receives a copy of the transcript (or in this case, the audio CD). Essentially, the Government Code provides for a bifurcated process. If the Commission accepts the Enforcement Division's recommendation that the proposed decision of the ALJ should be rejected and decided upon the record, the next step would be to order a copy of the transcript, and the Commission would have 100 days from its receipt of the transcript to issue its final decision. (Gov. Code, § 11517, subd. (c)(2)(E)(iv).) In such case, it may be appropriate to treat the audio record as the transcript since this would address Respondent's concerns about the listener being able to hear oral testimony.

The Commission has discretion either to allow or not to allow additional evidence to be submitted by the parties. *If* the Commission allows additional evidence to be presented in the form of oral testimony, no Commission member may vote on the adoption of a revised decision unless that member heard the oral testimony—but again, the Commission is not required to allow additional oral testimony. The Commission could choose to allow only additional *written* evidence, or the Commission could choose not to allow any additional evidence on grounds that the parties were afforded a full opportunity to introduce evidence at the hearing. (See Gov. Code, § 11517, subds. (c)(2)(E) and (c)(2)(E)(ii).)

Testimony/evidence is distinct from argument. The parties must be afforded an opportunity to present either oral or written argument. (Gov. Code, § 11517, subd. (c)(2)(E)(ii).) This requirement could be satisfied by a briefing schedule that would allow the parties to cite portions of the transcript and/or audio record and argue the evidence. The briefs could be reviewed by the Legal Division in conjunction with the drafting of a revised decision for the Commission's consideration, and oral argument could be made before the Commission itself.

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III. CONCLUSION

For all of the reasons discussed above and in its opening brief, the Enforcement Division respectfully submits that:

(a) The proposed decision of the ALJ should be rejected, and this case should be decided upon the record (including the transcript and/or audio CD of the hearing); and

(b) Pursuant to Government Code section 83116.3 (which requires the Commission to state written reasons for rejecting a proposed decision), the Commission should execute/adopt a statement of reasons substantially in the form of the document attached hereto as Exhibit E.

If the Commission agrees with this course of action, the Enforcement Division is prepared to argue in favor of a penalty of at least $3,000.

Dated: _____

FAIR POLITICAL PRACTICES COMMISSION

By: _____
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