

Law Offices of

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LLP

January 24, 2011

Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

RE: Motions to Vacate Default Decisions and Orders
In the Matter of Michelle Berman (FPPC No. 10/115)
In the Matter of Adrienne Lauby (FPPC No. 10/116)

Dear Chairman Schnur and Commissioners:

We write on behalf of Michelle Berman and Adrienne Lauby in support of the Motions to Vacate the Commission's Default Orders filed by Gregory Wonderwheel in the above cases. We are now representing these respondents on a pro bono basis and, on December 15, 2010, we filed an action in Sacramento Superior Court to set aside the Commission's November 12, 2010 decision rejecting their request to accept their Notices of Defense and afford them an opportunity for an administrative hearing before a neutral decision-maker. We attach a copy of that Complaint.

The staff report submitted to the Commission appears to argue that since no new facts have been provided and the Commission already considered and decided this issue, no additional consideration is warranted. It is ironic that the staff has essentially argued just the opposite in the Sacramento Superior Court case. In that case, the Commission staff urged the court to dismiss the case because Ms. Berman and Ms. Lauby still had administrative remedies that they could pursue. Now that they are before you attempting to pursue such a remedy, staff asserts that the matter was resolved at the November meeting and nothing further is needed.

In fact, we view this as an opportunity for the Commission to correct the determination made at the November meeting, accept the Notices of Defense, and allow the matters to be considered by an administrative law judge.

As Mr. Wonderwheel has frankly admitted, the failure of these respondents to file Notices of Defense was caused solely by his mistake. Both respondents acted promptly to file Notices of Defense once they realized what had happened. Given that these cases were not even opened until June or July 2010, it is not as if there has been substantial delay in the prosecution of this matter and, in the course of the brief investigation, respondents were extremely cooperative. On July 11 and 12, 2010, Mr. Wonderwheel responded to staff proposals for a stipulated settlement with written counter-proposals that attempted to settle the case. Mr. Wonderwheel's July correspondence noted substantive concerns with the high amount of staff's

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proposed stipulated fines and expressed concern that staff had failed to consider any facts that tended to mitigate any potential violation, even though the Commission is required to consider such factors in determining an appropriate fine. Not only did the staff never respond (which mistakenly led Mr. Wonderwheel to believe that further negotiations and proceedings were contemplated), but the staff materials and the Default Order presented to the Commission at the November meeting failed to mention both the unanswered correspondence from Mr. Wonderwheel and the mitigation factors identified by him.

The Notices of Default were served on counsel on or around October 19, 2010. It is uncontroverted that the notices *only* went to counsel and that respondents had no actual notice of the deadline to file a Notice of Defense. It was not until the default proceedings were posted on the Commission's website on or about November 2, 2010 that respondents learned of the potential default for the first time and immediately contacted Commission staff (who told them nothing could be done because the matter had already been publicly noticed). We also believe that service did not comply with Government Code section 11505 which requires either personal service or service by registered mail.

The Commission's determination to pursue a Default Order under all of these circumstances contravenes the strong public policy in favor of resolving such actions on their merits. While we acknowledge that relief from a default is a matter of discretion, it is subject to reversal for abuse of that discretion and we believe that the Superior Court will agree that refusal to allow respondents a hearing would constitute an abuse of discretion in these cases.

The staff also appears to believe that the "hearing" undertaken by the Commission at the November meeting was a legally adequate substitute for an administrative hearing. It is not. First, respondents (and their counsel) were unaware that the Commission would hold a mini "hearing" on the merits of the case and were unprepared for any such hearing. 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 that could ultimately affect either the merits of the legal violations charged or the amount of the penalties imposed by the Commission. Nor do any regulations provide for such a hearing or otherwise alert the public to such a procedure.

More significantly, however, the "hearing" undertaken by the Commission at the November meeting is no substitute for an administrative hearing on the merits. Petitioners were afforded none of the Political Reform Act's procedural protections for administrative hearings – they were not given an opportunity to submit written briefs describing the evidence and legal arguments, an opportunity to submit motions as to procedural matters, or an opportunity to call witnesses who could provide factual testimony to support their claims. (See 2 CCR §18361.5.) Nor did the November "hearing" comply with the requirements of the Administrative Procedure Act, which allows a respondent to conduct discovery, requires testimony to be taken under oath, allows parties to call and cross-examine witnesses and to introduce evidence on their own behalf. (Gov. Code, § 11500 *et seq.*)

Although the Commission focused only on the potential PRA violations, there is additional meaningful factual and mitigating evidence that a hearing officer could and should consider. For example, respondents have not yet fully testified about the circumstances under which the contributions were made, the degree of culpability of various actors, or the degree of cooperation with FPPC staff. Respondents should also have an opportunity to show that the fines imposed on them are disproportionately high, especially given the relatively low dollar amounts involved in this case, the degree of cooperation and remorse, and the imposition of fines in other cases with similar facts. For example, a review of the fines imposed by the Commission for similar violations of Government Code section 84301 and 84302 indicate that the penalties are more often imposed in the range of \$2-3,000 per violation rather than the \$5,000 per violation assessed on Ms. Berman and \$4,500 per count assessed on Ms. Lauby.

As recently as the Commission's August 2010 hearing, it imposed fines of \$3,000 per violation for 5 counts of violating Section 84301. (See In re Serco Management Services, Inc., FPPC Enforcement #08/074 (2010).) In addition, there are literally dozens of FPPC enforcement actions entered over the past decade where violations of Sections 84301 and 84302 were settled by the Commission for \$2,000 per violation. This includes at least one case where the Commission entered a default decision. (In re Flaherty, FPPC Enforcement #99-783 (2003).) In fact, the amount finally assessed in one of the default proceedings in this case was even higher than the amount proposed by staff in the initial negotiations over a stipulated settlement and to which Mr. Wonderwheel submitted a counter-proposal (never answered by staff).

Respondents' Motion to Vacate simply requests that the Commission reverse its November 2010 decision to enter default judgments in these matters and instead accept the Notices of Defense and refer these matters to an administrative law judge who can receive all relevant testimony, develop a record for review, and reach a fair recommended decision in light of the evidence presented. For these reasons, Respondents request that you grant the Motion.

Very truly yours,

OLSON HAGEL & FISHBURN LLP



DEBORAH B. CAPLAN



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DBC/RRR:ab

Enclosure

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6 MICHELLE BERMAN and ADRIENNE LAUBY

FILED
Superior Court Of California,
Sacramento
12/15/2010
amacias
By _____, Deputy
Case Number:
34-2010-80000740

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SACRAMENTO

11 MICHELLE BERMAN and
ADRIENNE LAUBY,

13 Petitioners,

14 v.

15 FAIR POLITICAL PRACTICES COMMISSION,

16 Respondent.

CASE NO.:

VERIFIED PETITION FOR WRITS OF
MANDATE

(Pursuant to Code of Civil Procedure section
1094.5 and Government Code section 11523)

Dept. 42

18 Petitioners MICHELLE BERMAN and ADRIENNE LAUBY allege as follows:

19 **BACKGROUND**

20 1. At issue in this proceeding is whether Respondent FAIR POLITICAL PRACTICES
21 COMMISSION ("COMMISSION" or "FPPC") abused its discretion by entering a default against
22 Petitioners MICHELLE BERMAN and ADRIENNE LAUBY and refusing to grant Petitioners an
23 opportunity for an administrative hearing regarding alleged violations of the Political Reform Act
24 despite Petitioners' tender of a Notice of Defense before the actual default was entered. The
25 uncontradicted facts in the record demonstrate that Petitioners had no actual notice of the deadline for
26 the Notice of Defense, that they acted promptly as soon as they discovered that none had been filed, and
27 that the failure to file their Notices of Defense was caused solely by the mistake, inadvertence, surprise
28 or excusable neglect of their prior attorney. The FPPC's refusal to provide a fair and impartial

1 administrative hearing to Petitioners is contrary to the strong public policy in favor of deciding such
2 enforcement matters on their merits and the conduct of the “hearing” afforded Petitioners by the FPPC
3 violated the requirements of the California Administrative Procedure Act and denied Petitioners the
4 opportunity to present contrary and mitigating evidence on their own behalf.

5 **PARTIES**

6 2. Petitioner MICHELLE BERMAN is a resident and registered voter in the city of Cotati.
7 She was the target of an FPPC investigation in connection with contributions made for the November 7,
8 2006 election in the City of Cotati. Petitioner became a named party in a Commission enforcement
9 action on or around July 12, 2010 (FPPC No. 10/115) alleging that she accepted a contribution in excess
10 of the Cotati contribution limits.

11 3. Petitioner ADRIENNE LAUBY is a resident and registered voter in the city of Cotati. She
12 was the target of an FPPC investigation in connection with contributions made for the November 7,
13 2006 election in the City of Cotati. Petitioner became a named party in a Commission enforcement
14 action on or around July 12, 2010 (FPPC No. 10/116) alleging that she made a contribution on behalf of
15 another person.

16 4. Respondent FAIR POLITICAL PRACTICES COMMISSION (“COMMISSION” OR
17 “FPPC”) is the state agency charged with administering the California Political Reform Act (“Act” or
18 “PRA”) and initiating enforcement proceedings against alleged violators of the Act. The Commission’s
19 power and authority over enforcement matters is set out in Chapter 3 of Title 9 of the Government Code
20 (commencing with section 83100). Government Code section 83116 authorizes the Commission to
21 determine whether there is probable cause to institute proceedings to determine whether the Act has
22 been violated. When the Commission determines there is probable cause, it is authorized to hold a
23 hearing in accordance with the notice and hearing requirements contained in the Administrative
24 Procedures Act. Upon finding violations of the Act, the Commission may order violators to cease and
25 desist violations, file campaign disclosure reports, or pay monetary fines up to \$5,000 per violation. The
26 FPPC’s principal place of business is in Sacramento, California.

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FACTUAL ALLEGATIONS

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2 5. On or around June and July 2010, Petitioners were approached by Commission staff and
3 asked to participate in interviews regarding their involvement in a local city council campaign in the
4 City of Cotati. After it became apparent that Petitioners were targets in the Commission's investigation,
5 they asked for the assistance of Attorney Alan Gregory Wonderwheel who agreed to represent them on a
6 pro bono basis throughout the investigation. At the time Petitioners engaged Mr. Wonderwheel, he had
7 no prior experience in campaign law or FPPC practice and had never been involved in Commission
8 proceedings.

9 6. Petitioners fully cooperated with the Commission's investigation.

10 7. On July 12, 2010, the Commission's Enforcement Division initiated an administrative
11 action against Respondents by serving Mr. Wonderwheel with a Report in Support of a Finding of
12 Probable Cause ("Probable Cause Report"). Petitioners were not served individually.

13 8. With regard to Petitioner MICHELLE BERMAN, the Probable Cause Report proposed a
14 \$4,500 penalty per for three separate violations of the Act for a total fine of \$13,500. On July 12, 2010,
15 the same day he received the Report, Mr. Wonderwheel responded to the Commission's settlement offer
16 and Probable Cause Report by requesting a reduction in the fine amount to \$1,200 per violation, or
17 \$3,600 total for Ms. Berman, and presenting several mitigating factors that were omitted from the
18 proposed stipulation.

19 9. With regard to Petitioner ADRIENNE LAUBY, the Probable Cause Report proposed a
20 \$4,500 penalty for one violation of the Act for a total fine of \$4,500. On July 11, 2010, Mr.
21 Wonderwheel provided written correspondence to the Commission requesting a reduction in the
22 proposed fine and presented several mitigating factors that were omitted from the proposed stipulation.

23 10. Mr. Wonderwheel did not receive a response to his written settlement offers on behalf of
24 Ms. Berman or Ms. Lauby.

25 11. On or about August 30, 2010, Mr. Wonderwheel received an Accusation and Notice of
26 Defense Form. The Commission did not serve or separately notify Petitioners of the Accusation or
27 Notice of Defense and they had no reason to know of the Accusation or Notice of Defense.

28 12. Mr. Wonderwheel acknowledges receiving the Accusation and Notice of Defense but he

1 failed to communicate his receipt of the Accusation to Petitioners and he did not respond to the
2 Commission within the 15 day statutory period by filing a Notice of Defense requesting a hearing or
3 objecting to the accusation as required by Government Code section 11506. Being unfamiliar with
4 FPPC enforcement procedures, Mr. Wonderwheel erroneously believed that his earlier letter was
5 sufficient to advise the FPPC that he wished to discuss the matter further with the FPPC staff on behalf
6 of his clients.

7 13. As a consequence of Mr. Wonderwheel's failure to respond to the Accusation or to file a
8 Notice of Defense, the Commission staff prepared a Default Decision and Order to submit to the
9 Commission. On October 19, 2010, the Commission sent a letter to Mr. Wonderwheel advising him
10 that Petitioners' enforcement cases would be submitted for Default Decision and Order at the
11 Commission's November 12, 2010 meeting. The proposed Default Decision and Order were not
12 separately served on Petitioners.

13 14. Mr. Wonderwheel acknowledges receiving the letter from the Commission in late October,
14 but was unsure what to do. On or about the same time, Petitioners learned from an acquaintance who
15 also had a matter on the Commission's November 12, 2010 meeting, and who had reviewed the agenda
16 for that meeting, that a proposed Default Decision was to be considered in their cases.

17 15. In early November, Mr. Wonderwheel contacted Bridgette Castillo to attempt to have the
18 matter removed from the default calendar and to file a Notice of Defense for each Petitioner. Ms.
19 Castillo indicated that it was too late to do that and the matter would have to be considered by the
20 Commission.

21 16. Mr. Wonderwheel and Petitioners appeared at the Commission's November 12, 2010
22 meeting to request that the Commission not enter the default and that it allow them to file a Notice of
23 Defense and proceed to an administrative hearing on the merits. Mr. Wonderwheel submitted a written
24 statement indicating that the error in missing the deadline was solely his and that his clients were
25 unaware of the deadline. He included a Notice of Defense for each client.

26 17. FPPC staff opposed Mr. Wonderwheel's request. The staff materials accompanying and
27 the proposed Default Order and Decision actually requested higher administrative fines than those
28 originally proposed in the July Probable Cause Report. The materials submitted by staff to the

1 Commission also failed to mention Mr. Wonderwheel's July 12 correspondence at all saying instead that
2 "Respondent neither requested a probable cause conference nor submitted a written response to the
3 Probable Cause Report." Nor did FPPC staff include any of the mitigating factors presented by Mr.
4 Wonderwheel in his July letter, instead indicating under "Mitigating Factors" -- "None."

5 18. Instead of focusing on the unconstructed evidence of Mr. Wonderwheel's error and the
6 timeliness of the Petitioners' actions in contacting the Commission as soon as they learned of the
7 proposed default, Commission members began examining Petitioners on the merits of the Accusation.
8 When it was urged that Petitioners wished to have a hearing precisely to address such points, the
9 Commission denied their request, concluding that such a hearing would provide no mitigating or
10 exculpatory evidence that would ultimately affect the violations charged or the amount of the penalties
11 imposed by the Commission.

12 19. On December 2, 2010, Petitioners received notice of the entry of the Default Decision and
13 Order and a Demand for payment of Imposed Administrative Penalties which stated that it was effective
14 November 15, 2010. Petitioners filed a Motion to Vacate the Default Decision and Order within the 7
15 day time period provided by Gov. Code section 11520(c). This motion was to be heard at the
16 Commission's December 9, 2010 meeting but that meeting was cancelled and the Commission has not
17 acted to stay the effectiveness of the November 15, 2010 order.

18 20. Petitioners are beneficially interested in the issuance of the writ of mandate requested and
19 have no plain, speedy or adequate remedy at law to compel Respondent to comply with Govt. Code, §
20 83115-83119, Govt. Code, §§ 11500 et seq., and those other provisions of law relied upon by the FPPC
21 in denying Petitioners a right to a hearing.

22 21. Petitioners are separately requesting the FPPC to prepare the administrative record in FPPC
23 Nos. 10/115 and 10/116 and the hearing conducted on November 13, 2010. The record will be lodged
24 with the court upon filing of Petitioner's Memorandum of Points and Authorities in Support of the
25 Petition for Writ of Mandate.

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FIRST CAUSE OF ACTION

**[Writ of Mandate under Code of Civil Procedure section 1094.5
and Government Code section 11523 To Review the Decision of
the Fair Political Practices Commission in Nos. 10/115 and 10/116.]**

22. Petitioners reallege and incorporate by reference as if fully set forth herein the allegations contained in paragraphs 1 through 21 above.

23. Respondent Fair Political Practices Commission has a legal duty to comply with the requirements of the Political Reform Act and the California Administrative Procedures Act in conducting its enforcement proceedings, and its determinations made November 12, 2010 to enter defaults in FPPC Nos. 10/115 and 10/116 and to deny respondents in each case (petitioners herein) an opportunity to file a Notice of Defense and participate in a hearing on the merits constituted a breach of that duty.

24. Petitioners request that this Court issue a writ of mandate under Code of Civil Procedure section 1094.5 and Government Code section 11523 directing the Respondent Fair Political Practices Commission to set aside the determinations made in FPPC Nos. 10/115 and 10/116 entering defaults in each of those cases and denying respondents in each case (petitioners herein) an opportunity to file a Notice of Defense and to accept for filing the Notices of Defense already tendered and to schedule these proceedings for a hearing on the merits.

25. The action taken by the Fair Political Practices Commission on November 12, 2010 in proceedings Nos. 10/115 and 10/116 were unlawful, in that:

- a. Respondent FPPC's entry of default against petitioners and its failure or refusal to allow them to file A Notice of Defense and an opportunity to have a fair hearing was arbitrary and capricious in light of the uncontested facts that petitioners' failure to file a timely Notice of Defense was due solely to the mistake, inadvertence or excusable neglect of prior counsel; that petitioners themselves did not have actual notice of the obligation to file a Notice of Defense or the pending default; and that petitioners acted promptly when they became aware of the pending default.
- b. Respondent FPPC committed a prejudicial abuse of discretion in that it acted in excess of

1 its jurisdiction.

- 2 c. Respondent FPPC committed a prejudicial abuse of discretion in that it did not proceed in
3 the manner required by law; the proceeding conducted on November 12, 2010 did not
4 constitute a "fair trial" or fair hearing and did not comply with the requirements of the
5 California Administrative Procedures Act or due process.
- 6 d. Respondent FPPC committed a prejudicial abuse of discretion in that it purported to
7 conduct a hearing on the merits of the FPPC's Accusation on November 12, 2010 without
8 giving reasonable notice to the parties of its intent to do so and which, as a result,
9 improperly excluded relevant evidence
- 10 e. Respondent FPPC committed a prejudicial abuse of discretion in relying on certain
11 "policies" or criteria or other rules that have not been properly adopted as a regulation.
- 12 f. Respondent FPPC committed a prejudicial abuse of discretion in that its decision is not
13 supported by any findings, and any findings made are not supported by evidence.

14 WHEREFORE, Petitioner prays for relief as follows:

- 15 1. That this Court issue a Peremptory Writ of Mandate pursuant to Code of Civil Procedure
16 section 1094.5, commanding the Fair Political Practices Commission to set aside its
17 decisions in Nos. 10/115 and 10/116 made November 12, 2010, to accept the Notices of
18 Defense previously tendered by petitioners and to hear and decide those matters in
19 accordance with law and the judgment of this court.
- 20 2. That this Court order an award of attorneys' fees to Petitioner, pursuant to Code of Civil
21 Procedure section 1021.5, or such other provision as the court finds appropriate, and
22 provide such other and further relief as the Court deems appropriate.

23 Dated: 12/15/10

24 Respectfully submitted,

25 OLSON HAGEL & FISHBURN LLP

26 By: Deborah B. Caplan
27 DEBORAH B. CAPLAN
28 Attorneys for Petitioners

VERIFICATION

I, DEBORAH B. CAPLAN, am an attorney for Petitioners ADRIENNE LAUBY and MICHELLE BERMAN. I hereby certify that I have read the foregoing Petition and the contents thereof are true and accurate to the best of my knowledge and belief.

Under California Code of Civil Procedure, section 446, I am authorized to verify this pleading on behalf of Petitioners. Petitioners are located in Sonoma County. Neither of the Petitioners is located in Sacramento County where my office is located which makes it necessary that I provide this verification.

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

Date: 12/15/10



DEBORAH B. CAPLAN

DECLARATION OF SERVICE

Case Name : *Berman, et al, v. Fair Political Practices Commission*
Case No: :
Court : **Sacramento County Superior Court**

I declare: I am a citizen of the United States, over the age of 18, and not a party to the within action. My business address is 555 Capitol Mall, Suite 1425, Sacramento, California, 95814. On December 15, 2010, I served a true and correct copy of the following entitled documents:

VERIFIED PETITION FOR WRITS OF MANDATE

on the parties in said action as follows:

 X BY PERSONAL SERVICE: By causing said envelope to be hand delivered via messenger to said parties at the address listed below.

Roman Porter, Executive Director
Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814

Respondent

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 December 15, 2010 in Sacramento, California.



ANN BARNER