

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

6 Attorneys for Complainant

7  
8 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION  
9 OF THE STATE OF CALIFORNIA  
10

11 In the Matter of:

OAH No. 2011030835

FPPC No. 10/449

12  
13 SHONG-CHING TONG,

**THE ENFORCEMENT DIVISION'S REPLY  
TO RESPONDENT'S RESPONSE TO THE  
ENFORCEMENT DIVISION'S OPENING  
BRIEF RE: PROPOSED DECISION OF  
ADMINISTRATIVE LAW JUDGE ERIC  
SAWYER**

14  
15 Respondent.

16  
17 **I. INTRODUCTION**

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

21 Thereafter, Respondent Shong-Ching Tong submitted a brief in response to the Enforcement  
22 Division's opening brief. However, Respondent's brief contains numerous inaccurate, misleading and  
23 irrelevant statements. Also, Respondent's brief shows a lack of remorse on Respondent's part for his  
24 violations of the Political Reform Act.

25 As discussed in more detail below, and for the reasons set forth in the Enforcement Division's  
26 opening brief, it is respectfully submitted that the proposed decision of the ALJ should be adopted in its  
27 entirety.

28 ///

1 **II. DISCUSSION**

2 **A. Respondent’s brief contains numerous inaccurate, misleading and irrelevant statements.**

3 Respondent claims that the Office of Administrative Hearings (“OAH”) was ignorant as to the  
4 law, facts and evidence in this case. Also, Respondent claims that OAH was biased against him.  
5 Additionally, Respondent claims that OAH somehow improperly limited his ability to present facts,  
6 evidence and witnesses at the hearing (which lasted two days).

7 However, these claims simply are not true.

8 This case involves independent expenditures made by Respondent, which totaled more than  
9 \$9,000, to influence the outcome of an election for the Arcadia City Council. Respondent’s independent  
10 expenditures were made in opposition to Paul Cheng, one of the candidates.

11 At the hearing in this case, Respondent sought to put Mr. Cheng on trial by introducing evidence  
12 that Mr. Cheng was a bad person. This sort of evidence was completely irrelevant to the issues in this  
13 case, to wit: *whether Respondent timely filed the campaign statements and reports in this case* and  
14 *whether Respondent included proper sender identification on the outside of his mass mailing.*

15 Even though this evidence was irrelevant, OAH afforded Respondent and his attorney great  
16 leeway at the hearing. Respondent was allowed to call several witnesses and introduce numerous  
17 documents regarding Mr. Cheng and the circumstances leading up to Respondent’s independent  
18 expenditures. It is a gross mischaracterization for Respondent to claim that OAH did not give him every  
19 opportunity to present a defense.

20 To the extent that Respondent claims that the ALJ refused to allow him to play various voicemail  
21 messages at the hearing, it is undersigned counsel’s recollection that Respondent never sought to play  
22 such messages at the hearing, and even if he had, there is no reason to believe they would be anything  
23 other than irrelevant and inadmissible hearsay.

24 Another thing Respondent claims is that the Fair Political Practices Commission (“FPPC”) did  
25 nothing when he complained about Mr. Cheng violating the Political Reform Act. However, undersigned  
26 counsel has no recollection of receiving such a complaint from Respondent. Of course, if Respondent  
27 wishes to submit a complaint to the FPPC about Mr. Cheng, he is welcome to avail himself of the formal  
28 complaint process, but the issue of whether or not Mr. Cheng violated the Political Reform Act is a red

1 herring as far as Respondent's own violations are concerned. Even if Respondent did make such a  
2 complaint about Mr. Cheng, it certainly would not excuse Respondent's own violations of the Political  
3 Reform Act.

4 To the extent that Respondent claims he was harassed and threatened by FPPC staff, it is worth  
5 noting that Respondent made these same arguments at the hearing, and the ALJ specifically found (at ¶  
6 26 of p. 5 of the proposed decision, which is attached to the opening brief as Ex. A):

7 The Commission's investigator, and later the prosecutor of this  
8 case, tried to contact Respondent regarding the above-described  
9 deficiencies and other matters related to this case, but Respondent ignored  
10 their messages. By or about July 2010, after a settlement offer had been  
11 sent to Respondent by the prosecutor, Respondent became gravely  
12 offended and enraged by the actions of the Commission's investigator and  
13 prosecutor for reasons that are not entirely clear. Respondent believed that  
14 the Commission's staff was harassing him. **In any event, it was not  
15 established that the Commission's staff did anything to warrant  
16 Respondent's refusal to cooperate with them.** Although Respondent  
17 believed he could not trust the Commission's staff and insisted that all  
18 communications be in writing, Respondent still failed to respond to those  
19 inquiries, including his refusal to comply with an investigative subpoena  
20 served on him. Respondent refused to submit any corrections to the  
21 documents that were ultimately submitted to the Arcadia City Clerk's  
22 office, and otherwise refused to cooperate any further with Commission  
23 staff. [Emphasis added.]

24 Also, it is worth pointing out that respondent has a great deal of legal experience to the point that  
25 he entered into settlement negotiations with Mr. Cheng on behalf of a restaurant that was being sued by  
26 Mr. Cheng's clients. Additionally, Respondent's vexatious litigant history tends to show that Respondent  
27 has more familiarity with the litigation process than your average non-lawyer. These facts all show that  
28 Respondent is or should be quite familiar with how settlement negotiations work, and when the  
Enforcement Division offered to settle this case with Respondent in July 2010, there was no legitimate  
reason for Respondent to view the Enforcement Division's settlement offer as harassment. (See Opening  
Brief of the Enforcement Division, p. 7, ll. 5-19; and p. 9, l. 16 through p. 10, l. 7.)

Also, as stated above, although Respondent claims that the ALJ refused to allow him to play  
voicemail from FPPC staff at the hearing, undersigned counsel has no recollection that Respondent ever  
actually attempted to play/move such voicemail into evidence, and even if Respondent had attempted to  
do so, there is no reason to believe such voicemail would be anything other than irrelevant and  
inadmissible hearsay.

1 Another thing Respondent claims is that the FPPC had ex parte communications with Brenda  
2 Manalo, the calendaring clerk with OAH. This is another red herring and incorrect statement of the law  
3 on Respondent's part. It is basic, hornbook law that the rule against ex parte communications applies to  
4 communications with the judge—not the calendaring clerk. If you call the main telephone number for  
5 OAH's Los Angeles office, they will tell you that Brenda Manalo is the calendaring clerk, and matters  
6 regarding the setting of hearings should be directed to her attention. To any extent that Respondent  
7 claims that there was ex parte communication with an ALJ—as opposed to normal communications with  
8 a calendaring clerk—undersigned counsel adamantly denies such allegations.

9 To the extent that Respondent complains that OAH should have scheduled the hearing for a more  
10 convenient date or that OAH should have set the matter for five days instead of two days, it is worth  
11 noting that Respondent has shown no prejudice in this regard. Respondent and his attorney were able to  
12 present their defense in a full and complete manner. They did not run out of time, and an additional three  
13 days for the hearing would have been a tremendous waste of time and money for Respondent, OAH and  
14 the FPPC—which is why the FPPC objected to Respondent's five-day time estimate at the outset.

15 To the extent that Respondent implies that the FPPC failed to properly share its exhibits before  
16 the hearing (see Respondent's brief, p. 5, ¶ 25), it is worth pointing out that: (a) such an implication is  
17 completely false; and (b) Respondent is in fact the one who failed to share his exhibits by the required  
18 deadlines before the hearing. In this case, Respondent had a duty to simultaneously exchange exhibits  
19 with the FPPC prior to the Prehearing Conference pursuant to California Code of Regulations, title 1,  
20 section 1026, subdivision (e). The FPPC relied upon this regulation and sent its exhibits to Respondent,  
21 but Respondent and his attorney did not exchange any of their exhibits with the FPPC by the required  
22 deadline of August 10, 2011. At the Prehearing Conference, when the FPPC complained about this, the  
23 ALJ gave the parties approximately three more weeks to exchange exhibits (as a sort of last chance).  
24 Even then, Respondent's document production was incomplete and disorganized, and at the hearing,  
25 when Respondent sought to introduce another exhibit that he had not shared prior to the hearing, the ALJ  
26 rightfully excluded the exhibit on grounds that Respondent had failed to abide by the "last chance"  
27 deadline that was given to him (and on grounds that Respondent failed to show diligence/good cause re:  
28 his failure to meet the "last chance" deadline).

1 Another thing Respondent complains about is OAH’s granting of the FPPC’s Motion for a  
2 Protective Order, which the FPPC filed when Respondent sought to force Roman G. Porter, former  
3 Executive Director, to travel to Los Angeles to be a witness at the hearing. However, Respondent’s  
4 complaint in this regard is completely without merit. The Motion for a Protective Order properly was  
5 granted on grounds that Respondent clearly intended to interrogate Mr. Porter about irrelevant matters  
6 such as settlement issues. Mr. Porter was not a percipient witness in this case, and at the hearing on the  
7 Motion for a Protective Order, Respondent’s counsel was not able to proffer a single, relevant line of  
8 questioning. Respondent’s sole purpose in demanding Mr. Porter’s attendance at the hearing was  
9 harassment, which is consistent with Respondent’s vexatious litigant history.

10 To the extent that Respondent complains about the Arcadia City Clerk in his brief, it is important  
11 to note that Respondent and his attorney did not properly subpoena the clerk. They sent a notice to the  
12 clerk instead of a subpoena. The notice only would be effective to compel the appearance of a party to  
13 the action—and the clerk was not a party. A subpoena should have been served instead of a notice.  
14 Accordingly, Respondent had no legal right to insist that the clerk be present at the hearing. Nor did he  
15 have any right to a continuance for the clerk’s failure to appear (and for that matter, undersigned counsel  
16 does not recall that Respondent even asked for a continuance for the clerk’s failure to appear). Also,  
17 there is no reason to believe that Respondent was wrongfully excluded from playing voicemail from the  
18 clerk. Undersigned counsel does not recall that Respondent sought to play such voicemail, and even if  
19 Respondent had attempted to do so, there is no reason to believe that the voicemail would have been  
20 anything other than irrelevant and inadmissible hearsay.

21 Respondent makes much of the city clerk, claiming that the clerk’s failure to educate Respondent  
22 about Respondent’s filing obligations was the cause of the violations in this case. However, Respondent  
23 admitted at the hearing that when he spoke with the clerk’s office, he intended to go door-to-door, and he  
24 had not thought about sending mass mailings at that point. For this reason, the ALJ found (at ¶ 9 of p. 2  
25 of the proposed decision, which is attached to the opening brief as Ex. A): “because Respondent was not  
26 clear in what he planned to do concerning Mr. Cheng, nobody at the Arcadia City Hall told him that he  
27 had any requirement to file any forms required by the Act.” Additionally, the ALJ correctly points out in  
28 his proposed decision that Respondent’s violations started out as inadvertent or negligent, but

1 Respondent ultimately made a *deliberate* decision not to comply with the Political Reform Act when  
2 asked to do so by the Enforcement Division. (Opening Brief, p. 5, ll. 1-26.)

3 Another thing Respondent complains about is the timing of the service of the proposed decision in  
4 this case, as well as the amount of time he was provided to respond to the Enforcement Division's  
5 opening brief. However, Respondent's legal arguments in this regard appear to be based upon an  
6 incorrect understanding of the law. The timing of the service of the proposed decision and the briefs in  
7 this case are governed by California Code of Regulations, title 2, section 18361.9, which has been  
8 adhered to by the FPPC. In fact, the Enforcement Division voluntarily waived its rights to a full 14 days  
9 to draft the opening brief and a full 14 days to draft the reply brief so that Respondent could be provided  
10 with his 14 days to draft his response brief. (This was done in order to add this matter to the agenda for  
11 December 2011.) Also, it is worth noting that Respondent did not ask for more time to respond, and it  
12 does not appear that he needed more time considering the length of his brief and the number of exhibits  
13 that he submitted.

14 Something else Respondent complains about is an alleged failure on the part of the FPPC to  
15 provide an adequate hearing record pursuant to an order of the ALJ. However, undersigned counsel has  
16 no idea what Respondent is talking about in this regard. The entire hearing was reported stenographically  
17 by a court reporter—at the expense of the FPPC.

18 To the extent that Respondent complains that Lynda Cassady, Chief of the Technical Assistance  
19 Division, should not have been allowed to testify as an expert witness at the hearing, Respondent is  
20 mistaken. The legal authority that he cites pertains to proceedings before the Medical Board of  
21 California—an entirely different entity from OAH. Additionally, it is important to note that prior to the  
22 hearing Respondent was timely apprised of Ms. Cassady's expected areas of testimony, and Respondent  
23 was provided with a statement of qualifications for Ms. Cassady. This is all that was required, which is  
24 why the ALJ allowed Ms. Cassady to testify as an expert at the hearing.

25 To the extent that Respondent argues that his filing violations were minor, the Enforcement  
26 Division respectfully disagrees. All of the filing violations (Counts 1, 2, and 4 through 6), involve an  
27 outright failure to file required statements and reports by the required deadlines. Respondent did not file  
28 anything until prodded to do so by the Enforcement Division well after the applicable deadlines, and even

1 then, what he submitted was incorrectly filled out and incomplete. Among other deficiencies,  
2 Respondent failed to provide required information regarding the identities of payees who assisted him  
3 with the mass mailings in question—effectively allowing the payees to remain anonymous. (See pp. 4-5  
4 of the proposed decision, which is attached to the opening brief as Ex. A.) Such deficiencies are hardly  
5 minor—especially considering that Respondent omitted required information as to the names of payees  
6 who assisted him with the mass mailings in question. Also, it is worth noting that the filings at issue in  
7 Counts 1, 2 and 4, should have been filed before the election, but they were not filed before the election.  
8 This means the public was deprived of important pre-election information.

9 The rest of Respondent’s arguments are without merit on their face and do not require any written  
10 explanation. However, should the Commission have questions at the meeting on December 8, 2011, the  
11 Enforcement Division is prepared to address any of the issues raised in Respondent’s brief.

12 **B. Respondent’s brief shows a complete lack of remorse on Respondent’s part for his violations**  
13 **of the Political Reform Act.**

14 The tone and contents of Respondent’s brief show that he accepts no responsibility for his  
15 violations of the Political Reform Act in this case.

16 Previously, Respondent rejected the Enforcement Division’s reasonable attempts to settle this  
17 case without the need for a formal hearing. As stated above, in so doing, Respondent cut off all lines of  
18 communication with the Enforcement Division.

19 Now, Respondent is unhappy with the results of the hearing. He denies any wrongdoing  
20 whatsoever, but asks that the Commission reject the proposed decision of the ALJ in its entirety—  
21 without even proposing that he would agree to or pay a lesser penalty.

22 It is respectfully submitted that Respondent’s refusal to admit wrongdoing and to accept  
23 responsibility for his actions should not be rewarded by the Commission.

24 **III. CONCLUSION**

25 For the foregoing reasons, and for the reasons discussed in the Enforcement Division’s opening  
26 brief, it is respectfully submitted that the Commission should adopt the ALJ’s proposed decision in its  
27 entirety.

28 ///

1 The total proposed penalty is roughly consistent with what the Enforcement Division requested at  
2 the hearing, and it is an appropriate amount given the public harm in this case. Respondent spent more  
3 than \$9,000 to influence the outcome of a local election, but he did not comply with the filing  
4 requirements imposed by the Political Reform Act, which deprived the public of important pre-election  
5 and post-election information. In aggravation, after Respondent late-filed (at the insistence of the  
6 Enforcement Division) he was informed of his duty to correct various reporting deficiencies, but he  
7 refused to provide full disclosure by correcting these deficiencies. In so doing, Respondent safeguarded  
8 the identities of payees who were involved with the production and mailing of the mass mailings in this  
9 case, allowing the individuals to remain unreported and anonymous.

10 Respondent has rejected every opportunity that was provided to him to settle this case without the  
11 need for a formal administrative hearing, and it would send the wrong message to the Respondent in this  
12 case, as well as the Respondents in other cases, if the proposed decision of the ALJ were disturbed in any  
13 way at this late stage.

14  
15 Dated: \_\_\_\_\_

FAIR POLITICAL PRACTICES COMMISSION

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