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9 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
10 STATE OF CALIFORNIA

11 In the Matter of) FPPC No. 08/508
12)
13 CARY MARLOW)
14 Respondent.) DEFAULT DECISION AND ORDER
15)
16) (Gov. Code §§ 11506 and 11520
)
)

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

20 Pursuant to the California Administrative Procedure Act,¹ Respondent Cary Marlow has been
21 served with all of the documents necessary to conduct an administrative hearing regarding the above-
22 captioned matter, including the following:

- 23 1. An Order Finding Probable Cause;
- 24 2. An Accusation;
- 25 3. A Notice of Defense (Two Copies);

26
27 ¹ The California Administrative Procedure Act, which governs administrative adjudications, is contained
in Sections 11370 through 11529 of the Government Code.

1 4. A Statement to Respondent; and

2 5. Copies of Sections 11506, 11507.5, 11507.6, 11507.7, and 11508 of the Government
3 Code.

4 Government Code Section 11506 provides that failure of a respondent to file a Notice of Defense
5 within 15 days after being served with an Accusation shall constitute a waiver of respondent's right to a
6 hearing on the merits of the Accusation. The Statement to Respondent, served on Respondent Cary
7 Marlow, explicitly stated that a Notice of Defense must be filed in order to request a hearing.
8 Respondent failed to file a Notice of Defense within fifteen days of being served with the Accusation.

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

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

17
18
19 Dated: _____

Roman G. Porter
Executive Director
Fair Political Practices Commission

ORDER

The Commission issues this Default Decision and Order and imposes an administrative penalty of Two Thousand Dollars (\$2,000) upon Respondent Cary Marlow, 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: _____

Chairman Dan Schnur
Fair Political Practices Commission

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EXHIBIT 1

INTRODUCTION

Respondent Cary Marlow (“Respondent Marlow”) was senior building inspector and designated employee of the City of Burbank (“City”). Respondent Marlow failed to disclose reportable interests in a business entity on his 2007 Annual Statement of Economic Interests filed on March 25, 2008. On August 25, 2008, this matter was referred to the Enforcement Division by City of Burbank’s City Clerk, Margarita Campos, alleging that Respondent Marlow violated the conflict-of-interest disclosure provisions of the Political Reform Act (the “Act”).¹

For the purposes of this Default Decision and Order, Respondent’s violations of the Act are stated as follows:

COUNT 1: As a senior building inspector and designated employee of the City of Burbank, Respondent Cary Marlow failed to disclose reportable interests in a business entity on his 2007 Annual Statement of Economic Interests, in violation of Sections 87300 and 87302 of the Government Code.

THE RESPONDENT

This matter involves one respondent: Respondent Cary Marlow.

DEFAULT PROCEEDINGS UNDER THE ADMINISTRATIVE PROCEDURE ACT

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, subdivision (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 California Administrative Procedure Act, which governs administrative adjudications, is contained in Sections 11370 through 11529 of the Government Code.

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, subdivision (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, subdivision (a).)

PROCEDURAL REQUIREMENTS AND HISTORY

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 prohibits a finding of probable cause by the Commission unless the person alleged to have violated the Act is 1) notified of the violation by service of process or registered mail with return receipt requested; 2) provided with a summary of the evidence; and 3) informed of his or her right to be present in person and represented by counsel at any proceeding of the Commission held for the purpose of considering whether probable cause exists for believing the person violated the Act. Additionally, Section 83115.5 states that the required 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 Act, shall be commenced more than five years after the date on which the violation occurred.

Documents supporting the procedural history are included in the attached Certification of Records ("Certification") filed herewith at Exhibit A, A-1 through A-7, and incorporated herein by reference.

In accordance with Sections 83115.5, the Enforcement Division initiated the administrative action against Respondent in this matter by serving him with a Report in Support of a Finding of Probable Cause (the "Report") dated September 1, 2010, by certified mail, return receipt requested on September 8, 2010.³ (See Certification, Exhibit A-1.) Therefore, the administrative action commenced on September 8, 2010. The five year statute of limitations was effectively tolled on this date.

As required by Section 83115.5, the packet served on Respondent contained a cover letter and a memorandum describing Probable Cause Proceedings, advising that Respondent had 21

³ Where any communication is required by law to be mailed by registered mail to or by the state, or any officer or agency thereof, the mailing of such communication by certified mail is sufficient compliance with the requirements of the law. (Section 8311.)

days in which to request a probable cause conference and/or to file a written response to the Report. (See Certification, Exhibit A-2.) Respondent neither requested a probable cause conference nor submitted a written response to the Report.

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 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, on September 30, 2010. (See Certification, Exhibit A-3.) Respondent was sent a copy of this document by regular mail. On October 7, 2010, Executive Director Roman G. Porter issued a Finding of Probable Cause and Order to Prepare and Serve an Accusation. (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 shall prepare an accusation pursuant to Section 11503 of the APA, and have it served on the persons who are the subject of the probable cause finding. (Regulation 18361.4, subd. (e).)

Section 11503 states:

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 October 7, 2010, the Commission's Executive Director, Roman G. Porter, issued an Accusation against Respondents in this matter. (See Certification, Exhibit A-5.) 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, 11507.5, 11507.6 and 11507.7, and 11508, and a cover letter dated October 20, 2010. The Accusation and accompanying documents were served by personal delivery on Respondent Marlow on October 26, 2010. (See Certification, Exhibit A- 6.) Therefore, Respondent was personally served for purposes of Section 11505.

As discussed above, along with the Accusation, the Enforcement Division served Respondent with a "Statement to Respondent" which notified him that he could request a hearing on the merits and warned that, unless a Notice of Defense was filed within 15 days of service of the Accusation, he would be deemed to have waived his right to a hearing. Respondent did not file a Notice of Defense within the statutory time period, which ended on November 10, 2010.

On November 16, 2010, Senior Commission Counsel Luisa Menchaca 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 December 9, 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- 7.)

SUMMARY OF THE EVIDENCE

An express purpose of the Political Reform Act, as set forth in section 81002, subdivision (c), is to ensure that the assets and income of public officials, that may be materially affected by their official actions, be disclosed, so that conflicts of interests may be avoided. In furtherance of this purpose, section 87300 requires every agency to adopt and promulgate a conflict of interest code.

Section 87302, subdivision (a), provides that an agency's conflict of interest code must specifically designate the positions within the agency that are required to file statements of economic interests ("SEI's"), disclosing reportable investments, business positions, interests in real property, and sources of income (including gifts). Under Section 82019, subdivision (a), and Section 87302, the persons who are to be designated in an agency's conflict of interest code are the officers, employees, members, and consultants of the agency whose position with the agency entails making, or participating in making, governmental decisions that may foreseeably have a material effect on one or more of the person's economic interests.

Section 87302, subdivision (b), provides that an agency's conflict of interest code must

require every designated employee of the agency to file an assuming office SEI within 30 days of assuming office. In addition, this subdivision provides that an agency's conflict of interest code must require every designated employee of the agency to file an annual SEI, at a time specified in the agency's conflict of interest code, for each year that the employee remains in office, disclosing his or her reportable economic interests during the preceding calendar year. This subdivision also requires every designated employee to file a leaving office statement within 30 days of leaving office covering the period between the closing date of the last statement and the date of leaving office.

Under section 87300, the requirements of an agency's conflict of interest code have the force of law, and any violation of those requirements is deemed a violation of the Act.

SUMMARY OF THE FACTS

Unless otherwise indicated, documents supporting the following summary of evidence are included in the attached Certification of Records filed herewith at Exhibit A, A-1 through A-7, and incorporated herein by reference.

Pursuant to the City of Burbank's 2007 Conflict of Interest Code, a senior building inspector was a designated position required to disclose investments in business entities or trusts, interests in real property, and sources of income, including gifts, loans and travel payments from sources located in or doing business within the City of Burbank.

In 2007, Respondent Marlow was a "designated employee" as defined in section 82019, subdivision (a), of the Act and in the Conflict of Interest Code for the City of Burbank. As such, Respondent Marlow was required to file a 2007 Annual SEI disclosing all of his economic interests during 2007.

Respondent Marlow reported no reportable interests on the 2007 Annual SEI he filed with the City on or about March 25, 2008. As a result of an internal review, the City determined that Respondent Marlow was a principal in a business entity, International Wholesale Interiors ("IWI"), and that he held an investment interest in that entity as well as received income from that source within the meaning of the Act. A potential conflict of interest was also revealed, although there was insufficient evidence to prove a conflict was present. It was determined that IWI sold cabinets to a residential project for which Respondent Marlow was the primary building inspector. Respondent Marlow resigned from his employment on April 25, 2008.

On or about January 7, 2009, the Enforcement Division staff notified Respondent Marlow of his failure to disclose IWI on his 2007 Annual SEI and requested he file the SEI with the proper disclosures by January 30, 2009. On or about January 30, 2009, Respondent Marlow contacted Enforcement Division staff and requested an extension to file by February 16, 2009. On or about February 16, 2009, Respondent Marlow indicated he was mailing the SEI. On or about April 8, 2009, Enforcement Division contacted the City to determine if Respondent Marlow had filed an amended SEI with the City. In addition, in July 2010, Senior Commission Counsel Luisa Menchaca spoke to Respondent Marlow regarding his filing obligations on three occasions. Despite contacts with the Enforcement Division encouraging him to properly file

Respondent failed to disclose all his reportable economic interests on his 2007 Annual SEI.

COUNT 1

**Failure to Disclose an Economic Interest on an
Annual Statement of Economic Interests**

As a senior building inspector and designated employee of the City of Burbank, Respondent Marlow was required to file a 2007 Annual SEI disclosing his economic interests in IWI, a business entity. Respondent Marlow failed to disclose all his reportable economic interests on his 2007 Annual SEI. Therefore, Respondent Marlow violated Sections 87300 and 87302 of the Act.

CONCLUSION

This matter consists of one count of violating Sections 87300 and 87302 of the Act, which carries a maximum possible administrative penalty of Five Thousand Dollars (\$5,000).

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.

Failure to correctly file statements of economic interests historically receive substantial penalties ranging up to the maximum penalty of \$5,000 per count a respondent has accompanying violations, a prior non-filing history, and/or prior prosecutions.

AGGRAVATING FACTORS

Respondent Marlow has yet to file an amendment to the 2007 Annual SEI despite written notification and other contacts by the Enforcement Division requesting he properly disclose. Respondent Marlow also never filed a Leaving Office Statement.

MITIGATING FACTORS

Respondent Marlow has no prior enforcement history.

PENALTY

Based on the above factors, a penalty of Two Thousand Dollars (\$2,000) is warranted for a violation of Sections 87300 and 87302 (1 Count).