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9 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION
10 STATE OF CALIFORNIA
11

12 In the Matter of) FPPC No. 12/760
13)
14) STIPULATION, DECISION and
SAN JOSE REFORM COMMITTEE) ORDER
15 SUPPORTING ROSE HERRERA FOR CITY)
COUNCIL 2012,)
16)
17 Respondent.)

18 Complainant the Enforcement Division of the Fair Political Practices Commission and San
19 Jose Reform Committee Supporting Rose Herrera for City Council 2012 (“Respondent”) hereby
20 agree that this Stipulation will be submitted for consideration by the Fair Political Practices
21 Commission at its next regularly scheduled meeting.

22 The parties agree to enter into this Stipulation to resolve all factual and legal issues raised in
23 this matter, and to reach a final disposition without the necessity of holding an administrative hearing
24 to determine the liability of Respondent.

25 Respondent understands, and hereby knowingly and voluntarily waives, any and all
26 procedural rights set forth in sections 83115.5, 11503 and 11523 of the Government Code, and in
27 Sections 18361.1 through 18361.9 of Title 2 of the California Code of Regulations. This includes,
28 but is not limited to, the right to personally appear at any administrative hearing held in this matter, to

1 be represented by an attorney at Respondent's own expense, to confront and cross-examine all
2 witnesses testifying at the hearing, to subpoena witnesses to testify at the hearing, to have an
3 impartial administrative law judge preside over the hearing as a hearing officer, and to have the
4 matter judicially reviewed.

5 It is further stipulated and agreed that Respondent violated the Political Reform Act by
6 making independent expenditures which caused mass mailings to be sent in support of Rose Herrera
7 for City Council and in opposition of her opponent, Jimmy Nguyen, all of which failed to display a
8 top contributor of \$50,000 or more during the 12 month period prior to the expenditures, in violation
9 of Government Code section 84506 (1 Count), as described in Exhibit 1. Exhibit 1 is attached hereto
10 and incorporated by reference as though fully set forth herein. Exhibit 1 is a true and accurate
11 summary of the facts in this matter.

12 Respondent agrees to the issuance of the Decision and Order, which is attached hereto.
13 Respondent also agrees to the Commission imposing upon it an administrative penalty in the amount
14 of Two Thousand Five Hundred Dollars (\$2,500). A cashier's check from Respondent in said
15 amount, made payable to the "General Fund of the State of California," is submitted with this
16 Stipulation as full payment of the administrative penalty, to be held by the State of California until
17 the Commission issues its Decision and Order regarding this matter.

18 The parties agree that in the event the Commission refuses to accept this Stipulation, it shall
19 become null and void, and within fifteen (15) business days after the Commission meeting at which
20 the Stipulation is rejected, all payments tendered by Respondent in connection with this Stipulation
21 shall be reimbursed to Respondent. Respondent further stipulates and agrees that in the event the
22 Commission rejects the Stipulation, and a full evidentiary hearing before the Commission becomes
23 necessary, neither any member of the Commission, nor the Executive Director, shall be disqualified
24 because of prior consideration of this Stipulation.

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Dated: _____

Gary S. Winuk, Enforcement Chief, on behalf of the
Fair Political Practices Commission

Dated: _____

Jesse Mainardi, Attorney for San Jose Reform
Committee Supporting Rose Herrera for City Council
2012, Respondent

1 **DECISION AND ORDER**

2 The foregoing Stipulation of the parties “In the Matter of San Jose Reform Committee
3 Supporting Rose Herrera for City Council 2012, FPPC No. 12/760,” including all attached exhibits, is
4 hereby accepted as the final Decision and Order of the Fair Political Practices Commission, effective
5 upon execution below by the Chair.

6
7 **IT IS SO ORDERED.**

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10 Dated: _____

Ann Ravel, Chair
Fair Political Practices Commission

EXHIBIT 1

INTRODUCTION

Respondent is the San Jose Reform Committee Supporting Rose Herrera for City Council 2012 (“Respondent”), formed primarily to support Rose Herrera on September 20, 2012.

The Political Reform Act (“Act”)¹ requires that a mass mailing must include complete disclosure statements. In this matter, Respondent failed to include complete disclosure statements on mass mailings, in violation of the Act. Specifically, the Respondent failed to display a statement on mass mailers indicating that it received major funding from the San Jose Fiscal Reforms, Mayor Reed, Chamber PAC and Issues Mobilization PAC Proponents. In a proactive effort to reduce the public harm prior to the November 2012 Election, the Enforcement Division contacted the Respondent in mid-October to inform it that it must include the complete disclosure statements on each mass mailing. Immediately upon being contacted, the Respondent stopped the distribution of future mailers with the improper disclosure statements, prior to the November 2012 Election.

For the purposes of this Stipulation, Respondents’ violation of the Act is stated as follows:

COUNT 1: In October 2012, Respondent San Jose Reform Committee Supporting Rose Herrera for City Council 2012 made independent expenditures which caused mass mailings to be sent in support of Rose Herrera for City Council and in opposition of her opponent, Jimmy Nguyen, all of which failed to display a top contributor of \$50,000 or more during the 12 month period prior to the expenditures, in violation of Government Code section 84506.

SUMMARY OF THE LAW

An express purpose of the Act, as set forth in Section 81002, subdivision (a), is to ensure that contributions and expenditures effecting election campaigns are fully and truthfully disclosed to the public, so that voters may be better informed, and improper practices may be inhibited. To that end, the Act sets forth a comprehensive campaign reporting system designed to accomplish this purpose.

Primarily Formed Committee

Section 82047.5 defines a primarily formed committee, in relevant part, as a committee which is formed or exists primarily to support or oppose a single candidate, a single measure, a group of specific candidates being voted upon in the same city, county, or multicounty election,

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.

or two or more measures being voted upon in the same city, county, multicounty, or state election. Regulation 18247.5, subdivision (a), states that a recipient committee that makes more than 70% of its total contributions and expenditures on a single candidate or against that candidate's opponents, is a primarily formed committee.

Definition of an Independent Expenditure

Government Code section 82031, in relevant part, defines an independent expenditure as an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee

Duty to Disclose the Two Highest Cumulative Contributors of \$50,000 or More in a Broadcast or Mass Mailing Advertisement

Section 84501, subdivision (a), defines an advertisement as any general or public advertisement which is authorized and paid for by a person or committee for the purpose of supporting or opposing a candidate for elective office or a ballot measure or ballot measures. Regulation 18450.1, subdivision (a), explains further that these advertisements include, among other things, communications placed in newspapers and direct mailings not solicited by the recipient and intended for delivery in substantially similar form to 200 or more households.

Section 84506, subdivision (a), requires that a broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both of the following: (1) The name of the committee making the independent expenditure. (2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars (\$50,000) or more during the 12 month period prior to the expenditure.

Regulation 18450.4, subdivision (b), further explains what is required in the disclosure statement required under Section 84506. It states that the disclosure shall explicitly indicate that the contributor was a major donor to the committee by stating, for example, "major funding by," "committee contributors" or "top contributors."

Administrative penalties for violations of Section 84506 are governed by Chapter 11 of the Act, and by Section 84510. Section 84510, subdivision (a), states that, in addition to the typical administrative remedies available under the Act (Section 91000 and following), any person who violates the advertisement disclosure rules is liable in a civil or administrative action brought by the Commission for a fine up to three times the cost of the advertisement, including placement costs.

Thus, the Commission has discretion to seek administrative penalties of up to three times the amount of the cost of an advertisement that does not have the proper disclosure.

SUMMARY OF THE FACTS

Respondent was a committee primarily formed to support Rose Herrera on September 20, 2012. Respondent filed a statement of organization stating that it qualified as a committee on September 20, 2012. The Respondent's statement of organization stated that the Respondent expected to make independent expenditures to support candidate Rose Herrera for the office of San Jose City Council in the November 6, 2012 General Election. According to Respondent's campaign statements, on September 24, 2012, Respondent accepted a monetary contribution of \$100,000 from the San Jose Fiscal Reforms, Mayor Reed, Chamber PAC and Issues Mobilization PAC Proponents.

According to Respondent campaign statements, during the period of October 1, 2012 through October 20, 2012, Respondent made expenditures of approximately \$73,754.28, all of which was made in support of Rose Herrera and in opposition to her opponent, Jimmy Nguyen. Of that \$73,754.28 total, approximately \$66,754.28 was spent on campaign literature and mailings in support of Rose Herrera and in opposition to her opponent, Jimmy Nguyen.

Prior to the November 6, 2012 General Election, Respondent paid for multiple advertisements and mass mailers in support of the election of Rose Herrera for San Jose City Council and in opposition of Jimmy Nguyen, none of which included the proper disclosure as required by the Act. Specifically, the Respondent failed to display a statement on mass mailers indicating that it received major funding from the San Jose Fiscal Reforms, Mayor Reed, Chamber PAC and Issues Mobilization PAC Proponents. In a pro-active effort to reduce the public harm prior to the November 2012 Election, the Enforcement Division contacted the Respondent in mid-October to inform it that it must include the complete disclosure statements on each mass mailing. Immediately upon being contacted, the Respondent stopped the distribution of future mailers with the improper disclosure statements, prior to the November 2012 Election.

Count 1

Failure to Disclose the Two Highest Cumulative Contributors of \$50,000 or More in a Broadcast or Mass Mailing Advertisement

Section 84506, subdivision (a), requires that a broadcast or mass mailing advertisement supporting or opposing a candidate or ballot measure, that is paid for by an independent expenditure, shall include a disclosure statement that identifies both of the following: (1) The name of the committee making the independent expenditure; (2) The names of the persons from whom the committee making the independent expenditure has received its two highest cumulative contributions of fifty thousand dollars (\$50,000) or more during the 12 month period prior to the expenditure.

In October 2012, Respondent made independent expenditures which caused mass mailings to be sent that did not include complete disclosure statements. The committee's disclosure on its advertisements read: "Not printed or mailed in coordination with any candidate or elected official. Paid for by San Jose Reform Committee – supporting Rose Herrera for City Council...", along with the committee's identification number, address and total cost of that

particular mailer. The advertisement disclosure failed to name the Respondent's major funder as the San Jose Fiscal Reforms, Mayor Reed, Chamber PAC and Issues Mobilization PAC Proponents, in violation of Section 84506(a).

Thus, Respondent failed to provide the required disclosure on mass mailings, that was paid for by an independent expenditure, in violation of Government Code section 84506.

CONCLUSION

This matter consists of one count of violating the Act, and carries a maximum administrative penalty of Five Thousand Dollars (\$5,000). However, in this case, Section 84510 authorizes the administrative penalty in the amount of three times the cost of the advertisements in Count 1, including placement costs.

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): 1) the seriousness of the violations; 2) the presence or lack of intent to deceive the voting public; 3) whether the violation was deliberate, negligent, or inadvertent; 4) whether the Respondent demonstrated good faith in consulting with Commission staff; 5) whether there was a pattern of violations; and 6) whether the violator, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure. Additionally, liability under the Act is governed in significant part by the provisions of Section 91001, subdivision (c), which requires the Commission to consider whether or not a violation is inadvertent, negligent or deliberate, and the presence or absence of good faith, in applying remedies and sanctions.

As a primarily formed committee, Respondent had a duty to display in any mass mailing the top two contributors of \$50,000 or more during the 12 month period prior to the expenditure. The failure to provide proper disclosure in a mass mailing deprives the public of important information regarding the major donors of political advertisements. Respondent sent multiple advertisements, all of which failed to provide proper disclosure. In mitigation, Respondent cooperated with the investigation and Respondent states that its failure to include the required disclaimer was not intentional. Further, in a pro-active effort to reduce the public harm prior to the November 2012 Election, the Enforcement Division contacted the Respondent in mid-October to inform it that it must include the complete disclosure statements on each mass mailing. Immediately upon being contacted, the Respondent stopped the distribution of future mailers with the improper disclosure statements, prior to the November 2012 Election.

Other similar cases regarding failing to properly include the required disclosure statements on advertisements recently approved by the Commission include:

In the Matter of Put California Back To Work, Sponsored by the Civil Justice Association of California and J. Richard Eichman, FPPC No. 10/504. This case involved 1 count of failing to disclose major donors on a mass mailer. A \$2,500 penalty was approved for this violation by the Commission on March 15, 2012.

In the Matter Yes on Proposition B, FPPC No. 10/932. This case involved one count of failing to provide written disclosure identifying persons whose contributions were \$50,000 or more for a period of at least 5 seconds on a television advertisement. A \$2,000 penalty was approved for this violation by the Commission on January 28, 2011.

In this matter, Respondent failed to provide proper disclosure statements as a result of not following the requirements of the Act. Taking into consideration the factors above, including the fact that the Respondent stopped the distribution of future mass mailings without the proper disclosure prior to the election, this case is not recommended for imposition of treble damages. Rather, imposition of an administrative penalty of two thousand five hundred dollars (\$2,500) is recommended.

RECOMMENDED PENALTY

After consideration of the factors of Regulation 18361.5, and the facts of this case, including the aggravating and mitigating factors discussed above, the Enforcement Division recommends the imposition of the agreed upon penalty of Two Thousand Five Hundred Dollars (\$2,500).