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Attorney for Respondent

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of MICHELLE BERMAN, Respondent	FPPC No.: 10/115 RESPONDENT MICHELLE BERMAN'S MOTION TO VACATE DECISON AND TO ALLOW RESPONDENT TO FILE A NOTICE OF DEFENSE; POINTS AND AUTHORITIES IN SUPPORT OF MOTION; and DECLARATION OF ALAN GREGORY WONDERWHEEL, (Government Code Section 11520(c))

Respondent MICHELLE BERMAN hereby requests that the FAIR POLITICAL PRACTICES COMMISSION (FPPC, "Agency" or "Commission") vacate its decision of November 12, 2010, based on Respondent's default and allow Respondent to file a Notice of Defense requesting an administrative hearing in the matter.

This motion is made on the grounds of mistake, inadvertence, surprise, or excusable neglect by Respondent's attorney, the interests of justice, and the protection of due process, and is supported by the accompanying Memorandum of Points and Authorities, the Declaration of Alan Gregory Wonderwheel and the documents in the file of this matter.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL SUMMARY

On or about June 2, 2010 the FPPC opened an investigation against Respondent alleging violations of the Political Reform Act (the Act) found in Government Code Section 81000 et seq. The FPPC initiated an administrative action and issued a probable cause report and order. On or about August 11, 2010, Roman G. Porter, Executive Director of the FPPC, issued an Accusation against Respondent. Respondent's attorney did not respond to the Accusation by filing a Notice of Defense within the statutory time limit resulting in the request by the enforcement division of the FPPC for a Default Decision and Order.

The Request for Default by the enforcement division was placed on the FPCC November 12, 2010 meeting agenda as a consent item. Respondent and Respondent's attorney appeared at the meeting and requested to be heard and were allowed to speak. Respondent and Respondent's attorney requested that the FPPC not make a decision based on Respondent's default of timely filing of a Notice of Defense and instead before the proposed decision was issued based on the default, to grant an administrative hearing on reasonable notice to the parties. At the meeting on November 12, 2010, the FPPC denied Respondent's request not to issue a decision based on the default and entered its decision without allowing Respondent to file a Notice of Defense and without granting an administrative hearing.

II. LAW AND ARGUMENT

Government Code Section 11520 (all further references to statute are to the California Government Code unless stated otherwise) subdivision (c) provides that the agency may vacate a default decision and grant a hearing on good cause, and states in part:

> As used in this subdivision, good cause includes, but is not limited to, any of the following:
> (1) Failure of the person to receive notice served pursuant to Section 11505.
> (2) Mistake, inadvertence, surprise, or excusable neglect. [1]

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[1] Government Code Section 11520. (a) If the respondent either fails to file a notice of defense or to appear at the hearing, the agency may take action based upon the respondent's express admissions or upon other evidence and

1. THE FPPC SHOULD SET ASIDE THE DEFAULT DECISION FOR THE GOOD CAUSE THAT IT RESULTED FROM RESPONDENT'S ATTORNEY'S MISTAKE, INADVERTENCE, OR EXCUSABLE NEGLECT.

Government Code Section 11520(c) defines "good cause" to include mistake, inadvertence, surprise, or excusable neglect. This standard uses the same language as Code of Civil Procedure (CCP) Section 473(b) to "relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect."[2] While Section 11520(c) provides that

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affidavits may be used as evidence without any notice to respondent; and where the burden of proof is on the respondent to establish that
the respondent is entitled to the agency action sought, the agency may act without taking evidence.
(b) Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties. If the agency and administrative law judge make conflicting orders under this subdivision, the agency's order takes precedence. The administrative law judge may order the respondent, or the respondent's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of the respondent's failure to appear at the hearing.
(c) Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:
(1) Failure of the person to receive notice served pursuant to Section 11505.
(2) Mistake, inadvertence, surprise, or excusable neglect.

[2] Code of Civil Procedure 473(b) The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken. However, in the case of a judgment, dismissal, order, or other proceeding determining the ownership or right to possession of real or personal property, without extending the six-month period, when a notice in writing is personally served within the State of California both upon the party against whom the judgment, dismissal, order, or other proceeding has been taken, and upon his or her attorney of record, if any, notifying that party and his or her attorney of record, if any, that the order, judgment, dismissal, or other proceeding was taken against him or her and that any rights the party has to apply for relief under the provisions of Section 473 of the Code of Civil Procedure shall expire 90 days after service of the notice, then the application shall be made within 90 days after service of the notice upon the defaulting party or his or her attorney of record, if any, whichever service shall be later. No affidavit or declaration of merits shall be required of the moving party. Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence,

the agency's decision to vacate a default is discretionary, the public policy of have a final decision based on the merits is of such great importance that in a judicial proceeding the legislature has provided in CCP Sec. 473(b) that setting aside a judgment is mandatory when the judgment results from a default that is caused by the attorney and the motion is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise or neglect.

There is no basis for the omission in Section 11520(c)--of the legislative language of CCP 473(b) requiring that setting aside the default is mandatory when based on the attorney's failure--to be construed as a prohibition preventing the FPPC from adopting the same standard as its own procedure in similar circumstances. In the interests of justice and due process, the FPPC should apply the same standard for its agency default decisions. When a default is entered by failure to submit the Notice of Defense in a timely manner and prevents the scheduling of the fair hearing of the Accusation against the Respondent, if the default resulted from the attorney's failure then the Respondent should be allowed their "day in court" to present their case at a fair administrative hearing. In such circumstances the FPPC's refusal decide the matter based on the merits is an abuse of discretion by the FPPC by denying Respondent a fair hearing due to the conduct of her attorney.

As shown by the attached Declaration of Alan G. Wonderwheel, the default of Respondent to timely file a Notice of Defense was the result of her attorney's mistake, inadvertence, or excusable neglect. For that reason the FPPC should set aside the decision based on the default and allow Respondent the opportunity to present her defense in a formal

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surprise, or neglect. The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties. However, this section shall not lengthen the time within which an action shall be brought to trial pursuant to Section 583.310.

administrative hearing using the evidentiary procedures of law including allowing testimony under oath and the presentation of other evidence in a coherent manner.

2. THE DEFAULT DECISION SHOULD BE SET ASIDE FOR THE GOOD CAUSE THAT IT RESULTED FROM RESPONDENT'S GOOD FAITH RELIANCE ON HER ATTORNEY

As a separate basis, the FPPC may vacate the decision on the good cause of Respondent's mistake, inadvertence, surprise, or excusable neglect. Here, the default of Respondent was due to the failure of her attorney to timely filing the Notice of Defense. Any mistake, inadvertence, surprise, or excusable neglect of the Respondent consisted in relying in good faith upon her attorney to act in a timely manner. Respondent was surprised by the default as her attorney had not informed her of the failure to timely file the notice. It is an abuse of its discretion for the FPPC to refuse to vacate the decision based on default when the Respondent has the good cause that her mistake, inadvertence, surprise, or excusable neglect was grounded on her good faith reliance upon her attorney. Respondent has relevant and substantial defenses and evidence of mitigation to the allegations of violation of the Act.

3. THE DEFAULT DECISION SHOULD BE SET ASIDE BECAUSE THE FPPC DECISION WAS AN ABUSE OF ITS DECRETION BY PREJUDGING THE OUTCOME OF A FAIR HEARING BEFORE A NEUTRAL HEARING OFFICER.

At the November 12, 2010 hearing of the FPPC, the FPPC allowed Respondent and Respondent's attorney to speak to the question of whether the decision should be entered based on the default. However, the FPPC abused its discretion in deciding the matter based on default by considering ***and prejudging*** the merits of the case without providing Respondent the

opportunity to present her case in the formal atmosphere and conduct of an administrative hearing before an administrative law judge as neutral hearing officer.

Prior to hearing from the Respondent's attorney and Respondent, the FPPC asked it's Chief of Enforcement counsel, Gary S. Winuk, to state the case against Respondent. Mr. Winuk proceeded to make an argumentative presentation of the merits of the case against Respondent. Respondent's attorney stated that it was inappropriate to argue the merits of the case at that place and time as it was a default item on the FPPC's meeting agenda and not a hearing and that Respondent was requesting that the agency exercise its discretion before a proposed decision was issued to grant an administrative hearing to Respondent.

Instead, the FPPC did not limit its discussion to the good cause for granting a hearing and conducted a haphazard inquiry into the merits of Respondent's case thus prejudging the outcome before the case could be presented to an administrative law judge as a neutral hearing officer. The Commissioners were not acting as neutral hearing officers as several stated that if they were to grant a hearing that their own counsel's work on the default documents would have been "wasted." The FPPC thus decided the question not on basis of the good cause of Respondent's default but by considering the so-called "wasted effort" that would be caused to the enforcement division by not issuing the default decision. This shows the lack of fair play and neutrality the FPPC has as a body in considering such matters when the enforcement division is not seen as a separate body but as the FPPC's own attorneys. Thus the FPPC was acting as both prosecutor and jury by the commissioners' failing to conduct themselves in a neutral manner to consider the question of Respondent's request and giving preferential and prejudicial concern to the enforcement division.

Additionally, using circular reasoning that prejudged the outcome of a possible administrative hearing, several FPPC Commissioners stated that they did not want to grant an administrative hearing because they were convinced that Respondent could do no better at an administrative hearing than the decision the FPPC was then making based on the default. Since under the default decision Respondent was being fined at the full amount of five thousand dollars ($5,000.00) for each of three counts, in the total amount of $15,000.00, there was no reasonable basis to believe that Respondent, if given the opportunity to present her side of the story to a neutral hearing officer, would not have been able to achieve at least some reduction of the full amount of the fine, if for no other reason than for establishing the fact of the the mitigating factors that the enforcement division was ignoring in its request for the full amount of the fine.

The FPPC's position, that a relatively brief and informal presentation at a public meeting on a consent calendar imposing a decision based on a default equates to a full and fair hearing before an impartial hearing officer who is able to hear testimony and receive evidence in an orderly fashion, is a prejudicial abuse of its discretion to grant a fair hearing. The FPPC prejudged the possible evidence without giving Respondent the requested fair hearing where she could present her evidence according to rules of procedure and evidence.

While the Respondent is thankful that the FPPC allowed her attorney and herself to speak to the Commission at its November 2, 2010, meeting, that presentation was not a fair hearing and the Commission did not give the Respondent a fair hearing of her entire case under any meaning of that term. Respondent's attorney told the Commission that he came to request that the Commission not enter a default and instead to grant a fair hearing by allowing the Respondent to file her Notice of Defense. The Commission then allowed the enforcement division's counsel to claim that there would be no point to a hearing because the Respondent was

guilty. The Commission agreed, thus prejudicing Respondent without a fair hearing and imposing the full amount of possible fines.

4. THE DEFAULT DECISION SHOULD BE SET ASIDE BECAUSE THE FPPC POLICY OF NOT ALLOWING THE GRANTING OF HEARINGS AT THE DEFAULT STAGE IS AN ABUSE OF DISCRETION BY REFUSING TO IMPLEMENT GOVERNMENT CODE SECTION 11520.

Government Code section 11520(b) provides in part "Notwithstanding the default of the respondent, the agency or the administrative law judge, before a proposed decision is issued, has discretion to grant a hearing on reasonable notice to the parties." A default may occur before a hearing is scheduled, as in the present case, by failing to return a Notice of Defense or after a hearing is scheduled by not appearing at the hearing. Section 11520(b) states that if the default is due to a failure to appear at the scheduled hearing that the administrative law judge may order the respondent, or the respondent's attorney or both to pay reasonable expenses incurred by another party as a result of respondent's failure to appear at the hearing. Thus even when a respondent does not appear at a scheduled hearing the code contemplates that the default may be vacated and a new hearing granted.

In this present matter there was no scheduled hearing so there was no expense incurred by failing to appear at a hearing.

However, the Commissioners stated that if they were to allow Respondent to appear at their FPPC meeting and request that the default decision not be made and request instead that a hearing be granted, then any other respondent could come to their meetings and request the same thing. This shows an abuse of discretion by the Commission by deliberately adopting a policy of refusing to exercise its discretion for fear that others would also come before the Commission asking it to exercise its discretion under Section 11520(b) or 11520(c). The Commissioners

stated that they did not want to establish "a precedent" of allowing default proceedings to be terminated and a hearing granted instead because such a precedent would open the floodgates of requests from other respondents both with and without attorneys. The Commission clearly stated that they do not acknowledge the validity of granting hearings after a default thus taking a prejudicial position on the implementation of Section 11520..

By its clear and plain language, Section 11520 provides the avenue for defaulting respondents to request that a hearing be granted after a default. Yet by their own argument, the Commission does not believe that ever granting a hearing at the default stage is warranted other wise others would come to the Commission asking for the same relief. This is the classic example of abuse of discretion by refusing to exercise the discretion.

III. CONCLUSION

This motion is accompanied by a Notice of Defense and Respondent's attorney's declaration of mistake, inadvertence, surprise, or excusable neglect. For each and all the foregoing stated reasons, Respondent respectfully requests that the decision based on default be vacated and that Respondent be granted a fair hearing pursuant to Section 1150(c) and that Respondent's Notice of Defense submitted herewith be deemed filed and served in order to give fair notice of the hearing.

Dated: November 19, 2010

By Alan Gregory Wonderwheel
Attorney for Respondent

DECLARATION OF ALAN GREGORY WONDERWHEEL

I, ALAN GREGORY WONDERWHEEL, declare as follows:

1. I am an attorney at law duly admitted to practice, and I am the attorney for Respondent MICHELLE BERMAN. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. I am competent to testify, and if called upon to testify, could and would testify as set forth herein. I make this declaration in support of Respondent's Motion to Set Aside the Default proceedings.

2. This FPPC proceeding arises from the actions of Respondent related to the election campaign of City of Cotati Council Member John Guardino in the election of November 7, 2006, and the FPPC's investigation alleging that Respondent's actions violated the Political Reform Act (the Act) found in Government Code Section 81000 et seq..

3. In the conduct of its proceeding the FPPC issued a Probable Cause Order resulting in an Allegation that required a timely response by Respondent executing a Notice of Defense to prevent a default.

4. As Respondent's counsel I should have prepared and filed the Notice of Defense in a timely manner but failed to do so due to my own mistake, inadvertence, or excusable neglect.

5. I am a sole practitioner attorney who is representing Respondent on a pro bono basis and through my own mistake or neglect I have failed to properly manage this case and to calendar the events needed to return the Notice of Defense in a timely manner. The notice from the FPPC was put on a stack of papers and buried and unfortunately forgotten. I was not in

adequate communication with my client and the Respondent who was not informed of the deadline for filing the Notice of Defense so the Respondent did not know to inquire about it.

6. Respondent has relevant and substantial defenses to the allegations of violation of the Act which Respondent would present should Respondent be allowed to have the administrative hearing contemplated by the Act.

7. Prior to the meeting where the request to make a decision based on Respondent's default was placed on the consent calendar, I contacted Bridgette Castillo, Commission Counsel, Enforcement Division, to request that the default decision request be taken off calendar and Respondent be allowed to file the Notice of Defense. Ms. Castillo informed me that once the meeting agenda was set she did not have the authority to remove it from the agenda.

8. I attended the FPPC meeting and requested orally and in a written motion that pursuant to Government Code Section 11520(b) the Commission terminate the default proceeding and grant a hearing by allowing Respondent to file the Notice of Defense.

9 The FPPC denied the request to grant a hearing before it issued it decision based on the default and instead issued its decision of default as requested by its enforcement division.

10. The FPPC Commissioners stated that they believed if they granted Respondent's request that other defaulting respondents could and would come with similar request to grant hearings after default and that they did not want to establish "a precedent" of doing this.

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

Executed this 19th day of November, 2010 at Sacramento, California.

By Alan Gregory Wonderwheel

BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

STATE OF CALIFORNIA

In the Matter of MICHELLE BERMAN, Respondent(s).	NOTICE OF DEFENSE (Pursuant to Gov. Code § 11506) FPPC Case No. 10/115

Michelle Berman, a Respondent named in the above entitled proceeding, hereby acknowledges receipt of the Accusation, a copy of the Statement to Respondent, a copy of Government Code Sections 11506, 11507, 11507.3, 11507.5, 11507.6, 11507.7 and 11508, and two copies of a *NOTICE OF DEFENSE*.

Pursuant to Government Code Section 11506, subdivision (a), you may file this *NOTICE OF DEFENSE* requesting a hearing on the grounds listed below. Failure to file this *NOTICE OF DEFENSE* shall constitute a waiver of your right to a hearing. If you waive your right to a hearing, you may file a statement of mitigation by separate letter that will be considered by the Commission in assessing any penalties for the violations alleged in the Accusation.

If you wish to file a *NOTICE OF DEFENSE*, please check <u>all</u> applicable grounds for the *NOTICE OF DEFENSE*, complete the remainder of the form, and mail to the Commission within fifteen (15) days of receipt of the Accusation.

GROUNDS FOR NOTICE OF DEFENSE

☑ 1) I request a hearing;

☑ 2) I object to the Accusation upon the ground that it does not state acts or omissions upon which the agency may proceed;

☐ 3) I object to the form of the Accusation on the ground that it is so indefinite or uncertain that I cannot identify the transaction that is the subject of the Accusation or prepare my defense;

☑ 4) I admit the Accusation in whole or in part (check box "a" or "b");

☐ a) I admit the Accusation in whole.

☑ b) I admit the Accusation in part as indicated below:

Admit paragraphs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12 and 35.
Deny all other paragraphs.

☑ 5) I wish to present new matter by way of defense;

☐ 6) I object to the accusation upon the ground that, under the circumstances, compliance with the requirements of a regulation of the Fair Political Practices Commission would result in a material violation of another regulation enacted by another department affecting substantive rights.

Dated: 11/11/10

Michelle S. Ber
MICHELLE BERMAN

MICHELLE S BERMAN
Print Name

Mailing Address

City, State, Zip

FPPC No.: 10/115

PROOF OF SERVICE

I, the undersigned, declare that I am and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above-entitled action; I am a citizen of the United States of America; I reside in Sonoma County, California; and my business address is 111 Santa Rosa Ave. Suite 406, Santa Rosa CA 95404.

On the dated indicated below, I served the foregoing/attached:

RESPONDENT MICHELLE BERMAN'S MOTION TO VACATE DECISON AND TO ALLOW RESPONDENT TO FILE A NOTICE OF DEFENSE; POINTS AND AUTHORITIES IN SUPPORT OF MOTION; and DECLARATION OF ALAN GREGORY WONDERWHEEL,

X By placing a true copy thereof enclosed in a sealed envelope, with the postage thereon fully prepaid, in the United States mail, in a mailbox regularly maintained by the United States Postal Service, at Sacramento, California, addressed as set forth to the persons named below.

_____ By facsimile telecopier transmission of a true copy thereof to the person named below at the telephone number as set forth below.

X By personally delivering a true copy thereof to the person named below, or their agent for service, at the address as set forth below.

_____ By causing a true copy thereof to be delivered to the person named below at the address as set forth by and/or through the services of :

_____ Federal Express

____ United States Express Mail.

- Service to:
- Fair Political Practices Commission
  428 J Street, Suite 800
  Sacramento, CA 95814

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 1/19, 2010, at Sacramento, California.

Alan Gregory Wonderwheel
Attorney at Law