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7

8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**

9 **STATE OF CALIFORNIA**

10  
11 In the Matter of ) FPPC No. 16/19959  
12 )  
13 )  
13 SAN FRANCISCO BAY AREA RAPID ) **STIPULATION, DECISION, AND ORDER**  
TRANSIT DISTRICT (BART), )  
14 )  
15 )  
16 Respondent. )  
17 )

18 **INTRODUCTION**

19 Respondent San Francisco Bay Area Rapid Transit District (“BART”) is a public transportation  
20 system that serves the San Francisco Bay Area. Under the Political Reform Act (the “Act”),<sup>1</sup> a local  
21 government agency that spends \$1,000 or more in public funds to advocate for or against a ballot measure  
22 qualifies as a campaign committee and must comply with all provisions of the Act related to campaign  
23 committees, including disclosing itself on advertisements and filing campaign statements and reports.  
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25  
26 <sup>1</sup> The Act is contained in Government Code sections 81000 through 91014. All statutory references are to the  
27 Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in  
28 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.

1 BART violated the Act by failing to file two late independent expenditure reports, failing to timely file  
2 one semi-annual campaign statement, and failing to include a disclosure statement on its advertisements.

### 3 **SUMMARY OF THE LAW**

4 The violations in this case occurred in 2016, so all legal references and discussions of the law  
5 pertain to the Act's provisions as they existed at that time.

#### 6 Need for Liberal Construction and Vigorous Enforcement of the Political Reform Act

7 When enacting the Political Reform Act, the people of California found and declared that previous  
8 laws regulating political practices suffered from inadequate enforcement by state and local authorities.<sup>2</sup>  
9 For this reason, the Act is to be construed liberally to accomplish its purposes.<sup>3</sup>

10 There are many purposes of the Act. One purpose is to promote transparency by ensuring that  
11 expenditures made in election campaigns are fully and truthfully disclosed so that voters are fully  
12 informed and improper practices are inhibited.<sup>4</sup> In furtherance of this purpose, the Act establishes a  
13 comprehensive campaign reporting system<sup>5</sup> and requires any committee that supports or opposes a ballot  
14 measure to print its name as part of any advertisement.<sup>6</sup> Another purpose of the Act is to provide adequate  
15 enforcement mechanisms so the Act will be "vigorously enforced."<sup>7</sup>

#### 16 Government Agencies as Campaign Committees

17 Any person or combination of persons who, in a calendar year, makes independent expenditures  
18 totaling \$1,000 or more qualifies as an independent expenditure committee.<sup>8</sup> When a state or local  
19 governmental agency uses public moneys for a communication that (1) expressly advocates for or against  
20 a clearly identified candidate or ballot measure or (2) unambiguously urges a particular result in an  
21 election, the Act identifies that payment as an independent expenditure.<sup>9</sup> A communication paid for with  
22 public moneys by a state or local governmental agency unambiguously urges a particular result in an

23 <sup>2</sup> Section 81001, subd. (h).

24 <sup>3</sup> Section 81003.

25 <sup>4</sup> Section 81002, subd. (a).

26 <sup>5</sup> Sections 84200, *et seq.*

27 <sup>6</sup> Section 84506.

28 <sup>7</sup> Section 81002, subd. (f).

<sup>8</sup> Section 82013, subd. (b).

<sup>9</sup> Section 82031 and Regulation 18420.1, subd. (a).

1 election if: (1) it clearly is campaign material or campaign activity, such as bumper stickers, billboards,  
2 door-to-door canvassing, or other mass media advertising; or (2) when considering the style, tenor, and  
3 timing of the communication, it can be reasonably characterized as campaign material and is not a fair  
4 representation of fact serving only an informational purpose.<sup>10</sup>

5 If a state or local governmental agency distributes communications that qualify as campaign  
6 expenditures and cost \$1,000 or more in a calendar year, it qualifies as an independent expenditure  
7 committee.<sup>11</sup>

8 The Commission adopted Regulation 18420.1 after the California Supreme Court's decision in  
9 *Vargas v. City of Salinas, et. al.* (2009) 46 Cal. 4<sup>th</sup> 1.<sup>12</sup> The Court in *Vargas* considered whether written  
10 communications concerning a ballot measure sent by the City of Salinas that did not contain express  
11 advocacy nevertheless was campaign activity and therefore an unauthorized use of public funds. The  
12 communications in question consisted of minutes from a city council meeting; city reports posted to the  
13 city's website regarding the potential impact on city services the measure would cause; a one page  
14 document available at city buildings that listed the service and program reductions the city would institute  
15 if the measure passed; and a city newsletter that described the proposed reductions in services that would  
16 result if the measure passed.

17 In its decision in *Vargas*, the Court relied on and reaffirmed its decision in *Stanson v. Mott* (1976)  
18 17 Cal. 3d 206. *Stanson* established the analysis for determining when communications by a  
19 governmental agency that do not contain express advocacy still constitute campaign activity. The Court  
20 drew a distinction between campaign expenditures made with public funds, which are prohibited absent  
21 express authority, and informational activities by public agency which are generally permissible. The  
22 Court stated:

23 With respect to some activities, the distinction is rather clear: thus, the use of public funds  
24 to purchase such items as bumper stickers, posters, advertising "floats," or television and  
radio "spots" unquestionably constitutes improper campaign activity.<sup>13</sup>

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25 <sup>10</sup> Regulation 18420.1, subd. (b).

26 <sup>11</sup> Regulation 18420, subd. (d).

27 <sup>12</sup> Fair Political Practices Commission, Minutes of Meeting, Public Session, Sept. 10, 2009, item no. 25, page 3.

28 <sup>13</sup> *Stanson*, 17 Cal.3d 206, 221.

1 Neither *Vargas* nor *Stanson* directly concerned any provisions of the Act. They were decided  
2 based on the constitutional prohibition against unauthorized use of public funds by public officials.  
3 Specifically, the use of public funds for campaign activity, which advocates for or against a ballot  
4 measure, as opposed to activity that merely educates the voters on an issue. But since in those cases the  
5 California Supreme Court had defined when government agencies are prohibited from using public  
6 moneys to pay for communications related to ballot measures, the Commission adopted the parameters  
7 described in *Vargas* for determining when a government agency participates in campaign activity by  
8 making independent expenditures under the Act.<sup>14</sup> That being the case, while *Vargas* and *Stanson* were  
9 instructive in determining when communications by a public agency constitute campaign activity,  
10 Regulation 18420.1 is the authority for determining when a payment of public money qualifies as an  
11 “independent expenditure” under the Act.

#### 12 Campaign Statement and Reports

13 If a local government agency makes expenditures and qualifies as a committee, it must file  
14 campaign statements.<sup>15</sup> If a committee is primarily formed to support a multi-county measure, it must  
15 file the original and one copy of its campaign statements with the county that has the largest number of  
16 registered voters.<sup>16</sup> It also must file a Late Independent Expenditure Report within 24 hours of making  
17 an expenditure of \$1,000 or more during the 90 days prior to an election and disclose the independent  
18 expenditure on a subsequent campaign statement.<sup>17</sup> It must report the committee’s name, committee’s  
19 address, number or letter of the measure, jurisdiction of the measure, amount, date, and description of  
20 goods or services for which the late independent expenditure was made.<sup>18</sup>

21 A local government agency as an independent expenditure committee also must file semi-annual  
22 campaign statements each year for the period ending June 30 and December 31 if it made independent  
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25 <sup>14</sup> Fair Political Practices Commission, Minutes of Meeting, Public Session, Sept. 10, 2009, item no. 25, page 3.

26 <sup>15</sup> Id.

27 <sup>16</sup> Section 84215, subd. (b).

28 <sup>17</sup> Sections 84200.6, subd. (b), and 84204.

<sup>18</sup> Section 84204.

1 expenditures during the 6-month period prior to those dates.<sup>19</sup> However, if an independent expenditure  
2 committee newly forms during the second half of a year, the reporting date begins on January 1.<sup>20</sup>

3 Advertisement Disclosure

4 An advertisement is any general or public advertisement which is authorized and paid for by a  
5 committee for the purpose of supporting or opposing a candidate for elective office or one or more ballot  
6 measures.<sup>21</sup> Such an advertisement, that is paid for by an independent expenditure, must include a  
7 disclosure statement that identifies the name of the committee.<sup>22</sup> A video electronic media advertisement,  
8 such as a YouTube video, requires both written and spoken disclosure information either at the beginning  
9 or at the end of the communication.<sup>23</sup> The written disclosure statement shall appear with a reasonable  
10 degree of color contrast between the background and text of the statement, must be of sufficient size to  
11 be readily legible to an average viewer and air for not less than four seconds.<sup>24</sup>

12 A text or graphic electronic media advertisement must show the disclosure information in letters  
13 at least as large as the majority of the text in the advertisement.<sup>25</sup> If the advertisement is limited in size,  
14 the disclosure may be displayed via a link to a webpage with disclosure information or other technological  
15 means that provide the user with disclosure.<sup>26</sup> In addition, the disclosure information must appear with a  
16 reasonable degree of color contrast between the background and text of the statement as to be legible.<sup>27</sup>  
17 In an electronic media advertisement whose size, space, or character limit constraints render it  
18 impracticable to include the full disclosure information, such as with SMS text message, the  
19 advertisement may provide abbreviated advertisement disclosure containing at least the committee's  
20 FPPC number.<sup>28</sup>

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22 <sup>19</sup> Section 84200, subd. (b).

23 <sup>20</sup> Section 82046, subd. (b).

24 <sup>21</sup> Section 84501, subd. (a); Regulation 18450.1, subd. (a)(2).

25 <sup>22</sup> Section 84506, subd. (a)(1).

26 <sup>23</sup> Regulation 18450.4, subd. (b)(3)(G)(iii).

27 <sup>24</sup> Id.

28 <sup>25</sup> Regulation 18450.4, subd. (b)(3)(G)(i).

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Regulation 18450.4, subd. (b)(3)(G)(iv).

1 **SUMMARY OF THE FACTS**

2 On June 9, 2016, the BART Board of Directors voted to place Measure RR on the  
3 November 8, 2016 ballot for Alameda, San Francisco, and Contra Costa County. Measure RR passed  
4 with 70.53 percent of the votes, and it authorized BART to issue \$3.5 billion in general obligation bonds  
5 to repair infrastructure, relieve congestion, and improve access.

6 Measure RR emanated from the Better BART Initiative (the “Initiative”), which had been  
7 promoted by BART since at least around July 2014. Through the Initiative and separately in support of  
8 Measure RR, BART used “it’s time to rebuild” as a tagline. In reflection of the time period when Measure  
9 RR was placed on the ballot, all activities relating to the Initiative and all references to “it’s time to  
10 rebuild” from June 2016 through November 2016 are comprehended by the Enforcement Division as  
11 promotion of Measure RR. BART contends that it did not intend on engaging in campaign activities when  
12 it used two YouTube videos, social media posts, and a text message to advocate for the passage of  
13 Measure RR.

14 YouTube Videos

15 BART published two videos on YouTube that constituted advocacy in support of Measure RR.  
16 BART uploaded “Rebuild BART: Riders’ Perspective” on August 19, 2016. In this video, riders  
17 complained about various deficiencies with BART’s transportation system, making the following  
18 inflammatory and argumentative statements: “we need to spend more dollars to get it into a more modern  
19 condition,” “gotten worse,” “safety has diminished over time,” “obviously showing its age,” “always  
20 problems with the elevator every day,” and “definitely fix that.” Then, the same riders expressed their  
21 gratitude for BART, emphasizing the message to rebuild BART by stating the following: “really thank  
22 God for BART,” “if there is no BART, can you imagine how many people aren’t going to get to work,”  
23 and “great idea if they could rebuild the whole system.” By borrowing the voices and the sympathy of its  
24 customers, BART campaigned for Measure RR.

25 BART hired Mark W. Jones in July 2016 to shoot, log, and edit the “Rebuild BART” video. An  
26 invoice shows that Jones billed BART \$2,600 on July 25, 2016 for his services.

1 BART also uploaded “It’s Time to Rebuild” on October 27, 2016. This video listed deficiencies  
2 in BART’s system, by declaring the following: “no longer reliable and requires replacement,” “parts of  
3 BART will continue to deteriorate,” “rebuild the bones of the system and improve the customer  
4 experience of travelers,” “an investment BART is serious about protecting,” and “keep our riders safe,  
5 our service reliable, and cars off the road.” Then, the video concluded with the Measure RR tagline, “It’s  
6 time to rebuild,” on the screen, which indicated a clear connection to and promotion of Measure RR.  
7 Then, the video briefly mentioned Measure RR and referred viewers to the Initiative’s website.

8 BART hired Stephen Connell dba Ripple Effect Media, and Connell billed BART approximately  
9 \$4,691.66 from July 1, 2016 through September 30, 2016 for the production, editing, and publication of  
10 the video. BART also paid Rita’s Voice \$500.00 on September 26, 2016 to record the narration used in  
11 the video. BART spent a total of \$7,791.66 to produce, edit, and distribute both videos.

12 “Rebuild BART” and “It’s Time to Rebuild” were video electronic media advertisements and,  
13 therefore by definition, were clearly campaign material. For this reason, they both required a disclosure  
14 statement with “paid for by” immediately preceding BART’s name. These advertisements should have  
15 included a written and spoken disclosure statement at the beginning or at the end of the communication  
16 for a length not less than four seconds. BART failed to include such a disclosure statement in both videos  
17 and violated the Act.

#### 18 Social Media

19 BART has maintained an active presence on social media to inform customers of BART’s new  
20 features and programs, praise BART’s employees, and promote BART’s good deeds within its  
21 communities. As of March 7, 2018, BART had 298,622 Twitter followers and 31,567 Facebook  
22 followers.

23 BART utilized its social media presence in furtherance of its campaign to support Measure RR.  
24 BART used Twitter and Facebook to upload the YouTube video advertisements mentioned above and to  
25 advocate for the measure. The social media posts in question were text electronic media advertisements,  
26 which were clearly campaign material. As campaign advertisements, they required a disclosure statement  
27 with “paid for by” immediately preceding BART’s name. Due to size, space or character limit constraints,  
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1 BART instead could have displayed the disclosure via a link to a webpage that contained the necessary  
2 information. However, BART failed to display a proper disclosure statement in its social media posts.

3 Text Message

4 BART customers can subscribe to text notifications regarding service advisories on BART’s  
5 website. On or around October 12, 2016, BART sent a text message stating, “Measure RR on the Nov.  
6 18 ballot would help to rebuild and update BART, after 44 years of service and billions of trips taken.  
7 Learn more at bart.gov/betterbart.” This text message was an electronic media advertisement, which is  
8 clearly campaign material. Although the cost of disseminating this text message very likely was nominal,  
9 it is an advertisement that should have included a disclosure statement. The disclosure statement should  
10 have had “paid for by” preceding BART’s name. If the text notifications were constrained by a limited  
11 number of characters, then BART could have included a link to a website where the proper disclosure  
12 language is displayed or provided an abbreviated advertisement disclosure to meet the disclosure  
13 requirement mandated by the Act. However, BART failed to display a proper disclosure statement.

14 Campaign Statement and Report

15 Since BART qualified on or around July 25, 2016 as an independent expenditure committee when  
16 it spent more than \$1,000 to produce the “Rebuild BART” video, it was required to file several forms to  
17 disclose its campaign activities to the public. BART should have filed with the Alameda County Registrar  
18 of Voters two 24-Hour Independent Expenditure Reports within 24 hours of making an expenditure of  
19 \$1,000 or more during the 90 days prior to November 8, 2016. BART made expenditures for the “Rebuild  
20 BART” and “It’s Time to Rebuild” videos, each in the aggregate exceeding \$1,000, during the 90 days  
21 prior to November 8, 2016. Because BART failed to timely file the 24-Hour Independent Expenditure  
22 Report, the public was unaware of the resources BART dedicated towards promoting Measure RR.

23 Additionally, BART was required to file a semi-annual campaign statement to itemize its  
24 campaign activities for the period covering January 1, 2016 through December 31, 2016 by  
25 January 31, 2017 but failed to do so. Therefore, in addition to not receiving timely disclosures during the  
26 90 days prior to election, the public remains uninformed about the resources BART dedicated towards  
27 promoting Measure RR.

1 **VIOLATIONS**

2 Count 1: Failure to Timely File Late Independent Expenditure Reports

3 BART failed to timely file two late independent expenditure reports in the 90-day period  
4 preceding the November 8, 2016 General Election, in violation of Section 84204.

5 Count 2: Failure to Timely File Semi-Annual Campaign Statement

6 BART failed to timely file a semi-annual campaign statement for the period covering July 1, 2016  
7 through December 31, 2016 by January 31, 2017, in violation of Section 84200, subdivision (b).

8 Count 3: Failure to Include Advertisement Disclosure Statements

9 BART failed to include a proper committee disclosure statement in its electronic media  
10 advertisements, in violation of Section 84506, subdivision (a); Section 84507; and Regulation 18450.4,  
11 subdivision (b).

12 **PROPOSED PENALTY**

13 This matter consists of three counts. The maximum penalty that may be imposed is \$5,000 per  
14 count. The Commission also may impose a fine up to three times the cost of an advertisement when it  
15 finds an advertisement disclosure violation.<sup>29</sup> Thus, the maximum penalty and fine that may be imposed  
16 is \$10,000 and \$23,374.98, respectively, for a combined amount of \$33,374.98.

17 In determining the appropriate penalty for a particular violation of the Act, the Commission  
18 considers the facts of the case, the public harm involved, and the purpose of the Act. Also, the  
19 Commission considers factors such as: (a) the seriousness of the violation; (b) the presence or absence of  
20 any intention to conceal, deceive, or mislead; (c) whether the violation was deliberate, negligent, or  
21 inadvertent; (d) whether the violation was isolated or part of a pattern; (e) whether corrective amendments  
22 voluntarily were filed to provide full disclosure; and (f) whether the violator has a prior record of  
23 violations.<sup>30</sup>

24 Although the Commission considers BART’s violations to be serious, the absence of any evidence  
25 of an intention to conceal, deceive, or mislead; the voluntary filing of the delinquent campaign statement;

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27 <sup>29</sup> Section 84510, subd. (a).

<sup>30</sup> Regulation 18361.5, subd. (d).

1 and the absence of a prior record are mitigating. BART contends that it did not intend on engaging in  
2 campaign activities in support of Measure RR.

3 The Commission also considers penalties in prior cases with comparable violations. Because  
4 similar cases involving public agencies are rare, the following comparable violations are provided for  
5 context. Recent comparable cases include the following:

6 Count 1

7 *In the Matter of Gray for Assembly 2014, Adam Gray, and Douglas L. White*, FPPC No. 16/455.  
8 (The Commission approved a stipulated decision on August 17, 2017.) The Committee made two  
9 independent expenditures, totaling approximately \$24,884.25, for radio advertisements in support of a  
10 proposition during the 90-day period preceding the election. The Committee filed the late independent  
11 expenditure reports 34 days late, on the date of the election, not within 24 hours of making those  
12 independent expenditures. The Commission approved a penalty of \$2,500 for failing to timely file the  
13 late independent expenditure reports.

14 Count 2

15 *In the Matter of Gregory Kelly Meagher*, FPPC No. 14/032. (The Commission approved a  
16 stipulated decision on May 19, 2016.) The Committee, as an independent expenditure committee, made  
17 expenditures totaling approximately \$14,669.00 and contributions totaling approximately \$3,500.00 in  
18 opposition to a local measure. The Committee failed to report these activities by filing a semi-annual  
19 campaign statement. The Commission approved a penalty of \$1,500 for failing to timely file a semi-  
20 annual campaign statement.

21 Count 3

22 *In the Matter of R4: Redondo Residents for Responsible Revitalization*, FPPC No. 15/112. (The  
23 Commission approved a stipulated decision on September 21, 2017.) The Committee produced four  
24 different written advertisements advocating against the passage of a ballot measure. Some advertisements  
25 did not include the name of the Committee or the phrase “paid for by,” although they did include two  
26 references to the Committee’s abbreviated name as well as its website and Facebook page. It was clear  
27

1 from the content on all advertisements that the Committee opposed the measure. The Commission  
2 approved a penalty of \$3,000 for failing to include proper disclaimer on advertisements.

3 Count 3 involved the use of public funds to produce materials advocating for Measure RR. While  
4 the Commission may impose a fine of up to three times the cost of an advertisement when it finds an  
5 advertisement disclosure violation, such a penalty is not justified in this circumstance. Considering the  
6 extent of BART's communication efforts regarding Measure RR, the total amount spent on independent  
7 expenditures, around \$7,791.66, was fairly small. Furthermore, BART's advertisements targeted  
8 individuals who had subscribed to receive only informational communications from BART. Although  
9 BART's advertisements were campaign related, it is worth distinguishing them from unsolicited  
10 advertisements put out to the general population. There also was no evidence of an intent to conceal.  
11 According to BART, it did not intend to produce advertisements that constituted campaign activity.  
12 Furthermore, BART fully cooperated with the Enforcement Division's investigation. For these reasons,  
13 a penalty of three times the cost of the advertisements is not appropriate in this case.

14 For the foregoing reasons, a penalty of \$2,500 for Count 1; \$1,500 for Count 2; and \$3,500 for  
15 Count 3, are recommended, for a total in the amount of \$7,500.

### 16 CONCLUSION

17 Complainant, the Enforcement Division of the Fair Political Practices Commission, and  
18 Respondent San Francisco Bay Area Rapid Transit District hereby agree as follows:

19 1. BART violated the Act as described in the foregoing pages, which are a true and accurate  
20 summary of the facts in this matter.

21 2. This stipulation will be submitted for consideration by the Fair Political Practices  
22 Commission at its next regularly scheduled meeting—or as soon thereafter as the matter may be heard.

23 3. This stipulation resolves all factual and legal issues raised in this matter—for the purpose  
24 of reaching a final disposition without the necessity of holding an administrative hearing to determine  
25 the liability of BART pursuant to Section 83116.

26 4. BART has consulted with its attorney, Matthew Burrows, and understands, and hereby  
27 knowingly and voluntarily waives, any and all procedural rights set forth in Sections 83115.5, 11503,  
28

1 11523, and Regulations 18361.1 through 18361.9. This includes, but is not limited to the right to appear  
2 personally at any administrative hearing held in this matter, to be represented by an attorney at BART's  
3 own expense, to confront and cross-examine all witnesses testifying at the hearing, to subpoena witnesses  
4 to testify at the hearing, to have an impartial administrative law judge preside over the hearing as a hearing  
5 officer, and to have the matter judicially reviewed.

6 5. BART agrees to the issuance of the decision and order set forth below. Also, BART agrees  
7 to the Commission imposing against it an administrative penalty in the amount of \$7,500. One or more  
8 cashier's checks or money orders totaling said amount—to be paid to the General Fund of the State of  
9 California—is/are submitted with this stipulation as full payment of the administrative penalty described  
10 above, and same shall be held by the State of California until the Commission issues its decision and  
11 order regarding the matter.

12 6. If the Commission declines to approve this stipulation—then this stipulation shall become  
13 null and void, and within fifteen business days after the Commission meeting at which the stipulation is  
14 rejected, all payments tendered by BART in connection with this stipulation shall be reimbursed to  
15 BART. If this stipulation is not approved by the Commission, and if a full evidentiary hearing before the  
16 Commission becomes necessary, neither any member of the Commission, nor the Executive Director,  
17 shall be disqualified because of prior consideration of this Stipulation.

18 7. The parties to this agreement may execute their respective signature pages separately. A  
19 copy of any party's executed signature page including a hardcopy of a signature page transmitted via fax  
20 or as a PDF email attachment is as effective and binding as the original.

21  
22 Dated: \_\_\_\_\_  
23 Galena West, Chief of Enforcement  
24 Fair Political Practices Commission

25 Dated: \_\_\_\_\_  
26 \_\_\_\_\_, on behalf of San Francisco Bay Area  
27 Rapid Transit District

1 The foregoing stipulation of the parties “In the Matter of San Francisco Bay Area Rapid Transit District  
2 (BART),” FPPC No. 16/19959, is hereby accepted as the final decision and order of the Fair Political  
3 Practices Commission, effective upon execution below by the Chair.

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5 IT IS SO ORDERED.

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7 Dated: \_\_\_\_\_

\_\_\_\_\_ Alice T. Germond, Chair  
8 Fair Political Practices Commission  
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