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7
8 BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

9 STATE OF CALIFORNIA

10 In the Matter of) FPPC No. 11/639
11)
12)
13 MICHAEL ENDICOTT) DEFAULT DECISION AND ORDER
14)
15 Respondent.) (Gov. Code §§ 11506 and 11520)
16)

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

20 Pursuant to the California Administrative Procedure Act,¹ Respondent Michael Endicott
21 (Respondent) has been served with all of the documents necessary to conduct an administrative hearing
22 regarding the above-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 ¹The 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 and 11507.7 of the Government Code.

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

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

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

16
17
18 Dated: _____

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

ORDER

The Commission issues this Default Decision and Order and imposes an administrative penalty of \$24,500 upon Respondent Michael Endicott, payable to the “General Fund of the State of California.”

IT IS SO ORDERED, effective upon execution below by the Chair of the Fair Political Practices Commission at Sacramento, California.

Dated: _____

Ann Ravel, Chair
Fair Political Practices Commission

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EXHIBIT 1

INTRODUCTION

Respondent Michael Endicott (“Respondent”) is a lobbyist and the responsible officer for the lobbying firm which bears his name. As a responsible officer of a lobbying firm under the Political Reform Act (the “Act”)¹, Respondent has a duty to timely file quarterly lobbying firm reports. Respondent failed to file seven consecutive quarterly lobbying firm reports with the Secretary of State by their respective deadlines.

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

COUNT 1: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the October 1, 2010, through December 31, 2010, reporting period, with the Secretary of State by January 31, 2011, in violation of Government Code sections 86114 and 86118.

COUNT 2: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the January 1, 2011, through March 31, 2011, reporting period, with the Secretary of State by April 30, 2011, in violation of Government Code sections 86114 and 86118.

COUNT 3: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the April 1, 2011, through June 30, 2011, reporting period, with the Secretary of State by July 31, 2011, in violation of Government Code sections 86114 and 86118.

COUNT 4: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the July 1, 2011, through September 30, 2011, reporting period, with the Secretary of State by October 31, 2011, in violation of Government Code sections 86114 and 86118.

COUNT 5: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the October 1, 2011, through December 31, 2011, reporting period, with the Secretary of State by January 31, 2012, in violation of Government Code sections 86114 and 86118.

COUNT 6: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the January 1, 2012, through March 31, 2012, reporting period, with the Secretary of State by April 30, 2012, in violation of Government Code sections 86114 and 86118.

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.

COUNT 7: Respondent Michael Endicott failed to file a quarterly lobbying firm report for the April 1, 2012, through June 30, 2012, reporting period, with the Secretary of State by July 31, 2012, in violation of Government Code sections 86114 and 86118.

**DEFAULT PROCEEDINGS UNDER
THE ADMINISTRATIVE PROCEDURE ACT**

When the Fair Political Practice 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”).¹ (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, subd. (a)(1)-(6).)

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, subd. (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, subd. (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 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

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

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-8, and incorporated herein by reference.

In accordance with Sections 83115.5 and 91000.5, 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 August 24, 2012. (Certification, Exhibit A-1.) Respondent was served by certified mail, return receipt requested.¹ The original return receipt addressed to Respondent was signed on August 29, 2012, and was returned to the Enforcement Division. (Certification, Exhibit A-2.) Therefore, the administrative action commenced on August 29, 2012, the date the registered mail receipt was signed, and 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, dated August 24, 2012, and a memorandum describing Probable Cause Proceedings, advising that Respondent had 21 days in which to request a probable cause conference and/or to file a written response to the Report. (Certification, Exhibit A-3.) 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 John Wallace on October 3, 2012. (Certification, Exhibit A-4.) Respondent was sent copies of these documents. (Certification, Exhibit A-5.)

On October 8, 2012, General Counsel Zackery P. Morazzini issued a Finding of Probable Cause and Order to Prepare and Serve an Accusation. (Certification, Exhibit A-6.)

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).)

¹ 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.)

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), sets 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 11, 2012, Enforcement Chief Gary S. Winuk issued an Accusation against Respondent in this matter. 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 a cover letter dated October 12, 2012, were personally served on Respondent on November 13, 2012. (Certification, Exhibit A-7.)

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 the right to a hearing. Respondent did not file a Notice of Defense within the statutory time period, which ended on November 28, 2012.

As a result, on December 6, 2012, the Enforcement Division sent a letter to Respondent advising him that this matter would be submitted for a Default Decision and Order at the Commission's first scheduled public meeting in 2013. A copy of the Default Decision and Order, and this accompanying Exhibit 1 with attachments, was included with the letter. (Certification, Exhibit A-8.)

SUMMARY OF THE LAW

An express purpose of the Act, as set forth in Section 81002, subdivision (b), is that the activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials. The Act therefore establishes a lobbying and lobbying firm reporting system designed to accomplish this purpose of disclosure.

The following reflects the Act as it was in effect at the time of the relevant violations.

A. Lobbyist

A "lobbyist" is any individual who receives \$2,000 or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or whose principal duties as an employee are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. (Section 82039.)

B. Duty to File Lobbyist Reports

A lobbyist shall complete and verify a periodic report which contains a report of all activity expenses by the lobbyist during the reporting period. (Section 86113, subd. (a).) A lobbyist shall provide the original of his or her periodic report to his or her lobbyist employer or lobbying firm within two weeks following the end of each calendar quarter. (Section 86113, subd. (b).)

C. Duty to File Lobbying Firm Reports

Lobbying firms shall file periodic reports containing all of the following: (1) the full name, address, and telephone number of the lobbying firm; (2) the full name, business address, and telephone number of each person who contracted with the lobbying firm for lobbying services, a description of the specific lobbying interests of the person, and the total payments, including fees and the reimbursement of expenses, received from the person for lobbying services during the reporting period; (3) the total amount of payments received for lobbying services during the period; (4) a periodic report completed and verified by each lobbyist in the lobbying firm pursuant to Section 86113; and (5) each activity expense incurred by the lobbying firm including those reimbursed by a person who contracts with the lobbying firm for lobbying services. A total of all activity expenses of the lobbying firm and all of its lobbyists shall be included. (Section 86114.)

Reports required by Sections 86114 shall be filed during the month following each

calendar quarter. (Section 86117, subd. (a).) The period covered shall be from the first day of January of each new biennial legislative session through the last day of the calendar quarter prior to the month during which the report is filed, and except that the period covered shall not include any information reported in previous reports filed by the same person. (*Id.*) When total amounts are required to be reported, totals shall be state both for the period covered by the statement and for the entire legislative session to date. (*Id.*)

D. Liability of Responsible Officer

Every lobbying firm must have a responsible officer, and it is that officer's duty to ensure that the firm complies with all of the requirements of the Act concerning the receipt and expenditure of funds and the reporting of such funds. (Section 86104, subd. (e).) A lobbying firm's responsible officer may beheld jointly and severally liable, along with the firm, for any reporting violations committed by the firm. (Section 83116.5.)

SUMMARY OF THE FACTS

Respondent Michael Endicott ("Respondent") is, and has been at all times relevant to this matter, a lobbyist and the responsible officer of his lobbying firm 'Michael Endicott'. During the 2009/2010 legislative session, Respondent and his firm were compensated \$103,500 for lobbying services, including \$18,000 during the October 1, 2010, through December 31, 2010, reporting period. During the 2011/2012 legislative session, Respondent and his firm were compensated \$18,000 during the January 1, 2011, through March 31, 2011, reporting period, \$18,000 during the April 1, 2011, through June 30, 2011, reporting period, and \$18,000 during the July 1, 2011, through September 30, 2011, reporting period, for lobbying services, totaling \$54,000. Despite qualifying as a lobbying firm in both the 2009/2010 and 2011/2012 legislative sessions, Respondent failed to file a quarterly lobbying firm report for his lobbying firm with the Secretary of State for the last reporting period of the 2009/2010 legislative session and the first six reporting periods of the 2011/2012 legislative session.

Accordingly, Respondent committed seven violations of the Act, as follows:

- COUNT 1:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the October 1, 2010, through December 31, 2010, reporting period, with the Secretary of State by January 31, 2011, in violation of Government Code sections 86114 and 86118.
- COUNT 2:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the January 1, 2011, through March 31, 2011, reporting period, with the Secretary of State by April 30, 2011, in violation of Government Code sections 86114 and 86118.
- COUNT 3:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the April 1, 2011, through June 30, 2011, reporting period, with the Secretary of State by July 31, 2011, in violation of Government Code sections 86114 and 86118.

- COUNT 4:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the July 1, 2011, through September 30, 2011, reporting period, with the Secretary of State by October 31, 2011, in violation of Government Code sections 86114 and 86118.
- COUNT 5:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the October 1, 2011, through December 31, 2011, reporting period, with the Secretary of State by January 31, 2012, in violation of Government Code sections 86114 and 86118.
- COUNT 6:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the January 1, 2012, through March 31, 2012, reporting period, with the Secretary of State by April 30, 2012, in violation of Government Code sections 86114 and 86118.
- COUNT 7:** Respondent Michael Endicott failed to file a quarterly lobbying firm report for the April 1, 2012, through June 30, 2012, reporting period, with the Secretary of State by July 31, 2012, in violation of Government Code sections 86114 and 86118.

CONCLUSION

This matter consists of seven counts of violating the Act, which carry a maximum administrative penalty of \$5,000 per count, for a total maximum administrative penalty of \$30,000.

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(s) demonstrated good faith in consulting with Commission staff; whether there was a pattern of violations; and whether upon learning of the violation the respondent voluntarily filed amendments to provide full disclosure. The facts are required to be considered by the Commission under Regulation 18361.5.

The failure to timely file lobbying reports violates one of the Act's central purposes: that the activities of lobbyists should be regulated and their finances disclosed in order that improper influences will not be directed at public officials. The public harm inherent in these violations is that the public is deprived of important and timely information regarding the amounts and nature of lobbying activity.

In this matter, Respondent failed to file seven consecutive quarterly lobbying firm reports. As a result, there was no disclosure of approximately \$72,000 in lobbying activity. Additionally, Respondent receiving a warning letter from the Enforcement Division on or about

December 16, 2010, for failing to timely file lobbying firm reports, and as such, should have been aware of his duties under the Act to file lobbying firm reports at the time of the violations in this matter. Therefore Respondent's violations in this matter were negligent at best and deliberate at worst.

Recent penalties approved by the Commission concerning violations of Sections 86114 and 86118 include:

In the Matter of Sacramento Advocacy and Catherine Barankin, FPPC No. 11427.

In December 2012, the Commission approved fines of \$2,500 per count for failing to file nine consecutive quarterly lobbying reports. In all, over \$500,000 of lobbying activity was not timely reported. The respondents did not cooperate with the investigation, but in the end filed most of the delinquent reports.

In the Matter of L. Scott Spahnn & Assoc. and Leslie Scott Spahnn, FPPC No. 05/0436.

In June 2007, the Commission approved a fine of \$2,400 for failing to file a quarterly lobbying firm report. The respondent cooperated with the investigation and agreed to an early resolution of the matter.

The imposition of an administrative penalty of \$3,500 per count is recommended. The proposed penalty is in the high range of penalties recommended for violations of Sections 86114 and 86118 because Respondent has recently received a warning letter for the same violation of the Act, did not cooperate with the investigation, and, to date, has refused to file the delinquent reports.

PROPOSED PENALTY

After consideration of the factors of Regulation 18361.5, and consideration of penalties in prior enforcement actions, a total penalty of \$24,500 is recommended.

* * * * *