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

12 In the Matter of) FPPC No. 12/158
13)
14 SAM DOWNING,) STIPULATION, DECISION and
15) ORDER
16 Respondent.)
17)

18 Complainant the Enforcement Division of the Fair Political Practices Commission and Sam
19 Downing (“Respondent”) hereby agree that this Stipulation will be submitted for consideration by the
20 Fair Political Practices Commission at its next regularly scheduled meeting.

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

24 Respondent understands, and hereby knowingly and voluntarily waives, any and all
25 procedural rights set forth in sections 83115.5, 11503 and 11523 of the Government Code, and in
26 Sections 18361.1 through 18361.9 of Title 2 of the California Code of Regulations. This includes,
27 but is not limited to, the right to personally appear at any administrative hearing held in this matter, to
28 be represented by an attorney at Respondent’s own expense, to confront and cross-examine all

1 witnesses testifying at the hearing, to subpoena witnesses to testify at the hearing, to have an
2 impartial administrative law judge preside over the hearing as a hearing officer, and to have the
3 matter judicially reviewed.

4 It is further stipulated and agreed that Respondent violated the Political Reform Act by
5 1) making a governmental decision by executing a contract to waive the security amount to the
6 Federal Deposit Insurance Corporation limits of \$100,000, for the benefit of First Capital Bank, in
7 which he knew or had reason to know he had a financial interest, in violation Government Code
8 section 87100 (1 count); and 2) failing to disclose his \$50,000 interest in First Capital Bank on his
9 2007 Annual Statement of Economic Interests, in violation of Government Code sections 87300 and
10 87302 (1 count), as described in Exhibit 1. Exhibit 1 is attached hereto and incorporated by reference
11 as though fully set forth herein. Exhibit 1 is a true and accurate 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 him an administrative penalty in the
14 amount of Five Thousand Dollars (\$5,000). A cashier's check from Respondent in said amount,
15 made payable to the "General Fund of the State of California," is submitted with this Stipulation as
16 full payment of the administrative penalty, to be held by the State of California until the Commission
17 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: _____

Sam Downing, Respondent

DECISION AND ORDER

The foregoing Stipulation of the parties “In the Matter of Sam Downing, FPPC No. 12/158,” including all attached exhibits, is hereby accepted as the final Decision and Order of the Fair Political Practices Commission, effective upon execution below by the Chair.

IT IS SO ORDERED.

Dated: _____

Ann Ravel, Chair
Fair Political Practices Commission

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EXHIBIT 1

INTRODUCTION

Respondent Sam Downing (“Respondent Downing”) was named President/Chief Executive Officer (“CEO”) of Salinas Valley Memorial Hospital (“SVMH”) in 1985 and held that position until his retirement on or about April 30, 2011. While employed as the President/CEO of SVMH, Respondent Downing was a “designated employee” as defined in section 82019, subdivision (a), of the Political Reform Act (“the Act”)¹ and in the Conflict of Interest Code for SVMH. The relevant SVMH Conflict of Interest Code for the 2007 Annual Statement of Economic Interests (“SEI”) specifies that Respondent Downing was required to file an annual SEI, disclosing, among other things, his investment interests in banks, savings and loans worth more than \$1,000.

At all relevant times, Respondent Downing owned \$50,000 of stock in First Capital Bank. On February 21, 2008, the SVMH Board approved the transfer of \$1 Million into First Capital Bank, a relatively new local bank that opened for business April 16, 2007. Respondent Downing subsequently made a governmental decision by executing a contract to waive the security amount to the Federal Deposit Insurance Corporation limits of \$100,000, and failed to disclose his economic interest in First Capital Bank on his 2007 Annual SEI.

For the purposes of this Stipulation, Respondent’s violations are stated as follows:

COUNT 1: On or about March 10, 2008, Respondent Sam Downing made a governmental decision by executing a contract to waive the security amount to the Federal Deposit Insurance Corporation limits of \$100,000, for the benefit of First Capital Bank, in which he knew or had reason to know he had a financial interest, in violation Government Code section 87100.

COUNT 2: On or about March 4, 2008, as President/CEO of Salinas Valley Memorial Hospital, Respondent Sam Downing failed to disclose his \$50,000 interest in First Capital Bank on his 2007 Annual Statement of Economic Interests, in violation of Government Code sections 87300 and 87302.

SUMMARY OF THE LAW

Conflict of Interests

The primary purpose for the conflict of interest provisions of the Act is to ensure that “public officials, whether elected or appointed, perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them.” (Section 81001, subd. (b).)

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.

To prevent conflicts of interest in governmental decision making, Section 87100 prohibits state and local public officials from making, participating in making, or attempting to use their official positions to influence a governmental decision in which they know, or have reason to know, that they have a financial interest. Under Section 87103, a public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect on a recognized economic interest of the official. For purposes of Sections 87100 and 87103, there are eight analytical steps to consider when determining whether an individual has a conflict of interest in a governmental decision. Steps seven and eight of the standard step by step analysis are exceptions to the Act and the respondent has the responsibility to provide facts and evidence that support the use of these exceptions. (Regulations 18707, 18708.) Because the facts and evidence do not indicate that either of the exceptions are applicable to this case, these exceptions are not discussed. The six relevant steps of the analysis follow below.

First, the individual must be a public official as defined by the Act. Section 82048 defines “public official” to include a member, officer, employee or consultant of a of a state or local governmental agency.

Second, the official must make, participate in making, or attempt to use his or her official position to influence a governmental decision. Under Regulation 18702.1, subdivision (a), a public official makes a governmental decision when the official, acting within the authority of his office or position, obligates or commits his agency to any course of action or enters into a contractual agreement on behalf of his agency.

Third, the official must have an economic interest that may be financially affected by the governmental decision. Under Section 87103, subdivision (a), an economic interest of a public official includes any business entity in which the public official has a direct or indirect interest worth \$2,000 or more.

Fourth, it must be determined if the economic interest of the official is directly or indirectly involved in the decision. Under Regulation 18704.1, subdivision (a)(2), a business entity is directly involved in a decision before an official’s agency when that business is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency. A business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any contract with the subject business.

Fifth, it must be determined what materiality standard will apply to the economic interest of the public official. Under Regulation 18705.1, subdivision (b) the financial effects of a governmental decision on a business entity which is directly involved in the governmental decision is presumed to be material. This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity.

Sixth, it must have been reasonably foreseeable, at the time the governmental decision was made, that the decision would have a material financial effect on the economic interest of the official. Under Regulation 18706, subdivision (a), a material financial effect on an economic interest is reasonably foreseeable if it is substantially likely, not just a mere possibility, that one

or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision. (*In re Thorner* (1975) 1 FPPC Ops. 198.)²

When determining whether a governmental decision will have a reasonably foreseeable material financial effect on a respondent's economic interest there are several factors that may be considered. These factors include the scope of the governmental decision in question and the extent to which the occurrence of the material financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency. (Regulation 18706, subd. (b).)

Duty to Disclose Economic Interests

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

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

Section 87302, subdivision (b), provides that an agency's conflict of interest code must require every designated employee of the agency to file an annual SEI, at a time specified in the agency's conflict of interest code, for each year that the employee remains in office, disclosing his or her reportable economic interests during the preceding calendar year.

Section 87300 declares that the requirements of an agency's conflict of interest code shall have the force of law, and any violation of those requirements shall be deemed a violation of the Act.

The relevant 2001 SVMH Conflict of Interests Code states that it intends to implement the Act, and does not intend to abridge or modify the Act. The 2001 SVMH Conflict of Interests Code lists the position of "President/CEO" as a designated employee, required to disclose, among other things, investments in Banks, Savings and Loan that exceed \$1,000.

² The *Thorner* opinion was codified in Regulation 18706 to provide that a material financial effect on an economic interest is reasonably foreseeable, within the meaning of Section 87103, if it is substantially likely that one or more of the materiality standards will be met as a result of the governmental decision.

SUMMARY OF THE FACTS

Respondent Downing was named President/CEO of SVMH in 1985 and held that position until his retirement on or about April 30, 2011. Respondent Downing purchased \$50,000 of stock in First Capital Bank on or about March 26, 2007. Respondent Downing sold 2500 of these shares on September 26, 2011 and the remainder 2500 of these shares on September 27, 2011. Therefore, Respondent Downing had a reportable investment interest in First Capital Bank from on or about March 26, 2007, through on or about September 27, 2011.

Sometime during 2007, members of the SVMH Board expressed interest in diversifying the hospital's investments. It is unclear whether First Capital Bank was proposed by Respondent Downing, but minutes reflect that it was not discussed by the Finance Committee, on which Respondent Downing served. Instead, on February 21, 2008, the SVMH Board approved Resolution 2008-02 which authorized the deposit of \$1 Million into First Capital Bank and designated the President/CEO and Senior Vice President/Finance & Information Technology, both of whom were members of the Finance Committee, as the authorized representatives of the District with the authority to execute necessary documents to carry out the intent of the Resolution. The two SVMH Board Members that were interviewed were unaware of Respondent Downing's \$50,000 investment interest in First Capital Bank at the time of the vote.

On February 22, 2008, Respondent Downing and CPA John Fletcher, the Senior Vice President/Finance & Information Technology, signed Resolution 2008-02 as authorized people to carry out the intent of the Resolution 2008-02.

Further, Respondent Downing and Mr. Fletcher signed a contract named "1st Capital Bank Waiver of Security," which was dated March 10, 2008. This contract specifically stated that it was discretionary for the President/CEO to waive the security amount to the Federal Deposit Insurance Corporation limits of \$100,000 and that it is to the advantage of First Capital Bank to increase the amount of its available collateral to secure the deposits of public accounts.

On or about March 4, 2008, within 2 weeks of the SVMH Board decision to deposit \$1 Million into First Capital Bank and approximately 6 days prior to signing the Discretionary Waiver, Respondent Downing filed his 2007 Annual SEI, failing to disclose that he had an investment interest of \$50,000 in First Capital Bank.

Count 1 **Failure to Disqualify Himself from Making a Governmental Decision** **Concerning First Capital Bank**

As the President/CEO of the SVMH, Respondent Downing was required by Section 87100 to disqualify himself from making, participating in making, or attempting to use his official positions to influence a governmental decision in which he knew, or had reason to know, that he had a financial interest.

The relevant analytical steps to consider when determining whether an individual has a conflict of interest are set forth below.

Step One: Respondent Downing Was a Public Official as Defined by the Act

Respondent Downing was an officer and employee of a local governmental agency. Therefore, Respondent Downing was a public official as defined in Section 82048.

Step Two: Respondent Downing Made a Governmental Decision

Respondent Downing made a governmental decision by executing a contract with First Capital Bank when he signed the Discretionary Waiver, allowing First Capital Bank the ability to utilize the funds deposited without setting aside a \$100,000 security amount for the FDIC. Therefore, by entering into the contract with First Capital Bank by signing the Discretionary Waiver, Respondent Downing made a governmental decision, in violation of Section 87100 and Regulation 18702.1, subdivision (a).

Step Three: Respondent Had an Economic Interest

On or about March 26, 2007, Respondent Downing purchased \$50,000 of stock in First Capital Bank. Respondent Downing sold 2500 of these shares on September 26, 2011, and the remaining 2500 shares on September 27, 2011, albeit at a loss. Therefore, Respondent Downing had a direct economic interest in the business entity First Capital Bank worth more than \$2,000 at all relevant times, for the purposes of Section 87103, subdivision (a).

Step Four: Respondent Downing's Economic Interest was Directly Involved in the Decision

First Capital Bank was a named party in the Discretionary Waiver, signed by Respondent Downing. Therefore, the business entity was directly involved in the governmental decision, for purposes of Regulation 18704.1, subdivision (a)(2).

Step Five: Applicable Materiality Standard

As discussed in Steps Two, Three, and Four, because the business entity was directly involved in a governmental decision, the financial effect of the governmental decision is presumed to be material, for purposes of Regulation 18705.1, subdivision (b). This presumption may be rebutted by proof that it is not reasonably foreseeable that the governmental decision will have any financial effect on the business entity. In this case, Respondent Downing does not challenge the presumption.

Step Six: It Was Reasonably Foreseeable that the Applicable Materiality Standard Would Be Met

It must have been reasonably foreseeable, at the time the governmental decision was made, that the decision would have a material financial effect on the economic interest of the official. Under Regulation 18706, subdivision (a), a material financial effect on an economic interest is reasonably foreseeable if it is substantially likely, not just a mere possibility, that one or more of the materiality standards applicable to that economic interest will be met as a result of the governmental decision.

The governmental decision which Respondent Downing made was to execute a contract with First Capital Bank by signing the Discretionary Waiver, allowing First Capital Bank to use the money deposited. The language of the Discretionary Waiver specifically states that it is to the advantage of First Capital Bank to increase the amount of its available collateral to secure the deposits of public accounts. Therefore, it was reasonably foreseeable at the time of the decision that there would be some financial effect on First Capital Bank.

By making a governmental decision that had a reasonably foreseeable material financial effect on his investment interest, Respondent Downing violated Section 87100.

Count 2
Failure to Report Investments and Interests in Real Property on a
Statement of Economic Interests

As the President/CEO of the SVMH, Respondent Downing was required by Section 87300 and 87302 to disclose certain investments on his 2007 Annual SEI, including investments in Banks, Savings and Loan that exceed \$1,000.

Respondent Downing purchased \$50,000 of stock in First Capital Bank on or about March 26, 2007. Respondent Downing retained his First Capital Bank stock until September of 2011. Therefore, Respondent Downing was required to disclose his interest in First Capital Bank on his 2007 Annual SEI.

On or about March 4, 2008, Respondent Downing filed his 2007 Annual SEI with the SVMH disclosing no investment interests. However, Respondent Downing was required to disclose his \$50,000 interest in First Capital Bank and he failed to do so.

By failing to disclose his \$50,000 investment interest in First Capital Bank on his 2007 Annual SEI, Respondent Downing violated Sections 87300 and 87302.

CONCLUSION

This matter consists of two counts of violating the Act, and carries a maximum administrative penalty of Ten Thousand Dollars (\$10,000).

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): 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 Respondent, upon learning of a reporting violation, voluntarily filed amendments to provide full disclosure.

The conduct of participating in a governmental decision in which an official has a financial interest is a serious violation of the Act as it creates the appearance that a governmental decision was made on the basis of an official's financial interest. Further, disclosure of economic interests is important to provide transparency and prevent conflicts of interest. Failure to report all required information on an SEI is a serious violation of the Act because it deprives the public of important information about a public official's economic interests and it has the potential to conceal conflicts of interest.

In this matter, Respondent Downing failed to disclose his \$50,000 investment interest in First Capital Bank within a few weeks that he impermissibly made a governmental decision.

In mitigation, Respondent Downing contends that his investment represented less than one percent of the bank's capitalization and he received no personal financial benefit from the waiver for First Capital Bank. Moreover, such a waiver is routinely granted in similar situations because California banks must set aside 110 percent of the amount invested by a public hospital, making the FDIC securing amount superfluous. In addition, Respondent Downing contends that his violation of the conflict of interests provisions was inadvertent as he believed that his execution of the waiver contract was routine and ministerial. Respondent Downing states that he received advice from counsel that his investment interest was de minimus and he did not have to disclose this interest on his SEI. However, this advice could not be confirmed. Respondent Downing did disclose the investment on his SEI the following year. Respondent Downing has no prior Enforcement History.

Regarding the failure to disclose financial interests on an SEI and conflict of interest violation, the typical penalty amounts have varied depending on the circumstances of the case. Recent prior penalties concerning SEI disclosure violations with conflict of interests include:

In the Matter of Gregory Fox, FPPC No. 10/798 (Approved November 10, 2011). Gregory Fox, as a member of the a member of the Saratoga Cemetery District Board of Trustees, failed to disclose real property interests of 2 undeveloped parcels on his SEI and voted on a matter within 500 feet of one of his parcels. In that case, Respondent Fox insisted that he received advice that that led him to believe that the 2 parcels could be considered part of his personal residence and did not have to be disclosed. Also, the Respondent stated that he did not believe his decisions had any financial effect on his property. The approved stipulated settlement was \$1,000 for the violation of failing to disclose income on an SEI and \$3,000 for the violation of the conflict of interests provisions of the Act.

In the Matter of Andres Herrera, FPPC No. 12/027 (Approved December 13, 2012). Andres Herrera, as a member of the Oxnard City Council, failed to report gifts on his annual SEI's and then impermissibly made, participated in making, or influenced a governmental decision concerning the donor of the gifts, which had a reasonably foreseeable material financial effect on the source of the gift. In this matter, the source of the gifts was a developer who regularly did business within the jurisdiction. The Respondent stated that he was unaware that the developer paid for the gifts, which is why he did not disclose the gifts. Further, Respondent amended his SEI's when he was contacted by the FPPC and has no prior Enforcement History. The approved stipulated settlement was \$1,000 for the violations of failing to disclose gifts on his SEI's and \$3,500 for the violation of the conflict of interest provisions of the Act.

In this case, Respondent Downing failed to disclose his \$50,000 investment interest during the same time that he impermissibly made a governmental decision. Under these circumstances, it is respectfully submitted that an agreed upon penalty of \$1,500 for the failure to report an investment interest on his 2007 SEI and a penalty of \$3,500 for the violation of the conflict of interest provisions of the Act, for a total penalty of \$5,000, is justified.

PROPOSED PENALTY

After consideration of the factors of Regulation 18361.5, the facts of this case and consideration of penalties in prior enforcement actions, the Enforcement Division recommends the imposition of the agreed upon penalty of Five Thousand Dollars (\$5,000).

* * * * *