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7

8 **BEFORE THE FAIR POLITICAL PRACTICES COMMISSION**

9 **STATE OF CALIFORNIA**

10  
11 In the Matter of ) OAH No. 2019030096  
12 ) FPPC No. 15/003  
13 )  
14 ) **COMPLAINANT'S CLOSING REPLY BRIEF**  
15 )  
16 ) Hearing Judge: Deena R. Ghaly  
17 ) Hearing Date: **June 19, 2019**  
18 ) Hearing Time: 9:00 a.m.  
19 ) Hearing Place: 320 W. Fourth Street, Suite 630  
20 ) Los Angeles, CA 90013  
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29 This matter came before Administrative Law Judge Deena R. Ghaly of the Office of  
30 Administrative Hearings (OAH) on June 19, 2019, in Los Angeles, California. The parties submitted  
31 simultaneous closing argument briefs on June 3, 2019. Complainant, the Enforcement Division of the Fair  
32 Political Practices Commission (Commission), submits the following closing reply brief:

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1 **I. INTRODUCTION**

2 Shelley argues that there has been no violation of the law because there are mitigating factors,  
3 including a lack of public harm, and that the case against her should be dismissed because of  
4 Complainant's conduct. But, as discussed in Complainant's Closing Argument and in this reply brief,  
5 Shelley's arguments fail. Shelley, Susan Shelley for Assembly 2013 ("2013 Committee,") and Susan  
6 Shelley for Assembly 2014 ("2014 Committee") failed to timely file pre-election campaign statements,  
7 as outlined in the Accusation. Shelley took on obligations by voluntarily running for office, opening two  
8 committees, and acting as her own treasurer; but refuses to take responsibility for her own errors. By  
9 failing to timely file, the public was deprived of relevant information before a closely contested election.  
10 Complainant has met its burden of proof by a preponderance of the evidence for the five violations stated  
11 in the Accusation and Shelley should pay a moderate to high penalty.

12 **II. MITIGATION GOES TO PENALTY, NOT TO FINDING THE VIOLATION**

13 In her closing arguments, Shelley repeatedly asserts that there was no violation of the Political  
14 Reform Act ("Act")<sup>1</sup> and cites mitigating factors, including mitigating factors acknowledged by  
15 Complainant and argues that there was no public harm. Shelley misunderstands the role of mitigating  
16 factors. Shelley does not deny, she does not present evidence, nor does she argue that she filed the  
17 campaign statements for the two committees timely. Instead, she argues that because there are mitigating  
18 factors, the law has not been broken. This is incorrect. Mitigating factors do not invalidate or disprove any  
19 of the evidence. Rather, the mitigating factors apply only to the amount of the penalty. The factors in this  
20 case, including the public harm from not following the law when failing to timely file campaign  
21 statements, justify a penalty, as argued in Complainant's Closing Arguments.

22 **III. COMPLAINANTS CONDUCT**

23 Shelley makes several assertions regarding Complainant's conduct. Complainant addresses each  
24 briefly as follows:

25 //

26 \_\_\_\_\_  
27 <sup>1</sup> The Political Reform Act is contained in Government Code §§ 81000 through 91014, and all statutory references  
28 are to this code. The regulations of the Fair Political Practices Commission are contained in §§ 18110 through 18997 of Title  
2 of the California Code of Regulations, and all regulatory references are to this source. See §§ 83111 and 83116.

1           **A. Complainant Presented Relevant Evidence to Prove the Violations**

2           Shelley alleges that Complainant has asserted a “flat-out falsehood,” has withheld evidence, and  
3 mislead the court. This is not true. Complainant presented relevant facts and evidence necessary to prove  
4 the case. Complainant introduced documentary evidence of the two candidate-controlled committees,  
5 2013 Committee and 2014 Committee, demonstrating that Shelley had two candidate-controlled  
6 committees that were active in 2013.<sup>2</sup> Complainant asked the court to take official notice of the results of  
7 the 2013 Special Election, demonstrating that Shelley was on the ballot in 2013.<sup>3</sup> Complainant introduced  
8 documentary evidence of the campaign statements and filing history maintained by the filing officer, the  
9 Secretary of State.<sup>4</sup> This evidence proves that Shelley, the 2013 Committee, and the 2014 Committee had  
10 an obligation to file pre-election campaign statements but failed to file timely. As appropriate in an  
11 adversarial proceeding, Shelley has had the opportunity to present her own evidence and to explain her  
12 case. Any disagreement is to be resolved by the finder of fact.

13           In response to Shelley’s argument that the Complainant has withheld evidence or attempted to  
14 mislead the court, the Complainant vigorously contests this argument. Shelley argues that Complainant  
15 had a duty to introduce evidence regarding the committee’s filing of 24-Hour contribution reports and  
16 argues that the absence of this evidence proves that Complainant seeks to mislead the court. 24-Hour  
17 contribution reports are required by the Act in addition to pre-election statements. These reports have no  
18 relevance to Complainant’s case in chief, which is to prove that Respondents failed to timely file pre-  
19 election campaign statements. As addressed in Complainant’s closing brief, though the 24-hour  
20 contribution reports provided some disclosure of Respondents campaign activity, this is only partially  
21 mitigating as there was additional information that was not otherwise disclosed timely. Shelley’s expert  
22 witness, Amber Maltbie, conceded this point by acknowledging that “a little over \$28,000” in expenditures  
23 were not reported when the 2013 Committee failed to timely file a second pre-election campaign statement  
24 prior to the general election.<sup>5</sup>

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26           <sup>2</sup> Ex. 5-8.

27           <sup>3</sup> Official Notice Ex. 31-32.

28           <sup>4</sup> Ex. 10-15.

<sup>5</sup> Hrg Tr. 153:18-21.

1           **B. Shelley and the Two Candidate-controlled Committees are Solely Responsible for the**  
2           **Violations**

3           As a candidate who volunteered to run for office and served as her own treasurer, Shelley obligated  
4 herself to learn, understand, and apply the law as it related to campaign finance and reporting. Ignorance  
5 of the law or lack of notice regarding the law does not excuse the violation. Shelley had a duty to timely  
6 file pre-election campaign statements. Her failure to do so makes her liable according to the statutory  
7 scheme approved by voters and expanded upon by the legislature.

8           Shelley argues that the Commission failed to notify her during her campaign and therefore, she is  
9 not responsible for her own actions. The Commission has a duty to assist and to publish manuals and  
10 instructions for use by the public.<sup>6</sup> The Commission and other agencies involved in elections, such as the  
11 Secretary of State and the county election offices, endeavor to encourage and foster compliance with the  
12 law. This mandate is intended for the public's benefit, to further the goals of the Act and promote better  
13 transparency in elections. This mandate to promote compliance does not excuse violations of the law. In  
14 addition to fostering compliance, the Commission has a duty to vigorously enforce the provisions of the  
15 Act<sup>7</sup> and has the power to impose a monetary penalty of up to \$5,000 per violation.<sup>8</sup> Therefore, when the  
16 evidence proves that Shelley, the 2013 Committee, and the 2014 Committee have violated the Act by  
17 failing to timely file pre-election campaign statements, the Commission has a duty to enforce the  
18 provisions of the Act and seek a penalty.

19           **C. Failing to Timely File Pre-Election Statements Caused Public Harm**

20           Shelley argues that she has proven that there was no public harm when she failed to timely file  
21 pre-election campaign statements. As discussed in Complainant's closing arguments, the failure to timely  
22 disclose campaign activity does cause public harm by depriving the public, including opponents in the  
23 same race, of transparent and accountable campaigns. Shelley's expert witness testified that, "the goal is  
24 to allow the public to have transparency about how campaigns are raising and spending money"<sup>9</sup> Pre-

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26           <sup>6</sup> § 83113.

27           <sup>7</sup> § 81002.

28           <sup>8</sup> § 83116.

<sup>9</sup> Hrg Tr. 158:20-22.

1 election campaign statements are the primary means for the public to assess how political candidates are  
2 being funded, to what extent, and how they are spending the funds. On cross examination, Maltbie  
3 conceded that timely filing was important when acknowledging that her clients wanted to know how their  
4 opponents in an election were raising and spending funds.<sup>10</sup> Maltbie testified that “one of the purposes of  
5 disclosure and transparency is it’s also a way to hold candidates accountable... an opponent wants to make  
6 sure that... their opponent is playing by the same rules....”<sup>11</sup> Though Shelley argued that there was no  
7 public harm, the evidence shows that the public harm when there was a lack of timely, required disclosure  
8 about the 2013 Committee and the 2014 Committee prior to a contested race for Assembly.

9 **D. The Administrative Hearing Process Protects Shelley’s Right to Due to Process**

10 Shelley makes several arguments relying on the Constitution of the United States of America that  
11 her case should be dismissed or that no penalty should be assessed. First, Shelley argues that the  
12 Complainant has acted in bad faith by serving the Accusation by email instead of by personal service.  
13 However, Shelley acknowledges that she received the Accusation, that she filed the Notice of Defense,  
14 and that she had notice of the Accusation and its contents. Shelley was responsive to and used e-mail to  
15 communicate with Complainant prior to the Accusation and readily acknowledged receipt of the  
16 Accusation. There has been no harm by serving the Accusation by email and there has been no deprivation  
17 of due process.

18 Second, Shelley cites the concept of double jeopardy because she has already been fined by the  
19 Secretary of State for late filing of campaign statements. However, this concept is not applicable here as  
20 double jeopardy is applicable to criminal punishments, not administrative penalties.<sup>12</sup> When asserting that  
21 she is in jeopardy, Shelley has the burden to show that the civil fines assessed by the Secretary of State  
22 and the civil penalty proposed by the Fair Political Practices Commission constitute a criminal  
23 punishment, in contravention to the intent of the legislature.<sup>13</sup> Shelley has failed to meet this burden.

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26 <sup>10</sup> Hrg Tr. 156:19-154:9.

27 <sup>11</sup> Hrg Tr. 158:5-10.

<sup>12</sup> See *People v. Gonzalez (2015) 241 Cal.App.4th 1103 [194 Cal.Rptr.3d 373].*

28 <sup>13</sup> *Id.*

1 Third, Shelley argues that the fine proposed by the Complainant is excessive and violates the Eight  
2 Amendment's prohibition on excessive fines. The Supreme Court has held that excessive fines are those  
3 that are "so grossly excessive as to amount to a deprivation of property without due process of law."<sup>14</sup> For  
4 example, the Supreme Court held that the civil forfeiture of \$357,144 from a foreign national who failed  
5 to report that he was transporting the funds when leaving the United States did violate the Eighth  
6 Amendment's excessive fines clause because of the gross disproportionality of the fine compared to the  
7 public harm.<sup>15</sup> Here, statute sets the maximum penalty at \$5,000 per violation of the Act. The voters of  
8 California judged that this was an appropriate maximum penalty for failure to comply with the Act. Unlike  
9 in the case of civil forfeiture, where property is seized without a hearing, Shelley has been given the  
10 opportunity to be heard on what the appropriate penalty should be. There has been no deprivation of  
11 property without due process.

12 Fourth, Shelley argues that her right to equal protection under the law has been violated because  
13 other candidates have received notice of their late filings and she did not. Shelley claims this shows that  
14 she is being treated disparately. However, the evidence that Shelley cites demonstrates that Shelley has  
15 not received disparate treatment. The Respondents cite the cases from Complainant's Official Notice  
16 where candidates for office were fined for failing to timely file campaign statements.<sup>16</sup> There is no  
17 disparate treatment when the evidence shows that failing to timely file a pre-election statement is the type  
18 of violation where candidates have been found liable and paid a penalty. Shelley appears to be asking the  
19 court to find that the rules do not apply to her, though they have applied to other candidates who failed to  
20 file the same type of campaign statement. Shelley suggests that because she did not receive notice of her  
21 obligation before the reports were due from the Commission, she should not be fined by the Commission.  
22 However, this is not the law. The duty of a person to file statements and reports disclosing information as

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26 <sup>14</sup> *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

27 <sup>15</sup> *United States v. Bajakajian*, 524 U.S. 321 (1998) (Superseded by statute after Congress passed legislation to  
legalize such a forfeiture).

28 <sup>16</sup> Official Notice Ex. 36-39.

1 required by the Act is not affected by a lack of notice.<sup>17</sup> Rather, it is the duty of the treasurer and candidate  
2 to ensure that the committee complies with the Act's reporting requirements.<sup>18</sup>

3 Finally, Shelley argues that her due process rights have been violated, however, this is not the case  
4 because she is currently exercising her right to due process as she requested and was granted a hearing.


5 **IV. CONCLUSION**

6 The preponderance of the evidence proves that Shelley, the 2013 Committee, and the 2014  
7 Committee violated the Act's requirement to timely file pre-election campaign statements. Though  
8 Shelley voluntarily placed herself on the ballot and voluntarily acted as her own treasurer, she has failed  
9 to take responsibility for her own errors. The Enforcement Division of the Fair Political Practices  
10 Commission respectfully requests that a proposed decision be issued with a finding that Susan G. Shelley,  
11 Susan Shelley for Assembly 2013, and Susan Shelley for Assembly 2014 violated the Political Reform  
12 Act as set forth in Counts 1-5 of the Accusation, imposing a moderate to high penalty.

13  
14 Dated: July 10, 2019

**FAIR POLITICAL PRACTICES COMMISSION**

By: Galena West  
Chief of Enforcement

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Theresa Gilbertson  
Commission Counsel

<sup>17</sup> Regulation 18117.

<sup>18</sup> Sections 81004, 84100, 84104, and Regulation 18427.