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BEFORE THE FAIR CAMPAIGN PRACTICES COMMISSION

CITY OF BERKELEY

In the matter of

Mike Chang for Berkeley School Board 2022,

Respondent.

STIPULATION,
DECISION AND ORDER

This Stipulation, Decision and Order (“Stipulation”) is entered into by and between the Complainant, Fair Campaign Practices Commission (“Commission” or “FCPC”), and Respondent, Mike Chang for Berkeley School Board 2022 (“Respondent” or “Committee”), (collectively “Parties”), through its treasurer, Neil Gray, and its assistant treasurer and candidate, Michael Chang.

The following is a true and accurate summary of the facts in this matter:

1. Respondent was a candidate-controlled committee created to support the election of Michael Chang for the office of School Board Director for the Berkeley Unified School District during the November 2022 election. It filed its initial Statement of Organization to open a Campaign Committee on March 8, 2022.

2. On August 17, 2022, Mr. Chang was certified to participate in the Berkeley public campaign financing program known as the Fair Elections Act of 2016 for the November

2022 election. The program requirements are enumerated in article 8 of the Berkeley Elections Reform Act (“BERA”), which is codified at title 2, chapter 12 of the Berkeley Municipal Code (“BMC”).

3. As a participant in the public financing program, the Committee received \$15,930 in City matching funds during the 2022 November election cycle.

4. BERA requires that City campaign committees file campaign reports consistent with the requirements of state law. (See BMC § 2.12.270.A.) The provisions of state law incorporated by reference require that candidates and committees “shall file semiannual statements each year no later than July 31 for the period ending June 30, and not later than January 31 for the period ending December 31.” (Cal. Gov. Code § 84200(a).) Additionally, BERA requires that “[e]ach candidate and each committee shall file no fewer than two campaign statements prior to an election, excluding run-off elections, and one campaign statement following the election, excluding run-off elections. Campaign statements shall be filed in accordance with the filing dates prescribed by state law.” (BMC § 2.12.270.A; see Gov. Code. § 84200.8.)

5. The Committee’s second pre-election report for the 2022 election cycle, which covers the period from September 25, 2022 to October 22, 2022, was due on October 27, 2022. The Committee filed the report five days late on November 1, 2022. On November 7, 2022, the City Clerk issued a \$50 late filing penalty pursuant to the authority under Government Code section 91013 to issue a late filing penalty of \$10 per day. The Committee has not paid that penalty.

6. The Committee’s semi-annual report covering the period from October 23, 2022 to December 31, 2022 – the period immediately preceding and following the November 2022 election – was due on January 31, 2023. The Committee filed the report 108 days late on May 19, 2023. Prior to the Committee filing the report, the City Clerk sent the Committee six separate notices reminding the committee of its obligation to file. The Commission also sent a

letter to the Committee, through the Commission Secretary, on May 3, 2023 again notifying the Committee of its obligation to file the outstanding campaign statement. Although the City Clerk has not previously issued a penalty for this late filing in light of the City Clerk's referral of this matter to the FCPC, the City Clerk has the authority to issue a penalty of \$1,080 for this late filing. (Gov. Code § 91013.)

7. The Committee's semi-annual report covering the period from January 1, 2023 to June 30, 2023 was due on July 31, 2023. The Committee filed the report 43 days late on September 12, 2023. Although the City Clerk has not previously issued a penalty for this late filing in light of the City Clerk's referral of this matter to the FCPC, the City Clerk has the authority to issue a penalty of \$430 for this late filing. (Gov. Code § 91013.)

8. There is also an outstanding late filing penalty from Mr. Chang's 2020 campaign committee Mike Chang for School Board 2020. The 2020 Committee's semi-annual report for the period from July 1, 2021 to December 31, 2021, which was due on January 31, 2022, was filed ten days late on February 10, 2022. Thus, the City Clerk issued a penalty of \$100 for this late filing on February 17, 2022. That penalty has not been paid.

9. Including the late penalty outstanding from the 2020 campaign committee, Mr. Chang has either been issued, or the City Clerk has the authority to issue, a total of \$1,660 in late filing penalties.

10. Although all reports were eventually filed by the Committee, a number of discrepancies exist in the Committee's reports. Additional reporting discrepancies were present in original filings but were resolved in subsequent amendments. Certain significant discrepancies are described below. As explained more fully below in paragraphs 22 and 23, the Committee has noted that it has worked actively with the City Clerk's office to resolve these discrepancies and to reconcile its account before filing amendments to ensure accuracy.

11. The Committee's semi-annual statement covering the period from October 23, 2022 to December 31, 2022 reported a \$365 contribution received from the campaign committee

Jennifer Shanoski for Berkeley School Board 2022. Berkeley public financing candidates are limited to accepting contributions of \$60 or less from natural persons. (BMC § 2.12.500.A.7.) A \$365 contribution received from a campaign committee violates this provision of BERA. After the Committee was notified of this violation, it explained that the \$365 payment was incorrectly recorded as a “contribution” from Shanoski, when in fact, it reflected a shared payment for campaign-related expenditures. On October 29, 2024, the Committee filed an amendment correcting this error.

12. The Committee’s semi-annual statement covering the period from January 1, 2022 to June 30, 2022 reports a \$120 contribution received from Elissa Gershon. Further, the Committee’s semi-annual statement covering the period from July 1, 2022 to September 24, 2022 reports another \$60 contribution from Ms. Gershon, for a total of \$180 in the calendar year. Berkeley public financing candidates are limited to accepting contributions of \$60 or less. (BMC § 2.12.500.A.7.) A \$180 contribution violates this provision of BERA. The Committee has explained that the original \$120 contribution was in fact a contribution from two individuals—Ms. Gershon and her husband Michael Butler—of \$60 each, but was improperly recorded by an online donation processor as a contribution of \$120. The Committee further explained that it believed the \$120 had been refunded by the online donations processor to Ms. Gershon in April 2022, and that based on this belief, Ms. Gershon and Mr. Butler each contributed an additional \$60 to the Committee in August 2022. However, after receiving this stipulation, the Committee reviewed the issue and concluded that the online donations processor in fact had not refunded the money to Ms. Gershon. Thus, the April 2022 contributions were misreported as a contribution from one individual, rather than two individuals, and the August 2022 contributions from Ms. Gershon and Mr. Butler were in excess of the amounts allowed by BERA.

13. At various points following the November 2022 election, the Committee has reported a positive cash balance. Public financing candidates are required, within 60 days of the

election, to return any unspent campaign funds to the City, after accounting for any campaign debts and expenditures. (BMC § 2.12.505.H.2.) The Committee has failed to meet this requirement by failing to accurately report its financial information. On July 28, 2023, staff notified the Committee that its semi-annual report for the period from October 23, 2022 through December 31, 2022, had an ending cash balance of \$1,364.44. The Committee worked with City staff to fix this issue through an amendment filed on September 12, 2023. However, on September 20, 2023, staff notified the Committee that its semi-annual report for a different period—the period from January 1, 2023 through June 30, 2023—showed an ending cash balance of negative \$2,292. The Committee responded by stating that it did not have a professional campaign treasurer and was struggling to rectify the negative balance, but that it believed the negative balance was due to an error associated with fees paid to a financial services company that processed donations. After hiring a treasurer, the Committee stated on December 15, 2023 that it had reconciled the issue by eliminating the negative balance and creating a positive balance of \$6.58.

14. The Committee has been unable to resolve the issue with the remaining \$6.58. It stated that due to account maintenance fees, the \$6.58 is no longer available in the account. It also stated that it had submitted the closing affirmation to the City without returning any unspent funds, because the Committee believed it had zeroed out the campaign bank account and that there were no remaining unspent funds. The Committee's semi-annual reports for January 1 to June 30, 2023, and July 1 to December 31, 2023, accordingly show ending cash balances of \$6.58.

15. Because there are no remaining funds in the Committee's account, the Committee cannot refund Ms. Gershon or Mr. Butler the excess amount the Committee received in violation of BERA.

**COMMISSION’S FINDING OF PROBABLE CAUSE
OF A VIOLATION OF SECTION 2.12.530**

16. At its October 19, 2023 regular meeting, the Commission determined that probable cause exists to believe that the Committee 1) failed to timely file the campaign statement covering the period from October 23, 2022 to November 31, 2022; 2) failed to timely file the campaign statement covering the period from January 1, 2023 to June 30, 2023; 3) failed to timely file the campaign statement covering the period from September 25, 2022 to October 22, 2022; and 4) failed to accurately report contributions or expenditures.

MITIGATING AND AGGRAVATING FACTORS

17. At the October 19, 2023 regular meeting, a number of Commissioners noted the lack of engagement with the Commission by the Committee as well as lengthy periods of inaction by the Committee to file outstanding reports or remedy reporting irregularities.

18. The length of time which the Committee’s and Mr. Chang’s two outstanding late penalties (issued February 17, 2022 and November 7, 2022) have gone unpaid is also an aggravating factor.

19. While the Commission recognizes that the Committee was in consultation with the Clerk’s office in spring 2023 regarding its outstanding reports, the 108-day late filing of the Committee’s semi-annual report for the period ending December 31, 2022 presents significant harm to the public’s ability to access campaign reporting information. First, the 108-period is significantly lengthy. Second, the report in question covers the period immediately preceding and following the election, a period in which the importance of disclosing information about the Committee’s contributions and expenditures is greatest for the public record.

20. Mr. Chang is also not a first-time candidate and ran for Berkeley office in 2020, although the Commission acknowledges that the 2022 campaign was the first time that public financing was available for school board candidates.

21. Additionally, there is a higher level of need for public information – and therefore timely and accurate reporting by campaigns – when the candidate has accepted public funds.

22. In contrast, a mitigating factor is that the FCPC has not found evidence of any intent to deceive or knowingly withhold information. The Committee has cooperated with the City Clerk and the FCPC in trying to reconcile the negative ending cash balance in its filings, meeting with the Clerk in person one on one to work through the Netfile account, and seeking guidance at various points since certifying the committee in 2022. The Committee has also explained that it has had inputting and classification challenges in the Netfile system, and worked directly with Netfile to obtain professional technical assistance and clarification on reporting methods.

23. Additionally, with respect to the allegations in paragraphs 11-12 above, the Committee contends that it diligently engaged with the Clerk’s office to seek advice regarding the shared Shanoski expenditure and the excess contribution at the time the issues arose, during the campaign period with requests for instruction at the time of receipt of the funds, and worked with the online donations processor to process refunds for Ms. Gershon and Mr. Butler, which the Committee believed erroneously and in good faith had been successfully processed. The Commission disagrees, and believes that the Committee has been less than fully responsive and has taken an excessive amount of time to resolve outstanding issues. However, the Commission acknowledges that the Committee has discussed these issues with the City and has been cooperative in attempting to resolve discrepancies. These mitigating factors are evidence that the Committee has acted in good faith.

24. Another mitigating factor relates to notice. The Committee believes that it was not provided adequate notice of the outstanding penalties and remaining issues with its campaign statements. Specifically, the Committee contends that it only received notice of the issues described in this stipulation on September 13, 2024, with the first draft of this stipulation letter. Given the close engagement of the Committee with the City Clerk, and the City’s awareness of

the Committee's active reconciliation efforts, the Committee interpreted the City Clerk's letters as warnings that a late fee could ensue if the Committee did not continue cooperating. In contrast, the Commission believes it provided clear notice that the outstanding filings were required to be filed as soon as possible, and that late penalties could (and possibly would) be imposed. The City Clerk and the Commission Secretary sent notices to the Committee throughout 2022 and 2023, which were included in the public agenda packet for the regular Commission meeting on October 19, 2023. The Commission Secretary also personally provided Mr. Chang with these materials via email on October 13, 2023. Nonetheless, the Commission acknowledges that it did not send Mr. Chang or the Committee any follow-up communications about this matter in 2024 until it sent this stipulation on September 13, 2024. Accordingly, the Committee's concerns about notice appear to be made in good faith, and provide evidence that the Committee has not had any intent to deceive, to knowingly withhold information, or to purposely avoid payment of penalties.

STIPULATIONS

THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties as follows:

1. The Commission found that probable cause exists to believe that Respondent violated BMC section 2.12.270.A by failing to timely file multiple campaign statements.
2. The Commission found that probable cause exists to believe that Respondent failed to accurately report contributions and expenditures in violation of BMC section 2.12.280.
3. Although the Committee has submitted numerous amendments to its campaign statements, the Committee's statements continue to have a number of discrepancies, as outlined above.
4. Based on the facts, law, and the factors in mitigation detailed above, Parties agree that Respondent has not committed a "substantial violation" as defined in BMC section 2.12.555 and FCPC Reg. R2.12.555.

5. The Parties agree to enter into this Stipulation to resolve all factual and legal issues raised in this matter and to reach a final disposition without the necessity of holding an administrative hearing to determine the liability of Respondent. Respondent understands and hereby knowingly and voluntarily waives any and all procedural rights under BERA, FCPC Regulations and FCPC Procedures in regard to this matter.

6. The FCPC agrees that if Respondent executes this Stipulation, it will forego any further enforcement action against Respondent related to this matter.

7. Based on the facts, law, and the mitigating and aggravating factors detailed above, the Parties agree that, rather than proceed with an administrative hearing on this matter under BMC section 2.12.230, the Parties will stipulate that Respondent will, no later than thirty (30) days after the Commission's approval of this stipulated agreement to : 1) pay a sum of \$1,660 as a stipulated monetary penalty, payable to the City of Berkeley for deposit into the City's Fair Elections Fund; and 2) close the Committee and file any required statements.

8. If approved by the FCPC, this stipulation will resolve all factual and legal issues raised in this matter and will be the final disposition of this matter for purposes of BERA sections 2.12.450, 2.12.455, and 2.12.550. Nothing in this Stipulation shall be read to preclude the Commission's consideration of any complaint or other action for any false statements stemming from any of Respondent's representations in this Stipulation.

9. The Parties agree that in the event the FCPC refuses to accept this Stipulation, it shall become null and void. Respondent stipulates and agrees that in the event a full evidentiary hearing before the Commission becomes necessary, no member of the Commission or FCPC staff shall be disqualified because of their consideration of this Stipulation and Order.

10. Respondent acknowledges that the FCPC shall retain jurisdiction over the Stipulation if it is signed by all parties and is acting under Section VI.C.2.d of the FCPC procedures, enacted pursuant to the Commission's authority to enact rules and procedures under BMC section 2.12.210.

Dated:

By: _____
FARIMAH FAIZ BROWN, City Attorney
SAMUEL J. HARVEY, Deputy City Attorney
STEPHEN A. HYLAS, Deputy City Attorney
LAUREN S. PACKARD, Deputy City Attorney
Attorneys for the Fair Campaign Practices Commission

Dated:

By: _____
NEIL GRAY, Treasurer
Mike Chang for Berkeley School Board 2022

Dated:

By: _____
MICHAEL CHANG, Candidate and Assistant Treasurer
Mike Chang for Berkeley School Board 2022