No. 74978-1-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THE MANDATORY POSTER AGENCY, INC., d/b/a CORPORATE RECORDS SERVICE, THE WASHINGTON LABOR LAW POSTER SERVICE, WASHINGTON FOOD SERVICE COMPLIANCE CENTER, and STEVEN J. FATA, THOMAS FATA, AND JOSEPH FATA, individually and their corporate capacity,

Petitioners.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Petitioners Mandatory Poster Agency, Inc. d/b/a Corporate Records Service, the Washington Labor Law Poster Service, Washington Food Service Compliance Center, and Steven J. Fata, Thomas Fata, and Joseph Fata ("CRS") seek review by this Court of the Court of Appeals opinion set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its published opinion on July 3, 2017. It is set forth in the Appendix at pages A-1 through A-23.

C. ISSUES PRESENTED FOR REVIEW

1. Where the State belatedly admitted that a business offering a service to Washington corporations, assisting them to comply with their statutory obligations to prepare and maintain corporate documents, accurately described Washington corporate law, and the business's mailings to prospective customers about a corporate records preparation service specifically stated that the mailings were not from a government agency and bore no earmarks that they were from such an agency, did the trial court err in ruling as a matter of law that such solicitations were unfair or deceptive under the CPA?

2. Did the trial court abuse its discretion in setting onerous penalties under the CPA that exceed the constitutional standards for due process of law and/or the Eighth Amendment for an excessive fine?

D. STATEMENT OF THE CASE

The Court of Appeals misstates or omits a number of key facts in this case salient to this Court's review decision. Most glaringly, that court

fails to note in its opinion that the State's position in this case abruptly changed course – the State initially argued CRS misrepresented Washington corporate law. But that assertion contained in the State's complaint was untrue, as experts testified, and as the State itself seemingly conceded.

CRS is a division of the Mandatory Poster Agency, Inc. ("MPA"), a family business founded by brothers Steve, Tom, and Joe Fata. CP 1288.[1] In 2008, the Attorney General raised concerns over MPA's workplace poster solicitation. CP 8-11. Though the Fatas disagreed with the State's allegations — indeed, similar allegations were dismissed by a Colorado court after a trial on the merits[2] — the company worked in good faith with the Attorney General's office to resolve its concerns and continue its direct mail business, entering into what amounted to a consent decree, denominated an Assurance of Discontinuance ("AOD"), with the Attorney General. CP 994-99.[3]

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[1] The Fata brothers started the MPA in 1999 to sell labor law posters to businesses across the country. CP 1290, 1296. Such posters are required by law to be posted in employers' businesses advising workers of the applicable minimum wage rates or other wages and hours requirements under local, state, and federal law. The company employs between 30 and 100 people on a seasonal basis in two offices in Lansing, Michigan. CP 1289, 1294-95.

[2] *State ex rel. Suthers v. Mandatory Poster Agency, Inc.*, 260 P.3d 9, 15 (Colo. App. 2009), *cert. dismissed* (2010).

[3] The AOD was a voluntary agreement entered into by the parties and contained no findings or admissions of liability; in fact, the AOD could not be treated as an

In approximately 2012, the Fatas started CRS to solicit a new line of business – a corporate records service – to assist corporations in complying with Washington corporate law recordkeeping requirements. CP 1297-98, 2194-95, 2197. The Fatas developed the business concept for CRS after receiving similar corporate records mailings directed to their corporation. *Id.*[4]

CRS marketed its corporate records services through direct mail to prospective customers. Corporations provided CRS information requested by completing an Annual Minutes Records form. CP 2199-2200. That form requested the names of all shareholders, directors, and corporate officers, along with a contact person. *Id*. CRS then prepared a Corporate Minute Book that included a unanimous shareholder consent for the election of directors and officers, as well as a ratification by the board of

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admission of CPA liability. CP 998-99. It contained extensive mutually-agreed standards for MPA's mailings in Washington that barred any effort to equate solicitations from MPA as coming from a public agency. CP 995-98. The AOD was filed in the Thurston County Superior Court and approved by that court. CP 994-98. No violations of the AOD have ever been discerned by the State in connection with MPA's poster business.

[4] CRS's services are similar to those provided by lawyers, accounting firms, and other corporate service providers such as Legal Zoom and CT Corporation Services. CP 1965-66; 1968. CRS charged $125. CP 618. Some law firms charge in excess of $1,000 for corporate maintenance requirements; Legal Zoom charges $99; and do-it-yourself consent forms can be found for free on the internet. CP 1308-15, 1320.

corporate actions in the prior year. CP 2203-08.[5] The service came with a money-back guarantee if a customer is dissatisfied. CP 2195, 2205. CRS maintained copies of the Corporate Minute Book as a backup in the event a corporation cannot find the original. CP 618.[6]

CRS sent solicitations to Washington consumers in 2012 and early 2013, CP 618, receiving 2,901 orders, CP 484-85, which were timely fulfilled.

Following CRS's first mailing, the Secretary of State's ("SOS") Corporations Division issued consumer alerts and blog posts that misrepresented CRS's mailing, claiming that it asked consumers to "file" annual minutes. CP 777-92, 803-13, 853-58. Pamela Floyd, the director of that division, publicly labeled CRS's service as a "scam" before any investigation,[7] and without knowing that Washington corporations have a statutory obligation to hold annual shareholder meetings and prepare

[5] Annual meeting consents are another useful corporate document that protects shareholders from personal liability for the financial obligations of the corporation and helps directors uphold their fiduciary duties. CP 1966, 1967.

[6] Nowhere in CRS's mailing were there any phrases prohibited by the AOD, such as "confidential," "important information," "approved," and "effective immediately." CP 2197, 2199, 2201. Indeed, CRS's mailing included multiple disclaimers in bold font explaining "THIS IS NOT A GOVERNMENT DOCUMENT" and that recipients had no obligation to respond. *Id*.

[7] Floyd had not examined the envelope of CRS's mailing before making her pronouncement. CP 722. Had she done so, she would have noted the specific disclaimer there stating that mailer was not a government document.

minutes. CP 707-08, 722, 739. She did not even know what a corporate minute book was. CP 708.

CRS's legal counsel sent letters to the Attorney General's Consumer Protection staff regarding specific complainants, CP 1327-34, explaining CRS's service in compliance with Washington corporation law, CP 1327, 1330, 1333, and further emphasizing that CRS's services are "fully guaranteed" and that any customer could receive a refund if dissatisfied with CRS's services. *Id.*; CP 1018.

After CRS's second mailing in October 2012, CP 618, the SOS published a Consumer Alert equating CRS with Compliance Services, another business offering corporate record keeping assistance, that had no relation to CRS. CP 784-85, 791.[8] Media outlets parroted the SOS "alert."[9]

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[8] In drafting this posting, the Division simply cut-and-pasted from a Florida alert, changing few substantive details. CP 725-26, 793-97. The Florida notice was sent to the Division by a Washington attorney in private practice. CP 793-94.

[9] Following the Consumer Alert, Washington media reported on the Division's statement that CRS's service was a "scam." CP 710, 729. For example, KING 5 News' October 23, 2012 11:00 p.m. broadcast accused CRS of "lying and deception," calling the company a "rat," and erroneously describing CRS's service as "a big fat waste of $125.00." CP 799-801. In conjunction with its report, KING 5 News posted on its website and Facebook that CRS's mailing was "bogus" and misstated that CRS's Form asked for a "filing fee." CP 656. Parroting the language of the October 19, 2015 Consumer Alert, KING 5 News stated it "is true [that] for-profit corporations and non-for-profit corporations alike must hold shareholder meetings and record minutes" but noted that "there is no requirement to submit the minutes to the state or to pay anyone to do so." *Id*. KING 5 News' Facebook post warned consumers: "Don't be duped!" by CRS's mailing. *Id.*

The next day, the Division published a blog post misstating that CRS's mailing offered to "file annual minutes for shareholders, directors and officers." CP 803-13. The State once again labeled CRS's mailing a "scam" and specifically added that it "encourage[d] people to file an online complaint with the consumer protection section of the Attorney General's office." CP 811-13. The blog stated that the SOS had received "at least 100 calls from Washington businesses saying they've received mailed notices from Compliance Services or Corporate Records Service." *Id*.

After CRS's third mailing in February 2013, CP 618, the SOS issued another Consumer Alert again conflating CRS with "COMPLIANCE SERVICES" and misstating that CRS's mailing requested "Annual Minutes" for "filing." CP 856. After its February 2013 mailing, when contacted by the Attorney General, CRS voluntarily suspended its business in Washington as a good faith gesture while it worked with the Attorney General to address any concerns. CP 619.

When the State ultimately filed the present action,[10] it misstated Washington corporate law in its complaint. CP 1-31. Even after the

[10] In July 2013, CRS's counsel sent a letter to the Attorney General's Office offering to allay any concerns over CRS's mailings by proposing that CRS send a letter to each of its 2,901 Washington customers that would provide additional information about CRS's business, reemphasize that customers had no obligation to purchase CRS's services, reiterate the distinction between CRS's service of preparing annual consents and

September 2012 and July 2013 letters from CRS's counsel, the Attorney General's Office misstated Washington corporate law in the complaint and its June 2014 press release. The complaint incorrectly stated that "Washington law does not require a corporation to prepare minutes of its annual meeting of shareholders. Rather, Washington law provides that if a corporation chooses to prepare minutes of its annual meeting those minutes must be retained permanently." CP 6.[11] Subsequently, in an interrogatory response shortly thereafter, the State insisted yet again that "there is no 'annual minutes requirement' in Washington law directing a corporation to prepare minutes of its annual meeting." CP 864.

CRS and its expert, University of Washington Law School Professor Dwight Drake, met with the Attorney General's Office in June 2015 to again attempt to correct that office's misstatement of Washington

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a corporation's annual renewal requirement, and again offer to fully refund any unsatisfied customer. CP 1348-50. The Attorney General's Office rejected that solution. CP 1351-52.

[11] The State's lawsuit was accompanied by a lengthy press release by the Attorney General which described CRS as having "duped" customers for the preparation of "unnecessary documents that Washington businesses are not required to file with the Secretary of State," and indicated in its headline that 2,900 businesses may receive refunds. CP 859. Attorney General Ferguson was quoted as saying CRS was a "scammer" and it "preyed on unsuspecting business owners." *Id.* The press release also misinformed the public stating that "[t]here is no requirement for Washington corporations to prepare minutes of their shareholder meetings." CP 859.

law. CP 867.[12] Following the meeting, the Attorney General sent a June 18, 2015 letter to "clarify" the State's position, conceding that "[i]f a meeting is held, then minutes must be kept as permanent records" and reaffirmed that corporate actions may "be taken by executed consent without a meeting, thereby bypassing the need for minutes." CP 867-68.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[13]

(1) There Is a Question of Fact as to Whether CRS Violated RCW 19.86.020

Division I's opinion focuses on the *format* of CRS's communications and not their *content*, op. at 12-15, even though the trial court's decision seemingly rested on both without differentiation, CP 1590-94, and the State argued on appeal that the content of the communications violated Washington law. Resp't br. at 31-35. Simply put, the trial court was incorrect as a matter of law if its decision rested on the proposition that CRS's mailings were deceptive by allegedly

[12] Professor Drake prepared a lengthy report on Washington corporate law in this case, CP 680-97, and also responded in detail to the State's corporate law expert. CP 1961-73.

[13] In reviewing the trial court's summary judgment decisions *de novo*, this Court considers the facts and reasonable inferences from those facts, in a light most favorable to CRS as the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Any credibility decisions pertinent to material issues are for the trier of fact. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626-27, 818 P.2d 1056 (1991). Moreover, the testimony of a competent expert on an ultimate issue of fact defeats a motion for summary judgment. *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992); *Chen v. City of Seattle*, 153 Wn. App. 890, 910, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010).

misstating Washington corporate law. To the extent the trial court's ruling was predicated on the format of CRS's mailings, a fact question is present as to whether they were unfair or deceptive.

(a) Standard for First *Hangman Ridge* Element

RCW 19.86.020 proscribes unfair methods of competition and unfair or deceptive acts or practices in trade or commerce. To demonstrate a CPA violation, the State had to prove by a preponderance of the evidence that CRS (1) engaged in an unfair or deceptive practice, (2) occurring in trade or commerce, and (3) having a public interest impact. *Hangman Ridge Training Stables v. Safeco*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Lack of proof on any one element defeats the action. *Id.* The State failed to meet its burden with regard to the first element of the *Hangman Ridge* test.[14]

The CPA defines neither "unfair" or "deceptive" and Washington courts have permitted the definitions to evolve as a matter of common law

[14] Generally, the first element of the *Hangman Ridge* test can be established one of three ways. Conduct is unfair or deceptive *per se*, if the violation of a statute also constitutes a violation of the CPA. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013). Alternatively, that element can be met if the acts of the defendant have the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785; *Behnke v. Ahrens*, 172 Wn. App. 281, 290-92, 294 P.3d 729 (2012), *review denied,* 177 Wn.2d 1003 (2013). Finally, that element can be met if the plaintiff proves an unfair or deceptive act or practice not regulated by statute, but the act is in violation of the public interest. *Klem*, 176 Wn.2d at 787; *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 37 n.3, 204 P.3d 885 (2009). Thus, unless a defendant's conduct is not *per se* unfair or deceptive, the plaintiff must show that the defendant's conduct is unfair or

interpretation. *Klem*, 176 Wn.2d at 785. This Court has held that the test for unfair or deceptive pertains to the perceptions of the ordinary or reasonable consumer. *Panag*, 166 Wn.2d at 50. *See also*, *Behnke*, 172 Wn. App. at 293.

While acknowledging that whether an act is unfair or deceptive is generally a question of law,[15] Division I previously stated that the act has the capacity to deceive a substantial portion of the public or affects the public interest, the third *Hangman Ridge* element, is a *question of fact*. *Behnke,* 172 Wn. App. at 292, 293; *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 226-27, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019 (2007) (form rental agreement sent to 500 mobile home park owners; question of fact as to whether that had the capacity to deceive a substantial portion of the public). Similarly, the question of whether a defendant's conduct was unfair or deceptive because it involved an activity not regulated but implicating the public interest is a question of fact.[16]

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deceptive under a case-specific analysis of those terms. *Rush v. Blackburn*, 190 Wn. App. 945, 962, 361 P.3d 217 (2015).

[15] Division I's opinion here notes that whether conduct has the capacity to deceive a substantial portion of the public is a question of law, *if the facts are undisputed*. Op. at 1. But the facts here are *disputed*, and its opinion is contrary to its own prior decisions.

[16] While Division I noted in *Behnke* and *Holiday Resort* that the capacity to deceive a substantial portion of the public is a question of fact, this Court in *Klem* did not

Plainly, whether there is *per se* unfair or deceptive conduct is readily a question of law; a court is applying the law in making such a decision. But the other two ways of proving unfair or deceptive conduct – the capacity to deceive or conduct implicating the public interest – are *factually-driven* decisions best left to the trier of fact after a full trial. Division I's ultimate attempt to distinguish its own precedents that held the capacity to deceive to be a question of fact,[17] quite frankly, makes no sense, conflating what is a question of law and of fact: "… these cases hold that the capacity to reach a substantial portion of the public may present a question of fact, *not* that the fact finder is asked to determine whether undisputed facts are likely to mislead a reasonable consumer." Op. at 10 (Court's emphasis).

There is a conflict among decisions of the Court of Appeals on the applicable standard of review on the first element of a CPA claim. This

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specifically address whether the third means of proving the first element of the *Hangman Ridge* test – an unfair or deceptive act or practice not regulated by statute but affecting the public interest – is a question of law or fact. But just as the proof of the third element of the *Hangman Ridge* test is a question of fact, this question is factual – proof of the public interest impact of the defendant's conduct is not a legal issue.

[17] "Whether a deceptive act has the capacity to deceive a substantial portion of the public is question of fact." *Behnke*, 172 Wn. App. at 292.

Court should grant review to clarify the appropriate standard of review as to that first element. RAP 13.4(b)(2).[18]

(b) The Court of Appeals Failed to Address the Content of CRS's Communications

The Court of Appeals opinion nowhere directly addresses the State's assertion, apparently adopted by the trial court, that CRS's mailings misstated Washington corporate law. Op. at 12-15.

As previously noted, the State insisted in its complaint, its press release, discovery, and communications with CRS that CRS misled the public when it stated that Washington law requires corporations to prepare minutes of annual shareholder meetings. CP 6, 859, 864, 867-68.[19] It bolstered its assertion by securing the expert report of Professor Douglas

[18] Closely allied with this standard of review issue is how to treat sophisticated businesses who receive communications. Plaintiffs in CPA and fraud claims who are businesses or other sophisticated entities are held to a higher standard to prove the first element of the *Hangman Ridge* test. For example, the CPA's public interest element is not established where alleged misrepresentations were made to limited group of businesspersons, "whose experience indicated they were better able than the average consumer" to evaluate risks. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 745, 935 P.2d 628 (1997), *review denied*, 133 Wn.2d 1033 (1998). This principle was also articulated by the Ninth Circuit in *Swartz v. KPMG, LLC,* 476 F.3d 756 (9th Cir. 2007). *Swartz* involved the marketing of an investment scheme to a "select audience" of highly sophisticated, extremely wealthy investors. *Id.* at 761. The district court noted that this select audience was "neither unsophisticated nor easily subject to chicanery." 401 F. Supp. 2d at 1154. The public interest was not affected here.

[19] Branson's opinion that no hard and fast requirement exists for annual shareholders' meetings and that there was not a requirement that minutes, or their equivalent, be kept, CP 882, 887, was inconsistent with what he has written in several corporate law textbooks, and with what he taught law students. CP 928-32. Professor Drake's contrary opinion indicated that respected experts disagreed on this issue, making summary judgment improper.

M. Branson. CP 871-95. But the State has equivocated on the legal requirements of Washington corporate law in light of the Worthy June 15, 2015 letter referenced *supra*,[20] and in discovery.[21]

Washington corporations must hold an annual shareholder meeting for the election of directors. RCW 23B.07.010(1) ("a corporation shall hold a meeting of shareholders annually for the election of directors at a time stated in or fixed in accordance with the bylaws.").[22] Minutes of those meetings must be kept. RCW 23B.16.010(1).[23] Corporations are

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[20] AAG Worthy conceded in that June 18, 2015 letter that minutes must be kept if a meeting is held. CP 867-68.

[21] Just one business day before the summary judgment deadline, the State admitted in discovery that: (1) Washington law provides that directors shall be elected annually or at a time stated in or fixed in accordance with the corporation's bylaws; (2) if an official meeting of the shareholders of a corporation takes place, a corporation must prepare and keep minutes of its shareholder meetings; (3) a corporation can take action without a meeting, which could include the election of directors, if the corporation acts in compliance with RCW 23B.07.040 and the other provisions of Washington corporate law such as notice of a meeting; and (4) there may well be and likely are attorneys and accountants that prepare written consent resolutions in lieu of annual shareholder meetings for corporations registered in Washington. CP 1899-1903. The Attorney General's admissions are consistent with Washington corporate law, and CRS's representations to prospective customers.

[22] Stewart M. Landefeld, Barry M. Kaplan, Steven R. Yentzer, *Washington Corporate Law: Corporations and LLCs* (Lexis Nexis, 2002 ed.) at § 7.1 ("A Washington corporation must hold an annual meeting of shareholders."). Perhaps most tellingly, the State's own "Small Business Guide," available to the public on the SOS website, advises corporations of the requirement to hold annual meetings. CP 922 ("Corporations also have other requirements, such as issuing stock certificates, holding annual meetings and keeping minutes, electing directors, etc.").

[23] WSBA, *Wash. Bus. Corp. Act Sourcebook* ("WSBA") indicates at 16.010-2 (RCW 23B.16.010 "requires a corporation to 'keep' as permanent records the minutes of meetings of its shareholders and board of directors."). *See also,* John Morey Maurice, *The 1990 Wash. Bus. Corp. Act*, 25 Gonz. L. Rev. 373, 448-49 (1990) ("Washington corporations must "keep permanent records of all meetings of the shareholders"); Robert

also required to assign to a corporate officer "the duty of preparing minutes of all shareholder meetings." RCW 23B.08.400(3);[24] RCW 23B.16.010.

Professor Drake, who has practiced law and advised corporate clients in private practice for more than 30 years, opined in his extensive, report, CP 680-97, that Washington's statutes and their legislative history make it clear that minutes of an annual meeting are mandatory. CP 687.[25]

CRS offered customers the preparation of consent forms in lieu of corporate meetings/minutes. That was not misleading. After meeting with Professor Drake, the State conceded a corporation preparing "executed consent[s] without a[n annual] meeting, thereby bypassing the need for minutes," has complied with Washington law. CP 868. Indeed, such executed shareholder consents approving a corporate action carry the same

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McGaughey, *Wash. Corp. Law Handbook* § 7.04 (2000) (statute "requires that minutes of shareholder meetings be kept"). Commentary to the Annotated Model Business Corporate Act, on which Washington's statute was based, lists Washington as a state that "expressly require[s] a corporation to maintain documents such as books and records of accounts and minutes of shareholders' . . . meetings." 4 Amer. Bar Assoc., *Model Bus. Corp. Act Annotated* 16-10 (2013).

[24] The official legislative history of RCW 23B.08.400 states that "[t]he bylaws or the board of directors must . . . delegate to an officer the responsibility to prepare minutes." WSBA at 08.440-1.

[25] Preparing and maintaining minutes or consents in lieu are not empty formalities. Failure to prepare and keep minutes of an annual meeting would be a "flagrant breach of duty by the board of directors" and could have significant implications for taxes and personal liability of the shareholders, directors, and offices. CP 688.

effect as a meeting vote and "may be described as such in any record." RCW 23B.07.040(5).[26]

CRS did not misrepresent Washington corporate law, and to the extent the trial court's decision was based on the content of CRS's mailings, it was error.

(c) The Format of the Communications Was Not Deceptive

As for the format of the communications, again a question of fact existed as to any deceptive or unfair quality to them, given expert testimony by Professor Carl Obermiller, of the Seattle University Business School, CP 1245-71, on their format and the disclaimers they contained.[27]

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[26] All shareholder consents must "be delivered to the corporation for inclusion in the minutes or filing with the corporate records." RCW 23B.07.040(1)(b)(v). "Shareholder resolutions adopted via written consent are identical to those that may be adopted through a meeting and have the exact same legal effect." CP 684-85. Such consents satisfy the statutory annual shareholder meeting requirement referenced in the form. CP 684. *See generally*, CP 1963-65. Treatises like WA Corp. Law at § 7.1 agree ("Many privately held corporations do not hold an actual meeting annually, but instead elect directors and take all other corporate action by shareholder consent. So long as directors are elected and other appropriate action taken, annual action by consent set forth in a record as permitted by section 23B.07.040 satisfies the need to hold an actual meeting."). Corporate service providers commonly provide consents in place of minutes. Practice guides for legal professionals so state "Consents are widely used by privately held corporations both for special and annual shareholder meetings. Approval by consent has the same effect as a meeting vote." *Washington Business Entities: Law and Forms* § 13:20 (Lexis Nexis 2014). Washington law firms advise corporations to keep a record of "all actions taken by the shareholders or board of directors without a meeting." CP 913-18. Reputable corporate compliance consultants, like CT Corporations Service, advise corporations that "[w]hen actions are taken pursuant to consent in lieu of a meeting, documentation supporting that action must be produced and retained." CP 937-43.

[27] Given the fact that the State's claim as to the unfair/deceptive prong of the *Hangman Ridge* test was based on a capacity to deceive or possibly *Klem's* implication for the public interest (although it never expressly addressed this prong in its pleadings

Mailings that display emblems of a governmental agency, use the terminology of a government agency, or even have a return address of the federal capital have been held to violate the Federal Debt Collection Practices Act, 15 U.S.C. § 1692, *et seq.* or § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 ("FTCA"), but not every reference to a governmental term or description violates federal law. *See* Br. of Appellants at 30 n.29.

In particular, a solicitation is not deceptive under § 5 of the Federal Trade Commission Act, the template for RCW 19.86.020, if it contains disclaimers or qualifications that are "sufficiently prominent and unambiguous" to "leave an accurate impression." *Removatron Int'l Corp. v. F.T.C.*, 884 F.2d 1489, 1497 (1st Cir. 1989).[28] Division I did not address this authority. Op. at 13.

Here, a significant question of fact existed as to whether a reasonable, ordinary consumer reviewing CRS's mailing could determine

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below), CP 628-30; RP 12, those matters involve questions of fact and the trial court erred in granting summary judgment to the State. *Behnke*, *supra*; *Klem*, *supra*. This is particularly true where the parties offered the testimony of competing experts on marketing and the effect of the CRS mailings that were at odds regarding their effect. CP 295-329, 448-82, 1245-80. Plainly, the trial court improperly chose to credit the State's experts over CRS's.

[28] Consistent with this rule, a Colorado appeals court held that "Defendants cannot be held liable for those customers who believed the solicitation came from the government, but who did not read or understand the clear and conspicuous disclosure." *State ex rel. Suthers*, *supra* (interpreting a Mandatory Poster Agency mailing for labor

that the document is a commercial solicitation—not a government document nor a bill. Neither the envelope nor the mailings' contents contain any of the indicia of a business attempting to mimic a government communicating with its people. CRS's name does not make reference to "Washington," "state," or "agency," "department," or "bureau," all terms denoting a government.

Nor did CRS's mailers resemble the annual corporate renewal forms used by the SOS during any of the relevant time periods, including the SOS's unique color schemes, graphics, logos, tables, and phrasing, sent to consumers by the Washington Business Licensing Service. CRS's envelopes also clearly stated in all-capitalized, black font "THIS IS NOT A GOVERNMENT DOCUMENT." CP 1401-04, 1409-14.

CRS's form was printed in black ink and does not bear a seal of any kind. CP 2199. Nowhere did it mention any affiliation with the SOS or any other government entity; nowhere did CRS's form mention the word "renew" or "renewal."

CRS's form makes it clear that, although Washington law requires corporations to hold annual shareholder meetings and keep minutes, corporations could fulfill the requirement themselves or hire a service

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law posters; court reasoned that "the people who actually read the documents easily determined that ... [they] were not government generated.").

provider to assist them. CP 2197, 2200. ("[I]t is not mandatory that you use our preparation service to prepare your minutes.) Nowhere on the CRS mailer does it state that the information requested will be or must be "filed" with the State. *Id.* In fact, the opposite is true because, as noted *supra*, the CRS mailing indicated that the preparation of minutes did not satisfy the statutory requirement to file an annual report. CP 2200.

Like the trial court, the Court of Appeals paid inordinate attention the AOD.[29] Op. at 14-15. But a question of fact was present as to whether CRS violated it.

[29] The trial court here labored under the misconception that CRS's present mailings, undertaken with regard to a different business activity (corporate support services as opposed to labor law advisory posters), somehow violated the AOD, a different MPA division entirely, CP 2045; RP 4, when the State belatedly raised the AOD issue on summary judgment. Although mentioned in its complaint, CP 8-11, the State did not specifically plead any AOD violation. CP 12-16. The AOD, as a consent decree, must be interpreted in accordance with contract principles. *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 446 (2009), *review denied*, 168 Wn.2d 1026 (2010). The trial court, aware of that decision, RP 5-6, should have applied the AOD parties' intent expressed in the language of the AOD, their objective manifestation of intent. Any terms in the AOD had to be interpreted in accordance with their ordinary, usual, and popular meaning. *Id*. First, CRS is not MPA. They are different divisions offering completely different services. Second, the AOD did not constitute an admission of a violation of the CPA by MPA. CP 998-99. Finally, any of the concerns addressed in the AOD are not present here. In MPA's case, the AOD indicated that the mailings appeared to come from a government agency: "The names given to outlets evoke an official government tone. Emblems mimic state agency emblem. The postal drop box with an Olympia address reinforces that misrepresentation." CP 995. These factors are not present in CRS's mailings except the Olympia address. The AOD noted that MPA's mailings had imperative language like "Advisory" or "effective immediately" or language calculated to compound "the sense of fear." *Id*. Again, none of those concerns are present in CRS's mailings, as this Court can readily discern. These issues are properly matters of fact for a trier of fact.

Given the factually-intense decision about whether CRS's solicitations mimicked government mailings and the effect of the disclaimers, the issue of whether the format of CRS's mailings was unfair or deceptive was for a jury. Review is merited. RAP 13.4(b)(4).

(2) The Trial Court Abused Its Discretion in Setting Penalties

The trial court imposed $793,540 in penalties against CRS pursuant to RCW 19.86.140.[30] RCW 19.86.140 specifically limits any penalty to $25,000. The AOD itself in § 5.1 limits violations of its terms to a civil penalty of up to $25,000. CP 998-99. Circumventing this obvious limitation on its punitive power, the trial court imposed a penalty on *each mailer* by CRS. CP 1592, 2045; RP 48. Not only did Division I ignore these limitations, the Court upheld the constitutionality of the penalties. Op. at 15-18.

Punitive damages may not exceed the bounds of due process. *BMW of No. America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). *See also*, *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003), *cert. denied*, 543

[30] Washington courts have never adopted a standard by which to analyze the propriety of a penalty award. *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976); *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Nor does RCW 19.86.090 specify the grounds for assessing a penalty. The trial court, however, never applied the penalty criteria from other states or federal law that the State argued on cross-review should apply, making up the penalty as it went along. CP 2045; RP 48-49. This Court should grant review to articulate the grounds for the imposition of CPA penalties. RAP 13.4(b)(4).

U.S. 874 (2004). The Eighth Amendment precludes excessive state-imposed fines. *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (fine violates 8th Amendment if it is grossly disproportional to the gravity of the alleged offense). *State v. WWJ Corp.*, 138 Wn.2d 595, 603-04, 980 P.2d 1257 (1999) (discussing 8th Amendment issue but declining to reach it). The trial court's decision fails under *Gore*.

Division I refused to apply constitutional principles to an excessive statutory penalty, resting its decision on this Court's decision in *Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 286 P.3d 46 (2012). Op. at 17. That is error. There, the *Perez-Farias* court acknowledged that the issue of the applicability of *Gore*/*Campbell* to statutory penalties had not yet been addressed by the United States Supreme Court. *Id*. at 532. The Court expressly declined to reach that issue of federal law. *Id*.[31] However, the Court also noted that statutory penalties could be invalidated if they were "so severe and oppressive as to be wholly disproportionated to the offense and obviously unreasonable." *Id*. at 533 n.13. *See also*, *WWJ Corp.*, 138 Wn.2d at 603-04 (8th Amendment may bar excessive fine/penalty).

[31] The Court only addressed penalties under state constitutional due process principles. *Id*. at 533-34.

Here, unlike *Perez-Farias* where the Court ruled that statutory liquidated damages of $500 per violation was mandatory under the statute essentially as the plaintiffs' full recovery, 175 Wn.2d at 529-20, the State recovered actual damages, in the form of a restitution fund. The penalties were not statutory liquidated damages; they were *punishment*. Moreover, the trial court here, like the juries in *Campbell* and *Gore*, had discretion on the amount of the penalty, up to $2,000 per violation. The conduct was akin to jury punitive damages decision to which the *Gore*/*Campbell* analysis properly applied.

The *Perez-Farias* court did not address the application of federal constitutional principles to statutory penalties in excess of actual damages. Ultimately, whether based on common law or statute, a penalty decision should be subject to a due process/Eighth Amendment constitutional challenge for excessiveness.

This Court has not addressed the constitutionality of statutory penalties like those allowed in the CPA under due process or Eighth Amendment principles. Review is merited. RAP 13.4(b)(4).

F. CONCLUSION

The Court of Appeals decision merits review under RAP 13.4(b)(2) where it creates a conflict among decisions of that Court on the standard for CPA claims. Review is also merited under RAP 13.4(b)(4)

where the CPA penalties imposed by the trial court violate due process and/or excessive fines principles.

This Court should grant review and reverse the trial court's summary judgment and vacate its award of restitution, penalties, fees, and costs. Costs on appeal should be awarded to CRS.

DATED this 20th day of July, 2017.

Respectfully submitted,

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APPENDIX

RCW 19.86.020:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

RCW 19.86.090:

> Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damaged sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.
>
> Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

RCW 19.86.140:

> Every person who shall violate the terms of any injunction issued as in this chapter provided, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.

Every person, other than a corporation, who violates RCW 19.86.030 or 19.86.040 shall pay a civil penalty of not more than one hundred thousand dollars. Every corporation which violates RCW 19.86.030 or 19.86.040 shall pay a civil penalty of not more than five hundred thousand dollars.

Every person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation: PROVIDED, That nothing in this paragraph shall apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer, or distributor of any newspaper, magazine, billboard or other advertising medium who publishes, prints, or distributes, advertising in good faith without any knowledge of its false, deceptive, or misleading character.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. THE MANDATORY POSTER AGENCY, INC., d/b/a CORPORATE RECORDS SERVICE, THE WASHINGTON LABOR LAW POSTER SERVICE, WASHINGTON FOOD SERVICE COMPLIANCE CENTER, and STEVEN J. FATA, THOMAS FATA, AND JOSEPH FATA, individually and in their corporate capacity, Appellant.	No. 74978-1-I PUBLISHED OPINION FILED: July 3, 2017

VERELLEN, C.J. — The first element of a Consumer Protection Act (CPA) violation is an unfair or deceptive act or practice.[1] An act is deceptive if it is likely to mislead a reasonable consumer. Such an act satisfies the first element if it has the capacity to deceive a substantial portion of the public. When the underlying facts are undisputed, the question whether the acts are likely to mislead–an objective inquiry–is a question of law. Whether such a deception has the capacity to reach a substantial portion of the public is a question of fact precluding summary judgment, unless the undisputed facts establish that capacity.

[1] Ch. 19.86 RCW.

Here, the undisputed facts show The Mandatory Poster Agency, Inc. (MPA) sent mass mailings under the assumed name Corporate Records Service (CRS) to more than 79,000 Washington corporations. As a matter of law, the undisputed format, images, and content of the mailings created a net impression likely to mislead a reasonable consumer into believing CRS is associated with a governmental agency and that the recipients were obligated to fill out and return the solicitations with a fee of $125. Notably, the mass mailings include language, tone, and imagery prohibited by MPA's 2008 "Assurance of Discontinuance," and such violations are prima facie evidence of a CPA violation.

Further, the undisputed scope of the extensive mass mailings generating payments by 2,901 consumers reveals a capacity to reach and thus deceive a substantial portion of the public. The trial court did not err in granting summary judgment that MPA engaged in a deceptive act or practice.

CRS contends the $793,540 penalty imposed by the court is excessive. On cross appeal, the State argues the penalty is too lenient. The trial court did not abuse its broad discretion in setting a penalty of $10 per mailing, together with a provision requiring CRS to fund restitution.

The trial court adequately engaged in a lodestar calculation of attorney fees, but failed to make the required findings for an award of nonlawyer time. And the trial court should not have awarded expert witness fees as costs.

Because the State is the prevailing party on appeal, it is entitled to fees on appeal.

We affirm in part and reverse in part.

FACTS

Steven Fata, Thomas Fata, and Joseph Fata each own one-third of MPA and jointly undertake all corporate decisions. CRS has a mailbox in Olympia, Washington at a United Parcel Service store.

Several years ago, the Attorney General's Office initiated an investigation into MPA's mass marketing of posters summarizing state and federal legal requirements. The State alleged MPA used mailers with various business names to deceive consumers into believing they must purchase posters from the company in order to comply with state and federal law. The MPA advertisements appeared to originate from the government or an organization associated or in contact with the government. The ads also used names that evoked "an official government tone" and emblems that "mimic a state agency emblem."[2] The ads also used a postal drop box with an Olympia address. The language suggested a necessity to act, such as "Advisory," "advisement," "achieve compliance," and "effective immediately."[3]

In February 2008, at the conclusion of the Attorney General Office's investigation, MPA entered into an Assurance of Discontinuance prohibiting the company and its officers, directors, and principals from engaging in a variety of unfair or deceptive practices, including sending misleading solicitations to consumers that create the impression that the solicitations are from a government agency. The Assurance of Discontinuance also barred the use of specific terms and practices, along with the following provision:

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[2] Clerk's Papers (CP) at 488.

[3] CP at 488.

> This Assurance of Discontinuance shall not be considered an admission of violation of the Consumer Protection Act for any purposes, but failure to comply with this Assurance of Discontinuance shall be prima facie evidence of violations of RCW 19.86.020, thereby placing upon the Respondents, and their officers, directors, and principals, the burden of defending against imposition by the court of damages, injunctions, restitution, civil penalties of up to $2,000.00 per violation and costs including reasonable attorney's fees. In addition, pursuant to RCW 19.86.140[,] violations of the injunctive provisions of this Assurance of Discontinuance may result in court imposed civil penalties of up to $25,000.00.[4]

In 2012 and 2013, CRS sent "Annual Minutes Records Form" solicitations to Washington consumers. Joseph Fata designed the solicitation; Steven Fata and Thomas Fata approved its use in Washington.

CRS mailed 79,354 solicitations to Washington consumers. The front of each envelope contained the language "IMPORTANT" in bold above "Annual Minutes Requirement Statement," "TIME SENSITIVE," and "If addressed name is incorrect, please forward document to an authorized employee representative Immediately."[5] The green colored envelope included a stylized eagle symbol in the upper right-hand corner and an Olympia return address. A notation "THIS IS NOT A GOVERNMENT DOCUMENT" was located just below the return address.[6]

Inside the envelope, CRS included a form entitled "2012 – ANNUAL MINUTES RECORDS FORM."[7] The form was addressed to the recipient's business and contained a key code, bar code, response date, and the recipient's date of incorporation. Each solicitation, excluding the February 2013 mailings, also included

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[4] CP at 492.

[5] CP at 1011, 1025, 1028.

[6] CP at 1011, 1025, 1028.

[7] CP at 1006, 1012-13, 1023-24, 1029, 2199-200.

the "Corporation Number" consisting of the uniform business identifier number assigned by the State to the corporation.[8] The first instruction on the form stated, "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM. PLEASE PRINT."[9] CRS listed selected citations to the Washington Business Corporations Act near the top of the page. The form had the disclaimer "CORPORATE RECORDS SERVICE IS NOT A GOVERNMENT AGENCY AND DOES NOT HAVE OR CONTRACT WITH ANY GOVERNMENT AGENCY TO PROVIDE THIS SERVICE."[10] This disclaimer was surrounded by other text and was located one-third of the way down from the top of the form.

CRS titled the second page "INSTRUCTIONS FOR COMPLETING THE ANNUAL MINUTES RECORDS FORM (Washington Corporations)."[11] The instructions direct recipients to review the accuracy of their preprinted corporate name and address and to then complete seven steps to fill out the form. The instructions also note that "[m]aintaining records is important to the existence of all corporations."[12] In response to the mailing, 2,901 Washington businesses submitted a completed form with the $125 fee.[13]

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[8] CP at 2199; CP at 1010-14 (CRS did not include the corporation number in its February 2013 mailings, totaling approximately 5,619 mailings).

[9] CP at 1012-13, 1023-24, 1027, 1029, 2199.

[10] CP at 1012-13, 1023-24, 1029, 2199-200.

[11] CP at 1024.

[12] CP at 1024.

[13] CP at 484-85.

CRS sent a corporate minute book to Washington consumers who returned the Annual Minutes Records Form and $125.[14] The corporate minute book contained "Unanimous Consent of Shareholders" and "Unanimous Consent of Directors" forms.[15] The corporate minute book included instructions to sign and date the documents. It advised that "[y]our company will be in full compliance with the corporate minute records requirement after the Unanimous Consent documents are signed and dated."[16]

After receiving numerous complaints, the Attorney General's Office filed a lawsuit in King County Superior Court, alleging misrepresentation and violations of the CPA. Both parties moved for summary judgment. The trial court partially granted the State's motion and denied CRS's motion. The court concluded as a matter of law that the Annual Minutes Records Form solicitation was a deceptive act or practice that violated the Assurance of Discontinuance and the CPA. Specifically, the court determined CRS committed 79,354 separate violations by creating the deceptive net impression that its solicitations "were from a governmental agency and that Washington consumers were obligated to fill out and return the solicitations along with $125."[17] The court also concluded as a matter of law that the "solicitations had the capacity to deceive a substantial number of Washington consumers" and because CRS engaged in trade and commerce, their actions affected the public interest.

The trial court entered an order imposing a civil penalty under RCW 19.86.140 in the amount of $793,540, $10 per violation, and instituted a restitution process requiring

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[14] CP at 1006.

[15] CP at 1015-21.

[16] CP at 1019.

[17] CP at 1591.

CRS to transmit the full amount of potential restitution, $362,625, to a claims administrator.[18] The trial court also awarded the State $337,593.20 in attorney fees and $39,571.27 in costs.[19]

CRS appeals. The State cross appeals.

ANALYSIS

We review a summary judgment decision de novo.[20] Summary judgment is appropriate if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'"[21] A response to a summary judgment motion "must set forth specific facts showing that there is a genuine issue for trial."[22]

I. Unfair or Deceptive Act

CRS argues the trial court erred by concluding as a matter of law that its solicitation was an unfair or deceptive act under the CPA.

The CPA forbids "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce."[23] The State must prove "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact."[24] Unlike a private plaintiff under the CPA, the State is not required to

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[18] CP at 2046.

[19] CP at 2125-27.

[20] Keck v. Collins, 181 Wn. App. 67, 78, 325 P.3d 306 (2014), affirmed, 184 Wn.2d 358 (2015).

[21] Id. at 78-79 (quoting CR 56(c)).

[22] CR 56(e).

[23] RCW 19.86.020.

[24] State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011).

prove causation or injury.[25] A CPA case brought by the State is an equitable action, and there is no jury trial.[26]

The "unfair or deceptive act" element can be established in one of three ways: (i) per se unfair or deceptive conduct,[27] (ii) an act that has the capacity to deceive a substantial portion of the public,[28] or (iii) an unfair or deceptive act or practice not regulated by statute but in violation of the public interest.[29] A plaintiff does not need to show the act was intended to deceive, "only that it had the capacity to deceive a substantial portion of the public."[30] "'Deception exists "if there is a representation, omission, or practice that is likely to mislead" a reasonable consumer.'"[31] The CPA does not define "deceptive," but "the implicit understanding is that 'the actor *misrepresented* something of material importance.'"[32] A deceptive act or practice is measured by "the net impression" on a reasonable consumer.[33]

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[25] Id.

[26] RCW 19.86.080; State ex rel. Dep't of Ecology v. Anderson, 94 Wn.2d 727, 730, 620 P.2d 76 (1980).

[27] Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013).

[28] Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531 (1986); Behnke v. Ahrens, 172 Wn. App. 281, 290-92, 294 P.3d 729 (2012).

[29] Klem, 176 Wn.2d at 787; Panag v. Farmers Ins. Co., 166 Wn.2d 27, 37 n.3, 204 P.3d 885 (2009).

[30] Panag, 166 Wn.2d at 47.

[31] Rush v. Blackburn, 190 Wn. App. 945, 963, 361 P.3d 217 (2015) (quoting id. at 50).

[32] Kaiser, 161 Wn. App. at 719 (quoting Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), rev'd on other grounds, 138 Wn.2d 248, 978 P.2d 505 (1999)).

[33] Panag, 166 Wn.2d at 50 (quoting Fed. Trade Comm'n v. Cyberspace.Com LLC, 453 F.3d 1196, 1200 (9th Cir. 2006)).

The parties dispute whether the first element of a CPA claim presents a question of law or question of fact. Several cases have recognized the first element is a question of law when the facts are undisputed.

In Leingang v. Pierce County Medical Bureau, Inc., the court noted:

> Whether a party in fact committed a particular act is reviewable under the substantial evidence test. However, the determination of whether a particular statute applies to a factual situation is a conclusion of law. Consequently, whether a particular action gives rise to a Consumer Protection Act violation is reviewable as a question of law. *Therefore, since there is no dispute of facts as to what the parties did in this case, whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law.*[34]

Twelve years later, our Supreme Court echoed the same standard in Panag v. Farmers Insurance Company of Washington: "The next issue is whether . . . the first [CPA] element has been established. Whether a particular act or practice is 'unfair or deceptive' *is a question of law.*"[35] We have recognized this standard in several cases.[36]

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[34] 131 Wn.2d 133, 150, 930 P.2d 288 (1997) (emphasis added) (citations omitted).

[35] 166 Wn.2d 27, 47, 204 P.3d 885 (2009) (emphasis added) (citing Leingang, 131 Wn.2d at 150).

[36] Rush, 190 Wn. App. at 963-64 ("'Whether undisputed conduct is unfair or deceptive is a question of law, not a question of fact.'") (quoting Lyons v. U.S. Bank Nat'l Ass'n, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014)); Holiday Resort Cmty. Ass'n v. Echo Lake Assocs., LLC, 134 Wn. App. 210, 226, 135 P.3d 499 (2006) ("Whether an alleged act is unfair or deceptive is a question of law.") (citing Leingang, 131 Wn.2d at 150); Kaiser, 161 Wn. App. at 719 (citing Leingang, 131 Wn.2d at 150); Stephens v. Omni Ins. Co., 138 Wn. App. 151, 166, 159 P.3d 10 (2007) (citing Leingang, 131 Wn.2d at 150); Bavand v. OneWest Bank, 196 Wn. App. 813, 840, 385 P.3d 233 (2016) (citing Leingang, 131 Wn.2d at 150); Keyes v. Bollinger, 31 Wn. App. 286, 289, 640 P.2d 1077 (1982); Barkley v. GreenPoint Mortg. Funding, Inc., 190 Wn. App. 58, 68, 358 P.3d 1204 (2015) (citing Leingang, 131 Wn.2d at 150); Walker v. Quality Loan Serv. Corp., 176 Wn. App. 294, 318, 308 P.3d 716 (2013); Wellman & Zuck, Inc. v. Hartford Fire Ins. Co., 170 Wn. App. 666, 678, 285 P.3d 892 (2012); Brown ex rel. Richards v. Brown, 157 Wn. App. 803, 815, 239 P.3d 602 (2010); Carlile v. Harbour Homes, Inc., 147 Wn. App. 193, 211, 194 P.3d 280 (2008) (citing Leingang, 131 Wn.2d at 150); Shields v. Morgan Financial, Inc., 130 Wn. App. 750, 755, 125 P.3d 164 (2005); Shah v. Allstate

CRS points to Behnke v. Ahrens[37] and Holiday Resort Community Association v. Echo Lake Associates, LLC[38] for the proposition that a question of fact may exist. But those cases hold that the capacity to reach a substantial portion of the public may present a question of fact, *not* that the fact finder is asked to determine whether undisputed facts are likely to mislead a reasonable consumer.[39]

The Holiday Resort court acknowledged that whether an act is unfair or deceptive is a legal question, but "whether the 1997 Rental Agreement has the capacity to deceive a substantial portion of the public is a question of fact."[40] In that case, the trial court dismissed the plaintiffs' suit and ruled there was no connection between the alleged CPA violation and the plaintiffs' injuries.[41] On appeal, this court concluded the language in the rental agreement violated a statute and was an unfair act or practice

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Ins. Co., 130 Wn. App. 74, 86, 121 P.3d 1204 (2005); Robinson v. Avis Rent A Car System, Inc., 106 Wn. App. 104, 114, 22 P.3d 818 (2001) (citing Leingang, 131 Wn.2d at 150); Dwyer v. J.I. Kislak Mortg. Corp., 103 Wn. App. 542, 546, 13 P.3d 240 (2000) (citing Leingang, 131 Wn.2d at 150); Griffith v. Centex Real Estate Corp., 93 Wn. App. 202, 214, 969 P.2d 486 (1998) (citing Leingang, 131 Wn.2d at 150); Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 560, 825 P.2d 714 (1992).

[37] 172 Wn. App. 281, 294 P.3d 729 (2012).

[38] 134 Wn. App. 210, 135 P.3d 499 (2006)

[39] The comments to the pattern jury instruction are consistent with this interpretation: "Whether an act has the capacity to deceive a substantial portion of the public is a question of fact. If the facts about a party's act or practice are not in dispute, the trial court may decide whether that act or practice was deceptive as a matter of law." 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 310.08, at 43 (6th ed. Supp. 2013) (citing Behnke, 172 Wn. App. at 281; Leingang, 131 Wn.2d at 149-50).

[40] Holiday Resort, 134 Wn. App. at 226-27.

[41] Id. at 217-18.

under the CPA as a matter of law.[42] But it also noted that whether that act "has the capacity to deceive a substantial portion of the public is a question of fact," reasoning:

> Here, the tenants allege the language in the 1997 Rental Agreement not only misstates the law but also has the capacity to deceive a portion of the public *because it is available for dissemination* to the more than 500 [Manufactured Housing Communities of Washington] members who are mobile home park owners or managers.[43]

In Behnke, citing Holiday Resort, this court also recognized "[w]hether a deceptive act has the capacity to deceive a substantial portion of the public is a question of fact."[44] This court specifically emphasized, "In applying the requirement that the allegedly deceptive act has the capacity to deceive 'a substantial portion of the public,' the concern of Washington courts has been to rule out those deceptive acts and practices that are unique to the relationship between plaintiff and defendant."[45] We also recognized that "[t]he definition of 'unfair' and 'deceptive' must be objective to prevent every consumer complaint from becoming a triable violation of the act."[46]

CRS's reliance on Holiday Resort and Behnke is misplaced. Those cases recognize only that the substantial portion of the public component of a deceptive act or practice may present a question of fact, not that a fact finder weighs whether a representation, omission, or practice is likely to mislead a reasonable consumer.[47]

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[42] Id. at 226.

[43] Id. at 226-27 (emphasis added).

[44] Behnke, 172 Wn. App. at 292 (citing id.).

[45] Id. at 292-93.

[46] Id. at 293.

[47] Additionally, Behnke cites Holiday Resort, which in turn cites Hangman Ridge, 105 Wn.2d at 789-90, where our Supreme Court held only that the separate public interest element is a question of fact. CRS also cites Deegan v. Windermere Real Estate/Center-Isle, Inc., 197 Wn. App. 875, 391 P.3d 582 (2017) and Rhodes v. Rains,

The undisputed facts show each of the 79,354 solicitations included an envelope that (1) contained bolded text reading, "IMPORTANT" "Annual Minutes Requirement Statement"; (2) depicted a large eagle on the top right side of the green colored envelope; (3) stated "Business Mail - Time Sensitive"; (4) directed the recipient to "[p]lease forward to an authorized employee representative Immediately"; and (5) used authoritative language similar to a government document.[48] The solicitation inside the envelope (1) contained selective citations to Washington corporate statutes, (2) directed "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM, PLEASE PRINT," (3) referred to the recipient's Washington State corporation uniform business identifier number, and (4) recited the recipient's incorporation date.[49] Although the CRS form is not identical to the Secretary of State's annual report form, the tone is similar to a mandatory governmental form.

The CRS mass mailings are likely to mislead a reasonable consumer because the undisputed format, images, and content do mimic government-related forms and create the net impression that the recipient is obligated to return the form and pay $125 to CRS. CRS contends its solicitations were not deceptive because they accurately stated Washington corporate law requirements. But "[e]ven accurate information may be deceptive 'if there is a representation, omission or practice that is likely to

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195 Wn. App. 235, 381 P.3d 58 (2016), but neither case affects the outcome of this matter. Deegan stands for the proposition that causation under the CPA is a question of fact, and Rhodes merely suggests that disputed facts should be resolved by the trier of fact.

[48] CP at 1011, 1025, 1028.

[49] CP at 1012-13, 1023-24, 1027, 1029, 2199.

mislead.'"[50] Here, it is clear that consents in lieu of director and shareholder meetings may satisfy Washington annual meeting and recordkeeping requirements. But the accuracy of those statements does not eliminate their likelihood to mislead in the context of the annual minutes solicitation. Consumers are likely misled by the net impression that CRS is associated with the government and that consumers are required to return the completed form with a fee.

CRS also focuses on its disclaimers, but courts have recognized that disclaimers do not always cure the potential for deception.[51] Here, the disclaimer "THIS IS NOT A GOVERNMENT DOCUMENT" is just underneath the return address on the envelope and is overshadowed by a large all caps and bold "IMPORTANT" notation on the face of the envelope just above "Annual Minutes Requirement Statement." The all-caps disclaimer in the instructions, that CRS is not a government agency and does not have a contract with a government agency is one-third down the page surrounded by unrelated instructions. Considering the format and placement, the disclaimers do not cure the potential for deception. Notwithstanding the disclaimers, CRS's solicitation created the misleading net impression that CRS is associated with a government agency and that consumers were obligated to return the form with a fee.

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[50] Kaiser, 161 Wn. App. at 719 (internal quotation marks omitted) (quoting Panag, 166 Wn.2d at 50).

[51] Panag, 166 Wn.2d at 50; Cyberspace.Com, 453 F.3d at 1200 (solicitation masquerading as a rebate check was misleading notwithstanding fine print notices accurately disclosing its true nature); Floersheim v. Fed. Trade Comm'n, 411 F.2d 874, 876 (9th Cir.1969) (disclaimer did not cure deceptive impression that demand letter was issued by United States government, as many individuals "would be unlikely to notice respondent's inconspicuous disclaimer or understand its import"); Indep. Dir. Corp. v. Fed. Trade Comm'n, 188 F.2d 468 (2d Cir.1951) (solicitation disguised as renewal notice deceptive notwithstanding fine print disclosures).

Additionally, because there is no dispute that the mass mailing was sent to over 79,000 consumers, generating 2,901 paid responses, there is no question of fact whether the misleading mailings reached, and thus had the capacity to deceive, a substantial portion of the public.

There is no issue of material fact for the trier of fact to decide.

Further, contrary to CRS's contentions, the mailings violated the Assurance of Discontinuance and are prima facie evidence of deceptive acts. The Assurance of Discontinuance precluded "[u]se of the term 'confidential', 'important information', 'approved', 'effective immediately', 'compliance', 'issued', or *any terms of similar import.*"[52] CRS used the words "IMPORTANT" and "Requirement" on its envelope and instructed recipients "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM."[53]

The Assurance of Discontinuance barred language suggesting that "an enclosed solicitation requires immediate or other mandated response."[54] CRS used "Annual Minutes Requirement Statement," "If addressed name is incorrect, please forward document to an authorized employee representative Immediately," and "TIME SENSITIVE" on the envelope.[55] CRS also referred to a corporate uniform business identifier number on the vast majority of the solicitations.[56]

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[52] CP at 489, Assurance of Discontinuance (AOD) 2.1(b)(3) (emphasis added).

[53] CP at 1011-12, 1028-29.

[54] CP at 489, AOD 2.1(b)(5).

[55] CP at 1011, 1028.

[56] CP at 1029.

We conclude CRS's mailers violated the Assurance of Discontinuance. The violations are prima facie evidence of a CPA violation.

II. Penalties

CRS argues the trial court abused its discretion in imposing an excessive penalty because the State did not prove each recipient was deceived by the solicitation. In its cross appeal, the State contends the penalties were too lenient.

The CPA includes specific provisions for civil penalties, authorizing a penalty up to $2,000 per violation.[57] We review the trial court's assessment of civil penalties within the statutory limits for an abuse of discretion.[58] Each deceptive act is a separate violation. In State v. Ralph Williams' North West Chrysler Plymouth, Inc., our Supreme Court recognized that the CPA "vests the trial court with the power to assess a penalty for each violation."[59] And CPA penalties are valid even though "the trial court did not find that the consumers relied on appellants' wrongful conduct."[60] Similarly, because *each* of CRS's 79,354 solicitations had the capacity to deceive, each mailing was a violation, whether or not the recipient purchased its product.

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[57] RCW 19.86.140.

[58] See Ethridge v. Hwang, 105 Wn. App. 447, 459, 20 P.3d 958 (2001) (award of enhanced damages under the CPA reviewed for abuse of discretion); United States v. ITT Continental Baking Co., 420 U.S. 223, 229 n.6, 95 S. Ct. 926, 43 L. Ed. 2d 148 (1975) (reviewing lower court assessment of civil penalty within statutory limits for Federal Trade Commission Act violation for abuse of discretion); see also Progressive Animal Welfare Soc'y v. University of Wash., 114 Wn.2d 677, 683-84, 688-89, 790 P.2d 604 (1990) (reviewing trial court's calculation of attorney fees mandated by statute for abuse of discretion).

[59] 87 Wn.2d 298, 317, 553 P.2d 423 (1976) (also recognizing the potential for multiple violations per consumer).

[60] Id.

Both parties cite United States v. Reader's Digest Association Inc., a similar mass mailing case under an analogous consumer protection standard, where a federal district court held that Reader's Digest committed 17,940,521 violations on the rationale that "each letter distributed in the Digest's mass mailings constituted a separate violation."[61] The United States Court of Appeals for the Third Circuit affirmed, holding "*each letter* included as part of a mass mailing constitutes a separate violation."[62] The court also identified five factors to consider in determining the appropriate penalty: (1) whether defendants acted in good faith, (2) injury to the public, (3) defendant's ability to pay, (4) desire to eliminate any benefits derived by the defendants from the violation at issue, and (5) necessity of vindicating the authority of the law enforcement agency.[63]

Here, the trial court focused on lack of good faith without addressing the other Reader's Digest factors. While the factors are helpful guidelines, we reject any suggestion by either party that a trial court is compelled to expressly address each factor.

Next, CRS argues RCW 19.86.140 limits the total civil penalty to $25,000.

RCW 19.86.140 provides, in relevant part:

> Every person who shall violate the terms of any injunction issued as in this chapter provided, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.
>
> . . . .
>
> Every person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation.

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[61] 662 F.2d 955, 959-60 (3rd Cir. 1981).

[62] Id. at 966 (emphasis added).

[63] Id. at 967.

The $25,000.00 limit from the first paragraph does not apply here because the State did not plead or seek to enforce the Assurance of Discontinuance injunctive provisions. Instead, the State pleaded relief for violations of RCW 19.86.020 for deceptive acts. The trial court determined that the violations of the assurance of discontinuance constituted prima facie evidence of such CPA violations.

Relying on BMW of North America, Inc. v. Gore, CRS also argues this civil penalty violates due process.[64] To determine whether a $2,000,000 punitive damages award to one plaintiff in Gore violated due process, the United States Supreme Court looked to the reprehensibility of the defendant's conduct by considering specific factors.[65] But in Perez-Farias v. Global Horizons, Inc., our Supreme Court expressly declined to apply the Gore factors to cases involving statutory damages, noting "no state public policy or due process principles require reduction in the total damages mandated by statute."[66] And CRS does not provide any compelling authority[67] that courts have applied the Gore factors to cases involving statutory damages.[68]

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[64] 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).

[65] The court in Gore looked at whether the harm caused was physical or economic, the conduct showed an indifference to or a reckless disregard of the health or safety of others, the target of the conduct had financial vulnerability, the conduct involved repeated actions or was an isolated incident, and if the harm was the result of intentional malice, trickery, or deceit. Id. at 575.

[66] 175 Wn.2d 518, 533-34, 286 P.3d 46 (2012).

[67] CRS cites to State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d. 585 (2003), but that case makes no mention of the applicability of the Gore factors to cases involving statutory damages.

[68] Although the State offers analysis as to how, if considered, the Gore factors would apply in this case, we need not apply those factors. See Perez-Farias, 175 Wn.2d at 532 n.15.

On cross appeal, the State argues the trial court did not impose penalties adequate to deter future violations, but does not establish that the trial court's decision was outside the range of acceptable choices. The trial court specifically noted the acceptable range of penalties in its order:

> The civil penalty set herein is less than the maximum potential civil penalty of $2,000 per violation, which would total $158,708,000. There is no mandatory "cap" on the penalty in this situation. The amount is also less than the potential harm of $9,919,250 that Defendants could have caused if all Washington consumers who had received Defendants' deceptive mailer had purchased the $125 product based on Defendants' deception.[69]

The penalties, combined with the restitution provisions, ensure compensation to injured consumers and, considering the likely response rate for such mass-mail solicitations, far exceed any potential profits. The penalty does deter similar misleading mailings.

We conclude the trial court did not abuse its discretion in setting the amount of penalties.

III. Fees

CRS argues the trial court abused its discretion in calculating and awarding the State a fee award in the amount of $337,593.20.

In a CPA enforcement action, the trial court has discretion to award the prevailing party the costs of the action, including reasonable attorney fees.[70] To determine a reasonable attorney fee, the court starts with the "lodestar" calculation.[71] That

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[69] CP at 2045.

[70] RCW 19.86.080(1); Ralph Williams, 87 Wn.2d at 314-15.

[71] Berryman v. Metcalf, 177 Wn. App. 644, 660, 312 P.3d 745 (2013).

calculation includes "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[72]

Here, the trial court engaged in the lodestar analysis and found that the hourly rates of the attorneys were reasonable. CRS argues that the requested government attorney rates are artificially high, but it was within the discretion of the trial court to accept the identified rates.[73] The trial court also concluded that the time detailed in the State's declarations was reasonable and appropriate. The State submitted a 28-page spreadsheet listing the individual time entries for which it sought fees. As CRS notes, several entries are vague and general. But the majority of the entries contain information identifying the nature of the work itemized. The trial court did not abuse its discretion in accepting the itemizations.

CRS argues the State failed to segregate its time spent on its abandoned theory that CRS misrepresented the legal standards for Washington corporate recordkeeping. The time itemized for a case should be discounted for hours spent on unsuccessful claims or otherwise unproductive time.[74] A reduction is warranted if "the hours at issue were unproductive or that they were not sufficiently related to the successful claim."[75]

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[72] Id.

[73] See W. Coast Stationary Eng'rs Welfare Fund v. City of Kennewick, 39 Wn. App. 466, 474-75, 694 P.2d 1101 (1985) (allowing fees for city attorney); Metro. Mortg. & Secs. Co., Inc. v. Becker, 64 Wn. App. 626, 632-33, 825 P.2d 360 (1992) (reasonable hourly rate for in-house counsel not limited to actual salary). We note that in the absence of any specific objection to the hourly rates, the record before us is not well developed regarding the basis for a challenge on appeal to the reasonableness of those rates.

[74] Berryman, 177 Wn. App. at 662 (quoting Bowers, 100 Wn.2d at 597).

[75] Pham v. Seattle City Light, 159 Wn.2d 527, 539, 151 P.3d 976 (2007).

The trial judge "is in the best position to determine which hours should be included in the lodestar calculation."[76]

Here, the question of segregation was squarely presented to the trial court. CRS argued a segregation was necessary for time spent by the State on its allegation that CRS inaccurately stated Washington corporate recordkeeping standards. Specifically, CRS pointed to the June 18, 2015 letter by the assistant attorney general as evidence the State abandoned that theory late in the litigation. The State replied:

> While the focus of the case has been on whether Defendants' solicitation created the deceptive net impression that the solicitation came from a government agency that consumers were required to return and whether Defendants violated the 2008 Assurance of Discontinuance (AOD), Defendants also engaged in deceptive acts and practices by offering to provide meeting minutes while actually providing corporate consents.[77]

The June 18 letter is largely consistent with the State's argument.[78] Although the State may have refined its theory of a corporate recordkeeping misrepresentation and the trial court granted summary judgment only on the "net impressions" theory, both alleged unfair and deceptive acts based on the same core of underlying facts of the contents of the mass mailings. Where the plaintiffs' claims involve a common core of facts and related legal theories, "'a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the [trial] court did not adopt each contention

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[76] Id. at 540.

[77] CP at 2111.

[78] The letter purports to clarify the State's legal theories and then reconcile its clarified position with an earlier interrogatory answer: "[I]t is our position that the Washington Business Corporation Act requires a corporation to take certain actions through a meeting or through executed consents. If a meeting is held, then minutes must be kept as permanent records. If a meeting is not held, and corporate actions are approved through executed consents, there is no requirement to prepare annual minutes. . . . We believe the State's response to Interrogatory No. 13 is consistent with the State's Causes of Action as plead." CP at 2088, 2090.

raised.'"[79] The trial court did not abuse its discretion in declining to require a segregation.

We conclude the trial court did not abuse its discretion in awarding $310,422.40 for the work performed by the State's four attorneys.

CRS also contends the trial court abused its discretion when it awarded fees for the State's paralegal and investigator.

For the recovery of fees of nonlawyers, the court must consider six factors identified in Absher Construction Co. v. Kent School District.[80] The State's declarations regarding the work of its investigator and paralegal do not specify how the services performed were legal in nature, whether they were supervised by an attorney, the qualifications of the person performing the work, or the reasonable community standards for the nature of work. CRS adequately raised the need to document requested fees. The trial court failed to address the governing factors.

We conclude the trial court abused its discretion when it included $10,405.80 for paralegal time and $16,764.90 for investigator time in the State's attorney fee award.

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[79] Martinez v. City of Tacoma, 81 Wn. App. 228, 243, 914 P.2d 86 (1996) (quoting Hensley v. Eckerhart, 461 U.S. 424, 440, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983)).

[80] 79 Wn. App. 841, 845, 917 P.2d 1086 (1996) ("(1) the services performed by the nonlawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.").

IV. Costs

CRS argues the trial court erred in awarding costs beyond those allowed in RCW 4.84.010.

The standard of review for an award of costs involves a two-step process.[81] First, whether a statute, contract, or equitable theory authorizes the award is a matter of law, which we review de novo.[82] Second, if there is such authority, the amount of the award is subject to the abuse of discretion standard.[83]

Costs in a CPA action are limited to those set out in RCW 4.84.010.[84] RCW 4.84.010 does not authorize expert witness fees in an award of costs to the prevailing party.[85] Our Supreme Court has recognized that "'[w]here an expert is employed and is acting for one of the parties, it is not proper to charge the allowance of fees for such expert against the losing party as a part of the costs of the action.'"[86]

Here, the State included expert witness fees and the transcription of that expert witness testimony in its cost bill.

We conclude the trial court erred in awarding costs for expert witness fees and the transcription of that testimony.

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[81] Estep v. Hamilton, 148 Wn. App. 246, 259, 201 P.3d 331 (2008).

[82] Id.

[83] Id.

[84] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 693-94, 132 P.3d 115 (2006).

[85] Estep, 148 Wn. App. at 263.

[86] Id. (alteration in original) (quoting Fiorito v. Goerig, 27 Wn.2d 615, 620, 179 P.2d 316 (1974)).

V. Fees on Appeal

The State requests fees and costs on appeal.

The prevailing party is entitled to attorney fees and costs on appeal if applicable law grants to a party the right to recover and that party includes such a request in its opening brief.[87] Under RCW 19.86.080(1), this court has discretion to award the prevailing party reasonable attorney fees and costs.[88]

We conclude, upon compliance with RAP 18.1, the State is entitled to an award of reasonable attorney fees and costs.

CONCLUSION

We reverse the portion of the fee award as it pertains to work performed by the two nonlawyers and the award of costs relating to expert witness fees and transcription of expert testimony. As to all other issues, we affirm the trial court.

WE CONCUR:

Mann, J.

Cox, J.

[87] RAP 18.1.

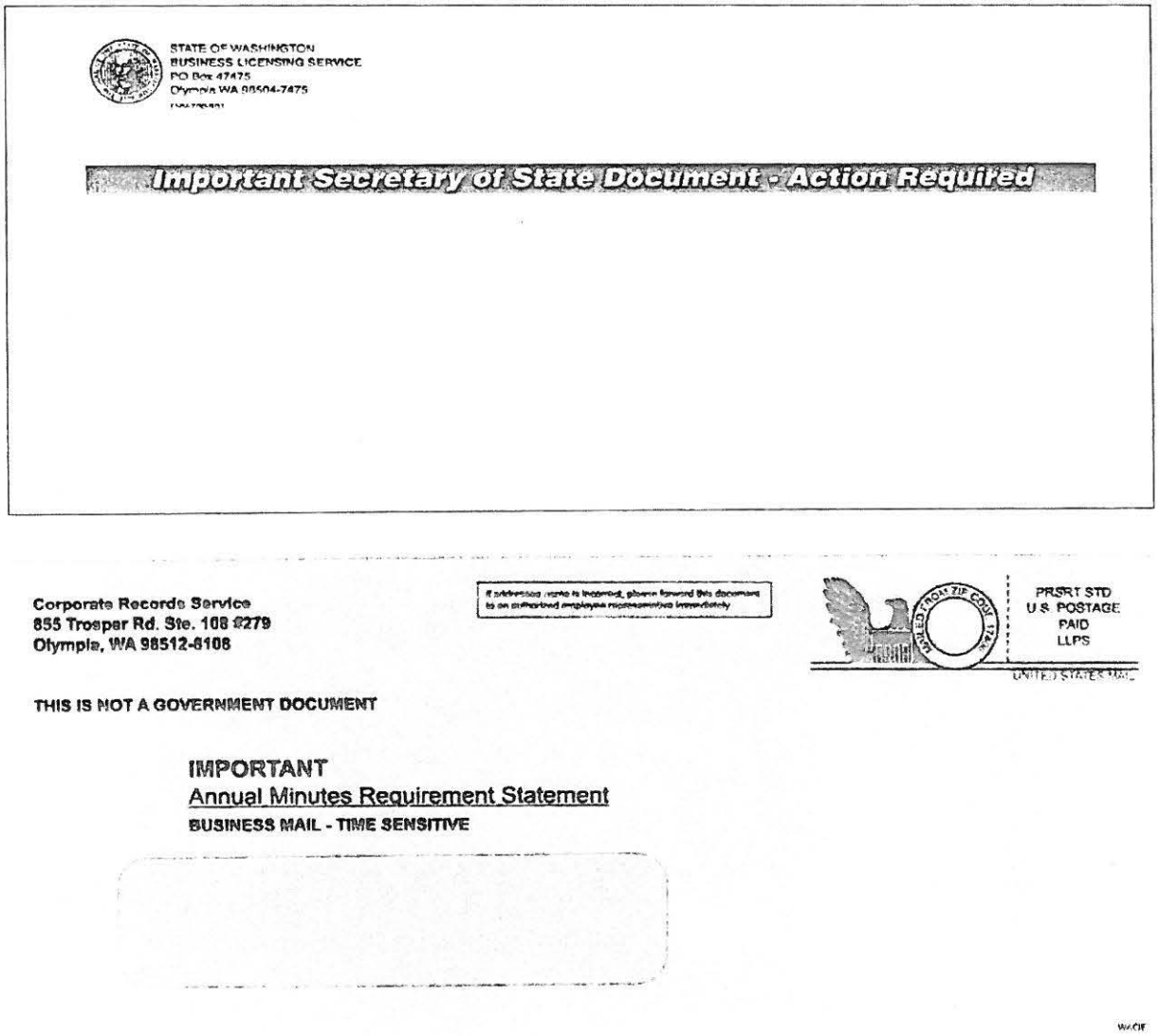
[88] Kaiser, 161 Wn. App. at 726.

APPENDIX B: ASSURANCE OF DISCONTINUANCE

State's Alleged AOD Violations	2012-2013 Mailings Complied With The AOD
State alleges use of words "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM. PLEASE PRINT." violates AOD Section 2.1(b)(3) because it uses the words 'IMPORTANT!' and 'Requirement.'" Pl. Mot. 12:2-4, 15:13-16. **Section 2.1(b)(3) prohibits** "[u]sing any solicitation materials . . . that have the tendency or capacity to mislead persons . . . that Respondent are a government agency, have a contract with a government agency to provide a product, or that the material is coming from a government agency, including but not limited to: . . . [u]se of the term 'confidential', 'important information', 'approved', 'effective immediately', 'compliance', 'advisors', 'issued', or any terms of similar import, when referring to Respondents' solicitations or products."	The use of the words "important" and "requirement" are not listed as terms that violate Section 2.3(b)(3). They do not otherwise have the tendency or capacity to mislead consumers. "The envelope is printed with bold text reading, 'Annual Business Requirement,'" which accurately stated Washington corporations statutory "requirement" to prepare and maintain minutes of annual shareholder meetings or consents. The word "IMPORTANT" clearly is intended to direct customers to take care in filling out the form.
State alleges use of "the unique corporate identifying code such as the recipient's corporate number/Unified Business identifier" and "recites the recipient's incorporation date" violates Section 2.1(b)(6). Pl. Mot. at 12:5-7, 12:22-13:2 15:19-21. **Section 2.3(b)(6) expressly permits** CRS to use business identification numbers "if there is a specific business purpose for Respondents to use such a designation."	Providing the corporation identification number on the 2012 mailings offered an easy way for CRS and the consumer to identify which corporation the Annual Minutes Form related to. CRS also incorporated a unique key code on each of its mailings to assist in fulfillment. *See* J. Fata Dep. at 25:2-4. CRS's legitimate use of identifiers to provide its service is not deceptive or misleading and does not violate the AOD.
State alleges use of the terms "IMPORTANT" and TIME SENSITIVE" on the envelope violated Section 2.1(b)(5). **Section 2.1(b)(5) prohibits** "[r]epresenting on envelopes or exterior mailings that an enclosed solicitation requires immediate or other mandated response."	As the Attorney General has conceded, Washington corporations have a statutory requirement to prepare and maintain minutes of an annual meeting. *See* Quarré Dec. Ex. 22. In that context, the mailing is entirely accurate in noting that preparing minutes is "IMPORTANT" and "TIME SENSITIVE." *See* Obermiller Report at 13, Obermiller Dec. Ex. A.

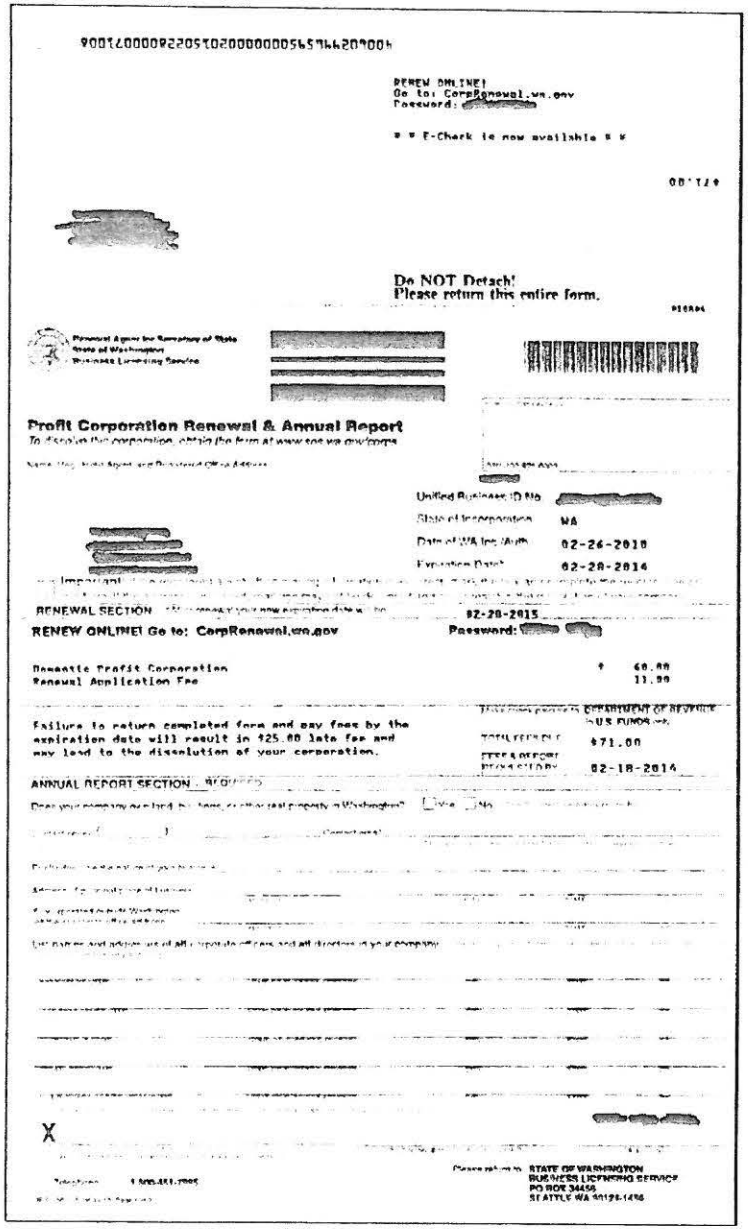
State's Alleged AOD Violations	2012-2013 Mailings Complied With The AOD
The State alleged, without citing any specific language, that CRS's mailings violated Sections 2.1(b)(8) and 2.1(d) for suggesting that the recipient will suffer adverse consequences for failing to comply with the notice. Pl. Mot. at 15:22-23. **Section 2.1(b)(8)** prohibits using "envelopes or exterior mailings" leading the recipient to "believe that Respondent are a government agency, have a contract with a government agency to provide the product, or that the material is coming from a government agency, including but not limited to: … Referring to any possible civil or criminal penalties, or other governmental actions that may occur or be imposed for failure to comply with workplace poster requirements that are incomplete, inaccurate, or suggest that penalties will be imposed for failure to purchase Respondents' product." **Sections 2.1(d)** prohibits "Representing that a failure to respond, or a delay in responding, to an advertisement or offer may result in negative consequences, legal or otherwise, including but not limited to use of numbered notices, (i.e. "2nd Notice", etc.)."	CRS's Annual Minutes Records Form explains that "[m]aintaining records is important to the existence of all corporations. In particular the recording of shareholders and directors meetings." *Id.* Nothing in CRS's mailings suggest that a consumer will suffer any adverse consequences for choosing not to purchase CRS's services or failing to respond to the solicitation. *See* Fata Dec. Exs. B, E. In fact, CRS's instruction form clearly explains that "[y]ou can engage an attorney to prepare [consents], prepare them yourself, use some other service company or use our service." *Id.*

Figure 1.0 – Distinct Envelopes.



1) Washington State Seal next to return address
   vs.
   No logo
2) "Secretary of State Document" in large font
   vs.
   "THIS IS NOT A GOVERNMENT DOCUMENT" in all capital letters and bold
3) Off white paper
   vs.
   Solid green
4) Green font in State mailing (not shown)
   vs.
   Black font

Figure 2.0 – Distinct Forms.



RENEW ONLINE!
Go to: CorpRenewal.wa.gov
Password: [redacted]

* * E-Check is now available * *

Do NOT Detach!
Please return this entire form.

Profit Corporation Renewal & Annual Report

Unified Business ID No. [redacted]
State of Incorporation WA
Date of WA Inc/Auth 02-26-2010
Expiration Date 02-28-2014

RENEWAL SECTION 02-28-2015
RENEW ONLINE! Go to: CorpRenewal.wa.gov Password: [redacted]

Domestic Profit Corporation Renewal Application Fee $ 60.00 11.00

Failure to return completed form and pay fees by the expiration date will result in $25.00 late fee and may lead to the dissolution of your corporation.

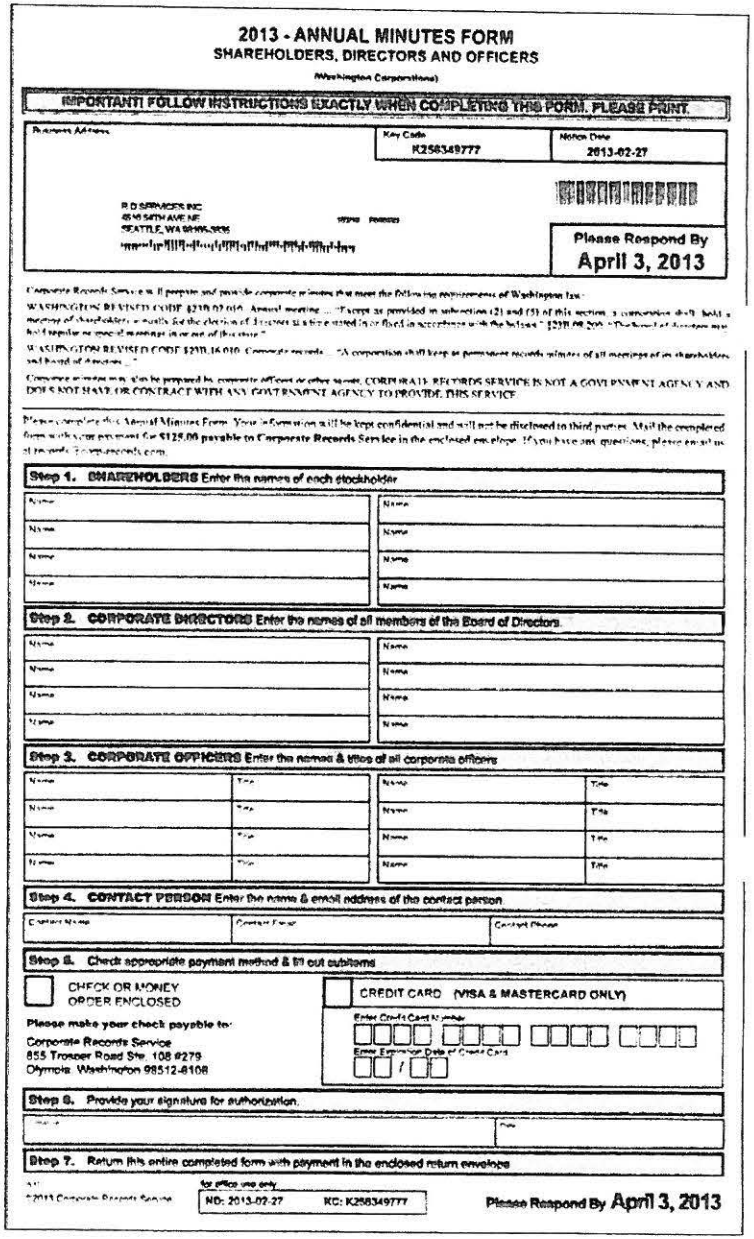
DEPARTMENT OF REVENUE US FUNDS
TOTAL FEES DUE $71.00
FEES & PENALTY PAID BY 02-18-2014

ANNUAL REPORT SECTION

X

STATE OF WASHINGTON
BUSINESS LICENSING SERVICE
PO BOX 34456
SEATTLE WA 98124-1456

1) "RENEW ONLINE!" option not on CRS form
2) Washington State Seal
3) Yellow highlighting of website information/password
4) $25 late fee and possible dissolution for failing to return completed form
   vs.
   no penalty or adverse consequence
5) Color (Blue & Red)
   vs.
   black and white
6) Return address
   Seattle
   vs.
   Olympia
7) State provides no credit card option



2013 - ANNUAL MINUTES FORM
SHAREHOLDERS, DIRECTORS AND OFFICERS
(Washington Corporations)

IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM. PLEASE PRINT.

Key Code K258349777
Notice Date 2013-02-27

R D SERVICES INC
4545 54TH AVE NE
SEATTLE, WA 98105-3636

Please Respond By
April 3, 2013

WASHINGTON REVISED CODE §23B.07.010. Annual meeting. ... Except as provided in subsection (2) and (3) of this section, a corporation shall hold a meeting of shareholders ... for the election of directors at a time stated in or fixed in accordance with the bylaws. ... The board of directors may fail to hold or cancel an annual meeting in any of the ...

WASHINGTON REVISED CODE §23B.16.010. Corporate records. ... A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, ...

Corporate minutes may also be prepared by corporate officers or other agents. CORPORATE RECORDS SERVICE IS NOT A GOVERNMENT AGENCY AND DOES NOT HAVE OR CONTRACT WITH ANY GOVERNMENT AGENCY TO PROVIDE THIS SERVICE.

Please complete this Annual Minutes Form. Your information will be kept confidential and will not be disclosed to third parties. Mail the completed form with your payment for $125.00 payable to Corporate Records Service in the enclosed envelope. If you have any questions, please email us at records@corprecords.com.

Step 1. SHAREHOLDERS Enter the names of each stockholder

Name	Name
Name	Name
Name	Name
Name	Name

Step 2. CORPORATE DIRECTORS Enter the names of all members of the Board of Directors

Name	Name
Name	Name
Name	Name
Name	Name

Step 3. CORPORATE OFFICERS Enter the names & titles of all corporate officers

Name	Title	Name	Title
Name	Title	Name	Title
Name	Title	Name	Title
Name	Title	Name	Title

Step 4. CONTACT PERSON Enter the name & email address of the contact person

Contact Name	Contact Email	Contact Phone

Step 5. Check appropriate payment method & fill out subforms

☐ CHECK OR MONEY ORDER ENCLOSED

Please make your check payable to:
Corporate Records Service
855 Trosper Road Ste. 108 #279
Olympia, Washington 98512-8108

☐ CREDIT CARD (VISA & MASTERCARD ONLY)

Enter Credit Card Number
Enter Expiration Date of Credit Card ☐☐ / ☐☐

Step 6. Provide your signature for authorization

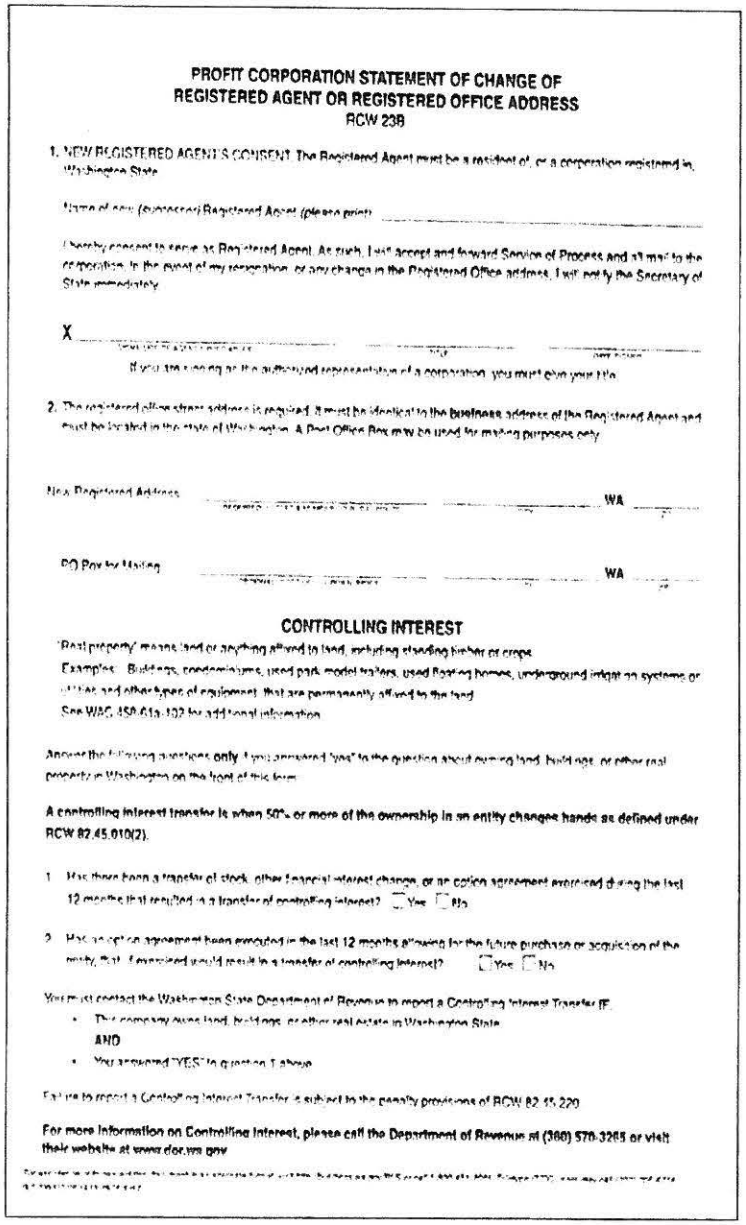
Signature	Title

Step 7. Return this entire completed form with payment in the enclosed return envelope

for office use only
ND: 2013-02-27 KC: K258349777

Please Respond By April 3, 2013

Figure 3.0 – Distinct Second Pages.



PROFIT CORPORATION STATEMENT OF CHANGE OF
REGISTERED AGENT OR REGISTERED OFFICE ADDRESS
RCW 23B

1. NEW REGISTERED AGENT'S CONSENT. The Registered Agent must be a resident of, or a corporation registered in, Washington State.

Name of new (successor) Registered Agent (please print) _____

I hereby consent to serve as Registered Agent. As such, I will accept and forward Service of Process and all mail to the corporation. In the event of my resignation, or any change in the Registered Office address, I will notify the Secretary of State immediately.

X _____

If you are signing as the authorized representative of a corporation, you must give your title.

2. The registered office street address is required. It must be identical to the business address of the Registered Agent and must be located in the state of Washington. A Post Office Box may be used for mailing purposes only.

New Registered Address _____ WA _____

PO Box for Mailing _____ WA _____

CONTROLLING INTEREST

"Real property" means land or anything affixed to land, including standing timber or crops.
Examples: Buildings, condominiums, used park model trailers, used floating homes, underground irrigation systems or utilities, and other types of equipment that are permanently affixed to the land.
See WAC 458-61A-102 for additional information.

Answer the following questions only if you answered "yes" to the question about owning land, buildings, or other real property in Washington on the front of this form.

A controlling interest transfer is when 50% or more of the ownership in an entity changes hands as defined under RCW 82.45.010(2).

1. Has there been a transfer of stock, other financial interest change, or an option agreement exercised during the last 12 months that resulted in a transfer of controlling interest? ☐ Yes ☐ No

2. Has an option agreement been executed in the last 12 months allowing for the future purchase or acquisition of the entity that, if exercised, would result in a transfer of controlling interest? ☐ Yes ☐ No

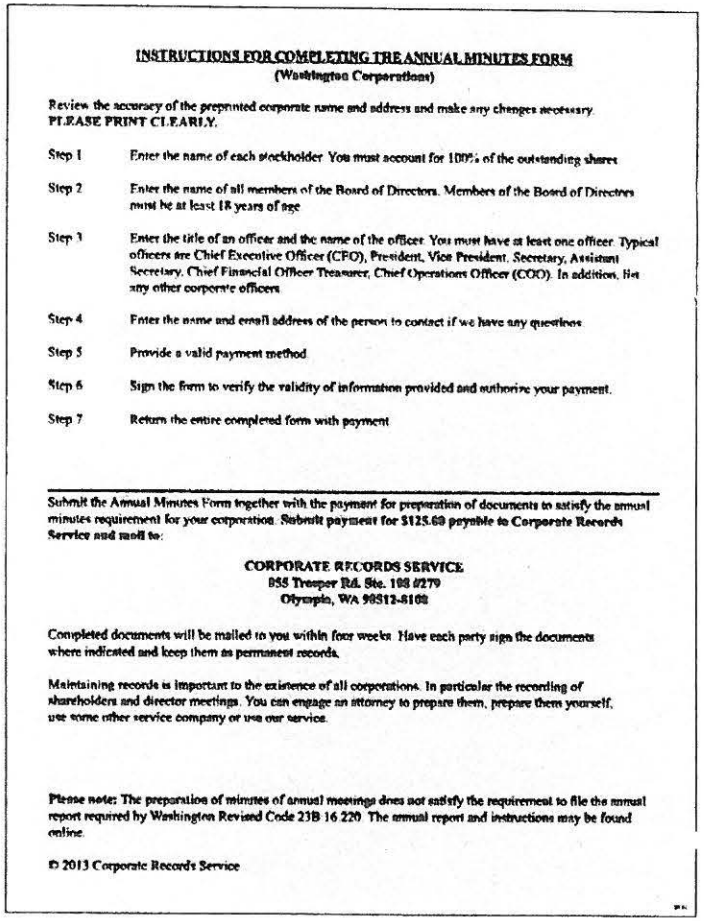
You must contact the Washington State Department of Revenue to report a Controlling Interest Transfer IF:

- This company owns land, buildings, or other real estate in Washington State
  AND
- You answered YES to question 1 above

Failure to report a Controlling Interest Transfer is subject to the penalty provisions of RCW 82.45.220.

For more information on Controlling Interest, please call the Department of Revenue at (360) 570-3265 or visit their website at www.dor.wa.gov

1) State form seeks information for Registered Agent/Registered Address & Controlling Interest vs.
   CRS provides instructions for completing the Annual Minutes Form
2) State Form in blue not black ink
3) State form provides contact information for Department of Revenue
4) CRS discloses that annual meeting minutes do not meet Washington's annual report requirement
5) Different sizes



INSTRUCTIONS FOR COMPLETING THE ANNUAL MINUTES FORM
(Washington Corporations)

Review the accuracy of the preprinted corporate name and address and make any changes necessary.
PLEASE PRINT CLEARLY.

Step 1 Enter the name of each stockholder. You must account for 100% of the outstanding shares.

Step 2 Enter the name of all members of the Board of Directors. Members of the Board of Directors must be at least 18 years of age.

Step 3 Enter the title of an officer and the name of the officer. You must have at least one officer. Typical officers are Chief Executive Officer (CEO), President, Vice President, Secretary, Assistant Secretary, Chief Financial Officer Treasurer, Chief Operations Officer (COO). In addition, list any other corporate officers.

Step 4 Enter the name and email address of the person to contact if we have any questions.

Step 5 Provide a valid payment method.

Step 6 Sign the form to verify the validity of information provided and authorize your payment.

Step 7 Return the entire completed form with payment.

Submit the Annual Minutes Form together with the payment for preparation of documents to satisfy the annual minutes requirement for your corporation. **Submit payment for $125.00 payable to Corporate Records Service and mail to:**

CORPORATE RECORDS SERVICE
855 Trosper Rd. Ste. 108 #279
Olympia, WA 98512-5108

Completed documents will be mailed to you within four weeks. Have each party sign the documents where indicated and keep them as permanent records.

Maintaining records is important to the existence of all corporations. In particular the recording of shareholders and director meetings. You can engage an attorney to prepare them, prepare them yourself, use some other service company or use our service.

Please note: The preparation of minutes of annual meetings does not satisfy the requirement to file the annual report required by Washington Revised Code 23B.16.220. The annual report and instructions may be found online.

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals Cause No. 74978-1-I to the following:

Marc Worthy, AAG
Jeffrey G. Rupert, AAG
Attorney General of Washington
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Michael K. Vaska
Kathryn C. McCoy
Foster Pepper PLLC
1111 Third Avenue, Suite 3000
Seattle, WA 98101

Original E-filed with:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 20, 2017, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

July 20, 2017 - 3:18 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	74978-1
Appellate Court Case Title:	State of Washington, Resp/X-App v. The Mandatory Poster Agency Inc, et al, Apps/X-Resps
Superior Court Case Number:	14-2-17437-3

The following documents have been uploaded:

- 749781_Motion_20170720151537D1443897_6070.pdf
  This File Contains:
  Motion 1 - Other
  The Original File Name was Motion for Leave to File Overlength Petition for Review.pdf
- 749781_Petition_for_Review_20170720151537D1443897_3807.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- JeffreyR2@atg.wa.gov
- cprreader@atg.wa.gov
- jacquie.quarre@foster.com
- katie.mccoy@foster.com
- marcw@atg.wa.gov
- matt@tal-fitzlaw.com
- mike.vaska@foster.com

Comments:

Motion for Leave to File Over-Length Petition for Review and Petition for Review (Note to COA Clerk: PFR filing fee payment will be sent directly to Supreme Court. Thank you.)

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20170720151537D1443897