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No. 66439-5-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

ROBERT UTTER and FAITH IRELAND, in the name of the STATE
OF WASHINGTON

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

APPELLANTS' OPENING BRIEF

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2011/11/15


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Appellants Robert Utter and Faith Ireland (hereafter “Plaintiffs”) respectfully submit this Opening Brief in support of their appeal of the King County Superior Court’s order granting summary judgment to Defendant Building Industry Association of Washington (“BIAW”) and dismissing Plaintiffs’ action with prejudice.

I. ASSIGNMENT OF ERROR

1. The Superior Court erred in granting summary judgment to BIAW, dismissing Plaintiffs’ action, where there were many genuine factual disputes over whether the BIAW qualified as a political committee during the 2008 election cycle under either the “contribution” or “expenditure” prongs of the test for political committee status.

These genuine factual disputes included:

(1) During the 2008 election cycle, did the BIAW have the expectation of receiving, or actually receive, contributions for electoral activities?

(a) Did BIAW solicit pledges for political activities, as contemporaneous documents show?

(b) Did BIAW received pledges for political activities, as contemporaneous documents show?

(2) During the 2008 election cycle, did the BIAW have the expectation of making, or actually make, expenditures for political activities?

(a) Did BIAW make the \$6.6 million in political expenditures that it publicly reported making, or did it submit false campaign reporting?

(b) If these expenditures were made by another entity, did BIAW finance them?

(c) Were the expenditures financed by BIAW because they were paid from “marketing assistance fees” paid to BIAW?

(d) If these expenditures were made by another entity, did BIAW control them?

(e) Did the BIAW control the expenditures through the formal action of its Board of Directors, Executive Committee, and Senior Officers, which voted for and supervised the expenditures?

(3) During the 2008 election cycle, were electoral activities one of BIAW's primary purposes?

II. STATEMENT OF THE ISSUES

1. Did BIAW become a political committee under the "contribution" prong of the political committee test when it solicited and received pledges for its political activities in the 2008 gubernatorial race?
2. Did the Superior Court err in dismissing the political committee claim where all contemporaneous documents proved that the BIAW solicited and received pledges for its political activities, thereby establishing it as a political committee under the "contribution" prong of the political committee test, and BIAW's uncorroborated and self-serving testimony could at most create a genuine factual issue for trial? Genuine issues of fact include those listed above as 1, 1(a) and 1(b).
3. Did the Superior Court err in allowing BIAW to rebut its own contemporaneous documents with uncorroborated testimony, especially when the BIAW's self-serving testimony was internally inconsistent and the BIAW had sought to conceal material facts?
4. Once an organization becomes a political committee by soliciting and receiving pledges, can it annul its political committee status by having pledged amounts paid to an affiliate instead?

5. Did the Superior Court err in dismissing the political committee claim because there was a genuine issue of material fact as to whether BIAW qualified as a political committee under the “expenditure” prong of the political committee test. Genuine issues of fact include those listed above as 2, 2(a), 2(b), 2(c), 2(d), 2(e), and 3.

III. STATEMENT OF THE CASE

This is an appeal from a decision of the King County Superior Court dismissing Plaintiffs’ citizen enforcement action, which asserted that the BIAW qualified as a political committee during the 2008 election cycle.

Plaintiffs contend that during the 2008 election cycle, the BIAW qualified as a political committee and was required to report as such under the Fair Campaign Finance Act, RCW 42.17 (the “Act”). Its failure to do so led Robert Utter and Faith Ireland (“Plaintiffs”) to bring this citizen enforcement action.

On July 25, 2008, Plaintiffs notified the State Attorney General that they would file a lawsuit against the BIAW for violations of the Act if the State did not do so. Plaintiffs’ Factual Record (“PFR”) Tab 1 (Clerks Papers (“CP”) 243-251). Plaintiffs asserted that the BIAW was legally responsible for the alleged violations of the Act, even though the independent expenditures in question were often handled through the

accounts of the BIAW's for-profit affiliate, BIAW Member Services Corporation ("MSC"). *Id.* at p. 1 (CP 244).¹

On September 19, 2008, the Attorney General filed a lawsuit against MSC in Thurston County Superior Court, but chose to take no action against BIAW. Defendants Factual Record ("DFR") Tab 5 (CP 109-114). On October 6, 2008, Plaintiffs filed their suit against the BIAW, asserting that the BIAW was required to register and report as a political committee during the 2008 election cycle.

In the first weeks of this lawsuit, no less than three motions were filed that argued that Plaintiffs' claims overlapped the claims of the Attorney General in the Thurston County case against MSC.² On October

¹ Plaintiffs offered to provide evidence on this subject upon request. *Id.* fn 2. In its investigation of the complaint, the Washington Public Disclosure Commission ("PDC") did not allow Plaintiffs or their counsel to review evidence or submit briefing, and ultimately the PDC's recommendation relied primarily upon declarations of BIAW. DFR Tab 1, 2 (CP 57).

² On October 13th, the BIAW moved for a protective order arguing that Plaintiffs lacked standing in part because "plaintiffs' claims are already encompassed by an action filed by the state against defendants that is currently pending before in Thurston County Superior Court." Defendants' Motion for Protective Order, at 6. Dino Rossi's briefing on his motion to quash the subpoena for his deposition made this identical argument. Rossi Reply RE: Motion to Quash/Motion for Protective Order, p. 1-2. On October 20th, BIAW filed a motion to dismiss again raising this argument. Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, p. 2 ("nearly identical allegations form the basis of a pending Thurston County action by the AG against BIAW's Member Services Corporation".)

27, 2008, Judge Kallas rejected these jurisdictional arguments and allowed Plaintiffs to conduct pre-election discovery.³

On November 3, 2010, the BIAW filed a motion for summary judgment to dismiss Plaintiffs' political committee claim.⁴ Judge Michael Heavey granted the motion on December 1, 2010. This appeal followed.

IV. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs assert that the BIAW was required to register and report as a political committee because it had “the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or ballot proposition.” RCW 42.17.020(39). The Courts have held that this definition creates two different avenues to qualify as a political committee: a “contribution prong” and an “expenditure prong.” Plaintiffs assert that BIAW qualified under both.

- **“Contribution Prong.”** In the 2008 election cycle, the BIAW had the “expectation of receiving contributions” for its political activities, thus qualifying under the “contribution prong.” Specifically, the BIAW (not MSC) solicited and received over \$584,000 in pledges from

³ Order Granting Plaintiffs' CR30(A) Motion for Expedited Discovery and Denying Motion for Protective Order.

⁴ The lawsuit originally included a claim that the BIAW had unlawfully coordinated with candidate Dino Rossi. Plaintiffs agreed to dismiss the improper coordination claim after the PDC conducted its own investigation and recommended no further action, DFR Tab 4 (CP 89-107).

local buildings associations (“Local Associations”) for its campaign to elect Dino Rossi as Governor. The Act explicitly defines these pledges as “contributions.”

- **Expenditure Prong.** Alternatively, the BIAW qualified under the “expenditure prong” because it financed and controlled *over \$6.6 million* in expenditures in support of efforts to elect Dino Rossi. The BIAW’s public campaign reporting admitted these were BIAW expenditures. In defense of Plaintiffs’ claims, BIAW recanted its own public filings, and claimed that MSC – not BIAW – made these expenditures. It provided no evidence to rebut its own campaign filings. Moreover, regardless of which entity wrote the checks, BIAW was legally responsible for the expenditures because it carried out these political activities with its assets and under the control of the BIAW Board of Directors and Executive Committee.

To prove its claim, Plaintiffs rely upon contemporaneous documentation from BIAW and its contributors. BIAW sought to undermine these documents with uncorroborated and self serving testimony, but at most such testimony could create a genuine factual dispute for trial. That dispute should not have been resolved on summary judgment.

V. ARGUMENT

A. THERE WAS AT LEAST A TRIABLE ISSUE OF FACT AS TO WHETHER BIAW QUALIFIED AS A POLITICAL COMMITTEE UNDER THE “CONTRIBUTION” AND/OR “EXPENDITURE” PRONGS OF THE TEST.

The Act defines a "political committee" as "any person ... having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or any ballot proposition." RCW 42.17.020(39). This definition "sets forth two alternative prongs under which an individual or organization may become a political committee and subject to the Act's reporting requirements." *Evergreen Freedom Found. v. Wash. Educ. Ass'n* ("EFF"), 111 Wn.App. 586, 599 (2002). "Thus, a person or organization may become a political committee by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures to further electoral political goals." *Id.*

"In the only Washington Supreme Court case to interpret the statutory definition of 'political committee,' the Court added a new requirement to the 'making of expenditures' prong. ... The organization making expenditures must have as its 'primary or one of the primary purposes ... to affect, directly or indirectly, governmental decision making

by supporting or opposing candidates or ballot propositions....' *EFF*, 111 Wn.App. at 599 (citations omitted).

1. Plaintiffs submitted contemporaneous documents proving that BIAW received pledges for electoral activities, which is sufficient to prevail on the claim.

In order to be deemed a political committee under the “contribution” prong, the BIAW only had to have an “expectation of receiving contributions” for electoral activities. RCW 42.17.020(39). The “contribution” prong does not include the “primary purpose” test. *EFF*, 111 Wn.App. at 599.

The Act specifically defines “contributions” to include “pledges.” RCW 42.17.020(15)(a). Under the Act, “A pledge is a promise of a future contribution. Pledges of \$100 or more are reportable in Part 2 of Schedule B. A pledge may be written or oral and for cash or in-kind contribution.” PFR Tab 16, p. 46 (PDC Political Committees, 2007 Instructions) (CP 345), Tab 17 (PDC website definitions) (CP 347).

Thus, to prove that the BIAW was a political committee, Plaintiffs only needed to show that the BIAW had an expectation to receive pledges for electoral activities. Plaintiffs went further, and introduced evidence that BIAW conducted a concerted effort to solicit pledges, and then received pledges, for its electoral activities.

a. **Plaintiffs provided contemporaneous documents from *eight* different corporate entities proving that BIAW solicited and received pledges.**

Plaintiffs produced dozens of contemporaneous documents from *eight different* entities proving that BIAW solicited and received pledges from other local building associations for electoral activities. The Declaration of former BIAW President Daimon Doyle explains that the “BIAW Senior Officers were responsible for the decision” to solicit pledges from the Local Associations. PFR Tab 19, ¶ 2 (CP 357). The BIAW Senior Officers made the requests throughout the spring of 2007. *Id.* ¶¶ 3-7.⁵

Plaintiff submitted to the trial court a chronological record of these solicitations and the pledges. The documents conclusively establish that BIAW Officers successfully solicited pledges for BIAW’s political activities. The document signed by all of the Local Associations documenting their pledges stated:

WHEREAS BIAW is committing 100% of excess retro dollars to the 2008 gubernatorial election,

⁵ BIAW President Daimon Doyle reported on this fundraising at BIAW’s June 29, 2007, Executive Committee Meeting. “Doyle mentioned that at BIAW’s Board meeting in Spokane a special fund was set up to raise funds for the 2008 gubernatorial races. At the Olympia meeting a plan was established. President Doyle said so far 12 Local Associations had signed on to the plan and others were still considering. So far three-quarters of a million dollars had been raised.” PFR Tab 49, p. 13 (CP 491).

...

The following local associations pledge that all Retro Marketing Assistance funds received in 2007, beyond the amount budgeted for the year, will be sent to the BIAW and placed in the BIAW 2008 gubernatorial election account, to be used for efforts in the 2008 gubernatorial race.

PFR Tab 28 (emphasis added) (CP 411). Other documents of the BIAW and the entities making the pledges are consistent (all emphasis added):

- March 6, 2007. Olympia Master Builders (“OMB”) Executive Committee passes motion to recommend “that funds received from the ROII program in excess of budget be ***donated to BIAW*** for the gubernatorial race.” PFR 25, p. 2 (CP 402).
- March 8, 2007. OMB notifies BIAW that OMB Board voted “***to forward any funds*** from the [ROII] Program that OMB receives in excess of budget in 2007 ***to BIAW***” for “the 2008 gubernatorial race.” PFR Tab 26 (CP 405-406).
- March 9, 2007. Doyle states that Local Associations will be asked to make written “***pledges ... to the BIAW*** to be used for efforts in the 2008 Gubernatorial race.” PFR Tab 27 (CP 408).
- March 15, 2007. Spokane Home Builders Association (“SHBA”) passes motion “to ***authorize BIAW to keep*** any proceeds from the ROII program over the \$275,000 budgeted in 2007 ***to be used by BIAW*** for the Governor’s race in 2008.” PFR Tab 29, p. 3 (CP 419).

- March 19, 2007. BIAW Doyle sends email to North Central Home Builders Association stating that the plan is for locals to “*pledge*” *excess ROII revenues “back to BIAW* to be used for candidate support.” PFR Tab 35 (CP 435).
- March 27, 2007. Home Builders Association of Tri-Cities Board votes “*to give BIAW the excess of budgeted funds ... to help in the governor’s race in 2008.*” PFR Tab 34 (CP 433). Agenda states that meeting is on “BIAW request for ROII excess ... *to be returned to BIAW* to assist in governor’s race.”
- March 30, 2007. Home Builders Association of Kitsap County approves “*contribution to the BIAW campaign* fund for 08 governor, noting that “BIAW is attempting to raise 5 m towards an expected budget of 25 m.” PFR Tab 38 (CP 440).
- April 4, 2007. OMB confirms that *OMB will forward funds “to BIAW* for the purpose of electing Dino Rossi as governor.” PFR Tab 39 (CP 444).
- April 5, 2007. North Peninsula Building Association votes to give excess ROII revenues “*back to BIAW for the 2008 campaign war chest.*” Minutes state “BIAW needs to build up a war chest and to support potential campaign for Dino Rossi in 2008. Daimon indicated that *not all money received would go to the Rossi campaign, that a portion would*

be held and used as in-kind contributions by BIAW.” PFR Tab 41 (CP 449).

- April 10, 2010. Central Washington Home Builders Association votes to approve “*Request from BIAW to return excess Retro funds ... back to BIAW for political purposes. BIAW is building a war chest for the Governor’s race*” Notes that “this appears to be a one time request from BIAW to raise 2 million dollars.” PFR Tab 42 (CP 452).

- June 4, 2007. Home Builders Association of Kitsap County writes to Doyle, as BIAW President, informing him that Board voted to pledge excess ROII revenues for Rossi campaign efforts. PFR Tab 47 (CP 464).

- July 2, 2007. Building Industry Association of Whatcom County (“BIAWC”) discusses plan to have the “*difference withheld by BIAW to put in the account for that candidate,*” noting that it would allow them to avoid reporting to PDC. PFR Tab 50 p. 1-2 (CP 493-494).

- July 11, 2007. *BIAWC votes “to allow BIAW to withhold \$10,000 from our current check.”* PFR Tab 52 (CP 499).

- July 11, 2007. Board of Central Washington Home Builders Association confirms that *\$37,453.97 is “committed to BIAW” for 08 gubernatorial fund.* “We have been assured by Daimon Doyle that they will put in writing the commitment to return our \$37,453.97 to us if Dino does not run for Governor in 2008.” PFR Tab 53 (CP 504). In a separate

email, confirms that this is the “*Total Funds committed to BIAW’s ’08 Gubernatorial Race’ Fund.*” PFR Tab 51 (CP 499).

- July 24, 2007. Doyle tells BIAW Senior Officers that “*Eleven of the 15 locals elected to ‘give back’ a share of their local MAF to BIAW for the Governor’s race in 2008.* With BIAW’s share of \$1.47 million, you as Senior Officers have now raised over \$2 million (before taxes) for the Governor’s race in 2008.” PFR Tab 55 (CP 509).

- July 25, 2007. Doyle sends confirmation to Tri Cities HBA stating the following agreement: “*BIAW will retain the funds* and not issue the HBA of Tri Cities a second check. *If Dino Rossi announces his candidacy for the Governor’s race in 2008, the funds become property of BIAW to dedicate towards that effort as they see fit.*” PFR Tab 56 (CP 511).

- July 31, 2007. HBA of Tri-Cities *votes to “allow BIAW to keep the excess funds of \$65,000 ... for use in the Governor’s race if Rossi declares.”* PFR Tab 57, p. 2 (CP 514).

Throughout this effort, the Senior Officers represented themselves as “BIAW Senior Officers” and President Doyle signed correspondence seeking the pledges as “BIAW President.” PFR Tab 33, 36, 43, 44, 46 (CP 430, 437, 455, 457, 462).

One document specifically stated that some of the funds would be passed on, but “a portion would be held and used as *in-kind contributions by BIAW*.” PFR Tab 41 (emphasis added) (CP 449).

- b. The BIAW was required to register within two weeks of first having the expectation of receiving pledges, and to report the pledges when received.**

The BIAW was required to register as a political committee within two weeks of first having the expectation of receiving contributions. RCW 42.17.040 (“Every political committee, within two weeks after its organization or, within two weeks after the date when it first has the expectation of receiving contributions or making expenditures in any election campaign, whichever is earlier, shall file a statement of organization with the commission.”) According to Daimon Doyle’s declaration, the plan to solicit these pledges was established in early March, 2007. PFR Tab 19 (CP 357). The BIAW was therefore required to register as a political committee in March, 2007.

At the very latest, BIAW was required to register as a political committee and report the pledges when those pledges were received. BIAW began receiving pledges almost immediately. For example, Olympia Master Builders pledged in early March, 2007. PFR Tab 25 (CP 402). Some of these pledges were for specific amounts so could be immediately reported. PFR Tab 52 (CP 499) (Whatcom HBA pledges

\$10,000 “to BIAW”); PFR Tab 57 (CP 514) (HBA Tri Cities pledges \$65,000 “to BIAW”).⁶

Thus, BIAW was required to register as a political committee when it began soliciting pledges. Then, at the very latest, BIAW was required to report the pledges after the BIAW understood the amount of the pledge, in May or June, 2007.⁷

c. Treating pledges as contributions is a fundamental component of Washington State campaign finance laws.

The implicit defense theory is that the pledges made to BIAW are unimportant because the BIAW never collected these pledges, choosing

⁶ Other pledges were not calculable until the BIAW received the 2007 retro refund from the Department of Labor and Industries on May 4, 2007. PFR Tab 75 (CP 731). At that point, BIAW was able to calculate the refund owed to local associations as compared to the budgeted amount, and could determine and report the amount of pledges. On June 29, 2007, the BIAW informed the Local Associations of the amount of their refund, so all parties at that point knew the amount of the pledges. See PFR Tabs 51, 53 (CP 497, 504).

⁷ WAC 390-05-215 provides that “‘Receipt’ of a campaign contribution, as that term is used in chapter 42.17 RCW, shall be deemed to occur at the earliest of the following:

- (1) The date that the candidate, treasurer, deputy treasurer, campaign manager, campaign chairperson or similarly situated campaign official obtains possession of the contribution, or
- (2) The date that the candidate, treasurer, deputy treasurer, campaign manager, campaign chairperson or similarly situated campaign official is informed of the contribution, or becomes aware that the campaign, or in the case of an earmarked contribution, the intermediary or conduit, has possession of the contribution, or
- (3) The date that the contribution becomes available for use by the candidate or committee.”

instead allowed its for-profit affiliate to handle the funds. However, campaign laws wisely deem a pledge to be a contribution when the pledge is made, regardless of collection.

Under Washington law, pledges constitute reportable contributions at the time the pledges are made. *See* RCW 42.17.020(15)(a) (defining “contribution” to include “pledges”); RCW 42.17.090 (campaign reports must include all contributions, except “pledges in the aggregate of less than 100 dollars from any one person need not be reported.”); PFR Tab 16, p. 46 (CP 345) (PDC Political Committees, 2007 Instructions).

This statutory scheme is patterned after federal law. *Buckley v. Valeo*, 424 U.S. 1, 145-146 (U.S. 1976) (noting that under Federal Campaign Laws, a “contribution” includes “a contract, promise, or agreement, expressed or implied, whether or not legally enforceable, to make a contribution for such purposes”). States throughout the nation also consider pledges to be reportable contributions. *State v. Moyer*, 348 Or 220, 228, ___ P.2d ___ (2010) (Oregon statutes regulate an “actual or promised transfer of money, certain services, or things of value.”) In *United States v. Hankin*, 607 F.2d 611 (3rd Cir. 1979), the Court of Appeals dismissed an election crime prosecution because it held that the illegal contribution took place – and the statute of limitations began to run – before the contribution check was deposited. Relying on the broad

definition of “contribution,” which includes “a written contract, promise or agreement, whether or not legally enforceable, to make a contribution,” the Court held that “[t]he act of making a contribution was complete whether or not the Committee decided to deposit the check.” 607 F.2d at 614.

Sound public policy supports the Legislative decision to regulate pledges as contributions. For example, once the BIAW had received \$584,000 in pledges, it could count on those funds to finance its political activities. Federal law and state law appreciate that pledges – unless uncollectible -- constitute valuable campaign assets as of the time the pledges are made. Indeed, many campaign committees purchase electioneering communications based upon pledges, and pay their campaign vendors later, when the pledges are paid. Washington law recognizes this. WAC 390-05-530 (“Source of Funds” for electioneering communication “means a person who contributes anything of value for the communication, including a ... pledge...”); WAC 390-05-245(2)(b) (Allowing the payment of pledges to be deposited into campaign accounts up to five days after the close of the election cycle.)

Washington law strictly regulates *both* the making and redemption of pledges. For example, WAC 390-16-250(1) prohibits the making or redeeming of pledges within 21 days of an election if the amount of the

pledge or redemption exceed the maximum contribution amount allowed during that period. WAC 390-16-250(2)(a) requires that pledges made with respect to the primary election “shall not be made or redeemed after the date of the primary.” WAC 390-16-250(2)(b).

d. The BIAW’s rebuttal evidence at most created a genuine issue of fact that could not be resolved on summary judgment.

To rebut these contemporaneous documents, BIAW relied upon declarations which claimed that the BIAW Officers were seeking pledges “for ChangePAC” --another political committee affiliated with the BIAW⁸-- but not for BIAW itself. Such testimony is directly contradicted by the contemporaneous documents, which established that BIAW Officers sought pledges for BIAW and that the Local Associations documented written pledges “to BIAW.” Indeed, *not a single contemporaneous document mentions ChangePAC* or provide any factual support for the BIAW’s defense .

⁸ BIAW President Daimon Doyle, who led the effort to solicit pledges, testified:

The Plan was for I, or one of the other Senior Officers, to visit each of the local associations and *to ask them to donate their excess unanticipated retro refunds to ChangePAC* for the 2008 Governor’s election.

Plaintiffs’ Factual Record (“PFR”) Tab 19 ¶ 2 (CP 357)(emphasis added). BIAW’s Then-Executive Vice President Tom McCabe similarly testified that this fundraising for pledges was to “help fund ChangePAC”. Defendants Factual Record (“DFR”) Tab 9 ¶ 12 (CP 153).

At most, BIAW's self-serving and uncorroborated testimony creates a genuine issue of material fact, but it cannot entitle BIAW to summary judgment. This testimony by Damian Doyle attempts to put into the record his unsubstantiated suppositions of what other parties (the Local Associations) must have been subjectively thinking when they made their pledges. At trial, this self-serving testimony should be given little if any weight in comparison to the *actual documentation* of these transactions, all of which is before the Court. These written pledges were documented in writing by third parties, and are legally binding for the purposes of campaign disclosure. Mr. Doyle's post hoc rationalizations about what others must have intended by the pledge was apparently taken a face value by the trial court as if no contradictory evidence existed. Instead the trial court's proper role was to determine whether material issues of fact existed which precluded summary judgment.

Moreover, BIAW should not be able to base its defense on uncorroborated testimony when any lack of documentation stemmed from a conspiracy of silence fostered by BIAW. Repeatedly, the BIAW cautioned that this fundraising campaign needed to be kept quiet and should not be documented in writing. For example, in March 12, 2007, Doyle cautioned the need for secrecy and that "it is important that we do not advertise that we are pooling our funds in this manner." PFR Tab 28

(CP 410). On March 22, 2007, Doyle asked that the plan not be publicized outside of the Board. PFR Tab 31, p. 2 (CP 424). That same day, Doyle warned senior officers of the need for secrecy and stated that all pledges would be documented on a single sheet of paper, so duplicates could not get into the wrong hands. PFR Tab 32 (CP 428). Despite this conspiracy of silence, eight different corporations independently documented campaign pledges “to BIAW.”

e. BIAW’s status as a political committee cannot be annulled by its *post litem* maneuvers.

BIAW implicitly claims that all parties to the transactions always intended the money to go to ChangePAC, not to BIAW, and that all eight corporations made the same “error” in documenting the pledges as being “to BIAW.” This argument is neither credible nor relevant. .

No funds were transferred to ChangePAC until *after* Plaintiffs caught BIAW red-handed and filed their notice of intent to sue. Surely such *post litem* maneuvering cannot rebut contemporaneous documents to annul a defendants’ political committee status. Had Plaintiffs not discovered these pledges, BIAW very well may have collected on these pledges to fund its political activities.

In any event, BIAW’s requirement to report as a political committee in March of 2007, and to report pledges received in June or

July, cannot be excused by its subsequent decision to have the funds transferred to ChangePAC. The Local Associations made pledges *to BIAW* and these pledges constituted BIAW's campaign asset. Some of those pledges were so clear as to state that the funds were the "property of BIAW" and to be used as "in kind contributions by BIAW." PFR Tab 41, 56 (CP 449, 511).

There is no question that if BIAW had purchased political advertising in reliance on these pledges, it would have had the legal right to collect upon them. WAC 390-05-530 ("Source of Funds" for electioneering communication "means a person who contributes anything of value for the communication, including a ... pledge..."); *Woodmere Academy v. Steinberg*, 53 A.2d2d. 156, 160 (N.Y.App.Div. 1976) (charitable subscriptions are enforceable when relied upon by institution). BIAW could have collected on these pledges. Its decision to allow an affiliate to take possession of those funds cannot relieve BIAW of its reporting requirements.

Plaintiffs submitted contemporaneous documents from eight different entities proving that BIAW solicited and received pledges for political activities. This was more than sufficient to create a genuine issue for trial. The Superior Court erred in granting the BIAW summary judgment on this claim.

2. There was a genuine factual question of whether the BIAW became a political committee under the “expenditure” prong of the political committee test.

In addition to claiming that BIAW became a political committee by receiving pledges from Local Associations, Plaintiffs claim that BIAW became a political committee by making *over \$6.6 million dollars* in expenditures in the 2008 election cycle, thereby making the BIAW a political committee under the “expenditure” prong of the political committee test.

To prove that the BIAW became a political committee under this “prong,” Plaintiffs need to prove (1) that BIAW made political expenditures and (2) that electoral activities were one of BIAW’s primary purposes. *EFF*, 111 Wn.App. at 599. Plaintiffs produced significant evidence to prove both of these facts, making the Superior Court’s dismissal of that claim on summary judgment improper.

a. There was at least a triable question of whether the BIAW made political expenditures.

Plaintiffs produced evidence that during the 2008 election cycle, BIAW reported making \$233,648.89 in independent expenditures and over \$6.4 million in contributions to other political committees. PFR Tabs 2, 3, 6, 7, 10 (CP 253, 264, 273-275, 277-281, 288-307). BIAW always acknowledged legal responsibility for these contributions and reported

them in its own name on campaign finance reporting. *Id.* The BIAW certified these campaign reports to be true and submitted them pursuant to RCW 42.17. *Id.* Thus, these campaign finance reports constitute BIAW's legally-binding admission that it made political expenditures during the campaign cycle.

BIAW sought to defend itself by arguing that *its own reporting* was erroneous and non-binding. Apparently the BIAW now claims that it did not in fact make the contributions that it reported as its own, and therefore, it claims, it carries no legal responsibility for them.

The BIAW should bare a very heavy burden to rebut its own certified campaign reports. However, the BIAW placed no evidence in the record to rebut these reports. The only arguably relevant evidence was a declaration by BIAW's Executive Vice President that stated "BIAW does not contribute to any political candidates or political action committees. Nor does it make political expenditures." Defendant's Factual Record, Tab 9, ¶ 8 (CP 153). This vague denial – whatever it means -- certainly is insufficient to rebut BIAW's own reporting.

The BIAW submitted *no evidence* to substantiate its argument that its subsidiary MSC made each of these contributions and that BIAW was free of legal responsibility for them.

Even if the BIAW had submitted admissible evidence that the expenditures were paid for out the MSC accounts, Plaintiffs submitted ample proof that BIAW was legally responsible for them because it funded and/or controlled the contributions. RCW 42.17.660(2) provides that “All contributions made by a person ...whose contribution or expenditure activity is financed, maintained, or controlled by a trade association...are considered made by the trade association... .” RCW 42.17.660 explicitly states that its attribution rules apply “for purposes of this chapter.” Thus, it applies for determining whether BIAW made a contribution and thus qualified as a political committee.

Under RCW 42.17.660(2), BIAW (a trade association) is considered the contributor if it financed, maintained *or* controlled an expenditure of MSC (a “person” under the Act ⁹). Here, Plaintiffs provided evidence that BIAW financed, maintained and controlled the contributions, thereby making BIAW legally responsible.

In addition, RCW 42.17.670 provides “All contributions made by a person or entity, either directly or indirectly, to ... a political committee,

⁹ "Person" includes an individual, partnership, joint venture, public or private corporation, association, federal, state, or local governmental entity or agency however constituted, candidate, committee, political committee, political party, executive committee thereof, or any other organization or group of persons, however organized. RCW 42.17.020 (36).

are considered to be contributions from that person or entity to the ... political committee, as are contributions that are in any way earmarked¹⁰ or otherwise directed through an intermediary or conduit to the ... political committee.” Again, this provision makes the BIAW responsible even if it carried out the contribution through MSC, although both would be responsible if MSC also exercised control of the contributions.¹¹

i. Plaintiffs provided proof that BIAW financed the contributions.

As detailed below, BIAW’s internal documents reveal that the source of the contributions in question was a “marketing assistance fee” paid to BIAW. The participants in BIAW’s “retrospective rating program” agree to pay this fee “to BIAW,” not to MSC. PFR Tab 71 (CP 679). Thurston County Judge Murphy recently found that this fee belongs to BIAW even though it is transferred into MSC’s bank account. PFR Tab 74 p. 16 lines 1-4 (CP 728). Thus, Plaintiffs provide proof that BIAW financed the contributions and its decision to run contributions

¹⁰ For the purposes of this section, “earmarked” means a designation, instruction, or encumbrance, whether direct or indirect, expressed or implied, or oral or written, that is intended to result in or does result in all or any part of a contribution being made to a certain candidate or state official. RCW 42.17.670.

¹¹ The Act states that “If a conduit or intermediary exercises any direction or control over the choice of the recipient candidate or state official, the **contribution is considered to be by both** the original contributor and the conduit or intermediary.” *Id* (emphasis added).

through MSC accounts does not relieve the BIAW of responsibility for them. RCW 42.17.660(2).

b. BIAW controlled the contributions.

Minutes of the BIAW Board of Directors shows that the BIAW (not MSC) made the decision to fund these contributions. On June 16, 2006, the BIAW Executive Committee learned that “BIAW’s ten percent ROII return is going to be approximately \$925,000 in excess of what was budgeted.” PFR Tab 23, p. 2 (CP 372). The BIAW Board of Directors, by motion, accepted the recommendation of the treasurer and BIAW Executive Committee to place the excess ROII revenues in “short term investment account for the 08’ Governor’s race.” *See Id. p. 3*(CP 372); PFR Tab 24, p. 3 (CP 385); PFR Tab 30 (CP 422-423) (“BIAW Executive Committee agreed to contribute all excess funds that BIAW receives above what was budgeted.”)

On several other occasions the BIAW Board of Directors and Executive Committee took formal action to fund this electoral campaign. First, on June 29, 2007, the BIAW Board voted to move \$1.4 million in excess ROII revenues to this effort. PFR Tab 48, p. 3 (CP 468). The minutes of the BIAW Executive Committee meeting explained that these funds were being combined with those pledged to BIAW from the Local Associations for the 2008 gubernatorial race. PFR Tab 49, p. 13 (CP 491).

Next, on November 9, 2007, the BIAW Board and the BIAW Executive Committee passed a motion “to move funds in the amount of \$2 million from excess revenue in 2007 to the 2008 political line item.” PFR Tab 61, p. 2-3 (CP 559-560); PFR Tab 62, p. 2 (CP 574). Doyle explained that BIAW was coming together to make sure “resources are available to participate 100% in the Governor’s race.” PFR Tab 61, p. 2 (CP 559).

Then, on June 20, 2008, the BIAW Executive Committee voted to move another \$1.6 million into the political line item. PFR Tab 66, p. 3 (CP 634). At this meeting, the BIAW Executive Committee was briefed on the campaign plan that had been previously approved by the BIAW Senior Officers. “President Spears spoke regarding the 2008 campaign effort for Dino Rossi. He stated that the Senior Officers spent a full day in Olympia to review and accept a very detailed and excellent plan to lend support for Dino Rossi in the November election. ... Tom McCabe stated that the radio/TV ads were real people with real stories, talking about issues that BIAW has polled and showed that Gregoire is vulnerable.” He explained that “*BIAW’s independent expenditures have met the scrutiny of the press... BIAW will reemerge in July with TV ads, direct mailings, and canvassing voters throughout Washington State* to find out what issues will move them to vote. The Senior Officers have been apprised

of everything within the campaign plan and will continue to receive updates via e-mail.” PFR Tab 66, p. 9-10 (CP 640-641) (emphasis added).

BIAW was unable to produce a single contemporaneous document showing that MSC made any contributions or exercised any control over these funds; all documents showed that BIAW did.

Thus, even if BIAW had submitted evidence showing that the contributions in question were paid out of the MSC accounts – which it did not – there would have remained a triable question of fact as to whether the BIAW was legally responsible for the contribution.

c. A genuine question existed over whether electoral activities was one of BIAW’s primary purposes.

To prove that BIAW became a political committee under the “expenditure” prong, Plaintiffs would also have to prove that the BIAW has as its “primary or one of its primary purposes ... to affect, directly or indirectly, government decision making by supporting or opposing candidates or ballot propositions.” *EFF, 111 Wn.App. at 598-599*. The Court has adopted a nonexclusive list of analytical tools to evaluate the evidence: (1) stated goals and mission of the organization; (2) whether the organization’s actions further its stated goals and missions; (3) whether the stated goals and mission would be substantially achieved by a favorable outcome in the election; and (4) whether the organization uses non-

electoral means to achieve its stated goals. *Id. at 600.* “The analysis should not be applied as a formula. They are analytical tools meant to guide the court’s determination of the equitable issues presented. ... For example, by examining the totality of the circumstances, a fact finder may look at all of the organization’s actions, including those in addition to its stated goals. If the activities of an organization reveal that a majority of its efforts are put towards electoral political activity, the fact finder may disregard the organization’s stated goals to the contrary.” Ultimately, the Court is to determine whether, on the whole, the evidence indicates that one of the organization’s primary purposes was electoral political activity during the period in question. *Id.*

Plaintiffs contend that the sheer magnitude of the BIAW’s contribution, in comparison to the organization, satisfy the primary purpose test as a matter of law. During the 2008 election cycle, the BIAW reported making ***over \$6.6 million in political expenditures***, which dwarfs the budget of the BIAW. *See* PFR Tab 12 (CP 316-330) (2008 BIAW Tax Return); Tab 11 (CP 309-314) (budgets of BIAW and MSC). An organization cannot devote this level of resources to electioneering and deny that electoral work is one of its primary purposes.

Alternatively, Plaintiffs argued that based upon the totality of circumstances, one of the BIAW's primary purposes during the 2008 election cycle was electoral work.

According to its mission statement, "The Building Industry Association of Washington is the voice of the housing industry in the State of Washington. . . . To accomplish this purpose, the association's primary focus is to educate, influence and affect the legislative, regulatory, judicial and executive agencies of Washington government. The Building Industry Association of Washington will offer its membership those services which can best be provided on a state wide basis" PFR Tab 13, 68 (CP 332). Plaintiffs provided evidence that BIAW touts its political program as one of its top member benefits, and acknowledges that the political program is carried out by the both BIAW and its affiliated political committees. PFR Tab 14 (CP 335) (2008 website).¹² See PFR Tab 73, p. 1 (CP 700) ("One of BIAW's functions is to engage in political activity on behalf of its members"); DFR Tab 10 ¶ 21 (CP 164) (McCabe

¹² **BIAW's Political Program
Supporting the Election of Pro-Housing Candidates**

BIAW and BIAW's Political Action Committee, the Washington Affordable Housing Council, play an active role in Washington State elections, pouring a significant amount of time, energy and money into ensuring the election of pro-business and pro-housing candidates that support the building industry and the continued economic growth of the state.

PFR Tab 13 (CP 332-333) (website excerpt).

testifies that political program is a member service). When asking for membership renewals, the BIAW touted ballot campaigns as its top two victories. PFR Tab 64 (CP 588-591).

Plaintiffs produced evidence that the BIAW decided that the most important way to meet its mission was by electing Dino Rossi governor in 2008. In asking members to renew their BIAW membership in 2008, the BIAW claimed to be “putting forth the largest political effort in the entire history of the association ‘to reelect’ Dino Rossi as governor. *Without a doubt, the governor’s office is the single most important position to bring about positive change for the housing industry ... the Governor is responsible for appointing nearly 2,000 key positions in state government, including the Director of Department of Labor & Industry and the Director of the Department of Ecology.*” PFR Tab 64 (CP 365) (emphasis added). See PFR 27 (CP 408) (BIAW claims that “In light of recent attacks on our entire industry by the legislature, we have never been more in need of a pro-housing Governor than now.”); PFR Tab 33 (CP 430) (BIAW President Doyle explains how electing Rossi advances BIAW’s mission).

President Brad Spears explained to the BIAW Board of Directors that “BIAW’s number one priority this campaign season would be to help Rossi get elected.” PFR Tab 65, p. 3 (CP 608). The BIAW’s 2007 Annual Report describes the BIAW’s political program:

2007 was a year of preparation for the BIAW Political Program. With the mammoth presidential election year in 2008 looming, BIAW began laying a solid foundation to elect a pro-business governor, pro-property rights Supreme Court and pro-housing legislators.

...

One of BIAW President Doyle's top priorities in 2007 was to meet with each of the BIAW's local associations throughout the state and encourage local association leaders and members to become active participants in the upcoming election, both financially and at the grassroots level. Though President Doyle's and BIAW leaders' efforts, 11 local associations pledged over \$500,000 for the upcoming election cycle. This much needed money will help BIAW's efforts to elect Dino Rossi, who announced his candidacy for governor late in 2007. BIAW was the first trade association in the state to endorse Rossi.

...BIAW political staff spent a good portion of 2007 traversing the state scouting for potential legislative candidates. ... This past year BIAW staff spent countless hours in these districts ... in an attempt to find construction and business friendly individuals who may have an interest in running for the legislature. BIAW recruited at least five viable and electable candidates ...

PFR Tab 15 (CP 340) (emphasis added).

In January of 2008, newly elected BIAW President Brad Spears claimed his three primary goals were electoral: electing Dino Rossi governor, electing new Supreme Court justices, and electing a new legislator from Mercer Island. PFR Tab. 63, p. 1, 10 (CP 588, 591). He stated that he was "committed not just personally, *but as president of BIAW*, to defeating Gregoire in her reelection effort." *Id.* p. 2 (CP 589) (emphasis added). BIAW Executive Vice President McCabe

acknowledged that “BIAW contributes to candidates like Dino Rossi”. *Id.* p. 3 (CP 590).

In August 2008, BIAW Senior Officers sent a letter claiming that “As the Building Industry Association of Washington (BIAW) 2008 Senior Officers ... Our primary goals this year has been to unify BIAW members and local associations behind a coordination all-out effort to elect Dino Rossi as Governor. ... BIAW is running an aggressive and truthful campaign to elect Dino.” PFR Tab 21, p. 1 (CP 368).

BIAW minutes acknowledged that “BIAW has decided that ...all of our efforts for the next two years need to be expended on electing a new Governor in 2008.” PFR Tab 29, p. 3 (CP 419).

Plaintiffs contend that these facts are so overwhelming as to establish BIAW as a political committee as a matter of law. The BIAW placed no rebuttal evidence in the record to support its denial that electoral activities are one of its primary purposes. Even if it had, such evidence could at most create a triable question of fact. The Superior Court erred in dismissing this claim on summary judgment.

VI. CONCLUSION

The evidence in the record established BIAW as a political committee as a matter of law. Defendant produced no evidence that rebutted this evidence. Even if BIAW had presented evidence in its

defense, it would have merely created a genuine question of fact. The trial court erred in granting summary judgment to BIAW and dismissing the political committee claim with prejudice.

Respectfully submitted this 4th day of March, 2011

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DECLARATION OF SERVICE

I, Lonnie Lopez, hereby declare that on I caused/will cause this document to be delivered on the respondent in this matter as follows:

- 1) By email and U.S. Mail on March 4, 2011.

Stated under oath this 4th day of March, 2011, in Seattle Washington.

Lonnie Lopez

2011 MAR -4 PM 4:44
COUNTY OF KING
SEATTLE, WA