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No. 66439-5-I

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

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

Appellants,

v.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON,

Respondent.

ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiffs filed this suit as a citizen's enforcement action under Washington's Fair Campaign Practices Act, RCW 42.17 *et seq.* ("FCPA" or "the Act"), just weeks before the 2008 election. CP 1–2 ¶ 1; CP 872 ¶ 9. They complained that the Building Industry Association of Washington ("BIAW") violated the Act in its support for Dino Rossi in his 2008 run for governor by exceeding campaign contribution limits (arguing that alleged coordination with Rossi on a fundraising effort converted subsequent independent expenditures into contributions, subject to caps) and failed to register and report as a "political committee." CP 2 ¶¶ 2–5.

Prior to suing, Plaintiffs sent a "45-day letter" to the Attorney General accusing BIAW of violating the FCPA and informing the AG that if no action was taken, Plaintiffs would file suit. CP 871 ¶ 7. The AG referred the matter to the Public Disclosure Commission for investigation. The PDC investigated and rejected the claims against BIAW but recommended action against BIAW's subsidiary, Building Industry of Washington Member Service Corporation ("BIAW-MSC"). CP 59, 87. The AG sued BIAW-MSC, and that matter was settled. The AG took no action against BIAW, and Plaintiffs filed this suit.

BIAW sought summary judgment below on several grounds: (1) Plaintiffs sued BIAW, but the acts complained about were committed, if at

all, by BIAW's subsidiary BIAW-MSC, and there was no basis for holding BIAW responsible; (2) Plaintiffs could not prove essential elements of their claims; (3) Plaintiffs' claims were precluded by the AG's suit that was based on the same allegations; and (4) Plaintiffs' claims depended on unconstitutional interpretation and application of the Act.

The trial court granted summary judgment for BIAW on the excess contribution/coordination claim because Plaintiffs submitted no evidence in support of that claim. The court also granted summary judgment on the political committee claim because the undisputed facts in the record demonstrated that BIAW was not a political committee: all the activity that Plaintiffs complained about was conducted, if at all, by BIAW-MSC, and the trial court determined that it was undisputed that BIAW did not have electoral activity as one of its primary purposes. The court did not reach BIAW's other arguments and denied BIAW's motion for fees. Plaintiffs have appealed the summary judgment, and BIAW has appealed the denial of fees.

This Court should affirm the judgment for BIAW. The evidence shows that BIAW did not violate the FCPA and that there is no basis for holding BIAW responsible for the actions of its subsidiary. Because this Court can affirm the judgment below based on any theory supported by the record, the judgment should also be affirmed because the AG's

enforcement action barred Plaintiffs' claims and because Plaintiffs' claims turn on unconstitutional interpretations and applications of the Act. The Court should reverse the decision to deny any fees to BIAW, and it should remand with instructions to award reasonable attorneys' fees.

II. ISSUES RELATED TO PLAINTIFFS' APPEAL OF THE JUDGMENT FOR BIAW

1. Whether the trial court correctly determined that there was no genuine issue of material fact that BIAW, as opposed to its subsidiary BIAW-MSC, had no expectation of receiving contributions or making expenditures to support or oppose candidates during the 2008 elections.

2. Whether the trial court correctly determined that there was no genuine issue of material fact that BIAW, as opposed to its subsidiary BIAW-MSC, did not receive contributions or make expenditures to support or oppose candidates during the 2008 elections.

3. Whether the trial court correctly determined that there was no genuine issue of material fact that one of BIAW's primary purposes during 2007 and 2008 was not to support or oppose candidates, where all the evidence showed that any support was provided by BIAW's subsidiary, BIAW-MSC.

4. Whether the AG's suit against BIAW-MSC in response to Plaintiffs' 45-day letter preludes Plaintiffs' enforcement action.

5. Whether BIAW was entitled to summary judgment because Plaintiffs' enforcement action cannot withstand the exacting scrutiny required when the state attempts to burden speech.

6. Whether BIAW was entitled to summary judgment because the provisions of the Act that Plaintiffs sought to enforce are unconstitutionally vague.

III. ASSIGNMENTS OF ERROR ON CROSS APPEAL

The trial court erred in its January 25, 2011, Order denying any award of fees and costs to BIAW under RCW 42.17.400(4) and (5).

IV. ISSUES RELATED TO ASSIGNMENTS OF ERROR ON BIAW'S CROSS APPEAL

1. Whether, after granting summary judgment to BIAW, the trial court abused its discretion by failing to award any attorneys' fees or costs to BIAW under 42.17.400(4)(b).

2. Whether the trial court abused its discretion by failing to award any attorneys' fees or costs to BIAW under 42.17.400(5), which, unlike 42.17.400(4)(b), does not require BIAW to establish that the claims against it were brought without reasonable cause.

V. STATEMENT OF THE CASE IN ANSWER TO APPEAL

A. The Structure and Function of Defendant BIAW

BIAW is a non-profit trade association, organized in accordance with Section 501(c)(6) of the Internal Revenue Code. CP 152 ¶ 3 (Aug. 6,

2008, Decl. of Tom McCabe) ("McCabe I"). It is an affiliate of the National Association of Home Builders ("NAHB"). *Id.* BIAW's 13,000 members are primarily home builders and other small, family owned companies involved in the construction industry, all of whom must also be members of one of 15 local builders associations. *Id.* ¶ 2–4; CP 156–57 ¶ 2 (Feb. 11, 2008, Decl. of Tom McCabe) ("McCabe II"). Each local association is independently incorporated in Washington and is an affiliate of NAHB. CP 152 ¶ 4 (McCabe I).

BIAW is a vibrant association whose mission is to promote the common interests of Washington's building industry. CP 158 ¶¶ 6–7 (McCabe II). BIAW accomplishes this mission in many ways, including by advocating policies beneficial to small businesses and conducive to economic growth and affordable housing. *Id.* BIAW also operates an award-winning education program, organizes conferences, and disseminates information concerning the building industry to its members and the general public. CP 153 ¶ 7 (McCabe I). BIAW communicates with its members and local associations on a range of topics, including legislative, regulatory, and political issues. *E.g.*, CP 153, ¶ 7 (McCabe I).

BIAW's sources of revenue include membership dues, income from interest and investments, health insurance fees, and fees from educational programs. CP 309 (income statement); CP 68 ¶ 3.17 (PDC

Report of Investigation).

B. The Structure and Function of BIAW's Subsidiary, BIAW Member Services Corporation

In 1993, because BIAW began to generate significant non-dues revenue from its programs, it created a wholly-owned for-profit subsidiary, BIAW-MSC. CP 175 ¶ 6 (Aug. 27, 2009, Decl. of Tom McCabe) ("McCabe III"); CP 153 ¶ 9 (McCabe I); CP 184 ¶ 7 (Sept. 15, 2009, Decl. of Sou Chiam) ("Chiam II"). BIAW-MSC is not a defendant in this lawsuit but was a defendant in the suit brought by the AG with respect to the same allegations plaintiffs rely on in this case. CP 109, 112 ¶ 3.8 (complaint against BIAW-MSC).

BIAW-MSC handles certain income-generating business and administers a number of programs. CP 175 ¶ 6 ("McCabe III"); CP 153 ¶ 9 (McCabe I); CP 184 ¶ 7 ("Chiam II"). The resulting structure—whereby the tax-exempt BIAW owns the for-profit BIAW-MSC—is lawful and commonplace: non-profits regularly create for-profit entities to conduct business that would jeopardize the tax-exempt status of the parent entity.[1]

BIAW-MSC's primary function is to administer a workers

[1] *See, e.g.*, RCW 24.03.035(7), (17) (granting Washington non-profits the power to own, form, and manage for-profit entities); *Shares, Inc. v. N.L.R.B.*, 433 F.3d 939, 942 (7th Cir. 2006) (describing how a non-profit entity created a "wholly owned for-profit subsidiary to own and manage" for-profit activities "[i]n order to maintain its not-for-profit status").

compensation insurance retrospective rating program ("retro program") pursuant to Washington Department of Labor and Industries ("L&I") rules. CP 175 ¶ 6 (McCabe III); CP 184 ¶ 7 (Chiam II). Retro programs allow members to pool their workers compensation risks and provide a chance for the pool to earn a refund of a portion of its premiums, when the group's combined claims are less than its premiums. *See* WAC 296-17-90455; CP 183–84 ¶ 6 (Chiam II). In conjunction with the retro program, BIAW-MSC offers training and consultation to participants to help improve workplace safety and claims handling. CP 183–84 ¶ 6 (Chiam II). This program has been one of the largest and most successful in the state. CP 164 ¶ 23 (McCabe II). By reducing the number and severity of claims, the program generated substantial refunds for participants. CP 183–190 ¶¶ 6, 12–14, 22 (Chiam II).

BIAW-MSC generates revenue from the retro program from a small up front enrollment fee and from a back end, incentive fee of 10% of any refund earned by the program in a given year (referred to as a "Marketing Assistance Fee" or "MAF"). CP 189 ¶ 20 (Chiam II) (describing MAFs paid to BIAW-MSC); CP 313 (BIAW-MSC income

statement with entries for "enrollment" and "retro").[2]

The undisputed evidence in the record shows that the MAF is revenue to BIAW-MSC, not BIAW. CP 187 ¶ 16 (Chiam II); CP 69 ¶ 3.22 (PDC Report of Investigation) (enrollment fees and MAF "represented more than 90 percent of the revenue received by BIAW-MSC" during the period reviewed); *compare* CP 309–11 (BIAW income statements with no line items for retro revenue), *with* CP 312–14 (BIAW-MSC income statements with line item for "income retro").

In addition to its primary functions, BIAW-MSC has engaged in certain political activities, including election-related speech. CP 153 ¶ 9 (McCabe I). For example, BIAW-MSC has made contributions to affiliated PACs, such as ChangePac. *See id.* These are reported to the PDC. CP 69–71 (PDC Report of Investigation); CP 178, ¶¶ 2–3 (Aug. 5, 2008, Decl. of Sou Chiam) ("Chiam I"). It is undisputed, however, that BIAW, the non-profit association, does not contribute to political committees. CP 153 ¶¶ 8–9 (McCabe I) (MSC makes contributions and expenditures, but "BIAW does not contribute to any political candidates or political action committees"); CP 69 ¶ 3.19 (PDC Report of Investigation) ("BIAW does not solicit or receive contributions to support or oppose

[2] The local associations affiliated with BIAW also receive a 10% MAF attributable to their members' participation in the retro program. CP 187 ¶ 16, 189 ¶ 20 (Chiam II).

candidates or ballot propositions, and does not contribute to candidates or political committees."); CP 316–330 (BIAW Form 990 tax return showing no expenses related to political activity); *compare* CP 309–311 (BIAW income statements with no political expense line item) *with* CP 312–314 (BIAW-MSC income statements with political expenditure line item).[3]

C. BIAW and BIAW-MSC are Separate Entities, Though They are Both Referred to as "BIAW."

The undisputed evidence shows that BIAW and BIAW-MSC are legally separate entities with different functions.[4] CP 153 ¶ 9 (McCabe I); CP 175 ¶ 6 ("McCabe III"); CP 178 ¶ 2 (Chiam I); CP 183–85 ¶¶ 3–11 (Chiam II). The fact that one entity is a non-profit association and the other is a for-profit corporation dictates which activities are handled by which entity. CP 153 ¶ 9 (McCabe I); CP 175 ¶ 6 (McCabe III) (BIAW-MSC was created to "reduce the risk of tax liability for BIAW ... for administering a for-profit retro program"); CP 184 ¶ 7 (Chiam II).

It is also undisputed that the trade association, Building Industry Association of Washington, and the for-profit subsidiary, Building

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[3] Plaintiffs' assertion that "BIAW submitted ***no evidence*** to substantiate its argument that its subsidiary MSC made each of" the donations to ChangePac, Opening Br. 23 (emphasis in original), is simply false.

[4] BIAW and BIAW-MSC share leadership and some staff, whose salaries are allocated between the entities based on the type of work performed. CP 178 ¶ 2 (Chiam I); CP 183 ¶ 3 (Chiam II); CP 152 ¶2 (McCabe I),

Industry Association of Washington Member Services Corporation, both typically referred to themselves simply as "BIAW." Numerous documents in the record created before the commencement of this lawsuit attest to this generic use of "BIAW" to refer to either BIAW, BIAW-MSC, or both. *E.g.*, CP 701 n.2; CP 156 ¶ 2. Before this suit, Plaintiffs themselves recognized and adopted this use of "BIAW" to refer to both BIAW and BIAW-MSC in documents publicizing their allegations.[5]

D. BIAW-MSC's 2008 Electoral Activity

As described above, BIAW-MSC administers a retro program, through which participants have a chance to obtain a refund of a portion of their workers compensation insurance premiums.[6] In brief, when the claims experience of the group in a given year is good, L&I issues a refund of a portion of premiums as a warrant (essentially a check) to BIAW (the sponsoring organization) as required by the regulations. CP 184–187 ¶¶ 10, 12, 17 (Chiam II); *see* WAC 296-17-90455. BIAW immediately delivers the refunds to BIAW-MSC for deposit into a BIAW-

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[5] *E.g.*, CP 1041 ("The term 'BIAW' is used herein to refer to BIAW and/or its subsidiary BIAW Member Services Corp., which is consistent with these organizations' use of the term."); *see also* documents linked to *http://www.smithandlowney.com/rossi/*.

[6] The September 15, 2009, Declaration of Sou Chiam, CP 181–195, describes in detail the financial mechanics of the retro program and the specifics of BIAW-MSC's administration of plan refunds.

MSC bank account and subsequent transfer to a trust for investment. CP 187 ¶ 17 (Chiam II). BIAW-MSC handles the accounting, distribution, and reconciliation of these funds. CP 184 ¶ 9, 187–192 ¶¶ 17–29, 198–200 (Chiam II & Ex. 2). Undisputed evidence shows that BIAW-MSC's handling the retro funds, including the refunds, pre-dates the transactions in this case by more than a decade. CP 153 ¶ 9 (McCabe I); CP 184 ¶7 (Chiam II). There is no evidence in the record that BIAW-MSC's handling of the funds at issue in this case was anything but the normal, routine practice for processing retro refunds.

Each year, BIAW-MSC estimates the amount of the MAF that each local association can expect to receive and communicates that to the local associations. *See* CP 180 (Chiam I). In 2007, the actual refunds were higher than anticipated. CP 178 ¶ 3, 180 (Chiam I). BIAW-MSC asked the local associations to authorize BIAW-MSC to withhold a portion of the above-budget MAF, to be donated to its affiliated political committee, ChangePac. CP 178 ¶ 3 (Chiam I). In response to BIAW-MSC's request, several of the locals authorized BIAW-MSC to withhold some or all of their excess MAF (totaling approximately $584,000) for transfer to ChangePac. CP 178 ¶ 3, 180 (Chiam I). BIAW-MSC (not BIAW or the local associations) was responsible for taxes on these funds. CP 178–79 ¶¶ 3–4 (Chiam I). The funds were subsequently reported as

contributions from the local associations to ChangePac when the funds were transferred to ChangePac.[7]

It is this conduct (BIAW-MSC's securing permission from some of the locals to withhold a portion of the MAFs so those funds could be given to ChangePac), that forms the basis of Plaintiff's claims. CP 3–4 ¶ 13.

E. Plaintiffs' Statutory Notice, the PDC Investigation and Report, and the AG's Enforcement Action

The FCPA permits a citizen to file a civil action, in the name of the State, for violations of campaign finance laws, but only after providing written notice of specific violations to the Attorney General, and then only if the AG fails to act on the alleged violations: An action "may be brought only if: (i) The attorney general ... [has] failed to commence an action...." RCW 42.17.400(4).

On July 25 and again on September 9, 2008, Plaintiffs wrote to the AG accusing BIAW ***and*** BIAW-MSC of violations of the FCPA, including the allegations at issue in this case. CP 243–251 (July notice letter); CP 871 ¶ 7 (Jan 3, 2011, Decl. of Rob Maguire) ("Maguire"). The AG referred these letters to the PDC for investigation. The PDC reviewed a formal response from BIAW and BIAW-MSC, received sworn

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[7] *See* http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/contributions?param=Q0hBTkcgIDUwNw====&year=2008&type=continuing (last visited Oct. 17, 2010) (sort contributions by date to see 10 of the contributions from local associations on August 20, 2008).

testimony from BIAW and BIAW-MSC personnel, conducted interviews of BIAW and BIAW-MSC personnel, and collected and analyzed financial and other records. The investigation culminated in the PDC's Report of Investigation. CP 55–78 (Exec. Summary and Report of Investigation).

In its report, the PDC determined that ***BIAW-MSC***, and ***not BIAW***, requested permission from the locals to withhold a portion of the MAF payments and handled the money at issue (the portions of the withheld MAF payments). The PDC determined that any concomitant duties under the FCPA attached to BIAW-MSC alone and not to BIAW: "During 2006-June 2008, BIAW did not solicit or receive contributions to support or oppose candidates or ballot propositions, nor did it contribute to candidates or political committees or use its general treasury for other campaign-related expenditures." CP 57 (emphasis in original); *see also* CP 69 ¶ 3.19. Accordingly, the PDC did not recommend action by the AG against BIAW. CP 59. It did recommend action against BIAW-MSC for an alleged failure to report the withheld funds as a political committee. *Id.*

As a result of the PDC's report, the AG filed a complaint in Thurston County Superior Court, alleging that BIAW-MSC was obligated under the FCPA to register as a political committee with respect to the withheld MAF funds and timely file reports with the PDC. CP 109–114. BIAW-MSC and the AG settled that lawsuit. CP 116–120 (Stipulated

Judgment). As part of that settlement, BIAW-MSC agreed that it would "file a political committee registration form and all campaign finance disclosure reports to the Public Disclosure Commission to account for its receipt of and expenditures made from the $584,000 in campaign contributions it received in 2007...." CP 120. Thus, this $584,000 contribution of refunds withheld from local associations has now been reported twice (once in the name of the local associations when transferred to ChangePac and once as a result of the settlement). This is the same $584,000 that Plaintiffs now claim were "pledges" to BIAW (the nonprofit) that make it a political committee. Open Br. 30 at 10–12, 17.

F. The Instant Litigation and Plaintiffs' Distortion of the Evidence in the Record

Despite the PDC's investigation and the AG's enforcement action, Plaintiffs, standing in the shoes of the State, filed this suit under RCW 42.17.400. And despite all the evidence (and the PDC's conclusions) that BIAW-MSC, and not BIAW, was responsible for the conduct at issue, Plaintiffs sued BIAW.[8] Filed with fanfare just three weeks before the 2008 election, the case was obviously intended to generate negative

[8] Plaintiffs originally named both BIAW and BIAW-MSC but dropped BIAW-MSC. They were rightly concerned that the AG's suit against BIAW-MSC, in response to the same 45-day letter on which Plaintiffs base this case, precluded their pressing claims against BIAW-MSC. CP 1 n.1, CP 2 n.2.

publicity about Rossi and BIAW right before the election. *E.g.,* CP 893; CP 1047; CP 1049–51.

Plaintiffs claim that BIAW violated the FCPA in two ways: (1) by exceeding the campaign contribution limits (arguing that the alleged assistance by Rossi on a fundraising effort converted any otherwise independent expenditures into "contributions," subject to statutory caps) and (2) by failing to register and report as a political committee.

In their attempt to convince the court that BIAW should be responsible for the requests to the locals and the subsequent donations to ChangePac, Plaintiffs relied on PDC filings and other documents that refer to "BIAW," but when those documents are viewed in context, they obviously refer to the for-profit subsidiary, BIAW-MSC. Specifically, Plaintiffs cited PDC filings that report contributions made by the "Building Industry Association of Wa" or "Building Industry Association." *E.g.*, Open Br. 22–23. But the PDC itself determined that those reports actually refer to ***BIAW-MSC*** contributions. During the PDC's investigation of Plaintiff's claims, BIAW explained that the names appeared as they did because there is not room on the forms to type "Building Industry Association of Washington Member Services Corporation" and that it knew that the PDC discouraged the use of

acronyms. Report of Investigation, Ex. 2.[9] In its investigation, the PDC recognized the deficiencies in its forms, explaining that "PDC reports show BIAW as the entity providing support. PDC reports should identify BIAW-MSC as providing the support." CP 69 ¶ 3.21.

Plaintiffs also cited references to "BIAW" in documents from officers and a board that acts for both BIAW and BIAW.[10] Both the PDC and AG, after looking at documents such as those relied upon by Plaintiffs, recognized that any reporting duties rested with BIAW-MSC because all the funds in question were actually managed by BIAW-MSC in its accounts and later donated to ChangePac. The undisputed evidence in the record shows that the funds were donated to ChangePac by BIAW-MSC, not BIAW. *Compare* CP 309–311 (BIAW income statements with no political expense line item) *with* CP 312–314 (BIAW-MSC income

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[9] *Available at* http://www.pdc.wa.gov/home/enforcement/reports/enforcement.aspx?Title=2008&Page=http://www.pdc.wa.gov/home/enforcement/reports/2008.aspx (cited to trial court at CP 760 and CP 49).

[10] There is no dispute that BIAW and MSC share a board and certain officers; that the board, officers, and BIAW members often refer to BIAW and/or MSC as "BIAW" without distinction; and that when the board or officers direct actions by BIAW, staff ensures that the appropriate entity (BIAW or MSC) carries them out to comply with regulatory and tax obligations. It is disingenuous for Plaintiffs to imply that references to BIAW without express references to MSC and ChangePac means that MSC and ChangePac were not involved. The undisputed evidence cited in this section shows that the funds were only handled by those entities and not by BIAW.

statements with political expense line item); *see also* CP 178 ¶¶ 2–3 (Chiam I) (political activities are handled by BIAW-MSC, not BIAW); CP 153 ¶¶ 8–9 (McCabe I) (same).

Although they have tried hard to dance around this issue, Plaintiffs concede in their pleadings that BIAW-MSC was responsible for the conduct they complain about. CP 14 ¶ 52 ("the improper transfers and expenditures were processed through the accounts of BIAW-MSC" and vaguely alleging that BIAW "orchestrated" them); CP 15 ¶ 55 ("BIAW ... conducted its illegal fundraising through the accounts of a controlled entity."). At oral argument on the summary judgment motion, Plaintiffs' counsel admitted that the funds at issue were BIAW-MSC funds, held in BIAW-MSC accounts.

VI. STATEMENT OF THE CASE SUPPORTING CROSS-APPEAL

The FCPA authorizes fee and cost awards to prevailing parties. In the trial court, BIAW obtained summary judgment and sought fees from Plaintiffs and their lawyers under RCW 42.17.400(4)(b) because they pressed claims that lacked factual and legal support, used unreasonable litigation tactics, and sued to silence speech they disagreed with. BIAW also sought fees from the State under 42.17.400(5) because the State refused to intervene in a case that it knew was barred and allowed the suit

to proceed (even coordinating with the Plaintiffs) despite the burden imposed on BIAW and the chilling effect on political speech.

A. Plaintiffs Pressed Baseless Claims.

As described above, the evidence has always been undisputed that the acts Plaintiffs complained of were the acts of BIAW's subsidiary, BIAW-MSC. When the PDC investigated, it concluded that there was no basis for any claim against BIAW because the funds at issue were generated by BIAW-MSC's operation of the retro program and were collected and handled by BIAW-MSC. CP 57, 59; CP 69 ¶¶ 3.19, 3.21. This confirmed what Plaintiffs already knew: BIAW-MSC administered the retro program and received the MAF, which it used for political purposes,[11] but they pressed their political committee claim against BIAW nonetheless.

Plaintiffs also pressed a claim that BIAW exceeded campaign contribution limits by virtue of alleged coordination with gubernatorial candidate Dino Rossi. In fact, this was the central claim in the suit and

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[11] Plaintiffs' counsel actually argued this point in a putative class action against BIAW and BIAW-MSC, asserting that the MAFs were excessive and being for improper purposes). *E.g.*, Pls. Mot. for Class Cert., at 8 (Jan. 17, 2008) (W.D. Wash. Cause. No. 2:07-CV-01519-RSM) (asserting that BIAW-MSC is one of the "largest recipients" of marketing assistance fees); Pls. Mot. for Prelim. Inj., at 10 (Sept. 5, 2008) (Thurston County Superior Court Case No. 08-2-01674-6) (describing the receipt of "millions of dollars of trust funds ...[by] this for-profit corporation [BIAW-MSC]" that are then used for political purposes); CP 849 n.1.

drove the expansive, "emergency" discovery described below. Yet, Plaintiffs offered no evidence to support this claim and abandoned it only in response to BIAW's motion for summary judgment.[12]

There was simply never any evidence to support either claim pressed by Plaintiffs against BIAW. Despite this, Plaintiffs filed this suit against BIAW, with fanfare, three weeks before the 2008 election.

B. Plaintiffs' Tactics Unreasonably Increased Litigation Costs.

From the outset, Plaintiffs' tactics unnecessarily drove up BIAW's litigation costs. For example, despite a specific request from BIAW's counsel for notice of any motions, Plaintiffs sought a tactical advantage immediately after filing suit by obtaining an *ex parte* order for expedited discovery, including depositions on short notice. CP 873 ¶ 11 (Maguire). The court rescinded this order on BIAW's motion. CP 210 at 5–11.

Plaintiffs moved again for expedited discovery, arguing that it was imperative that they seek pre-election relief and that the depositions of Rossi and others were essential to that effort. Plaintiffs' counsel then acted improperly in Rossi's deposition and were admonished by the Court

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[12] Plaintiffs' counsel's homepage still contains a link entitled "Read information about Dino Ross's [sic] Participation in BIAW Illegal Fundraising." This is a reference to the coordination claim, but nowhere does Plaintiffs' counsel mention that the claim was dismissed after Plaintiffs failed to support these allegations with fact or law. *See* http://www.smithandlowney.com/ (last visited April 4, 2011).

for their misconduct. CP 906 (order on motion for sanctions). They took a handful of other depositions and then abruptly canceled the remaining emergency depositions with little notice. CP 873 ¶ 13 (Maguire). And, despite their repeated representations to the court that the expedited discovery was necessary for an emergency, pre-election motion, they never filed such a motion. CP 877–78 ¶ 24 (Maguire).

Plaintiffs served wide-ranging discovery seeking intrusive information about political strategies and speech. CP 873 ¶ 14 (Maguire). They demanded documents and depositions on short notice. They served subpoenas on the home of Mr. Rossi rather than serving his lawyer. CP 874 ¶ 16 (Maguire). They served defective subpoenas on third parties and sought to discover communications between local homebuilding associations and BIAW and Rossi. CP 874 ¶ 16 (Maguire); CP 913–15 (subpoena). They coordinated their tactics with the AG's separate case against BIAW-MSC. CP 908–09, 911 (email communications with AG's office). They sought all of the files held by the PDC regarding its investigation and the AG's suit against BIAW-MSC. CP 917–920.

Plaintiffs' response to BIAW's summary judgment motion continued the abusive pattern. Plaintiffs now misrepresent to this Court how their coordination claim was dismissed. They state they "agreed to dismiss the improper coordination claim after the PDC conducted its own

investigation and recommended no further action." Open Br. 5 n. 4. Actually, Plaintiffs only relinquished this claim in the face of BIAW's summary judgment motion, about eight months after the PDC accepted its staff's recommendation. CP 214–15 (Plaintiffs' opposition brief); CP 758 (BIAW's summary judgment reply); CP 879 ¶ 29 (Maguire). And even then, they only did so after demanding that BIAW file a formal answer, *id.*, which required significant work to respond to the many detailed allegations supposedly demonstrating improper coordination. *See* CP 1-16. The excess contribution / coordination claim was not dismissed by any action of the Plaintiffs but when the trial judge signed BIAW's summary judgment order. CP 835.

C. Plaintiffs' Motive was Retribution against a Speaker with whom They Disagreed.

This lawsuit was about political payback and abuse of the legal system, by Plaintiffs or their lawyers, for political gain. In response to discovery requests and in comments to the media, Plaintiffs admitted being motivated by their dislike of BIAW's past political speech:

- "My sole reason for involvement in this matter was my great concern about the nature of the BIAW involvement in the 2006 election campaigns involving a number of judges .... They seemed intent on undermining the public confidence in that ability of judges to fairly and impartially decide matters before them, which I thought was potentially fatal to the public

confidence in the impartiality of the judiciary." CP 896 (Plaintiff Utter's Response to Interrogatory 27)

- "I also mentioned to a few people that my motivation actually stems from the unfair judicial campaign against Chief Justice Alexander orchestrated by BIAW." CP 901 (Plaintiff Ireland's Response to Interrogatory 27); *see also* Gene Johnson, *Judge denies Rossi's request to drop lawsuit, available at* http://www.komonews.com/news/local/33228219.html ("Ireland said Friday it's partly personal, having witnessed what she described as the 'despicable' campaign run against Supreme Court Chief Justice Gerry Alexander....").

Similarly, Plaintiffs' counsel made clear the goal of the lawsuit:[13] "Lowney said he hopes his lawsuits will taint the BIAW to the point that candidates will be 'returning their money.'"[14]

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[13] Plaintiffs' counsel had earlier misused the legal process on the eve of the 2006 U.S. Senate election, filing a shareholder derivative lawsuit against Republican U.S. Senate candidate Mike McGavick asserting that Mr. McGavick had received improper payments from Safeco. The lawsuit and the spurious allegations against Mr. McGavick generated negative publicity on the eve of the election, but the case was quietly dismissed in its entirety months after the election. *See Schwartzman v. McGavick* (W.D. Wash. Case No. 2:06-cv-01080-MJP).

[14] Bob Young, *BIAW, Rossi's biggest backer explains what it wants*, Seattle Times, Oct. 17, 2008, *available at*http://seattletimes.nwsource.com/html/nationworld/2008276966_biaw17m0.html.

D. The State Failed to Intervene Despite its Conclusion that Plaintiffs' Claims Were Barred.

The State has been fully aware of the claims made by Plaintiffs and, despite having concluded that the claims were without merit and barred, failed to intervene and seek dismissal of the baseless claims.

BIAW encouraged the State to do so, CP 875 ¶ 18 (Maguire), but instead, on October 9, 2008, the AG's office merely sent a letter to the parties indicating that it had reviewed the suit and believed that some of the claims were barred by the AG's separate action against BIAW-MSC and others were barred because Plaintiffs did not provide sufficient notice of the claims to the State. CP 887–888. The fact that the State refused to intervene was significant in the Court's decision to deny BIAW's motion to dismiss early in the case:

> It's significant to the Court that neither the Attorney General nor the Public Disclosure Commission have intervened in this matter. Neither has objected to this Court's jurisdiction and neither has asked this Court to defer any action taken. I recognize we have a letter from an Attorney General indicating her interpretation of the notice letter. I give no weight to that letter.

CP 926:6-13. The State took no action to address these concerns.

Nonetheless, the State followed this case's progress, communicating with Plaintiffs' counsel and apparently coordinating

efforts in the two cases. CP 874 ¶¶ 15-16 (Maguire); CP 908–09, 911 (emails with the AG's office). The PDC monitored the case so closely that within a week of the summary judgment, it contacted BIAW's counsel and asked whether responses to certain public records requests were still necessary. CP 933 ¶ 8 (Jan. 3, 2011, Decl. of Matthew Clark). Plainly the State had notice of the suit and its progress, yet failed to intervene or otherwise ensure that BIAW was not forced to defend against baseless, duplicative, and politically motivated claims.

E. The Trial Court Denied Attorneys' Fees to BIAW.

After prevailing on summary judgment, BIAW sought a fee award against Plaintiffs, their counsel, and the State. In its order, the trial court noted that BIAW had "presented circumstantial evidence that this case was brought for improper motives." CP 1059. The order continued: "However, they have not shown proof of improper motives by a preponderance of the evidence." *Id.* Applying this erroneous standard, the trial court wrongly denied BIAW's motion for fees. CP 1058.

VII. ARGUMENT FOR ANSWERING BRIEF

Plaintiffs earlier agreed that the material facts are not in dispute. CP 843 (Motion for Special Setting) ("Plaintiffs contend that this case can be decided for Plaintiffs as a matter of law, without need for trial."). This Court need only determine whether the trial court reached the correct

result when it applied the relevant law to the undisputed facts. After applying the law to the facts, "[s]ummary judgment should be granted," where as here, "reasonable persons, giving all reasonable inferences to the nonmoving party, could only conclude that the moving party is entitled to judgment. In such cases, there is no genuine issue of material fact." *LaMon v. Butler*, 112 Wn.2d 193, 199 n.5, 770 P.2d 1027 (1989).[15] This Court may affirm the trial court based on any theory supported by proof in the record. *Id.* at 200–01. There are many: BIAW is entitled to judgment because the undisputed evidence shows (1) it did not receive or expect to receive contributions or make or expect to make expenditures; (2) there is no basis for holding BIAW responsible for the acts of its subsidiary BIAW-MSC; (3) BIAW did not have electoral activity as its primary purpose; (4) the lawsuit commenced and settled by the AG against BIAW-MSC precludes Plaintiffs' claim; (5) the registration and reporting sought by Plaintiffs would burden political speech and fails the exacting scrutiny required of government efforts to regulate speech; and (6) the statute Plaintiffs seek to enforce is unconstitutionally vague.

Plaintiffs' Opening Brief repeatedly makes vague accusations

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[15] The summary judgment did not take this case from a jury; the court would be the trier of fact here, as there is no right to a jury trial in this FCPA enforcement action. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 612, 49 P.3d 894 (2002).

about the quality of BIAW's evidence and accuses BIAW of rewriting history. This criticism is striking given shortcomings in Plaintiffs' factual presentation. Beginning with a 31-line Statement of the Case that cites only to two pleadings, three briefs, and the PDC's investigation report, Plaintiffs' presentation of the facts (1) fails to support factual allegations with citation to evidence in the record (because none exists); (2) relies on conjecture as if it were fact; and (3) cites to portions of the record below that Plaintiffs did not designate (because the record does not say what Plaintiffs represent it to say). Such argument, unsupported by admissible evidence, will not defeat a motion for summary judgment. *E.g.*, *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601–02, 200 P.3d 695 (2009) (non-moving party cannot rely on speculation or argument but must set forth specific facts to disclose a genuine issue).

In contrast, BIAW's evidence is robust and undisputed. BIAW submitted numerous contemporaneous documents and sworn declarations of people with knowledge (many of which were originally submitted in other lawsuits that pre-date this one) in support of its arguments. Indeed, based on the same core of evidence, the PDC, AG, and trial court have now all come to the same conclusion: The undisputed evidence shows that the activity that Plaintiffs complain of was not undertaken by BIAW

and, therefore, BIAW had no obligation to register and report as a political committee during the 2008 general election cycle.

A. BIAW Did Not Receive or Expect to Receive Contributions and Did not Make or Expect to Make Expenditures in Support of a Candidate or Ballot Initiative.

The trial judge, Judge Heavey, is a former state legislator and has hands-on experience with Washington's campaign finance laws. Giving his oral ruling in favor of BIAW, he offered a simple analogy based upon his experience that went something like this:[16] As a candidate, Mike Heavey might tell his supporters, "Contribute to Mike Heavey." This does not mean that candidate Heavey actually expects to receive checks, deposit them in a personal account, and then spend them on his campaign. And it certainly does not make Mike Heavey a political committee. Candidate Heavey really intends for his supporters to contribute to his political committee. And that is what actually happens.

Similarly, documents in this case mention donations to "BIAW," and PDC forms list contributions from "Building Industry Assn of Wa." But there is no genuine factual dispute that these references are to BIAW-MSC. And there is no genuine dispute regarding what BIAW and BIAW-MSC always intended or how the money in question was actually handled. Plaintiffs argue these references are to the nonprofit association, but they

[16] Unfortunately, there is no transcript from the hearing.

can point to absolutely no evidence to support that conjecture and nothing to counter the testimony and documents submitted by BIAW.

As Plaintiffs' counsel admitted at oral argument, all the evidence in the record shows that BIAW-MSC received the withheld funds from the local association MAFs and that BIAW-MSC (not BIAW) donated to ChangePac, including the $584,000 in withheld MAF funds. Plaintiffs made similar admissions throughout the litigation. *E.g.*, Opening Br. 3 ("... the independent expenditures in question were often handled through the accounts of BIAW's for-profit affiliate...."); CP 3 n.3 (First Amended Complaint) ("BIAW has taken some of the Actions herein through its affiliate BIAW Member Services Corporation...."), CP 14 ¶ 52 ("[T]ransfers and expenditures were processed through the accounts of BIAW-MSC."), CP 15 ¶ 55 ("BIAW ... conducted its illegal fundraising through the accounts of a controlled entity.").[17]

[17] Plaintiffs hedge by using qualifiers such as "often" and "some," but no evidence in the record supports these qualifications. Rather, the evidence unequivocally demonstrates that the relevant transactions were conducted by BIAW-MSC. Plaintiffs' counsel knows this and in other contemporaneous litigation asserted that BIAW-MSC was improperly using funds for political purposes—the very same funds Plaintiffs now claim make BIAW a political committee. *E.g.*, Pls. Mot. for Class Cert., at 8 (Feb. 8, 2008) (W.D. Wash. Cause. No. 2:07-CV-01519-RSM) (asserting that BIAW-MSC is the "largest recipient" of marketing assistance fees); Pls. Mot. for Prelim. Inj., at 12 (Sept. 5, 2008) (Thurston County Superior Court Case No. 08-2-01674-6) (describing the receipt of

Because of the undisputed evidence and Plaintiff's admissions, Plaintiffs are forced to argue that what actually happened with the funds at issue is irrelevant. They argue that the Court should focus instead on the use of "BIAW" in various documents to assign liability to the non-profit, when there is no dispute that the documents actually describe BIAW-MSC's role. At best, Plaintiffs are playing word games.

Even the evidence cited by Plaintiffs (such as BIAW's tax return and BIAW's and BIAW-MSC's income statements, *see* Opening Br. 29), shows that BIAW-MSC, not BIAW, made electoral political expenditures. As a non-profit entity, BIAW must report to the IRS both revenue ***and expenses*** on its Form 990. *See* CP 316. Nowhere on that form are there any electoral expenditures. CP 316–330. The income statements similarly show that political expenditures are part of BIAW-MSC's expenses rather than BIAW's. CP 309–314.

To try to bolster their political committee claim against BIAW, Plaintiffs direct this Court to briefs and declarations filed in other cases that refer to "BIAW" political activities. But that is misleading: those same documents expressly note that the term "BIAW" as used therein refers collectively to the trade association ***and*** its for-profit subsidiary (the

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"trust funds ...[by] this for-profit corporation [MSC]" that are then used for political purposes); CP 849 n.1.

distinction was immaterial in that context). *E.g.*, Opening Br. 30 (citing to sentence on CP 700 that concludes with a footnote on CP 701 stating that BIAW and BIAW-MSC will be collectively referred to as "BIAW"; citing to declaration at CP 164 that specifically states at CP 156 ¶ 2 that "BIAW" is used to refer to both the trade association and non-profit).

The evidence in the record is undisputed that BIAW did not intend to or actually receive or expend funds for electoral purposes, and no reasonable fact finder could conclude otherwise. Therefore, BIAW does not come within the FCPA's definition of a political committee, *see* RCW 42.17.020(39), and the trial court had to grant summary judgment to BIAW. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (summary judgment should be denied only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

B. There is no Basis for Imposing Liability and Additional Reporting Obligations on BIAW Based on the Actions of its Subsidiary BIAW-MSC.

Because the actions at issue (asking for authority to withhold some of the 2007 MAF and delivering that money to ChangePac) were taken by BIAW-MSC, Plaintiffs are left to argue that BIAW should be responsible for the acts of a separate legal entity. Plaintiffs' sole argument for holding BIAW liable for BIAW-MSC's actions is RCW 42.17.660(2), but that statute simply does not apply here, as the trial court recognized.

Under RCW 42.17.660(2) (which appears in the FCPA under the "Campaign Contribution Limitation" subheading), campaign contributions from a corporation and its controlled entities are aggregated for purposes of determining whether a campaign contribution cap has been reached. *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) ("RCW 42.17.660(2) specifies a relationship between entities in which those entities are considered a single entity ***for purposes of campaign contribution limits***.") (emphasis added). It says nothing about and has nothing to do with political committee reporting.[18]

Judge Heavey aptly noted at oral argument that, if Plaintiffs' interpretation of the statute were correct, then every entity that controlled a political committee (such as the Trial Lawyers Association) would itself be required to report as a political committee as well. There would be no reason for any entity to set up a political committee, since it would still be subject to all the same onerous registration and reporting obligations after setting up a committee. Fortunately, this is not the law. RCW 42.17.660(2) prevents entities from evading contribution caps by using

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[18] The PDC shares this interpretation. *State ex rel. Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586, 594 n.3, 49 P.3d 894 (2002) (hereinafter "*EFF*") (describing settlement in which PDC treated affiliated entities as a single entity "for the purposes of sharing contribution limits but separate entities for purposes of reporting contributions").

affiliates, but it imposes no registration or reporting obligation on BIAW as a result of the electoral activities of its subsidiaries.

C. Supporting or Opposing Candidates or Ballot Initiatives Was not BIAW's Primary Purpose or One of its Primary Purposes.

As explained above and as demonstrated by the record, BIAW is a trade association, promoting the interests of and providing services to its 13,000 members. Its mission is to be the voice of the home building industry in Washington state and its purpose is to increase membership, provide education opportunities, and serve its members' needs. CP 153 ¶ 7 (McCabe I); CP 158 ¶ 6 McCabe II).

Plaintiffs' argument that BIAW is a political committee is based largely upon the assertion that one of the association's "primary purposes" was supporting or opposing candidates, and that assertion in turn is based largely on the claim that BIAW received the contributions and made the expenditures that were actually received and made by BIAW-MSC. For the reasons described in subsection A above, BIAW never expected to or actually did receive contributions or make expenditures supporting or opposing candidates or ballot initiatives: the evidence showed that the acts Plaintiffs complain of were committed, if at all, by BIAW-MSC. Similarly, for the reasons described in subsection B, above, there is no basis for holding BIAW liable for the electoral activity of BIAW-MSC.

In addition to trying to ascribe BIAW-MSC's actions to BIAW, Plaintiffs try to make BIAW look "political" by conflating lobbying, legislative efforts, and other non-electoral political speech with electoral speech. For example, Plaintiffs quote BIAW's mission statement, which discusses the trade association's legislative and judicial advocacy efforts, as an example of political activity that subjects BIAW to reporting requirements. Opening Br. 30. But this gets them nowhere. The FCPA recognizes that such political speech is not electoral activity that subjects the speaker to registration and reporting requirements. RCW 42.17.020(39) (defining "political committee" based only on electoral activity); *EFF*, 111 Wn. App. at 598 (2002) (describing burdensome reporting requirements). Indeed, the United States Constitution shields such speech from regulation. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958) ("[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."); *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression ...."); *see also*

RCW 42.17.020(15)(b)(v) (membership organization's internal communications are not "contributions" under the FCPA).

Thus, there is no evidence to support Plaintiff's claim that electoral political activity is BIAW's primary purpose (or even one of BIAW's primary purposes).[19] *State v. Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 509, 546 P.2d 75 (1976). The court below correctly determined that BIAW had no obligation to register or report as a political committee.

D. The AG's Lawsuit against BIAW-MSC Precludes Plaintiffs' Claim.

BIAW argued below that the AG's Thurston County suit (in

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[19] To avoid constitutional problems of vagueness and overbreadth, the U.S. Supreme Court has limited the definition of "political committees" in federal campaign finance laws to "organizations that are under the control of a candidate ***or <u>the</u> major purpose of which is the nomination or election of a candidate***. *Buckley*, 424 U.S. at 79 (emphasis added). This narrowing construction, which BIAW believes applies to both the contribution and expenditure prongs of the political committee test, must also be used when interpreting the scope of registration and reporting requirements for political committees under state laws as well. As the Fourth Circuit recognized, *Buckley* expressed "the Supreme Court's insistence that political committees can only be regulated if they have the support or opposition of candidates as their primary purpose." *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008). The court in *Leake* held that it was not enough to show that ***one of*** the organization's major purposes was the support of candidates. The Ninth Circuit recently approved Washington's less strict construction, creating a circuit split. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1011–12 (9th Cir. 2010). BIAW contends that it is not a political committee under either of the two competing formulations, but if the standard were to make a difference, BIAW contends that this court should follow the *Buckley* and *Leake* formulation (applying the narrower "the primary purpose" test).

response to Plaintiffs' 45-day letter) precluded Plaintiffs from bringing this citizens' enforcement action. The trial court did not reach this issue, but this Court should affirm the judgment below on this basis as well.

By its plain terms, the FCPA allows a citizen to step into the shoes of the State and bring an action ***only*** when the State itself has "failed to commence an action." RCW 42.17.400(4)(a); *see Vance v. Offices of Thurston County Comm'rs*, 117 Wn. App. 660, 670, 71 P.3d 680 (2003) ("[A plaintiff] can bring an action only if ... authorities fail to act after receiving notice of possible violations."); *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 22, 60 P.3d 652 (2002) (enforcement action appropriate "only after notice to and failure by the attorney general and the prosecuting attorney to act.").

There is no dispute that (1) Plaintiffs sent a notice letter to the State in which they argued that the MAF funds in BIAW-MSC's accounts and later contributed to affiliated PACs required both BIAW and BIAW-MSC to register as political committees, *e.g.*, CP 243, 244 n.2 (notice letter); and (2) in response to Plaintiffs' notice, the AG—after receiving the investigation report from the PDC (the administrative agency with expertise regarding violations of the FCPA)—initiated ***an action***: the lawsuit in Thurston County against BIAW-MSC. CP 109 (AG complaint against BIAW-MSC). Plaintiffs have yet to provide any legal authority

that justifies ignoring the statute's plain meaning.[20] *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4 (2002) ("[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning ....").

Moreover, giving effect to the plain meaning here, and giving preclusive effect to the AG's action ensures that defendants will not be subjected to multiple suits (both in the name of the State) regarding the same set of facts but asserting inconsistent theories and proposed remedies. *C.f.*, *DeAtley v. Barnett*, 127 Wn. App. 478, 484, 112 P.3d 540 (2005) (judicial estoppel doctrine prevents a party from pursuing incompatible theories to gain an advantage).

E. The Enforcement of the FCPA Sought by Plaintiffs Would be Unconstitutional.

The contributions to ChangePac at issue in this case (the portion of the MAFs withheld by BIAW-MSC from the local associations) has already been reported to the PDC by ChangePac as contributions from the local associations at the time of the transfer of the money to ChangePac,

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[20] Plaintiffs state that the trial court previously rejected this argument when it denied BIAW's Motion to Dismiss and Motion for Protective Order early in the lawsuit. This is wrong. BIAW argued in those motions that Plaintiffs had failed to provide the required statutory notice of their coordination claim and that venue was improper for the political committee claim. The motions did not raise the issue of whether the Plaintiffs' suit was precluded pursuant to RCW 42.17.400(4). CP 1060–1088.

and BIAW-MSC agreed to report as a political committee as part of the settlement reached between BIAW-MSC and the State in the AG's Thurston County action.

BIAW argued below that summary judgment was appropriate because the enforcement sought by Plaintiffs would be unconstitutional for the following reasons: (1) the additional reporting sought is not sufficiently related to an important governmental interest to justify the burden on speech and therefore fails exacting scrutiny; and (2) the statute that Plaintiffs seek to enforce is unconstitutionally vague, as Plaintiffs admit in their amended complaint. The trial court did not reach these issues, but this Court should affirm the judgment for BIAW on these grounds as well.

1. Requiring BIAW to register and report as a political committee under the circumstances would not satisfy "exacting scrutiny."

The State's enforcement of the FCPA—a statute that burdens core First Amendment activity—is subject to "exacting" judicial scrutiny. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010). "To survive exacting scrutiny, the Disclosure Law's challenged provisions must bear a substantial relationship to Washington State's sufficiently important interest in providing the electorate with source and

financial information to inform their decisionmaking at the ballot box." *Id.* at 1008.

Plaintiffs cannot make the required showing here. There is no dispute that all the contributions and expenditures at issue in this case have already been reported to the Public Disclosure Commission. *See, e.g.*, CP 264 (ChangePac C3 form showing contributions from "BUILDING INDUSTRY ASSOCIATION O"). All of MSC's contributions to ChangePac during the 2008 election are available for anyone to see on the PDC's web site.[21] The reports filed by ChangePac and BIAW-MSC give the electorate full disclosure of all the relevant campaign financing activity. As a result of its settlement with the AG, BIAW-MSC will itself report as a political committee with respect to the withheld MAF funds, *see* CP 118 (stipulated judgment), which had already been reported by ChangePac as contributions from the local associations.[22]

Requiring BIAW, a statewide trade association that provides a wide range of programs to thousands of members, to register and make

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[21] *E.g,* http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/contributions?param=Q0hBTkcgIDUwNw====&year=2008&type=continuing (last visited Oct. 17, 2010) (showing 2008 contributions from "BUILDING INDUSTRY ASSN OF WA to ChangePac)

[22] *See* http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/contributions?param=Q0hBTkcgIDUwNw====&year=2008&type=continuing (last visited Oct. 17, 2010) (sort contributions by date to see 10 contributions from local associations on August 20, 2008).

monthly disclosures of "all bank accounts, all deposits and donations, and all expenditures, including the names of each person contributing funds" even when unrelated to electoral campaign activity, *see EFF*, 111 Wn. App. at 598, would impose a significant burden on BIAW. Information pertinent to the funds at issue in this case would be duplicative of information already reported by BIAW-MSC and ChangePac, and requiring BIAW to register and report as a political committee would make no significant additional campaign finance information available to the public. *See Dan J. Evans Campaign*, 86 Wn.2d at 508–09 (requiring those who "make a single contribution" to report "would result in an unnecessary and unreasonable duplication and extension of the Act's detailed and somewhat lengthy reporting requirements"); *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("First Amendment freedoms need breathing space to survive, [and] government may regulate in the area only with narrow specificity."). Since the enforcement demanded by Plaintiffs (and rejected by the PDC) would impose significant additional burdens on BIAW and would serve no important purpose, it does not satisfy the exacting scrutiny required when government attempts to limit or burden political speech. Based on the record before the trial court, BIAW was entitled to summary judgment on these grounds, and its judgment should be affirmed.

2. Plaintiffs cannot justify enforcing a vague statute that burdens speech.

BIAW is also entitled to summary judgment on the political committee claim because, as Plaintiffs admit in their First Amended Complaint, it is unclear even to them whether the FCPA's reporting requirements extend to BIAW. Enforcing a vague statute that burdens speech would be unconstitutional. *E.g.*, *Citizens United v. F.E.C.*, 130 S. Ct. 876, 889 (2010) (laws unconstitutionally chill speech when "[p]eople of common intelligence must necessarily guess at [the law's] meaning and differ as to its application") (citation and quotation omitted); *see also Button*, 371 U.S. at 433 (government may only regulate the exercise of First Amendment freedoms "with narrow specificity").

In their First Amended Complaint, Plaintiffs plead that "[j]ust cause exists for litigating this claim because the public interest favors ***resolving the question*** as to who is legally responsible when there is a violation of RCW 42.17." CP 14 ¶ 52 (emphasis added). They also alleged that "[j]ust cause for litigation also exists because ***there is confusion*** over the extent of reporting requirements that apply in circumstances where an organization qualifies as a political committee." *Id.* ¶ 53 (emphasis added). Plaintiffs' contention that vagueness justifies reading the FCPA broadly and imposing registration and reporting

requirements on BIAW, gets things backwards. Vagueness and confusion regarding the scope and application of a statute, especially one that burdens speech, requires that the statute be construed narrowly or struck down. *E.g.*, *Buckley*, 424 U.S. at 42–44 (narrowing definition of "advocating the election or defeat" of a candidate to include only express advocacy because broader definition could chill speech); *see also F.E.C. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456–57 (2007) (courts must "err on the side of protecting rather than suppressing" political speech). BIAW was entitled to summary judgment on this ground as well.

VIII. ARGUMENT FOR BIAW'S CROSS-APPEAL OF THE DENIAL OF ATTORNEYS' FEES

The FCPA authorizes an award to BIAW of its attorneys' fees and costs in obtaining dismissal of the citizen's action. RCW 42.17.400(4) & (5). The statute provides two separate standards and two separate sources for such an award. First, "in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorneys' fees incurred by the defendant." RCW 42.17.400(4)(b). Second, a prevailing defendant "shall be awarded all costs of trial, and may be awarded reasonable attorneys' fees to be fixed by the court to be paid by the state of Washington." RCW

42.17.400(5).

BIAW's motion in the trail court was fully supported by the declarations and time records that would have allowed the trial court to determine the reasonableness of the request. *E.g.*, CP 931–85 (Clark Decl. and Exhibits); CP 986–88 (Jan 3. 2011, Decl. of L. Keith Gorder, Jr.). Plaintiffs did not challenge the reasonableness of the requested fees and costs. CP 1002:11–12.

A. The Court Should Have Awarded Fees to BIAW Pursuant to RCW 42.17.400(4)(b).

The purpose RCW 42.17.400(4)(b) is not only to prevent frivolous cases but to prevent "***harassing*** lawsuits" as well. *EFF*, 111 Wn. App. at 615 (emphasis added). In fact, the Washington Supreme Court has upheld the citizen enforcement provision against constitutional attack in part because it allows for an award of fees to a defendant who, like BIAW, has been subject to a harassing suit. *Fritz v. Gorton*, 83 Wn.2d 275, 314, 517 P.2d 911 (1974). The record shows that Plaintiffs brought and continued to press their suit without reasonable cause. The trial court did not address this standard and instead focused on whether Plaintiffs had "improper motives" in filing suit. CP 1059.

Demonstrating a lack of reasonable cause for purposes of a fee award under the FCPA is not difficult. A claim need not be facially

invalid to subject a plaintiff to fees, and fees may be awarded even as to claims that can survive summary judgment. *EFF*, 111 Wn. App. at 616 (granting fees to defendant on claim that survived summary judgment and was disposed of only at trial). A claim that fails for lack of proof merits an award of fees to the defendant. *Id.*

An award of fees is appropriate here because Plaintiffs and their counsel knew from the very beginning that the PDC and AG had carefully investigated their political committee claim and rejected it as lacking merit. Two years later, in opposition to BIAW's summary judgment motion, Plaintiffs offered no new evidence to disturb the PDC and AG's earlier conclusions. And Plaintiffs did not even bother presenting evidence to support their coordination / excess contribution claim, which had been the central claim in the litigation and provided the justification for disrupting Rossi's campaign with depositions and discovery right before the 2008 gubernatorial election.

Not only did Plaintiffs press their claims without reasonable cause but they unreasonably litigated them. Plaintiffs did not dispute in the trial court that they engaged in a laundry list of tactics that increased the cost of the litigation, including (1) the timing of the lawsuit to coincide with the run up to the 2008 election; (2) an *ex parte* request for emergency discovery (rescinded by the Court on BIAW's motion); (3) admonishable

behavior during Rossi's deposition; (4) last-minute cancellation of supposedly emergency depositions; (5) service of defective third-party subpoenas on multiple occasions; (6) abandoning a threatened motion for preliminary injunction (that had been the justification of the emergency discovery to begin with) after forcing BIAW to prepare a response; (7) failing to dismiss their coordination claim after (apparently) deciding months earlier to heed the PDC's recommendation that no further action was appropriate; and (8) insisting that BIAW answer the coordination claim after Plaintiffs had apparently decided to abandon it.

While these harassing tactics and Plaintiffs' failure of proof are sufficient to support a finding of no reasonable cause and an award of fees, *EFF*, 111 Wn. App. at 616, Plaintiffs' motives further support an award to BIAW. While not necessary for an award of fees, evidence of improper motives in suing helps demonstrate that the litigation was harassing.

This lawsuit was a weapon wielded by Plaintiffs and their attorneys to try to chill political speech with which they disagree. The discovery responses provided by Plaintiffs confirms this. *E.g.*, CP 896, CP 901. Plaintiffs claim that their actions furthered the goals of the FCPA, CP 239 ¶ 6 (Nov. 22, 2010, Decl. of Knoll Lowney) ("The wide reporting of the case and the dissemination of the deposition transcript did serve the public disclosure goals of the Act."), but publicizing spurious

allegations that had been rejected by the PDC and AG and were later dismissed does not further any of the policies identified in the FCPA. *See* RCW 42.17.010.

Plaintiffs will undoubtedly attempt to justify their suit in this Court as they did in the trial court by highlighting the vagueness and confusion surrounding the provisions under which they sued. But this flies in the face of long-standing First Amendment and Washington Constitutional jurisprudence, something the Plaintiffs are uniquely able to understand. CP 14 ¶¶ 52, 53. It is not reasonable to seek to apply vague laws to restrict speech. *E.g.*, *Button*, 371 U.S. at 435 (the Constitution does not condone prosecution under "a vague and broad statute" which "lends itself to selective enforcement against unpopular causes") (cited with approval in *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 169, 157 P.3d 831 (2007) (Johnson, J. concurring)); *Buckley*, 424 U.S. at 41 n.48 (vague laws "trap the innocent" and "foster arbitrary and discriminatory application"); *see also F.E.C. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 456–57 (2007) (courts must "err on the side of protecting rather than suppressing" political speech); *Voters Educ. Comm. v. Wash. State Pub. Disclosure Comm'n*, 161 Wn.2d 470, 485, 166 P.3d 1174 (2007) ("where First Amendment freedoms are at stake a greater degree of specificity and clarity of purpose is essential.").

In this case, liability for fees should extend to Plaintiffs' counsel as well as to Plaintiffs. The sworn testimony in the record indicates that this case was driven by Plaintiffs' counsel as much as it was by the named Plaintiffs. CP 1004 ¶ 4 (Decl. of Michael E. Withey) (referring to "our effort," "our discovery deposition," and "our reasons"); CP 1022 (discovery responses) ("[Utter] was in Africa when much of the preparation and litigation in this case occurred. He did not leave Africa until after the election."); CP 1029 (discovery responses emphasizing the role of Plaintiffs' counsel in identifying, collecting, and maintaining the factual materials upon which Plaintiffs relied). Given the unreasonable tactics they employed, the trial court should have awarded fees against Plaintiffs' counsel along with Plaintiffs as "person[s] commencing the action." RCW 42.17.400(4)(b).

B. Failing to Assess Fees against the Plaintiffs in this Case Will Chill Political Speech in Washington.

At its core, "the First Amendment prohibits the State from silencing speech it disapproves, particularly silencing criticism of the government itself." *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 135 Wn.2d 618, 626, 957 P.2d 691 (1998); *see also No New Gas Tax*, 160 Wn.2d at 166 (Johnson, J. concurring). Yet, Plaintiffs' discovery responses confirm that is exactly what they sought to do with this lawsuit.

CP 896; CP 901.

Denying a fee award in this case would chill free speech rights. When the State, including Plaintiffs standing in the shoes of the State, uses campaign finance laws as a sword to attack political opponents or silence speech, citizens must be protected and the State must be held accountable. *See No New Gas Tax*, 160 Wn.2d at 169 (Johnson, J. concurring). Without a fee award, any organization that lawfully exercises its First Amendment rights (or is affiliated with a subsidiary or political committee that does so) will have reason to fear that it may be burdened by years of litigation and hundreds of thousands of dollars of legal fees defending against false claims without recourse. First Amendment rights are too important. If an award of fees is not called for in this case, then it never is.

C. Fees Should Also Be Assessed against the State, which Determined that the Lawsuit Was without Merit and Barred yet Failed to Intervene.

An award of fees pursuant to RCW 42.17.400(5) is discretionary with the trial court. *No New Gas Tax*, 160 Wn.2d at 165. Such discretion is abused when based upon untenable grounds or reasons. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999). The only reason given by the trial court for not awarding fees was that BIAW did not show by a preponderance of the evidence that Plaintiffs acted with an improper motive. CP 1059. Nothing in the text of RCW 42.17.400(5)

requires any showing of improper motive, and the trial court "necessarily abuse[d] its discretion ... [when] it based its ruling on an erroneous view of the law." *EFF*, 111 Wn. App. at 605 (citing *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)).

The State should be held liable for BIAW's attorneys' fees and costs because of its failure to act. The AG identified fatal procedural defects at the outset of the lawsuit, coordinated with Plaintiffs here who prosecuted a largely duplicative suit, and kept itself apprised of the progress of this litigation. CP 875 ¶ 18 (Maguire). As the trial court recognized, the State could have intervened in the case. Had they done so—having already determined that the claims lacked merit—they could have stopped this lawsuit and protected BIAW from incurring substantial fees and expenses to defend its First Amendment rights in two separate cases. It is difficult to think of a situation where an award of fees under RCW 42.17.400(5) would be more appropriate.

IX. ATTORNEYS' FEES ON APPEAL

Pursuant to RAP 18.1, BIAW requests that this Court award it attorneys' fees on appeal on two grounds. ***First,*** if BIAW prevails on its cross-appeal, this Court should also grant it attorneys' fees for the cross-appeal. *Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198

(2007). Because, for the reasons just described, BIAW was entitled to attorneys' fees in the trial court, it should also receive fees on appeal.

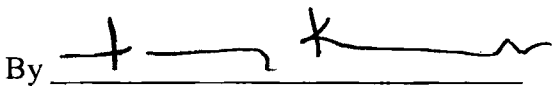
Second, regardless of how the Court resolves the cross-appeal, BIAW should be awarded fees for defending against this appeal, which makes arguments that are wholly unsupported by facts and contrary to settled Washington law. RAP 18.9 gives the Court the power to impose fees upon a party who "files a frivolous appeal." Additionally, RCW 4.84.185 provides for a prevailing party in any civil action "to receive expenses for opposing [a] frivolous action or defense." The statute applies to frivolous appeals as well as trial actions. *Fernando v. Nieswandt*, 87 Wn. App. 103, 111–12, 940 P.2d 1380 (1997).

X. CONCLUSION

For the foregoing reasons, this Court should affirm the summary judgment for BIAW and reverse the decision to deny a fee award. The case should be remanded with instructions to determine an appropriate award of fees to BIAW.

RESPECTFULLY SUBMITTED this 4th day of April, 2011.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Respondent Building Industry Association of Washington

By 

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Appendix

RCW 42.17.400
Enforcement. (Effective until January 1, 2012. Recodified as RCW 42.17A.765.)

(1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in RCW 42.17.390.

(2) The attorney general and the prosecuting authorities of political subdivisions of this state may investigate or cause to be investigated the activities of any person who there is reason to believe is or has been acting in violation of this chapter, and may require any such person or any other person reasonably believed to have information concerning the activities of such person to appear at a time and place designated in the county in which such person resides or is found, to give such information under oath and to produce all accounts, bills, receipts, books, paper and documents which may be relevant or material to any investigation authorized under this chapter.

(3) When the attorney general or the prosecuting authority of any political subdivision of this state requires the attendance of any person to obtain such information or the production of the accounts, bills, receipts, books, papers, and documents which may be relevant or material to any investigation authorized under this chapter, he shall issue an order setting forth the time when and the place where attendance is required and shall cause the same to be delivered to or sent by registered mail to the person at least fourteen days before the date fixed for attendance. Such order shall have the same force and effect as a subpoena, shall be effective statewide, and, upon application of the attorney general or said prosecuting authority, obedience to the order may be enforced by any superior court judge in the county where the person receiving it resides or is found, in the same manner as though the order were a subpoena. The court, after hearing, for good cause, and upon application of any person aggrieved by the order, shall have the right to alter, amend, revise, suspend, or postpone all or any part of its provisions. In any case where the order is not enforced by the court according to its terms, the reasons for the court's actions shall be clearly stated in writing, and such action shall be subject to review by the appellate courts by certiorari or other appropriate proceeding.

(4) Any person who has notified the attorney general and the prosecuting attorney in the county in which the violation occurred in writing that there is reason to believe that some provision of this chapter is being or has been violated may himself bring in the name of the state any of the actions (hereinafter referred to as a citizen's action) authorized under this chapter.

(a) This citizen action may be brought only if:

(i) The attorney general and the prosecuting attorney have failed to commence an action hereunder within forty-five days after such notice;

(ii) Such person has thereafter further notified the attorney general and prosecuting attorney that said person will commence a citizen's action within ten days upon their failure so to do;

(iii) The attorney general and the prosecuting attorney have in fact failed to bring such action within ten days of receipt of said second notice; and

(iv) The citizen's action is filed within two years after the date when the alleged violation occurred.

(b) If the person who brings the citizen's action prevails, the judgment awarded shall escheat to the state, but he shall be entitled to be reimbursed by the state of Washington for costs and attorney's fees he has incurred: PROVIDED, That in the case of a citizen's action which is dismissed and which the court also finds was brought without reasonable cause, the court may order the person commencing the action to pay all costs of trial and reasonable attorney's fees incurred by the defendant.

(5) In any action brought under this section, the court may award to the state all costs of investigation and trial, including a reasonable attorney's fee to be fixed by the court. If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages. If damages or trebled damages are awarded in such an action brought against a lobbyist, the judgment may be awarded against the lobbyist, and the lobbyist's employer or employers joined as defendants, jointly, severally, or both. If the defendant prevails, he shall be awarded all costs of trial, and may be

awarded a reasonable attorney's fee to be fixed by the court to be paid by the state of Washington.

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On April 4, 2011, I caused to be served in the manner noted below a copy of the document entitled **ANSWERING BRIEF AND OPENING CROSS-APPEAL BRIEF OF THE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON** on the following:

BY LEGAL MESSENGER:

Knoll Lowney
c/o Lonnie Lopez
Smith & Lowney, PLLC
2317 East John Street
Seattle, WA 98112

Michael E. Withey
Law Offices of Michael Withey
601 Union Street, Suite 4200
Seattle, WA 98101-4036

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

Executed this 4th day of April, 2011, in Seattle, Washington.

Suzette Barber