

No. 74978-1-I

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Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Respondent,

v.

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

Appellants.

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii-vi
A. INTRODUCTION	1
B. ASSIGNMENTS OF ERROR	2
(1) <u>Assignments of Error</u>	2
(2) <u>Issues Pertaining to the Assignments of Error</u>	3
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT	13
E. ARGUMENT	15
(1) <u>CRS Did Not Violate RCW 19.86.020</u>	15
(a) <u>CRS’s Solicitation Correctly Described Requirement of Corporate Minutes and Annual Meetings and the Trial Court Erred in Denying CRS’s Motion for Partial Summary Judgment</u>	20
(i) <u>Washington Law Requires Annual Shareholder Meetings</u>	20
(ii) <u>Minutes of Annual Shareholder Meetings</u>	25
(iii) <u>Shareholder Consents</u>	26
(b) <u>CRS’s Mailings to Prospective Customers Did Not Mislead by Attempting to Resemble Official Government Documents</u>	28
(i) <u>CRS Did Not Mimic Official Government Communications in Its Solicitation of Customers</u>	28

(ii)	<u>CRS’s Solicitations Did Not Contravene the AOD</u>	35
(2)	<u>The Trial Court Abused Its Discretion in Setting Penalties</u>	37
(3)	<u>The Trial Court Abused Its Discretion in Calculating the State’s Fee Award</u>	42
(a)	<u>The State’s Documentation of Its Attorney Time Was Inadequate</u>	43
(b)	<u>The State Cannot Recover the Time of Its Paralegal Investigator as Part of a Fee Award</u>	44
(c)	<u>The State’s Hours Claimed Fail to Segregate and Excise Time Spent on Unsuccessful Theories or Activities and Wasteful or Duplicative Time</u>	45
(4)	<u>The Trial Court Erred in Awarding Costs Beyond Those Allowed in RCW 4.84.010</u>	49
F.	CONCLUSION.....	50

Appendix

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Absher Construction Co. v. Kent Sch. Dist. No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1996).....	44
<i>Behnke v. Ahrens</i> , 172 Wn. App. 281, 294 P.3d 729 (2012), <i>review denied</i> , 177 Wn.2d 1003 (2013).....	16, 18, 19, 29
<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 312 P.3d 745 (2013), <i>review denied</i> , 179 Wn.2d 1026 (2014).....	42
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	43, 49
<i>Chen v. City of Seattle</i> , 153 Wn. App. 890, 223 P.3d 1230 (2009), <i>review denied</i> , 169 Wn.2d 1003 (2010).....	15
<i>Dowler v. Clover Park Sch. Dist. No. 400</i> , 172 Wn.2d 471, 258 P.3d 676 (2011).....	15
<i>Eriks v. Denver</i> , 116 Wn.2d 451, 824 P.2d 1207 (1992).....	15
<i>Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.</i> , 86 Wn. App. 732, 935 P.2d 628 (1997), <i>review denied</i> , 133 Wn.2d 1033 (1998).....	19
<i>Hangman Ridge Training Stables v. Safeco</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	<i>passim</i>
<i>Holiday Resort Cmty. Ass’n v. Echo Lake Assocs.</i> , 134 Wn. App. 210, 135 P.3d 499 (2006), <i>review denied</i> , 160 Wn.2d 1019 (2007).....	18
<i>Howell v. Spokane & Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991).....	15
<i>Klem v. Wash. Mut. Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	<i>passim</i>
<i>Leingang v. Pierce Cy. Medical Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	18
<i>Magney v. Lincoln Mut. Sav. Bank</i> , 34 Wn. App. 45, 659 P.2d 537 (1983).....	17
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998)	42, 43
<i>Miller v. Kenny</i> , 180 Wn. App. 772, 325 P.3d 278 (2014).....	50
<i>No. Coast Electric Co. v. Selig</i> , 136 Wn. App. 636, 151 P.3d 211 (2007).....	45
<i>Nordstrom, Inc. v. Tampourlos</i> , 107 Wn.2d 735, 733 P.2d 208 (1987).....	46, 49

<i>Panag v. Farmers Ins. Co.</i> , 166 Wn.2d 27, 204 P.3d 885 (2009)	16, 17
<i>Pham v. City of Seattle</i> , 159 Wn.2d 527, 151 P.3d 976 (2007)	46, 48
<i>Rush v. Blackburn</i> , 190 Wn. App. 945, 361 P.3d 217 (2015).....	16, 18
<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn.2d 148, 795 P.2d 1143 (1990).....	46
<i>Smith v. Behr Processing Corp.</i> , 113 Wn. App. 306, 54 P.3d 665 (2002).....	46
<i>State v. Black</i> , 100 Wn.2d 793, 676 P.2d 963 (1984)	42
<i>State v. Evans</i> , 177 Wn.2d 186, 298 P.3d 724 (2013)	25
<i>State v. Ralph Williams’ NW Chrysler Plymouth, Inc.</i> , 87 Wn.2d 298, 553 P.2d 423 (1976).....	37
<i>State v. Reader’s Digest Ass’n</i> , 81 Wn.2d 259, 501 P.2d 290 (1972).....	29
<i>State v. R.J. Reynolds Tobacco Co.</i> , 151 Wn. App. 775, 211 P.3d 446 (2009), <i>review denied</i> , 168 Wn.2d 1026 (2010)	35, 41
<i>State v. WWJ Corp.</i> , 138 Wn.2d 595, 980 P.2d 1257 (1999)	39, 41
<i>TJ Landco, LLC v. Harley C. Douglass, Inc.</i> , 186 Wn. App. 249, 346 P.3d 777, <i>review denied</i> , 184 Wn.2d 1003 (2015).....	45
<i>Wilson v. Steinbach</i> , 98 Wn.2d 434, 656 P.2d 1030 (1982)	15

Federal Cases

<i>Baker v. G.C. Services Corp.</i> , 677 F.2d 775 (9th Cir. 1982)	30
<i>BMW of No. America, Inc. v. Gore</i> , 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996).....	38, 40, 41
<i>Douyon v. N.Y. Med. Health Care, P.C.</i> , 894 F. Supp. 245 (E.D.N.Y. 2012).....	30
<i>Empie v. Medical Society Business Services Inc.</i> , 2014 WL 5080414 (D. Ariz. 2014).....	30
<i>Fed. Trade Comm’n v. Sperry & Hutchinson Co.</i> , 405 U.S. 233, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972).....	16-17
<i>Floersheim v. F.T.C.</i> , 411 F.2d 874 (9th Cir. 1969), <i>cert. denied</i> , 396 U.S. 1002 (1970).....	30
<i>Gradisher v. Check Enforcement Unit, Inc.</i> , 210 F. Supp. 2d 907 (W.D. Mich. 2002).....	30
<i>Pettit v. Retrieval Masters Creditors Bureau, Inc.</i> , 42 F. Supp. 2d 797 (N.D. Ill. 1999), <i>aff’d</i> , 211 F.3d 1057 (7th Cir. 2000)	30
<i>Removatron Int’l Corp. v. F.T.C.</i> , 884 F.2d 1489 (1st Cir. 1989)	31

<i>Slough v. F.T.C.</i> , 396 F.2d 870 (5th Cir. 1968), <i>cert. denied</i> , 393 U.S. 980 (1968).....	30
<i>State Farm Mut. Auto Ins. Co. v. Campbell</i> , 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).....	38, 39, 40, 41
<i>Sullivan v. Credit Control Servs.</i> , 745 F. Supp. 2d 2 (D. Mass. 2010).....	30
<i>Swartz v. KPMG, LLC</i> , 476 F.3d 756 (9th Cir. 2007)	19

Other Cases

<i>Adams v. First Fed. Credit Control, Inc.</i> , 1992 WL 131121 (N.D. Ohio 1992).....	30
<i>State ex rel. Suthers v. Mandatory Poster Agency, Inc.</i> , 260 P.3d 9 (Colo. App. 2009), <i>cert. dismissed</i> (2010).....	4, 30

Statutes

RCW 4.84.010	3, 15, 49
RCW 19.86	1
RCW 19.86.020	<i>passim</i>
RCW 19.86.080	42
RCW 19.86.090	2
RCW 19.86.140	3, 37
RCW 19.86.920	29, 34
RCW 23B.07.010(1).....	24
RCW 23B.07.040.....	24, 27
RCW 23B.07.040(1)(b)(v).....	27
RCW 23B.07.040(5)	27
RCW 23B.08.400.....	25
RCW 23B.08.400(3).....	23, 25
RCW 23B.16.010.....	23, 26
RCW 23B.16.010(1).....	25
RCW 23B.16.020(2)(a).....	25
RCW 23B.16.220.....	33
RCW 43.10.150	43

Codes, Rules and Regulations

§ 1692e(1).....	29
-----------------	----

§ 1692e(9)	29
15 U.S.C. § 45	29, 30
15 U.S.C. § 1692	29
CR 11	45
RPC 3.1	45
RPC 3.6	11

Other Authorities

4 Amer. Bar Assoc., <i>Model Bus. Corp. Act</i> <i>Annotated</i> 16-10 (2013)	26
25 <i>Wash. Prac., Contract Law and Practice</i> § 18:310.02 (3d ed.)	34
John Morey Maurice, <i>The 1990 Wash. Bus. Corp. Act</i> , 25 <i>Gonz. L. Rev.</i> 373 (1990)	26
Philip A. Talmadge, <i>The Award of Attorney Fees in Civil</i> <i>Litigation in Washington</i> , 16 <i>Gonz. L. Rev.</i> 57 (1980)	43
Robert McGaughey, <i>Wash. Corp. Law Handbook</i> § 7.04 (2000)	26, 27
Stewart M. Landefeld, Barry M. Kaplan, Steven R. Yentzer, <i>Washington Corporate Law: Corporations and LLCs</i> (Lexis Nexis, 2002 ed.)	24
<i>Washington Business Entities: Law and Forms</i> § 13:20 (Lexis Nexis 2014)	27
WI 180.1601(1)	10, 23
WSBA, <i>Wash. Bus. Corp. Act Sourcebook</i> , 08.400-1 (3rd ed. 2010)	25, 26

A. INTRODUCTION

The present case arises under the Consumer Protection Act, RCW 19.86 (“CPA”). The appellants, collectively “CRS,” are a family-owned business offering a service to Washington corporations, assisting them to comply with their statutory obligation to properly prepare and maintain corporate documents. The State, through the Attorney General’s Office, and the Secretary of State’s Office (“SOS”), publicly accused CRS of misrepresenting Washington corporate law, and soliciting customers as if it were a public agency. The State begrudgingly admitted, after filing suit against CRS, that CRS’s service correctly reflected Washington corporate law.

Even though the State effectively acknowledged that a key aspect of its case on CRS’s alleged misrepresentation of Washington corporate law was wrong, the trial court, in a series of rulings without a trial, made key liability and damages decisions. The trial court denied CRS’s motions for summary judgment on the State’s CPA claim. It granted the State’s motion, determining as a matter of law that the format of CRS’s solicitation of its prospective customers was an unfair or deceptive act or practice in trade or commerce under RCW 19.86.020 because they impliedly were from a public agency, despite the fact that they did not bear the indicia of a governmental mailing and they contained specific

statements that they were not from a government agency. The trial court then imposed onerous civil penalties and sanctions against CRS and excessive attorney fees pursuant to RCW 19.86.090 in no small part due to its erroneous perception that CRS had violated what amounted to a consent decree involving a different division of CRS that was marketing labor law compliance posters.

This Court should reverse the trial court's decision with its heavy-handed penalties and fee award.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering its January 26, 2016 order granting the State's motion for summary judgment and denying CRS's motion.

2. The trial court erred in entering its February 10, 2016 order denying CRS's motion for reconsideration.

3. The trial court erred in entering its March 3, 2016 order on the amount of civil penalties and restitution.

4. The trial court erred in entering its March 11, 2016 fees and costs order.

5. The trial court erred in entering its March 25, 2016 judgment.

(2) Issues Pertaining to the Assignments of Error

1. Where the State belatedly admitted that a business offering a service to Washington corporations, assisting them to comply with their statutory obligations to prepare and maintain corporate documents accurately described Washington corporate law, did the trial court err in denying the business's motion for summary judgment in connection with the content of its solicitation to its prospective customers under RCW 19.86.020? (Assignments of Error Numbers 1, 2, 5)

2. Where a business's mailings to prospective customers about a corporate records preparation service specifically stated that the mailings were not from a government agency and bore no earmarks that they were from such an agency, did the trial court err in ruling as a matter of law that such solicitations were unfair or deceptive? (Assignments of Error Numbers 1, 2, 5)

3. Did the trial court abuse its discretion in setting onerous penalties under RCW 19.86.140 based on the number of solicitations by a business to sophisticated business customers that exceed the standards for due process of law? (Assignments of Error Numbers 3, 5)

4. Did the trial court abuse its discretion in the calculation of the attorney fee award for the State by failing to properly apply the requisite lodestar method? (Assignments of Error Numbers 4, 5)

5. Did the trial court err in awarding costs beyond those authorized in RCW 4.84.010? (Assignments of Error Numbers 4, 5)

C. STATEMENT OF THE CASE

CRS is a division of the Mandatory Poster Agency, Inc. ("MPA"), a family business founded by brothers Steve, Tom, and Joe Fata. CP 1288. The Fata brothers started the MPA in 1999 to sell labor law posters

to businesses across the country. CP 1290, 1296.¹ The company employs between 30 and 100 people on a seasonal basis in two offices in Lansing, Michigan. CP 1289, 1294-95.

In 2008, the Attorney General raised concerns over MPA's workplace poster solicitation. CP 8-11. Though the Fatas disagreed with the State's allegations — indeed, similar allegations were dismissed by a Colorado court after a trial on the merits² — the company worked in good faith with the Attorney General's office to resolve its concerns and continue its direct mail business, hiring David Brake, an accomplished Michigan lawyer, CP 1390, who negotiated what amounted to a consent decree, denominated an Assurance of Discontinuance (“AOD”), with the Attorney General. CP 994-99.

The 2008 AOD was a voluntary agreement entered into by the parties and contained no findings or admissions of liability; in fact, the AOD could not be treated as an admission of CPA liability. CP 998-99. It contained extensive mutually-agreed standards for MPA's mailings in Washington that barred any effort to equate solicitations from MPA as

¹ Such posters are required by law to be posted in employers' businesses advising workers of the applicable minimum wage rates or other wages and hours requirements under local, state, and federal law.

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

coming from a public agency. CP 995-98. The AOD was filed in the Thurston County Superior Court and approved by that court. CP 994-98. No violations of the AOD have ever been discerned by the State in connection with MPA's poster business.

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

CRS marketed its corporate records services through direct mail to prospective customers; to purchase CRS's service, corporations provided information requested in the mailing and complete an Annual Minutes Records form. CP 2199-2200. The form requested the names of all shareholders, directors, and corporate officers, along with a contact person. *Id.* CRS used the information to prepare a Corporate Minute Book that included a unanimous shareholder consent for the election of directors and officers, as well as a ratification by the board of corporate actions in the prior year. CP 2203-08.³ The service came with a money-

³ Annual meeting consents are another useful corporate document that protects shareholders from personal liability for the financial obligations of the corporation and helps directors uphold their fiduciary duties. CP 1966, 1967.

back guarantee if a customer is dissatisfied. CP 2195, 2205. CRS maintained copies of the Corporate Minute Book as a backup in the event a corporation cannot find the original. CP 618. That Minute Book is similar to services provided by lawyers, accounting firms, and other corporate service providers such as Legal Zoom and CT Corporation Services. CP 1965-66; 1968. CRS charged \$125 for its service, but there were other separate charges for the preparation of shareholder and director consents. CP 618.⁴

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

CRS sent solicitations to Washington consumers in August 2012, September 2012, and February 2013, CP 618, and received 2,901 orders, CP 484-85, which were timely fulfilled. CRS offered all customers an unconditional money-back guarantee. CP 618.

⁴ Some law firms charge in excess of \$1,000 for corporate maintenance requirements; Legal Zoom charges \$99; and do-it-yourself consent forms can be found for free on the internet. CP 1308-15, 1320.

Following CRS's August mailing, the SOS's Corporations Division issued consumer alerts and blog posts that misrepresented CRS's mailing, claiming that the solicitation asked consumers to "file" annual minutes. CP 777-92, 803-13, 853-58. Pamela Floyd, the director of that division, publicly labeled CRS's service as a "scam" before any investigation,⁵ and without knowing that Washington corporations have a statutory obligation to hold annual shareholder meetings and prepare minutes. CP 707-08, 722, 739. That same state official did not know what a corporate minute book was. CP 708.

Brake responded to consumer inquiries arising out of the confusion caused by the SOS by preparing letters to the Attorney General's Consumer Protection staff regarding specific complainants. CP 1327-34.

In those letters, Brake explained:

Washington law requires that corporations hold annual meetings of shareholders. Furthermore, meetings of board of directors are authorized by law. Washington law also requires that corporations keep as permanent records minutes of all meetings of shareholders and board of directors. My client provides services to meet these requirements.

⁵ Floyd had not even examined the envelope of CRS's mailing before making her pronouncement. CP 722. Had she done so, she would have noted the specific disclaimer there stating that mailer was not a government document.

CP 1327, 1330, 1333. The letters further emphasized that CRS's services are "fully guaranteed" and that any customer could receive a refund if dissatisfied with CRS's services. *Id.*; CP 1018.⁶

In October 2012, CRS sent its second mailing. CP 618. On October 9, 2012, the SOS published a Consumer Alert equating CRS with Compliance Services, another business offering corporate record keeping assistance, that had no relation to CRS. CP 784-85, 791.⁷

Following that Consumer Alert, Washington media reported on the Division's statement that CRS's service was a "scam." CP 710, 729. For example, KING 5 News' October 23, 2012 11:00 p.m. broadcast accused CRS of "lying and deception," calling the company a "rat," and erroneously describing CRS's service as "a big fat waste of \$125.00." CP 799-801.⁸

⁶ Notably, *seven* of the State's eighteen declarants decided to keep their CRS corporate minute books and not seek a refund. CP 139, 145, 159, 185, 207, 223, 238.

⁷ In drafting this posting, the Division simply cut-and-pasted from a Florida alert, changing few substantive details. CP 725-26, 793-97. The Florida notice was sent to the Division by a Washington attorney in private practice. CP 793-94.

⁸ In conjunction with its report, KING 5 News posted on its website and Facebook that CRS's mailing was "bogus" and misstated that CRS's Form asked for a "filing fee." CP 656. Parroting the language of the October 19, 2015 Consumer Alert, KING 5 News stated it "is true [that] for-profit corporations and non-for-profit corporations alike must hold shareholder meetings and record minutes" but noted that "there is no requirement to submit the minutes to the state or to pay anyone to do so." *Id.* KING 5 News' Facebook post warned consumers: "Don't be duped!" by CRS's mailing. *Id.*

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

In February 2013, CRS sent its third mailing. CP 618. On March 12, 2013, the SOS issued another Consumer Alert again conflating CRS with "COMPLIANCE SERVICES" and misstating that CRS's mailing requested "Annual Minutes" for "filing." CP 856.

After its February 2013 mailing, CRS was contacted by the Attorney General and it voluntarily suspended its business in Washington as a good faith gesture while it worked with the Attorney General to address any concerns. CP 619. The Attorney General's Office issued a Civil Investigation Demand ("CID") to CRS in April 2013, to which CRS promptly responded. CP 1337-46.

Floyd, who authorized calling CRS a "scam" testified she was "happy" about the media coverage. CP 729.

The State filed the present action one year later in the King County Superior Court on June 25, 2014,⁹ misstating Washington corporate law. CP 1-31.¹⁰ The lawsuit was accompanied by a lengthy press release by the Attorney General which described CRS as having “duped” customers for the preparation of “unnecessary documents that Washington businesses are not required to file with the Secretary of State,” and indicated in its headline that 2,900 businesses may receive refunds. CP 859. Attorney General Ferguson was quoted as saying CRS was a “scammer” and it

⁹ In July 2013, Brake sent a letter to the Attorney General’s Office offering to allay any concerns over CRS’s mailings by proposing that CRS send a letter to each of its 2,901 Washington customers that would provide additional information about CRS’s business, reemphasize that customers had no obligation to purchase CRS’s services, reiterate the distinction between CRS’s service of preparing annual consents and a corporation’s annual renewal requirement, and again offer to fully refund any unsatisfied customer. CP 1348-50. The Attorney General’s Office rejected that solution. CP 1351-52.

¹⁰ Even after receiving Brake’s September 2012 and July 2013 letters, the Attorney General’s Office misstated Washington corporate law in the complaint and its June 2014 press release. The complaint incorrectly stated that “Washington law does not require a corporation to prepare minutes of its annual meeting of shareholders. Rather, Washington law provides that if a corporation chooses to prepare minutes of its annual meeting those minutes must be retained permanently.” CP 6. The press release also misinformed the public stating that “[t]here is no requirement for Washington corporations to prepare minutes of their shareholder meetings.” CP 859.

This continued misstatement is not surprising as the complaint was largely a “cut and paste” of a Wisconsin complaint. CP 1034. Wisconsin law, unlike Washington law, does not clearly direct that annual corporate shareholders meeting occur. *See* WI 180.1601(1).

“preyed on unsuspecting business owners.” *Id.*¹¹ The case was assigned to the Honorable William Downing.

CRS filed a motion for partial summary judgment in February 2015, explaining that the contents of its solicitations to prospective customers were not unfair or deceptive because they accurately represented Washington corporate law. CP 39-52. In an interrogatory response shortly thereafter, the State insisted yet again that “there is no ‘annual minutes requirement’ in Washington law directing a corporation to prepare minutes of its annual meeting.” CP 864.

CRS and its expert, University of Washington Law School Professor Dwight Drake, met with the Attorney General’s Office in June 2015 to again attempt to understand the State’s position and correct the misstatement of Washington law. CP 867.¹² Following the meeting, the Attorney General sent a June 18, 2015 letter to “clarify” the State’s position, conceding that “[i]f a meeting is held, then minutes must be kept as permanent records” and reaffirmed that corporate actions may “be taken

¹¹ This practice by the Attorney General, an elected official, implicates the provisions of RPC 3.6, particularly where, as here, the assertions in the media are the product of a poor understanding of the applicable law.

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

by executed consent without a meeting, thereby bypassing the need for minutes.” CP 867-68.

Both CRS and the State moved for summary judgment on November 16, 2015, with regard both to the format and contents of CRS’s mailings. CP 620-70. The State’s motion continued to insist, albeit very briefly, that the CRS’s solicitation somehow provided a service unnecessary under Washington corporate law, CP 636-37, notwithstanding the June 18, 2015 letter and admissions it made in response to CRS’s requests for admission of facts regarding Washington corporate law. CP 899-903.

The trial court ruled as a matter of law that CRS violated the CPA, focusing essentially on the format of its solicitations. RP 45-47. The court did not address the contents of the solicitations on Washington corporate law. *Id.* It granted the State’s motion for summary judgment and denied CRS’s on January 26, 2016. CP 1590-94. CRS moved for reconsideration of that order, CP 1595-1601, but the trial court denied the motion. CP 1751-52.

The trial court had indicated in its summary judgment ruling on December 18, 2015 that it intended to impose penalties, including restitution, after the parties conferred on that question. RP 49-50. The trial court then subsequently entered an order on civil penalties, imposing

a sanction of \$10 for what it perceived were 79,354 violations of the AOD and CPA. CP 2044-53. In that order, the court also set up a restitution fund. CP 2045-51. In a subsequent March 11, 2016 order, the court awarded the State \$337,593.20 in fees and costs of \$39,571.27. CP 2125-27. The court entered a final judgment on March 25, 2016, CP 2128-32, from which CRS has timely appealed. CP 2133-63.

D. SUMMARY OF ARGUMENT

CRS offered a lawful annual meeting minutes service (similar to that provided by law firms and others). The State initially contended that CRS violated RCW 19.86.020 because the contents and format of its mailings to prospective customers of this service were unfair or deceptive. But after filing this action and issuing damning press releases (following the SOS's Consumer Alerts), the Attorney General's Office belatedly *admitted* that CRS's service was legitimate as Washington corporate law mandated the filing of documents relating to shareholder annual meetings of the type CRS marketed.

With regard to the contents of CRS's solicitations, they accurately stated Washington corporate law and the trial court should have ruled as a matter of law that RCW 19.86.020 was not violated; the trial court should have granted CRS's motion for partial summary judgment on this facet of the State's claim.

With regard to the format of CRS's solicitations, its mailings accurately described its service in solicitations to Washington corporations, did not include any impermissible indicia suggesting the solicitation was from a government agency (such as the State Seal), included a clear statement that it was not from a government agency, and offered a money back guarantee for any dissatisfied customers. CRS fulfilled its customers' service requests.

The trial court could have entered summary judgment dismissing the State's claims regarding the format of CRS's solicitations because, as a matter of law, its mailings were neither unfair or deceptive. At a minimum, however, as this was a "capacity to deceive" case or one based on a violation of the public interest, the issue of whether the format of CRS's mailings violated RCW 19.86.020 was for the trier of fact after a trial, where competing expert opinions were provided by the parties on their effect. The trial court should have denied the State's summary judgment motion.

If the trial court erred in finding that CRS violated the CPA, its decisions on penalties and fees and costs must not stand. However, even if this Court determines that CRS violated the CPA, the trial court abused its discretion in setting the penalties and calculating the State's fee award under the lodestar method by accepting without question the State's

excessive fee request. Moreover, the trial court erred in awarding costs beyond those allowed under RCW 4.84.010 to the State.

E. ARGUMENT¹³

(1) CRS Did Not Violate RCW 19.86.020

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

Generally, the first element of the *Hangman Ridge* test can be established one of three ways. Conduct is unfair or deceptive per se, if the violation of a statute also constitutes a violation of the CPA. *Klem v.*

¹³ This Court must review the trial court's summary judgment decisions de novo. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). In doing so, this Court considers the facts and reasonable inferences from those facts, in a light most favorable to CRS as the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Any credibility decisions pertinent to material issues are for the trier of fact. *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 626-27, 818 P.2d 1056 (1991). Moreover, the testimony of a competent expert on an ultimate issue of fact defeats a motion for summary judgment. *Eriks v. Denver*, 116 Wn.2d 451, 457, 824 P.2d 1207 (1992); *Chen v. City of Seattle*, 153 Wn. App. 890, 910, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003 (2010).

Wash. Mut. Bank, 176 Wn.2d 771, 785, 295 P.3d 1179 (2013). Alternatively, that element can be met if the acts of the defendant have the capacity to deceive a substantial portion of the public. *Hangman Ridge*, 105 Wn.2d at 785; *Behnke v. Ahrens*, 172 Wn. App. 281, 290-92, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013). Finally, that element can be met if the plaintiff proves an unfair or deceptive act or practice not regulated by statute, but the act is in violation of the public interest. *Klem*, 176 Wn.2d at 787; *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 37 n.3, 204 P.3d 885 (2009). Thus, unless a defendant's conduct is not per se unfair or deceptive, the plaintiff must show that the defendant's conduct is unfair or deceptive under a case-specific analysis of those terms. *Rush v. Blackburn*, 190 Wn. App. 945, 962, 361 P.3d 217 (2015).

The CPA defines neither “unfair” or “deceptive” and Washington courts have permitted the definitions to evolve as a matter of common law interpretation. *Klem*, 176 Wn.2d at 785. But it is important to note that the test for unfair or deceptive pertains to the perceptions of the ordinary or reasonable consumer. *Panag*, 166 Wn.2d at 50; *Behnke*, 172 Wn. App. at 293.

Washington law has largely adopted the FTC's definition of “unfair” conduct noted in *Fed. Trade Comm'n v. Sperry & Hutchinson*

Co., 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972) that looks to:

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise – whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of fairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen).

Klem, 176 Wn.2d at 786; *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983).

The *Panag* court addressed the standard for “deceptive” conduct stating that conduct is deceptive if there is a representation, omission or practice that is likely to mislead a reasonable consumer. 166 Wn.2d at 50. The Court also noted that a communication must be assessed against the “net impression” it conveys and that a communication may be deceptive even though it contains truthful information. *Id.* Conduct can be unfair without being deceptive. *Klem*, 176 Wn.2d at 787.

Of critical importance here is the standard of review to be applied by this Court with respect to a trial court decision on the first element of the *Hangman Ridge* test for an RCW 19.86.020 claim. Candidly, the law on the standard of review is not a picture of clarity. Courts often state by rote that whether an act or practice is unfair or deceptive is a question of

fact, citing *Leingang v. Pierce Cy. Medical Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). *E.g.*, *Rush*, 190 Wn. App. at 963-64. But that is a superficial analysis of *Leingang*. The Court there actually indicated that whether a party, in fact, committed a particular act is a factual issue, and the application of the statute to such facts is a question of law. In *Leingang*, there was no dispute as to the parties' conduct.

This Court has employed a more nuanced understanding of the standard of review. While acknowledging that whether an act is unfair or deceptive is generally a question of law, this Court has stated that the act has the capacity to deceive a substantial portion of the public or affects the public interest¹⁴ is a question of fact. *Behnke*, 172 Wn. App. at 292, 293; *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs.*, 134 Wn. App. 210, 226-27, 135 P.3d 499 (2006), *review denied*, 160 Wn.2d 1019 (2007) (form rental agreement sent to 500 mobile home park owners; question of fact as to whether that had the capacity to deceive a substantial portion of the public). Similarly, the question of whether a defendant's conduct was unfair or deceptive because it involved an activity not regulated but implicating the public interest is a question of fact.¹⁵

¹⁴ The third, distinct element of the *Hangman Ridge* test is whether the conduct complained of affects the public interest. *Behnke*, 172 Wn. App. at 293-94.

¹⁵ While this Court clearly noted in *Behnke* and *Holiday Resort* that the capacity to deceive a substantial portion of the public is a question of fact, the Supreme Court in

Put another way, whether there is per se unfair or deceptive conduct is readily a question of law; a court is applying the law in making such a decision. As for the other two ways of proving unfair or deceptive conduct – the capacity to deceive or conduct implicating the public interest – are precisely factually-driven decisions best left to the trier of fact after a full trial.

Finally, plaintiffs in CPA and fraud claims who are businesses or other sophisticated entities are held to a higher standard to prove the first element of the *Hangman Ridge* test. For example, the CPA’s public interest element is not established where alleged misrepresentations were made to limited group of businesspersons, “whose experience indicated they were better able than the average consumer” to evaluate risks. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 745, 935 P.2d 628 (1997), *review denied*, 133 Wn.2d 1033 (1998).¹⁶

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

¹⁶ This principle was also articulated by the Ninth Circuit in *Swartz v. KPMG, LLC*, 476 F.3d 756 (9th Cir. 2007), a case criticized by the *Behnke* court. 172 Wn. App. at 290-92. But *Swartz* involved the marketing of an investment scheme to a “select audience” of highly sophisticated, extremely wealthy investors. *Id.* at 761. The district court noted that this select audience was “neither unsophisticated nor easily subject to chicanery.” 401 F. Supp. 2d at 1154. The public interest was not affected.

In this case, the trial court erred in concluding as a matter of law that CRS's conduct was unfair or deceptive. In particular, whether CRS's conduct was unfair or deceptive, either because it had a capacity to deceive a substantial portion of the public or because, though unregulated, it affected the public interest, was an issue for the trier of fact at trial.

(a) CRS's Solicitation Correctly Described Requirement of Corporate Minutes and Annual Meetings and the Trial Court Erred in Denying CRS's Motion for Partial Summary Judgment

Here, CRS accurately described the service that it intended to provide; more to the point, that service was a legitimate one under Washington corporate law, as the State now essentially concedes.

(i) Washington Law Requires Annual Shareholder Meetings

The record here confirms that the SOS and the Attorney General labored under a misconception about Washington corporate law. As noted *supra*, Floyd, the director of the Corporations Division, was unaware of the annual meeting requirements for Washington corporations and failed to conduct any investigation of CRS's service before sending a State-wide announcement that CRS's solicitation was a "scam" using "sneaky tactics." Instead of waiting for the results of the Attorney General's investigation, the Division rushed to judgment, cutting and pasting a Florida consumer alert involving a different company and different

mailing, lumping CRS's mailings together with unrelated, allegedly fraudulent mailers.¹⁷ The Division misstated its contents when it claimed that CRS's mailer stated it would assist customers to file documents. The SOS even went so far as to actively encourage Washington corporations to file complaints with the Attorney General.¹⁸

When consumers heard this misinformation about the law and accusations of CRS being a "scam" and a "rat," some people understandably may have been confused about their legal obligations and CRS's services. However, many who called the SOS before the October 19, 2015 Consumer Alert noted that they had not been deceived, but were instead concerned about other consumers possibly being confused about annual filing requirements. CP 828.

CRS's direct mail solicitation informed Washington corporations about the statutory obligation to hold an annual shareholder meeting and prepare minutes. CRS did not misrepresent a requirement of Washington law.

¹⁷ That misstatement of law persisted until at least 2014. CP 961-62 (2014 Facebook post still conflating CRS with two unrelated companies).

¹⁸ The campaign of misinformation continued when the State filed this lawsuit in 2014, it publicly misstated the law, claiming that: "There is no requirement for Washington corporations to prepare minutes of their shareholder meetings." CP 859.

Similarly, the State’s complaint alleged that CRS falsely stated that Washington law requires corporations to prepare minutes of annual shareholder meetings. CP 6. It appears that the State adopted this position from the Wisconsin Attorney General’s complaint, applying Wisconsin law that is different than Washington’s corporate law. CP 619, 1031-38. The complaint asserts that “Washington law does not require a corporation to prepare minutes of its annual meeting of shareholders. CP 6. Rather, the State claimed, Washington law provides that if a corporation chooses to prepare minutes of its annual meeting, those minutes must be retained permanently.” *Id.* The State’s June 30, 2014 press release announcing the lawsuit also stated “[t]here is no requirement for Washington corporations to prepare minutes of their shareholder meetings.” CP 859.

Shortly after CRS’s February 2015 filing of a motion for partial summary judgment, the State reiterated in discovery that “there is no ‘annual minutes requirement’ in Washington law directing a corporation to prepare minutes of its annual meeting.” CP 864. The State once again reaffirmed this misstatement of law in its letter sent after the June 2015 meeting with Professor Drake. CP 867-68.¹⁹

¹⁹ The Attorney General did concede in that June 18, 2015 letter that minutes must be kept if a meeting is held, demonstrating the risks of mindlessly adopting the Wisconsin complaint. Washington law states that a corporation “*shall delegate* to one of the officers responsible for preparing minutes of the directors’ and shareholders’ meetings and for authenticating records of the corporation” and that a corporation “*shall*

To support its theory that minutes need only be kept “if a meeting is held,” in August 2015 the Attorney General’s Office produced the expert report of Professor Douglas M. Branson. CP 871-95. Branson asserted that no hard and fast requirement exists for annual shareholders’ meetings and that there was not a requirement that minutes, or their equivalent, be kept. CP 882, 887. He also so testified in his deposition. CP 933. But Prof. Branson’s testimony is inconsistent with what he has written in several corporate law textbooks, and with what he teaches law students. CP 928-32.²⁰

Just one business day before the summary judgment deadline, the State served responses to CRS’s requests for admission, in which it admitted in various answers that: (1) Washington law provides that directors shall be elected annually or at a time stated in or fixed in accordance with the corporation’s bylaws; (2) if an official meeting of the shareholders of a corporation takes place, a corporation must prepare and

keep as permanent records minutes of *all* meetings of its shareholders.” RCW 23B.08.400(3) (emphasis added); RCW 23B.16.010 (emphasis added). By contrast, Wisconsin statutes do not as clearly require that meeting minutes be prepared, stating “[a] corporation shall keep as permanent records any of the following *that has been prepared*: (a) Minutes of meetings of its shareholders and board of directors” WI 180.1601(1) (emphasis added). Despite this significant difference, both complaints stated—in almost identical language—that there is no annual minutes requirement. *See* CP 6, 1034.

²⁰ Here, too, this Court can independently determine that Professor Drake was correct in his analysis of Washington corporate law, but the mere fact that respected experts disagreed on this issue demonstrates summary judgment was improper.

keep minutes of its shareholder meetings; (3) a corporation can take action without a meeting, which could include the election of directors, if the corporation acts in compliance with RCW 23B.07.040 and the other provisions of Washington corporate law such as notice of a meeting; and (4) there may well be and likely are attorneys and accountants that prepare written consent resolutions in lieu of annual shareholder meetings for corporations registered in Washington. CP 1899-1903. The Attorney General's admissions are consistent with Washington corporate law.

Washington law unambiguously states that corporations must hold an annual shareholder meeting for the election of directors. RCW 23B.07.010(1) ("a corporation shall hold a meeting of shareholders annually for the election of directors at a time stated in or fixed in accordance with the bylaws.").²¹

CRS did not mispresent the law in saying annual corporate meetings are necessary.

²¹ This requirement is generally acknowledged in treatises. Stewart M. Landefeld, Barry M. Kaplan, Steven R. Yentzer, *Washington Corporate Law: Corporations and LLCs* (Lexis Nexis, 2002 ed.) (hereinafter "WA Corp. Law") at § 7.1 ("A Washington corporation must hold an annual meeting of shareholders."). Perhaps most tellingly, the State's own "Small Business Guide," available to the public on the Secretary of State's website, advises corporations of the requirement to hold annual meetings. CP 922 ("Corporations also have other requirements, such as issuing stock certificates, holding annual meetings and keeping minutes, electing directors, etc."). Moreover, the State's expert, Professor Branson, when asked whether he teaches law "students that they should tell their clients they need to have an annual meeting and document those annual meetings" replied, "Yes." CP 928.

(ii) Minutes of Annual Shareholder Meetings

Washington law is also clear that corporations “shall keep as permanent records minutes of all meetings of its shareholders and board of directors.” RCW 23B.16.010(1).²² Corporations are also required to assign to a corporate officer “the duty of preparing minutes of all shareholder meetings.” RCW 23B.08.400(3).²³ The statutes make it clear that Washington corporations must prepare minutes of all shareholder meetings and keep them permanently.

Professor Drake, who has practiced law and advised corporate clients in private practice for more than 30 years, opined in his extensive, thorough report, CP 680-97, that Washington’s statutes and their legislative history make it clear that “nothing optional was intended with regard to this statutory duty” to take minutes of an annual meeting. CP 687. Preparing and maintaining minutes or consents in lieu are not empty formalities. Failure to prepare and keep minutes of an annual meeting would be a “flagrant breach of duty by the board of directors” and could

²² Shareholders may seek the minutes of such shareholder meetings. RCW 23B.16.020(2)(a).

²³ The official legislative history of RCW 23B.08.400 states that “[t]he bylaws or the board of directors must . . . delegate to an officer the responsibility to prepare minutes.” WSBA, *Wash. Bus. Corp. Act Sourcebook*, 08.400-1 (3rd ed. 2010) (“WSBA”). See *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724, 728 (2013) (“We may . . . look to legislative history for assistance in discerning legislative intent [regarding an ambiguous statute].”).

have significant implications for taxes and personal liability of the shareholders, directors, and offices. CP 688. *See also*, CP 1961-73 (response to Professor Branson).

Various treatises also make clear that CRS's contention that Washington corporate law requires corporations to keep and maintain minutes of annual shareholder meetings was correct.²⁴

CRS did not misrepresent Washington law in telling prospective customers that corporate minutes must be appropriately maintained.

(iii) Shareholder Consents

In its June 18, 2015 letter, the State attempted to raise a new claim that it was misleading for CRS to advertise “the preparation and sale of corporate minutes while instead delivering executed consents.” CP 869. But after meeting with Professor Drake, the State conceded a corporation preparing “executed consent[s] without a[n annual] meeting, thereby

²⁴ The WSBA *Sourcebook* indicates that RCW 23B.16.010 “requires a corporation to ‘keep’ as permanent records the minutes of meetings of its shareholders and board of directors.” WSBA at 16.010-2. *See also*, John Morey Maurice, *The 1990 Wash. Bus. Corp. Act*, 25 Gonz. L. Rev. 373, 448-49 (1990) (“Washington corporations must ‘keep permanent records of all meetings of the shareholders’”); Robert McGaughey, *Wash. Corp. Law Handbook* § 7.04 (2000) (statute “requires that minutes of shareholder meetings be kept”). Commentary to the Annotated Model Business Corporate Act, on which Washington’s statute was based, lists Washington as a state that “expressly require[s] a corporation to maintain documents such as books and records of accounts and minutes of shareholders’ . . . meetings.” 4 Amer. Bar Assoc., *Model Bus. Corp. Act Annotated* 16-10 (2013).

bypassing the need for minutes,” has complied with Washington law. CP 868. CRS’s service prepares such consents.

Under Washington law, executed shareholder consents approving a corporate action carry the same effect as a meeting vote and “may be described as such in any record.” RCW 23B.07.040(5). All shareholder consents must “be delivered to the corporation for inclusion in the minutes or filing with the corporate records.” RCW 23B.07.040(1)(b)(v). “Shareholder resolutions adopted via written consent are identical to those that may be adopted through a meeting and have the exact same legal effect.” CP 684-85. Such consents satisfy the statutory annual shareholder meeting requirement referenced in the form. CP 684.²⁵ *See generally*, CP 1963-65.

Specifically, CRS did not misrepresent Washington law in making consents in lieu of annual meetings a part of their service. CRS’s

²⁵ Treatises like WA Corp. Law at § 7.1 agree (“Many privately held corporations do not hold an actual meeting annually, but instead elect directors and take all other corporate action by shareholder consent. So long as directors are elected and other appropriate action taken, annual action by consent set forth in a record as permitted by section 23B.07.040 satisfies the need to hold an actual meeting.”). Corporate service providers commonly provide consents in place of minutes. Practice guides for legal professionals so state “Consents are widely used by privately held corporations both for special and annual shareholder meetings. Approval by consent has the same effect as a meeting vote.” *Washington Business Entities: Law and Forms* § 13:20 (Lexis Nexis 2014). Washington law firms advise corporations to keep a record of “all actions taken by the shareholders or board of directors without a meeting.” CP 913-18. Reputable corporate compliance consultants, like CT Corporations Service, advise corporations that “[w]hen actions are taken pursuant to consent in lieu of a meeting, documentation supporting that action must be produced and retained.” CP 937-43.

preparation and provision of consents assisted corporations in complying with their statutory obligations under Washington law.

.....

In sum, because CRS’s mailings did not misrepresent the law, and provided a legitimate service that helped Washington corporations comply with the law, the trial court erred in failing to grant CRS’s motion for partial summary judgment that the contents of its mailings did not violate the CPA.

- (b) CRS’s Mailings to Prospective Customers Did Not Mislead by Attempting to Resemble Official Government Documents
 - (i) CRS Did Not Mimic Official Government Communications in Its Solicitation of Customers

With regard to the second aspect of the State’s CPA claim, CRS did not violate the CPA with regard to the format of its solicitations. The trial court should have ruled that the format of CRS’s solicitations was not unfair or deceptive as a matter of law, and granted summary judgment to CRS. But, at a minimum, given the fact that the State’s claim as to the unfair/deceptive prong of the *Hangman Ridge* test was based on a capacity to deceive or possibly *Klem’s* implication for the public interest (although it never expressly addressed this prong in its pleadings below), CP 628-30; RP 12, those matters involve questions of fact and the trial court erred in

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

There is no specific Washington case that documents how RCW 19.86.020 is violated by solicitations of customers in a format designed to imply that the communication is from a public agency. However, federal decisions provide guidance in this area.²⁶

There is considerable case law on conduct mimicking that of a government agency that has arisen under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, ("FDCPA")²⁷ or § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Mailings that display emblems of a governmental agency, use the terminology of a government agency, or

²⁶ RCW 19.86.920 ("It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters."). Federal court decisions are guiding, but not binding, authority. *State v. Reader's Digest Ass'n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972).

²⁷ § 1692e(1) prohibits representations that a debt collector is vouched for, bonded by, or affiliated with the federal or state governments; § 1692e(9) prohibits communications that falsely represent that they are issued, authorized, or approved by a government official or agency. Unlike Washington's CPA that looks to whether conduct is unfair or deceptive from the standpoint of the ordinary or reasonable consumer, the

even have a return address of the federal capital have been held to violate the FDCPA.²⁸ But not every reference to a governmental term or description violates the FDCPA.²⁹

Similarly, a solicitation is not deceptive under § 5 of the Federal Trade Commission Act, the template for RCW 19.86.020, if it contains disclaimers or qualifications that are “sufficiently prominent and

FDCPA looks at the conduct from the perspective of the least sophisticated debtor. *Baker v. G.C. Services Corp.*, 677 F.2d 775, 778 (9th Cir. 1982).

²⁸ See, e.g., *Slough v. F.T.C.*, 396 F.2d 870 (5th Cir. 1968), *cert. denied*, 393 U.S. 980 (1968) (debt collector used the name “State Credit Control Board” and deceptive practices that created the false impression that the debt collector was affiliated with the government); *Floersheim v. F.T.C.*, 411 F.2d 874, 877 (9th Cir. 1969), *cert. denied*, 396 U.S. 1002 (1970) (using Washington, D.C. as a return address and a format that simulated government documents exploited consumers’ assumption that documents were from the United States government). *Slough* and *Floersheim* pre-dated the enactment of the FDCPA, but apply analogous reasoning to post-FDCPA cases. See also, *Adams v. First Fed. Credit Control, Inc.*, 1992 WL 131121 (N.D. Ohio 1992) (defendant used the word “federal” in its name and the style of its letters sent to the plaintiff; defendant also used eagle icons that resembled the seal of the United States on either side of the defendant’s name); *Gradisher v. Check Enforcement Unit, Inc.*, 210 F. Supp. 2d 907, 914 (W.D. Mich. 2002) (defendant sent letters on Sheriff’s Department letterhead).

²⁹ E.g., *Pettit v. Retrieval Masters Creditors Bureau, Inc.*, 42 F. Supp. 2d 797, 807 (N.D. Ill. 1999), *aff’d*, 211 F.3d 1057 (7th Cir. 2000) (holding that use of word “national” did not suggest affiliation with the United States government); *Sullivan v. Credit Control Servs.*, 745 F. Supp. 2d 2, 8-10 (D. Mass. 2010) (reference to Government Employees Insurance Company rather than GEICO not a violation); *Douyon v. N.Y. Med. Health Care, P.C.*, 894 F. Supp. 245, 260 (E.D.N.Y. 2012) (a business card that did not list any government agency or entity and the title “financial crimes investigator” did not imply that defendant worked for the government); *Empie v. Medical Society Business Services Inc.*, 2014 WL 5080414 (D. Ariz. 2014) (no violation where defendant used name Bureau of Medical Economics).

unambiguous” to “leave an accurate impression.” *Removatron Int’l Corp. v. F.T.C.*, 884 F.2d 1489, 1497 (1st Cir. 1989).³⁰

Here, a reasonable and ordinary consumer reviewing CRS’s Annual Minutes Records form mailing can easily determine that the document is a commercial solicitation—not a government document nor a bill. Neither the envelope nor the mailings’ contents contain any of the indicia derived from the cases cited *supra* of a business attempting to mimic a government communicating with its people.

First, the name – Corporate Records Service – does not make reference to “Washington,” “state,” or “agency,” “department,” or “bureau,” all terms denoting a government.

Moreover, the CRS mailers did not resemble the annual corporate renewal forms used by the State during any of the relevant time periods. The State’s forms have unique color schemes, graphics, logos, tables, and phrasing, and are sent to consumers by the Washington Business Licensing Service; they undergo “minor changes . . . about every six

³⁰ Consistent with this rule, a Colorado appeals court held that “Defendants cannot be held liable for those customers who believed the solicitation came from the government, but who did not read or understand the clear and conspicuous disclosure.” *State ex rel. Suthers, supra* (interpreting a Mandatory Poster Agency mailing for labor law posters; court reasoned that “the people who actually read the documents easily determined that ... [they] were not government generated.”).

months to a year” including changes to the wording, colors, and highlighting.

The SOS sent its 2012 Renewal and Annual Report form in a white or off-white envelope with green font and a bold green stripe across the front. In contrast, CRS’s mailings were sent to consumers in a green envelope with black font. The envelope for the State’s form states that it is an IMPORTANT SECRETARY OF STATE DOCUMENT – ACTION REQUIRED. This statement is not found on CRS’s mailing envelopes and CRS’s envelope states it is *business mail*; CRS’s envelopes also clearly stated in all-capitalized, black font “THIS IS NOT A GOVERNMENT DOCUMENT.” The State’s 2012 form is also readily distinguishable from CRS’s form. The State’s form bears the Washington State Seal on the upper left hand corner and expressly says “Renewal Agent for Secretary of State . . . State of Washington . . . Business Licensing Service.” The bottom right hand corner of the State’s form also says “State of Washington” and provides Business Licensing Services’ postal office box address in bold font. The State’s 2012 form uses the word “renew” or “renewal” in bold four times. The State’s form asks for the corporation to list the corporate officers and directors, but not

shareholders. Moreover, the State's form was printed in blue and red ink. CP 1401-04, 1409-14. *See* Appendix.³¹

In stark contrast, CRS's form is printed in black ink and does not bear a seal of any kind. CP 2199. Nowhere does it mention any affiliation with the SOS or any other government entity; nowhere does CRS's form mention the word "renew" or "renewal" and, in fact, the CRS's enclosed instruction sheet expressly states:

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

CP 2200. CRS's form makes it clear that, although Washington law requires corporations to hold annual shareholder meetings and keep minutes, corporations can fulfill the requirement themselves or hire a service provider to assist them:

You can engage an attorney to prepare them, prepare them yourself, use some other service company or use our service.

Id.; *see also*, CP 2197 (CRS website – "it is not mandatory that you use our preparation service to prepare your minutes. Many businesses choose our company because they find our service to be of great value. Our

³¹ Beginning in approximately 2011, the State's forms began encouraging corporations to "RENEW ONLINE!" CP 949, 951. In 2014, the State stopped mailing the annual report and renewal forms, instead sending a letter instructing corporations to file online. CP 959.

service is competitively priced and very reasonable when compared to some alternate preparation services, such as corporate attorneys.”). While the State’s form does not ask for a corporation’s shareholder information, the first step on CRS’s Annual Minutes Reports form and instructions sheet asks for the names of each stockholder in the corporation. CP 2200.³² Nowhere on the CRS mailer does it state that the information requested will be or must be “filed” with the State. *Id.* In fact, the opposite is true because, as noted *supra*, the CRS mailing indicated that the preparation of minutes did not satisfy the statutory requirement to file an annual report. CP 2200.

No ordinary, reasonable consumer who reads CRS’s mailings could believe that it is a State document.

Ultimately, the CPA “does not prohibit acts or practices that are reasonable in relation to the development and preservation of business or that are not injurious to the public interest.” 25 *Wash. Prac., Contract Law and Practice* § 18:310.02 (3d ed.); RCW 19.86.920. CRS marketed its corporate form service business by direct mail.³³ Its solicitations

³² While the State’s form encourages corporations to complete their annual renewals online, the CRS mailer does not provide consumers with an online option. CP 2200.

³³ Direct mail businesses make up a significant component of the American economy. More than seventy percent of Americans shopped direct mail last year, generating \$686 million in sales and supporting jobs at more than 300,000 small businesses nationwide. Direct mail keeps consumers “in-the-know” and is critical to the

effectively educated corporations about their legal obligations, advertising CRS's service, and collected the necessary information to provide its product. CRS provided a legal, beneficial service to Washington corporations that did not violate RCW 19.86.020.

(ii) CRS's Solicitations Did Not Contravene the AOD

The trial court here also labored under the misconception that CRS's present mailings, undertaken with regard to a different business activity (corporate support services as opposed to labor law advisory posters), somehow violated the AOD, a different MPA division entirely. CP 2045; RP 4.³⁴ The trial court was wrong.

The AOD, as a consent decree, must be interpreted in accordance with contract principles. *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 446 (2009), *review denied*, 168 Wn.2d 1026 (2010). The trial court, aware of that decision, RP 5-6, should have applied the AOD parties' intent expressed in the language of the AOD, their objective manifestation of intent. Any terms in the AOD had to be

economic well-being of communities and businesses. The United States Postal Service even offers a tool to "Plan A Direct Mail Campaign" on its website. CP 1390.

³⁴ The State belatedly raised the AOD issue on summary judgment. Although mentioned in its complaint, CP 8-11, the State did not specifically plead any AOD violation. CP 12-16.

interpreted in accordance with their ordinary, usual, and popular meaning.

Id.

First, CRS is not MPA. They are different divisions offering completely different services.

Second, the AOD did not constitute an admission of a violation of the CPA by MPA. CP 998-99.

Finally, any of the concerns addressed in the AOD are not present here. In MPA's case, the AOD indicated that the mailings appeared to come from a government agency: "The names given to outlets evoke an official government tone. Emblems mimic state agency emblem. The postal drop box with an Olympia address reinforces that misrepresentation." CP 995. These factors are not present in CRS's mailings except the Olympia address.

The AOD noted that MPA's mailings had imperative language like "Advisory" or "effective immediately" or language calculated to compound "the sense of fear." *Id.* Again, none of those concerns are present in CRS's mailings, as this Court can readily discern.

In any event, these issues are properly matters of fact for a trier of fact, if the trial court had properly accepted the facts, and all reasonable inferences from them, in a light most favorable to CRS as the nonmoving party on summary judgment.

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

The trial court imposed \$793,540 in penalties against CRS pursuant to RCW 19.86.140. *See* Appendix.³⁵ In doing so, the trial court chose to impose a penalty of \$10 per “violation,” on top of its creation of a restitution fund, claiming “repeated” violations of the AOD and harm to small businesses never proven on this record. CP 2045. While not a picture of clarity, the trial court’s principal rationale for the penalty is the court’s view that CRS violated the AOD, a consent decree involving a different division doing a different type of business, as noted *supra*.

But to the extent the trial court’s order rests on putative violations of the AOD, the order cannot stand. RCW 19.86.140 specifically limits any penalty to \$25,000. The AOD itself in § 5.1 limits violations of its terms to a civil penalty of up to \$25,000. CP 998-99. Circumventing this obvious limitation on its punitive power, the trial court then sought to justify its onerous penalty by treating *each mailer* by CRS, as opposed to each sale to a Washington customer as a violation of RCW 19.86.020. CP 1592, 2045; RP 48. While the trial court had some discretion in this regard, *e.g.*, *State v. Ralph Williams’ NW Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 316-17, 553 P.2d 423 (1976) (Court upheld a \$2,000 per

³⁵ Typical of its overreaching in this case, the State proposed a penalty of more than \$4.7 million in its penalty motion and more than \$6.5 million in its summary judgment motion. CP 1804.

violation penalty and rejected a “one violation per consumer” rule), the trial court needed to base its decision on proper legal grounds, which it did not when it based its decision on the AOD.

But this does not end the analysis of the penalty imposed by the trial court. A civil penalty may not exceed the bounds of due process. *BMW of No. America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). *See also, State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).³⁶ The trial court’s decision fails under *Gore*.

With regard to the alleged reprehensibility of CRS’s conduct, the United States Supreme Court has explained that the degree of reprehensibility is determined by considering factors such as, whether (i) the harm caused was physical as opposed to economic; (ii) the conduct showed an indifference to or a reckless disregard of the health or safety of others; (iii) the target of the conduct had financial vulnerability; (iv) the conduct involved repeated actions or was an isolated incident; and (v) the harm was the result of intentional malice, trickery, or deceit, or was mere accident. *Campbell*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575).

³⁶ In particular, a court must analyze the degree of reprehensibility of the conduct, 517 U.S. at 575-80, compare the amount of the award with the actual and potential harm caused by the conduct, *id.* at 580-83, and compare the amount of the punitive award with the amount of civil penalties authorized by statute in comparable cases, *id.* at 583-84.

None of those factors is present here. The trial court held that the “Defendants committed 79,354 separate violations of the AOD and RCW 19.86.020 by creating the deceptive net impression that Defendants’ solicitations were from a governmental agency and that Washington consumers were obligated to fill out and return the solicitations along with \$125.” CP 1591. But, the record here shows that any harm from CRS’s solicitations was purely economic: \$125. And, since CRS had a money-back guarantee, some Washington consumers have already recouped that \$125. There is simply *no evidence* that CRS caused serious harm of any kind, let alone physical harm or safety, or targeted vulnerable people or entities. Its prospective customers were businesses sophisticated enough to do business in the corporate form.

Likewise, there is no evidence that CRS repeatedly mailed illegal solicitations in Washington. CRS never offered a corporate records service in Washington prior to August 2012 and voluntarily stopped any further mailings by early 2013 after the Attorney General raised concerns.

Finally, CRS’s conduct certainly did not rise to the level of “*intentional* malice, trickery, or deceit.” *Campbell*, 538 U.S. at 419 (emphasis added).³⁷ No such facts exist here. To the contrary, CRS

³⁷ In *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999), for example, our Supreme Court upheld a \$500,000 punitive damages award under the CPA where defendant’s “conduct was found to be egregious, willful, and repetitive.” *Id.* The

attempted *repeatedly* to address any concerns articulated by the Attorney General. Substantively, the State's allegation in its complaint that CRS misrepresented Washington corporate law requirements was undercut by the State's own admissions in this litigation. Moreover, its assertions that CRS's mailings "mimicked" the SOS's mailings to corporations is similarly unfounded, as noted *supra*, a position supported by Seattle University Professor Obermiller's report and declaration. CP 1245-80. In fact, given the disclosures in the CRS mailings, some recipients of those mailings read and understood that the solicitation was not from a governmental agency. CP 1975-80.

CRS's conduct does not support a large penalty, which the United States Supreme Court has reserved for truly reprehensible behavior.

With regard to the second *Campbell/Gore* element, the United States Supreme Court has held that penalties "must be based upon the facts and circumstances of the defendants' conduct and the harm to the plaintiff," and "few awards exceeding a single-digit ratio between punitive and compensatory damages...will satisfy due process." *Campbell*, 538 U.S. at 419, 424-25 (setting aside a penalty award of 145 to 1 ratio). The

defendant's conduct there was reprehensible, in part, because he "violated the fiduciary trust of every single client with whom he did business by improperly handling client funds." *Id.* at 604-05 (the "gravity of [Defendant's] offenses includes the gross violation of his fiduciary duty to his clients, but even more is involved").

Court also noted that “when compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Id.* The facts and circumstances of this case did not justify the trial court’s penalty award that so vastly exceeded any likely restitution.

Finally, as to the third element in the due process analysis, there is a disparity here between the punitive damages award and the “civil penalties authorized or imposed in comparable cases.” *Campbell*, 538 U.S. at 428. There are few reported decisions discussing penalties awarded to the State for violations of RCW 19.86.020. In *WWJ Corp.*, our Supreme Court allowed a penalty of \$500,000 where the defendant intentionally violated his fiduciary duties and compensatory damages were “difficult to determine from the record, but [were] at least \$148,863.” 138 Wn.2d at 607.³⁸ The penalty here far exceeds the norm.

Because the trial court’s penalty here violated the due process standard set in *Campbell/Gore*, this Court should reverse the trial court’s onerous penalty award.

³⁸ The Attorney General’s Consumer Protection Division typically negotiates and/or receives less than \$500,000 in penalties and often suspends all or some payment unless the alleged wrongdoer violates injunctive terms. *See, e.g.*, CP 1982-2005. Indeed, in *R.J. Reynolds*, the Attorney General stipulated to dismissal of a penalty of \$100 per issue of *Rolling Stone* magazine for each issue containing a cartoon violating a consent decree. 151 Wn. App. at 788.

(3) The Trial Court Abused Its Discretion in Calculating the State's Fee Award

RCW 19.86.080 allows, but does not mandate, a fee award to the prevailing party. *State v. Black*, 100 Wn.2d 793, 804, 676 P.2d 963 (1984). Consistent with the general requirement in Washington law that courts must take an active role in assessing the reasonableness of a fee request. *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998); *Berryman v. Metcalf*, 177 Wn. App. 644, 657, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014), courts in CPA litigation must be vigilant in ensuring that requested fees are reasonable. Indeed, in *Berryman*, this Court reminded trial courts that they must not simply accept counsel's claims that fees are reasonable at face value, giving only lip service to a careful assessment of the reasonableness of the requested fees. *Id.* at 658. Here, the trial court here rubberstamped the State's fee request, not reducing the requested fees *by a penny*. Compare CP 1756 with CP 2125-27. It authorized the recovery of fees in excess of \$337,000 to resolve a matter on summary judgment. In doing so, the trial court abused its discretion in the calculation of the lodestar fee.

To establish the lodestar fee, a court must multiply a reasonable number of hours by a reasonable hourly rate.³⁹ The request must be

³⁹ The rates sought by the State for its Assistant Attorneys General are artificial. CP 1763-96. The only testimony in support of those rates was that of assistant Attorney

documented by the contemporaneous billings of counsel. *Mahler*, 135 Wn.2d at 433-34. While the documentation for fees need not be exhaustive, it must still be sufficient to enable a court to know the number of hours worked, the type of work performed, and the attorney performing the work. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). The burden of documenting the fee award rests entirely with the party seeking an award of attorney fees. *Mahler*, 135 Wn.2d at 433. *See generally*, Philip A. Talmadge, *The Award of Attorney Fees in Civil Litigation in Washington*, 16 Gonz. L. Rev. 57 (1980).

(a) The State's Documentation of Its Attorney Time Was Inadequate

The documentation was inadequate as the State inadequately documented its attorneys' activities that justify a fee award. CP 1768-95. A review of the State's fee invoices reveals amorphous time entries that offer the reader little clue as to the work being performed. Entries such as "review case information," "case research," "witness contacts," or "identify business contacts," or the like are entirely meaningless for

General Shannon Smith, Chief of the Consumer Protection Division of that office, far from a disinterested witness. CP 1801-02. That declaration makes reference to billing rates, as if a real client was being billed for such services. But that is entirely inaccurate. They are not rates actually charged to clients who will insist that attorneys conduct themselves in an economically reasonable fashion, a key check when fee-shifting is sought; rather, they are rates that are "created" to mimic rates charged actual clients in the marketplace. Moreover, the rates sought by the State's attorneys here bear no relationship to the rates *actually charged* by the Attorney General's Office to state agencies pursuant to the Legal Services Revolving Fund. RCW 43.10.150, *et seq.*

conveying information to a court or CRS regarding the alleged work performed. The time entries of Christopher Welch are *replete* with such useless time information. This Court should not reward such slipshod documentation.

(b) The State Cannot Recover the Time of Its Paralegal Investigator as Part of a Fee Award

The State here sought, CP 1756, and the trial court awarded it the hourly services of a paralegal and an investigator as a component of the fee award. CP 2126. This was error. Nowhere in the State's fee motion or supporting documents did it address the protocol established by this Court in *Absher Construction Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1996) for the recovery of fees of non-lawyers:

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

This Court has had little difficulty in denying the clerical expenses that are appropriately part of the lawyer's overhead.⁴⁰ The State's billings records do not reflect that the work of its paralegal and investigator were "legal" as opposed to clerical in nature.

More specifically, the pre-filing efforts of the State, principally through its investigator, to ascertain *if* a case merited filing should be excluded. No reported Washington case has authorized such a recovery. The State has an ethical obligation to bring only meritorious claims. RPC 3.1; CR 11. The good faith determination that a claim has merit is a necessary *precursor* to a lawsuit, but it is not necessarily an expense to be shifted to an opponent under a fee-shifting statute any more than would be a lawyer's discussions with a client over the terms of representation or the lawyer's office overhead.⁴¹ The trial court should have excised this requested time that in some instances pre-dated the filing of the action by 2 years.

(c) The State's Hours Claimed Fail to Segregate and Excise Time Spent on Unsuccessful Theories or Activities and Wasteful or Duplicative Time

⁴⁰ *No. Coast Electric Co. v. Selig*, 136 Wn. App. 636, 643-44, 151 P.3d 211 (2007) (secretarial services). *See also, T.J. Landco, LLC v. Harley C. Douglass, Inc.*, 186 Wn. App. 249, 346 P.3d 777, *review denied*, 184 Wn.2d 1003 (2015) (paralegals and legal interns).

⁴¹ Such investigative activities will frequently lead to blind alleys; it is precisely for this reason that not all of such time should be shifted to CRS. *See infra*.

Finally, and most significantly, neither the State nor the trial court addressed the State's unsuccessful efforts or duplicative, wasteful time. It has long been the rule in CPA cases that a party may only recover attorney time spent on the proof of the CPA violation. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743-44, 733 P.2d 208 (1987); *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 169-70, 795 P.2d 1143 (1990) (Court upholds trial court decision to excise time spent on numerous unsuccessful non-CPA claims by plaintiff). Time that pertains to theories for which fees may not be awarded, or unsuccessful theories, or wasteful or duplicative time must usually be excised by the requesting party, and may not be awarded by the court. Parties dislike bearing this burden of segregating compensable from un-compensable time, but must do so as Division II noted in *Smith v. Behr Processing Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002) in giving short shift for failing to segregate wasteful or duplicative hours: "Regardless of the difficulty involved in segregation,...the trial court has to undertake the task." *Id.* at 344-45. Our Supreme Court in *Pham v. City of Seattle*, 159 Wn.2d 527, 151 P.3d 976 (2007) made it clear that even time spent on unsuccessful efforts associated with otherwise successful theories of recovery must be excised. *Id.* at 539 (time spent on an unsuccessful claim for injunctive relief, an amended complaint never filed, unsuccessful activities such as a summary

judgment motion and appellate court motions practice, as well as efforts to develop media contacts).

The State prevailed on the legal theory that CRS violated the CPA by “creating the deceptive impression that CRS’s solicitations were from a governmental agency and that Washington consumers were obligated to fill out and return the solicitations along with \$125,” the State’s second cause of action in its complaint. But that was but one of four theories advanced in its complaint. CP 1-31. The State should not have recovered fees for the work connected with those unsuccessful or abandoned theories, particularly where the State admitted, at the last minute, in connection with claims one and three, that Washington corporations have a duty to hold annual meetings, to prepare and maintain minutes of an annual meeting, and that consents in lieu satisfy that requirement. CP 1899-1903, 2066-68.⁴²

Despite its belated admission that a significant premise for its case was erroneous, the State sought and recovered fees for the presentation of this position. All expenses relating to these causes of action should have been segregated and reduced from the overall fee award, including: time

⁴² CRS, of course, as noted *supra*, worked to correct the Attorney General’s misunderstanding of Washington’s corporation law, even before the lawsuit was filed, through the efforts of David Brake and Professor Dwight Drake. The Attorney General’s Office only belatedly acknowledged its misreading of Washington corporate law after CRS incurred substantial legal expense to dispel that unfounded interpretation of law.

drafting the complaint; meetings and phone calls between counsel rebutting this legal issue; issuing and responding to related written and document discovery, including both parties' requests for admissions; review of Professor Drake's reports, his deposition, and related discovery; hiring Professor Branson, including time he and the State's attorneys spent reviewing, preparing, and correcting reports; Professor Branson's deposition; and summary judgment briefing relating to the complaint's erroneous statements of Washington's corporation law. This work should have been segregated from the work necessary to the State's success, which primarily focused on its marketing expert, Professor Anthony Pratkanis.

Moreover, even as to theories on which it was successful, consistent with our Supreme Court's teaching in *Pham*, the State failed to excise time it spent on unsuccessful efforts. For example, in discovery, the State produced a privilege log, spanning over 100 pages, with hundreds of entries justifying its withholding of documents. After CRS's review of the log revealed that the State was improperly asserting work product protection for nearly 800 documents responsive to CRS's discovery requests, the State released them. CRS reviewed the thousands of additional pages of documents, learning that the State withheld hundreds of additional documents from the Burlington Police Department,

again, without explanation of how those documents were privileged. The State produced the documents. CP 2061.

Despite the foregoing, the trial court permitted the State to recover fees to withholding and releasing these documents, including dozens of hours of paralegal time. *Id.* The State is not entitled to be reimbursed for correcting its improper discovery practices. *E.g., Bowers*, 100 Wn.2d at 597. The trial court should have excised all time spent on these discovery issues from the State's fee request.

In sum, the trial court simply refused to do its job in assessing the State's bloated, ill-supported fee request. In so doing it abused its discretion and the fee award must be vacated.

(4) The Trial Court Erred in Awarding Costs Beyond Those Allowed in RCW 4.84.010

The trial court permitted the State to recover more than \$39,500 in costs, including costs beyond those authorized in RCW 4.84.010. CP 2127. For example, it allowed the recovery of expert witness fees and the cost of the transcription of those experts' testimony. CP 1798-99. This was error.

The rule in Washington is that costs in a CPA action are limited to those set out in RCW 4.84.010. *Nordstrom*, 107 Wn.2d at 743. This

Court recently reaffirmed this rule in *Miller v. Kenny*, 180 Wn. App. 772, 827-28, 325 P.3d 278 (2014).

This Court should reverse the trial court's excessive cost award.

F. CONCLUSION

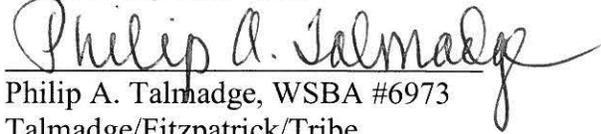
In its zeal to punish CRS for what it perceived was misconduct, the trial court erred in ruling as a matter of law that CRS violated the CPA in its mailings to prospective customers both as to their contents and format. With regard to the former, the mailings' contents accurately stated customers' Washington corporate law obligations, as the State has belatedly essentially agreed. With regard to the latter, the mailings did not mimic government documents as a matter of law, but, at a minimum, this was an issue of fact for the trier of fact after an actual trial.

The trial court compounded this error by imposing onerous restitution and civil penalties on CRS and making an excessive award of attorney fees and costs to the State.

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

DATED this 10th day of August, 2016.

Respectfully submitted,



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APPENDIX

RCW 19.86.020:

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

RCW 19.86.090:

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

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

RCW 19.86.140:

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

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

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

The Honorable William Downing

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,
Plaintiff,

v.

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

Defendants.

NO. 14-2-17437-3 SEA

ORDER GRANTING IN PART
PLAINTIFF STATE OF
WASHINGTON'S MOTION FOR
SUMMARY JUDGMENT AND
DENYING DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

~~PROPOSED~~

This matter came before the Court on the State of Washington's Motion for Summary Judgment and Defendants' Motion for Summary Judgment. The Court has heard the arguments of the parties and considered the motions and supporting materials submitted by the parties. It is ORDERED that the State of Washington's Motion for Summary Judgment is GRANTED IN PART and Defendants' Motion for Summary Judgment is DENIED.

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Ⓢ If appellate review is contemplated, these submissions should be cataloged in an agreed supplemental order.

WJ

ORDER GRANTING PLAINTIFF STATE
OF WASHINGTON'S MOTION FOR
SUMMARY JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT [~~PROPOSED~~] - 1

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

1 The Court finds as follows:

2 1. There are no issues of material fact.

3 2. In February 2008 Defendant The Mandatory Poster Agency, Inc. ("Mandatory
4 Poster") entered into an Assurance of Discontinuance ("AOD") with the Attorney General's
5 Office, which was filed February 13, 2008, under Thurston County Cause No. 08-2-00099-8.
6 The AOD applied to Mandatory Poster and its "officers, directors, and principals." Defendants
7 Steven Fata, Thomas Fata, and Joseph Fata were and are officers, directors and/or principals of
8 Mandatory Poster.

9 3. In 2012 and 2013, Defendants Mandatory Poster, Steven Fata, Thomas Fata,
10 and Joseph Fata, created and mailed 79,354 Annual Minutes Records Form solicitations to
11 Washington consumers. 2,901 Washington consumers responded to Defendants' Annual
12 Minutes Records Form solicitation and sent the completed Annual Minutes Records Form and
13 \$125 to Defendants. Defendants then sent these Washington consumers a Minute Book that
14 included corporate consents to act without a meeting forms.

15 4. The Court finds as a matter of law that the Defendants' Annual Minutes
16 Records Form solicitation was a deceptive act or practice that violated the AOD and the
17 Consumer Protection Act, RCW 19.86 ("CPA"). Defendants committed 79,354 separate
18 violations of the AOD and RCW 19.86.020 by creating the deceptive net impression that
19 Defendants' solicitations were from a governmental agency and that Washington consumers
20 were obligated to fill out and return the solicitations along with \$125. Defendants' solicitations
21 had the capacity to deceive a substantial number of Washington consumers. Defendants were
22 engaged in trade and commerce and their actions affected the public interest.

23 5. The individual Defendants, Steven J. Fata, Thomas Fata, and Joseph Fata, are
24 found personally liable for the conduct that violates the AOD and CPA described herein. The
25 Court finds that Defendants Steven J. Fata, Thomas Fata, and Joseph Fata participated in and
26

1 with knowledge approved of the practices that violated the AOD and CPA.

2 6. Pursuant to RCW 19.86.080(1), the Court finds that the State is entitled to the
3 costs of pursuing this matter, including its reasonable attorney fees, in an amount to be
4 determined by the Court. Defendants are jointly and severally liable for this amount.

5 7. Pursuant to RCW 19.86.080(2), the Court finds that Defendants must jointly
6 and severally provide restitution to Washington consumers. The Court is not issuing an order
7 at this time regarding the specific consumers that should receive restitution.

8 8. The Court finds that, pursuant to RCW 19.86.140, Defendants shall jointly and
9 severally pay a civil penalty for each of their 79,354 violations of the AOD and CPA. The
10 Court is not issuing an order at this time regarding the amount of the civil penalty that it will
11 impose on the Defendants. *this includes the question of whether or not
12 there should be a "cap", which is reserved.* *LMJ*

The Court ORDERS that:

13 1. In determining the appropriate amount for a civil penalty for each of the 79,354
14 violations of the AOD and CPA, the parties are ordered to attempt to agree on appropriate figure.
15 The Court directs the parties that the amount of civil penalty should be based on an equal amount
16 for each of the 79,354 violations, meaning that the parties should agree on a figure that will then
17 be multiplied 79,354 times. If the parties agree on appropriate figure for a civil penalty, they are
18 to submit it to the Court in an Agreed Order by February 15, 2016. If the parties are unable to
19 agree on appropriate figure for a civil penalty, the parties are directed to submit competing
20 Proposed Orders and file supporting briefs, which shall not exceed 12 pages, by February 19,
21 2016. Each party may submit a reply brief, which shall not exceed 5 pages, by March 2, 2016.
22 There will be no oral argument.

23 2. In determining restitution to Washington consumers, the parties are ordered to
24 attempt to agree on appropriate mechanism for determining the consumers that should receive
25 restitution. Defendants submitted a declaration from one Washington consumer indicating that
26

1 | the consumer understood from Defendants' solicitation that the Defendants were a private
2 | company selling corporate consents to act without a meeting and that the consumer returned the
3 | solicitation because the consumer intended to purchase this product from Defendants. If there any
4 | other Washington consumers that understood from Defendants' solicitation that the Defendants
5 | were a private company selling corporate consents to act without a meeting and the consumer
6 | returned the solicitation because the consumer intended to purchase this product from Defendants,
7 | they are not entitled to restitution. All other consumers^(P) are entitled to restitution. If the parties
8 | agree on appropriate mechanism for restitution, they are to submit it to the Court in an Agreed
9 | Order by February 15, 2016. If the parties are unable to agree on an appropriate mechanism for
10 | restitution, the parties are directed to submit competing Proposed Orders and file supporting
11 | briefs, which shall not exceed 12 pages, by February 19, 2016. Each party may submit a reply
12 | brief, which shall not exceed 5 pages, by March 2, 2016. There will be no oral argument.

13 | 3. The State shall submit its costs and fees to the Court by February 19, 2016.
14 | Defendants' response shall be submitted by March 4, 2016, and any reply shall be submitted by
15 | March 11, 2016. The Court will determine the award of costs and attorney's fees without oral
16 | argument.

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⊕ who have not received a refund and now indicate they desire one

WJ

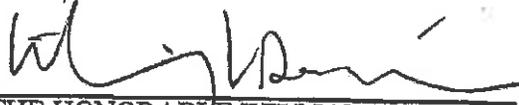
1 4. Defendants, as well as their successors, assignees, officers, agents, servants,
2 employees, representatives, and all other persons in active concert or participation with them,
3 are PERMANENTLY ENJOINED, pursuant to RCW 19.86.080(1) from:

4 a. Engaging in acts or practices that violate the CPA in the solicitation of or
5 transactions with Washington consumers;

6 b. Engaging in any other acts or practices that violate the CPA;

7 c. Failing to ensure that all their successors, assignees, officers, agents,
8 servants, employees, representatives, and all other persons in active concert or participation with
9 them receive a copy of this Order.

10 DATED this 26 day of January, 2016.

11
12 
13 THE HONORABLE WILLIAM DOWNING

15 Presented by:

16
17 ROBERT W. FERGUSON
18 Attorney General

Approved for Entry and as to Form,
Notice of Presentation Waived

FOSTER PEPPER PLLC

19
20 MARC WORTHY, WSBA #29750
21 Assistant Attorney General
22 JEFFREY G. RUPERT, WSBA #45037
23 Assistant Attorney General
24 Attorneys for Plaintiff State of Washington

MICHAEL K. VASKA, WSBA #15438
KATHRYN C. MCCOY, WSBA #38210
JACQUELINE C. QUARRÉ, WSBA #48092
Attorneys for Defendants

The Honorable William L. Downing

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

No. 14-2-17437-3 SEA

v.

AGREED ORDER SUPPLEMENTING
JANUARY 26, 2016 ORDER GRANTING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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

Defendants.

THIS MATTER came before the Court on the State of Washington's Motion for Summary Judgment and Defendants' Motion for Summary Judgment. On January 26, 2016, the Court entered an Order Granting In Part Plaintiff State of Washington's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment ("Order"). The Court stated, "If appellate review is contemplated," then the "motions and supporting materials submitted by the parties," "should be catalogued in an agreed supplemental order." Order at 1.

The parties agree that the following pleadings, declarations, and supporting documents constitute the complete list of "motions and supporting materials submitted by the parties" relating to the Court's January 26, 2016 Order:

AGREED ORDER SUPPLEMENTING
JAN. 26, 2016 ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

- 1 1. Plaintiff's Motion for Summary Judgment;
- 2 2. Declaration of Marc Worthy In Support of Plaintiff's Motion for Summary
- 3 Judgment;
- 4 3. Declaration of Jeffrey G. Rupert In Support of Plaintiff's Motion for Summary
- 5 Judgment;
- 6 4. Declaration of Patrick Reed;
- 7 5. Declaration of Rebecca Hartsock;
- 8 6. Declaration of Scott Greene;
- 9 7. Declaration of Carin Smith;
- 10 8. Declaration of Jennifer Flynn;
- 11 9. Declaration of John Schmid;
- 12 10. Declaration of Kathryn Alvord;
- 13 11. Declaration of Joe Gretsch;
- 14 12. Declaration of Michael Smith;
- 15 13. Declaration of Valerie Blomdahl;
- 16 14. Declaration of Carolyn Johnson;
- 17 15. Declaration of James Wiley;
- 18 16. Declaration of Angela Douglas;
- 19 17. Declaration of Lisa Robinson;
- 20 18. Declaration of Sandra Kay Brabant;
- 21 19. Declaration of Tim Olson;
- 22 20. Declaration of Ruth Boschma;
- 23 21. Declaration of Brett Meade;
- 24 22. Declaration of Keith Randall;
- 25 23. Declaration of Christine Dormaier;

26
AGREED ORDER SUPPLEMENTING
JAN. 26, 2016 ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT - 2

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

- 1 24. Declaration of Anthony Pratkanis;
- 2 25. Affidavit of Douglas Branson;
- 3 26. Defendants' Opposition to Plaintiff's Motion for Summary Judgment;
- 4 27. Declaration of Jacqueline Quarré in Support of Defendants' Response to
- 5 Plaintiff's Motion for Summary Judgment;
- 6 28. Declaration of Carl Obermiller in Support of Defendants' Response to Plaintiff's
- 7 Motion for Summary Judgment;
- 8 29. Plaintiff's Reply In Support of Motion for Summary Judgment;
- 9 30. Defendants' Motion for Summary Judgment;
- 10 31. Declaration of Jacqueline Quarré in Support of Defendants' Motion for Summary
- 11 Judgment and exhibits;
- 12 32. Declaration of Steven Fata in Support of Defendants' Motion for Summary
- 13 Judgment and exhibits;
- 14 33. Errata to Declaration of Steven Fata and Declaration of Jacqueline Quarré In
- 15 Support of Motion for Summary Judgment;
- 16 34. Plaintiff's Response to Defendants' Motion for Summary Judgment;
- 17 35. Supplemental Declaration of Marc Worthy In Support of Plaintiff's Motion for
- 18 Summary Judgment;
- 19 36. Supplemental Declaration of Jeffrey G. Rupert In Support of Plaintiff's Motion
- 20 for Summary Judgment;
- 21 37. Declaration of Carla O'Hearn;
- 22 38. Declaration of Christopher D Welch;
- 23 39. Reply In Support of Defendants' Motion for Summary Judgment;
- 24 40. Third Declaration of Jacqueline Quarré in Support of Defendants' Motion for
- 25 Summary Judgment;

26
AGREED ORDER SUPPLEMENTING
JAN. 26, 2016 ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT - 3

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

- 1 41. Declaration of Michelle Perdue;
- 2 42. Praecipe to Defendants' Motion for Summary Judgment;
- 3 43. Praecipe to Defendants' Opposition to Plaintiff's Motion for Summary Judgment;
- 4 44. State of Washington's Opposition to Defendants' Praecipis;
- 5 45. Plaintiff's Presentment of Proposed Entry Granting Plaintiff's Motion for
- 6 Summary Judgment in Part and Denying Defendants' Motion for Summary Judgment;
- 7 46. Defendants' Opposition to Plaintiff's Presentment of Proposed Entry Granting
- 8 Plaintiff's Motion for Summary Judgment in Part and Denying Defendants' Motion for
- 9 Summary Judgment;
- 10 47. Declaration of Kathryn C. McCoy In Support of Defendants' Opposition to
- 11 Plaintiff's Presentment of Proposed Entry Granting Plaintiff's Motion for Summary Judgment in
- 12 Part and Denying Defendants' Motion for Summary Judgment;
- 13 48. Plaintiff's Reply In Support of its Presentment of Proposed Entry Granting
- 14 Plaintiff's Motion for Summary Judgment in Part and Denying Defendants' Motion for
- 15 Summary Judgment; and
- 16 49. Oral argument from each party on December 18, 2015.

17 The Order Granting In Part Plaintiff State of Washington's Motion for Summary

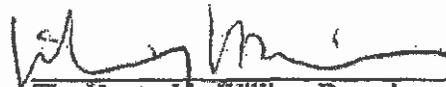
18 Judgment and Denying Defendants' Motion for Summary Judgment entered on January 26, 2016

19 is hereby ORDERED to be supplemented with this list of documents and information the Court

20 considered.

21 DATED this 2nd day of March, 2016.

22

23 
The Honorable William Downing

24

25

26 AGREED ORDER SUPPLEMENTING
JAN. 26, 2016 ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT - 4

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

1 **Presented and Agreed Upon by:**

2 s/ Michael K. Vaska

3 Michael K. Vaska, WSBA #15438

4 s/ Kathryn C. McCoy

5 Kathryn C. McCoy, WSBA #38210

6 s/ Jacqueline C. Quarré

7 Jacqueline Quarré WSBA #48092

8 FOSTER PEPPER PLLC

9 1111 Third Avenue, Suite 3400

10 Seattle, Washington 98101-3299

11 T: 206-447-4400 / F: 206-447-9700

12 Email: yaskm@foster.com,

13 cardk@foster.com, quarj@foster.com

14 *Attorneys for Defendants*

15 ROBERT W. FERGUSON

16 Attorney General

17 s/ Marc Worthy

18 Marc Worthy, WSBA #29750

19 s/ Jeffrey G. Rupert

20 Jeffrey G. Rupert, WSBA #45037

21 800 Fifth Avenue, Suite 200

22 Seattle, WA 98104-3188

23 Assistant Attorneys General

24 Email: marcw@atg.wa.gov, jeffreyr2@atg.wa.gov

25 T: 206-464-7745

26 *Attorneys for Plaintiff*

AGREED ORDER SUPPLEMENTING
JAN. 26, 2016 ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT - 5

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
PHONE (206) 447-4400 FAX (206) 447-9700

The Honorable William Downing
Hearing Date: March 2, 2016
Without Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO. 14-2-17437-3 SEA

ORDER ON AMOUNT OF CIVIL
PENALTY AND PROCEDURE FOR
RESTITUTION

This matter came before the Court on the State of Washington's Presentment of Order Regarding Penalty Amount and Restitution Process, and a competing entry from Defendant Mandatory Poster Agency, Inc., Steven Fata, Thomas Fata, and Joseph Fata (collectively, the "Defendants"). The Court examined the papers, pleadings, and supporting document on file in this case before entering the Order herein.

On January 26, 2016, the Court entered an Order Granting in Part Plaintiff State of Washington's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment (the "January 26 Order"). The Court adopts and incorporates the January 26 Order

ORDER ON AMOUNT OF CIVIL
PENALTY AND PROCEDURE FOR
RESTITUTION - 1

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7745

1 into this Order. In the January 26 Order, the Court reserved three issues for later ruling: (1) the
2 method for restitution, (2) the amount of civil penalty, and (3) the amount of attorneys' fees
3 and costs that would be awarded. This Order addresses the first two issues. Attorneys' fees
4 and costs will be addressed in a separate entry.

5 I. CIVIL PENALTY

6 1. The Court previously held that, pursuant to RCW 19.86.140, Defendants shall
7 jointly and severally pay a civil penalty for each of their 79,354 violations of the AOD and
8 CPA.

9 2. The Court orders Defendants to jointly and severally pay a civil penalty to the
10 State in the amount of \$793,540. This civil penalty amount is based on \$10 per violation for
11 79,354 violations.

12 3. In setting the civil penalty amount, the Court considered Defendants' lack of
13 good faith the most important element. This civil penalty will eliminate any benefits derived
14 by the Defendants from their deceptive practices, and also will vindicate the authority of the
15 Consumer Protection Act to protect Washington consumers from unfair and deceptive acts.
16 Defendants entered into an Assurance of Discontinuance with the State and then repeatedly
17 violated it. Defendants' conduct harmed those that bought their product due to Defendants'
18 deception. In addition to those small businesses that purchased Defendants' product due to
19 deception, others that did not purchase the product spent time and wasted effort reviewing the
20 deceptive solicitation. The civil penalty set herein is less than the maximum potential civil
21 penalty of \$2,000 per violation, which would total \$158,708,000. There is no mandatory "cap"
22 on the penalty in this situation. The amount is also less than the potential harm of \$9,919,250
23 that Defendants could have caused if all Washington consumers who had received Defendants'
24 deceptive mailer had purchased the \$125 product based on Defendants' deception.

1 **II. RESTITUTION**

2 4. In the January 26 Order, the Court found that, pursuant to RCW 19.86.080(2),
3 that Defendants must jointly and severally provide restitution to Washington consumers. The
4 Court orders that restitution shall be administered as follows.

5 5. Within 45 days of the Entry of this Order, Defendants must retain a nationally
6 recognized claims administrator to operate the claims process. Defendants are required to
7 receive approval from the State before retaining the claims administrator, which shall not be
8 unreasonably withheld. The parties shall then file a motion for approval of the claims
9 administrator with the Court.

10 6. Defendant is responsible for all costs and fees associated with retaining the
11 nationally recognized claims administrator. As the claims process is ongoing, none of the costs
12 of the claims administrator may be paid from the potential restitution funds or from the civil
13 penalty amount. Once the claims administration process is complete, amounts remaining in the
14 restitution fund will be allocated or disbursed per agreement of the parties or subsequent order
15 of the court.

16 7. Within 10 days of the Court's entry of approval of the claims administrator,
17 Defendants must transmit the full amount of potential restitution, \$362,625, to be held in trust
18 by the claims administrator (the "Restitution Fund"). The Defendants shall have no interest,
19 right, title, ownership, privilege or incident of ownership, or authority in regard to the
20 Restitution Fund and shall have no right to alter, amend, revoke or terminate the Restitution
21 Fund. The claims administrator is not authorized to pay or distribute any money from the
22 Restitution Fund unless specifically authorized by this Order or a later order of the Court.

23 8. Within 10 days of the Court's entry of approval of the claims administrator,
24 Defendants must provide the claims administrator and the State a verified list of all
25 Washington consumers that purchased Defendants' product along with a list of those that have
26 received a refund and the amount of the refund. Washington consumers will be eligible to

1 receive restitution in the amount of the difference between the amount they paid and any
2 refund they received from Defendants.

3 9. The claims administrator shall accept and process all claims of Washington
4 consumers, taking appropriate measures (as determined in the claim administrator's discretion)
5 to minimize fraud and promote accuracy. The claims administrator shall provide confirmation
6 of a claim submission, and if applicable, a check in the amount of the restitution pursuant to the
7 process set forth herein.

8 10. For the entire period of the claims process, the claims administrator shall
9 maintain a website with the terms and conditions of this Order and the process by which a
10 consumer may file a claim for restitution to be paid using monies from the Restitution Fund.
11 The website shall enable, with appropriate measures to minimize fraud and promote accuracy,
12 consumers to file a claim for restitution with the claims administrator. The website must be in
13 both English and Spanish.

14 11. For the entire period of the claims process, the claims administrator will offer a
15 1-800 number whereby consumers can call to receive more information regarding the
16 restitution mechanism. The 1-800 number must have operators available to assist consumers in
17 English and Spanish during business hours.

18 12. The claims administrator shall verify all addresses on Defendants' customer list
19 that will be used for restitution through a nationally recognized third-party vendor. This must
20 be completed within 40 days of the Court's entry of approval of the claims administrator, but
21 this deadline may be extended for good cause.

22 13. The Court directs the claims administrator to send two mailings to the Washington
23 consumers that are eligible for restitution. The first mailing will be a postcard notifying
24 consumers of the restitution mechanism at the direction of King County Superior Court. It will
25 tell the consumer that there is a website where they can enter their opt-in and that a second
26 mailing with a claims form will be arriving shortly. The first mailing must list a 1-800

1 telephone number that consumers may call with questions about the restitution process. This
2 first mailing must be sent within 70 days of the Court's entry of approval of the claims
3 administrator, but this deadline may be extended for good cause.

4 14. The second mailing will contain the opt-in or opt-out information as listed
5 below. The second mailing will contain a self-addressed stamped envelope addressed to the
6 claims administrator. The second mailing must be mailed within 7 days of the mailing of the
7 first mailing referenced above. This second mailing must contain a claims form that is
8 substantially similar to Exhibit 1 although this form may be changed by agreement of the
9 parties or for good cause.

10 15. Consumers will have 75 days from the mailing date of the second mailing to file
11 a claim. The claim application for restitution shall be deemed timely if it is received by the
12 claims administrator with a postmark date and/or is received by the claims administrator no
13 more than 75 days after the date of the mailing of the claims form, which is referred to as the
14 second mailing.

15 16. In the event that there are any mailings that are returned as undeliverable due to
16 an incorrect address or for any other reason, the claims administrator within 60 days of such
17 return shall make all reasonable efforts to locate and contact the consumer, which must include
18 a search of commercial databases as well as the State of Washington's Business Licensing
19 Service and the Secretary of State for current addresses and/or contact information for the
20 business, its principal, and its registered agent. The claims administrator will mail the first and
21 second mailing to any newly discovered addresses or contact information, and the consumer
22 will have 75 days from the second mailing date to file a claim.

23 17. A claims form shall be deemed valid if the consumer checks the box in full or in
24 part indicating "if you purchased the "annual minutes" product from Defendants because you
25 believed the solicitation originated from the government or you believed you were under a
26 legal obligation to purchase Defendants' product. You are entitled to restitution." or otherwise

1 indicates that they are eligible for restitution. If a claims form is returned to the claims
2 administrator with neither box checked, the claims administrator must request additional
3 information from the consumer within 30 days by mail, email (if available), and telephone (if
4 available). The consumer will then have an additional 30 days from the date of the
5 aforementioned mailing by the claims administrator to provide this additional information. A
6 claims form is deemed timely if it is received or post-marked in the longer of (a) the 30-day
7 period referenced in the foregoing sentence or (b) the time period specified in Paragraph 15.

8 18. The claims administrator shall pay all restitution claims deemed to be valid
9 within 30 days of receipt of a valid claim.

10 19. All disbursements distributed by the claims administrator shall be made by
11 check that is valid for 90 days from issuance. The claims administrator shall advise, by mail
12 and email (if available), each consumer to whom such checks were issued if such check has
13 remained un-cashed for more than 60 days. The consumer may, if they contact the claims
14 administrator within 45 days thereafter, have a restitution check reissued, which will be valid
15 for 45 days.

16 20. The claims administrator shall provide to the Defendants and the State a
17 monthly report that provides the following information: (a) number of claims received; (b)
18 number of claims paid; (c) identities of consumers who made a claim; (d) identities of
19 consumers who were paid a claim; (e) amount of monies paid into and remaining in the
20 Restitution Fund; (f) total amount of claims paid; (g) number of deficient claims received; (g)
21 number of deficient claimants notified of their deficiency; (h) number of cured deficiencies; (i)
22 number of ineligible claims made; (j) the identities of consumers whose claims were deemed
23 deficient or ineligible; and (k) for each claim deemed deficient or ineligible, the basis for this
24 decision. The claims administrator shall provide, upon request by the State, all documentation
25 and information necessary for the State to confirm compliance with this Order.

26

1 21. All layout, language on the outside of the mailing and the inside of the mailing,
2 as well as the website, will be executed by the claims administrator subject to the sole approval
3 by the State prior to submission to the consumer.

4 22. The Court provides the following guidance for the content and layout of the
5 outside and inside of the mailing.

6 Outside of Mailing

7 23. Design the notice to make it distinguishable from "junk mail."

8 24. A reference to the court's name (at the administrator's address) and the Attorney
9 General must be included to ensure that the consumer recognizes the notice's legitimacy.

10 25. "Call-outs" on the front and back must be included to encourage the recipient to
11 open and read the notice when it arrives with other mail.

12 26. The call-out on the front must identify what the notice is about and who is
13 affected. On the back, the call-out must highlight the restitution opportunity.

14 27. The claims administrator is directed to use these techniques even if the mailed
15 notice is designed as a self-mailer, i.e., a fold-over with no envelope.

16 28. Identify the Office of the Attorney General as the sender and that this mailing is
17 at the direction of the King County Superior Court, State of Washington.

18 Inside of Mailing

19 29. The claims administrator shall notify consumers this is a court ordered process
20 and will include a reference to the court's name (at the administrator's address) and the
21 Attorney General to ensure that the consumer recognizes the notice's legitimacy.

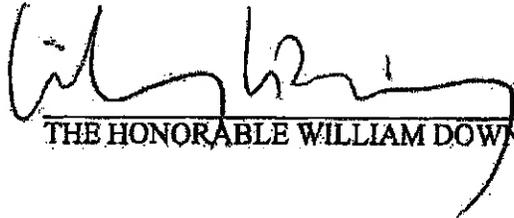
22 30. The claims administrator shall ask consumers to check one of two boxes. The
23 first box will state that consumers did not intend to purchase the "annual minutes" from
24 Defendants and only did so because of the unfair and deceptive nature of the mailers. As such,
25 consumers understand they are entitled to \$125 in restitution. The second box will state that the
26 consumer intended to purchase the "annual minutes" product from Defendants and understand

1 they are not entitled to restitution.

2 31. This second mailing must contain a claims form that is substantially similar to
3 Exhibit 1 although this form may be changed by agreement of the parties or for good cause.

4 32. A self-addressed stamped envelope addressed to the claims administrator will
5 be sent to every consumer in the second mailing.

6
7 DATED this 3rd day of March, 2016.

8
9
10 
11 THE HONORABLE WILLIAM DOWNING

12 Presented by:

13 ROBERT W. FERGUSON
14 Attorney General

Approved for Entry and as to Form,
Notice of Presentation Waived

FOSTER PEPPER PLLC

15
16
17 MARC WORTHY, WSBA #29750
Assistant Attorney General
18 JEFFREY G. RUPERT, WSBA #45037
Assistant Attorney General
19 Attorneys for Plaintiff State of Washington

MICHAEL K. VASKA, WSBA #15438
KATHRYN C. MCCOY, WSBA #38210
JACQUELINE C. QUARRÉ, WSBA #48092
Attorneys for Defendants

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EXHIBIT 1

(sample form)

KING COUNTY SUPERIOR COURT

This is a Washington State Court Authorized Notice and is also authorized by Washington Attorney General Robert Ferguson – This is not a solicitation from an Attorney

**State of Washington vs. The Mandatory Poster Agency, et al.
King County Superior Court 14-2-17437-3 SEA**

CORPORATE RECORDS SERVICE CONSUMER RESTITUTION FUND

To: [name and address of consumer]

You may be eligible for a payment of \$125. The Washington Attorney General filed a lawsuit that may allow you to obtain \$125. The King County Superior Court has ordered the Defendants in the above case to provide restitution to certain consumers that purchased a legal form from Corporate Records Service (“CRS”). Records indicate that you purchased a legal form product from CRS. If you wish to file a claim for restitution, please follow these instructions.

Alternatively, you may complete a Claim form online at: _____.

These rights and options – and the deadlines to exercise them - are explained in this notice.

The pages of this document contain a Claim Form for filing with the Administrator. If you bought an “annual minutes product” legal form from CRS, you could get a refund.

- A refund of \$125 will be paid to you if you purchased an annual minutes product because you believed it originated from the government or were under a legal obligation to purchase the product.
- Your legal rights are not affected whether you act, or don’t act. Read this notice carefully.
- To be considered for a refund, you must return this form or file a claim online within 75 days of the date of the mailing of this claims form.

Check this box if you purchased the “annual minutes” product from Defendants because you believed the solicitation originated from the government or you believed you were under a legal obligation to purchase Defendants product. **You are entitled to restitution.**

Check this box if you intended to purchase the “annual minutes” product from Defendants. **You are not entitled to restitution.**

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Questions? Call _____ Toll Free, or visit _____
(sample form)(continued)

Para una notificación Español, llamar _____ ó visitar nuestro website: _____

Date of mailing: _____ You have 75 days from this date to file a claim. You may file a claim by returning this form or by filing a claim online at _____

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO. 14-2-17437-3 SEA

ORDER ON ATTORNEYS' FEES
AND COSTS
~~[PROPOSED]~~

This matter came before the Court on the State of Washington's Motion for Costs and Fees. The Court having considered its previous January 26, 2016, Order, the State's Motion for Costs and Fees, a response brief from Defendant Mandatory Poster Agency, Inc., Steven Fata, Thomas Fata, and Joseph Fata (collectively, the "Defendants"), a reply brief from the State and the other papers, pleadings, and supporting documents on file in this case before entering the Order herein.

On January 26, 2016, the Court entered an Order Granting in Part Plaintiff State of Washington's Motion for Summary Judgment and Denying Defendants' Motion for Summary

1 Judgment (the "January 26 Order"). The Court adopts and incorporates the January 26 Order
2 into this Order. In the January 26 Order, the Court reserved three issues for later ruling: (1)
3 the method for restitution, (2) the amount of civil penalty, and (3) the amount of attorneys'
4 fees and costs that would be awarded. This Order addresses the last issue. The civil penalty
5 and restitution process are addressed in a separate entry.

6 1. The Court previously held that, pursuant to RCW 19.86.080(1), the State is
7 entitled to the costs of pursuing this matter, including its reasonable attorney fees, in an
8 amount to be determined by the Court. Defendants are jointly and severally liable for this
9 amount.

10 2. The State has substantially prevailed in asserting its claims under the Consumer
11 Protection Act, RCW 19.86.080.

12 3. The State submitted an attorneys' fee bill listing the following hours work and
13 seeking the following hourly rates:

<i>Attorneys</i>	<i>Hours</i>	<i>Billing Rate</i>	<i>Total</i>
Marc Worthy	572.2	\$358/hr	\$204,847.60
Jeff Rupert (services before 12/1/15)	154.5	\$358/hr	\$55,311.00
Jeff Rupert (services after 12/1/15)	107.1	\$408/hr	\$43,696.80
Mary Lobdell	10.5	\$408/hr	\$4,284.00
Kim Gunning	7.9	\$289/hr	\$2,283.10
<i>Investigator</i>			
Chris Welch	136.3	\$123/hr	\$16,764.90
<i>Paralegal</i>			
Carla O'Hearne	84.6	\$123/hr	\$10,405.80

<i>Total Hours</i>	1073.1	<i>Total Attorneys' Fees</i>	\$337,593.20
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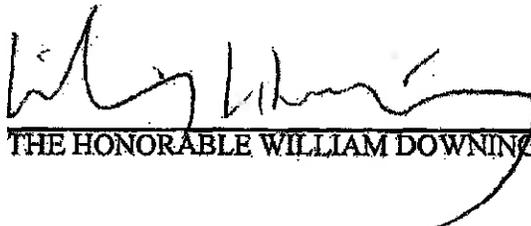
4. The State has incurred reasonable attorneys' fees in the amount of \$337,593.20. The Court finds that the hourly rates charged by the State and that the time spent by the State as stated above and as detailed in the State's Motion and supporting Declarations were reasonable and appropriate. The Court is not making any upward or downward lodestar adjustment.

5. The State has incurred costs in the amount of \$39,571.27. The Court finds that these costs as detailed in the State's Motion and supporting Declarations were reasonable and necessary for the investigation and litigation of this matter.

6. Therefore, the State is entitled to \$377,164.47 in costs and attorney fees.

7. The Court orders Defendants to jointly and severally pay the State \$377,164.47 in costs and attorney fees.

DATED this 11 day of March, 2016.


 THE HONORABLE WILLIAM DOWNING

Presented by:

Approved for Entry and as to Form,
 Notice of Presentation Waived

ROBERT W. FERGUSON
 Attorney General

FOSTER PEPPER PLLC


 MARC WORTHY, WSBA #29750
 Assistant Attorney General
 JEFFREY G. RUPERT, WSBA #45037
 Assistant Attorney General
 Attorneys for Plaintiff State of Washington.

MICHAEL K. VASKA, WSBA #15438
 KATHRYN C. MCCOY, WSBA #38210
 JACQUELINE C. QUARRÉ, WSBA #48092
 Attorneys for Defendants

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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON,

Plaintiff,

v.

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

Defendants.

NO. 14-2-17437-3 SEA

~~PROPOSED~~ JUDGMENT
FOR PLAINTIFF STATE OF
WASHINGTON

I. JUDGMENT SUMMARY

- 1.1 Judgment Creditor: State of Washington
- 1.2 Judgment Debtors: The Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata, and Joseph Fata, jointly and severally.
- 1.3 Principal Judgment Amount:
 - a. Civil Penalties: \$793,540
 - b. Restitution: As specified in the Court's March 3, 2016 Order on Amount of Civil Penalty and Procedure for Restitution, Defendants must transmit \$362,625 to the claims administrator to be held in trust. Restitution claims will be paid from this amount. Once the claims process set forth in the Court's March 3, 2016 Order is complete, all amounts remaining in the

Restitution Fund will be returned by the claims administrator to Judgment Debtors.

- 1.5 Costs and Attorneys' Fees: \$377,164.47
- 1.6. Total Judgment: \$1,170,704.47 plus restitution as described above and more fully described in the Court's March 3, 2016 Order.
- 1.7 Post Judgment Interest Rate: 12% per annum
- 1.8 Attorneys for Judgment Creditor: Marc Worthy
Assistant Attorney General
Jeffrey G. Rupert
Assistant Attorney General
- 1.9 Attorney for Judgment Debtors: Michael K. Vaska
Kathryn C. McCoy
Jacqueline C. Quarré
Attorneys at Law
Foster Pepper PLLC

II. JUDGMENT

The Court having considered the pleadings filed in the action and its January 26, 2016 Order Granting in Part Plaintiff's State of Washington's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, the March 3, 2016 Order on Amount of Civil Penalty and Procedure for Restitution, and the March 11, 2016 Order on Attorneys' Fees and Costs, hereby enters judgment as follows:

1. The Court hereby restates and incorporates by reference its (a) January 26, 2016 Order Granting in Part Plaintiff's State of Washington's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment, (b) March 3, 2016 Order on Amount of Civil Penalty and Procedure for Restitution, and (c) March 11, 2016 Order on Attorneys' Fees and Costs.

2. The State of Washington is granted judgment against Defendants The Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata, and Joseph Fata jointly and severally in the amount of \$793,540 for civil penalties pursuant to RCW 19.86.140.

1 3. The State of Washington is granted judgment against Defendants The
2 Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata, and Joseph Fata jointly and
3 severally in the amount of \$377,164.47 for costs and reasonable attorneys' fees pursuant to
4 RCW 19.86.080(1).

5 4. Pursuant to RCW 19.86.080(2), the Court enters a judgment order that
6 Defendants The Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata, and Joseph Fata
7 must jointly and severally provide restitution to Washington consumers as more fully specified
8 in the Court's March 3, 2016 Order. Within 45 days from March 3, 2016, Defendants must
9 retain a nationally recognized claims administrator to operate the claims process. The parties
10 shall then file a motion for approval of the claims administrator with the Court. Within 10
11 days of the Court's entry of approval of the claims administrator, Defendants must transmit the
12 full amount of potential restitution, \$362,625, to be held in trust by the claims administrator
13 (the "Restitution Fund"). The claims administrator is not authorized to pay or distribute any
14 money from the Restitution Fund unless specifically authorized by the Court's March 3, 2016
15 Order or a later order of the Court. Once the claims administration process set forth in the
16 Court's March 3, 2016 Order is complete, all amounts remaining in the Restitution Fund will
17 be returned by the claims administrator to Defendants.

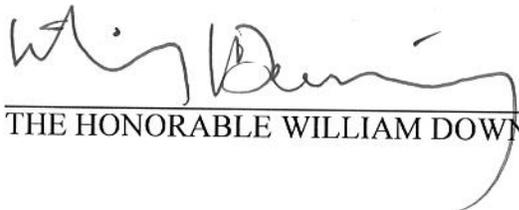
18 5. The total amount of the judgment granted to the State of Washington and
19 against Defendants The Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata, and
20 Joseph Fata, jointly and severally, is \$1,170,704.47 plus restitution as described above and
21 more fully described in the Court's March 3, 2016 Order.

22 6. Defendants The Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata,
23 and Joseph Fata as well as their successors, assignees, officers, agents, servants, employees,
24 representatives, and all other persons in active concert or participation with them, are
25 PERMANENTLY ENJOINED, pursuant to RCW 19.86.080(1) from:
26

- 1 a. Engaging in acts or practices that violate the CPA in the solicitation of or
2 transactions with Washington consumers;
3 b. Engaging in any other acts or practices that violate the CPA;
4 c. Failing to ensure that all their successors, assignees, officers, agents, servants,
5 employees, representatives, and all other persons in active concert or
6 participation with them receive a copy of this Order.

7 7. The amounts for civil penalties and attorneys' fees and costs shall be paid to the
8 State of Washington by check made payable to "Attorney General – State of Washington" and
9 sent to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative
10 Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington 98104-3188.

11
12 DATED this 25 day of March, 2016.

13
14 
15 THE HONORABLE WILLIAM DOWNING
16

17 Presented by:

18 ROBERT W. FERGUSON
19 Attorney General

20 s/ Marc Worthy

Marc Worthy, WSBA #29750

21 s/ Jeffrey G. Rupert

Jeffrey G. Rupert, WSBA #45037

22 Assistant Attorney General

Attorneys for Plaintiff State of Washington

23 800 Fifth Avenue, Suite 2000

Seattle, WA 98104-3188

24 Assistant Attorneys General

25 Email: marcw@atg.wa.gov, jeffreyr2@atg.wa.gov

26 T: 206-464-7745

1 Approved for Entry and as to Form,
2 Notice of Presentation Waived:

3 FOSTER PEPPER PLLC

4 s/Michael K. Vaska

5 Michael K. Vaska, WSBA #15438

6 s/Kathryn C. McCoy

7 Kathryn C. McCoy, WSBA #38210

8 s/Jacqueline C. Quarré

9 Jacqueline Quarré WSBA #48092

10 FOSTER PEPPER PLLC

11 1111 Third Avenue, Suite 3400

12 Seattle, Washington 98101-3299

13 T: 206-447-4400 / F: 206-447-9700

14 Email: vaskm@foster.com,

15 cardk@foster.com, quarj@foster.com

16 *Attorneys for Defendants*

APPENDIX A: FORM COMPARISON

	State's Profit Corporation Renewal & Annual Report Form¹⁴	CRS's Annual Minutes Form¹⁵
Envelope	<ul style="list-style-type: none"> • Off-white envelope. • Green font. • State of Washington Seal • Green stripe across the envelope states: "Important Secretary of State Document – Action Required". 	<ul style="list-style-type: none"> • Solid green envelope. • Black font. • No seal of any kind. • States: "THIS IS NOT A GOVERNMENT DOCUMENT" in black, bold, and capitalized font.
Form	<ul style="list-style-type: none"> • State of Washington Seal • Blue and red font. • Yellow highlighting. • References "renewal" in five places. • Requests names of directors and officers but <i>not</i> shareholders. • \$25.00 late fee and possible dissolution for failing to return the completed form and pay fees. • "RENEW ONLINE!" • Does not provide an option to provide credit card information. 	<ul style="list-style-type: none"> • No seal of any kind. • Only black font. • No highlighting. • No references to a requirement to "renew" or "file." • Requests names of all <i>shareholders</i>, directors, and officers. • No penalty, fee, or other consequence for choosing not to purchase CRS's service. • No option to renew online. • Does not provide an option to complete the form online.
Second Page	<ul style="list-style-type: none"> • Request information about a change of registered agent or registered agency address. 	<ul style="list-style-type: none"> • Requests no information about registered agents. • Reiterates that the mailing is "for preparation of documents to satisfy the annual minutes requirement for your corporation." • "You can engage and attorney to prepare [minutes], prepare them yourself, use some other service company or use our service." • "Please note: The preparation of minutes of annual meetings does not satisfy the requirement to file the annual report required by [RCW] 23B.16.220. The annual report and instructions may be found online."

¹⁴ See Quarré Dec. Ex. 31; Reed Dep. at 41:1-7, Quarré Dec. Ex. 14; Declaration of Patrick Reed, Exs. B, C.

¹⁵ See Fata Dec. Exs. B, E.

APPENDIX B: ASSURANCE OF DISCONTINUANCE

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

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

Figure 1.0 – Distinct Envelopes.



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

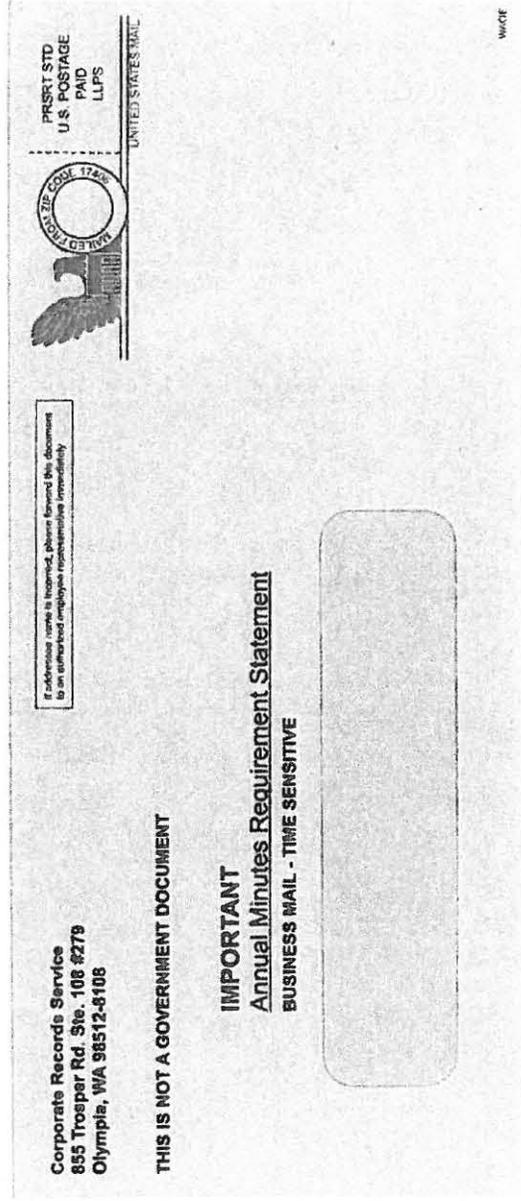


Figure 3.0 – Distinct Second Pages.

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

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

Name of new (domestic) Registered Agent (please print): _____

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

Signature of new Registered Agent: _____ Date: _____

If you are acting as the authorized representative of a corporation, you must give your title: _____

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

New Registered Address: _____ WA _____

PO Box for Mailing: _____ WA _____

CONTROLLING INTEREST

Real property, mineral, land or anything attached to land, including standing timber or crops
 Examples: Buildings, condominiums, used park model trailers, used floating homes, underground irrigation systems, or
 all types and other types of equipment that are permanently affixed to the land
 See WAC 459-619-102 for additional information.

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

A controlling interest transfer is when 50% or more of the ownership in an entity changes hands as defined under RCW 82.45.0102.

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

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

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

AND

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

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

For more information on Controlling Interest, please call the Department of Revenue at (360) 576-3265 or visit their website at www.dor.wa.gov

For additional information on this form, visit www.dor.wa.gov or call 1-800-433-3300. This form is available in Spanish at www.dor.wa.gov.

INSTRUCTIONS FOR COMPLETING THE ANNUAL MINUTES FORM
(Washington Corporation)

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

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

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

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

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

Step 5 Provide a valid payment method.

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

Step 7 Return the entire completed form with payment.

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

CORPORATE RECORDS SERVICE
855 Tanager Bld. S.W. 100 0279
Olympia, WA 98512-8108

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

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

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

© 2013 Corporate Records Service

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

DECLARATION OF SERVICE

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

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

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

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

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

DATED: August 10, 2016, at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe