

NO. 74978-1 I

FILED  
Sep 9, 2016  
Court of Appeals  
Division I  
State of Washington

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

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STATE OF WASHINGTON,

Respondent/Cross-Appellant,

v.

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

Appellant.

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**OPENING BRIEF OF RESPONDENT/CROSS-APPELLANT  
STATE OF WASHINGTON**

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ROBERT W. FERGUSON  
Attorney General

Marc Worthy, WSBA #29750  
Jeffrey G. Rupert, WSBA #45037  
Assistant Attorneys General  
Consumer Protection Division  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104

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## I. INTRODUCTION

Appellants are in the business of deception. Appellants entered into an Assurance of Discontinuance (AOD) with the State pursuant to RCW 19.86.100 whereby they agreed to not send mailers that implied that the solicitation was from the government and not to use specific terms. Appellants violated this AOD on a mass scale. Appellants sent 79,354 Annual Minutes Records Form solicitations to Washington small businesses that created the deceptive net impression that the solicitation was from the government and that consumers were required to respond to the solicitation. The solicitations used numerous terms prohibited by the AOD. The trial court correctly ruled on summary judgment that each of Appellants' 79,354 solicitations was a deceptive act or practice that violated the Consumer Protection Act (CPA), RCW 19.86. The trial court also correctly held that Appellants committed 79,354 violations of the AOD, which was prima facie evidence of 79,354 CPA violations. *See* RCW 19.86.100.

Appellants go to great lengths in their Brief to explain that corporate consents to act without a meeting—which was the product that they were selling with their Annual Minutes Records Form solicitations—are functionally equivalent to minutes of a corporate meeting. Appellants also focus on whether Washington corporate law requires corporations to

hold an annual shareholder's meeting to elect a board of directors. These are red herrings. Both issues are irrelevant to (a) whether Appellants' solicitation created the deceptive net impression that the solicitation came from a government agency and that consumers were obligated to return the form and (b) whether Appellants violated the AOD.

The trial court properly granted the State's motion for summary judgment and determined that Appellants violated the CPA and the AOD. It imposed a \$793,540 civil penalty, which was based on a \$10 civil penalty for each of Appellants' 79,354 CPA violations. The State cross-appeals. A higher civil penalty is warranted due to Appellants' clear, obvious, deliberate, and overwhelming number of violations of the AOD and the CPA. The State does not object to a \$10 civil penalty for each of the 76,453 CPA violations that did not lead to a purchase, but the trial court abused its discretion when it failed to impose a higher penalty for each of the 2,901 CPA violations where Washington consumers returned the form and paid Appellants \$125. For Appellants to sell their corporate consent product, they had to engage in deception as comparable products were available for free or for minimal cost. Indeed, as shown by the consumer declarations, what Washington consumer would purchase \$125 corporate consents to act without a meeting from non-lawyers from Michigan whose only familiarity with Washington law appears to have

been that they previously entered into an AOD with the State unless the consumer was deceived?

## **II. ASSIGNMENT OF ERROR**

The trial court erred in setting the amount of civil penalties pursuant to RCW 19.86.140 in its March 3, 2016 order that was incorporated into its March 25, 2016 judgment.

### **III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR AND COUNTERSTATEMENT OF THE ISSUES RAISED IN APPELLANTS' ASSIGNMENTS OF ERROR**

- A. Whether The Trial Court Abused Its Discretion In Setting The Amount Of Civil Penalties Pursuant To RCW 19.86.140. (State's Assignment of Error No. 1.)**
- B. Did The Trial Court Correctly Grant the State Summary Judgment And Deny Appellants' Motion For Summary Judgment?**
- C. Did Appellants Waive Numerous Issues They Seek To Raise On Appeal By Failing To Raise Them Before The Trial Court?**

### **IV. COUNTERSTATEMENT OF THE CASE**

Appellant Mandatory Poster Agency, Inc. d/b/a Corporate Records Service (CRS) is a Michigan corporation. CP 0499:8-15. Appellants Steven J. Fata, Thomas Fata, and Joseph Fata each own one-third of CRS and jointly undertake all corporate decisions. CP 0498:2-4, 0500:15-18. CRS has a mailbox in Olympia, Washington, at a United Parcel Service (UPS) Store. CP 0517:19-0518:1, 0518:5-11. In the solicitations it sent to Washington consumers, CRS identified this Olympia address as its

business location and return address. CP 0502:13–20. Appellants claim they selected Olympia as their mailing address because they thought it was centrally located. *Id.*

**A. The 2008 Assurance Of Discontinuance**

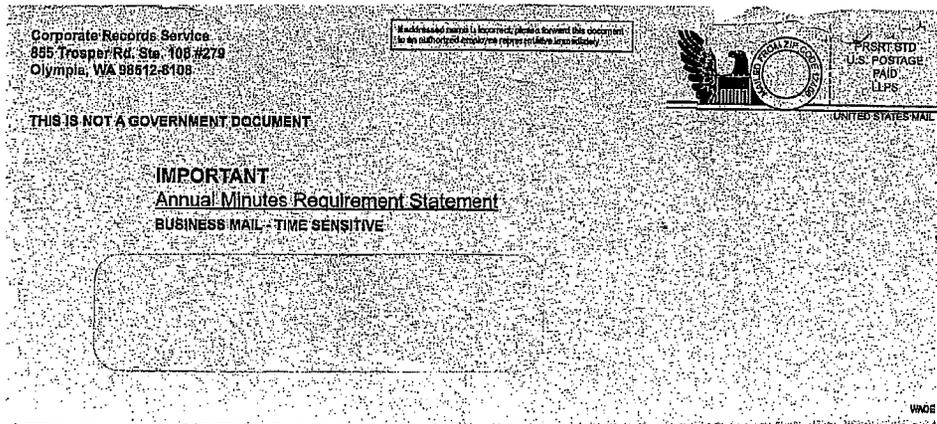
In February 2008, CRS entered into an AOD with the Attorney General’s Office. CP 0487-0493. The AOD prohibits CRS and its “officers, directors, and principals” (who are the Appellants in this case) from engaging in a variety of unfair or deceptive practices including sending misleading solicitations to consumers that create the impression that the solicitations are from a government agency. *Id.* The AOD also barred the use of specific terms and practices. *Id.*

**B. The “Corporate Minutes” Solicitation**

In 2012, Appellants began sending their Annual Minutes Records Form solicitation to Washington consumers. CP 0519:15–17. Joseph Fata designed the solicitation, while Steven Fata and Thomas Fata approved its use in Washington. CP 0500:25–0501:5. None of the Fata brothers could identify a single section of Washington law as the basis for the legal advice they purport to give Washington small business owners. CP 0520:1–16, 0521:21–25, 0522:1–24.

Appellants mailed 79,354 solicitations to Washington consumers in 2012 and 2013. CP 0556:4, 1006. On the envelope of every mailer,

Appellants chose to prominently state “**IMPORTANT**”, even though AOD ¶ 2.1(b)(3) barred the “Use of the term \*\*\* ‘important information’ \*\*\*or any terms of similar import[.]” CP 0489, 1011, 1025, 1028, 2195-2201. Appellants also chose to state on the envelope “Annual Minutes Requirement Statement”, “**TIME SENSITIVE**”, and “If addressed name is incorrect, please forward document to an authorized employee representative immediately”, even though AOD ¶ 2.1(b)(5) prohibited Appellants from “Representing on envelopes or exterior mailings that an enclosed solicitation requires immediate or other mandated response”:



*Id.*

Inside the envelope, Appellants placed a form entitled, “2012-ANNUAL MINUTES RECORDS FORM.” CP 1006, 1012-13, 1023-24, 1027, 1029, 2199–2200. The form was addressed to the recipient’s business and contained a bar code, response date, and the recipient’s date

of incorporation. *Id.* Contrary to the clear prohibition in AOD ¶ 2.1(b)(6) barring the “Use of notice numbers or business ID numbers, unless there is a specific business purpose for Respondents to use such a designation”, Appellants’ form included the business’s Washington corporate ID number.<sup>1</sup> CP 0489, 1006, 1012-13, 1023-24, 1027, 1029, 2199-2200. Contrary to the prohibition in AOD ¶ 2.1(b)(3) discussed above, the first instruction on Appellants’ form stated, “IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM. PLEASE PRINT.” *Id.* Appellants listed partial citations to the Washington Business Corporations Act in a prominent place near the top of the page. *Id.* The form had a disclaimer in the text one-third from the top. *Id.*

Appellants titled the second page of their mailing “INSTRUCTIONS FOR COMPLETING THE ANNUAL MINUTES RECORDS FORM (Washington Corporations).” *Id.* These instructions first direct recipients to review the accuracy of their pre-printed corporate name and address, then direct recipients through a series of seven steps for completing the form. *Id.* The instructions tell the recipient, “Maintaining corporate records is important to the existence of all corporations.” *Id.*

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<sup>1</sup> The Washington corporate ID number was included on 73,735 solicitations, but was not included on 5,619 solicitations. CP 1006.

In response to the mailing, 2,901 Washington small business owners purchased the Appellants' product. CP 484, ¶ 8.

**C. The Washington Secretary Of State Issued Warnings About Appellants' Mailer In Response To Consumer Complaints**

The Washington Secretary of State (SOS) received hundreds of customer calls, complaints, and inquiries. CP 0429, ¶ 6. *See also*, CP 0613:21-0614:2. The AGO received 120 complaints and letters regarding CRS. CP 1159-67.<sup>2</sup> Patrick Reed of the SOS explained that, Appellants' mailer was "very similar in layout and structure, even to the bar coding section " as the State of Washington Business License Service form " [a]nd the instruction sheets were a very similar form as well." CP 1095. In order to attempt to address the widespread consumer confusion that Appellants' mailer had originated from the SOS, the SOS issued a number of consumer alerts and warnings. CP 0441-47. For instance, on October 24, 2012, the Washington SOS alert stated in part:

Our concern is that the form being mailed is not coming from the Secretary of State's office and it could be misleading for businesses to think it's a required filing. In fact, what they are referencing is something a corporation normally does internally themselves without a fee.

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<sup>2</sup> One of those letters, addressed to both the SOS and AGO, was from Foster Pepper prior to its representation of the Appellants, which stated in part, "While we realize these mailings are not technically a 'scam', we're sending you copies of the mailing we received in support of any warnings your Departments may issue or post on your websites, or any other actions you may take regarding such mailings." CP 1162.

*Id.*

**D. Washington Consumers Received The Mailers And Were Deceived**

Many Washington consumers believed the CRS mailer originated from the government. For example, Christine Dormaier, a small business owner from Seattle, stated, “I believed that I was required to fill out the form and pay \$125 as instructed in the letter or my corporate status would be in default.” CP 0175:4–5. Angela Douglas, a small business owner from Seattle, received the CRS mailing and stated, “I believed that it was a document from the State of Washington and that I was required to fulfill my corporate filing requirement with the state.” CP 0185:4–5. Jennifer Flynn, another small business owner from Seattle, stated that she “believed that it was a document from the State of Washington.” CP 0191:4–5. Tim Olson, a small business owner from Seattle, stated that the documents initially looked to be from the government, and “the form even had my business’s Uniform Business Identifier – or ‘UBI’ – on it. I understand that UBI is the way in which the State identifies and tracks all businesses in Washington.” CP 0229:6–8.

Many consumers also believed they that they were required to fill out CRS’s form and mail \$125 to Olympia to fulfill a non-existent annual minutes requirement. Carolyn Johnson, a small business owner from

Shoreline, indicated: "When I reviewed the letter [from CRS], I believed that by returning the form and payment of \$125 as instructed in the letter I would be filing my corporate minutes as required by the law." CP 0213:3-4. Lisa Robinson, a small business owner from Bothell, stated: "When I received this letter [from CRS], I believed that was a document from the state of Washington and that I was required to fill out the form and pay \$125 as instructed in the letter in order to fulfill my corporate minute filing requirement with the state." CP 0244:4-6. Scott Greene, a small business owner from Shoreline, indicated that: "When I received the letter, I believed it was from the State of Washington and pertained to the reporting of the annual minutes of my corporation. It looked official to me and even came from an address in Olympia, Washington. I did not question its authenticity." CP 0197:4-6.

The State submitted declarations from a total of 18 Washington consumers who had been deceived by Appellants' solicitation. CP 0138-294. The State also submitted the declaration and expert reports of Prof. Anthony Pratkanis, an experimental social psychologist at the University of California at Santa Cruz. CP 0448-82. The day before reply briefs were due on the summary judgment briefing, Appellants submitted a declaration from one Washington consumer claiming to be satisfied with Appellants' product. CP 1433-34. During the course of three years of investigation and

litigation, this was the only Washington consumer that Appellants could find who was satisfied with their product.

**E. The CRS Corporate Consent Product**

For those Washington consumers who returned the Annual Minutes Records Form and \$125, Appellants sent the Washington consumers a binder titled, "Corporate Minute Book." CP 1006. Appellants did not send corporate minutes to Washington consumers who paid \$125. Rather, the Corporate Minute Book contained a "Unanimous Consent of Shareholders" and "Unanimous Consent of Directors." CP 1015-21. Joseph Fata was asked why consumers are not told in the Annual Minutes Records Form solicitation that they would be receiving corporate consent resolution documents instead of minutes. He answered, "Because they're told about it in the minute book." CP 0523:1-5. Steven Fata explained, "Yes, I believe they will understand it especially with our revised flyer, yeah. Maybe - maybe there might have been some confusion with this first flyer maybe, but we've since changed it and, you know, we're trying to get people to so they fully understand exactly what's going on." CP 1141.

For \$125, each Washington small business received a form document pre-populated with the small business's name, board of directors, and shareholders:

**THE XYZ COMPANY**  
**Unanimous Consent of Shareholders**

The undersigned, being all of the Shareholders of THE XYZ COMPANY (the "Corporation"), unanimously and in writing consent to the following action in lieu of a meeting:

**RESOLVED:** The Directors of the Corporation are as follows:

John Doe

Susan Smith

The Directors of the Corporation shall hold office until the next annual meeting or until successors are duly elected and qualified.

**FURTHER RESOLVED** All the actions and decisions of the Board of Directors and Officers of this Corporation for the past fiscal year through and including the date of this meeting are hereby approved and ratified.

The undersigned further certifies that the foregoing Resolutions remain in full force and effect and have not been either rescinded or modified.

IN WITNESS WHEREOF, the Shareholders of THE XYZ COMPANY have executed this Unanimous Consent of Shareholders.

CP 1020. The Corporate Minute Book included instructions to sign and date the documents and that, after signing the documents, "Your company will be in full compliance with the corporate minute records requirement after the Unanimous Consent documents are signed and dated." CP 1119.

**F. Comparable Corporate Consent Forms Are Available For Free Or At Minimal Cost**

There is no dispute that corporate consents to act without a meeting comparable to Appellants' product are available for free or at minimal cost on the internet. Appellants' motion for summary judgment attached a sample consent form from the law firm of Hillis Clark Martin & Peterson that is available for free on the internet. CP 0917. Appellants' marketing expert, Prof. Carl Obermiller, agreed in his deposition that there

is a product that “seem[s] to address the same issue” as the CRS product available for free on the internet and another similar product was available for \$19.95. CP 0343:9–24, 0341:23-0342:9, 0367-75. There are multiple additional examples of free corporate consents on the internet. CP 0331, 0367-97.<sup>3</sup>

Appellants’ expert did qualify his testimony regarding the free comparable product by noting there was no guarantee of quality for the product. CP 0344:2–22. However, Appellants’ expert admitted that Appellants’ solicitation also had no indication of quality. CP 0344:23–0345:8.

**G. The Comparable Products Do Not Mimic A Government Document Or Require Consumers To Purchase The Product**

Unlike the Appellants’ solicitation, the advertising for the comparable products uniformly did not mimic a government document or imply that a consumer was required to purchase the product. For instance, Legalzoom.com “uses a photo of a meeting (upper right corner) to communicate the core meaning of ‘minutes’ as a record of a meeting.” CP 0319, ¶ 1; CP 0325. Legalzoom.com also uses customer recommendations, advertising product quality by stating it was “created by

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<sup>3</sup> There also are products that include corporate consent forms as part of a larger package of unlimited use of corporate forms for a year such as the service offered by Legalzoom.com for \$99/year. CP 0319, ¶ 1; CP 0325.

experienced attorneys” and “our documents have been accepted by courts and government in all 50 states,” guaranteeing satisfaction, touting its price, and providing unlimited usage to prepare minutes for any and all meetings the corporation might have. CP 0325. Appellants’ expert agreed that Appellants did not use these techniques. CP 0337:10–0340:13. Further, unlike the Appellants’ form, Appellants’ expert agreed Legalzoom.com did not use a bureaucratic tone. CP 0337:3–9.

#### **H. The State’s Responses To Requests For Admissions**

Appellants, at various times in their Brief, imply that the State’s responses to request for admissions were improper or untimely. Appellants served the requests for admission on October 14, 2015, and the State submitted its responses on November 13, 2015. CP 1092, 1131-38. The State’s responses were consistent with its prior April 2, 2015, interrogatory responses. CP 1092, 1121-25.

#### **I. The Trial Court’s Decision**

On November 16, 2015, all parties moved for summary judgment. On January 26, 2016, the trial court partially granted the State’s summary judgment motion and denied Appellants’ motion for summary judgment. CP 1590-94. The trial court held that Appellants committed 79,354 violations of the CPA and AOD. CP 1591. The trial court found the individual Appellants personally liable because they participated in and

with knowledge approved of the practices that violated the AOD and CPA. CP 1591-92. The trial court found that there was no material question of fact that Appellants created and mailed 79,354 solicitations. CP 1591. The trial court also found that 2,901 Washington consumers returned the form and \$125, and Appellants sent them corporate consents to act without a meeting. *Id.*

On March 3, 2016, the trial court specified the restitution process and imposed civil penalties pursuant to RCW 19.86.140 in the amount of \$793,540, which was based on \$10 for each of the 79,354 CPA violations. CP 2044-53. The State requested fees and costs, and submitted a detailed 28-page spreadsheet with time entries, its hourly rates, and declarations supporting those. CP 1761-1802. On March 11, 2016, the trial court awarded the State \$337,593.20 in fees pursuant to RCW 19.86.080(1). CP 2125-27. The trial court also awarded the State \$39,571.27 in costs pursuant to RCW 19.86.080(1). *Id.*

## **V. SUMMARY OF ARGUMENT**

The trial court correctly ruled that Appellants committed 79,354 violations of the CPA and AOD. Appellants' violations of the AOD were open and obvious. For instance, Appellants' chose to use the word "IMPORTANT" when the AOD barred the use of the term "important

information” or “any terms of similar import”. Each violation of the AOD was prima facie evidence of a violation of the CPA.

The trial court also correctly ruled that Appellants violated the CPA by creating the deceptive net impression that their solicitations were from a government agency and that Washington consumers were obligated to fill out and return along with \$125. Avoiding the AOD and CPA, Appellants’ Brief focuses on the requirements of Washington corporate law. But the requirements of Washington corporate law are irrelevant to whether (1) Appellants created the deceptive net impression that Appellants’ solicitations were from a government agency and that Washington consumers were obligated to return the solicitation and (2) Appellants violated the AOD.

With regard to its cross-appeal, the trial court erred and abused its discretion when it set a civil penalty amount of \$793,540. The trial court properly found that Appellants did not act in good faith. CP 2045, ¶ 3. Appellants’ bad faith merits a substantially higher civil penalty because (a) Appellants blatantly violated the AOD; (b) Appellants had no qualifications to sell a legal form, and had no ability to obtain market share without deception; and (c) Appellants used this deceptive approach to charge \$125 when competing products were available for free or at no cost. Specifically, the trial court erred by not imposing a higher civil

penalty for each of the 2,901 CPA violations that led to a sale. The Court's order related to these 2,901 CPA violations should be reversed and remanded. In the alternative, this Court should set the civil penalty amount for each of the 2,901 CPA violations that led to a sale.

## VI. ARGUMENT

When reviewing a summary judgment decision, this Court conducts a de novo review. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). Summary judgment is appropriate when no issue of material fact exists and only questions of law remain to be determined. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). “[A]n adverse party may not rest upon the mere allegations or denials of a pleading[.]” CR 56(e). Rather, a response to a summary judgment motion “must set forth *specific facts* showing that there is a genuine issue for trial.” *Id.* (emphasis added); *Young v. Key Pharm.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

### A. Appellants Violated The AOD

The trial court found that appellants committed 79,354 violations of the AOD. CP 1591, ¶ 4. No reported cases have interpreted RCW 19.86.100,<sup>4</sup> which provides for assurances of discontinuance. The

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<sup>4</sup> RCW 19.86.100 provides “In the enforcement of this chapter, the attorney general may accept an assurance of discontinuance of any act or practice deemed in

closest parallel is *State v. Black*, 100 Wn.2d 793, 804, 676 P.2d 963 (1984), an antitrust case brought pursuant to RCW 19.86.020 that involved a prior consent decree. In *Black*, the trial court narrowly interpreted the consent decree because the defendant had made a good faith effort to comply. The Supreme Court reversed. The Court held that a good faith effort to comply was irrelevant and the literal terms of the consent decree controlled. *Id.* In a similar vein, Division I referred to contract principles and gave words their ordinary, usual, and popular meaning when interpreting a consent decree stemming from litigation brought by State against tobacco companies. *State v. R.J. Reynolds Tobacco Co.*, 151 Wn. App. 775, 783, 211 P.3d 448 (2009).

### **1. The AOD Applied To CRS**

Appellants' argue that the trial court erred in finding that they violated the AOD because "CRS is not MPA. They are two different divisions offering completely different services." Br. of Appellants at 36. First, as a threshold matter, this argument was not preserved for appeal because Appellants did not raise it in the trial court. RAP 9.12 and 2.5(a). *See Cano-Garcia v. King County*, 168 Wn. App. 223, 248, 277 P.3d 34

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violation of this chapter, from any person engaging in, or who has engaged in, such act or practice. \*\*\* Such assurance of discontinuance shall not be considered an admission of a violation for any purpose; however, proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of this chapter."

(2012); *Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011).

Second, using either a literal interpretation of the AOD or contract principals to interpret it, the trial court correctly held that the AOD applied to Mandatory Poster Agency, Inc. d/b/a Corporate Records Service. Thomas Fata signed the AOD on behalf of Mandatory Poster Agency, Inc. Corporate Records Service is an assumed name that Mandatory Poster Agency, Inc. used. CP 0035, ¶ 5.17. The plain language of the AOD states that it applies to Mandatory Poster Agency, Inc., which would include an assumed name. Further, there is no language in the AOD that even suggests that the AOD does not apply to Corporate Records Service or that Mandatory Poster Agency, Inc. could set up a different division to avoid the AOD.<sup>5</sup>

## **2. Appellants' AOD Violations Were Prima Facie Evidence Of Violations Of The CPA**

Appellants argue that the trial court erred because the “AOD did not constitute an admission of a violation of the CPA.” Br. of Appellants

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<sup>5</sup> Appellants claim in Footnote 34 that “The State belatedly raised the AOD issue on summary judgment.” This is incorrect. The State’s Complaint at Paragraphs 5.21 through 5.23 discussed the AOD at length and the causes of action assert conduct that violates the AOD, which is prima facie evidence of a CPA violation. CP 0577-80. Further, in discovery, Appellants’ Interrog. No. 11 asked the State to “Identify every way in which You believe Defendants violated the “2008 AOD” described in paragraphs 5.21 to 5.23 of the Complaint.” In its April 2, 2015 response, the State identified each of the violations that it subsequently cited in its motion for summary judgment. CP 1122-23.

at 36. It is difficult to discern what issue Appellants are raising. The trial court never held that a violation of the AOD constituted a violation of the CPA, and the State never made that claim. As the State has repeatedly stated and the AOD and RCW 19.86.100 plainly indicate, a violation of the AOD is prima facie evidence of a violation of the CPA. Appellants, therefore, identify no error in the trial court's conclusion. More to the point, Appellants have never rebutted the prima facie evidence of 79,354 CPA violations created by their 79,354 violations of the AOD.

### **3. Appellants Violated The AOD**

Appellants' final alleged error related to the AOD is that "any of the concerns addressed in the AOD are not present here." Br. of Appellants at 36. Appellants claim that there are matters of fact related to the AOD that are unresolved, but do not describe them. Further, as Appellants never claimed before the trial court that there were unresolved factual issues related to the AOD, this argument has not been preserved for appeal. RAP 9.12. *See Cano-Garcia, supra; Silverhawk, supra.*

Under a literal or contract interpretation of the AOD, the trial court correctly held that Appellants violated the AOD. Appellants violated Paragraph 2.1(b)(3)<sup>6</sup> by using the words "IMPORTANT" and

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<sup>6</sup> AOD ¶ 2.1(b)(3) barred the "Use of the term 'confidential,' 'important information,' 'approved,' 'effective immediately,' 'compliance,' 'advisors,' 'issued,' or

“Requirement” on their envelope and by instructing recipients, “IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM.” Appellants violated Paragraph 2.1(b)(5)<sup>7</sup> by including the terms “IMPORTANT”, “Annual Minutes Requirement Statement”, “If addressed name is incorrect, please forward document to an authorized employee representative immediately”, and “TIME SENSITIVE” on the envelope. Appellants violated Paragraph 2.1(b)(6)<sup>8</sup> by including the recipient’s UBI number and incorporation date on the solicitation. Appellants also violated Paragraphs 2.1(b)(8)<sup>9</sup> and 2.1(d).<sup>10</sup>

Further, as discussed in the next section, Appellants violated Paragraph 2.1(b) of the 2008 AOD, which prohibited Appellants from “Using any solicitation materials, including envelopes or exterior mailings, that have the tendency or capacity to mislead persons to whom the solicitation is directed to believe that Respondents are a government

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any terms of similar import, when referring to Respondents’ solicitations or products.” CP 0489.

<sup>7</sup> AOD 2.1(b)(5) prohibited Appellants from “Representing on envelopes or exterior mailings that an enclosed solicitation requires immediate or other mandated response.” *Id.*

<sup>8</sup> AOD ¶ 2.1(b)(6) barred the “Use of notice numbers or business ID numbers, unless there is a specific business purpose for Respondents to use such designation.” *Id.*

<sup>9</sup> AOD ¶ 2.1(b)(8) prohibited Appellants from referring to government penalties or other government actions that may result from the recipient’s failure to purchase Respondents’ product. *Id.*

<sup>10</sup> AOD ¶ 2.1(d) prohibited Appellants from representing that a failure or delay in responding may result in negative consequences. *Id.*

agency, have a contract with a government agency to provide a product, or that the material is coming from a government agency.” CP 0488.

**B. Appellants Violated The CPA, RCW 19.86.020**

The CPA forbids “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. The Legislature intended that the CPA be “liberally construed that its beneficial purposes may be served.” RCW 19.86.920. The Washington Supreme Court has reiterated this liberal construction directive in order to ensure protection of the public and the existence of fair and honest competition. *Thornell v. Seattle Serv. Bur., Inc.*, 184 Wn.2d 793, 799, 363 P.3d 587 (2015).

The State must prove three elements to prevail on its CPA claim: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) that affects the public interest. *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2001); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). Unlike private plaintiffs, the State is not required to prove causation or injury. *Id.* A CPA case brought by the State pursuant to RCW 19.86.080 is an equitable action, and there is no jury trial. *State ex. rel. Dep’t of Ecology v. Anderson*, 94 Wn.2d 727, 620 P.2d 76 (1980). Appellants’ appeal challenges the trial court’s finding that they committed an unfair or deceptive act or practice, but does not contest the other two elements.

**1. Whether An Act Is Unfair Or Deceptive Is A Question Of Law**

Appellants claim that it is unclear if the first *Hangman Ridge* element—whether a particular act is unfair or deceptive—is a question of law. Appellants claim that it is a question of fact as applied here. Appellants are wrong.

First, this argument was not preserved for appeal because Appellants did not raise it in the trial court. RAP 9.12. *See Cano-Garcia, supra; Silverhawk, supra*. Indeed, before the trial court when Appellants were moving for summary judgment, they asserted the exact opposite. CP 0659.

Second, even if Appellants had preserved for review the issue of whether the first *Hangman Ridge* element is a question of fact, they did not argue before the trial court that there were any questions of fact and have not preserved that issue for review. *See Silverhawk, supra*.

Finally, the Supreme Court has addressed this issue and held that whether a particular act is unfair or deceptive is a question of law:

The next issue is whether, as CCS contends, the first *Hangman Ridge* element has been established. Whether a particular act or practice is “unfair or deceptive” is a question of law. *Leingang v. Pierce Cnty Med. Bureau, Inc.*, 131 Wash.2d 133, 150, 930 P.2d 288 (1997). A plaintiff need not show the act in question was intended to deceive, only that it had the capacity to deceive a substantial portion of the public. *Id.*

*Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). As is the case here, the primary issue in *Panag* did not involve a per se CPA violation, so that holding controls this case.

**2. The Trial Court Did Not Err In Ruling That Appellants Committed 79,354 CPA Violations**

The trial court correctly ruled that Appellants committed 79,354 CPA violations. To demonstrate that a party is engaging in unfair or deceptive acts or practices, a “plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wn.2d at 785. “The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs.” *Id.* In evaluating this question, the Court ““should look not to the most sophisticated readers but rather to the least.”” *Panag*, 166 Wn.2d at 50 (quoting *Jeter v. Credit Bur., Inc.*, 760 F.2d 1168, 1174 (11th Cir. 1985)). An act or practice can also violate the CPA if it is unfair, even if is not deceptive. *See Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). An act is unfair under the CPA if it (1) offends public policy in a general sense; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers, competition, or other businesses. *Magney v. Lincoln Mutual Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983).

Even an accurate communication can be deceptive if the “net impression” it conveys is deceptive. *Panag*, 166 Wn.2d at 50 (citing *F.T.C. v. Cyberspace.com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006)). In *Panag*, the Washington Supreme Court held that actionable deception exists where there is a practice likely to mislead a “reasonable” or “ordinary” consumer. *Id.* at 50. As Judge Lasnik explained in *Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257 (W.D. Wash. 2011), the capacity to deceive test does not require that every consumer be deceived:

Not everyone would be fooled by this marketing technique. Some individuals would understand that obtaining something for nothing is a rare event and, at Step 3, would decline the offer of a \$10.00 discount on the assumption that there was a catch. Others would take the time to read every word of the screen shot labeled Step 4 and realize that the advertised \$0.00 price tag for Identity Protect would jump to \$19.95 per month after the first seven days. But not everyone is so wary and/or detail-oriented, nor is the CPA designed to protect only those who need no protection. The capacity of a marketing technique to deceive is determined with reference to the least sophisticated consumers among us. The FTC has noted that on-line consumers do not read every word on a webpage and advises advertisers that they must draw attention to important disclosures to ensure that they are seen. Decl. of Mark A. Griffin (Dkt. # 82), Ex. I at 5. This is particularly important when the consumer has no reason to be looking for, and therefore is not expecting to find, a disclosure. *Id.*

*Id.* at 1268.

**a. Appellants Deceived Washington Consumers**

The trial court correctly held that the net impression that Appellants' solicitation conveyed was deceptive and violated the CPA. Appellants' solicitation created the deceptive net impression that their form was from the government that consumers were required to return: (1) the envelope is printed with bold text reading, "Annual Minutes Requirement Statement" and "IMPORTANT" (2) the envelope also depicts a large, official-looking eagle, states "Time Sensitive," and orders the recipient to "Please forward to an authorized employee representative"; (3) authoritative language similar to a government document is used throughout the solicitation; (4) the unusually large physical size of the solicitation form mimics official Secretary of State mailings; (5) the solicitation contains selective citations to Washington's corporations law; (6) the solicitation demands urgent and exact completion at the top of the first page – "IMPORTANT! FOLLOW INSTRUCTIONS EXACTLY WHEN COMPLETING THIS FORM. PLEASE PRINT."; (7) the solicitation includes the recipient's unique Washington State corporation number/Unified Business identifier; (8) the solicitation recites the recipient's incorporation date; and (9) the detailed instructions accompanying the Annual Minutes Records Form warn the recipient, "Maintaining records is important to the existence of all corporations."

Further, Appellants' solicitation created the impression for consumers that it was a bill or invoice that the consumer was obligated to comply with.

The State submitted numerous declarations from Washington small business owners who received Appellants' solicitation. Many believed the mailing originated from the government. Many believed they that they were required to fill out Appellants' form and mail \$125 to Olympia to fulfill a non-existent annual minutes required filing.

According to Prof. Pratkanis, the Annual Minutes Records Form "is written in authoritative language as if it is a government agency or other authority speaking on a government requirement." CP 0457. "The use of this authoritative language and authority cues provides CRS with instant and smuggled credibility with consumers; the form appears to be from a trusted agent such as the government or someone with the right to speak for government. Credibility is an important factor for believability and persuasion." CP 0458. "Appellants capitalized on this usurped authority and deceived thousands of Washington consumers into returning the form and paying \$125. To further the ruse that the CRS mailer fulfills a requirement of the State of Washington and that the mailer is from an authority, the CRS 'Annual Minutes Record Form' also includes personal information about the targeted consumer." CP 0459.

Appellants' deceptive solicitation worked. The CRS mailers sent to Washington consumers produced a response rate of 3.65 percent, which was two to three times higher than the typical response rate of between one to two percent for a letter-sized direct mail piece sent to a prospect mailing list. CP 0455. As Prof. Pratkanis noted, "Remarkably, the CRS mailer obtains this high rate of response even though it fails to use many of the most effective influence devices used in direct mail to increase response rates such as offering free gifts and free trials, providing money-saving offers, highlighting testimonials concerning the value of the product, and featuring prominently money-backed guarantees of satisfaction." *Id.*

**b. The Comparison To The Washington Secretary Of State Renewal Form**

Appellants argue that their solicitation was not deceptive because it was not similar to the Washington Secretary of State (SOS) renewal form required by RCW 23B.16.220. The apparent premise of this argument is that consumers compared the SOS renewal form to Appellants' solicitation. However, there is no evidence in the record that any consumers compared the two forms side-by-side when they received the Appellants' solicitation. Further, there is no evidence in the record that any consumer even had the current SOS renewal form at the time they

were reviewing Appellants' solicitation. Moreover, there is no evidence in the record that anyone in Washington knew what Appellants were actually selling and affirmatively wanted the product other than one consumer.

Even if Appellants' solicitation had no similarity whatsoever to the SOS renewal form, the issue remains whether the "net impression" Appellants' solicitation conveyed was deceptive. *See Panag*, 166 Wn.2d at 50. As discussed above, consumers were deceived by Appellants' solicitation. Appellants' "comparison to SOS form" argument does not counter this. Nor does it counter Appellants' clear violations of the AOD. Put bluntly, Appellants had no qualifications to sell a legal form, and the way they sold it was by deception. Thus, the trial court correctly concluded that Appellants' form was deceptive and violated the CPA.

**c. The Disclaimers On Appellants' Solicitation Are Insufficient**

Appellants claim that their disclaimers that the solicitation did not originate from the government cured the deceptive nature of their solicitation. However, courts have repeatedly held that attempts to cure or absolve deceptive impressions and activities by employing disclaimers and disclosures are insufficient. *F.T.C. v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1065 (C.D. Cal. 2012) (citing *F.T.C. v. Gill*, 71 F. Supp. 2d 1030, 1044 (C.D. Cal. 1999), *aff'd*, 265 F.3d 944 (9th Cir.

2001)); *see also F.T.C. v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 42-43 (D.C. Cir. 1985) (affirming finding that an advertisement's description of cigarette tar content was deceptive despite the fine print truthfully explaining how the tar content was measured); *Floersheim v. F.T.C.*, 411 F.2d 874, 876-77 (9th Cir. 1969); *Standard Oil Co. of Cal. v. F.T.C.*, 577 F.2d 653, 659 (9th Cir. 1978) (affirming for substantial evidence the FTC's finding that the predominant visual message of an advertisement was misleading and that it was not corrected by the accompanying verbal message in the advertisements).

Likewise, the Washington Supreme Court has not been receptive to claims that disclaimers cure deceptive impressions. In *Panag*, the Washington Supreme Court cited *Cyberspace.Com* for the proposition that a "solicitation masquerading as a rebate check was misleading notwithstanding fine print notices accurately disclosing its true nature." *Panag*, 166 Wn.2d at 50. The *Panag* Court also cited *Independent Directory Corp. v. F.T.C.*, 188 F.2d 468, 470 (2d Cir. 1951) for the position that a solicitation for advertising orders that appeared instead to be a renewal notice was deceptive even though the fine print disclosed that the advertisement clipped to the form was one the recipient had taken out in a different publication. *Panag*, 166 Wn.2d at 50. In a similar vein, the *Panag* Court cited *Floersheim*, 411 F.2d at 876-77 for the proposition that

a “disclaimer did not cure deceptive impression that demand letter was issued by United States government, as many individuals ‘would be unlikely to notice respondent’s inconspicuous disclaimer or to understand its import.’” *Panag*, 166 Wn.2d at 50 (quoting *Floersheim*, 411 F.2d at 876).

The trial courts legal conclusion remains sound because, as Prof. Pratkanis explained, there is “vast scientific literature showing that disclaimers and disclosure information is generally ineffective in countering mistaken beliefs as well as the research in related fields including corrective advertising, belief perseverance, warning effectiveness, and rumor control.” CP 0473; CP 0479-82. “Disclaimers tend not to be read and when read tend to be misunderstood and fail to clarify or correct information presented in the main body of a marketing communication.” CP 0473. Additionally, the use of “not” as part of a disclaimer (i.e., “Not authorized by the N.F.L.”) is particularly ineffective. CP 0474. The two CRS disclaimers both use “not” as part of the disclaimers. As Prof. Pratkanis explained, “The Jacoby research finds that such disclaimers are ineffective and may even strengthen the perception that CRS is a government agency to the extent that the consumer misses the word “not” (as Jacoby and his associates found in their research).” CP 0475.

**d. While The Parties Largely Agree On The Requirements Of Washington Corporate Law, Appellants' Argument On That Point Is Irrelevant**

Appellants argue at length that Washington corporate law requires corporations to hold an annual shareholders' meeting to elect a board of directors. While irrelevant to this case, there is no dispute that Washington law provides that "[a] corporation shall hold an annual meeting for the election of directors at the time fixed by the bylaws." RCW 23B.07.010. The parties agree that, if there is no annual shareholders' meeting, the directors in office continue on as before, termed "holdover directors." CP 1180, ¶ 23. Further, the parties agree that RCW 23B.07.010(4) (1989) (2002) affirmatively provides that "[t]he failure to hold an annual meeting ... does not affect the validity of any corporate action."

The parties disagree as to the consequences for a corporation not holding an annual shareholders' meeting or preparing a shareholders consent to act without a meeting to elect a board of directors. The State's expert opined there is no penalty for not holding a meeting or executing consents. CP 1183-84, ¶ 28. Appellants' expert Prof. Drake conceded in his deposition that a lack of corporate formality observance alone was unlikely to result in a loss of corporate status and allow for the piercing of the corporate veil. CP 1147-48, at 40:13-43:1. *See also* CP 0689, ¶ 4.9.

Small closely held and family-owned businesses – these were the type of entities to whom Appellants sent their solicitations – have traditionally been afforded flexibility in the formal recording of corporate minutes. *See Barnett v. Joseph Mayer & Bros.*, 119 Wash. 323, 328, 205 P. 396 (1922). It has long been established in Washington that the, “[i]nformality of operation is permitted in case of close or family-owned corporations.” *Block v. Olympic Health Spa, Inc.*, 24 Wn. App. 938, 945, 604 P.2d 1317 (1979). This means that, “at least in close corporations and family-owned corporations, the failure to keep minutes will not invalidate the actions taken.” Robert J. McGaughey, *Washington Corp. Law Handbook* 214 (2000). While agreeing that the corporate veil likely would not be pierced, Prof. Drake was concerned that there were possible adverse tax consequences. CP 1045, ¶ 3.11. Even if Prof. Drake’s possible tax consequences issue is a fair concern as opposed to a purely academic one, it has no bearing whatsoever on: (a) whether Appellants’ solicitation created the deceptive net impression that the solicitation came from a government agency and that consumers were obligated to return the form and (b) whether Appellants violated the 2008 AOD.

Moreover, contrary to the implication in Appellants’ solicitation, even Appellants’ expert agreed that there is no requirement in Washington law that a corporation must file minutes of annual meetings with the

Secretary of State. CP 1154, at 38:19–24. Rather, Washington law requires that corporations file with the Secretary of State an annual report containing certain information about the corporation, its activities, and ownership. *See* RCW 23B.16.220 and CP 1186, ¶ 31.

**e. Appellants’ Deceptively Offered To Provide Corporate Minutes While Actually Providing Corporate Consents**

In a similar attempt to avoid discussing the deception caused by their solicitation, Appellants’ argue that Washington corporate law provides that an act approved via a corporate consent to act without a meeting is functionally similar to that act being approved at a corporate meeting and then recorded in the minutes of the meeting. This is irrelevant to: (a) whether Appellants’ solicitation created the deceptive net impression that the solicitation came from a government agency and that consumers were required to return the form and (b) whether Appellants violated the 2008 AOD.

The differences between meeting minutes and corporate consents to act without a meeting was relevant to the State’s assertion that Appellants’ solicitation was deceptive for the additional reason that Appellants deceptively offered to provide corporate minutes while actually providing corporate consents to act without a meeting. The State and Appellants generally agree that Washington law provides that corporations

must elect directors and that this election can be accomplished at a meeting or through executed shareholder consents to act without a meeting. If there is no election, the prior directors are hold-over directors. If the company holds a meeting, minutes must be kept. If there is no meeting, there can be no minutes.

Appellants engaged in deceptive acts and practices by offering to provide meeting minutes while actually providing corporate consents. The State's expert, Prof. Branson, explained that corporate minutes differ materially from corporate consents in some respects. CP 1189, ¶ 37. Appellants' expert Prof. Drake agreed that minutes and consents are different corporate instruments. CP 1149: 18-24, 1150:18-24. Washington consumers, however, would not have the benefit of Prof. Drake's or Prof. Branson's expert opinions when they reviewed Appellants' Annual Minutes Records Form and were attempting to understand what "product" the Appellants were offering to provide. As Prof. Pratkanis explained, a consumer would interpret the term "minutes" in the CRS mailer as follows: First, consumers rely on their experiences, and many business owners would have an experience of attending a meeting where minutes are contemporaneously taken. Second, some consumers would not give the term "minutes" much thought and would pay the bill as it was a government requirement. Third, some consumers may wonder about the

details and might consult legal or accounting professionals, state government, or the dictionary or a wiki site. CP 0318. For those consumers consulting a dictionary, Wikipedia, or Roberts Rules of Order, the definitions of “minutes” uniformly indicate that minutes are notes of a meeting without any reference to corporate consents to act without a meeting. CP 1194-1244. In sum, consumers expected to receive, and paid for, meeting minutes from Appellants, but they were not provided. The deceptive failure to provide meeting minutes was part of Appellants’ scam.

**C. The Trial Court Properly Held That Appellants Committed 79,354 CPA Violations**

Appellants argue that the civil penalty amount is too high by claiming that the trial court erred by treating each of Appellants’ 79,354 solicitations as a CPA violation. The trial court followed established precedent and correctly held that each mailer violated the CPA. In contrast, Appellants cite no case law supporting their argument.

In *United States v. Reader’s Digest Ass’n*, 662 F.2d 955, 967 (3d Cir. 1981), *cert. denied* 455 U.S. 908 (1982), the trial court held in a deceptive mailer case brought by the Federal Trade Commission that Reader’s Digest committed 17,940,521 violations on the rationale that “each letter distributed in the Digest’s mass mailings constituted a separate

violation.” *Reader’s Digest Ass’n*, 662 F.2d at 959-60. The Third Circuit affirmed and held that “each letter included as part of a mass mailing constitutes a separate violation.” *Id.* at 966.

That there is an individual violation for each mailing is further confirmed in *State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976) where the Court addressed whether civil penalties were appropriate when “the trial court did not find that the consumers relied on appellants’ wrongful conduct.” *Id.* at 436. The Court held that, “A claimant need not prove consumer reliance to establish an unfair or deceptive practice. A claimant must prove that the conduct has the capacity or tendency to deceive.” *Id.* at 437. The Court also held that the “statute vests the trial court with the power to assess a penalty for each violation.” *Id.* at 316-17. This shows that a consumer need not fall victim to or rely on the deception for there to be a CPA violation. Rather, there is a CPA violation for each of Appellants’ 79,354 deceptive solicitations regardless of whether the consumer purchased Appellants’ product.

**D. The Trial Court’s Order Does Not Violate RCW 19.86.140**

Appellants claim that RCW 19.86.140 limits the civil penalty that could be awarded to \$25,000. Appellants’ theory is that, because they agreed to a prior AOD, they can violate Washington law with impunity

and RCW 19.86.140 limits any future civil penalty award to \$25,000.

RCW 19.86.140 provides in relevant part as follows:

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.

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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[.] \*\*\*

The plain language of RCW 19.86.140 does not state or even imply that the first paragraph of RCW 19.86.140 (up to \$25,000 injunction violation civil penalty) cancels out the third paragraph of RCW 86.140 (up to \$2,000 per violation of RCW 19.86.020 civil penalty). Rather, the Attorney General can utilize both the first paragraph of RCW 19.86.140 (up to \$25,000 injunction violation civil penalty) and the third paragraph of RCW 19.86.140 (up to \$2,000 per violation of RCW 19.86.020 civil penalty) in a case if appropriate. Here, only the third paragraph of RCW 19.86.140 is applicable as the State did not plead or seek any injunction violation in this case. The State pled and the trial court found violations of RCW 19.86.020. The trial court also found that Appellants violated the AOD, which created a prima facie evidence of violations of the CPA.

This result is reinforced by the CPA liberal construction obligation. RCW 19.86.920 provides that the CPA “shall be liberally construed that its beneficial purposes may be served.” Likewise, in *State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc.* 82 Wn.2d 265, 273-4, 510 P.2d 233 (1973), the Court held that RCW 19.86.140 is to be liberally construed. Under Appellants’ theory, two-time bad actors such as them could act with impunity and violate the CPA at will with little resulting civil penalty, while a first time bad actor would face significant civil penalties for the same conduct. Appellants’ proposed interpretation is anything but a liberal interpretation of RCW 19.86.140. As the Court in *Ralph Williams* explained, the now-third paragraph of RCW 19.86.140 (up to \$2,000 per violation of RCW 19.86.020 civil penalty) was added in 1970 to alleviate a problem with the prior version<sup>11</sup> and that the now-third paragraph “was not intended to be a remedy dependent upon the issuance of an injunction.” *Id.* at 273. The trial court ruled properly when it imposed civil penalties above \$25,000 on Appellants.

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<sup>11</sup> The *Ralph Williams*’ Court stated “When first enacted, the only sanctions in RCW 19.86.140 for violating RCW 19.86.020, dealing with unfair competition and practices, were those of an injunction and civil penalty for violation of the terms of the injunction. See O’Connell, *Washington Consumer Protection Act—Enforcement Provisions and Policies*, 36 Wash.L.Rev. 279 (1961). Where injunctions are the only remedies in consumer protection acts, firms can operate in a county or state and then remove themselves from the jurisdiction after being formally enjoined, all without suffering any penalty. The addition of fines to the list of sanctions in consumer protection acts has the effect of deterring and penalizing this type of violator.” *Id.* at 273.

**E. The Civil Penalty Against Appellants Does Not Violate Due Process**

The trial court imposed a civil penalty of \$793,540. Appellants argue that this amount or any larger *BMW of N. A., Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996) amount violates due process by relying upon the line of cases for reviewing whether a punitive damages award violated the Due Process Clause. Appellants' argument should be rejected.

First, the Washington Supreme Court has questioned whether the *BMW* analysis for reviewing whether a punitive damages award violated the Due Process Clause applies to statutory damages. *See Perez-Farias v. Global Horizons, Inc.*, 175 Wn.2d 518, 531-32, 286 P.3d 46 (2012). In *Perez-Farias*, the Court noted that no award of statutory damages has ever been invalidated under the *BMW* or *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003) analysis. *Perez-Farias*, 175 Wn.2d at 531-32. When a judge exercises discretion to impose civil penalties within the amounts specified by statute, the *BMW* analysis is not implicated. There is no random jury award. Rather, there are statutory limits of up to \$2,000 per violation specified by the CPA that Appellants were aware of when they chose to engage in their deceptive conduct.

Second, even if the *BMW* punitive damages analysis applies to an award of statutory damages, the civil penalty imposed by the trial court of \$793,540 is within all constitutional Due Process guideposts. In *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999), the Court identified the three *BMW* factors as (1) the degree of reprehensibility of Appellants' conduct, (2) a comparison of the amount of the award with the actual and potential harm caused by Appellants' conduct, and (3) a comparison of the amount of the award to the civil penalties authorized by statute, which the court characterized as whether the Appellants had fair notice that the offensive conduct could incur such a high amount of penalties. *Id.*<sup>12</sup>

As to the first factor, the trial court explained its rationale as follows:

In setting the civil penalty amount, the Court considered Defendants' lack of good faith the most important element. This civil penalty will eliminate any benefits derived by the Defendants from their deceptive practices, and also will vindicate the authority of the Consumer Protection Act to protect Washington consumers from unfair and deceptive acts. Defendants entered into an Assurance of Discontinuance with the State and then repeatedly violated it. Defendants' conduct harmed those that bought their product due to Defendants' deception. In addition to those small businesses that purchased Defendants' product due to deception, others that did not purchase the product spent time and wasted effort reviewing the deceptive solicitation.

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<sup>12</sup> In *WWJ*, the Washington Supreme Court applied the *BMW* punitive damages Due Process analysis "for the sole purpose of analyzing whether [the] claim is manifest [error] under RAP 2.5(a)(3)." *Id.* at 606.

CP 2045, ¶ 3. The State submits that there is a high degree of reprehensibility present here. As the State demonstrated and the Court held, Appellants engaged in a pattern of deception. Appellants' pattern of deception was calculated and intentional as they blatantly violated numerous provisions of the AOD.

As to the second factor, the civil penalty imposed by the trial court of \$793,540 is well below the actual or potential harm caused by Appellants. As the trial court held "The amount is also less than the potential harm of \$9,919,250 that Defendants could have caused if all Washington consumers who had received Defendants' deceptive mailer had purchased the \$125 product based on Defendants' deception." *Id.* Appellants sold their \$125 corporate consent product to 2,901 consumers, and thus received \$363,625. Appellants caused actual harm to: (1) the Washington small businesses that purchased legal forms from the Appellants for \$125 based on Appellants' deception, (2) the many small businesses that spent time and wasted effort reviewing the deceptive solicitation, (3) Washington consumers who now question the authenticity of the documents they receive from the State, and (4) other sellers of legal forms as Appellants competed unfairly.

As to the third factor, the potential civil penalty under RCW 19.86.140 is \$2,000 per CPA violation, which equals \$158,708,000

for 79,354 violations. *Id.* Appellants were on notice of the \$2,000 per violation amount as this is specifically referenced in Paragraph 5.1 of the AOD. In sum, the civil penalty of \$793,540 is well within the *BMW* and *State Farm* guideposts to the extent that they even apply.<sup>13</sup>

**F. The Trial Court Did Not Abuse Its Discretion In Awarding The State Fees And Costs**

The Appellants also challenge the trial court's award to the State of fees of \$337,593.20 and costs of \$39,571.27. In a CPA enforcement action brought by the State, the court has discretion to award the prevailing party the costs of the action, including a reasonable attorneys' fee. RCW 19.86.080(1); *Ralph Williams*', 87 Wn.2d at 314-15. Awarding attorneys' fees to the State places the substantial costs of enforcement proceedings on violators of the act and lessens the burden on public funds. *Ralph Williams*', 87 Wn.2d at 315. To determine a "reasonable" attorneys' fee, the court must determine the number of hours reasonably expended and the claimant's customary billing rate,<sup>14</sup> which are then multiplied to determine the "lodestar." *See Bowers v. Transamerica Title Ins. Co.*,

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<sup>13</sup> Appellants suggest in Footnote 38 that the State has settled several comparable CPA claims for less than it sought here. Appellants are incorrect. The State has a long history of seeking and obtaining significant consumer protection recoveries. CP 2014-15.

<sup>14</sup> In Footnote 39 of their Brief, Appellants argue that the State's hourly rates were unreasonable. Appellants, however, did not contest the State's hourly attorney rates before the trial court. Therefore, this argument was not preserved for appeal.

100 Wn.2d 581, 597-98, 675 P.2d 193 (1983). The Appellants show no errors in the fees and costs.

**1. The Documentation Of Attorney Time**

The trial court found that the time spent by the State as detailed in the State's declarations was reasonable and appropriate. CP 2127, ¶ 4. Appellants argue that this was an abuse of discretion. The Washington Supreme Court has held that billing documentation "need not be exhaustive or in minute detail, but must inform the court ... of the type of work performed[.]" *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d at 597. The State submitted a 28-page spreadsheet listing the individual time entries for the work for which it was seeking fees. Tellingly, Appellants have not complained about any specific time entry before the trial court or on appeal. The trial court did not abuse its discretion.

**2. Paralegal And Investigator Time**

The trial court awarded the State \$10,405.80 for paralegal time and \$16,764.90 for investigator time after reviewing time entries detailing the work by the State's paralegal and investigator. Appellants claim that the trial court abused its discretion by not considering the factors in *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995). Appellants, however, did not raise this issue before the trial court. Therefore, this argument was not preserved for appeal. RAP 9.12

and RAP 2.5(a). Further, there is no basis in the record for claiming that the trial court did not undertake this analysis when it reviewed the time entries.

### **3. Appellants' Segregation Of Time Theory**

The trial court did not find that Appellants' prevailed on any portion or theory of the case. Nonetheless, Appellants argue that the trial court abused its discretion by not finding that the State supposedly lost on an "erroneous" legal theory regarding the requirements of Washington corporate law that the State supposedly abandoned "at the last minute." Appellants' theory is that the State abandoned some portion of its case apparently by admitting in response to requests for admissions on November 13, 2015, that corporate consents to act without a meeting can be similar to meeting minutes if a meeting has been held and that RCW 23B.07.010 provides that "[a] corporation shall hold an annual meeting for the election of directors at the time fixed by the bylaws."

The State's legal position was well known to the Appellants throughout the case. Notably, Appellants sent a contention interrogatory on March 3, 2015, regarding the supposedly "erroneous" legal theory. The State timely responded to Interrog. No. 13 on April 2, 2015, and explained its position, which was the same position as in the State's summary judgment briefing. Appellants also appear to indirectly argue that the trial

court abused its discretion by accepting the States' request that the trial court find Appellants committed 79,354 CPA violations. While there was a basis for the State to seek 317,416 CPA violations,<sup>15</sup> it in no way follows that the State was not the prevailing party or only was a partially prevailing party by seeking 79,354 CPA violations. The trial court's decision is not manifestly unreasonable or based on untenable grounds or reasons.

#### **4. The Trial Court's Cost Award**

Appellants assert that the trial court awarded costs beyond those authorized in RCW 4.84.010. Appellants never argued to the trial court that any of the fees sought by the State were beyond those authorized in RCW 4.84.010, and therefore waived the issue for appeal.

### **VII. ARGUMENT RELATED TO CROSS-APPEAL**

The trial court abused its discretion in imposing civil penalties pursuant to RCW 19.86.140 in the amount of \$793,540 based on \$10 per violation for 79,354 CPA violations. "The trial court's imposition of a civil penalty within the statutory limits is reviewed for an abuse of discretion." *State v. WWJ Corp.*, 88 Wn. App. 167, 169, 941 P.2d 717 (1997), *aff'd on other grounds* 138 Wn.2d 595, 598, 980 P.2d 1257

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<sup>15</sup> The Washington Supreme Court held that "[w]e decline to follow the one-violation-per-consumer rule[.]" *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn. 2d 298, 316-317, 553 P.2d 423 (1976).

(1999). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A decision is “manifestly unreasonable” if, given the facts and applicable legal standard, “it is outside the range of acceptable choices.” *Id.*

The CPA does not set forth specific factors for courts to consider in imposing civil penalties, but authorizes courts to look to federal court decisions interpreting the Federal Trade Commission Act for guidance. RCW 19.86.920. Federal courts have identified five factors to consider in determining the appropriate civil penalty: (1) whether defendants acted in good faith, (2) injury to the public, (3) defendants’ ability to pay, (4) desire to eliminate any benefits derived by the defendants from the violation at issue, and, (5) necessity of vindicating the authority of the law enforcement agency. *United States v. Reader’s Digest Ass’n*, 662 F.2d 955, 967 (3rd Cir. 1981), *cert. denied* 455 U.S. 908 (1982).

The State agrees with the findings in the trial court’s rationale for its civil penalties award, particularly the finding that Appellants did not act in good faith. CP 2045, ¶ 3. However, Appellants’ bad faith merits a substantially higher civil penalty. The AOD barred the use of specific terms, and Appellants deliberately disregarded those terms on a mass scale. This demonstrates blatant disrespect for Washington law. Moreover,

Appellants' deception was a calculated attempt to deceive consumers. Appellants had no qualifications to sell a legal form, and used deception to obtain sales. They charged \$125 for a form that many corporations prepare internally at no cost or which is available on the internet for free or minimal cost. In this context, \$793,540 is not a substantial civil penalty. It can be shrugged off as a calculated risk of doing business for Appellants, and they have already paid this amount to the State.

This Court should hold that the *Readers Digest* factors lead to a higher penalty for the violations where a sale occurred. In *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 316 n. 11, 553 P.2d 423 (1976), the trial court awarded civil penalties per violation of \$250, \$500, and \$2,000 depending on the nature of the violation. Using the *Reader's Digest* factors, a similar approach to civil penalties that reflected the nature of the conduct was recently utilized by the South Carolina Supreme Court. It set civil penalties based on a per violation amount of \$100, \$2,000, and \$4,000 depending on the nature of the violation. *State ex rel. Wilson v. Ortho-McNeil-Janssen Pharm., Inc.*, 414 S.C. 33, 777 S.E.2d 176 (2015).<sup>16</sup>

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<sup>16</sup> *State ex rel. Wilson* was a consumer protection claim in connection with Janssen's sales and marketing of Risperdal. Janssen's deceit was substantial, but that there was an "absence of significant actual harm resulting from Janssen's deceptive conduct." *Id.* at 86. The penalty was divided into three categories – (1) civil penalties of

The reason for an increased civil penalty for those that purchased Appellants' product is due to the second and fourth *Readers' Digest* factors. The injury suffered by those that purchased the product—the second factor—and benefit that Appellants received as a result—the fourth factor—is substantially different for those that purchased versus those that did not. After three years of investigation and litigation, the only evidence in the record is that one Washington consumer returned the solicitation with the understanding that they were buying the corporate consent product and affirmatively wanted the product.

Appellants also wronged those Washington residents who received their deceptive mailer but did not purchase Appellants' product. As noted by the Third Circuit in *Reader's Digest*, "(t)he principal purpose of a cease and desist order is to prevent material having a capacity to confuse or deceive from reaching the public ... (t)hus, whenever such promotional items reach the public, that in and of itself causes harm and injury." *Reader's Digest*, 662 F.2d at 969 (internal citations omitted). Appellants' deceptive solicitation was barred by the AOD, and should never have reached the public. Yet thousands of Washington small businesses had to

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\$100 for each of Risperdal sample boxes that Janssen distributed that contained a deceptive label, (2) civil penalties of \$4,000 for each Dear Doctor Letters that Janssen mailed to physicians, and (3) civil penalties of \$2,000 for each follow-up sales calls after the Dear Doctor Letter. *Id.* The highest penalty was reserved for the most deceitful conduct. *Id.* at 53. The total civil penalty was \$124 million.

spend time reviewing Appellants' deceptive solicitation. The State of Washington and Washington consumers are further damaged because consumers that received the deceptive mailer may now question the authenticity of the documents from the State. Finally, Appellants' conduct is unfair to its competitors who provide legal forms. If Appellants want to compete for market share in the legal forms business, they must do so without deception.

This Court should reverse and remand the civil penalties award with guidance for the trial court to use its discretion to set a higher civil penalty amount for the 2,901 CPA violations that led to a sale. In the alternative, this Court should set the civil penalty amount for each of the 2,901 CPA violations that led to a sale.

#### **VIII. THE COURT SHOULD AWARD THE STATE ATTORNEY FEES AND COSTS INCURRED IN THIS APPEAL**

Pursuant to RAP 18.1(b), the State respectfully requests the Court to exercise its discretion and award the State its reasonable attorneys' fees and costs on appeal. A prevailing party is entitled to attorneys' fees and costs on appeal if requested in the party's opening brief and if "applicable law grants to a party the right to recovery." RAP 18.1(a)-(b). The CPA provides the Court with discretion to award the State reasonable fees and costs as the prevailing party on appeal. RCW 19.86.080(1); *See State v.*

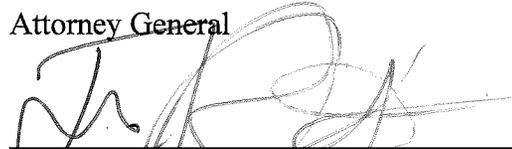
*Kaiser*, 161 Wn. App. at 726. Should the Court grant the State's request, the State will file an affidavit detailing the fees and costs incurred. RAP 18.1(d).

### IX. CONCLUSION

The Attorney General respectfully requests that the Court reverse and remand the issue of the amount of the civil penalty to the superior court to set a higher civil penalty for each of the 2,901 CPA violations that resulted in a sale. In the alternative, this Court should set the civil penalty amount for each of the 2,901 CPA violations that led to a sale. In all other respects, the Attorney General requests that the Court affirm the superior court's orders granting summary judgment for the State and award the State its reasonable attorneys' fees and costs pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 9th day of September, 2016.

ROBERT W. FERGUSON  
Attorney General



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

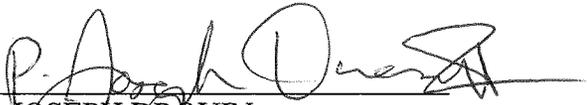
## CERTIFICATE OF SERVICE

I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein. I certify that on the 9th day of September, 2016, I caused a true and correct copy of Opening Brief of Respondent/Cross-Appellant State of Washington to be filed with the Court and served, via electronic service and U.S. Mail, Postage Prepaid, to the following parties:

Michael K. Vaska  
Kathryn C. McCoy  
Jacqueline Quarré  
Foster Pepper PLLC  
1111 Third Avenue, Suite 3400  
Seattle, WA 98101

Philip A. Talmadge  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Suite C  
Seattle, WA 98126

DATED: September 9th, 2016, at Seattle, Washington.

  
P. JOSEPH DROUIN  
Legal Assistant

# **APPENDIX**

**RCW 19.86.020**

**Unfair competition, practices, declared unlawful.**

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

**RCW 19.86.080**

**Attorney general may restrain prohibited acts—Costs—Restoration of property.**

(1) The attorney general may bring an action in the name of the state, or as parens patriae on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

**RCW 19.86.100**

**Assurance of discontinuance of prohibited act—Approval of court—Not considered admission.**

In the enforcement of this chapter, the attorney general may accept an assurance of discontinuance of any act or practice deemed in violation of this chapter, from any person engaging in, or who has engaged in, such act or practice. Any such assurance shall be in writing and be filed with and subject

to the approval of the superior court of the county in which the alleged violator resides or has his or her principal place of business, or in Thurston county.

Such assurance of discontinuance shall not be considered an admission of a violation for any purpose; however, proof of failure to comply with the assurance of discontinuance shall be prima facie evidence of a violation of this chapter.

**RCW 19.86.140**  
**Civil penalties.**

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 knowledge of its false, deceptive or misleading character.

For the purpose of this section the superior court issuing any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for the recovery of civil penalties.

With respect to violations of RCW 19.86.030 and 19.86.040, the attorney general, acting in the name of the state, may seek recovery of such penalties in a civil action.

**RCW 19.86.920**

**Purpose—Interpretation—Liberal construction—Saving**

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. 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 and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se.



**INSTRUCTIONS FOR COMPLETING THE ANNUAL MINUTES RECORDS FORM**  
(Washington Corporations)

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

- Step 1 Enter the name of each stockholder. You must account for 100% of the outstanding shares.
- Step 2 Enter the name of all members of the Board of Directors. Members of the Board of Directors must be at least 18 years of age.
- Step 3 Enter the title of an officer and the name of the officer. You must have at least one officer. Typical officers are Chief Executive Officer (CEO), President, Vice President, Secretary, Assistant Secretary, Chief Financial Officer, Treasurer, Chief Operations Officer (COO). In addition, list any other corporate officers.
- Step 4 Enter the name and email address of the person to contact if we have any questions.
- Step 5 Provide a valid payment method.
- Step 6 Sign the form to verify the validity of information provided and authorize your payment.
- Step 7 Return the entire completed form with payment.

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

**CORPORATE RECORDS SERVICE**  
855 Trospen Rd, Ste. 108 #279  
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.

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Corporate Records Service  
855 Trospen Rd. Ste. 108 #279  
Olympia, WA 98512-8108

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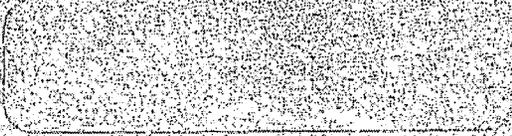


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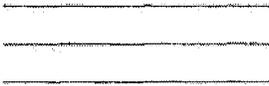
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**FILED**  
JAN 15 2008  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

STATE OF WASHINGTON  
THURSTON COUNTY SUPERIOR COURT

**FILED**  
FEB 13 2008  
NO. 08-2-00099-8  
SUPERIOR COURT  
BETTY J. GOULD  
THURSTON COUNTY CLERK

In re:  
MANDATORY POSTER AGENCY, INC;  
and the WASHINGTON HEALTHCARE  
COMPLIANCE CENTER,  
  
Respondents.

NO. 08-2-00099-8  
ASSURANCE OF DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert M. McKenna, Attorney General, and Robert Lipson, Assistant Attorney General, files this Assurance of Discontinuance pursuant to RCW 19.86.100.

**I. INVESTIGATION**

1.1 The Attorney General initiated an investigation into the misrepresentations or unfair and deceptive acts or practices of the Mandatory Poster Agency, Inc., and the Washington Healthcare Compliance Center ("Respondents").

1.2 The State contends as follows in paragraphs 1.2-1.6. Respondents used mailers with various business names such as Washington Labor Law Poster Company, Washington Food Service Compliance Center, and Washington Healthcare Compliance Center to deceive consumers into ordering posters. Consumers were deceived into believing that the posters must be purchased from the company in order to comply with state and federal law.

1 1.3 Advertisements used appear to originate from an official or quasi-official  
2 communication from an organization within government or having contacts with government.  
3 The names given to outlets evoke an official government tone. Emblems mimic a state agency  
4 emblem. The postal drop box with an Olympia address reinforces that misrepresentation.

5 1.4 Advertisements contain language including but not limited to "Advisory" and  
6 "Washington Health Compliance Center has recently issued" and "effective immediately," which  
7 contribute to the misleading nature of the advertisement.

8 1.5 Advertisements highlight language that compounds the sense of fear, which the  
9 advertisements are is designed to generate if one fails to follow the "advisement," does not  
10 "achieve compliance," and does not order posters from Respondents.

11 1.6 Respondents are not registered or licensed to do business in the state of  
12 Washington.

13 **II. ASSURANCE OF DISCONTINUANCE**

14 2.1 The Attorney General deems the following to constitute unfair or deceptive acts or  
15 practices in violation of the Consumer Protection Act, RCW 19.86.020. Respondents shall not  
16 and are hereby enjoined from:

17 (a) Using a company name in any solicitation which includes words or terms  
18 that have a tendency to mislead recipients to believe the solicitation is from a government agency,  
19 a company contracting with a government agency or entity engaged in a non-commercial activity,  
20 including but not limited to use of the words "agency", "mandatory", "compliance", "advisory",  
21 "advisement", "education" or "research" in a company name.

22 (b) Using any solicitation materials, including envelopes or exterior mailings,  
23 that have the tendency or capacity to mislead persons to whom the solicitation is direct to believe  
24 that Respondent are a government agency, have a contract with a government agency to provide a  
25 product, or that the material is coming from a government agency, including but not limited to:  
26

1                   1) Use of words such as "government information" or "official  
2 business";

3                   2) Use of symbols that included the outline of the United States, the  
4 outline of the State of Washington, the seal of the State of Washington or any Washington  
5 Agency or department, or symbol similar to the seal of the State of Washington or seal of  
6 Washington agency or department;

7                   3) Use of the term "confidential", "important information",  
8 "approved", "effective immediately", "compliance", "advisors", "issued", or any terms of similar  
9 import, when referring to Respondents' solicitations or products;

10                  4) Representing that the solicitations were sent via express, registered  
11 mail, special delivery, or any other form of mail or delivery other than by the rate that actually  
12 applies, such as bulk rate or first class mail;

13                  5) Representing on envelopes or exterior mailings that an enclosed  
14 solicitation requires immediate or other mandated response;

15                  6) Use of notice numbers or business ID numbers, unless there is a  
16 specific business purpose for Respondents to use such a designation;

17                  7) Use of names of state, local, or federal departments that are non-  
18 existent or do not represent actual entities, departments or divisions;

19                  8) Referring to any possible civil or criminal penalties, or other  
20 governmental actions that may occur or be imposed for failure to comply with workplace poster  
21 requirements that are incomplete, inaccurate, or suggest that penalties will be imposed for failure  
22 to purchase Respondents' product; and

23                  9) Representing, by use of company name and otherwise, that  
24 Respondents are engaged in a governmental or other non-commercial activity, including but not  
25 limited to research, education, or issuance of public service or like advisories. Notwithstanding  
26 the foregoing, this provision does not preclude Respondents from providing businesses with

1 information or recommendations, provided that the disclaimers required below are made in a clear  
2 and conspicuous manner as required by this Assurance.

3 (c) Representing that Respondents are the sole source of notices or posters or  
4 that these products must be purchased from Respondents to comply with any law.

5 (d) Representing that a failure to respond, or a delay in responding, to an  
6 advertisement or offer may result in negative consequences, legal or otherwise, including but not  
7 limited to use of numbered notices, (i.e. "2<sup>nd</sup> Notice", etc.).

8 (e) Falsely representing any material fact in a solicitation for Respondents'  
9 products, including but not limited to:

- 10 1) The legal requirement(s) of workplace postings;
- 11 2) Possible civil or criminal penalties, or other governmental actions
- 12 that may be imposed on businesses or individuals for failure to comply with workplace postings;
- 13 and
- 14 3) Existence of new or recently imposed legal requirements attendant
- 15 to workplace postings.

16 (f) Doing business in Washington without being properly licensed in all  
17 regards.

18 2.2 Defendants shall clearly and conspicuously disclose in all solicitations for the sale  
19 of workplace posters that:

20 (a) It is not a government agency or affiliated with a government agency and  
21 does not have any authorization from any state or governmental agency to supply posters to the  
22 public;

23 (b) As to mandatory workplace posters: similar posters may be available free  
24 of charge from other sources, including governmental agencies;

25  
26

1 (c) As to non-mandatory workplace posters (posting not required by  
2 Washington or Federal law): posters containing the same or similar information may be available  
3 free of charge from other sources; if true.

### 4 III. CONSUMER REFUNDS

5 3.1 Respondents shall provide full reimbursement to any Washington customer that  
6 requests a refund for hand washing posters purchased prior to the filing date of this Assurance,  
7 within seven days of the request. Respondents may require that the purchaser return the  
8 posters to Respondents, if Respondents first provide affirmative notice that the purchaser will  
9 also receive full reimbursement, including mailing costs associated with returning the posters.

10 Respondents warrant that within 45 days of entry of this Assurance, it will provide  
11 written notice to all of its Washington consumers who purchased hand-washing posters within  
12 the past year that the posters contained misrepresentations and offering full refunds.  
13 Consumers shall be given reasonable time to respond to Respondents' refund offer, which time  
14 shall be presumed to be 30 days after it is initially mailed by Respondent. A final accounting  
15 of Washington consumer refunds will be provided to the State approximately 120 days after  
16 entry of this Assurance.

### 17 IV. COSTS

18 4.1 The Respondent agrees to pay the amount of \$3,000.00 toward the costs and  
19 reasonable attorneys' fees incurred by the Attorney General in pursuing this matter, which is  
20 payable in full upon signing this Assurance of Discontinuance. Payment shall be made by valid  
21 cashier's check, paid to the order of "Attorney General—State of Washington." Respondent  
22 shall send the signed Assurance of Discontinuance and the cashier's check to the Office of the  
23 Attorney General, Attention: Cynthia Lockridge, Consumer Protection Division, 800 Fifth  
24 Avenue, Suite 2000, Seattle, Washington 98104-3188.

### 25 V. ADDITIONAL PROVISIONS

26 5.1 This Assurance of Discontinuance shall not be considered an admission of

1 violation of the Consumer Protection Act for any purposes, but failure to comply with this  
 2 Assurance of Discontinuance shall be *prima facie* evidence of violations of RCW 19.86.020,  
 3 thereby placing upon the Respondents, and their officers, directors, and principals, the burden of  
 4 defending against imposition by the court of damages, injunctions, restitution, civil penalties of up  
 5 to \$2,000.00 per violation and costs including reasonable attorney's fees. In addition, pursuant to  
 6 RCW 19.86.140 violations of the injunctive provisions of this Assurance of Discontinuance may  
 7 result in court imposed civil penalties of up to \$25,000.00.

8       5.2 Under no circumstances shall this Assurance of Discontinuance or the name of the  
 9 State of Washington, the Office of the Attorney General, or any of its employees or  
 10 representatives be used by Respondents or by its officers, employees, representatives, or agents in  
 11 conjunction with any business activity of the Respondents.

12       5.3 Nothing in this Assurance of Discontinuance shall be construed so as to limit or  
 13 bar any other person or entity from pursuing any legal remedies against the Respondents.

14 APPROVED IN OPEN COURT THIS \_\_\_\_\_ day of \_\_\_\_\_, 2007.

~~DAVID HUNTER OF MONTLAW  
COURT COMMISSIONER~~

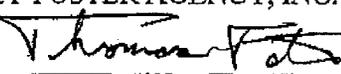
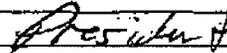
\_\_\_\_\_  
 JUDGE/COURT COMMISSIONER

18 Approved for Entry and Presented by:

Agreed to, Approved for Entry, Notice of  
 Presentation Waived:

20 ROBERT M. MCKENNA  
 Attorney General

21  12/23/07  
 22 ROBERT LIPSON, WSBA #11889  
 23 Senior Counsel  
 24 Attorneys for State of Washington

\_\_\_\_\_  
 WASHINGTON HEALTHCARE  
 COMPLIANCE CENTER, and  
 MANDATORY POSTER AGENCY, INC.  
 Respondents  
 By:   
 Title: 

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EXPEDITE  
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 Hearing is Set  
Date:  
Time:

FILED  
FEB 13 2008  
SUPERIOR COURT  
BETTY J. GOLD D  
THURSTON COUNTY CLERK

EX PARTE

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

In re:  
**THE MANDATORY POSTER AGENCY,  
INC.,**  
Respondent.

NO. **08-2-00099-8**  
**ORDER APPROVING ENTRY OF  
ASSURANCE OF DISCONTINUANCE**

The Court hereby approves and orders entry of the attached Assurance of Discontinuance pursuant to RCW 19.86.100.

Approved on this 15th day of January, 2008

DAVID HUNTER OF MONTLAW  
COURT COMMISSIONER

JUDGE/COURT COMMISSIONER

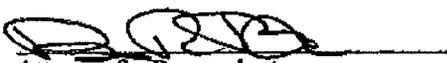
Presented By:

Agreed to, Approved For Entry, and  
Notice of Presentation Waived:

ROBERT M. MCKENNA  
Attorney General



ROBERT A. LIRSON  
WSBA # 11889  
Senior Counsel  
Attorneys for Plaintiff  
State of Washington



Attorney for Respondent  
The Mandatory Poster Agency, Inc.  
David R. Burke



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.* *WJ*

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<sup>(\*)</sup> 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:

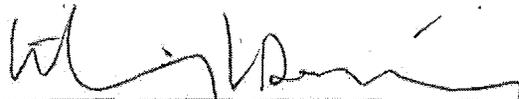
4 a. Engaging in acts or practices that violate the CPA in the solicitation of or  
5 transactions with Washington consumers;

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.

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THE HONORABLE WILLIAM DOWNING

Presented by:

ROBERT W. FERGUSON  
Attorney General

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

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

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

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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 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

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.

## II. RESTITUTION

1  
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; (f) 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.

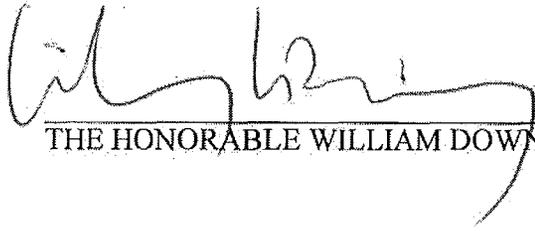
22 30. The claims administrator shall ask consumers to check one of two boxes. The  
23 first box will state that consumers did not intend to purchase the "annual minutes" from  
24 Defendants and only did so because of the unfair and deceptive nature of the mailers. As such,  
25 consumers understand 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 30<sup>th</sup> day of March, 2016.

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10   
11 THE HONORABLE WILLIAM DOWNING

12 Presented by:

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

13 ROBERT W. FERGUSON  
14 Attorney General

FOSTER PEPPER PLLC

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

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

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 \_\_\_\_\_ o 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 \_\_\_\_\_

The Honorable William Downing  
Hearing Date: March 11, 2016  
Without Oral Argument

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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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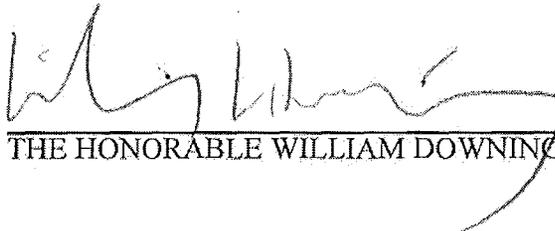
4. The State has incurred reasonable attorneys' fees in the amount of \$337,593.20. The Court finds that the hourly rates charged by the State and that the time spent by the State as stated above and as detailed in the State's Motion and supporting Declarations were reasonable and appropriate. The Court 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

The Honorable William Downing

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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

1		Restitution Fund will be returned by the
2		claims administrator to Judgment Debtors.
3	1.5	Costs and Attorneys' Fees: \$377,164.47
4	1.6.	Total Judgment: \$1,170,704.47 plus restitution as described
5		above and more fully described in the
6		Court's March 3, 2016 Order.
7	1.7	Post Judgment Interest Rate: 12% per annum
8	1.8	Attorneys for Judgment Creditor: Marc Worthy
9		Assistant Attorney General
10		Jeffrey G. Rupert
11		Assistant Attorney General
12	1.9	Attorney for Judgment Debtors: Michael K. Vaska
13		Kathryn C. McCoy
14		Jacqueline C. Quarré
15		Attorneys at Law
16		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.

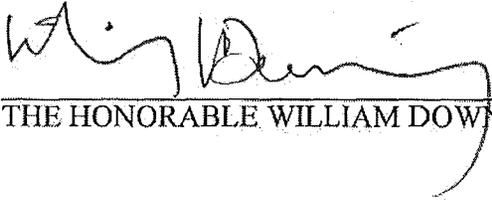
18           5.     The total amount of the judgment granted to the State of Washington and  
19 against Defendants The Mandatory Poster Agency, Inc., Steven J. Fata, Thomas Fata, and  
20 Joseph Fata, jointly and severally, is \$1,170,704.47 plus restitution as described above and  
21 more fully described 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  
 19 ROBERT W. FERGUSON  
 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](mailto:marcw@atg.wa.gov), [jeffreyr2@atg.wa.gov](mailto:jeffreyr2@atg.wa.gov)  
 T: 206-464-7745  
 26

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](mailto:vaskm@foster.com),

15 [cardk@foster.com](mailto:cardk@foster.com), [quarj@foster.com](mailto:quarj@foster.com)

16 *Attorneys for Defendants*

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