

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR.....	1
III.	ISSUES RELATED TO ASSIGNMENTS OF ERROR	3
IV.	STATEMENT OF THE CASE	4
A.	Statement Of Facts.....	4
1.	The Defendants Collectively Participated In Running A Retrospective Rating Program On Behalf of Petitioners and Other Employers.	4
2.	The Defendants Held Employer Participants' ROII Retro Refunds In Trust.....	7
3.	WBBT Was Established To Hold The Trust Funds. Its Trustees Also Have Allegiance To BIAW And MSC.	8
4.	BIAW Charges the Trust a 20% "Marketing Assistance Fee.".....	8
5.	BIAW-MSC Paid Itself Multi-Million Dollar "Marketing Assistance Fees" Out Of The WBBT Trust.....	11
6.	BIAW-MSC Commingled WBBT Trust Funds With Its Own Funds And Retained The Interests As Profit.	13
B.	Procedural History.	14

V.	ARGUMENT	17
A.	The Trial Court Erred In Authorizing On Summary Judgment The Trustees' Multi-Million Dollar Payments To Their Affiliates Under The Guise Of A Marketing Assistance Fee.	17
1.	The BIAW Engaged In Self-Dealing By Funneling Funds To Its Own For-Profit Subsidiary And Local Associations Through The Marketing Assistance Fee.....	18
2.	The Settlers Never Authorized This Self Dealing In The Enrollment Agreements, Which Is The Only Document That Represents Their Intent.....	21
3.	The Trial Court Erred In Holding That The "Plain Language" Of The Trust Documents Authorizes Defendants To Charge A Marketing Assistance Fee That Is Not Used For Marketing.	24
4.	The Trial Court Erred In Refusing To Review The Reasonableness Of A Marketing Assistance Fee Set At A Flat Rate Of 20% Of Trust Assets.	27
5.	The Defendants Breached Their Duty To Provide The Beneficiaries With The Information Necessary To Determine The Nature Of The Marketing Assistance Fee.....	29
6.	The Trial Court Erred In Allowing The Trustees To Pay Themselves The Marketing Assistance Fee Before Final Adjustment, Contrary To The 1994 Declaration of Trust.	30

7.	The Authority For And Reasonableness Of The Flat 20% Marketing Fee Presents An Issue Of Fact.	31
B.	After Correctly Finding A Breach Of Their Fiduciary Duties, The Trial Court Erred By Allowing The Defendants To Retain The Interest They Secretly Retained From Trust Funds.....	32
1.	A Fiduciary Cannot Retain Funds Earned In Breach Of Fiduciary Duties.....	33
2.	Petitioners Sought Recovery On Behalf Of All The Beneficiaries To Restore Illegal Profit To The Trust.	35
C.	The Trial Court Erred In Dismissing The Master Builders Association Of King And Snohomish Counties.....	40
D.	Petitioners Were Entitled To Their Attorneys' Fees Because They Provided A Benefit To The Trust.....	43
E.	Petitioners Are Entitled To Their Attorney's Fees On Appeal.	49
VI.	CONCLUSION.....	49
	APPENDICES	

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock</i> , 861 F.2d 1406 (9th Cir. 1988)	38, 39
<i>Graden v. Conexant Sys. Inc.</i> , 496 F.3d 291 (3d Cir. 2007), <i>cert. denied</i> , 552 U.S. 1243 (2008).....	37
<i>Magruder v. Drury</i> , 235 U.S. 106, 35 S. Ct. 77, 82, 59 L. Ed. 151 (1914)	34
<i>Pelt v. Utah</i> , 2:92-CV-639 TC, 2006 WL 1881019 (D. Utah 2006).....	42
<i>Washington Legal Found. v. Legal Foundation of Washington</i> , 271 F.3d 835 (9th Cir. 2001), <i>aff'd sub nom., Brown v. Legal Foundation of Washington</i> , 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003).....	33

STATE CASES

<i>Allard v. Pacific Nat'l Bank</i> , 99 Wn.2d 394, 663 P.2d 104 (1983)	21, 43-47
<i>City of Seattle v. King County</i> , 52 Wn. App. 628, 762 P.2d 1152 (1988), <i>rev. denied</i> , 112 Wn.2d 1002 (1989)	33
<i>Dwyer v. J.I. Kislak Mortg. Corp.</i> , 103 Wn. App. 542, 13 P.3d 240 (2000), <i>rev. denied</i> , 143 Wn.2d 1024 (2001)	25
<i>Estate of Johnson</i> , 187 Wash. 552, 60 P.2d 271 (1936).....	19

<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	28
<i>Gillespie v. Seattle-First Nat. Bank</i> , 70 Wn. App. 150, 855 P.2d 680 (1993), <i>rev. denied</i> , 123 Wn.2d 1012 (1994)	44, 47
<i>Grein v. Cavano</i> , 61 Wn.2d 498, 506, 379 P.2d 209 (1963)	44, 47
<i>In re Estate of Black</i> , 116 Wn. App. 476, 66 P.3d 670 (2003), <i>aff'd on other grounds</i> , 153 Wn.2d 152, 102 P.3d 796 (2004)	46
<i>In Re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	45, 46
<i>In re Estate of Stevenson</i> , 605 N.W.2d 818 (S.D. 2000).....	22
<i>In re Montgomery's Estate</i> , 140 Wash. 51, 248 P. 64 (1926)	34
<i>In re Perry's Estate</i> , 168 Wash. 428, 12 P.2d 595 (1932).....	28
<i>Indoor Billboard/ Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	25
<i>Lesley v. State</i> , 83 Wn. App. 263, 921 P.2d 1066 (1996), <i>rev. denied</i> , 131 Wn.2d 1026 (1997).....	4
<i>Lynn v. City of Longview</i> , 15 Wn.2d 528, 131 P.2d 164 (1942)	33
<i>Marriage of Petrie</i> , 105 Wn. App. 268, 19 P.3d 443 (2001)	20, 29, 34

<i>Matter of Drinkwater's Estate</i> , 22 Wn. App. 26, 587 P.2d 606 (1978), <i>rev. denied</i> , 92 Wn.2d 1001 (1979)	19
<i>Matter of Estate of Cooper</i> , 81 Wn. App.79, 913 P.2d 393, <i>rev. denied</i> , 130 Wn.2d 1011 (1996).....	45
<i>Matter of Polson</i> , 21 Wn. App. 489, 585 P.2d 840 (1978).....	36
<i>Northwest Independent Forest Mfrs. v. Department of Labor and Industries</i> , 78 Wn. App. 707, 899 P.2d 6 (1995).....	7
<i>Paysse v. Paysse</i> , 86 Wash. 349, 150 P. 622 (1915).....	41
<i>Rodgers v. Simmons</i> , 43 Wn.2d 557, 262 P.2d 204 (1953)	22
<i>Rummens v. Guar. Trust Co.</i> , 199 Wash. 337, 92 P.2d 228 (1939)	32, 37
<i>State v. Kaiser</i> , 161 Wn. App. 705, 254 P.3d 850 (2011).....	19
<i>Villegas v. McBride</i> , 112 Wn. App. 689, 50 P.3d 678 (2002), <i>rev. denied</i> . 149 Wn.2d 1005 (2003).....	49
<i>Wilkins v. Lasater</i> , 46 Wn. App. 766, 733 P.2d 221 (1987)	18, 34, 45
<i>Williams v. Bank of California, N. A.</i> , 96 Wn.2d 860, 639 P.2d 1339 (1982)	33

STATUTES

RCW 11.96.140.....	46
RCW 11.96A.020	27

RCW 11.96A.030	27
RCW 11.96A.080	35
RCW 11.96A.120	36
RCW 11.96A.150	45, 46
RCW 11.97.010	21
RCW 11.100.045	19
RCW 11.100.090	20
RCW 11.106.030	15
RCW 11.106.040	15, 35
RCW 11.106.070	36
RCW 11.106.200	17

RULES AND REGULATIONS

CR 12	41
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OTHER AUTHORITIES

3 Pomeroy's Equity Jurisprudence (3d Ed.) § 1048	42
3 Austin Scott, et al., <i>Scott and Ascher on Trusts</i> (5th Ed. 2007)	22
4 Austin Scott, et al., <i>Scott and Ascher on Trusts</i> (5th Ed. 2007)	20, 33, 36
Bogert and G. Bogert, <i>The Law of Trusts and Trustees</i> , § 901 (2d rev. ed. 1995)	42
Final Bill Report SB 5196 (1999)	36
<i>Restatement (Second) of Trusts</i> § 170 (1959)	19, 20

<i>Restatement (Second) of Trusts § 179 (1959)</i>	34
<i>Restatement (Second) of Trusts § 203</i>	28
<i>Restatement (Second) of Trusts § 205 (1959)</i>	34
<i>Restatement (Second) of Trusts § 214</i>	36
<i>Restatement (Second) of Trusts § 288</i>	41
<i>Restatement (Second) of Trusts § 291</i>	42
<i>Restatement (Third) of Trusts § 38 (2003)</i>	27-28
<i>Restatement (Third) of Trusts § 82 (2007)</i>	29
<i>Restatement (Third) of Trusts § 83 (2007)</i>	29
<i>Webster's New Universal Unabridged Dictionary 705-06 (1996)</i>	24

I. INTRODUCTION

Appellants, beneficiaries of a trust, sued the trustees and the related entities that administered the trust. The trial court rejected the defendants' denial of a trust relationship and held that defendants breached their fiduciary duties by commingling funds, keeping for themselves interest earned on trust income, and failing to provide the beneficiaries with accountings of trust assets and expenses as required by statute. The trial court then erroneously refused to provide any monetary relief, refused to require defendants to disgorge funds belonging to the trust, and denied the beneficiaries attorney fees despite finding that petitioners established breaches of fiduciary duties and provided a benefit to the trust. The petitioner trust beneficiaries appeal.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in entering its September 10, 2010 Order Dismissing the Master Builders Association (CP 4983) (Appendix A) and its June 25, 2010 Order Granting Summary Judgment for Local Associations. (CP 8179-82)¹ (Appendix B)

¹ Respondent Master Builders Association of King and Snohomish County ("MBA") is the only local association that remains a party to this appeal.

B. The trial court erred in entering its September 13, 2010 Order on Cross-Motions for Summary Judgment. (CP 4996-5015) (Appendix C)

C. The trial court erred in entering the following findings of fact (“FF”) in its Findings and Conclusions: (CP 7140-56) (Appendix D)

1. The trial court erred in entering FF 21. (CP 7145)
2. The trial court erred in entering FF 49. (CP 7150-51)
3. The trial court erred in entering FF 50. (CP 7151)
4. The trial court erred in entering FF 57. (CP 7152)
5. The trial court erred in entering FF 65. (CP 7153)
6. The trial court erred in entering FF 66. (CP 7153)
7. The trial court erred in entering FF 67. (CP 7153-4)

D. The trial court erred in entering its March 4, 2011 Order denying petitioners an award of attorney fees and costs, (CP 8109-14) (Appendix E), including the following findings of fact:

1. The trial court erred in entering Fee FF 5. (CP 8110)
2. The trial court erred in entering Fee FF 6. (CP 8110)

E. The trial court erred in excluding petitioners’ expert evidence relating to the standard of care. (CP 2952)

F. The trial court erred in entering its March 4, 2011 Judgment. (CP 8115-56) (Appendix F)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Did the trial court err in holding as a matter of law that the settlors/beneficiaries of a trust authorized payment of a 20% fee to the trustees' affiliates based upon a Declaration of Trust that the settlor beneficiaries never saw, nor signed?

B. Did the trial court err in holding as a matter of law that trust fiduciaries were entitled to profit from the trust by retaining 20% of trust assets, which they represented were "fees" for "marketing and promotion" of the trust, when those funds were not used for marketing, and were kept as profits?

C. Did the trial court err in refusing to require fiduciaries to restore to the trust interest earned on millions of dollars of trust funds, thereby allowing the fiduciaries to retain illicit profits from what the trial court found was a breach of trust, on the ground that the petitioners' individual losses were small?

D. Is an affiliate of a trustee who participates and profits from the trustee's breach of trust liable along with the trustee?

E. Did the trial court err in refusing to award the petitioner-beneficiaries attorney fees incurred in obtaining a

declaration that a trust existed and that defendants were fiduciaries, in forcing an accounting of trust assets and expenses, in establishing breaches of fiduciary duty by the defendant trustees, and in obtaining an injunction preventing defendants from continuing these practices in the future?

IV. STATEMENT OF THE CASE

A. Statement Of Facts.

This is an appeal from a judgment awarding trust beneficiaries no financial relief even though the trial court found that respondents profited from violating their fiduciary duties as trustees of millions of dollars of industrial insurance premium rebates earned by petitioners and other trust beneficiaries. This statement of facts relies primarily on the trial court's factual findings ("FF"), as supplemented by the record before the trial court, considered in the light most favorable to the appellants, in ruling for respondent defendants on summary judgment. *Lesley v. State*, 83 Wn. App. 263, 266, 921 P.2d 1066 (1996), *rev. denied*, 131 Wn.2d 1026 (1997).

1. The Defendants Collectively Participated In Running A Retrospective Rating Program On Behalf of Petitioners and Other Employers.

Defendant Building Industry Association of Washington (BIAW) is a not-for-profit trade association. (FF 1, CP 7141) BIAW

sponsors a retrospective rating program, the Return on Industrial Insurance (“ROI”) program, which facilitates the right of employer participants to earn industrial insurance premium rebates from the Washington State Department of Labor and Industries (“DLI”). (FF 2-3, CP 7141) DLI’s “retro” programs reward participating employers that keep their claims costs below a pre-selected level by refunding a portion of the premiums they paid to the Department. (FF 6, CP 7142)

Approximately 6,000 Washington building trade employers participate in the ROI group retro program sponsored by BIAW. (FF 7, CP 7142) BIAW delegates the administration of the ROI program to defendant BIAW Member Services Corp. (“MSC”), a wholly-owned for-profit subsidiary of BIAW. (FF 3, CP 7141; FF 27-29, CP 7146) The non-profit BIAW and for-profit MSC share staff and leadership, and are operated as a single entity.²

Petitioners are five participants in BIAW’s ROI program, and beneficiaries under the Washington Builders Benefit Trust (“WBBT”), the trust BIAW created to hold the participant employers’

² Each member of the Executive Committee sits on the Executive Committee of BIAW. Each Board Member of BIAW is also a Board Member of MSC. The local affiliates appoint members to both BIAW and MSC boards. MSC does not hold meetings of its Board of Directors or Executive Committee separate from BIAW Board and Executive Committee meetings. MSC and BIAW have a consolidated budget. (FF 31, CP 7147)

state insurance premium refunds until they are distributed to ROII participants. (FF 3-4, CP 7141; FF 13, CP 7143) The WBBT trust is managed by seven trustees appointed by BIAW's president. (FF 3, CP 7141) WBBT has no staff. In carrying out the administration of the trust, the WBBT trustees rely upon the joint staff of the BIAW and MSC. (FF 28, CP 7146) WBBT and its trustees have not documented the delegation of duties by trustees to MSC. Nor have they documented any safeguards in that relationship, such as requiring segregated accounts or billings for services provided. (FF 28, CP 7146)

The WBBT trustees also owe allegiances to BIAW and MSC during their service as trustees. For example, the Chair and Vice Chair of the WBBT automatically sit on the Executive Committee of BIAW and MSC, with responsibility for those organizations' budgets. (CP 444) In addition, virtually every WBBT Trustee holds leadership positions in BIAW and MSC, before and during their tenure as a trustee. (CP 444) For example, during 2003, the WBBT chair simultaneously served as President of the Board of both BIAW and MSC. (CP 5086)

BIAW, MSC, WBBT, and the WBBT trustees are known collectively in this brief as the BIAW defendants.

2. The Defendants Held Employer Participants' ROII Retro Refunds In Trust.

DLI pays industrial insurance premium rebates earned by ROII employer participants to the plan sponsor BIAW as a matter of convenience. (FF 16, CP 7144; CP 1537) BIAW as the sponsoring organization has the responsibility to distribute any refunds to the group members and is a conduit for ROII participants' refunds. (FF 8, CP 7142) The refunds are the property of the employer participants who earn the industrial insurance premium rebates. Without the employer participants, there would be no refund. See ***Northwest Independent Forest Mfrs. v. Department of Labor and Industries***, 78 Wn. App. 707, 715-16, 899 P.2d 6 (1995) (retro group members "were entitled to the fruits of any ruling that might award a refund or diminish an assessment;" sponsoring group "was merely a conduit for any refunds or assessments to its members").

The trial court found as a matter of fact that the BIAW defendants owed fiduciary duties to the trust beneficiaries, including petitioners. (FF 23, CP 7145; FF 30, CP 7147) Petitioners became beneficiaries of WBBT when BIAW received funds from DLI representing the petitioners' share of the industrial insurance rebate, pursuant to petitioners' agreement to participate in the ROII

program by signing an annual enrollment agreement. (FF 24, CP 7145)

3. WBBT Was Established To Hold The Trust Funds. Its Trustees Also Have Allegiance To BIAW And MSC.

Through WBBT, BIAW holds and invests ROII refunds between the time DLI pays any refunds to BIAW and the time BIAW distributes refunds to employer participants. (FF 13, CP 7143) Between 2004 and 2008, DLI paid nearly \$200 million in industrial insurance premium rebates to BIAW. (FF 34, CP 7148) In part because BIAW defendants' policy is to distribute refunds to the beneficiaries over a three year period,³ at any one time the WBBT trust is holding significant funds that have been earned, but not yet paid, to the employer participants. (FF 15, CP 7144)

4. BIAW Charges the Trust a 20% "Marketing Assistance Fee."

As a condition to participation, each employer participant signs a yearly enrollment agreement in the ROII program. (FF 19, CP 7145) The trial court found that these yearly enrollment agreements, along with a 1994 Declaration of Trust, defined the

³ WBBT distributes 70 percent of the first adjustment received from DLI in April or May, in July of each year. The following year, WBBT distributes an additional 20 percent of the total of the first and second adjustments. In July of the next year, after the third and final adjustment is received from DLI, WBBT distributes the remaining amount, if any, to employer participants. (FF 15, CP 7144)

parties' rights as beneficiaries and the defendants' obligations in managing WBBT. (FF 17, CP 7144) The enrollment agreements, prepared by BIAW staff and signed by each employer participant, contained standard language and were not subject to modification by the participating employers. (FF 20, CP 7145; FF 25, CP 7145-46) BIAW did not disclose the Declaration of Trust to the employer participants. (FF 17, CP 7144) As a result, "[t]he enrollment agreement is the only trust document that shows the intent of the employer participants." (FF 26, CP 7146)

Under the enrollment agreements, employer participants agree to pay significant annual membership fees to BIAW and local associations as a condition of participating in the ROII program. (e.g., Ex. 2227; CP 4467-4473) Also, employers must pay an annual "enrollment fee" of 1.5% of their industrial insurance premiums to participate in ROII. (Ex. 2227 at Form 3 ¶ 4(a); CP 4470) These enrollment fees earn MSC millions of dollars annually. (CP 4598-4615) A participating employer also authorizes the Trustees "to pay from the Premium Returns . . . such costs and expenses for the operation and administration of the Plan as the Trustees may direct." (Ex. 2227 at Form 3 ¶ at 4(b); CP 4470) The enrollment agreement "further authorizes the Trustees to *transfer*

ten percent (10%) of the Participants' Premium Returns . . . to local associations and 10% to BIAW for *marketing and promotion of the Plan.*" (FF 21, CP 7145; Ex. 2227 at Form 3 ¶ 4(b); CP 4470) (emphasis added)

The "1994 Declaration of Trust" (CP 4475-85), was signed only by WBBT's trustees, and was never distributed to the employer participants who were both trust settlors and the beneficiaries of the WBBT trust. (FF 17, CP 7144; FF 24, FF 7145) The Declaration of Trust requires that the "Trustees shall discharge their duties solely in the interest of the Employer Participants." (CP 4483) The Declaration of Trust mandates that "the Trustees shall hold in trust for the benefit of the Employer Participants . . . all Adjustments transferred to BIAW by the DLI together with all accruals thereto and income therefrom." (CP 4480) The Declaration of Trust only authorizes the Trustees to recover "[a]ll reasonable expenses of the Trustees actually incurred in the performance of their duties as Trustees . . . upon submission and approval of a majority of Trustees." (CP 4482)

5. BIAW-MSC Paid Itself Multi-Million Dollar “Marketing Assistance Fees” Out Of The WBBT Trust.

Each year, the WBBT Trustees transferred a “marketing assistance fee” (“MAF”) of 10% of the ROII refunds trust funds to BIAW’s for-profit subsidiary, MSC, and 10% to its local affiliates. (FF 39-40, CP 7149; CP 438) The 20% “fee” was paid informally, by direct withdrawal from WBBT investment accounts to the MSC, with no oversight by the trustees whatsoever. (FF 29, CP 7146; CP 438, 1545-46, 5182-84) It is one of the defendants’ “largest sources of revenue.” (CP 1531, 4684)

The enrollment agreements do not mention this “marketing assistance fee.” The Declaration of Trust does, but provides that the 20% marketing assistance fee be paid “[b]efore distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLI.” (CP 4481) MSC nonetheless takes the 20% marketing assistance fee from each distribution to the beneficiaries before final adjustment. (CP 1540, 1593, 1603, 4511)

BIAW-MSC took and spent the marketing assistance payments without restriction. After the trial court ordered WBBT to file an accounting, the trustees confirmed that no limits are placed on the use of the marketing assistance fee and that BIAW-MSC

uses the MAF payments for an array of general purposes, treating this income as “profit.” (CP 1529-30, 3875; *see also* CP 441, 2334 (“BIAW’s marketing assistance fee is intended to generate a profit”), 4246)

BIAW-MSC spends about \$300,000 a year on marketing. (CP 1529, 4598-4615)⁴ The marketing assistance fee payments to BIAW-MSC ranged from \$2,958,969 to \$4,869,832 annually between 2005 and 2008. (CP 464) Thus, in that 4-year period, the revenues received by BIAW-MSC from the fee exceeded the budget expense for marketing and promotion of the plan by almost \$15,000,000.

Although they admitted that the local associations (including respondent MBA), do little “marketing and promotion” of the ROII plan, defendants also make no effort to track use by the local associations of the 10% of the ROII refunds that they receive as a fee for “marketing and promoting” the plan. (CP 1529, 3687-88, 4230, 4233) The BIAW defendants do not require the local associations to provide information on marketing expenses, and the

⁴ BIAW admits that the defendants made no effort to monitor how the marketing assistance fee was spent. (CP 3550 (BIAW executive McCabe testified that such an effort “would be a waste of time”)) As a result, the joint budgets of BIAW and MSC provide the only evidence of how much defendants actually spent on marketing.

local associations do not track these expenses. (CP 1533, 3687-88, 4230, 4233) Top BIAW-MSC staff wrote that “a large part of [local associations] salaries are already paid by the MAF money they get from ROII and health insurance when a good portion of them do nothing.” (CP 1545, 4624; *see also* CP 3872) BIAW executive McCabe described the payment of marketing assistance fees to the local associations as akin to a “welfare state where the welfare recipients don’t believe they have to work at all.” (CP 1545, 4621) “[N]o one expects that all or even most of this money will actually go toward marketing ROII at the local level.” (CP 1545, 4627)

6. BIAW-MSC Commingled WBBT Trust Funds With Its Own Funds And Retained The Interests As Profit.

The yearly payments to BIAW from the DLI were as much as \$50 million. (FF 9, CP 7142) When the DLI warrants arrive, BIAW deposits the funds into a BIAW-MSC money market account at South Sound Bank (FF 32, CP 7147) in which it also kept other funds belonging to MSC, before transferring the funds to an investment account. (FF 32, CP 7147; FF 41, CP 7149; FF 52, CP 7151)) The trust funds were then transferred back into an unsegregated BIAW-MSC money market account from which

BIAW-MSC writes checks to the 6,000 beneficiaries.⁵ (FF 41, CP 7149) BIAW-MSC kept the interest earned on trust funds while those funds were in the BIAW-MSC money market account. (FF 35, CP 7148; FF 46-47, CP 7150)

B. Procedural History.

Petitioners, five employer participants in BIAW's ROII program, commenced this action in Thurston County Superior Court against the BIAW defendants and the local associations, including respondent MBA. (CP 5486, 1015-40) The petitioners sought an accounting under the Trustees Accounting Act and a return to the trust and the beneficiaries of sums improperly paid to the defendants.⁶ (CP 54-86, 1015-40) The case was assigned to Thurston County Superior Court Judge Carol Murphy ("the trial court"). Pursuant to the trial court's March 13, 2009 order, petitioners at their own expense served every employer participant with a summons and complaint. (CP 116-29)

Each of the defendants denied the existence of any fiduciary relationship, and alleged that the relationship between the

⁵ Rather than send the checks directly, BIAW-MSC delivers the checks to the local associations, for delivery to beneficiaries. (FF 41, CP 7149)

⁶ BIAW and MSC retaliated by kicking the named petitioners out of the ROII program, forcing petitioners to pay thousands of dollars in additional fees to switch retro groups. (9/14 RP 145)

defendants and the employer participants was purely contractual. (e.g., CP 100) On March 20, 2009, petitioners moved for a trust accounting. (CP 130-46) The trial court ordered the WBBT to provide an accounting of the trust pursuant to RCW 11.106.030-.040. (CP 423-25)

The accounting ordered by the trial court, lodged May 1, 2009, for the first time disclosed the size of the trust and the millions of dollars of employer participant funds that WBBT held. (CP 453-879) For the first time, the WBBT trustees also admitted paying millions of dollars to their affiliate defendant MSC in “related party transactions.” (CP 464, 4685)

The trial court dismissed on summary judgment the claims against the local associations, on the grounds the locals were not “fiduciaries” of the marketing assistance fees that the BIAW defendants had transferred to them. (CP 8179-83) Later, MBA obtained an order dismissing the claims against it on the pleadings, based upon the trial court’s previous summary judgment dismissing the local associations. (CP 4983)

On August 6, 2010, the trial court issued a letter ruling on cross-motions for summary judgment. (CP 4868-81) The court held that the WBBT constituted a trust under Washington law, that

the participant employers were its settlors and beneficiaries, that defendants owed fiduciary duties to the employers, and that the trust was bound by the annual enrollment agreements signed by the employers. (CP 4873) The trial court held, however, that BIAW's payment of a flat percentage of the rebate as a "marketing fee" did not violate the enrollment agreement or the Declaration of Trust (CP 4874-76), and that BIAW had no obligation to monitor or to use the 20% "marketing fee" for any specific purpose. (CP 4876)

The trial court also held that defendants breached their duty as trustees by commingling trust funds and retaining interest earned on trust funds. It rejected the BIAW defendants' assertion that because they "could have been paid administrative costs associated with running the BIAW ROII program," the unpaid interest and improperly commingled funds "are simply a wash." (CP 4778-80) The trial court reserved for trial the issue of damages resulting from the BIAW defendants' breach of fiduciary duties. (CP 4880)

After trial on September 13-22, 2010, the trial court held that all of the BIAW defendants were equally culpable for commingling trust funds and for improperly taking interest earned on trust funds, and enjoined them from continuing such practices. (CP 7154-56, 8115-17) However, the trial court dismissed petitioner's claims for

monetary relief. (CP 7155, 8115) While finding that the BIAW defendants improperly withheld from the beneficiaries interest totaling \$424,000 between 2004 and 2008 (FF 35, 47, CP 7148, 7150), the trial court held that the amount of interest to which the five petitioners were entitled was too small to justify a damage award. (CP 7154-55) The trial court also found that the trustees failed to review the trust's books, failed to provide the beneficiaries with annual statements as required by RCW 11.106.200, or otherwise account to the beneficiaries. (FF 59-61, CP 7153) The trial court then denied petitioners' request for attorney fees, finding that they "were awarded no damages or other financial recovery." (CP 8110)

Petitioners appeal.

V. ARGUMENT

A. **The Trial Court Erred In Authorizing On Summary Judgment The Trustees' Multi-Million Dollar Payments To Their Affiliates Under The Guise Of A Marketing Assistance Fee.**

The defendants engaged in impermissible self-dealing by paying themselves and their local affiliates millions of dollars annually as "marketing assistance fees," even though these "fees" were never authorized by the settlors, were not for "marketing," and

were excessive in comparison to the marketing services that were actually provided. The trial court misapplied the legal standards governing the interpretation of trust documents and the fiduciary duties of trustees in granting summary judgment to BIAW defendants rather than to petitioners on this issue.

When a beneficiary, as here, has proven that the trustees are involved in a self-interested transaction, the burden of proof in the case shifts, and “[t]he burden of proof is on the fiduciary to demonstrate no breach of loyalty has been committed.” *Wilkins v. Lasater*, 46 Wn. App. 766, 777, 733 P.2d 221 (1987). This court should apply the proper legal standard, reverse the trial court’s grant of summary judgment to the BIAW defendants, and grant judgment instead to petitioners. At a minimum, the court should reverse and remand for trial to determine whether petitioners authorized the 20% payments under the guise of a “marketing assistance fee.”

- 1. The BIAW Engaged In Self-Dealing By Funneling Funds To Its Own For-Profit Subsidiary And Local Associations Through The Marketing Assistance Fee.**

Defendants’ 20% “marketing fee” is a classic example of trustee self-dealing in violation of its duty of loyalty because it was

not fairly disclosed to trust beneficiaries and it was unrelated to trust administration. The marketing assistance fee is a gratuitous pass-through from the trust to the trustees' affiliates, BIAW-MSC and the local associations, that violated the defendants' fiduciary duties to the trust beneficiaries.

A trustee's strict duty of loyalty requires that he "administer the trust solely in the interest of the beneficiary." *Restatement (Second) of Trusts* § 170(1) (1959). See also RCW 11.100.045 ("A fiduciary shall invest and manage the trust assets solely in the interests of the trust beneficiaries."); ***Matter of Drinkwater's Estate***, 22 Wn. App. 26, 30, 587 P.2d 606 (1978) ("[a] trustee is under a duty to the beneficiary to administer the trust solely in the interest of such beneficiary, and, in doing this, an undivided loyalty to the trust is required."), *rev. denied*, 92 Wn.2d 1001 (1979) (quoting ***Estate of Johnson***, 187 Wash. 552, 554, 60 P.2d 271 (1936). A trustee violates his duty of loyalty where he engages in self-dealing or uses trust property for his own purposes, rather than for the benefit of the beneficiaries. ***State v. Kaiser***, 161 Wn. App. 705, 723, ¶ 47, 254 P.3d 850 (2011) ("A trustee has a fiduciary duty to act exclusively on behalf of the beneficiary and cannot put himself in a position where he is dealing with the trust for personal

profit.”); *Marriage of Petrie*, 105 Wn. App. 268, 276, 19 P.3d 443 (2001) (“A trustee who engages in self-dealing violates his duty of loyalty to the beneficiaries.”).

A trustee that participates in a transaction that benefits himself instead of another who is owed a fiduciary duty engages in self-dealing. See RCW 11.100.090 (“Unless the instrument creating the trust expressly provides to the contrary, any fiduciary in carrying out the obligations of the trust, may not buy or sell investments from or to himself, herself, or itself or any affiliated or subsidiary company or association.”); 4 Austin Scott, et al., *Scott and Ascher on Trusts* § 17.2, p. 1084-85 (5th Ed. 2007) (“Paying oneself for one’s own services is blatant self-dealing”). The duty of loyalty requires that a trustee not only refrain from dealing with itself, but also with its affiliates or subsidiaries. See *Restatement (Second) of Trusts* § 170, comment d; RCW 11.100.090. By paying a “marketing assistance fee” to the for-profit MSC, which the WBBT trustees also controlled, the BIAW defendants violated their fiduciary duties.

2. The Settlers Never Authorized This Self Dealing In The Enrollment Agreements, Which Is The Only Document That Represents Their Intent.

The trial court ignored fundamental rules of trust interpretation in holding on summary judgment that the “plain language” of the trust documents authorizes payment of 20% of the trust income to BIAW and its local associations as a “marketing assistance fee.” (CP 4875-76)

The trial court erred in relying on the 1994 Declaration of Trust to authorize these self dealing transactions. It was undisputed, as the trial court found, that the employer participants – who are the settlors and the beneficiaries of the trust – never saw the 1994 Declaration of Trust. (FF 17, CP 7144) That document reflects the intent of the trustees who signed it, not the intent of the participant employers, who the trial court confirmed to be the trust settlors. (FF 26, CP 7146; CP 4872-73)

Only a trustor (or “settlor”) can authorize a waiver of the duty of loyalty by stating its clear intent in the trust instrument itself. RCW 11.97.010 (“The trustor of a trust may by the provisions of the trust relieve the trustee from” fiduciary duties, including the duty of loyalty.); see **Allard v. Pacific Nat’l Bank**, 99 Wn.2d 394, 402-03, 663 P.2d 104 (1983). Courts construe trust documents narrowly to

prohibit, not to authorize, a fiduciary to profit from the trust. 3 Scott, *supra*, § 17.2.11, p. 1138 (“[T]he courts require the governing instrument to authorize, expressly and by specific language, each act that would otherwise constitute an act self-dealing; courts typically construe such language narrowly.”); see also ***In re Estate of Stevenson***, 605 N.W.2d 818, 822, ¶15 (S.D. 2000) (“In order for self-dealing activities to be authorized, the trust provision must provide ‘clear and unmistakable language’”).

The trial court erred in holding that the beneficiaries authorized the Trustees to pay BIAW and the local associations 20% of the trust corpus as “flat fees under the Declaration of Trust.” (CP 4875) As the trial court found, the enrollment agreement is “the only trust document that shows the intent of employer participants.” (FF 26, CP 7146) See ***Rodgers v. Simmons***, 43 Wn.2d 557, 560, 262 P.2d 204 (1953) (the intention of the donor at the time the trust property is conveyed is controlling). The enrollment agreement does not authorize the Trustees to pay their affiliates a 20% “marketing assistance fee.” The enrollment agreement authorized the payment of “fees” using clear and unambiguous language, allowing BIAW to “pay” itself only a 1.5% “Enrollment Fee and such costs and expenses for the operation

and administration of the Plan as the Trustees may direct.” (CP 4470) The agreement then authorizes the Trustee to “transfer” 20% of the refund to BIAW and the local associations only “for marketing and promotion of the Plan.” (CP 4470; *see also* CP 2180, 3867). This can be read consistently with the duty of loyalty. For example, BIAW’s executive director McCabe sent letters to employer participants claiming that 20% of the refund was paid to affiliates “for their expenses in marketing and promoting the program.”

Thus, the settlors never agreed to allow the trustees to pay their affiliates a “fee” that would generate millions of dollars of profit annually. But it is undisputed that this is what happens. The marketing assistance fee is a 20% syphon of trust funds to the BIAW defendants and to the local associations for non-trust, purely profit, purposes. The trial court erred in holding that the settlors authorized “flat fees under the Declaration of Trust,” which they never expressly approved as “fees” and that were unrelated to any purpose of the ROII trust. (CP 4875) The trial court should have analyzed these “transfers” for what they were – self-dealing transactions by the BIAW defendants for purposes unrelated to trust administration and in violation of their fiduciary duty.

3. The Trial Court Erred In Holding That The “Plain Language” Of The Trust Documents Authorizes Defendants To Charge A Marketing Assistance Fee That Is Not Used For Marketing.

Even if the trustees could authorize their own fees in a document that only they saw and signed, the 1994 Declaration of Trust, read together with the enrollment agreement, cannot authorize a flat “marketing assistance fee” that was unrelated to “marketing.” (CP 4481-82) A “fee” is a “charge or payment for a professional service.” *Webster’s New Universal Unabridged Dictionary* 705-06 (1996). By characterizing the 20% transfer of funds as a fee for “marketing assistance,” even the Declaration of Trust required that the payment must be a fair exchange for performing marketing service that benefited the Trust.

Even if the Declaration of Trust could relax the duty of loyalty, it must still be construed narrowly to avoid profit taking by the fiduciaries. The trial court instead interpreted the documents “very broadly.” (CP 4876) The trust documents never authorize the fiduciaries or their local affiliates to take a “marketing assistance fee” for purposes unrelated to marketing of the ROII plan. Even a non-fiduciary has an obligation not to mislabel fees charged under a contract in a manner that may confuse or deceive the other party.

See, e.g., *Indoor Billboard/ Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 78, ¶ 42, 170 P.3d 10 (2007) (defendant violated the Consumer Protection Act by knowingly mislabeling a charge imposed on customers in order to recover costs it did not actually incur); *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 545-56, 13 P.3d 240 (2000) (defendant violated the Consumer Protection Act by including non-secured fees with secured fees on invoice), *rev. denied*, 143 Wn.2d 1024 (2001). If defendants who are not fiduciaries cannot retain mislabeled fees, then certainly the defendants, fiduciaries charged with the highest duty to act in the beneficiaries' best interest, may not falsely represent the nature of their compensation in a governing trust document.

MSC paid itself marketing assistance fees of \$2.9 million, \$3.9 million, \$4.8 million, and \$4.3 million in 2005-2008, respectively. (CP 464; see also CP 4194) The amount received by BIAW-MSA under the marketing assistance fee dwarfs their actual marketing costs, by a factor of more than ten. (CP 4599, 4602, 4605, 4608, 4611, 4614 (BIAW budgets showing estimates for "ROI Marketing/Member Services" of roughly \$300,000 per year)

Defendants conceded that BIAW and local associations used the marketing assistance fee not for promoting the ROII plan, but for activities entirely unrelated to the ROII plan and the trust, including for their operating expenses and political campaign activities. (CP 4578, 3872, 3875, 4246, (marketing assistance fee is charged on the “back end” “in order to generate revenue”) 4619, 4624 (email from BIAW staff noting that “a large part of [local] salaries are already paid by the MAF money”), 4627 (email from Tom Kwieciak to local association stating “no one expects that all or even most of this money will actually go toward marketing ROII”)) Moreover, defendants admitted that the marketing assistance fee “is intended to generate a profit.” (CP 2331-34; see *also*, CP 2341-44 (“[T]he response to the complaint that the marketing assistance fees exceed actual expenditures on marketing and promotion is ‘of course it does – that was the point!’”)).

Because the Trustees never complied with their statutory duty to provide an accounting, the beneficiaries had no way to know that the 20% taken from their premium refunds was five times greater than BIAW’s marketing expenses and that this transfer was instead a source of profit for BIAW. See Arg. § A.5, *infra*. Defendants’ unrestrained use of the marketing assistance fee in

contravention of its stated purpose violated their duty of loyalty. The trial court erred in holding that the trust documents, as a matter of law, authorized fiduciaries to retain a deceptively labeled “marketing assistance fee” comprised of 20% of the trust corpus.

4. The Trial Court Erred In Refusing To Review The Reasonableness Of A Marketing Assistance Fee Set At A Flat Rate Of 20% Of Trust Assets.

Even if the trust documents had initially authorized the payment of a flat 20% fee, the trial court erred in refusing to hold that this fee had become unreasonable as a matter of law. The trial court abdicated its authority to supervise the reasonableness of fees taken by the trustee from the trustee.

The courts have the ultimate supervisory authority over a trust, including the fees charged by a trustee. See RCW 11.96A.020(1)(b) (“courts shall have full and ample power and authority under this title to administer and settle All trusts and trust matters.”); RCW 11.96A.030(2)(c) (defining “Matter” as “includ[ing] any issue, question, or dispute involving the determination of fees for a personal representative or trustee.”) The trial court had the duty to ensure that the marketing assistance fee was not unreasonably large. See *Restatement (Third) of Trusts* § 38, comment e (2003) (“If the amount of compensation provided

by the terms of the trust is or becomes unreasonably high . . . the court may allow a smaller . . . compensation.”); see also *Restatement (Third) of Trusts* § 38, illustration 2 (2003).

In ***Fred Hutchinson Cancer Research Ctr. v. Holman***, 107 Wn.2d 693, 732 P.2d 974 (1987), a decedent’s will provided that the trustees would each be “paid normal compensation for acting as trustees.” 107 Wn.2d at 696. The defendant initially charged hourly fees, but later switched to a flat percentage charge based on the value of the trusts. The trial court found the defendant’s fees excessive, and required him to refund all fees in excess of reasonable compensation. The Supreme Court affirmed, noting that “because this court finds the fees to be excessive, even without there being a breach of trust, Holman may still be properly surcharged for the excess, as he would be for any profit.” ***Holman***, 107 Wn.2d at 707 (citing *Restatement (Second) of Trusts*, § 203). See also ***In re Perry’s Estate***, 168 Wash. 428, 435, 12 P.2d 595 (1932) (“The fees of the executor are to be determined strictly upon the basis of what is just and reasonable in view of the services rendered.”)

Here, the marketing assistance fees taken by the BIAW defendants and the local associations had grown enormously over

the life of the trust. For instance, while in 1992 the 10% marketing assistance fee paid to the locals was \$354,880, by 2005 it had grown to nearly \$3 million, and to nearly \$5 million in 2007. (CP 464, 6071-72) In addition to an annual enrollment fee of 1.5% of premiums, the BIAW defendants have received over \$16 million as their 10% share of the marketing assistance fee payments between 2005 and 2008. (CP 464) The trial court erred in refusing to exercise its supervisory authority to order the BIAW defendants and the MBA to disgorge the excessive fees charged to the beneficiaries of the WBBT trust.

5. The Defendants Breached Their Duty To Provide The Beneficiaries With The Information Necessary To Determine The Nature Of The Marketing Assistance Fee.

A trustee also has a duty “to inform the beneficiaries fully of all facts that would aid them in protecting their interests.” *Marriage of Petrie*, 105 Wn. App. at 275 (citations and quotations omitted); see also *Restatement (Third) of Trusts* § 82(1) (2007); *Restatement (Third) of Trusts* § 83 (2007). Defendants violated their duty to provide the beneficiaries with basic information relating to the marketing assistance fee. The trustees never provided an annual accounting until petitioners successfully sued for it. The accounting

provided by court order was the first time that defendants acknowledged the relationship between the defendants, the size of the trust, and that the trustees' payment to its affiliates was as much as \$10 million annually. (CP 464)

Moreover, the BIAW defendants admitted that their marketing materials did not disclose the true nature of the marketing assistance fee (CP 4437-38; *see also* CP 3190-98) The BIAW defendants did not have a publicly available copy of the Declaration of Trust, and most ROII participants have never seen a copy of it. (CP 4488; FF 17, CP 7144) Nor did the BIAW defendants disclose to the beneficiaries the schedule showing when the marketing assistance fee was paid. (CP 4256-57) The beneficiaries had no way to discern that the marketing assistance fee was in actuality a profit-making device for BIAW and its local associations, rather than a fee used to market and promote the plan as stated in the enrollment agreement. (CP 2355-85)

6. The Trial Court Erred In Allowing The Trustees To Pay Themselves The Marketing Assistance Fee Before Final Adjustment, Contrary To The 1994 Declaration of Trust.

The 1994 Declaration of Trust purported to authorize the payment of the marketing assistance fee “[b]efore distribution of the

balance of each Fund left *after payment of all expenses and final Adjustments by DLI.*" (CP 4481) Rather than waiting for "final Adjustments by DLI," BIAW paid the 20% fee in three installments – 70% at the close of the first adjustment, 20% at the close of the second adjustment, and 10% at the close of the third and final adjustment. (CP 1540, 1593, 1603, 4511) Petitioners' expert estimated that the failure to follow the Declaration of Trust further deprived the beneficiaries of millions of dollars in lost interest. (CP 4550-51)

The trial court held on summary judgment that the "common sense reading of the above language" allowed BIAW to pay the marketing assistance fee *before* final adjustment by DLI, thereby increasing their profit at the expense of the beneficiaries. (CP 4876) This was error.

7. The Authority For And Reasonableness Of The Flat 20% Marketing Fee Presents An Issue Of Fact.

At a minimum, whether the beneficiaries authorized a flat 20% fee that was unrelated to marketing, and the reasonableness of the 20% flat fee, presented questions of fact that the trial court should not have resolved on summary judgment. This court should hold that this self dealing constituted a breach of trust as a matter

of law. At a minimum, it should remand to the trial court to place on the defendants the burden of showing that the flat 20% marketing assistance fee was reasonable and that it was fairly disclosed and consented to by the settlors.⁷

B. After Correctly Finding A Breach Of Their Fiduciary Duties, The Trial Court Erred By Allowing The Defendants To Retain The Interest They Secretly Retained From Trust Funds.

The trial court concluded that the BIAW defendants' undisclosed retention of interest earned on trust funds constituted a breach of their fiduciary duties. (CP 7154-55; CL 3; *see also* CP 7148, 7150; FF 35, 47) The trial court nonetheless refused to order that the defendants to disgorge this illicit profit to the beneficiaries, reasoning that "the damages to each of the petitioners is not in significant amounts." (CP 7155; CL 9; *see also* CL 10 "petitioners represent only five out of thousands of employer participants") "Equity will not suffer a wrong . . . to be without a remedy." ***Rummens v. Guar. Trust Co.***, 199 Wash. 337, 347, 92 P.2d 228 (1939). The trial court erred in allowing the BIAW defendants to

⁷ In the event of a remand, this court should also reverse the trial court's exclusion of petitioners' expert testimony relating to the standard of the case. (CP 2952-54)

retain the profit reaped by breaching their fiduciary duties and in refusing to order that the BIAW defendants disgorge their illicit profit.

1. A Fiduciary Cannot Retain Funds Earned In Breach Of Fiduciary Duties.

“All increase in the value of a trust fund derived from investment or reinvestment returns or from interest earned on the fund, belongs to, and becomes a part of, the corpus of the trust estate” *Lynn v. City of Longview*, 15 Wn.2d 528, 533, 131 P.2d 164 (1942) (listing cases); 4 Scott, *supra*, § 24.7 at 1682 (“a trustee who deposits trust funds in a bank account is accountable for any interest earned on the funds, regardless of whether it was a breach of trust, or whether the trustee had a duty, to make the deposit”). This rule has been applied in Washington many times.⁸

The trial court correctly held that the BIAW defendants breached their fiduciary duties by secretly retaining for themselves interest earned on trust funds and ordered defendants to “modify

⁸ See, e.g., *Lynn*, 15 Wn.2d at 533 (City could not retain interest earned on funds it held in trust for benefit of bondholders); *Williams v. Bank of California, N. A.*, 96 Wn.2d 860, 872, 639 P.2d 1339 (1982) (“Since the trust corpus must be held as a separate and independent fund, its earnings belong to and must remain with it”); *Washington Legal Found. v. Legal Foundation of Washington*, 271 F.3d 835, 852 (9th Cir. 2001) (applying Washington law to hold “there can be no doubt that the interest earned on IOLTA account deposits is the private property of the owners of the principal”), *aff’d sub nom.*, *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S. Ct. 1406, 155 L. Ed. 2d 376 (2003); *City of Seattle v. King County*, 52 Wn. App. 628, 633, 762 P.2d 1152 (1988) (applying common law principle that “interest follows the ownership of the funds”), *rev. denied*, 112 Wn.2d 1002 (1989).

their practices” in the future. (CL 3, 11, CP 7154-56) By allowing the BIAW defendants to then retain this money, the trial court ignored the “well-settled rule that a trustee can make no profit out of his trust.” *In re Montgomery’s Estate*, 140 Wash. 51, 54, 248 P. 64 (1926) (quoting *Magruder v. Drury*, 235 U.S. 106, 119, 35 S. Ct. 77, 82, 59 L. Ed. 151 (1914)); *Wilkins*, 46 Wn. App. at 780 (remanding for formal accounting where trustee failed to meet his burden of proving that he had not profited from lease of trust land to himself); *Restatement (Second) of Trusts* § 205 (1959) (“If the trustee commits a breach of trust, he is chargeable with . . . any profit made by him through the breach of trust”).

The trial court also correctly found that the defendants breached their fiduciary duties by commingling of trust funds with their own funds in a BIAW-MSA bank account, (FF 52, CP 4879-80), and enjoined this practice. (CP 7151; CL 11, CP 7155-56) See *Marriage of Petrie*, 105 Wn. App. 268 at 276 (relying on trustee’s improper commingling of his personal funds and custodial funds as basis for removing him as trustee); *Restatement (Second) of Trusts* § 179 (1959) (“The trustee is under a duty to the beneficiary to keep the trust property separate from his individual property . . .”). However, in ruling that this breach caused no harm

to the beneficiaries (CL 9, CP 7155), the trial court failed to recognize the integral role commingling played in the defendants' appropriation of interest earned on trust funds. Had BIAW held the trust funds in a separate account, interest on those funds would have automatically accrued to the Trust, rather than to the BIAW defendants.

The trial court erred in refusing to require the BIAW defendants to account to the Trust as a whole for their ill gotten gains. This court should reverse and remand with instructions to require the defendants to account for and return to the trust all interest wrongfully withheld from the WBBT beneficiaries.

2. Petitioners Sought Recovery On Behalf Of All The Beneficiaries To Restore Illegal Profit To The Trust.

The trial court refused to grant monetary relief because it concluded that the interest lost by the five petitioners was not "significant." (CL 9, CP 7155) But any beneficiary may bring suit to remedy a trustee's illicit profiting through a breach of his fiduciary duties. RCW 11.96A.080 ("any party may have a judicial proceeding for the declaration of rights or legal relations with respect to any matter"); RCW 11.106.040 ("any settlor or beneficiary of a trust may file a petition under RCW 11.96A.080

with the superior court in the county where the trustee or one of the trustees resides asking the court to direct the trustee or trustees to file in the court an account”).⁹ The trial court acknowledged that under the Trustees Accounting Act, the court is to “determine the propriety of all actions of the trustee or trustees” and “surcharging the trustee or trustees for *all losses*, if any, caused by negligent or willful breaches of trust.” RCW 11.106.070 (emphasis added). (See FF 62, CP 7153)

Under TEDRA “[a]n action taken by the court is conclusive and binding upon each person receiving actual or constructive notice or who is otherwise virtually represented.” RCW 11.96A.120(4).¹⁰ The statute reflects the common law rule that where a trustee breaches fiduciary duties, any beneficiary may enforce a trustee’s duties, so that all beneficiaries will benefit. See,

⁹ See also *Restatement (Second) of Trusts* § 214(1) (“If there are several beneficiaries of a trust, any beneficiary can maintain a suit against the trustee to enforce the duties of the trustee to him or to enjoin or obtain redress for a breach of the trustee’s duties to him.”); *Matter of Polson*, 21 Wn. App. 489, 495, 585 P.2d 840 (1978) (any beneficiary can seek accounting); Scott, § 24.19 at 1746 (“If, as is almost always the case, the trust has more than one beneficiary, any one of them can sue to enforce the trust or to obtain redress for breach of trust.”).

¹⁰ Further, TEDRA specifically authorizes a beneficiary to “virtually” represent other beneficiaries with similar interests and provides that those beneficiaries will be bound by any judgment entered by the court. RCW 11.96A.120(1). This section “is intended to adopt the common law concept of virtual representation,” under which “a member of a class of persons, to represent all members of the class in a dispute that determines interests in an estate, trust, or nonprobate asset.” RCW 11.96A.120(1); Final Bill Report SB 5196 (1999) at 1.

e.g., **Graden v. Conexant Sys. Inc.**, 496 F.3d 291, 295-96 (3d Cir. 2007) (“When a common-law trustee commits a breach of trust that results in a loss, any beneficiary whose beneficial interests were affected may sue to compel the trustee to make good on the loss.”), *cert. denied*, 552 U.S. 1243 (2008); cf. **Rummens**, 199 Wash. at 349 (creditors of a decedent’s estate were “entitled to maintain an equitable action, for the benefit of all creditors” where the estate administrator failed to properly do so).

Here, in order to remove any doubt about the trial court’s authority to provide trust-wide relief under TEDRA, all of the beneficiaries were served with process. (CP 116-129) The summons and petition served on each beneficiary stated that petitioners would represent the interests of all beneficiaries, that the relief would affect all beneficiaries, and that not every beneficiary needed to participate. (CP 54-86, 127-29)

The trial court initially recognized this principle, authorizing the petitioners to seek “a judgment, injunction or other equitable relief requiring [BIAW defendants] to repay the Washington Builders Benefit Trust amounts determined to have been wrongfully taken, received or retained.” (Supp. CP ___, Sub. No. 753) The trial court then ignored its previous ruling, confusing the amounts due the

named petitioners in damages for the amounts for which the defendants must account as a matter of equity. This was error. See ***Amalgamated Clothing & Textile Workers Union, AFL-CIO v. Murdock***, 861 F.2d 1406 (9th Cir. 1988).

In ***Murdock***, the plaintiff ERISA beneficiaries sued alleging that their fiduciary profited by breaching his duty of loyalty. Plaintiffs sought to impose a constructive trust on the fiduciary's profits in favor of all plan beneficiaries. The district court held that a constructive trust was not an available remedy. 861 F.2d at 1408-09. The Ninth Circuit reversed, holding that "a constructive trust on a fiduciary's ill-gotten profits in favor of all plan participants and beneficiaries is an important, appropriate, and available form of relief" under ERISA. ***Murdock***, 861 F.2d at 1414.¹¹

The ***Murdock*** court relied on the common law principle that a fiduciary may not benefit from its breach of trust:

The purpose behind this rule is to deter the fiduciary from engaging in disloyal conduct by denying him the profits of his breach. . . . The purpose of the rule is not to make beneficiaries whole for any damages they may have suffered. *In fact, whether beneficiaries have*

¹¹ The court noted that a similar remedy would be available under traditional trust principles. ***Murdock***, 861 F.2d at 1417 ("A constructive trust on the fiduciary's ill-gotten profits in favor of plan participants and beneficiaries is a remedy that would be available under traditional trust law to enforce the traditional trust principle that a fiduciary may not profit by his breach of the duty of loyalty.").

been financially damaged by the breach is immaterial. Rather, the objective is to make disobedience of the trustee to the duty of loyalty so prejudicial to him that he and all other trustees will be induced to avoid disloyal transactions in the future.

861 F.2d at 1411-12 (emphasis added) (citations and quotations omitted). The court concluded that the plaintiffs could maintain their suit “on behalf of *all* plan participants and beneficiaries, not to compensate them for damages suffered, but to deny the fiduciaries profits from their alleged breach and thereby to deter future breaches of ERISA’s duty of loyalty.” **Murdock**, 861 F.2d at 1414 (emphasis in original).

Here, the petition expressly sought “to return trust funds to the trust.” (CP 1039) Petitioners sought “an order requiring the State defendants to return to the trust for distribution to the beneficiaries all interest earned on the retro refunds and retained by MSC.” (CP 7067) The individual beneficiaries’ aggregated damages are substantial – as is the defendants’ profit from their violation of trust. (FF 35, CP 7148; FF 47, CP 7150) While correctly concluding that the BIAW defendants profited through a breach of their duty of loyalty (CL 3, CP 7154-55), the trial court misapplied the law, authorizing the BIAW defendants to retain this profit by erroneously focusing on the damage to individual

beneficiaries rather than to the trust as a whole. (CL 9, CP 7155)

The trial court erred by refusing to order that defendants disgorge their illicit profit on behalf of *all* plan participants and beneficiaries.

C. The Trial Court Erred In Dismissing The Master Builders Association Of King And Snohomish Counties.

The trial court erred in dismissing the MBA with prejudice on the grounds that as a “local association” it was not a fiduciary. (CP 4882-85, 4983) This was error for several reasons:

First, the petition alleged that MBA had participated in setting up the WBBT and colluded with the trustees in carrying out the breaches. (CP 1027, 1030-31) These allegations, which were supported by substantial documentary evidence, were sufficient to maintain an action for breach of trust, and distinguish the MBA from the other local associations who the Court dismissed on summary judgment. (See CP 8179-82)

Given the MBA's involvement in the management and operation of the WBBT trust, it should be held to the standard of a fiduciary. MBA solicits employer participants in the ROII program, (CP 4621-22) and was instrumental in setting up the WBBT. (CP 2776-80) The trial court erred in holding that MBA does not owe the beneficiaries fiduciary duties, given its role in managing the

WBBT. (CP 4983) At a minimum, the MBA's involvement with BIAW presented issues of fact that should have been resolved at trial, rather than in a CR 12 motion.

Second, even if the MBA stood in the same position as the local associations, the trial court's summary judgment order dismissing the locals, upon which MBA relied in moving for judgment on the pleadings, was also error.¹² (CP 8179-82) MBA need not owe trust beneficiaries fiduciary duties in order to be held accountable for trust funds it received. If a beneficiary is wrongfully deprived of trust funds, the recipients of those funds are accountable to the trust. *Restatement (Second) of Trusts* § 288 ("If the trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust, the transferee does not hold the property free of the trust, although he paid value for the transfer."); see also *Paysse v. Paysse*, 86 Wash. 349, 354-55, 150 P. 622 (1915) ("the rule is universal that such . . . voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and

¹² While petitioners are not seeking any relief against the local associations in this appeal, they challenge the trial court's reasoning in dismissing the local associations on summary judgment because this was the only basis for its dismissal of the claims against MBA on the pleadings. (See CP 4882, 907, 4959-69, 4983, 8179-83)

becomes himself a trustee for the original beneficiary.”) (*quoting* 3 Pomeroy’s Equity Jurisprudence (3d Ed.) § 1048); ***Pelt v. Utah***, No. 2:92-CV-639 TC, 2006 WL 1881019 at *13-14 (D. Utah 2006) (trust funds remained trust funds even after trustee transferred them to third parties).

The employer participants as trust beneficiaries are entitled to trace any ill gotten gains to any third party who takes those funds with knowledge of the trustee’s breach of fiduciary duty. *Restatement (Second) of Trusts* § 291(1) (providing for multiple remedies against a transferee “[w]here the trustee in breach of trust transfers trust property to a person who takes with notice of the breach of trust”). One who aids and abets a trustee in acts of self dealing must account to the trust beneficiaries. Bogert and G. Bogert, *The Law of Trusts and Trustees*, § 901 at 304 (2d rev. ed. 1995) (“One acting with a trustee in performing an act that such person knows or should know is a breach of trust becomes a participant in the breach and subject to liability for any damages that result or to restore the trust property traced to such person’s possession.”) The trial court erred in dismissing the Master Builders Association. (CP 4983)

D. Petitioners Were Entitled To Their Attorneys' Fees Because They Provided A Benefit To The Trust.

Washington courts have always awarded fees to a beneficiary who brings suit to remedy a trustee's breach of fiduciary duty and thereby confers a benefit on the trust, even when there is no financial recovery. The trial court erred in holding that the petitioners were not entitled to their fees because "[p]etitioners were awarded no damages or other financial recovery" and because there were "many issues in this case in which the petitioners did not prevail." (FF 6, CP 8110)

First, petitioners "should be granted their request to recover all attorney fees expended at both the trial and on appeal on behalf of the plaintiffs and all . . . beneficiaries" because they established a breach of fiduciary duties. *Allard v. Pacific Nat'l Bank*, 99 Wn.2d 394, 407-08, 663 P.2d 104 (1983).

Second, petitioners were entitled to fees even if the breaches were technical, and even in absence of a monetary award. "[T]he successful maintenance by a few for the benefit of many of an equitable action resulting in the protection of [their] contractual rights as originally established is ground for allowing attorney's fees to those who battle to redress the wrong and

maintain the previous personal rights *although no actual court order to return the erroneously spent funds has been made.*" **Allard**, 99 Wn.2d at 408 (emphasis added) (quoting **Grein v. Cavano**, 61 Wn.2d 498, 506, 379 P.2d 209 (1963)).

Third, beneficiaries' fees should be paid by the breaching fiduciaries. "Where litigation is necessitated by the inexcusable conduct of the trustee, . . . the trustee individually must pay those expenses," **Allard**, 99 Wn.2d at 408, even where the fiduciaries were exercising their discretion or acting in good faith. See **Gillespie v. Seattle-First Nat. Bank**, 70 Wn. App. 150, 177-78, 855 P.2d 680 (1993), *rev. denied*, 123 Wn.2d 1012 (1994).

In **Allard**, beneficiaries of a trust brought suit against the trustee alleging it breached its fiduciary duties. The trial court found no breach and awarded the trustee its attorneys' fees from the trust. The Supreme Court reversed, explaining that a "court's underlying consideration must be whether the litigation and the participation of the party seeking attorney fees caused a benefit to the trust." 99 Wn.2d at 407. The Court concluded by "hold[ing] that since defendant breached its fiduciary duty plaintiffs should be granted their request to recover all attorney fees expended at both the trial and on appeal." 99 Wn.2d at 407-08. The Court also

directed that the fees be paid by the trustee individually because it had necessitated the litigation by breaching its fiduciary duties. 99 Wn.2d at 408 (“Where litigation is necessitated by the inexcusable conduct of the trustee . . . the trustee individually must pay those expenses.”); see also *In Re Estate of Jones*, 152 Wn.2d 1, 21, 93 P.3d 147 (2004) (holding that personal representative was personally responsible for beneficiaries’ attorneys’ fees under former RCW 11.96A.150 where “the litigation was necessitated by his multiple breaches of fiduciary duty”); *Wilkins v. Lasater*, 46 Wn. App. 766, 733 P.2d 221 (1987).

In *Wilkins*, the petitioner proved that the trustees breached fiduciary duties by leasing trust property to himself and commingling trust property, but failed in proving financial harm to the trust. The court held that even though the trustee’s “lease of the farmland may not have involved more than technical breaches of fiduciary duties, Mrs. Wilkins action will have the effect of remedying these and any other more substantial breaches; ultimately, the beneficiaries will benefit from the action.” *Wilkins*, 46 Wn. App. at 781. The court held that “Mrs. Wilkins’ failure to ultimately demonstrate such facts is not a valid reason for denying her attorney fees.” *Wilkins*, 46 Wn. App. at 781. Accord *Matter of*

Estate of Cooper, 81 Wn. App. 79, 92, 913 P.2d 393, *rev. denied*, 130 Wn.2d 1011 (1996) (“If there is a breach of fiduciary duties, the plaintiff has a right to recover fees against the trustee personally.”).

Cases decided after TEDRA continue to follow ***Allard***, as TEDRA recodified the attorneys’ fees statute, but did not materially change it. Compare former RCW 11.96.140 (“as justice may require”) and RCW 11.96A.150 (“as the court determines to be equitable”). See ***In re Estate of Jones***, 152 Wn.2d at 20-21 (2004) (relying on ***Allard*** to hold that the TEDRA petitioners “should be awarded all reasonable and necessary attorney fees, including those incurred on appeal . . . because the litigation was necessitated by [the trustee’s] multiple breaches of fiduciary duty.”); ***In re Estate of Black***, 116 Wn. App. 476, 491, 66 P.3d 670 (2003) (reversing trial court’s award under former RCW 11.96A.150 “on equitable grounds” of fees to executor who unsuccessfully contested probate of second will, but not to beneficiary of second will who successfully petitioned for admission into probate of the second will), *aff’d on other grounds*, 153 Wn.2d 152, 102 P.3d 796 (2004).

There are strong policy reasons for awarding fees for proving a breach of fiduciary duty and where the litigation benefits

the trust. An award of fees recognizes that the trustee's actions have necessitated the suit and the need to incur fees. *Gillespie v. Seattle-First Nat. Bank*, 70 Wn. App. at 178 ("But for the breach of fiduciary duty, there would have been no need for the beneficiaries to incur the fees."). And as the Court in *Allard* recognized, like the common fund doctrine, awarding attorneys' fees to beneficiaries who benefit a larger class of beneficiaries provides an important incentive to bring suit to remedy breaches of fiduciary duty:

[T]he successful maintenance by a few for the benefit of many of an equitable action resulting in the protection of [their] contractual rights as originally established is ground for allowing attorney's fees to those who battle to redress the wrong and maintain the previous personal rights although no actual court order to return the erroneously spent funds has been made.

99 Wn.2d at 408 (quoting *Grein*, 61 Wn.2d at 506, which held that the plaintiffs were entitled to their attorneys' fees for forcing the defendants to amend and correct their accounting practices, despite the lack of a monetary award).

The trial court ignored these principles here. The petitioners were forced to bring suit because the BIAW defendants refused to acknowledge that the funds they administered constituted a trust under Washington law, and that they owed the employer

participants fiduciary duties, including the duty to account for their fees and for the trust funds that they administered. (CP 426-56) The action established the participating employer's rights as settlors and beneficiaries of the trust and established the BIAW defendants' fiduciary duties. (FF 17, CP 7144; FF 19, CP 7145) The trial court required the BIAW defendants to provide an accounting in order to comply with their statutory duties to inform the beneficiaries of the size of the trust, the amount of funds that they held, and to admit that they paid millions of dollars to their affiliate in "related party transactions." (CP 423-25, 457-879) The petitioners' action also established that the BIAW defendants breached the trust by commingling trust funds and by improperly taking interest from the trust. (CL 3-4, CP 7154-55) The trial court held that all of the BIAW defendants were equally culpable and enjoined them from continuing such practices. (CL 11, CP 7155-56) It ordered the BIAW defendants to provide annual accountings in the future. (CL 5, 11, CP 7155-56)

Having found both a breach of trust and that the petitioners' action provided a benefit to the trust, the trial court then erred in refusing to award petitioners their fees. The trial court's refusal to

award fees was based on a fundamental misunderstanding of the law of trusts and necessarily constitutes an abuse of discretion.

E. Petitioners Are Entitled To Their Attorney's Fees On Appeal.

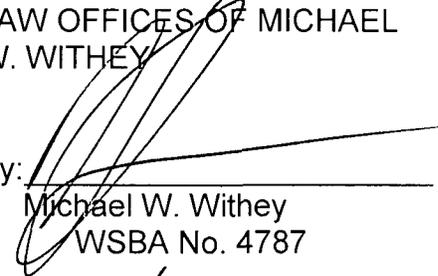
Petitioners are also entitled to their attorney fees on appeal. *Villegas v. McBride*, 112 Wn. App. 689, 697, 50 P.3d 678 (2002) (reversing trial court's summary judgment order and awarding fees on appeal and remanding for award of fees incurred below under RCW 11.96A.150), *rev. denied*. 149 Wn.2d 1005 (2003).

VI. CONCLUSION

This court should reverse and remand with instructions to direct the BIAW defendants and the MBA to restore to the trust the marketing assistance fee and all interest wrongfully retained from the trust. Because this litigation was necessary to establish the existence of the trust, to remedy the BIAW defendants' breach of fiduciary duty, and to ensure compliance with those duties in the future, this court should also award petitioners their attorney fees at trial and on appeal.

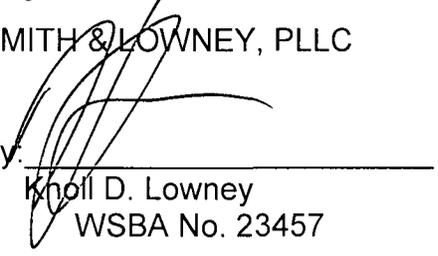
Dated this 7th day of October, 2011.

LAW OFFICES OF MICHAEL
W. WITHEY

By: 

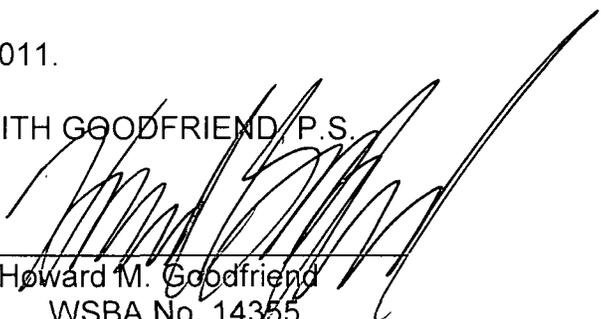
Michael W. Withey
WSBA No. 4787

SMITH & LOWNEY, PLLC

By: 

Knoll D. Lowney
WSBA No. 23457

SMITH GOODFRIEND, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

Attorneys for Appellants

DECLARATION OF SERVICE

11 OCT 10 4:10:02

STATE OF WASHINGTON
BY _____
DEPUTY

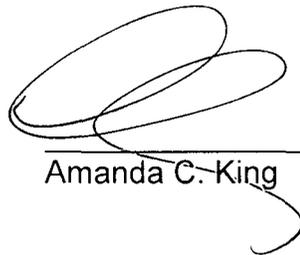
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 7, 2011, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Michael E. Withey Law Offices of Michael Withey 601 Union St Ste 4200 Seattle WA 98101-4036	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Knoll D. Lowney Smith & Lowney PLLC 2317 East John St Seattle WA 98112-5412	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Tonna K. Farrar Bonnett, Fairbourn, Friedman & Balint 600 W. Broadway, Suite 900 San Diego, CA 92101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Andrew Friedman Bonnett Fairbourn Friedman & Balint, PC 2901 No. Central Avenue, Suite 1000 Phoenix, AZ 85012	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

Matthew D. Clark Harvey Korrell, III Robert J. Maguire David Tarshes Davis Wright Termaine LLP 1201 Third Avenue, Suite 2200 Seattle WA 98101-3045	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Gwendolyn Payton Ryan McBride Lane Powell PC 1420 5th Ave Ste 4100 Seattle WA 98101-2375	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

DATED at Seattle, Washington this 7th day of October,
2011.



Amanda C. King

Index To Appendices

Appendix A:	Order Dismissing the Master Builders Association	9/10/2010	CP 4983
Appendix B:	Order Granting Summary Judgment for Local Associations	6/25/2010	CP 8179-82
Appendix C:	Order On Cross-Motions For Summary Judgment	9/13/2010	CP 4996-5015
Appendix D:	Findings and Conclusions	12/17/2010	CP 7140-56
Appendix E:	Order Denying All Motions For Awards of Attorney Fees and Costs	3/4/2011	CP 8109-14
Appendix F:	Judgment (without exhibits)	3/4/2011	CP 8115-17

EXPEDITE (if filing within 5 court days of hearing)
 Hearing is set:
 Date: _____
 Time: _____
 Judge/Calendar: _____

FILED
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 THURSTON COUNTY, WASH.
 10 SEP 10 AM 11:48
 BETTY J. GOULD, CLERK
 BY: _____
 DEPUTY

**SUPERIOR COURT OF WASHINGTON
 FOR THURSTON COUNTY**

In re: Washington Builders
 Benefit Trust
 Plaintiff/Petitioner,
 vs.
Building Industry Association of
 Washington et al.
 Defendant/Respondent.

NO. 08-2-01674-6
 ORDER
 (OR)

- I. BASIS
1. Master Builders Association of King and Snohomish Counties' Motion on the Pleadings;
 2. Petitioners' Opposition to Motion for Judgment on the Pleadings; and
 3. Reply in Support of Motion for Judgment on the Pleadings.

II. FINDINGS

After reviewing the case record to date, and the basis for the motion, the court finds that:
 Master Builders Association of King and Snohomish Counties' Motion for Judgment on the Pleadings is GRANTED.

III. ORDER

IT IS ORDERED that:
 Master Builders Association of King and Snohomish County is hereby dismissed with prejudice.

DATED this 10th day of Sept., 2010.

Carol Murphy
 JUDGE / COURT COMMISSIONER

Presented by:
Gwendolyn C. Payton
 Attorney for Master Builders Association of
 King and Snohomish County
 ORDER Approved as to Form.
Michael Whitney
 Michael Whitney, Attorney for Petitioner

FORMS 0-000004983

5
FILED
SUPERIOR COURT
THURSTON COUNTY WA

1 [] EXPEDITE (if filing within 5 court days of hearing) 10 JUN 25 P 3 :04

2 [X] Hearing is set:

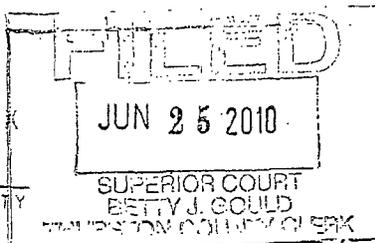
3 Date: June 25, 2010

4 Time: 1:30

5 Judge/Calendar: Carol Murphy

BETTY J. GOULD CLERK

BY _____ DEPUTY



6 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

7 IN RE: WASHINGTON BUILDERS BENEFIT
8 TRUST

NO. 08-2-01674-6

9 _____
10 RE SOURCES FOR SUSTAINABLE
11 COMMUNITIES, A-1 BUILDERS, SF
12 MCKINNON COMPANY INC.,
13 CABINETWORKS, LIVING SPACE, and all others
14 similarly situated,

ORDER GRANTING
SUMMARY
JUDGMENT FOR
LOCAL
ASSOCIATIONS

15 Plaintiffs,

16 vs.

17 BUILDING INDUSTRY ASSOCIATION OF
18 WASHINGTON, BIAW MEMBER SERVICES
19 CORPORATION, MASTER BUILDERS
20 ASSOCIATION OF KING AND SNOHOMISH
21 COUNTIES, WASHINGTON BUILDERS
22 BENEFITS TRUST, DAVE BAKER, JOHN
23 MILLER, DICK ROKES, ROB STEWART, JERRY
24 STURGILL, STEVE THOSATH, RUSS TYE,
25 PAUL NOLAN, PAUL ABENROTH, RANDY
GOLD, GARY CRONCE, DICK LOWELL, JOHN
PIAZZA, JENNIE STACK, CATHY GINGROW,
RICK TERMAINE, TED CLIFTON, CATHY
SANDERS, MARK SMITH, JERRY CLARK,
MARK SHAFFER, AND DOES 1-40,

Defendants.

WHEREAS this matter came regularly on for hearing on the motion of
Lower Columbia Contractors Association, Skagit-Island Counties Builders

ORDER GRANTING SUMMARY JUDGMENT FOR LOCAL
ASSOCIATIONS - 1

Bullivant|Houser|Bailey PC

1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

ORIGINAL

0-000008179

1 Association, Home Builders Association of Tri-Cities, Home Builders
2 Association of Kitsap County, North Peninsula Building Association, Jefferson
3 County Home Builders Association, Spokane Home Builders Association and
4 Building Industry Association of Clark County, and joined in by Central
5 Washington Home Builders Association, North Central Home Builders
6 Association and San Juan Builders Association for summary judgment on their
7 behalf and on behalf of all locals, and the Court having heard the arguments of
8 counsel and the court having reviewed the files and pleadings herein and
9 specifically:

10 Sub#	Date Filed	Docket Code	Docket Description
11 327	11-18-2009	AMENDED PETITION	Amended Petition 12 Second
13 389	01-08-2010	DECLARATION	Declaration Art Castle
14 390	01-08-2010	MOTION FOR 15 SUMMARY 16 JUDGMENT	Motion For Summary 17 Judgment
18 507	04-23-2010	INDEX	Index To Record
19 522	05-14-2010	RESPONSE	Response
20 523	5-14-2010	JOINDER	Joinder in Motion for 21 Summary Judgment
22 533	05-14-2010	COPY	Copy Of Factual Record 23 Vol 2
24 541	05-18-2010	DECLARATION	Declaration Of Michael 25 Withey
569	05-24-2010	BRIEF	Brief Locals Reply
570	05-24-2010	REPLY	Reply Supplemental

ORDER GRANTING SUMMARY JUDGMENT FOR LOCAL
ASSOCIATIONS - 2

Bullivant|Houser|Bailey PC

1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930

0-000008180

1	Sub#	Date Filed	Docket Code	Docket Description
2	572	05-25-2010	REPLY	Reply In Support
3	573	05-25-2010	STATEMENT	Statement Of Additional
4				Authorities
5	574	05-25-2010	PRAECIPE	Praecipe

6 THE COURT HEREBY FINDS The second amended petition is the
7 operative complaint for the purposes of this motion. The allegations against the
8 local associations are violations of fiduciary duties owed to the ROII
9 beneficiaries. Therefore, for any liability to be established against the local
10 associations, those local associations must be trustees with respect to the money
11 they receive and thus owe fiduciary duties. The court finds that there are no
12 questions of material fact as to this threshold question and that all local
13 associations joined in this action by the Second Amended Petition are entitled to
14 judgment as a matter of law and NOW THEREFORE

15 IT IS HEREBY ORDERED AND ADJUDGED that the plaintiffs' claims
16 against Lower Columbia Contractors Association, Skagit-Island Counties
17 Builders Association, Home Builders Association of Tri-Cities, North Peninsula
18 Building Association, Home Builders Association of Kitsap County, Jefferson
19 County Home Builders Association, Building Industry Association of Clark
20 County, Spokane Home Builders Association, North Central Home Builders
21 Association, San Juan Builders Association, Central Washington Home Builders
22 Association, Olympia Master Builders, Master Builders Association of Pierce
23 County, and Building Industry Association of Whatcom County are DISMISSED
24 with prejudice and the Motion for Summary Judgment is GRANTED.
25

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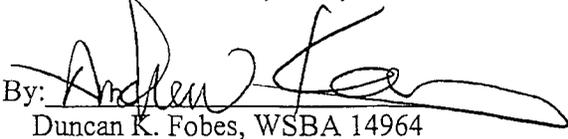
DONE IN OPEN COURT this 25th day of June 2010.


CAROL A. MURPHY
SUPERIOR COURT JUDGE

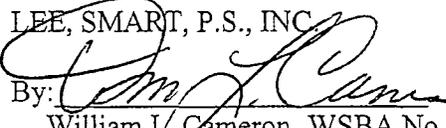
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BULLIVANT HOUSER BAILEY
A Professional Corporation

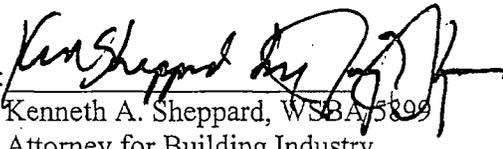
PATTERSON BUCHANAN FOBES
LEITCH & KALZER, INC., P.S.

By: 
Joseph J. Strass, WSBA No. 12063
Lisa Grimm, WSBA #40600
Attorneys for Master Builders
Association of Olympia

By: 
Duncan K. Fobes, WSBA 14964
Rhianna M. Fronapfel, WSBA 38636
Of Attorneys for N. Central Home Bldrs.
Assoc., Central WA Home Bldrs. Assoc.
and San Juan Bldrs. Assoc.

SIMBURG, KETTER, SHEPPARD &
PURDY LLP

LEE, SMART, P.S., INC
By: 
William L. Cameron, WSBA No. 5108
Of Attorneys for Defendants Home
Builders Association of Kitsap County,
Lower Columbia Contractors Association,
North Peninsula Building Association,
Skagit/Island Counties builders Association
Spokane Home Builders Association and
Home Builders Association of Tri-Cities

By: 
Kenneth A. Sheppard, WSBA 5899
Attorney for Building Industry
Association of Whatcom County

THE LAW OFFICE OF ROBERT W.
DENOMY

By: _____
Robert W. Denomy WSBA No. 9050
Attorney for Pierce County Master
Builders Association

FILED
SUPERIOR COURT
THURSTON COUNTY WA

'10 SEP 13 P5:12

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BY _____ DEPUTY

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SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS)
BENEFIT TRUST)

No. 08-2-01674-6

RE SOURCES FOR SUSTAINABLE)
COMMUNITIES, *ET AL.*,)

~~PROPOSED~~ ORDER ON
CROSS-MOTIONS FOR
SUMMARY JUDGMENT

Petitioners,)

v.)

BUILDING INDUSTRY)
ASSOCIATION OF WASHINGTON, et)
al.,)

Defendants.)

This Order memorializes the Court's Letter Opinion of August 6, 2010 (the "Letter Opinion"), which is attached hereto as Exhibit A.

This matter having come before the Court on the following motions:

1. State Defendants'¹ Motion for Judgment on the Petitioners' Trust Claims Based on the ROII Enrollment Agreement;

¹ The State Defendants are Building Association of Washington (BIAW), BIAW-Member Services Committee (BIAW-MS), Washington Builders Benefit Trust (WBBT), and the individually named WBBT trustees.

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- 2. Washington Builders Benefit Trust and Trustees' Motion for Judgment on Payment of Marketing Assistance Fees;
- 3. Motion for Judgment That Petitioners' Claims Are Barred By the Statute of Limitations and Equitable Defenses;
- 4. BIAW, MSC, WBBT, and Trustees' Motion for Judgment on Interest Issues;
- 5. Petitioners' First Motion for Partial Summary Judgment to Establish Breach of Express Terms of Trust and Fiduciary Duties By Commingling, Interest Skimming, and Failure to Supervise; and
- 6. Petitioners' Second Motion for Partial Summary Judgment to Establish That 20% Payments Constitutes A Breach of Express Trust and/or Breach of Loyalty;

The court has considered these motions and all the supporting materials, including the declarations submitted and the attachments to those declarations (presented in the several volumes of Defendants' Factual Record and Petitioners' Factual Record), and all other papers, evidence, and argument submitted in favor or opposition to the motions, as well as any other documents on file with the Court.

The court hereby ORDERS as follows:

I. State Defendants' Motion for Judgment on the Petitioners' Trust Claims Based on the ROII Enrollment Agreement is GRANTED, for the reasons set forth in the Letter Opinion;

II. Washington Builders Benefit Trust and Trustees' Motion for Judgment on Payment of Marketing Assistance Fees is GRANTED, for the reasons

1 set forth in the Letter Opinion;

2 III. Motion for Judgment That Petitioners' Claims Are Barred By the
3 Statute of Limitations and Equitable Defenses is GRANTED in part and DENIED
4 in part as follows: it is DENIED, except that the Court grants the motion only to
5 limit the cause of action regarding the duty to provide an annual report to the years
6 2005 through 2007, for the reasons set forth in the Letter Opinion;
7

8
9 IV. BIAW, MSC, WBBT, and Trustees' Motion for Judgment on Interest
10 Issues is DENIED, for the reasons set forth in the Letter Opinion;

11 V. Petitioners' First Motion for Partial Summary Judgment to Establish
12 Breach of Express Terms of Trust and Fiduciary Duties By Commingling, Interest
13 Skimming, and Failure to Supervise is GRANTED IN PART and DENIED IN
14 PART, as follows: (1) Petitioners have established that the inbound float interest is
15 subject to the trust and their motion is granted on this issue; (2) Petitioners have
16 established that BIAW-MSC commingled trust funds in its general account, and
17 their motion is granted on the issue of breach of the duty not to commingle
18 (whether this commingling caused any damage is an issue properly reserved for
19 trial); this motion is otherwise denied, for the reasons set forth in the Letter
20 Opinion;
21
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25 VI. Petitioners' Second Motion for Partial Summary Judgment to
26 Establish That 20% Payments Constitutes A Breach of Express Trust and/or
27

1 Breach of Loyalty is DENIED, for the reasons set forth in the Letter Opinion.

2 DATED: 9/13/10

3 Carol Murphy
4 The Hon. Carol Murphy

5 Presented By:

6 Davis Wright Tremaine LLP
7 Attorneys for Building Industry Association of Washington,
8 BIAW Member Services Corporation,
9 Washington Builder Benefit Trust and certain trustees

10 By Robert Maguire
11 Harry J. F. Korrell, WSBA No. 23173
12 Robert J. Maguire, WSBA No. 29909
13 Suite 2200, 1201 Third Avenue
14 Seattle, Washington 98101-3045
15 Tel: (206) 622-3150, Fax: (206) 757-7700
E-mail: harrykorrell@dwt.com
E-mail: robmaguire@dwt.com

16 Approved As To Form; Notice Of Presentation Waived By:

17 Law Offices of Michael Withey
18 Attorneys for Petitioners

19 By _____
20 Michael Withey, WSBA No. 4787
21 Two Union Square
22 601 Union Street, Suite 4200
23 Seattle, WA 98101
24 Tel: (206) 405-1800
E-mail: mike@witheyllaw.com

25 Knoll Lowney, WSBA No. 23457
26 Smith & Lowney, PLLC
27 2317 East John Street
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1 Riddell Williams P.S.
2 Attorneys for "Trust Beneficiaries"

3 By _____
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5 1001 Fourth Avenue
6 Suite 4500
7 Seattle, WA 98154-1192
8 Email: klederman@riddellwilliams.com

9 Lane Powell PC
10 Attorneys for Defendant Master Builders Association
11 of King/Snohomish Counties

12 By _____
13 Gwendolyn Payton, WSBA No. 26752
14 1420 Fifth Avenue, Suite 4100
15 Seattle, WA 98101-2338
16 Tel: (206) 223-7746
17 paytong@lanepowell.com

18 Allied Law Group
19 Attorneys for Clark Custom Remodeling, et al.

20 By _____
21 Greg Overstreet, WSBA No. 26682
22 Michele L. Earl-Hubbard, WSBA No. 26454
23 2200 Sixth Avenue, Suite 770
24 Seattle, WA 98121
25 Tel: (206) 443-0200

Exhibit A

0-0000

Superior Court of the State of Washington
For Thurston County



Paula Casey, Judge
Department No. 1
Thomas McPhee, Judge
Department No. 2
Richard D. Hicks, Judge
Department No. 3
Christine A. Pomeroy, Judge
Department No. 4

2000 Lakeridge Drive SW • Building No. Two • Olympia WA 98502
Telephone (360) 786-5560 • Fax (360) 754-4060

Gary R. Tabor, Judge
Department No. 5
Chris Wickham, Judge
Department No. 6
Anne Hirsch, Judge
Department No. 7
Carol Murphy, Judge
Department No. 8

August 6, 2010

Eric D. "Knoll" Lowney
2317 E John Street
Seattle, WA 98112-5412

Robert W. Denomy, Jr.
1117 A Street
Tacoma, WA 98402-5003

Harry J.F. Korrell, III
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Seattle, WA 98101-3045

Terry E. Miller
7409 W Grandridge Blvd Ste C
Kennewick, WA 99336-6710

D. Michael Reilly
1420 5th Avenue, Suite 4100
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Rhianna M. Fronapfel
2112 3rd Avenue, Suite 500
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Robert D. Johns
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Bellevue, WA 98004-6969

Joel E. Wright
701 Pike Street, Suite 1800
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Kenneth Sheppard
999 3rd Avenue, Suite 2525
Seattle, WA 98104-4032

Mark Rosencrantz
701 5th Avenue, Suite 4400
Seattle, WA 98104-7012

Joshua J. Busey
230 S. 2nd Street, Suite 202
Yakima, WA 98901-2865

Joseph J. Straus
1601 5th Ave Ste 2300
Seattle, WA 98101-1618

LETTER OPINION

Re: *Re Sources for Sustainable Communities, et al. v. BIAW, et al.*
Thurston County Cause No. 08-2-01674-6

Dear Counsel:

This matter came before the court on June 25, 2010 for hearing on six motions for summary judgment. The parties to these summary judgment motions are the "State Defendants" and the Plaintiffs. The "State Defendants" consist of Building Association of Washington (BIAW), BIAW-Member Services Committee (BIAW-MSA), and the Washington Builders Benefit Trust (WBBT) and its trustees. The other defendants in this

lawsuit, known as the "Local Associations" were mostly dismissed by an earlier ruling and are not parties to these motions. The Plaintiffs are five Washington businesses that are employers and participate in the Building Industry Association of Washington's retrospective ratings program.

This court has considered the pleadings filed by the parties and the declarations and attachments associated with those pleadings. It also heard oral argument on June 25, 2010. In this letter opinion, the court makes rulings on each issue in the summary judgment motions.

Standard of Review

The standard summary judgment standards apply to these motions. The State Defendants also seek resolution on the merits under the Trust and Estate Dispute Resolution Act, ch. 11.96A RCW. TEDRA allows resolution of factual issues in this opinion. RCW 11.96A.100(10). This court declines to resolve all factual issues in this ruling, however, in favor of full resolution at trial as presented by the parties.

Statute of Limitations

The State Defendants argue that the statute of limitations bars this action because the plaintiffs reasonably should have discovered the alleged breach. This court denies summary judgment on this issue.

Under TEDRA:

An action against the trustee of an express trust for a breach of fiduciary duty must be brought within three years from the earlier of: (i) The time the alleged breach was discovered or reasonably should have been discovered; (ii) the discharge of a trustee from the trust as provided in RCW 11.98.041 or by agreement of the parties under RCW 11.96A.220; or (iii) the time of termination of the trust or the trustee's repudiation of the trust.

RCW 11.96A.070(1)(a). Here, the trustee has not been discharged and the trust has not terminated or been repudiated. Thus, the relevant question is whether, more than three years before filing this lawsuit, "the alleged breach was discovered or reasonably should have been discovered." *Id.*

The discovery rule does not require knowledge of the existence of a legal cause of action; instead, the statute of limitations begins to run when "the plaintiff knew or should have known all of the essential elements of the cause of action, *i.e.*, duty, breach, causation and damages." *Gevaart v. Metco Constr., Inc.*, 111 Wn.2d 499, 501-02 (1988). The application of the discovery rule is generally a question of fact. *Matson v. Weidenkopf*, 101 Wn. App. 472, 482 (2000).

Three alleged breaches are at issue to the statute of limitations defense. Those breaches relate to the marketing assistance fee, the interest earned on out-bound float and in-bound float, and the failure to provide annual reports.

1. *Marketing Assistance Fee*

The first issue here relates to the marketing assistance fee. Stated very generally, the Plaintiffs allege that the State Defendants violated the trust by deducting and giving to BIAW a ten percent "marketing assistance fee" when only a small portion of that fee was actually used for marketing and promotion of the plan and when, allegedly, the fee is far greater than fair consideration for BIAW and BIAW-MSA's services to the trust.

The State Defendants assert that the statute of limitations elapsed on this claim because the Plaintiffs should reasonably have discovered the breach. These defendants point to facts from BIAW publications, news media, the member agreements, and the beliefs of employers who are not plaintiffs in this litigation. If true, the State Defendants' evidence shows that it was well-publicized that BIAW earned money from the retrospective ratings program and it spent that money on political activity. This evidence may also show that the Plaintiffs, exercising due diligence, could have discovered over three years before filing this complaint that BIAW retained a ten percent member service fee and spent some of it on political activities. This is insufficient, however, to support summary judgment.

Due diligence is a factual issue unless the facts are so persuasive that they constitute proof as a matter of law. *See Matson v. Weidenkopf*, 101 Wn. App. at 482. The evidence here is not so persuasive. Some media reports and BIAW newsletter commentaries explained that the BIAW spent retrospective ratings program funds on political efforts, but it is a question of fact whether a person exercising due diligence would discover that this expenditure breached the trust. Summary judgment is denied on the issue of whether the statute of limitations bars the marketing assistance fee claim.

2. *Interest*

The second issue involves interest. The Plaintiffs allege that the State Defendants violated the trust by employing certain financing practices for "in-bound float" and "out-bound float." "In-bound float" occurred directly after the Department of Labor and Industries paid premium refunds to BIAW. The evidence showed that BIAW held the refunds in its interest-bearing account for two days, and on at least one occasion for five days, before transferring the funds to the trust fund, WBBT. BIAW kept the interest that accrued during these two days instead of transferring it to the trust.

"Out-bound float" occurred after BIAW-MSA issued checks to employers, including plaintiffs, from the trust fund. In the period between when BIAW-MSA wrote the checks and when the employers cashed the checks, BIAW-MSA retained the interest earned in its bank account on the funds.

The State Defendants assert that it is obvious that they retained the out-bound float. They argue that it was clear that no interest accrued on a payment between the time the check was cut and when it was cashed because the amount on the check remained the same. However, the evidence does not support the conclusion that it was obvious that the interest accruing during that time period was kept as profit or was rolled over into future payments or was retained or dispersed in some other manner. There was no accounting until this court ordered one and other evidence of obviousness is lacking. This court denies summary judgment to the State Defendants on this ground.

3. Annual Statement

The State Defendants also assert that the Plaintiffs cannot complain of the lack of an annual statement because they were put on notice of the breach when they did not receive such a statement during the many years in which they each participated in the plan.

RCW 11.106.020 requires the trustee to mail or deliver an annual statement to each adult income trust beneficiary at least once each year. The State Defendants did not do this, and one may fairly conclude that the plaintiffs were notified that this provision was breached when they did not receive an annual statement each year.

This does not warrant holding that the statute of limitations bars this issue in its entirety, however. RCW 11.106.020 mandates a duty that must be performed each year and therefore the State Defendants separately breached this duty each year in which they failed to provide an annual statement. Thus, the statute of limitations bars this cause of action only for three years prior to filing the lawsuit.

This court previously limited the lawsuit to events occurring on or after September 27, 2003. The complaint was filed on July 16, 2008. Given the three year statute of limitations and the annual report requirement, as a matter of law the Plaintiffs knew, or should have known, on December 31, 2004, that no 2004 annual report would be forthcoming in that year or prior years. The next three years fall within the three-year statute of limitations and an action for failure to provide an annual report can be maintained for 2005, 2006, and 2007.

Accordingly, this court denies summary judgment on the statute of limitations except to the extent that this court limits the cause of action regarding the duty to provide an annual report to the years 2005 through 2007.

Equitable Defenses

The State Defendants next assert that equity bars this lawsuit. They argue that the plaintiffs knew about the actions subject to this lawsuit and acquiesced to it by continuing to be members of the plan. However, as discussed above, it is not clear whether the plaintiffs knew of any alleged breaches of trust. Instead, the State Defendants merely

show that the Plaintiffs did not agree with the BIAW's political activities but they continued to participate in the plan. Summary judgment on this basis is denied.

Governing Trust Instrument

A hotly debated issue in this case involves which instrument governs the trust. In 1994, BIAW created the Washington Benefit Builders Trust by a document commonly known in this litigation as the "1994 Declaration of Trust." The State Defendants argue that this is the trust document. The Plaintiffs never signed or saw this document and argue that the enrollment agreements that they signed are the governing trust document. This court holds that both documents govern the trust.

The State Defendants first attempt to argue, unpersuasively, that the enrollment agreements could not form trusts. They assert that the enrollment agreement must be only a contract or a trust, but cannot be both. They cite foreign case law and one Washington case that does not stand for this proposition. The Washington case cited, *Grandy v. Luther*, actually held that "if the necessary elements are present, a writing may create two sets of obligations, such as a contract and a trust." 12 Wn. App. 542, 545 (1975). The only disputed element of a trust in this case is the identity of the settlor, and this court may resolve that element as a matter of law.

The primary issue in dispute here is which parties are the settlors, because resolution of that issue will determine whether the enrollment agreement is the trust instrument. A "trust instrument" is a document in which the settlor transfers equitable title in property to the trust beneficiary and transfers a property interest to the trustee. BOGERT, GEORGE G., ET AL., BOGERT'S TRUSTS AND TRUSTEES § 147. A "settlor" (i.e., trustor) is the person who has legal competence to make a disposition of the legal title to the property, such as the property's owner. RESTATEMENT (SECOND) OF TRUSTS § 3; 76 AM. JUR. 2D TRUSTS § 49. The settlor can also be a beneficiary of the trust. RESTATEMENT (SECOND) OF TRUSTS § 114. "If a beneficiary transfers part of the property or supplies part of the consideration to fund a trust, the beneficiary is ordinarily settlor to the extent of a fractional portion appropriate to reflect his or her proportionate share of the funding." RESTATEMENT (THIRD) OF TRUSTS § 58, CMT. F.

Here, the 1994 Declaration of Trust was drafted and signed by BIAW in order to create the WBBT. The Declaration of Trust was not signed by employers who participate in BIAW's industrial insurance premium return program (ROII) fund. However, no ongoing trust could exist without the enrollment agreements because assets would not be deposited into the trust. The 1994 Declaration of Trust was never disclosed to employers and is not incorporated into any document that the participating employers saw. The enrollment agreements are drafted by BIAW and signed by employers who participate in the ROII program, but they are not formally acknowledged or agreed to by BIAW's Board.

The parties dispute the identity of the settlor based on the structure of BIAW's ROII program. The State Defendants argue that they own the premium refunds because the Department of Labor and Industries pays the refunds directly to BIAW and does not oversee the refunds' distribution to employers. The plaintiffs argue, on the other hand, that they own the refund and the State Defendants are merely a conduit for the funds. The plaintiffs are correct; they own the refunds subject to the conditions the parties agreed to in the enrollment agreements.

Washington law provides for refunds of industrial insurance premiums in certain circumstances to groups of employers through their chosen sponsoring organization. The purpose of the law is to provide incentives to employers to increase workplace safety. Refunds are based on the participating employers' workers' compensation records. Although the Department of Labor and Industries does not regulate the distribution of refunds to employers, it states that "[i]t is the responsibility of the sponsoring organization to distribute any refund to the group members." WAC 296-17-90445. Under this regulatory scheme, it appears that the regulation contemplates that employers own the refunds.

The parties also understood that the employers owned the premium refund, subject to deductions and conditions agreed to in the enrollment agreements. The 1994 Declaration of Trust established the WBBT "on behalf of Employer Participants" and it makes no claim that the State Defendants own the funds outright. The member enrollment agreement, also written by BIAW, states that "[b]y execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable to DLI on behalf of the Member" This clause expresses an understanding by all parties that the refunds belong to the employers and are held in trust by the sponsoring organization until they are distributed. Under both the L&I regulations and the parties' understanding, the employers own these refunds, subject to the enrollment agreements, and therefore, the employers are the settlors. As such, the enrollment agreements are trust instruments. See BOGERT, GEORGE G., ET AL., BOGERT'S TRUSTS AND TRUSTEES § 147 (trust instruments are documents in which settlor transfers assets into trust).

This court further holds that the 1994 Declaration of Trust is a valid trust instrument. The State Defendants concede this point. They assert that the 1994 Declaration of Trust was incorporated into the enrollment agreements and that they abided by its terms. Under equitable principles, the State Defendants bound themselves to this document's terms. Accordingly, this court holds that both the enrollment agreements and the 1994 Declaration of Trust are valid trust instruments.

Marketing Assistance Fee

The parties also present cross motions for summary judgment regarding the marketing assistance fee. To resolve this issue, the court must answer three questions. First, did payment of a flat ten percent fee to BIAW and a flat ten percent fee to Local

Associations violate the trust instruments? Second, were the trustees of WBBT required to use BIAW's fee for only marketing and assistance of the plan or to oversee that it was used in this manner? Third, did the State Defendants violate the trust by paying the marketing assistance fees in three annual installments? This court will address each question in turn.

1. *Payment of Flat Fees*

This court must resolve whether payment of flat ten percent fees violated the trust instruments. It did not.

This court determines the settlor's "intent in a trust document by construing the document as a whole." *Bartlett v. Betlach*, 136 Wn. App. 8, 19 (2006). "Where the meaning of an instrument evidencing a trust is unambiguous, the instrument is not one requiring judicial construction or interpretation." *Templeton v. Peoples Nat'l Bank of Wash.*, 106 Wn.2d 304, 309 (1986). "A trust is ambiguous if it is susceptible of more than one meaning; ambiguity is a question of law." *Waits v. Hamlin*, 55 Wn. App. 193, 200 (1989). Further, "if the intention may be gathered from [the trust] language without reference to rules of construction, there is no occasion to use such rules, and the actual intent may not be changed by construction." *Templeton*, 106 Wn.2d at 309. Accordingly, extrinsic evidence should not be considered where "intent can be derived solely from the four corners of the trust document." *Id.*

Whether a trust instrument is ambiguous is a question of law. *Waits v. Hamlin*, 55 Wn. App. 193, 200, *review denied*, 113 Wn.2d 1025 (1989). If the trust instrument is ambiguous, however, extrinsic evidence is admissible to show the settlor's intent when executing the document and the issue becomes factual. *In re Estate of Curry*, 98 Wn. App. 107, 113 (1999).

The 1994 Declaration of Trust contains two relevant sections:

Section 10. The trustees shall pay or provide for the payment of the Funds of all reasonable and necessary expenses of BIAW or any other entity in administering the retrospective rating program on behalf of Employer Participants.

Section 11. Before distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLL, the Trustees shall to [sic] pay to BIAW a marketing assistance fee of 10% of all Employer Participants' distributive shares of the Fund. In addition, the Trustees shall pay to any local associations with members who are Employer Participants in a Plan a marketing assistance fee of 10% of the distributive share of the Fund allocated to Employer Participants who are members of such local association.

Section 11 of this document plainly allows a ten percent flat fee to BIAW and a ten percent flat fee to local associations. The plaintiffs assert that the term "marketing assistance fee" is a contingent clause and, therefore, the ten percent fees to BIAW and locals are acceptable only if they are used for "marketing assistance." The plaintiffs provide evidence that those fees primarily generated profit and the actual marketing of the plan required a very small percentage of this money.

However, this interpretation is inconsistent with Section 10 and the opening clause of section 11. Section 10 provides a separate authorization to pay all reasonable and necessary expenses to administer the retro plan. And section 11 provides that the "marketing assistance fee" is deducted after paying all expenses. The marketing assistance fees are plainly flat fees under the Declaration of Trust. The duty to pay these fees are not contingent on any event or expenses.

The parties also dispute the meaning of the fees within the enrollment agreements. The relevant portion of the agreement reads:

By execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable by DLI on behalf of the Member, to protect the Member and the BIAW from Penalties and from other future obligations to DLI with respect to Industrial Insurance for the Coverage Period and any other period. The Member further authorizes the Trustee to pay from the Premium Returns the balance of the Enrollment Fee and such *costs and expenses* for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants' Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW *for marketing and promotion of the Plan*.

MEMBER AGREEMENT, AT RECITAL (A)(4)(B) (emphases added).

The Plaintiffs argue that the term "for marketing and promotion of the Plan" creates a duty to deduct these fees only if needed to market and promote the plan and that duty was not fulfilled because a small percentage of the fees were used in this manner. The plain language of the agreements provides otherwise. Unlike the fee for costs and expenses, in which BIAW is to deduct the exact cost of the expenses, the marketing fees total 20 percent of the premium return, regardless of the actual expense. The agreement does not state, for instance, that "up to ten percent" may be deducted. Payment of a flat fee is required.

Under the plain language of the Declaration of Trust and the enrollment agreements, the marketing assistance fee is a flat fee that is not contingent on its use. It is best construed as consideration. Courts do not generally inquire into the adequacy of consideration, *Browning v. Johnson*, 70 Wash.2d 145, 147 (1967). The Plaintiffs have not persuaded this court that doing so is a proper exercise of equitable power under these

circumstances, when they knowingly entered into enrollment agreements that clearly provide for flat fees of ten percent each to BIAW and the Local Associations. Accordingly, this court rules that the State Defendants were required to pay ten percent of the premium returns to BIAW and ten percent to the Local Associations.

2. Use of Fees

The question remains, however, whether the Defendants' fees may be deducted and returned by the Defendants if the expense of marketing and promotion is less than the fee generates or whether the Defendants have a duty to ensure that the fees are used solely for marketing and promotion.

The State Defendants do not argue that the ten percent fees were wholly used solely for marketing and promotion of the plan. The Plaintiffs, in contrast, provide evidence that only a small percentage was used for these purposes, by their calculation. However, there is no evidence that this flat fee must be used for a specific purpose, such as advertising the plan or printing promotional materials. More importantly, the term "marketing and promotion of the plan" may be construed very broadly to encompass many activities. The Plaintiffs do not present authority for the proposition that BIAW must monitor the way these fees are used. For these reasons, this court holds that the State Defendants are not liable for breach of trust for improperly expending the marketing assistance fees.

3. Timing of Payment

A narrow issue also remains regarding when these fees were paid. The Declaration of Trust provides that the fee will be paid "[b]efore distribution of the balance of each Fund left after payment of all expenses and final Adjustments by DLL." It is undisputed that the fee was paid in three annual installments, just as the premium refunds are paid, and after certain adjustments common-sense reading of the above language shows that this timing of payments was not improper. Summary judgment is granted to the State Defendants on this issue.

Interest, Commingling, Failure to Earmark, and Failure to Supervise

The next set of issues relates to interest, commingling, failure to earmark, and failure to supervise. The State Defendants move for summary judgment regarding in-bound float, out-bound float, and waiver of interest issues. The plaintiffs move for summary judgment regarding in-bound float, out-bound float, commingling and failure to earmark trust funds, and failure to supervise BIAW-MSC.

1. Facts

The parties appear to agree on the following facts, unless indicated otherwise. The Department of Labor and Industries pays premium refunds to BIAW in three

installments for each year. BIAW deposits these refund checks directly into MSC's bank account. BIAW-MSC keeps other funds in that account and does not set it aside in a sub-account or otherwise designate it as trust funds at this time. The State Defendants assert that they could always trace the funds while they were in BIAW-MSC's account.

BIAW-MSC must keep the premium refunds in its bank account for at least two days to comply with bank policy. Other banking structures were possible, but the State Defendants chose this one. BIAW-MSC kept the refunds in this account for at least two days and concedes that it did not always transfer the funds as soon as possible to WBBT.

Primary payments, the first of the three installments, were transferred after two days with the exception of one mistake in which the primary payment was transferred after five days. Interim payments were not transferred two days after deposit. The State Defendants explain that "because they are much smaller, it did not occur to MSC's accountant that it was as urgent to transfer them to WBBT as quickly."¹ And BIAW-MSC followed a different practice if an appeal was pending to dispute the refund. In cases of appeals, BIAW-MSC's accountant would "sometimes wait to see whether those appeals will yield additional payments so that the interim payments can be transferred together."²

Regardless of whether BIAW-MSC transferred the funds as soon as possible under the bank's policy, it kept all the interest. In 2006, BIAW-MSC kept \$14,424 in interest on the primary adjustment, \$155 on the first interim adjustment, and \$1,695 on the second interim adjustment.

After the two or more days elapse, BIAW-MSC transfers the funds to WBBT. WBBT only holds the funds, it does not administer them. When it is time to distribute the trust funds to member employers, WBBT transfers the funds to BIAW-MSC and BIAW-MSC cuts the checks to the member employers.³ During the time in between when BIAW-MSC cuts the checks and when they are cashed, BIAW-MSC keeps the accrued interest instead. This is called "out-bound float interest."

2. In-Bound Float Interest

Both parties seek summary judgment on the issue of in-bound float interest. This court holds that this interest belongs to the trust and the State Defendants breached the trust by retaining it.

"All increase in the value of a trust fund derived from investment or reinvestment returns or from interest earned on the fund, belongs to, and becomes a part of, the corpus

¹ Defendant's Motion for Judgment on Interest Issues, at 5.

² *Id.*

³ There is some evidence that it would be onerous to require WBBT to cut checks because it would have to be done by the bank itself, which may refuse to do so and would certainly charge a fee for this service.

of the trust estate in the absence of some specification to the contrary in the instrument or the statute creating the trust." *Lynn v. City of Longview*, 15 Wn.2d 528, 533 (1942).

The State Defendants assert that the premium refunds are not subject to the trust until they are transferred to WBBT. Until that happens, they argue, the beneficiaries have no property interest in the funds and the State Defendants may do as they wish, taking fees and interest from the premium refunds with impunity. They cite RCW 11.104A.070, which reads, in relevant part:

(a) An income beneficiary is entitled to net income from the date on which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) On the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life[.]

Neither the 1994 Declaration of Trust nor the enrollment agreements specify a date in which income interest begins. The State Defendants argue that these funds are not subject to the trust until they are "transferred to a trust" by literally transferring the money to WBBT's account.

As previously resolved, however, the employers are the settlors and own the premium refunds at all times after the refunds are issued, subject to the terms of the enrollment agreement. The refund is transferred to a trust according to the terms of the enrollment agreement once BIAW receives the refund. It is irrelevant when the funds are transferred to the WBBT account. Moreover, BIAW could have developed a banking system that would allow it to immediately deposit the funds in the WBBT account or to account for interest and pay that interest into the trust account. Its failure to do so should not result in a financial benefit to the State Defendants. This court holds that the in-bound float interest is subject to the trust. The Plaintiffs' summary judgment motion is granted on this issue.

3. *Out-Bound Float Interest*

Both parties also seek summary judgment regarding out-bound float interest. This court denies summary judgment on this issue because there remain questions of fact as to whether interest was retained as trust funds or as profit and the amounts retained.

Additionally, it is unclear how much, if any, retained out-bound float interest was retained after the checks were within the dominion and control of employers. Once the employers received the payments, it was solely their discretion when to deposit them into their accounts. Summary judgment is denied on the issue of out-bound float interest.

4. Waiver of Liability

The final issue in the State Defendants' motion is waiver. This court denies summary judgment on this ground.

A settlor may relieve the trustees of statutory trust duties by express provision. RCW 11.97.010. However, "[i]n no event may a trustee be relieved of the duty to act in good faith and with honest judgment." RCW 11.97.010. Here, the Declaration of Trust states:

The Trustees shall not be liable for any mistake or error of judgment in the administration of the Trust, except for willful misconduct, so long as they continue to exercise their duties and powers in a fiduciary capacity primarily in the interests of BIAW, the local associations, and the Employer Participants.

Art. IV, § 17. And the enrollment agreement states:

The Member hereby releases and agrees to indemnify and hold BIAW, its subsidiary, the Trust, and all the members of the Trust harmless from any and all liability for any decision which may now or hereafter b[e] made by BIAW, its subsidiary, or the Trust with regard to the Plan, any Premium Returns (including interest, principal and profit), the payment of any such sums or the investment of such sums.

Article B-10.

The State Defendants argue that these agreements abrogate their duties under the trust. However, the ultimate issue for each alleged breach of fiduciary duty is whether the defendants exercised good faith and honest judgment. These duties cannot be abrogated by agreement. RCW 11.97.010. This court denies summary judgment on this issue.

5. Commingling and Failure to Earmark

The Plaintiffs move for summary judgment for commingling the trust funds in BIAW-MSC's general account. Commingling of personal funds with trust funds may constitute self-dealing that violates the duty of loyalty to beneficiaries. *In re Marriage of Petrie*, 105 Wn. App. 268, 276 (2001). The State Defendants concede that they commingled the funds.⁴ Based on the State Defendants' concession, the Plaintiffs'

⁴ OPPOSITION TO PLAINTIFFS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING INTEREST ISSUES, AT 12-13 ("When retro refunds are transmitted from DLI to MSC and then to WBBT, or distributions are transmitted from WBBT to BIAW-MSC and then to the participants and local associations, they temporarily rest in accounts at BIAW-MSC. These accounts also contain other funds of BIAW-MSC.")

motion is granted on the issue of breach of duty only. The State Defendants argue that this breach did not cause damages, but they do not bring a cross motion for summary judgment on this issue and therefore damages from this breach is an issue properly reserved for trial.

The State Defendants correctly assert that they could have been paid for administrative costs associated with running the BIAW ROI program. The BIAW has chosen not to bill for or be paid for its administrative costs. However, the State defendants cannot use the unpaid administrative costs to claim that improper interest payments or commingling of funds are simply 'a wash.' This argument fails as a matter of law. The question is whether a particular breach of fiduciary duties occurred and proximately caused damage. The present question is not, as the State Defendants assert, whether the Plaintiffs ultimately benefited from BIAW's actions.

6. *Failure to Supervise*

The parties agree that BIAW designated BIAW-MSA as an agent of the trust and tasked BIAW-MSA with administering it. The Plaintiffs seek a ruling on summary judgment that BIAW failed to adequately supervise BIAW-MSA. This court denies this motion.

A trustee has the right to designate agents to administer the trust. RCW 11.98.070(27). The trustee must select and retain the agent with "reasonable care." RCW 11.98.070(27)(c). Further, the trustee may breach the trust if it does not exercise adequate supervision over the agent's conduct. RESTATEMENT (SECOND) TRUSTS § 225. The 1994 Declaration of Trust also requires the trustees to "act prudently in the delegation or allocation of responsibilities to other persons" and to "exercise reasonable care to prevent any other fiduciary from committing a breach of the fiduciary's obligations and responsibilities." 1994 DECL. OF TRUST, ART. IV, § 20.

The State Defendants argue that it was solely their discretion to delegate trust duties to another entity. However, this argument relates to the decision about to whom it could properly delegate, while the Plaintiffs complain that there was failure to supervise a properly-delegated entity.

The parties dispute the facts. The Plaintiffs argue that WBBT's trustees exercised almost no oversight of BIAW-MSA. The State Defendants alternatively argue that the trustees were aware of the manner in which BIAW-MSA processes payments and retained interest.

The Plaintiffs provide no evidence that the alleged failure to supervise caused any damages. Nor do they argue that, if BIAW had better supervised BIAW-MSA, then the alleged breaches would not have occurred. There is no evidence supporting damages. For this reason, this court denies summary judgment on this issue.

The court will sign findings of fact and conclusions of law consistent with this ruling upon presentation.

Sincerely,



Carol Murphy
Superior Court Judge

cc: Court Clerk

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SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS)
BENEFIT TRUST,)

No. 08-2-01674-6

RE SOURCES FOR SUSTAINABLE)
COMMUNITIES, *et al.*,)

FINDINGS AND CONCLUSIONS

Plaintiffs,)

v.)

BUILDING INDUSTRY)
ASSOCIATION OF WASHINGTON, *et*)
al.,)

Defendants.)

1 This case was tried to this Court in a bench trial from September 13 to
2 September 22, 2010. The Court now makes the following findings:

3 **I. FINDINGS OF FACT**

4 1. The Building Industry Association of Washington is a not-for-profit
5 trade association. The Building Industry Association of Washington ("BIAW")
6 provides a range of services to its members. Its members include home builders
7 and related businesses in Washington State. There are 15 local associations
8 affiliated with BIAW who were previously named as defendants. The Court
9 granted summary judgment for the local associations on the claims asserted
10 against them.

11 2. BIAW sponsors one of the many retrospective rating
12 programs("retro programs") through which the Washington State Department of
13 Labor and Industries may rebate employers' industrial insurance premiums
14 pursuant to statutes in the State of Washington under RCW 51.18.

15 3. BIAW Member Services Corporation("BIAW-MS") is BIAW's
16 wholly-owned for-profit subsidiary. Washington Builders Benefit Trust
17 ("WBBT") is the trust related to BIAW's retro program, which it calls Return on
18 Industrial Insurance, or "ROI". The trust is managed by seven trustees appointed
19 by BIAW's president who selects the trustees from among BIAW's membership.
20 The individual Washington Builders Benefit Trust trustees are volunteers. They
21 are not compensated for their services as trustees.

22 4. Petitioners are five participants in BIAW's retro program and
23 beneficiaries under the Washington Builders Benefit Trust, although no longer
24 enrolled in the program. Each petitioner is or was also a member of BIAW and
25 one of BIAW's local associations.
26
27

1 5. Eight beneficiaries of the Washington Builders Benefit Trust entered
2 appearances and objected to the petition in this case. Beneficiaries of the trust
3 from 2003 through 2008 and other interested parties were served with a summons
4 and petition pursuant to the Trustees Accounting Act and the Trust and Estate
5 Dispute Resolution Act under RCW 11.96A. The form of the summons was
6 agreed to by the parties and approved by the Court.

7 6. Under Washington Administrative Code 296-17-90401, a retro
8 program is designed to reward employers participating in the program who are
9 able to keep their claims costs below the pre-selected level they have chosen.
10 Participating employers who are successful may be refunded a portion of the
11 premiums they paid to the Department of Labor and Industries.

12 7. Currently, approximately 6,000 mostly small employers participate
13 in the group retro program sponsored by BIAW. This program is generally
14 accurately described within trial Exhibit 2033, specifically on the ninth page.

15 8. The retro refund for all employer participants in the Return on
16 Industrial Insurance program is paid by the Department of Labor and Industries to
17 BIAW. Pursuant to Washington Administrative Code 296-17-90445, all retro
18 group refunds are paid directly to the sponsoring organization. It is the
19 responsibility of the sponsoring organization to distribute any refunds to the
20 group members.

21 9. The Department of Labor and Industries evaluates a retro group's
22 claims history over three years after the close of the plan year, with the goal of
23 retrospectively adjusting the premium paid by the group to the appropriate level.
24 The Department of Labor and Industries tenders a primary adjustment payment to
25 BIAW in May. These yearly payments were as much as \$50 million.

26 10. There may be disputes about claims or adjustments, and the
27 Department of Labor and Industries may increase the total adjustment amount or

1 make additional smaller payments to BIAW two to three times a year. These
2 smaller payments to BIAW have ranged from a few thousand dollars to
3 approximately half a million dollars.

4 11. The Department of Labor and Industries can also adjust the total
5 adjustment amount downward to resolve a dispute or to account for changes in its
6 estimate of the total refund. Up until the time of the third and final adjustment,
7 the Department of Labor and Industries may reduce or retract a previously
8 granted retro refund and/or issue a penalty.

9 12. BIAW and others created the original Washington Builders Benefit
10 Trust. The original WBBT operated under a document called the 1990
11 Declaration of Trust until 1994. The former WBBT and the transfer of its assets
12 to the current WBBT are not currently before the Court, and the Court addresses
13 no issues with regard to the former WBBT.

14 13. BIAW established WBBT to hold and invest ROII refunds between
15 the time Department of Labor and Industries pays any refunds to BIAW and the
16 distribution of refunds to employer participants. BIAW is the sponsor of the
17 ROII program through the Department of Labor and Industries. BIAW chose to
18 establish the trust as the method of holding the funds it received from the
19 Department of Labor and Industries. It could have chosen not to create a trust.
20 The choice was made after consideration of tax consequences and other impacts
21 to BIAW, its members, and the employer participants.

22 14. In 1993, the WBBT trustees chose to change their role in the ROII
23 program and divest themselves of day-to-day operations. In 1993, the WBBT
24 trustees and BIAW formed BIAW-MSA. The trustees and BIAW staff served as
25 the original BIAW-MSA board of directors. In 1993, the WBBT trustees drafted
26 a new declaration of trust that would govern the WBBT beginning in 1994. On
27 December 9, 1993, the WBBT trustees passed a resolution transferring all of the

1 assets held by WBBT to a new trust also called WBBT, to operate under the 1994
2 Declaration of Trust (Trial Exhibit 2027).

3 15. In July of each year, WBBT's policy is to distribute 70 percent of the
4 first adjustment received from the Department of Labor and Industries during
5 April or May. The following year, WBBT distributes an additional 20 percent of
6 the total of the first and second adjustments. Then in July of the following year,
7 after the third and final adjustment is received from or paid to the Department of
8 Labor and Industries, WBBT distributes the remaining amount, if any, to the
9 participants. The current structure of BIAW's retro plan, ROII, has been in place
10 and largely unchanged since 1994.

11 16. Under the program, the Department of Labor and Industries pays all
12 group refunds, if any, to the plan sponsor, BIAW. BIAW, as the plan sponsor, is
13 also directly responsible to the Department of Labor and Industries for any
14 shortfalls. Department of Labor and Industries pays group refunds relating to a
15 particular plan year over the course of three years.

16 17. The WBBT trustees work closely with a professional investment
17 adviser to invest the funds diligently and effectively. WBBT is governed by
18 written documents, including the 1994 Declaration of Trust and yearly enrollment
19 agreements. The Court has previously held that the employer beneficiaries, the
20 employer participants in ROII, are settlors of the WBBT. The Court has ruled
21 that the trustees are also bound by the 1994 Declaration of Trust because they
22 agreed to be so bound. The 1994 Declaration of Trust was signed only by
23 WBBT's trustees and was never distributed broadly to the employer participants.

24 18. The BIAW had a choice about how to structure its retro program. It
25 was not required to structure it as a trust, and, if it chose to form a trust, there was
26 no Department of Labor and Industries statute or regulation governing how the
27 trust must be structured. BIAW chose to use a trust and to allocate

1 responsibilities among BIAW, BIAW-MSA, and WBBT in this manner partially
2 to reduce taxes and liability.

3 19. In order to participate in BIAW's ROII program, each of the
4 approximately 6,000 employer participants must demonstrate their eligibility and
5 sign an enrollment agreement. A participant must enroll each year to continue to
6 participate in the next year of the program. The employer participants are
7 beneficiaries of the WBBT.

8 20. Although enrollment agreements may not have been identical since
9 1994, Exhibit 2227 was often utilized by the parties as the standard language in
10 the enrollment agreements signed by the employer participants.

11 21. Employer participants pay an enrollment fee to BIAW to enroll in
12 the ROII program. Additionally, the employer participants are informed in the
13 enrollment agreements that ten percent of the premium returned by the
14 Department of Labor and Industries is paid to BIAW as a marketing assistance
15 fee. Similarly, ten percent of the premium returned by the Department of Labor
16 and Industries is paid to the employer participant's local association.

17 22. The Court has previously ruled on petitioners' challenges to the
18 marketing assistance fee, and those issues are no longer before the Court.

19 23. WBBT trustees owe fiduciary duties to the trust beneficiaries, which
20 include petitioners.

21 24. Petitioners became beneficiaries of WBBT when funds were
22 received by BIAW from the Department of Labor and Industries, representing the
23 petitioners' share of the industrial insurance rebate pursuant to petitioners'
24 agreement to participate in the ROII program by signing an annual employer
25 participation agreement, or enrollment agreement.

26 25. The employer participation agreements were prepared by BIAW
27 staff and were not subject to modification by the employer participant prior to

1 signing. By signing the employer participation agreement, the employer
2 participant absolutely assigns to the trust all premium returns that may be payable
3 by the Department of Labor and Industries on behalf of the member and agrees
4 that the trust is vested with the sole authority to receive the premium return from
5 BIAW or the Department of Labor and Industries to hold some or all of such
6 premium return until the expiration of the period the Department of Labor and
7 Industries may adjust such premium return or claim penalties with respect to the
8 coverage period and distribute all premium returns to participants.

9 26. The enrollment agreement is the only trust document that shows the
10 intent of the employer participants. The enrollment agreement states that any
11 premium returns payable to BIAW by the Department of Labor and Industries
12 under the Department of Labor and Industries agreement shall be held in trust by
13 the trust for participants.

14 27. Pursuant to the enrollment agreement, BIAW is responsible for
15 administration of the ROII program but may delegate this responsibility to its
16 subsidiary.

17 28. WBBT has no staff and, instead, relies upon certain joint staff of the
18 BIAW and BIAW-MSA. There is no documentation of delegation of duties by
19 trustees to BIAW-MSA. There is no documentation of safeguards in that
20 relationship, such as requiring segregated accounts or billings for services
21 provided.

22 29. BIAW-MSA staff handles the trust funds, including depositing initial
23 adjustment checks received from the Department of Labor and Industries,
24 transferring the adjustment into WBBT investment accounts, withdrawing the
25 adjustments with earnings from WBBT investment accounts, calculating all
26 distributions and fee payments, and distributing the adjustments with earnings.

1 30. When BIAW-MSA was handling trust money by apparent authority
2 of the trustees, fiduciary duties attached to the handling of those trust funds.
3 BIAW-MSA and BIAW share offices and staff, including their executive vice-
4 president and accountant. The salaries and benefits of many staff members are
5 apportioned between BIAW and BIAW-MSA. It is unclear to what degree BIAW
6 and BIAW-MSA staff time and resources are devoted specifically to tasks on
7 behalf of WBBT.

8 31. Each member of the executive committee of BIAW-MSA also sits on
9 the executive committee of BIAW. Each board member of BIAW is also a board
10 member of BIAW-MSA. The local affiliates appoint members to BIAW and
11 BIAW-MSA boards. BIAW-MSA does not hold board meetings of its board of
12 directors or executive committee separate from BIAW board and executive
13 committee meetings. BIAW-MSA and BIAW have a consolidated budget. Not
14 all members of the BIAW board and/or executive committee were aware that they
15 also serve on the board and/or executive committee of BIAW-MSA.

16 32. Each year in late April or early May, the Department of Labor and
17 Industries issues a warrant to BIAW as sponsor of the ROI plan. When the
18 warrant arrives, the funds are deposited into a BIAW-MSA money market
19 account at South Sound Bank. South Sound Bank policies require that the funds
20 deposited in an account such as BIAW-MSA's money market accounts must
21 remain there for at least two business days before being transferred out. BIAW-
22 MSA endeavors to transfer the primary adjustments received from the
23 Department of Labor and Industries to WBBT's investment account at Wells
24 Fargo within a few days (in referencing Wells Fargo investment accounts, the
25 Court includes the predecessor investment accounts through AG Edwards and
26 Wachovia).

27

1 33. Because the funds received from the Department of Labor and
2 Industries are held in a money market account before being transferred to
3 WBBT's investment account, the money market account funds earn interest while
4 South Sound Bank holds them. The Court has already ruled that this interest,
5 called the "inbound interest," is a trust asset.

6
7 34. During the years 2004 to 2008, nearly \$200 million was transferred
8 from the Department of Labor and Industries to BIAW-MSA's money market
9 account and then to WBBT's investment account.

10 35. The inbound interest retained by BIAW-MSA was calculated by
11 accountant Todd Menenberg for each year between 2004 and 2008 in Trial
12 Exhibit 1485. On the amount transferred from the Department of Labor and
13 Industries to BIAW-MSA's money market account and then to WBBT's
14 investment account during these five years, BIAW-MSA earned a total of about
15 \$63,000 of inbound interest. For each employer participant for each year, the
16 amount is relatively small. The amount of the Department of Labor and
17 Industries funds plus the interest earned could have been transferred to the WBBT
18 investment account, but it was not.

19 36. WBBT invests the funds held in the investment accounts at Wells
20 Fargo. The trustees, in consultation with an investment adviser at Wells Fargo,
21 make decisions on where to invest the funds. Funds are held in WBBT's
22 investment account, invested for periods ranging from a few months to more than
23 two years.

24 37. The trustees made sound decisions regarding investments and
25 expenditures authorized by the trustees when trust funds were in Wells Fargo
26 investment accounts.

1 38. The funds held in WBBT investment accounts include the ten
2 percent marketing assistance fees that will be paid to BIAW and the local
3 associations.

4 39. In June of each year, the portion of the ten percent marketing
5 assistance fee that is to be paid to the local associations is transferred to BIAW-
6 MSC's money market account. The ten percent fee paid does not include any
7 interest or investment earnings.

8 40. In July of each year, the ten percent marketing assistance fee to be
9 paid to BIAW is transferred to the BIAW-MSC money market account from the
10 WBBT investment account. That ten percent fee does not include any interest or
11 investment earnings.

12 41. Also, in early July each year, the amounts that are to be paid to the
13 employer participants are transferred from the WBBT investment account to the
14 BIAW-MSC money market account at South Sound Bank. The funds transferred
15 from WBBT's investment account to BIAW-MSC in July are deposited in a
16 BIAW-MSC money market account that is linked to a checking account. BIAW-
17 MSC writes checks to the approximately 6,000 participants and then delivers
18 them to the local associations, which are responsible for delivering the checks to
19 the participants.

20 42. At distribution, net realized earnings on WBBT's investments from
21 the prior calendar year are paid to the participants receiving their third and final
22 adjustments. The net realized earnings distributed to all participants in the years
23 2004 through 2008 were between \$600,000 to over \$1 million per year.

24 43. The checks that BIAW-MSC sends to local associations come in
25 bundles of individual checks. The bundles include checks for employer
26 participants who have not renewed their membership that year and are not entitled
27 to the refund unless they renew.

1 44. Thus, some refund checks sent to local associations will never be
2 cashed by the employer participant. The forfeited refunds remain at South Sound
3 Bank. Local associations distribute checks to their member participants various
4 ways, including check distribution events and mailings.

5 45. The reasons for distributing checks through the local associations
6 were (1) to confirm membership and therefore eligibility to receive the check and
7 (2) for marketing purposes. There was testimony that BIAW staff were able to
8 confirm membership and mail checks directly to employer participants.

9 46. Typically, most participants cash their check within a matter of
10 weeks after BIAW-MSA writes the checks. BIAW-MSA earns and retains
11 interest on all these funds while they are in BIAW-MSA's money market account
12 between the time funds were transferred from the WBBT investment account and
13 the time the participant's check was presented.

14 47. The parties stipulated that BIAW-MSA retained all of this interest,
15 referred to as the "outbound" float interest. BIAW-MSA earned about \$361,000
16 interest on funds being distributed to all participants during the years 2004 to
17 2008.

18 48. Because the distribution system is not uniform, it is unknown what
19 amount of that interest is attributable to the employer participants' delaying
20 depositing their checks after the checks were in their dominion and control.
21 BIAW-MSA retained this interest although it could have returned it to WBBT.
22 This interest was not difficult to calculate or to return to the trust.

23 49. The accountant who testified at trial, Todd Menenberg, was able to
24 calculate the exact amount of interest earned and retained by MSA related to each
25 of the petitioners for each year from 2004 to 2008. The total for all five
26 petitioners together was \$300.92. This calculation could have been done for each
27

1 of the employer participants. Again, the amount of outbound interest related to
2 each employer participant for each year is relatively small.

3 50. None of the trustees and none of their companies profited
4 individually from their service as trustee. No decision by any trustee resulted in a
5 benefit to the trustees or their companies that did not also inure to the benefit of
6 all other ROII employer participants.

7 51. There was testimony regarding specific money market accounts as
8 well as testimony indicating that new money market accounts are opened each
9 year.

10 52. BIAW-MSC's money market accounts, which hold trust funds, also
11 contain BIAW-MSC's own funds. The Court has already determined that this
12 constitutes commingling and is a breach of trust. However, with minor
13 exceptions, the trust funds transferred to and from BIAW MSC's money market
14 accounts from 2004 through 2008 have been tracked through a recent accounting.

15 53. BIAW-MSC performs services for the trust, including administrative
16 support for meetings, calculation of refunds, processing refunds, responding to
17 inquiries, and administration of appeals for reconsideration of the application of
18 the trust's underwriting criteria for certain employer participants.

19 54. The value of the services that BIAW-MSC provides to WBBT is
20 unknown. Although the value is generally substantial, there has been no
21 presentation of contemporaneous records, forensic accounting, or other
22 documentation of the actual value of BIAW MSC's trust administration services.
23 It is not clear from the testimony and exhibits what services precisely are
24 provided solely for the enrollment fee.

25 55. The trustees did not understand that their trust duties applied,
26 whether or not trust funds were in the WBBT investment accounts. Although the
27 declaration of Trust provides that the trustees may employ and pay for the

1 services of others to assist them, BIAW-MSA has not billed WBBT for the
2 services it performs for the trust. Although there was testimony that retention of
3 interest by BIAW-MSA was a fair exchange for the services provided, there is no
4 documentation that the trustees ever authorized such payment nor a record of the
5 value of the services involved in the exchange.

6 56. Testimony on this subject was inconsistent, and the Court finds that
7 no formal decision by the trustees occurred regarding this exchange.

8 57. BIAW-MSA performed the administrative services for WBBT, and
9 BIAW-MSA performed those services efficiently and effectively.

10 58. BIAW-MSA made regular reports of activities on behalf of the trust
11 to the WBBT trustees at meetings and in telephonic conferences between
12 meetings, and the trustees received monthly reports of transactions involving the
13 funds held in WBBT's investment account from which they could monitor
14 activity on those accounts.

15 59. The Declaration of trust Section 12 requires an annual review of the
16 trust's books for account and records of all transactions. The trustees did not
17 meet this requirement.

18 60. RCW 11.106.020 requires that the trustee or trustees appointed by
19 any agreement shall mail or deliver at least annually to each adult income trust
20 beneficiary a written itemized statement of all current receivables and
21 disbursements made by the trustee of the funds of the trust, both principal and
22 income, and upon the request of any such beneficiary shall furnish the beneficiary
23 an itemized statement of all property then held by that trustee and may also file
24 any such statement in the Superior Court.

25 61. Prior to this action, WBBT had never provided beneficiaries with an
26 annual statement as required by RCW 11.106.020. Petitioners moved the Court
27 to order the trustees to file an accounting pursuant to RCW 11.106.030. The

1 Court granted petitioners' motion and ordered trustees to file an accounting. The
2 trustees filed an accounting on May 1st, 2009.

3 62. Pursuant to RCW 11.106.070, the Court is authorized to determine
4 the correctness of all action of the trustee or trustees set forth in the account and
5 shall render its decree either approving or disapproving the account or any parts
6 of it and surcharging the trustee or trustees for any losses caused by negligent or
7 willful breaches of trust.

8 63. The Court finds that the accounting provided before trial was
9 sufficient to satisfy the Court's order but only through 2008.

10 64. The trustees allowed BIAW-MSC to administer trust funds. The
11 trustees did not expressly delegate to BIAW-MSC trust duties but, rather,
12 acquiesced in this arrangement. It is not clear whether the trustees, BIAW staff,
13 or BIAW-MSC staff ever considered whether the trust was operating consistent
14 with the 1994 Declaration of Trust or the enrollment agreements.

15 65. The trustees did not closely supervise BIAW-MSC's administration
16 of the trust and did not enact safeguards to ensure that BIAW-MSC properly
17 administered the trust; however, the record contains no evidence establishing the
18 required standard of care regarding supervision of BIAW-MSC.

19 66. The petitioners have not proven that the precise level of supervision
20 over BIAW-MSC violated any specific duty. The level of supervision over
21 BIAW-MSC did not cause harm to the trust or its beneficiaries.

22 67. The bank account in which BIAW-MSC held trust funds at South
23 Sound Bank was insured for \$100,000 until 2009 and thereafter insured for
24 \$250,000. However, BIAW-MSC held as much as \$50 million in money market
25 accounts at South Sound Bank at that time. BIAW-MSC had sound reasons to
26 use the bank account at South Sound Bank, despite the inadequate insurance,
27

1 including that the account provided a competitive interest rate. The bank did not
2 fail.

3 68. Although individuals acting on behalf of the trustees at times failed
4 to follow required practices, such as two signatures for certain transactions and
5 signing over inaccurate titles, the actions were apparently all authorized, and no
6 harm resulted from these failures to follow required practices.

7 69. RCW 11.97.010 does not permit an exculpatory clause to relieve
8 trustees from accountability under RCW 11.106.030 and statutes following.
9 Those are the primary claims remaining in this suit. Nor can an exculpatory
10 clause permit the trustees to retain profit or excuse them from ultra vires acts.

11 II. CONCLUSIONS OF LAW

12 1. Under Washington law, trustee exculpatory and indemnification
13 provisions are valid and enforceable, but they are not effective to waive the
14 obligation that a trustee act with good faith and honest judgment. Both the
15 enrollment agreements and the Declaration of Trust that the Court has formerly
16 determined controlled the obligation of the trust and the trustees have broad
17 clauses releasing the defendants from liability for the kinds of claims asserted in
18 this case.

19 2. However, the waiver of liability clauses do not shield the defendants
20 from the remaining claims in this litigation, which are claims of failure to
21 exercise good faith or are claims of violations of statutory duties such as the duty
22 to perform an accounting. Those duties are not waivable.

23 3. The defendants violated their duties under the trust when they
24 retained interest from the period of time between when the Department of Labor
25 and Industries transferred funds to BIAW and before the funds were transferred to
26 the WBBT investment accounts. The defendants violated their duties under the
27

1 trust when they retained interest earned from the period of time between when
2 BIAW-MSC distributed the checks to member employees and when the member
3 employers deposited those checks. That includes all of the time that has been
4 considered outbound interest.

5 4. The defendants violated their duties under the trust when BIAW-
6 MSC commingled funds in its account or accounts.

7 5. The defendants violated their duties under the trust when they failed
8 to provide annual accountings.

9 6. The petitioners have not otherwise proven a breach of trust on their
10 remaining claims. *and they are dismissed with prejudice.*

11 7. Based upon those findings and conclusions, the court orders the
12 following remedies:

13 8. Petitioners have properly invoked the Court's equity jurisdiction
14 under RCW 11.96A and RCW 11.106, and the Court, therefore, has broad
15 discretion to fashion appropriate equitable relief. The petitioners have disclaimed
16 any right to money damages in this case and seek only equitable relief.

17 9. To the extent that petitioners seek payment of interest retained by
18 BIAW-MSC, that requested relief is denied. The Court finds that the damages to
19 each of the petitioners is not in significant amounts and that the trustees primarily
20 exercised sound discretion and maintained the trust on behalf of the beneficiaries.

21 10. The Court is also aware the petitioners represent only five out of
22 thousands of employer participants and that at least eight other employer
23 participants have implored the Court to deny any relief.

24 11. Accordingly, the BIAW, BIAW-MSC and the WBBT trustees are
25 ordered to modify their practices to be consistent with their obligations under the
26 law according to the Court's rulings and consistent with the documents created by
27

1 them in establishing the rights and duties under the trust, specifically, the
2 Declaration of Trust and the enrollment agreements.

3 12. The Court denies the petitioners' motion for an order to show cause
4 in 45 days after the judgment is entered concerning whether the defendants have
5 implemented the procedures to remedy the breaches of trust.

6 13. The matter of attorneys' fees in this case may be raised in an
7 appropriate motion.

8 DATED: 12/17/10

9 Carol Murphy
10 The Hon. Carol Murphy

11 Presented By:

12 By [Signature]
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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 MAR -4 AM 9:50

BETTY J. GOULD, CLERK

EXPEDITE
 No hearing set
 Hearing is set
Date: March 4, 2011
Time: 9:00 a.m
Judge/Calendar: Carol Murphy

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SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS)
BENEFIT TRUST,)

No. 08-2-01674-6

RE SOURCES FOR SUSTAINABLE)
COMMUNITIES, *et al.*,)

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DENYING ALL
MOTIONS FOR AWARDS OF
ATTORNEY FEES AND COSTS

Plaintiffs,

v.

BUILDING INDUSTRY)
ASSOCIATION OF WASHINGTON,)
et al.,)

Defendants.

This case was resolved on the merits in prior proceedings, including several motions for summary judgment and then a bench trial on the remaining claims. The question of who should be responsible for the attorney fees and costs incurred in the course of this litigation is now before the Court on motions filed by Petitioners, by Defendants BIAW, BIAW Member Services Corporation, Washington Builders Benefit Trust ("WBBT"), and WBBT's trustees, and by defendant Master Builders Association of King and Snohomish Counties.

FINDINGS, CONCLUSIONS, AND ORDER ON
MOTIONS FOR ATTORNEY FEES AND COSTS - 1
DWT 16604809v2 0030722-000009

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0-000008109

1 The Court has considered all the briefs and supporting material filed by the
2 parties and heard the arguments of counsel on February 11, 2011.

3 For the reasons stated below, this Court denies all the motions and orders
4 that each party shall be responsible for its own attorney fees and costs.

5 I. FINDINGS OF FACT

6 1. The Court is extremely familiar with the disputes of the parties in
7 this case, having heard testimony, having heard argument, having reviewed the
8 pleadings, and in fact having decided the matters that proceeded to trial, as well
9 as deciding the vast majority of the pretrial matters in this case.

10 2. This case is a unique case even within the context of cases brought
11 under the Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A,
12 which are in and of themselves unique cases. The conclusion of this case is
13 unique as well.

14 3. The major basis for fees in the motions brought by the parties today
15 is the TEDRA statute. An alternative basis has been cited to and that is paragraph
16 nine of the enrollment agreement.

17 4. The Court finds that the enrollment agreement does not provide a
18 basis for fees in this case. However, even if it does apply to the facts of this case,
19 under a prevailing party analysis, the Court does not find that it is clear in this
20 case which party would be entitled to those fees given the result in this case.

21 5. Petitioners prevailed in some of their claims in this case. There is
22 also no question that many claims were made by the Petitioners were not
23 successful, and Defendants prevailed on those claims.

24 6. Petitioners were awarded no damages or other financial recovery in
25 this case. Petitioners did obtain injunctive relief at the end of this trial, but there
26 were many, many issues in this case in which the Petitioners did not prevail.
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appropriate, which factors may but need not include whether the litigation benefits the estate or trust involved.

4. The parties have cited to numerous TEDRA cases in support of their respective positions.

5. As the Court has indicated previously in this litigation, this case is a very unique case even within the context of TEDRA cases, which are in and of themselves unique cases. The conclusion of this case is unique as well.

6. So although the Court has reviewed the authority cited by the parties, none of those cases are exactly what we have here.

7. The parties throughout this litigation have attempted in looking at those authorities to try and find some basis for their positions in various motions before this Court, and I appreciate those efforts. I know it has been difficult because of the uniqueness of this particular case.

8. The Court agrees that a lack of financial recovery is not a bar to the receipt of attorneys' fees and costs.

9. The Court also agrees that the claims made, even those in which the Petitioners did not prevail, were not frivolous.

10. As noted above, the Court is extremely familiar with the facts of this case and the progress of the litigation. The Court is in a position at this time to make a determination based upon the Court's equitable powers.

11. Based upon the Court's review of this entire case, the authorities that have been provided, and the Court's discretionary authority to award fees in this matter, the Court finds that the proper equitable decision here is to require that the parties bear their own costs and fees.

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III. ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED:

1. All motions for an award of attorney fees, expenses and costs are denied.

2. Each party shall bear its own fees, expenses and costs incurred in the captioned action.

DATED: this 4th day of March, 2011

Carol Murphy
Hon. Carol Murphy

Presented By:

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Attorneys for Petitioners

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FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2011 MAR -4 AM 9:50

BETTY J. GOULD, CLERK

<input type="checkbox"/> EXPEDITE
<input type="checkbox"/> No hearing set
<input checked="" type="checkbox"/> Hearing is set
Date: <u>March 4, 2011</u>
Time: <u>9:00 a.m.</u>
Judge/Calendar: <u>Murphy</u>

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SUPERIOR COURT OF THE STATE OF WASHINGTON
THURSTON COUNTY

IN RE: WASHINGTON BUILDERS)	
BENEFIT TRUST,)	
_____)	No. 08-2-01674-6
)	
RE SOURCES FOR SUSTAINABLE)	JUDGMENT
COMMUNITIES, <i>et al.</i> ,)	
)	
Plaintiffs,)	
v.)	
)	
BUILDING INDUSTRY)	
ASSOCIATION OF WASHINGTON,)	
<i>et al.</i> ,)	
)	
Defendants.)	

Judgment Summary

This judgment does not provide for the payment of money.

JUDGMENT

It is hereby ORDERED, ADJUDGED AND DECREED that final judgment is entered in accordance with the Court's December 17, 2010 Findings and Conclusions attached hereto as Exhibit A, and the Court's Order on Cross-

JUDGMENT - 1
DWT 16426326v4 0030722-000009

Davis Wright Tremaine LLP
LAW OFFICES
Suite 2200 • 1201 Third Avenue
Seattle, Washington 98101-3045
(206) 622-3150

0-000008115

nij

1 Motions for Summary Judgment, attached hereto as Exhibit B.

2 Each party shall bear its own fees, expenses and costs. All claims pending
3 in the captioned matter that are not otherwise addressed in this judgment shall be
4 and they hereby are dismissed with prejudice, and without costs or fees to any
5 party.
6

7 DATED this 4th day of March, 2011.
8

9
10 Carol Murphy
11 Hon. Carol Murphy

12
13 Presented by:

14 Matthew D. Clark
15 Harry J. F. Korrell, WSBA No. 23173
16 Robert J. Maguire, WSBA No. 29909
17 David C. Tarshes, WSBA No. 13658
18 Matthew D. Clark, WSBA No. 39514
19 Davis Wright Tremaine LLP
20 Attorneys for State Defendants
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22 Seattle, Washington 98101-3045
23 Tel: (206) 622-3150, Fax: (206) 757-7700

24 Approved for entry:

25 Andrew S. Friedman (PRO HAC VICE)
26 Tonna K. Farrar (PRO HAC VICE)
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12 Attorneys for Petitioners
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