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

)	08-2-34270-1 SEA
ROBERT F. UTTER and FAITH)	
IRELAND, in the name of the STATE OF)	PLAINTIFFS' EX PARTE
WASHINGTON,)	MOTION TO TAKE
)	DEPOSITIONS WITHIN 30 DAYS
Plaintiffs,)	OF FILING OF COMPLAINT,
)	SUBJECT TO MOTIONS FOR
v.)	PROTECTIVE ORDER
)	
BUILDING INDUSTRY ASSOCIATION)	(AND SIGNED ORDER)
OF WASHINGTON, BIAW MEMBER)	
SERVICES CORPORATION,)	
)	
Defendants.)	
)	

I. MOTION

Plaintiffs Faith Ireland and Robert Utter today filed a citizen action against the Building Industry Association of Washington ("BIAW")¹ and its subsidiary BIAW Member Services Corp. ("BIAW-MS") for violation of campaign finance laws pursuant to RCW 42.17.400(4), after satisfying notice requirements set forth in that statute.

Plaintiffs' action seeks immediate equitable relief to prohibit ongoing violations of the law between now and the election, as well as post election remedies.

¹ Except where differentiated, the term "BIAW" as used herein refers to BIAW and/or BIAW-MS, which is consistent with these organizations' usage of that term. On information and belief, these organizations were not treated as separate entities in their actions at issue in this Complaint, and both share legal responsibility for all actions herein

1 Plaintiffs seek to take depositions to support their motion for injunctive relief beginning in
2 approximately one week due to the exigent circumstances as explained herein. Under Civil Rule 30
3 "Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a
4 deposition prior to the expiration of 30 days after service of the summons and complaint". CR 30(a).
5 Without leave of the court, Plaintiffs will be unable to confirm their allegations in time to pursue
6 their claim for pre-election injunctive relief. This would be unfortunate for the voters of Washington
7 State and our campaign finance laws.

8 Given the political nature of this case, it is possible that there will be resistance to the taking
9 of discovery. Plaintiffs request that the Court grant this motion so that notices of depositions can be
10 served on defendants and subpoenas may be served on third parties. Then, parties and non-parties
11 will be entitled to present their arguments as to why discovery should be limited or delayed. CR
12 26(c) (party or person from whom discovery is sought permitted to file motion for protective order).
13 This is the most expedient procedure for fully resolving the inevitable discovery dispute and allowing
14 discovery to proceed if allowed by the Court.

15 **II. BRIEF STATEMENT OF FACTS**

16 Plaintiffs have filed a citizen action to enforce the Washington Fair Campaign Practices Act
17 pursuant to RCW 42.17.400. Plaintiffs served notices of the violations asserted herein as required by
18 RCW 42.17.400(4) on July 25 and September 9, 2008. The State Attorney General did not take
19 action on the violations alleged in the Citizen Action Complaint.² Complaint for Civil Penalties and
20 Injunctive Relief for Past and Ongoing Violations of RCW Chapter 42.17 ("Complaint") at ¶ 1.

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24 ² On September 19, 2008, the Attorney General did bring suit against BIAW Member Services Corporation ("BIAW-
25 MSC") for another violation alleged by Plaintiffs. The Attorney General's investigation found, and his lawsuit claims,
that BIAW Member Services Corporation ("BIAW-MSC") conducted an illegal fundraising campaign and furthermore,
that the proceeds of this fundraising constituted a "political committee" that failed to publicly report itself and its
financial activities as required by law.

1 Plaintiffs filed their Complaint for violations of Washington Campaign Finance laws on
2 October 6, 2008. Plaintiffs' action seeks immediate equitable relief to prohibit ongoing violations of
3 the law between now and the election, as well as post election remedies. Complaint at ¶ 51, Prayer
4 for Relief ¶ 4.

5 Plaintiffs Complaint proffers significant evidence that in Spring of 2007 Dino Rossi assisted
6 the BIAW to fundraise for a political committee promoting his candidacy for governor. *See*
7 Complaint at ¶ 3- 34. If this is true, the complaint claims that our campaign finance laws preclude
8 the BIAW and its political committees from making "independent expenditures" in the governor's
9 race. *See* Complaint at ¶ 45-51. It would also mean that they have already spent \$2 million over
10 their legal contribution limit. *Id.*

11 Defendants and Dino Rossi deny wrongdoing, but have admitted to reporters sufficient facts
12 that, if confirmed, likely would make BIAW's ongoing expenditures illegal. *See* Complaint at ¶27.
13 The complaint asserts that the BIAW has already spent \$2 million over its contribution limit, but has
14 approximately another \$1.5 million to spend in the next month. Complaint at ¶¶ 4, 19. Thus,
15 Plaintiffs should be entitled to immediate discovery to confirm the facts and, if appropriate, to move
16 for emergency injunctive relief.

18 III. ARGUMENT

19 **A. PLAINTIFFS REQUEST TO TAKE DEPOSITIONS WITHIN 30 DAYS OF FILING** 20 **THE COMPLAINT, WHICH THE COURT MAY PERMIT "WITH OR WITHOUT** 21 **NOTICE."**

22 The request to begin discovery early should be granted in a case such as this where plaintiffs
23 seek such discovery to support a claim for emergency injunctive relief. By specifically stating that
24 such request may be granted "with or without notice," CR 30 suggests that this motion may be heard
25

1 ex parte and that the request is a minor one. Plaintiffs would unquestionably have the right to notice
2 these depositions in 30 days and merely seek to advance that schedule.

3 **B. THE PROPOSED ORDER ALLOWS PLAINTIFFS TO IMMEDIATELY SERVE**
4 **NOTICES OF DEPOSITION AND SUBPOENAS, BUT GIVES PARTIES AND NON**
5 **PARTIES AN OPPORTUNITY TO BE HEARD BEFORE DEPOSITIONS ARE**
6 **TAKEN.**

7 Plaintiffs want to note up depositions immediately and begin taking depositions in
8 approximately one week. By allowing the deposition notices and subpoenas to be served, both
9 parties and non-parties may be heard through a motion for protective order pursuant to CR 26(c).

10 The alternative – seeking early discovery through a contested motion – would have similar
11 arguments presented and decided twice. First, the parties would spar over this motion and then the
12 non-parties would present their arguments in CR26(c) motions. This would double the burden on the
13 Court and delay the start of discovery by a week Plaintiffs cannot afford.

14 **C. PLAINTIFFS' SEEK EARLY DISCOVERY TO PROVE UP THEIR REQUEST FOR**
15 **INJUNCTIVE RELIEF TO PROHIBIT ILLEGAL CAMPAIGN EXPENDITURES.**

16 Plaintiffs assert that all of the BIAW's current expenditures in the gubernatorial race are
17 prohibited because the BIAW's coordination with Dino Rossi disqualifies it as an independent
18 expenditure committee. If Plaintiffs are able to confirm their allegations through deposition
19 discovery, they will move the Court to enjoin further illegal expenditures.

20 Plaintiffs' Complaint requests such injunctive relief, and this Court has the power to grant it.
21 *See* Complaint at ¶¶ 4, 38, Prayer for Relief ¶ 4; RCW 42.17.400(4) (citizen action can seek any
22 remedy in title 42.17); 42.17.390 (6) ("court may enjoin any person to prevent the doing of any act
23 herein prohibited, or to compel the performance of any act required herein). *See also State ex rel.*
24 *Evergreen Freedom Found. v. Wash. Educ. Ass'n*, 111 Wn. App. 586 , 611 (2002) (citizen
25 enforcement action seeking injunctive relief).

1 **D. IF PLAINTIFFS CAN PROVE THAT DINO ROSSI ASSISTED WITH THE**
2 **FUNDRAISING FOR THE BIAW'S POLITICAL COMMITTEE, AS THE**
3 **EVIDENCE SUGGESTS, THEN THE POLITICAL COMMITTEE'S ONGOING**
4 **EXPENDITURES IN THAT RACE ARE ILLEGAL AND SHOULD BE ENJOINED.**

5 Plaintiffs allege that "On or before May of 2007, Dino Rossi knew and consented to the
6 BIAW's formation of a political committee to promote his candidacy for governor. In that period,
7 Rossi provided assistance to the BIAW in its fundraising efforts for this political committee."
8 Complaint ¶ 13. It is this allegation that Plaintiffs seek to bolster through depositions before moving
9 for a temporary restraining order.

10 If Plaintiffs are able to prove this fact, two legal conclusions should follow:

11 (1) That Dino Rossi was a "candidate" under RCW 42.17; and

12 (2) That the political committee he assisted does not qualify as an independent expenditure
13 committee and has already grossly exceeded its permissible contribution limit.

14 Thus, if Plaintiffs are able to show that Rossi in fact assisted this political committee in 2007,
15 Plaintiffs will have grounds to seek injunctive relief.

16 **1. If Rossi knew of and consented to the BIAW's political committee supporting his**
17 **candidacy, he would be deemed a candidate under RCW 42.17.020.**

18 RCW 42.17.020(8) defines a "candidate" under the State's campaign finance laws. One does
19 not have to announce publicly or file for office to become a candidate. Another way is when a
20 person "gives his or her consent to another person" to "receive contributions or make expenditures or
21 reserve space with intent to promote his or her candidacy for office" *Id.*

22 Under WAC 390-05-200, the following circumstance "shall give rise to presumption that the
23 individual is a 'candidate' as that term is defined by RCW 42.17.020(8): (1) **The existence of a**
24 **political committee promoting the election of such individual for public office with the**
25 **knowledge and consent of that individual**". The definition of consent is "compliance in or

1 approval of what is done or proposed by another; ACQUIESCENCE.” Marriam Webster’s Collegiate
2 Dictionary (10th Ed. 2002).

3 **2. If Rossi provided any fundraising support to BIAW’s political committee**
4 **supporting his candidacy, that political committee would be disqualified from**
5 **making “independent expenditures” in his race.**

6 A political committee’s expenditure must meet four elements set forth in RCW 42.17.020(24)
7 in order to avoid the \$2,800 contribution limit for a gubernatorial race under RCW 42.17.640. If the
8 candidate provides any fundraising assistance to the political committee, that committee is
9 disqualified from making independent expenditures.

10 The Public Disclosure Commission has made this clear to the BIAW in a formal advisory
11 opinion issued on June 15, 2004. The BIAW, asked “If a PAC is set up to (among other things)
12 support a particular candidate by doing independent expenditures, is it permissible for that same
13 candidate to informally refer supporters (who wish to make a contribution) to the PAC” if the
14 candidate has no other involvement in the expenditures? The PDC advisory opinion concluded “the
15 answer to the question is no. Not all of the elements of an Independent Expenditure as defined in
16 RCW 42.17.020(24)(a) could be satisfied.” It stated:

17 **One of the most fundamental ways a candidate could encourage a person to purchase**
18 **political advertising supporting that candidate is to help make sure that person has**
19 **sufficient funds to undertake an effective advertising effort.** Assisting a PAC in
20 fundraising fosters that committee’s ability to make the political advertising expenditure
benefiting the candidate. As such, the PAC expenditure is not sufficiently removed from the
candidate to qualify as an independent expenditure.

21 **That collaboration disqualifies any resulting expenditure from the definition of**
22 **independent expenditure.**

23 The opinion concluded: “if a candidate assists a PAC in fundraising and the PAC then
24 undertakes political advertising supporting that candidate or promoting the defeat of that candidate’s
25 opponent, that expenditure does not satisfy the definition of ‘independent expenditure.’” Public

1 Disclosure Commission, Advisory Memorandum on Independent Expenditures, June 15, 2004,
2 adopted August 24, 2004.

3 **E. AVAILABLE EVIDENCE STRONGLY SUPPORTS PLAINTIFFS' ALLEGATIONS**
4 **THAT ROSSI ASSISTED IN THE FUNDRAISING FOR THE BIAW'S POLITICAL**
5 **COMMITTEE, DISQUALIFYING THE COMMITTEE FROM MAKING**
6 **INDEPENENT EXPENDITURES ON HIS BEHALF.**

7 Plaintiffs' Complaint proffers significant evidence supporting the allegation that Rossi was
8 aware of and assisted the BIAW's political committee, as shown in the Complaint at ¶¶ 12-34,
9 attached and incorporated herein by reference.

10 **F. PLAINTIFFS SHOULD BE ALLOWED TO NOTE UP DEPOSITIONS TO**
11 **CONFIRM THIS EVIDENCE, SUBJECT TO THE COURT'S RULING ON**
12 **ANTICIPATED MOTIONS FOR PROTECTIVE ORDERS.**

13 Plaintiffs have alleged facts and supporting evidence that, if confirmed, would show the
14 ongoing expenditures of BIAW illegal. Plaintiffs should be allowed to immediately note up
15 depositions to confirm these violations in support of a motion for temporary restraining order. If any
16 party or deponents seeks to avoid such discovery, and has grounds to do so, they will have an
17 opportunity to move for such protection pursuant to CR 26(c).

18 **IV. CONCLUSION**

19 Given the unique facts and exigent circumstances of the case, the proposed order adopts an
20 expedient and efficient method for proceeding.

21 RESPECTFULLY SUBMITTED this 6th day of October, 2008

22 SMITH & LOWNEY, PLLC

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24 By _____
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PROPOSED ORDER

Pursuant to CR 30, Plaintiffs requested to note depositions within 30-days of filing the complaint, subject to motions for protective order under CR 26(c). The motion was presented without notice, pursuant to CR 30. The Court having heard argument from Plaintiff, hereby

ORDERS:

(1) Plaintiffs may serve notices of deposition and subpoenas beginning immediately, but shall limit depositions to issues relating to their potential request for injunctive relief;

(2) Plaintiffs shall attempt to serve subpoenas and notice of such depositions by October 7, 2008, with depositions scheduled no sooner than October 15.



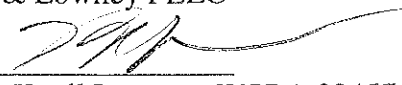
Superior Court Judge

Presented by:

ERIC WATNESS

Smith & Lowney PLLC

OCT 06 2008

By 
Knoll Lowney, WSBA 23457

COURT COMMISSIONER

*Assigned Judge is unavailable;
counsel was directed to file.*