☐ EXPEDITE
☐ No Hearing Set
☑ Trial is Set:
Date: Monday, April 11, 2016
Time: 8:30 a.m.
The Honorable Anne Hirsch

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. GROCERY MANUFACTURERS ASSOCIATION, Defendant.	No. 13-2-02156-8 PLAINTIFF STATE OF WASHINGTON'S TRIAL BRIEF

I. INTRODUCTION

This Court has already held that Defendant Grocery Manufacturers Association (GMA) "violated the spirit and letter of Washington's Public Campaign Finance Laws," Ltr. Op. at 8, concealing the true source of campaign contributions on a scale unprecedented in our state's history. The Court must now set a penalty and resolve the sole issue for trial: whether GMA's actions were intentional such that the judgment should be trebled. The undisputed evidence already submitted, together with the evidence to be presented at trial, will show that GMA's conduct was intentional.

Contrary to GMA's claims, to impose treble damages the Court need not find that GMA knew that its conduct was illegal. Rather, the Court need find only that GMA intended the consequences of its actions—to shield its members' contributions from public scrutiny. The evidence will amply support that conclusion.

Because of the number, extent, and egregious nature of GMA's violations, this Court

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should impose a penalty of $14,622,820, plus award the State's investigative costs and attorney's fees. And because GMA's conduct was intentional, the Court should then treble the judgment. This penalty will send a clear message to GMA and other entities that violating Washington's campaign finance laws has real consequences, and that the penalties for doing so are not just a cost of doing business.

II. ISSUES

A. Based on the Court's determination that GMA violated state law by failing to register a political committee, concealing the true source of contributions, and failing to report properly, what civil penalty should the Court assess against GMA under RCW 42.17A.750?

B. Should the Court award the State its attorneys' fees, costs of trial, and costs of investigation under RCW 42.17A.765 (5)?

C. Should the Court treble the judgment it orders under RCW 42.17A.765 (5) because GMA intentionally engaged in conduct that violated the State's disclosure laws?

III. FACTS

This Court has already concluded that GMA violated Washington campaign finance law in two distinct ways. First, although GMA qualified as a political committee under state law, it failed to register with the Public Disclosure Commission and file reports as required by state law. Ltr. Op. at 5. The Court concluded that GMA's obligations to register and report were triggered as of February 28, 2013. *Id.* Second, GMA "conceal[ed] the true source of contributions received and expenditures made in opposing I-522 and therefore GMA violated RCW 43.17A.435." Ltr. Op. at 6. The evidence presented so far and to be developed at trial will establish that GMA's conduct was intentional.

As to intent, the evidence shows that one of GMA's central goals from the time it first considered creating the Defense of Brands Account was to allow its members to fund opposition to Initiative 522 without facing the public criticism that some of them had faced for funding opposition to a similar ballot measure (Proposition 37) in California. Ltr. Op. at 2. GMA's explicit goal was to allow its "members . . . to contribute significant funds . . . 'while

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shielding individual members' from public 'scrutiny.'" Ltr. Op. at 2; *id.* at 5 ("The undisputed evidence further shows that the GMA's intent was to create a plan to 'provide anonymity and eliminate state filing requirements for contributing members.'")

On February 28, 2013, GMA's Board approved the creation of the Defense of Brands Account. As this Court has held, GMA had "the express and specific purpose of shielding the contributions members made from scrutiny and to eliminate filing requirements for contributing members." Ltr. Op. at 3. Moreover, as GMA gathered and utilized the funds, "GMA members were regularly told by GMA staff how to respond if they received media or other inquiries, in order to divert attention from the true source of the funds, namely the individual members of the GMA." *Id.* GMA submitted the contributions to the No on 522 political committee in its own name, and the Committee then reported the money as coming from GMA, not the 34 companies who really supplied the money for the contributions. The net effect was exactly what GMA intended, to shield the true identity of the donors, at least until the State filed this lawsuit. As this Court has found, "There is one, and only one, reasonable inference that can be drawn from the facts before this court: that the GMA intentionally took steps to create and then hide the true source of the funds in the DOB account from the voting public of Washington State." Ltr. Op. at 7.

The sort of information GMA sought to "shield"—the true identities of campaign donors and the amounts of their contributions—is highly sought after and used by the public, voters, campaigns, and the media in Washington. Over the years, the state legislature has acted repeatedly to ensure that such information is readily available to all. As early as 1994, the legislature required the state Public Disclosure Commission to maintain an accessible website that would provide the public reports and data about the financing of campaigns. RCW 42.17A.050; *see also* RCW 42.17A.060 (The Commission is to "provide the general public timely access to all contributions and expenditure reports. . . . failure to meet goals for full and timely disclosure threatens to undermine our electoral process."). In 1999, the

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legislature directed the PDC to allow political committees to file their reports electronically. RCW 42.17A.055. The legislature's goal was to provide "the general public timely access to all contribution and expenditure reports submitted by candidates, continuing political committees, bona fide political parties, lobbyists, and lobbyists' employers." RCW 42.17A.060. The legislature found "that failure to meet [these] goals for full and timely disclosure threatens to undermine our electoral process." *Id.* The importance of public access to information regarding funding of ballot measures has also been confirmed by both state and federal courts. *See, e.g., Human Life of Washington, Inc. v Brumsickle*, 624 F.3d 990, 1020 (9th Cir. 2010); *Voters Educ. Comm. v. Pub. Disclosure Comm'n,* 161 Wn.2d 470, 498, 166 P.3d 1174 (2007); *Fritz v. Gorton,* 83 Wn.2d 275, 517 P.2d 911 (1974).

IV. LEGAL AUTHORITY

A. State Law Requires Transparency In Washington Elections

Enacted in 1972, Initiative 276 (I-276) set a high bar for transparency and integrity in politics and government in Washington. In adopting I-276, the voters declared that the public has a strong interest in the disclosure of money raised and spent on ballot measure campaigns. "[T]he public's right to know of the financing of political campaigns and lobbying and the financial affairs of elected officials and candidates far outweighs any right that these matters remain secret and private." RCW 42.17A.001(10). As the Court has recognized here, the people directed that these laws be liberally construed "so as to assure continuing public confidence of fairness of elections and governmental processes, and so as to assure that the public interest will be fully protected." RCW 42.17A.001.

While the law has been modified since its enactment, its fundamental purpose has never wavered. Of the public policies furthered by RCW 42.17A, one stands above all others: transparency. RCW 42.17A's declaration of policy is unequivocal:

> It is hereby declared by the sovereign people to be the public policy of the state of Washington:

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> (1) That political campaign and lobbying contributions and expenditures be fully disclosed to the public and that secrecy be avoided.

RCW 42.17A.001. To this end, the law "seeks to ferret out . . . those whose purpose is to influence the political process" and requires them to register as political committees and publicly disclose campaign contributions and expenditures. *State v. (1972) Dan J. Evans Campaign Comm.* (*Evans Campaign Comm.*), 86 Wn.2d 503, 508-09, 546 P.2d 75 (1976).

B. State Law Gives The Court Broad Authority In Assessing GMA's Penalty

Having concluded that GMA violated state law, the Court must assess a penalty for GMA's misconduct that fits the significance of GMA's intentional non-disclosure. As explained in the State's Motion for Summary Judgment (at 20-21), RCW 42.17A.750 describes the Court's options for assessing a penalty.

The Court can impose *one or more* of the following remedies for GMA's violations:

(1) a "per violation" penalty of not more than $10,000;

(2) a penalty equal to $10 per day for every day a required report is late; and

(3) a penalty equal to the amount that went undisclosed.

RCW 42.17A.750 (1)(c), (d), (f). The Court may also award "to the state all costs of investigation and trial, including reasonable attorneys' fees to be fixed by the court. RCW 42.17A.765(5). Finally, as discussed in the next section, the Court may treble the judgment as punitive damages "[i]f the violation is found to have been intentional." *Id.* The penalty amount is within the Court's discretion. *Cf. Winchester v. Stein*, 135 Wn.2d 835, 858, 959 P.2d 1077 (1998) (acknowledging statutory penalty awarded in court's discretion); *State v. WWJ Corp.*, 88 Wn. App. 167, 941 P.2d 717 (1997), *aff'd in part, rev'd in part on other grounds*, 138 Wn.2d 595, 980 P.2d 1257 (1999) (reviewing trial court's assessment of civil penalties within statutory limits for abuse of discretion).

The facts underlying the State's penalty request were unchallenged at summary judgment, and GMA should be held accountable for each violation of the law. First, GMA

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violated the law with each report it failed to file. Given the Court's holding that GMA's reporting and disclosure obligations were triggered on February 28, 2013, Ltr. Op. at 5, GMA failed to file at least 60 reports, as Mr. Stutzman calculated:

- **Reporting violation 1:** GMA should have filed its committee registration report no later than March 14, 2013 (14 days from when the committee was formed). *See* RCW 42.17A.205 (1). This form should have identified the committee treasurer and its committee depository. *See* RCW 42.17A.210, .215.
- **Reporting violations 2-48:** GMA should have filed Form C3 reports of contributions it received from members. Committees are required to deposit funds within five business days of receipt. *See* RCW 42.17A.220 (1). These deposits are to be recorded on the Form C3. *See* WAC 390-76-031. Based on GMA's disclosures after this lawsuit was filed and the uncontested evaluation of that information, GMA should have filed 47 Form C3 reports during 2013. *See* Stutzman Decl., ¶ 6.
- **Reporting violations 49-60:** GMA should have filed eleven Form C4 reports summarizing its activities, including expenditures it made. *See* RCW 42.17A.235; Stutzman Decl., ¶ 8. These reports were due monthly starting in March 2013, more frequently closer to the general election, and then as a final report when the committee's activity concluded in December 2013.

Each of these reports that went unfiled or untimely filed constitutes a separate violation of the reporting statute for which the Court can assess up to a $10,000 penalty. RCW 42.17A.750 (1)(c). Thus, the Court may assess a penalty of up to $600,000 based on GMA's failure to file reports.

Next, the statute authorizes a penalty for each day a report is late. RCW 42.17A.750 (1)(d). In its summary judgment briefing, the State identified how many days these reports were late. *See* Stutzman Decl., ¶¶ 7, 9. The committee registration report alone was 218 days

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late. *Id.* Each missed report was late by varying numbers of days, as outlined in Mr. Stutzman's declaration. Using December 2013 as the last month reports would be due, the total days late for GMA reports is 2,282. At $10 per day under the statute, the Court may assess a penalty of $22,820 for the late filed reports.

Finally, GMA set out to conceal the true source of contributions amounting to over $14 million. The Court has already determined that GMA concealed this money in violation of state law. Ltr. Op. at 5-6. RCW 42.17A.750 (f) allows the Court to assess a penalty in the amount of funds that went unreported. *Id.* ("A person who fails to report a contribution or expenditure as required by this chapter may be subject to a civil penalty equivalent to the amount not reported as required."). The Court should assess a penalty for the concealment violation alone at $14,000,000.

GMA has presented no contrary evidence calling these amounts into question. Moreover, the extent and scope of GMA's violations are unprecedented in state history. At the close of trial, the Court should assess a base penalty of $14,622,820 (the total of the penalties described above), and award the State its costs of investigation and trial along with reasonable attorney's fees.

C. The Court Should Treble GMA's Penalty Under RCW 42.17A.765 (5) Because GMA Intentionally Concealed The True Source Of Its Contributions

RCW 42.17A.765 (5) provides that the Court may treble the judgment against GMA "[i]f the violation is found to have been intentional." *Id.* The term "intent" has a technical meaning under state law. *Hanson PLC v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 58 Wn. App. 561, 571, 794 P.2d 66 (1990). "[A] person acts with intent or intentionally when acting with the object or purpose to accomplish a particular result" that constitutes a violation under the law. RCW 9A.08.010(1)(a) (defining "intent" for state criminal matters); *see also, e.g., In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d 594, 611, 211 P.3d 1008 (2009) (applying definition for purposes of lawyer disciplinary proceedings); *Bradley v. Am.*

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Smelting and Ref. Co., 104 Wn.2d 677, 682-84, 709 P.2d 782 (1985) (applying definition for intentional tort of trespass); *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) (applying definition to first degree murder charge); *Hanson PLC,* 58 Wn. App. at 571-72 (applying definition in insurance claim action); *accord State v. Conte*, 159 Wn.2d 797, 811, 154 P.3d 194 (2007) (acknowledging that violations of former RCW 42.17 can occur without a "knowingly" mental state). "Intent is not, however, limited to the consequences which are desired," but also applies to those consequences "which are certain, or substantially certain, to result." *Bradley*, 104 Wn.2d at 683 (quoting the Restatement (Second) of Torts Section 8a). In other words, the Court may infer that the actor intends the natural and probable consequences of his or her actions. *Caliguri*, 99 Wn.2d at 506.

For example in *Bradley*, the court held that, because the defendant knew that its plant was emitting pollutants into the air and that these pollutants were likely to settle back to earth on others' property, the defendant had the requisite intent to commit civil trespass. *Bradley*, 104 Wn.2d at 682, 684. Likewise, in *Vanderveen*, the court found that an attorney's acts of receiving cash payments and failing to record or report them could only be "characterized as nothing other than intentional," such that he had "the conscious objective or purpose to accomplish a particular result, *concealing* the receipt of the cash payments." *In re Disciplinary Proceeding Against Vanderveen*, 166 Wn.2d at 611 (emphasis added). And in *Caliguri*, the court found that a defendant's statement that "the janitor's gonna [sic] go for sure" was evidence of his knowledge that a particular individual's death would result. *Caliguri*, 99 Wn.2d at 506.

Here, GMA's actions demonstrate that it intended to conceal the true source of its contributions to the No on 522 political committee. As this Court has found: "There is one, and only one, reasonable inference that can be drawn from the facts before this court: that the GMA intentionally took steps to create and then hide the true source of the funds in the DOB account from the voting public of Washington State." Ltr. Op. at 7; *id.* at 5 ("The undisputed

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evidence further shows that the GMA's intent was to create a plan to 'provide anonymity and eliminate state filing requirements for contributing members.'"). Like the defendants in *Bradley* and *Caliguri*, and the respondent in *Vanderveen*, GMA's violations of the state's campaign finance laws can only be characterized as intentional. GMA's own statements show that it knew and intended that its members' contributions to the No on 522 political campaign would go undisclosed to Washington voters. Its stated goals were "to contribute significant funds . . . 'while shielding individual members' from public 'scrutiny,'" and "to 'provide anonymity and eliminate state filing requirements for contributing members.'" Ltr. Op. at 2, 5. It is hard to imagine clearer evidence of intent to conceal the true source of contributions.

Lacking any argument that its actions were unintentional or inadvertent, GMA attempts to move the goal posts. GMA may claim that the State must prove not only that it intentionally concealed the true source of its contributions, but also that GMA knew that this conduct was illegal. *See* GMA Opp. to State's Mtn. to Exclude Testimony ("GMA Opp.") at 3. That is not the law. As explained above, "intent" depends not on how well a person understands state law, but rather on whether he or she "act[ed] with the object or purpose to accomplish a particular result" that is illegal. RCW 9A.08.010(1)(a). Here, GMA plainly acted with the purpose of accomplishing an illegal result: concealing the true source of its contributions. Ltr. Op. at 7 ("the GMA intentionally took steps to create and then hide the true source of the funds in the DOB account from the voting public of Washington State.").

GMA creates a straw man by claiming that under the State's interpretation of the statute, every campaign finance violation would be "intentional." *See* GMA Opp. at 3. That is simply not true. There are many ways that a candidate or campaign committee might violate campaign finance law without doing so "intentionally" under the State's reading, *e.g.,* if a committee attempted to file a report on time but failed to do so because of a technology error; if a committee believed its treasurer filed a report when he actually did not; or if a committee

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treasurer believed he had reported all contributions but actually failed to list some because of a miscommunication with a candidate. The list could go on and on.

In reality, it is GMA's proposed reading of the statute that would lead to absurd consequences. Under GMA's view, trebling the judgment would be appropriate only if the State could produce evidence that a campaign committee consulted with an attorney or the PDC, learned that its proposed conduct was illegal, and then did it anyway. A candidate or committee who simply never asked whether his conduct was legal could never be deemed to have committed an intentional violation. That would not only allow egregious abuses of state law, but it would also give candidates and committees a strong incentive not to check whether their conduct was legal, a result that the legislature never could have intended.

In short, "[t]here is one, and only one, reasonable inference that can be drawn from the facts before this court: that the GMA intentionally took steps to create and then hide the true source of the funds in the DOB account from the voting public of Washington State." Ltr. Op. at 7. The Court should therefore treble the judgment under RCW 42.17A.765(5).

D. Fines Levied And Settlements Reached In Other Administrative And Court Actions Are Irrelevant To The Court's Assessment Of Penalties Here

The State anticipates that GMA will try to rely on certain "cherry-picked" trial court or PDC decisions to support its view that the Court should impose a minimal penalty. The Court should reject this argument for at least two reasons. First, without having all the facts for each case, the Court has no way of knowing what factors led to a particular fine or settlement. And second, the scale of GMA's illegal conduct here is unprecedented, making comparisons to other cases unhelpful.

Nothing authorizes a party to use other trial court or administrative decisions to support any argument for a particular penalty. *See Bauman v. Turpen,* 139 Wn. App. 78, 87, 160 P.3d 1050 (2007) ("the findings of fact and conclusions of law of a superior court are not legal

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authority and have no precedential value."); *see also State v. Fitzpatrick,* 5 Wn. App. 661, 668-70, 491 P.2d 262 (1971) (setting forth the reasons why unpublished cases cannot be cited). Comparisons to fines imposed by the PDC are particularly unhelpful, as the PDC's penalty authority is statutorily limited to $10,000. RCW 42.17A.755(4). Thus, one of the key reasons that the PDC refers matters to the Attorney General's Office is where its penalty authority is insufficient to address the magnitude of the alleged violation, as here. *See, e.g., Utter v. Bldg. Indus. Ass'n of Washington,* 182 Wn.2d 398, 411 n.4, 341 P.3d 953, 959, *cert. denied,* 136 S. Ct. 79, 193 L. Ed. 2d 33 (2015) (noting that that the penalty at stake in a lawsuit is "significantly higher" than that at risk before the PDC, so "[a] PDC action thus serves as significantly less of a deterrent to illegal campaign practices").[1]

Other cases and settlements provide little guidance not only because of the limited facts available about those cases, but also because the facts here are so extraordinary. No case in Washington's history of campaign finance regulation remotely compares to GMA's willful misconduct of concealing over $14,000,000 in contributions.

In short, rather than relying on cases as to which the Court lacks full information, the Court should assess the facts of this case and its determination that GMA violated the law, and then apply the criteria set out in RCW 42.17A.750 and RCW 42.17A.765(5).

V. CONCLUSION

"GMA intentionally took steps to create and then hide the true source of the funds in the DOB account from the voting public of Washington State." Ltr. Op. at 7. That illegal, intentional conduct cries out for a substantial penalty. The Court should apply

[1] "Through administrative enforcement, the PDC may issue orders requiring the respondent "to cease and desist from the activity that constitutes a violation" and "may assess a penalty in an amount *not to exceed ten thousand dollars.*" RCW 42.17A.755 (4) (emphasis added). The amounts at issue in a lawsuit are significantly higher. For example, BIAW–MSC settled the AG's suit against it for $584,000. *Utter,* 182 Wn. 2d at 411 n. 4.

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RCW 42.17A.750 and RCW 42.17A.765(5) to the facts here, determine the appropriate penalty amount, award the State its costs and fees, and then treble the resulting judgment.

DATED this 7th day of April, 2016.

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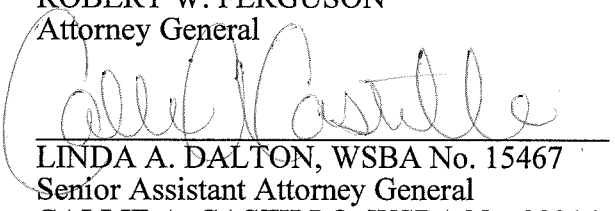

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I certify that I served a true and correct copy of this document on all parties or their counsel of record on the date below pursuant to the parties' electronic service agreement to:

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

DATED this 7th day of April, 2016, at Olympia, Washington.

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