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Superior Court of the State of Washington
For Thurston County

13-2-02156-8
CTD
Court's Decision
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2000 Lakeridge Drive SW • Building Two • Olympia WA 98502
Telephone: (360) 786-5560 **Website:** www.co.thurston.wa.us/superior

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Linda A. Dalton
Attorney General's Office
PO Box 40100
Olympia, Washington 98504-0100

Phillip Guess
Aaron E. Millstein
Michael K. Ryan
K&L Gates, LLP
925 Fourth Avenue, Suite 2900
Seattle, Washington 98104

Bert W. Rein (pro hac vice)
Carol A. Laham (pro hac vice)
Matthew J. Gardner (pro hac vice)
Wiley Rein LLP
1776 K Street Northwest
Washington, D.C. 20006

Court's Letter Opinion

Re: ***State of Washington v. Grocery Manufacturers Association***
Thurston County Superior Court Case No. 13-2-02156-8

Dear Counsel,

On October 16, 2013, the State filed a complaint against the Grocery Manufacturers Association (GMA) for civil penalties and injunctive relief, alleging violations of Chapter 42.17A RCW. A first amended complaint was filed on November 20, 2013. In its amended complaint, the State asserts that the GMA intentionally and repeatedly violated the public finance provisions of the public disclosure laws. The State seeks a significant financial penalty against GMA because, it asserts, the GMA intentionally and flagrantly violated the law, and did so with the express purpose of shielding its member companies from public scrutiny and attack, and to influence the outcome of Initiative 522 (I-522). I-522 appeared on the Fall 2013 state ballot and was an Initiative to the People, which, if passed, would require labeling on all packaged food products that contained Growth Modified Organisms (GMO's).

On January 3, 2014, GMA filed a separate lawsuit for injunctive and declaratory relief against the State, claiming various constitutional issues arising out of the same set of facts alleged by the State in its October 2013 suit. On January 31, 2014, the cases were consolidated under this cause number.

On January 22, 2016, the State filed a motion for summary judgment. On the same day the GMA filed a cross motion for summary judgment. This letter opinion contains the court's ruling on the parties' motions, beginning with the factual and legal background in which the case arose.

FACTS

The facts in this letter opinion are undisputed and are taken from the exhibits filed in the case. (Some of the same documents were exhibits filed by both parties. Unless otherwise noted, however, all citations to exhibits in the record are to those attached to the Second Declaration of Linda Dalton). The GMA is a trade association, founded in 1908, comprised of over 300 food and beverage companies. (Ex 1; Ex 3, 14 of Millstein Declaration in Support of GMA's cross motion for summary judgment). There is a large Board of Directors each of whom represent a food or beverage company. (Ex 1). The CEO of the GMA at all relevant times in this case was Pamela Bailey. (Ex. 13.) The Executive Vice President for Governmental Affairs and key staff involved in the creation of the Defense of Brands (DOB) account was Louis Finkel. (Ex. 13).

In 2012, the GMA actively participated in a campaign in California against a ballot initiative that, if passed, would have required labeling of GMOs on all packaged food products. (Ex's 1, 6). The GMA and other sources spent $43,000,000.00 to defeat the California ballot initiative, including hiring a campaign consultant (Ex 1). The measure was defeated. (Ex 1). Although successful in its opposition to the ballot measure in California, some individual members of the GMA, and some staff, received negative responses from the public and the supporters of the California Initiative, including death threats. (Ex 1). After the California campaign, the GMA's Board discussed proposed strategies to defeat similar initiatives in states across the country and at the national level. These discussions included a focus on a possible initiative in Washington State. Discussions occurred at regular GMA Board of Director meetings and at committee meetings of the Board (See e.g., Ex's 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 19).

Over 30 GMA Board members attended the January 2013 Board of Directors meeting (Ex's 11, 12). At that meeting there was a presentation outlining GMA's concern about the growing potential for GMO initiatives nationwide and in Washington State. There was also discussion about the need to aggressively address that "problem," and that it would cost a great deal of money, both in Washington State and nationwide. (Ex's 4, 5). Louis Finkel advised the group that all members of the Board would need to contribute significant funds in order to be successful and, further, that staff had determined a way to do this "while shielding individual members" from public "scrutiny." (See e.g., Ex 4, 9). At the February 28, 2013 GMA Board of Directors meeting, the Board voted to approve this plan.

At the February 28, 2013 Board of Directors meeting, the Board also voted to create an account, the Defense of Brand (DOB) account, for the express and specific purpose of shielding the contributions members made from scrutiny and to eliminate filing requirements for contributing members (See e.g., Ex's 1,12). The DOB account would be and was created to hold funds from GMA members to address the GMO strategy and work nationwide and also specifically in Washington. In other words, the account from its inception held funds from a number of companies and was intended to be used to support activities in Washington, in other states, and nationally. Success in Washington was a key part of the GMA's national strategy regarding the GMO issue. (Ex 19).

Invoices were sent to most GMA members beginning in mid-March and continued throughout 2013. (Ex. 20, 23). The invoices contained a memorandum from Linda Bailey, regarding the Washington State initiative; regular updates on the initiative followed and members were informed that their contributions were going to be transferred from the DOB account to the No on I-522 account. (Ex 20). 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. (See, e.g., Ex's 46, 50, 51, and 62).

GMA did not register with the PDC as a political committee until October 17, 2013, when it says it did so "under duress" from the State in this litigation. It has yet to file any subsequent reports, including its final report.

It is within the above context that both parties filed their motions. The court will address them in the order filed, beginning with the motion by the State.

STATE'S MOTION FOR SUMMARY JUDGMENT

Motions for summary judgment are governed by CR 56. The court will grant a motion for summary judgment if the undisputed facts, and reasonable inferences from the undisputed facts, show that there is no disputed issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 787 (2005). A motion for summary judgment should be granted only if reasonable people could reach one conclusion based on the evidence when viewing the facts in the light most favorable to the nonmoving party. *O.S.T. v. BlueShield*, 181 Wn.2d 691 (2014). Bare assertions that a genuine material issue exists do not constitute facts sufficient to defeat a motion for summary judgement. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d, 127 (2104).

The State requests that the court grant summary judgment and find, as a matter of law, that the GMA violated RCW 42.17A as follows:

1) By failing to register as a political committee and report its activities while it was receiving contributions from its members to defeat I-522; and
2) By concealing the true source of the funds it was spending against I-522.

In 1976, the voters of Washington enacted Initiative 276, which declared that the:

> public policy of the state of Washington [is] that (1) political campaign...contributions and expenditures be fully disclosed to the public and ....(10) That the public's right to know of the financing of political campaigns ...far outweighs any right that these matters remain secret and private.

Initiative 276 was codified in Chapter 42.17A RCW. Among other requirements:

> The provisions of this chapter shall be liberally construed to promote complete disclosure of all information respecting the financing of political campaigns...and full access to public records so as to assure continuing public confidence of fairness of elections and government processes, and so as to assure that the public interest will be fully protected . . . .

RCW 42.17A.001.

Chapter 42.17A RCW defines political committees as "any person...having the expectation of receiving contributions or making expenditures in support of, or opposition to, any candidate or ballot proposition." RCW 42.17A.005 (37). A "person" includes organizations and associations. RCW 42.17A.005 (36). Political Committees must disclose contributions and expenditures in support of or opposition to any ballot proposition. RCW 42.17A.005 (37). The term "ballot proposition" includes any "question or measure submitted to voters" or any proposed initiative "from and after the time when the proposition has been initially filed ...before its circulation for signatures." RCW 42.17A.005 (4). An organization qualifies as a political committee "by either (1) expecting to receive or receiving contributions, or (2) expecting to make or making expenditures" for any initiative from the time of its initial filing for signatures to its final submission to the voters. *Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586 (2002); *Utter v. Building Association of Washington*, 182 Wn.2d 398 (2015).

The Washington Supreme Court has previously determined that these disclosure requirements do not restrict free speech—"they merely ensure that the public receives accurate information about who is doing the speaking." *Voters Educ. Comm. V. Public Disclosure Commission, 161 Wn.2d 470, 498 (2007).*

The first question is whether the GMA qualifies as a political committee under the above definitions. An organization has "the expectation of receiving contributions...in...opposition to, any...ballot proposition" (and thus is a political committee) when its members have "actual or constructive knowledge that the organization is setting aside funds to support or oppose a candidate or ballot proposition." Additionally, when funded primarily by membership dues, an organization is a receiver of contributions "if the members are called upon to make payments that are segregated for political purposes and the members know, or reasonably should know, of this political use." *Evergreen Freedom Foundation*, 111 Wn. App. at 602; *Human Life of Washington, Inc. v. Brumsickle*, 624 F.3d 990, 1020 (9th Cir. 2010). Further, an organization is a political committee if it "makes expenditures in support of, or opposition to, any ...ballot

proposition" and one of its primary purposes is political advocacy. RCW 42.17A.005 (37); *Human Life of Washington,* 624 F.3d at 1020.

Applying the above requirements to the undisputed facts in this case, GMA is a political committee. Under the clear terms of RCW 42.17A.205, GMA was required to register with the Public Disclosure Committee (PDC) and report contributions received and expenditures made opposing I-522 according to the schedule prescribed by the PDC. Although the evidence shows that the GMA was planning to campaign against I-522 for some time beforehand, the date the court is finding applies is **February 28, 2013**, the date on which the GMA Board of Directors formally approved the creation of the DOB account to collect and later distribute funds collected from members to defeat the Initiative. The failure of the GMA to so register was a violation of the Public Campaign Finance Laws of Washington. The court notes that the State has declined to ask the court to assign liability on an earlier date.

The State next asserts that the GMA violated RCW 42.17A by concealing the true source of the funds that it received and spent opposing I-522. The Public Campaign Finance Act requires that reports filed with the PDC include the name and address of every person who has made contributions, with a few minor exceptions not relevant here. RCW 42.17A.240 (2). Further,

> No contribution shall be made and no expenditure shall be incurred, directly or indirectly, in a fictitious name, anonymously, or by one person through an agent, relative, or other person in such a manner as to conceal the identity of the source of the contribution or in any other manner so as to effect concealment.

RCW 43.17A.435.

As the Ninth Circuit Court of Appeals has previously stated:

> [C]itizens, acting as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyist' services and how much. Indeed, the provision of this information is particularly critical in the ballot measure context, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. If nothing else, "knowing who backs or opposes a given initiative" will give voters "a pretty good ideas of who stands to benefit..."

Human Life of Washington, Inc. v. Brunsickle, 624 F.3d 990, 1006 (9th Cir. 2010) (internal citations and quotations omitted.)

GMA did not disclose its members who contributed to the DOB account. Although the GMA did report its initial contribution on June 10, 2013, it did not disclose the individual contributors, stating instead that the contributor's name was "Grocery Manufacturers." (Ex. 49). Further, GMA failed to submit several required reports that it would have had to submit had it properly identified itself as a political committee, and those reports would have included and identified its donors. 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."

(Ex 12,) At a minimum, the members had constructive knowledge of this activity. Additionally, many members were on the Board and had actual knowledge as well. The distinction however is not determinative because liability attaches for either actual or constructive knowledge. *Human Life of Washington v. Brumsickle*, 624 F.3d 990, 1020 (9th Cir. 2010). The court therefore holds that, as a matter of law, GMA members had knowledge of the plan to conceal the true source of contributions received and expenditures made in opposing I-522 and therefore GMA violated RCW 43.17A.435.

GMA CROSS MOTION FOR SUMMARY JUDGMENT

Undisputed evidence before the court supports, as noted above, a conclusion that as a matter of law the GMA was required to register as a political committee in Washington and report contributions received and expenditures made in opposing I-522. In its cross motion for summary judgment GMA argues, however, that the State has unconstitutionally singled it out for enforcement, and that the Public Campaign Finance law as applied to it is unconstitutionally vague. Both of these arguments fail.

GMA appears to argue that this court should apply a strict scrutiny analysis to its constitutional claims. However, courts use an exacting scrutiny standard in these cases. *See e.g., John Doe No 1 v. Reed*, 561 U.S. 186, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010). Under this test there must be a "substantial" relation between the disclosure requirement and a sufficiently important governmental interest. *Reed*, 130 S.Ct. at 2818. And Washington disclosure laws have been found to pass this test. *Human Life of Washington, Inc.*, 624 F.3d 990; *Utter*, 182 Wn.2d 398. There is no basis for this court to rule otherwise in this case and this court will not accept the invitation to do so.

A law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited or is so indefinite as to allow arbitrary and discriminatory enforcement." *Human Life of Washington, Inc.*, 624 F.3d at 1021. If a person of ordinary intelligence can understand what the law proscribes, notwithstanding some possible areas of disagreement, the law is sufficiently definite. *City of Spokane v. Douglass*, 115 Wnd.2d 171, 179 (1990).

In fact, courts have already found that the Washington public campaign finance laws are sufficiently clear. (See, e.g., *Voter's Education Committee*, 161 W.2d at 48).

RCW 42.17A requires the GMA to register and report. Simply because the GMA chose to create the DOB account and commingle funds does not make the law unclear. If there is any confusion, it results from GMA's actions in creating the DOB account. The court will not permit intentional acts of the GMA to create a situation in which an otherwise clear law is unconstitutional as applied to it because its own actions created confusion. GMA had the expectation of receiving contributions from its members, and in fact received and then spent those contributions opposing I-522. These actions violated the law.

First, as asserted by the State and as seen from a reading of the applicable provisions, the requirements of the statute are quite clear: political committees must report contributions received and expenditures made, and do so in a certain specified time frame. In this case, the undisputed facts show that the GMA created a political committee for the purpose of defeating

I-522, and received contributions in the amount of approximately $11,000,000.00, yet did not disclose the existence of the committee to the PDC, did not file reports showing the full amount of the contributions, and did not file reports showing the expenditures made. Each of these actions and inactions constituted violations of Chapter 42.17A RCW.

The evidence submitted by GMA (Ex 4 to Mr. Millstein's Declaration in support of the GMA's Reply Brief on its Cross Motion for Summary Judgement) along with evidence submitted by the State is illuminating. Ex. 20 contains excerpts of the December 10, 2015 deposition of Evelyn Lopez, of the PCD. In response to questions by Mr. Rein, she states, beginning at p. 201:

> [A]s a practical matter, having the entire Grocery Manufacturers Association be a political committee is problematic both for the GMA and for the State....that was the reason that the GMA...set up this Defense of Brands Account, so that there would be a place to put money that could be used for political purposes. Similar to what we see when you have other associations or unions setting up a PAC...but I will say that constantly changing the names of what we're referring to is concerning. That that is not helpful when you're trying to have an open process and a lot of public disclosure....GMA should have registered as a political committee in the State of Washington in early 2013 when it began its efforts to engage in political activity in opposition to I-522.

During argument, counsel for the GMA asserted that, as applied to the GMA, the State's interest in disclosure of its members "is less because the voters know what interest the trade association represents. [The GMA is] very public. The GMA has been around for over 100 years. The voters knew." The facts, and the reasonable inferences drawn from the facts, however, require a different conclusion. 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. As the GMA Board minutes state: "By doing so, state **GMO related spending will be identified as coming from GMA, which will provide anonymity and eliminate state filing requirements for contributing members**. (Ex 12, emphasis added. See also Ex's 6, 9, 10). That is a direct violation of the statute.

As the Court said in *Human Life of Washington, Inc.*:

> In the ballot initiative context, where voters are responsible for taking positions on some of the day's most contentious and technical issues, voters serve as legislators while interest groups and individuals advocating a measure's defeat or passage act as lobbyists. As a result of this process, average citizens are subjected to advertising blitzes of distortion and half-truths and are left to figure out for themselves which interest groups pose the greatest threats to their self-government.

624 F.3d at 1007.

In enacting the Public Campaign Finance Laws, the people of Washington directed that they be interpreted liberally, to promote transparency and full disclosure to the voters. RCW 42.17A. By its actions in creating the DOB account, the GMA violated the spirit and letter of Washington's Public Campaign Finance Laws. The laws are not unconstitutional as applied to the GMA. The court denies GMA's cross motion for summary judgement.

PENALTIES

The State asks the court to find that the GMA intentionally violated the Public Campaign Finance laws and to impose a significant penalty, and triple that, because the conduct of the GMA was so egregious. GMA responds that if the court finds a violation, it cannot find an intentional violation of the law. Rather, it asserts that its conduct, while intending to shield its members from public scrutiny, was not an intentional violation of the law. The distinction is significant in that an intentional violation of the law allows the court to impose treble damages.

The standard the court applies in determining what penalties might be appropriate for a violation of the Public Campaign Finance laws is found at RCW 42.17A.765 (5):

> In any action brought under this section, the court may award to the state all costs of investigation and trial, including reasonable attorneys' fees to be fixed by the court. **If the violation is found to have been intentional, the amount of the judgment, which shall for this purpose include the costs, may be trebled as punitive damages.**

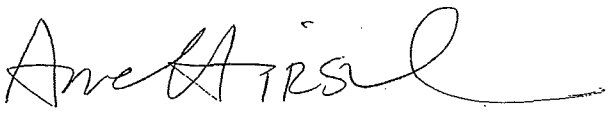
(Emphasis added.)

In the context of a summary judgment motion, the court is required to interpret the facts, and the reasonable inferences from the facts, in favor of the nonmoving party. CR 56(c); *Owen,* 153 Wn.2d at 787. In this case, Mr. Finkel and Ms. Bailey advised the GMA Board that if they structured an account in a certain way the individual members of the GMA would be "shielded" from public scrutiny and would avoid reporting requirements. (Ex's 1, 2 and see eg, 9).

There is some evidence that GMA believed that such concealment was appropriate under Washington law. GMA consulted with attorneys on this issue, including a staff attorney who specialized in campaign finance law. (Ex 1, Declaration of Millstein, at Ex. 3) Pamela Bailey explained that she thought this was legal. *Id.* She wrote in talking points that the DOB fund is "legal" and would "protect you as companies from any disclosure requirements." (Millstein Decl., Ex. 11.) Staff member Louis Finkel also seemed to believe this concealment was legal based on the involvement of attorneys in the project. (Ex 2; Millstein Decl., Ex. 2.) Taking the evidence in the light most favorable to the non-moving party, GMA in this case, there is a question of material fact regarding whether the GMA intentionally violated the provisions of RCW 42.17A. The matter of determining the amount of penalties under RCW 42.17A.765 (5) therefore should not be resolved on summary judgment.

A copy of this letter opinion is being filed with the Clerk. The parties should either present an agreed order incorporating the terms of the court's letter opinion or schedule a time for hearing on presentation on the Court's Friday civil motion calendar.

Very Truly Yours,



Anne Hirsch, Judge
Thurston County Superior Court

cc: Thurston County Clerk for filing