

1 ☐ EXPEDITE

2 ☐ No Hearing Set

3 ☒ Hearing is Set:

4 Date: Friday, February 19, 2016

5 Time: 9:00 a.m.

6 The Honorable Anne Hirsch

7 **STATE OF WASHINGTON**
8 **THURSTON COUNTY SUPERIOR COURT**

9 STATE OF WASHINGTON,

10 Plaintiff,

11 v.

12 GROCERY MANUFACTURERS
13 ASSOCIATION,

14 Defendant.

NO. 13-2-02156-8

STATE OF WASHINGTON
/DEFENDANT FERGUSON'S
MOTION FOR SUMMARY
JUDGMENT

15 GROCERY MANUFACTURERS
16 ASSOCIATION,

17 Plaintiff,

18 v.

19 BOB FERGUSON, ATTORNEY
20 GENERAL,

21 Defendant.

NO. 14-2-00027-5

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I. INTRODUCTION

In 2012, members of the Grocery Manufacturers Association (GMA)—such as PepsiCo, Kraft, and Coca Cola—spent millions of dollars to defeat a California ballot measure that would have required labeling of genetically modified foods. When Washington considered a similar measure in 2013, GMA members again wanted to spend heavily to defeat it. But many GMA members had faced criticism for their role in the California election, so they sought to “shield” their identities in Washington. To that end, GMA decided that it would serve as a front for its members’ spending, assessing them special dues and using their money—under GMA’s name—to defeat Washington Initiative 522.

Their plan largely worked. For months, GMA members were able to funnel millions of dollars to the No on 522 campaign without publicly disclosing their involvement; indeed, GMA encouraged them to deny that they were funding the campaign.

But their plan was a flagrant violation of Washington campaign disclosure laws. Our state has long required disclosure of campaign contributions and expenditures so that voters can make informed choices. GMA flouted these rules in at least two ways: (1) by failing to register a political committee and report its activities even as it was receiving contributions from its members to defeat Initiative 522; and (2) by concealing the true source of funds it was spending against Initiative 522. These violations deeply undermined the purpose of state laws.

In this action, the Attorney General seeks to hold GMA accountable. The undisputed facts described below demonstrate that GMA repeatedly and intentionally violated State law. GMA has no valid statutory or constitutional defense. The Court should grant summary judgment for the State and impose a penalty commensurate to GMA’s egregious conduct.

II. OVERVIEW OF WASHINGTON CAMPAIGN FINANCE DISCLOSURE LAW

Washington voters expect transparency in their campaigns and elections. In 1972, voters enacted Initiative 276, declaring that it is “the public policy of the state of Washington:

1 (1) That political campaign . . . contributions and expenditures be fully disclosed to the public
2 and . . . (10) That the public's right to know of the financing of political campaigns . . . far
3 outweighs any right that these matters remain secret and private." RCW 42.17A.001.

4 The State enforces the disclosure laws to ensure that political campaign committees
5 comply. These laws "seek to ferret out those whose purpose is to influence the political
6 process and subject them to the reporting and disclosure requirements of the act in the interest
7 of public information." *State v. (1972) Dan J. Evans Campaign Comm.*, 86 Wn.2d 503, 508,
8 546 P.2d 75 (1976). The "requirements do not restrict political speech – they merely ensure
9 that the public receives accurate information about who is doing the speaking." *Voters Educ.*
10 *Comm. v. Pub. Disclosure Comm'n*, 161 Wn.2d 470, 498, 166 P.3d 1174 (2007).

11 The law requires disclosure and reporting by "political committees," which it defines as
12 "any person . . . having the expectation of receiving contributions or making expenditures in
13 support of, or opposition to, any candidate or ballot proposition." RCW 42.17A.005(37).
14 A "person" under the Act is broadly defined to include organizations of all sorts, including
15 "association[s]." RCW 42.17A.005(36); *see also State ex rel. Evergreen Freedom Found. v.*
16 *Wash. Educ. Ass'n (EFF)*, 111 Wn. App. 586, 602, 49 P.3d 894 (2002) (political committee
17 includes person or organization). Ballot proposition includes any "question or measure
18 submitted to voters" or any proposed initiative "from and after the time when the proposition
19 has been initially filed with the appropriate election officer of that constituency before its
20 circulation for signatures." RCW 42.17.005(4); RCW 29A.04.091. Thus, relevant here, an
21 organization qualifies as a political committee "by either (1) expecting to receive or receiving
22 contributions, or (2) expecting to make or making expenditures" for any initiative from the
23 time of its initial filing for signatures to its final submission to the voters. *EFF*, 111 Wn. App.
24 at 598; *see also Utter v. Bldg. Indus. Assn. of Washington*, 182 Wn.2d 398, 341 P.3d 953
25 (2015).

1 Case law has applied and clarified the political committee definition. Under the first
2 prong, an organization has “the expectation of receiving contributions . . . in support of, or
3 opposition to, any candidate or ballot proposition,” when its members have “actual or
4 constructive knowledge that the organization is setting aside funds to support or oppose a
5 candidate or ballot proposition.” *Human Life of Washington, Inc. v Brumsickle*, 624 F.3d 990,
6 1020 (9th Cir. 2010) (citing *EFF*, 111 Wn. App. at 602); *see also Utter*, 182 Wn.2d at 416-17.
7 When an organization is funded primarily by membership dues, it is a “receiver of
8 contributions” “if the members are called upon to make payments that are segregated for
9 political purposes and the members know, or reasonably should know, of this political use.”
10 *EFF*, 111 Wn. App. at 602 (emphasis added). That is, membership payments become
11 “political ‘contributions’ if the organization’s members intend or expect their dues to be used
12 for electoral political activity.” *Id.*

13 Under the second prong, an organization is a political committee if it “mak[es]
14 expenditures in support of, or opposition to, any candidate or ballot proposition,”
15 RCW 42.17A.005(37), and “one of its primary purposes is political advocacy.” *Human Life of*
16 *Washington, Inc.*, 624 F.3d at 1020; *see also Utter*, 182 Wn.2d at 427. The “primary purpose”
17 limitation “ensures that the electorate has information about groups that make political
18 advocacy a priority, without sweeping into its purview groups that only incidentally engage in
19 such advocacy.” *Id.* at 1011.

20 Once an organization’s conduct triggers the definition of political committee, it must
21 register a political committee with the Public Disclosure Commission (PDC) and publicly
22 report contributions received and expenditures made on a fixed schedule throughout a given
23 election cycle. RCW 42.17A.205(1) requires political committees to file a statement of
24 organization with the PDC within two weeks after organizing or within “two weeks after the
25 date when it first has an expectation of receiving contributions or making expenditures in any
26 election campaign, whichever is earlier.” Within this same time frame, a political committee

1 must also appoint a treasurer (RCW 42.17A.210(1)) and open a designated bank account in
2 which political contributions must be deposited. RCW 42.17A.215. On the day a treasurer is
3 identified, a political committee must file a report of all contributions received and
4 expenditures made prior to that date. RCW 42.17A.235. All deposits must be made within
5 five days of receiving the contribution. RCW 42.17A.220(1). The political committee must
6 thereafter file regular reports with the PDC of all contributions received and expenditures
7 made. RCW 42.17A.235, .240. To ensure that the true source of all contributions and
8 expenditures is transparent to the public, RCW 42.17A.435 prohibits concealment of these
9 transactions. *See State v. Permanent Offense*, 136 Wn. App. 277, 150 P.3d 568 (2006), *review*
10 *denied*, 162 Wn.2d 1003 (2007).

11 III. STATEMENT OF FACTS

12 A. GMA's Organizational Structure

13 GMA is a trade association, whose members include "America's leading food,
14 beverage, and consumer products" companies, including manufacturers and suppliers. Ex. 1
15 (Bailey Dep.) at 9.¹ GMA members pay general membership dues for GMA operations and,
16 on occasion, special or voluntary assessments. *Id.* at 17-18, 19, 21.

17 B. 2012 California Proposition 37

18 In 2012, California voters rejected an initiative (Proposition 37) that would have
19 required labeling of genetically modified or engineered food. Ex. 2 (Finkel Dep.) at 24. GMA
20 opposed this initiative. Ex. 1 (Bailey) at 25-26. GMA hired a campaign consultant, Winner &
21 Mandabach, to mount the opposition through a political committee, No on Prop 37. Ex. 1
22 (Bailey) at 87-88. GMA's members and other companies ultimately spent \$43 million in
23

24
25 ¹ The relevant portions of deposition testimony relied upon by the State are attached to the Second
26 Declaration of Linda Dalton as exhibits. They are cited using the deponent's name and the related page number.
Any document cited by the State is likewise attached and referenced by the Exhibit number.

1 individual company contributions to No on Prop 37. Ex. 3 (Basu Dep.) at 28-29; Ex. 1
2 (Bailey) at 30-31.

3 Following the California election, some of GMA's member companies faced
4 significant criticism for their role in funding the opposition to Proposition 37. Ex. 1 (Bailey) at
5 31-32, 95-96, 146-47. Accordingly, as early as August of 2012, GMA began considering
6 alternative ways to address subsequent federal and state genetically modified organisms
7 (GMO) labeling efforts, including other state initiatives. *Id.* at 31-34; Ex. 3 (Finkel) at 24-25.

8 **C. Initiative 522**

9 On June 29, 2012, Chris and Leah McManus submitted Initiative 522 to the
10 Washington Secretary of State as an initiative to the legislature. First Amended Complaint
11 (First Am. Compl.) 2 ¶ 6; GMA Answer to First Am. Compl. 2 ¶ 6. Initiative 522 would have
12 "require[d] most raw agricultural commodities, processed foods, and seeds and seed stocks, if
13 produced using genetic engineering as defined, to be labeled as genetically engineered when
14 offered for retail sale." *Id.* After the legislature took no action, Initiative 522 appeared on the
15 November 5, 2013 General Election ballot. First Am. Compl. 3 ¶ 7; GMA Answer to First
16 Am. Compl. 2 ¶ 7.²

17 **D. "Defense Of Brand Strategic Account"**

18 Following Proposition 37's defeat, GMA staff and its Board of Directors began
19 developing short and long-term strategies to oppose any mandatory labeling on products
20 containing GMOs. Exs. 4, 5. As early as November 2012, if not before, GMA's strategy
21 included defeating "the possible Washington state ballot measure" and "developing a plan and
22 budget for fighting it if need be past January." Exs. 6, 7. GMA, however, had an insufficient
23 budget to address the anti-labeling efforts, including opposing state ballot measures. Ex. 1
24

25 ² See also Office of the Secretary of State, November 5, 2013 General Election Results, Measures,
26 <http://results.vote.wa.gov/results/20131105/Measures.html>.

1 (Bailey) at 35. Further, GMA members “wanted predictability” in funding future opposition to
2 GMO labeling. *Id.* at 35-36.

3 Accordingly, GMA staff member Louis Finkel developed a fund “that would cover all
4 of these projects, which would include a ballot initiative in Washington State.” *Id.*; *see also id.*
5 at 40. This fund would provide a reliable funding source for GMA and provide certainty to
6 GMA’s members in knowing how much money it was going to cost them. Ex. 2 (Finkel) at
7 32-33. The fund would also allow GMA to be identified as the primary funder of these
8 projects, thus shielding member companies from attack. Ex. 1 (Bailey) at 42-43; Ex. 2 (Finkel)
9 at 32-33.

10 During the January 2013 GMA Board meeting, GMA staff presented the political
11 landscape of GMO labeling issues to the Board. Exs. 4, 5, 8, 9. During the GMA Board’s
12 Executive Committee meeting, Mr. Finkel outlined “continuing challenges” on GMO
13 developments. As noted in the Executive Committee’s meeting minutes:

14 To successfully oppose ballot measures and state legislation and advance a
15 long-term plan to manage this issue, Mr. Finkel explained that GMA will need
16 to develop a funding methodology that provides significant financial support.
17 Mr. Finkel described the potential benefits of establishing a multiple use fund
18 for this purpose that will provide greater budgeting certainty to the companies
while also shield (sic) individual companies from public disclosure and possible
criticism...Mr. Finkel then reviewed the status of potential GMO labeling
legislation and ballot initiatives in several states.

19 Ex. 9. Further, as stated in the GMA Board’s Food & Beverage Products Breakout Session
20 meeting minutes,

21 The Board agreed that engaging in the State of Washington and reviewing long-
22 term strategies were necessary. The Board understood that advancing a strategy
23 that includes opposition to state legislation and ballot measures, consumer
24 research to support a uniform transparency program, and efforts to advance
25 federal preemption legislation will be costly and require additional funding
26 support from the membership...Mr. Finkel then described to the Board an effort
underway to create a strategic account at GMA for “Defense of Brands”. This
account would allow for greater predictability to the membership on funding
needs while shielding individual companies from being disclosed and ultimately
criticized for opposing ballot measures.

1 Ex. 10; *see also* Ex. 11. Further, the GMA Board's Finance and Audit Committee meeting
2 minutes reflect, "The [Government Affairs Council's Defense of Brand] proposal supports
3 developing a fund of member GMO contributions in advance of forming a state campaign. *By*
4 *doing so, state GMO related spending will be identified as having come from GMA, which will*
5 *provide anonymity and eliminate state filing requirements for contributing members.*" Ex. 12
6 (emphasis added).³

7 Ultimately, the GMA Board directed GMA staff to develop a plan and budget for a
8 comprehensive approach to address these issues. Ex. 11. It directed staff to conduct polling in
9 Washington State "to determine the viability of a campaign to defeat I-522," Exs. 4, 5 at 301,
10 and to "begin preparations for a campaign . . . to defeat I-522." *Id.* The GMA Board also
11 discussed the cost for a campaign to defeat I-522 and GMA members' "appetite to mount a
12 campaign to defeat the Washington State Measure." Ex. 5. The GMA Board expressed "a
13 preference for GMA to be the funder of such efforts, rather than individual companies."
14 Ex. 13.

15 Following the January 2013 Board Meeting, GMA staff began preparing to address the
16 "Washington Ballot Measure." Ex. 14. GMA again engaged campaign consultant Winner &
17 Mandabach to assist it in determining how much money would be needed to oppose Initiative
18 522. Ex. 1 (Bailey) at 170, Ex. 15. GMA also intended to initiate polling, develop a coalition,
19 examine possible initial campaign expenditures, and develop a side-by-side of the California
20 and Washington campaigns. Ex. 14. "Following the results from the polling and assuming the
21 polling results indicate that an aggressive campaign can result in electoral victory," GMA staff
22 informed the GMA Board that it intended to begin "preparations for a campaign, in partnership
23 with biotech companies, to defeat the Washington State Ballot measure." Ex. 13.

25 ³ GMA's Government Affairs Council was comprised of senior government affairs offices or officials of
26 GMA member companies by invitation. Ex. 2 (Finkel) at 106.

1 GMA staff also began developing the budget and funding formula to be used in
2 assessing its member contributions to the “Defense of Brands” fund. Exs. 16, 17. The formula
3 would be based “on member sales as a percentage of all members’ sales.” Ex. 16. GMA staff
4 also intended to send the full account assessment to all Board members and a few non-Board
5 members, but would not assess any GMA Board member who said upfront that they “are not
6 in” for Washington State. *Id.* GMA staff determined that, while 2014 and 2015 member
7 contribution numbers were “clearly still estimates,” 2013 numbers were fixed, in part, because
8 “[w]e know we have a campaign in Washington state.” Ex. 17; *see also* Ex. 18 (“The
9 contingency was included to ensure that if there are unforeseen costs such as more money
10 needed in Washington state, more research, etc. we would not need to go back to the
11 membership for more money—giving them the certainty they requested.”).

12 The following month, GMA CEO Bailey formally proposed to the GMA Board a
13 separate account for GMA’s efforts on GMO labeling, which included the “fight Washington
14 State Ballot Measure” in 2013. Ex. 13. This proposal included establishing a separate GMA
15 fund that would “allow for greater planning for the funds to combat current threats and better
16 shield individual companies from attack that provide funding for specific efforts.” *Id.* The
17 fund, identified as the “Defense of Brand Strategic Account,” was intended to allow GMA—
18 rather than its member companies—to be identified as the source of funding. Ex. 13.

19 On February 28, the GMA Board approved creation of the Defense of Brands Strategic
20 Account (Account). Ex. 19; Ex. 1 (Bailey) at 114, 165-67. During the conference-call meeting
21 of the Board, Ms. Bailey and Mr. Finkel described the plans for establishing the fund and the
22 “advantages of the funding mechanism—a *significant one being the ability to identify only*
23 *GMA as the contributor.*” Ex. 19 (emphasis added).

24 The Board discussed questions about whether the money might be segmented,
25 for example whether funding efforts in Washington could be considered
26 separately. Mr. [Kendall] Powell [Chairman of the Board] and Ms. Bailey
noted that if the referendum in Washington were to pass, it could make success
on other fronts very unlikely to succeed. As a consequence, *Washington was*

critical to the success of the overall objective, but the overall objective remained the strategic goal.

Ex. 19 (emphasis added). The Board voted to approve the plan. *Id.*⁴

On March 15, 2013, GMA sent its first Account invoice to GMA Board members and certain nonmembers as planned. Ex. 20. GMA, however, deviated from its normal process for invoicing members. Ex. 1 (Bailey) at 125. GMA staff included a memo from Ms. Bailey and directed it to each company's CEO so that each had the necessary background for the invoice. Ex. 1 (Bailey) at 125-26. In addition to describing the Account's purpose, Ms. Bailey provided an "Update on Washington State," including GMA's efforts to "assess the viability of a campaign to defeat I-522" and the results of GMA's polling completed by Winner & Mandabach. Ex. 20. She also promised updates to GMA members about "our progress on the Washington State efforts." *Id.* The March Account invoice characterized the amount GMA billed its members as a "contribution" to GMA's 2013 Defense of Brands Strategic Account and as the first of two installments with a due date of April 15, 2013. *Id.* When later questioned by a GMA Board member about how monies from the Account would be spent, GMA responded, in relevant part, as follows:

As you may have seen in the materials provided to the Board on February 25th, the \$17.3 budget for 2013 is built around 4 primary focus areas:

1. Opposition to State Efforts—This consumes \$11.3 million of the budget and includes \$10 million for the Washington State ballot measure, \$1 million, for a legal challenge in the event a state was to pass legislation, and \$200,000 in additional state consulting resources to oppose the legislation pending in 20 states.

Ex. 21.

On August 12, 2013, GMA sent its second invoice to the same GMA members for the 2013 Defense of Brands Strategic Account, again labeling the installment as a "contribution" to the Account. Ex. 22. While most of the invoiced members paid GMA's special assessment

⁴ GMA's non-board members received notice of this information through the minutes prepared by GMA's general counsel. Ex. 1 (Bailey) at 123.

1 as per the invoices, some did not pay at all and some restricted the use of their funds.
2 See, e.g., Ex. 23. For instance, when Kraft Foods remitted its full payment, it specifically told
3 GMA that “this contribution is unrestricted, *except that none of the funds may be expended in*
4 *connection with the ‘No on 522’ campaign in Washington State.*” Ex. 24 (emphasis added).
5 By December 2013, GMA had collected \$14,283,140.00 in contributions from its members to
6 the Account. Ex. 23. GMA contributed \$11,000,000 of those Account funds to the No on 522
7 committee, which equates to 77% of the Account’s total funds for 2013. *Id.*

8 Once the GMA Board approved establishing the Account, GMA staff made regular
9 reports to the Board on the progress of the No on 522 campaign (Exs. 25-31; Ex. 1 (Bailey) at
10 157-58), and regular reports on expenditures from the Account to the GMA Finance and Audit
11 Committee. *Id.* The GMA Board understood that funds from the Account would be spent in
12 opposition to Initiative 522 and that GMA staff retained control over how the funds were
13 disbursed. Ex. 1 (Bailey) at 165-67.

14 **E. GMA Contributions To The No On 522 Committee From Its Defense Of Brands**
15 **Strategic Account**

16 GMA, primarily through Louis Finkel, actively engaged in the formation, strategy, and
17 funding of the No on 522 committee. For example, as early as February 2013 and throughout
18 the entire campaign, Mr. Finkel participated in discussions regarding committee staff and
19 consultants (Exs. 32, 33); retained campaign consultant Winner & Mandabach for the
20 opposition to Initiative 522 (Exs. 34, 15); signed contracts on behalf of the committee (Ex. 35);
21 reviewed preliminary budgets (Exs. 36-37); participated in committee working group calls
22 (Ex. 38); and approved each No on 522 committee expenditure (Ex. 39; Ex. 40 (Clarke)
23 at 21, 25). Mr. Finkel also coordinated with Winner & Mandabach on the timing of GMA’s
24 contributions to the committee based on the campaign’s needs and other contributors. See,
25 e.g., Exs. 41-45; Ex. 2 (Finkel) at 64-67, 72-73.
26

1 In late April 2013, GMA anticipated making its first contribution to No on 522. Ex. 46.
2 Accordingly, GMA provided its members with initial press response protocols and promised
3 that members would be notified when the funding would occur. *Id.*; Ex. 47. As it told the
4 GMA Board on April 22, 2013:

5 *In Washington State*, we are on track on our aggressive campaign to defeat the
6 ballot measure. Our consumer research in Washington State has confirmed the
7 messages and strategies that should enable us to succeed. We have again
8 retained the firm Winner & Mandabach (our firm in California last year) to
9 manage the day-to-day campaign program; we are already engaged in pursuit of
10 earned media opportunities with three favorable editorials in Washington
newspapers; and are well on our way to building a strong, active coalition. In
the coming weeks, GMA will begin spending money on the campaign which
will likely increase the public scrutiny. We have already been working with
your communications and government affairs teams to coordinate media and
consumer inquiries.

11 *Id.* (emphasis in original). A few weeks later, on May 7, 2013, GMA notified its members that
12 “tomorrow, GMA will transmit funding for the first time to the campaign in Washington state.
13 We will send \$472,000. The funding will be reported in the next campaign filing which will be
14 submitted and public on June 10th. *As a reminder, GMA will be the disclosed funder.*” Ex. 48
15 (emphasis added). The next day, GMA submitted its first contribution of \$472,500.00 to the
16 No on 522 committee, which the committee then reported on its June 10, 2013 state filing as its
17 first contribution from GMA.⁵ Ex. 49.

18 Shortly before the No on 522 committee reported receipt of GMA’s first contribution,
19 GMA provided its Board members with “media guidance” regarding the campaign. Ex. 50.
20 GMA staff stated:

21 The Washington campaign finance situation differs significantly from that in
22 California during the “No on Prop 37” campaign. *Virtually all of the financial*
23 *support for “No on I-522” will come from GMA, not individual companies, and*
24 *under Washington State law, the campaign will not have to report GMA’s*
members on campaign finance reports or in any campaign advertising.

25 ⁵ As a registered political committee in Washington, the No on 522 committee regularly reported the
26 contributions it received and expenditures it made in opposition to Initiative 522. *See* RCW 42.17A.235, .240.

1 *Id.* (emphasis added). Regarding possible questions on GMA member companies' "position on
2 the ballot initiative" or their "financial support," GMA suggested the following response:

3 Q: Is your company providing funding to the "No on I-522" campaign in
4 Washington State?

5 A: No. Company X is a member of the Grocery Manufacturers Association
6 and supports the work the association does on product safety, health and
7 wellbeing, sustainability and a host of other issues. We support GMA, its
8 position on genetically modified ingredients and the association's opposition to
9 I-522 in Washington State. GMA's views and financial support for the "No on
10 I-522" campaign reflect the views of most food and beverage manufacturers in
11 the United States.

12 *Id.* When drafting the initial questions, GMA staff rejected providing GMA Board members
13 with a statement that GMA "uses the funds at our discretion" finding that it "*will lead the press*
14 *and or NGO groups right where we don't want them to go—meaning, 'are you assessing you*
15 *[sic] members, or do you have a 'secret' fund of some kind'.*" Ex. 51 (emphasis added).

16 GMA then made the following additional contributions to the No on 522 political
17 committee from the Account: (a) August 23, 2013 - \$1,750,000⁶; (b) September 27, 2013 -
18 \$5,000,000; (c) October 24, 2013 - \$2,900,000; and (d) October 25, 2013 - \$877,500.
19 Exs. 52-55. GMA spent \$11,000,000 of the total collected from its members on contributions
20 to the No on 522 committee.⁷ Ex. 23. All of the funds from GMA members' contributions to
21 the Account were received by GMA prior to GMA registering a political committee in
22 Washington State. *Id.*

23 **F. GMA's Failure To Comply With Washington's Campaign Finance Laws**

24 The State commenced this enforcement proceeding against GMA on October 16, 2013,
25 charging GMA with failing to timely register and properly report a political committee, as well
26 as concealing the source of the funds it used to contribute to the No on 522 committee.
27 Compl. at 8 (Claims ¶¶ 1-5). Despite soliciting and receiving millions of dollars between

⁶ The day before the contribution, GMA gave notice to its members and re-sent its "media guidance" to the companies. Ex. 62.

⁷ GMA also paid for polling expenses on behalf of the No on 522 political committee that were reported late. Ex. 63.

1 March and October, 2013, GMA did not register the Account as a political committee until
2 October 17, 2013. Ex. 56. On October 18, 2013, GMA initially disclosed \$7,222,500 in its
3 filings with the PDC as the total amount of contributions its Account had collected from its
4 members as of that date. Ex. 57. It later reported another \$2.9 million that it had raised
5 between March and October 2013 and then contributed to the No on 522 committee after
6 October 18. Ex. 58. GMA last reported receiving contributions on October 29, 2013. Ex. 59.
7 GMA has not filed a closing report for the committee it registered and did not report the full
8 amount of contributions it received into the Account. *Compare* Ex. 60 to Ex. 61 to Ex. 23.

9 IV. ISSUES PRESENTED

- 10 **A. Was GMA Required To Register A Political Committee Subject To Washington**
11 **State's Disclosure Requirements?**
- 12 **B. Did GMA Engage In Prohibited Concealment When It Failed To Disclose The True**
Source Of The Moneys It Received And Used To Oppose Initiative 522?
- 13 **C. Once The Court Determines That GMA Violated State Law By Failing to Register**
14 **and Report Contributions and Expenditures From Its Defense of Brands Strategic**
Account, What Penalty Should Be Assessed, Including Attorneys Fees and Costs?

15 V. STANDARD OF REVIEW FOR RULE 56 MOTION

16 Summary judgment is proper if (1) there is no genuine issue of material fact,
17 (2) reasonable persons could reach but one conclusion, and (3) the moving party is entitled to
18 judgment as a matter of law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065
19 (2000); CR 56(c); *see also Voters Educ. Comm.*, 161 Wn.2d at 481. A material fact is one
20 upon which the outcome of the case depends, in whole or in part. *Morris v. McNicol*,
21 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

22 The moving party bears the initial burden of demonstrating the absence of a genuine
23 issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d
24 265 (1986). Once the moving party has met its burden, the non-moving party must produce
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1 concrete evidence that shows genuine disputes of fact; it may not rely on allegations.
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 91 L. Ed. 2d 202
3 (1986).

4 Here, there are no material disputed facts about GMA's creation and operation of its
5 Defense of Brands Strategic Account, including its contributions to the No on 522 committee.
6 Additionally, no facts are in dispute about GMA's intention to operate the Account to conceal
7 the true source of the contributions to the No on 522 committee. Applying the law to these
8 undisputed facts, summary judgment in favor of the State is appropriate.

9 VI. ARGUMENT

10 A. GMA, Having Solicited, Received, And Retained Money From Its Members To 11 Oppose Initiative 522, Was Required To Register A Political Committee

12 1. GMA Formed A Political Committee As A Receiver Of Contributions

13 State law obligated GMA to register its Defense of Brands Account as a political
14 committee because GMA solicited and received contributions into the Account from its
15 members for the express purpose of opposing Initiative 522 during the 2013 general election.

16 As provided above, a political committee is formed when one of the following two
17 "prongs" is met: (1) a person has the expectation of receiving or receives political
18 contributions, or (2) a person makes or expects to make expenditures to support or oppose
19 candidates or ballot propositions. *Utter*, 182 Wn.2d at 413; (1972) *Dan J. Evans Campaign*
20 *Comm.*, 86 Wn.2d at 509; RCW 42.17A.005(39). Under case law, an organization has "the
21 expectation of receiving contributions...in support of, or opposition to, any candidate or ballot
22 proposition" when its members have "actual or constructive knowledge that the organization is
23 setting aside funds to support or oppose a candidate or ballot proposition." *Human Life of*
24 *Washington, Inc.*, 624 F.3d at 1020; *see also Utter*, 182 Wn.2d at 416-17. That is, membership
25 payments become "political 'contributions' if the organization's members intend or expect
26

1 their dues to be used for electoral political activity.” *EFF*, 111 Wn. App. at 602. GMA’s
2 actions plainly qualify the Account as a political committee under this standard.

3 GMA had the expectation of receiving contributions by at least February 28, 2013,
4 when its Board approved the GMA staff plan to fund opposition to Initiative 522 using the
5 Account. The undisputed evidence shows that in late 2012, GMA knew that it would likely be
6 opposing a Washington State measure on behalf of its members. *See, e.g.*, Exs. 4, 5, 6, 7. In
7 January 2013, GMA specifically informed its Board that it intended to begin preparing for the
8 campaign to “defeat the Washington State Ballot measure.” Ex. 13. Its Board approved
9 creation of the Account in February specifically to oppose the looming Washington initiative,
10 finding that “engaging in Washington” was “necessary.” Ex. 11.

11 GMA billed GMA members to pay for the opposition effort, thus again creating the
12 expectation of receiving contributions. Exs. 20, 22. Additionally, Ms. Bailey took the unusual
13 step of sending the Account invoices with a memo from her directly to each member’s CEO,
14 explaining the Account’s strategy and specifically referring to the Washington ballot measure.
15 Ex. 1 (Bailey) at 113-14; Ex. 20. GMA members paid the invoices knowing full well that
16 GMA would be spending the money to oppose the 2013 ballot measure in Washington State.
17 Exs. 11, 20-24. As GMA staff explained to at least one Board member, \$10 million of the
18 Account’s \$11.4 budget was for the Washington State Ballot measure. Ex. 21. All the
19 contemporaneously-created records demonstrate that GMA and its contributing members knew
20 that money given to the Account would be spent on Washington state campaign activity. No
21 matter how GMA tries to argue against it, its conduct in creating the Account created a
22 political committee in Washington.

23 As reflected in its Answer, GMA may argue that, because it structured the Account to
24 have “mixed” purposes and because GMA staff retained exclusive authority to determine how
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1 the funds would be spent, the Account was not a political committee.⁸ This argument is
2 meritless, as Washington law draws no such distinction. If an organization has the expectation
3 of receiving or does in fact receive political contributions to support or oppose a state ballot
4 measure, then it is a political committee regardless of whether the organization may choose to
5 spend some of the money on other purposes. RCW 42.17A.005(39). To accept GMA's
6 argument would create a loophole through which transparency in Washington would be
7 destroyed. Every organization with an eye towards hiding its contributors' identities would
8 simply claim at least one unrelated activity and then say it was not a political committee. The
9 Court should outright reject such circumvention, especially without a legal basis of support.

10 GMA also asserts that there is no governmental interest in GMA's other financial
11 transactions unrelated to the Washington ballot measure, so disclosing all the Account
12 contributions or expenditures serves no purpose.⁹ Again, GMA is wrong. The point of
13 disclosure is to provide the public information about money coming into a political committee
14 and money available to that political committee at any point during a campaign. GMA's own
15 campaign consultants, as well as those associated with the No on 522 committee, agreed that
16 knowing the value of an opponent's war chest is important strategic information valuable to
17 any campaign. Ex. 64 (W&M Dep.) at 29-32; Ex. 65 (Hall Dep.) at 30-31, 35; Ex. 50. The
18 amount of money available to GMA during the campaign would be vital information to the
19 other side. Ex. 66 (Lopez Dep.) at 146, 150, 151, 152.

20 Finally, through its Counterclaim to the Complaint and its CR 12 (c) motion, GMA
21 claims that requiring the registration and reporting of the GMA Account unconstitutionally
22 treats GMA differently from other entities. *See* GMA Mot. for J. on the Pleadings; GMA's
23 Answer to Amended Compl., Aff. Defense No. 4 and Counterclaim. Since this argument has
24

25 ⁸ GMA's Answer to Amended Compl., Aff. Defenses No. 1, 3, 4.

26 ⁹ GMA's Answer to Amended Compl. at 12; *see also* Ex. 2 (Finkel) at 80.

1 already been rejected, this Court should reject it again.¹⁰ In Washington, any group that sets up
2 a separate account for the stated purpose of supporting or opposing ballot measures would be
3 required to comply with state disclosure law. The State did not “single out” GMA in any way.
4 It is not GMA’s identity or status as a trade association that brings it under the auspices of
5 RCW 42.17A; rather, it is GMA’s conduct in creating a political committee by soliciting,
6 receiving and contributing funds to oppose Initiative 522.

7 In short, based on the undisputed facts, GMA created a political committee when it
8 created the Account.

9 **2. Once It Created A Political Committee, GMA Failed To Register And**
10 **Report The Financial Activities Of The Account**

11 Washington political committees are required to file a one page registration form and
12 identify a treasurer and depository. RCW 42.17.205, .205(2)(d); *see also* WAC 390-16-011.
13 GMA failed to do so when it formed the Account. Once registered, GMA should have
14 followed an established schedule for reporting monies received (contributions to the Account –
15 PDC Form C3 – WAC 390-16-031) and monies spent from the Account (WAC 390-16-041 –
16 PDC Form C4). *See* RCW 42.17A.235, .240; Ex. 66 (Lopez) at 176, 178, 180. GMA filed no
17 reports until October 17, 2013, the day after this case was filed. Stutzman Decl., ¶¶ 3, 5 and
18 Ex. 1 to Stutzman Decl.

19 GMA should have filed a registration form for the Account no later than March 14,
20 2013, two weeks after its Board approved creation of the Account. Stutzman Decl., ¶ 6;
21 RCW 42.17A.205(1). It did not register or identify its treasurer until October 17, 2013, more
22 than 218 days late. Stutzman Decl., ¶ 5. Once registered, GMA should have filed over 58
23 reports from March 2013 to December 31, 2013, including at least 47 C3 reports of income and
24 11 C4 Summary Forms of financial activities. Stutzman Decl., ¶¶ 6-9. After the election,
25 GMA should have filed one more report to disclose the final disposition of funds remaining in

26 ¹⁰ Order on J. on Pldgs. dated July 25, 2014.

1 the committee and then could have closed the committee in accordance with state law.
2 Stutzman Decl., ¶ 11; *see also* WAC 390-16-041. Thus, contrary to any assertion GMA may
3 make, it was not required to keep the Account reporting in Washington through the life of the
4 Account.

5 In total, GMA failed to timely file over 58 reports (the reports ranged from 9 to 218
6 days late). Stutzman Decl., ¶¶ 6-9. It failed to identify the true source of the contributions the
7 Account received. Given GMA's failure to file timely and complete reports showing all
8 income and expenses from the Account during 2013, Court-ordered filings are appropriate.
9 GMA has the information to complete those reports and should complete them. The State asks
10 that the Court, as part of any relief the Court may grant, direct GMA to file complete reports
11 and disclose all contributions to and expenditures from the Account.

12 Finally, contrary to any assertion GMA may make, its disclosures should include all
13 statutorily-required information. GMA may argue that it should be excused from disclosing
14 monies the Account received prior to October 23, 2013. These monies formed the bases for
15 the contributions the Account made to the No on 522 committee on October 24, 2013 (\$2.9
16 million) and October 25, 2013 (\$877,500). State law requires timely reporting of *all* income
17 and expenditures from the Account during 2013. GMA should be made to comply.

18 **B. GMA Improperly Concealed The True Source of the Monies It Used To**
19 **Contribute to the No on 522 Political Committee**

20 In the interest of transparency, Washington requires full disclosure of the identity of all
21 persons contributing or making expenditures to state ballot measures and other campaigns.
22 RCW 42.17A.010(17), .435. Concealing political contributions and expenditures in
23 Washington is strictly prohibited. RCW 42.17A.435 provides:

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

1 This “broad” directive prohibits any person from engaging in “any” manner of concealment.
2 *Permanent Offense*, 136 Wn. App. at 284, 289 (the State has a substantial interest in promoting
3 integrity and preventing concealment that could harm the public and mislead voters.). While
4 proof of *intentional* concealment is not required, state law permits treble penalties if the fact-
5 finder determines a person intentionally concealed the source of a political contribution or
6 expenditure. *Id.*; RCW 42.17A.765(4).

7 Here, GMA intentionally concealed the true source of monies contributed to the No on
8 522 committee. Undisputedly, GMA solicited its members’ monies to oppose Initiative 522. It
9 then used the Account to contribute to No on 522 to “shield individual companies from attack
10 that provide funding for specific efforts” (*see, e.g.*, Exs. 10-13, 19, 48) and strategically
11 coached its members so that GMA would be identified as the source of the funds. *See, e.g.*,
12 Exs. 50, 51.

13 After the GMA Board approved the Account’s formation, GMA invoiced Board
14 members as well as a few additional members on two separate occasions to fund the Account.
15 Exs. 20, 22. From its inception through the 2013 campaign, the GMA Board knew that
16 opposing I- 522 was part of the strategy for the Account. *See, e.g.*, Exs. 4, 5, 8, 9, 10, 19,
17 25-31. As provided above, the GMA Board also knew that GMA intended to use the Account
18 to shield the identities of the contributing companies. *See supra*, section IV (A)(1). Of the 52
19 2013 GMA Board members, 31 gave money to the Account in 2013 and are now identified as
20 funding the GMA designated contribution to No on 522. Exs. 23, 54-59.

21 GMA budgeted for and spent the vast majority of the money its members paid to
22 oppose Initiative 522. As of December 3, 2013, GMA stated it had raised \$14,283,140, of
23 which \$11 million was spent to oppose Initiative 522. Ex. 23. However, until this action was
24 commenced, GMA concealed the fact that the source of this money was contributions from 34
25 GMA members to the Account.
26

1 Washington prohibits concealing contributions (including their true source). Every
2 time that GMA made a contribution in its own name instead of identifying the GMA members
3 from whom the money actually came, GMA engaged in concealment in violation of
4 RCW 42.17A.435. Each of the five Account contributions to No on 522 constitutes a separate
5 act of concealment. Because the uncontested facts establish a pattern of concealment, the
6 Court should find that GMA violated RCW 42.17A.435 each time it spent money from the
7 Account without identifying the true source of the money. Further, because GMA
8 intentionally concealed those true sources, the Court should treble the amount of the penalty.

9 **C. Once The Court Concludes That GMA Committed Multiple Violations Of**
10 **RCW 42.17A, It Can Assess A Penalty, Including An Award Of Attorneys Fees, Costs**
11 **Of Investigation, And Litigation Costs**

12 In violation of several state laws, GMA failed to report the true sources of \$14,283,000
13 in contributions to the Account. It failed to timely file over 58 disclosure reports of
14 contributions and expenditures. Stutzman Decl., ¶¶ 6-9. Its 2013 reports were between 9 and
15 218 days late. *Id.* GMA has not filed any reports since January 2014, even though it never
16 closed the committee after the November 2013 general election. Stutzman Decl., ¶ 11. GMA
17 concealed the true sources of the contributions to the Account. It also concealed all the
18 expenditures made from the Account. Stutzman Decl., ¶ 12; Ex. 23 at GMA 4823. These acts
19 constitute individual violations of state law. State law authorizes this Court to issue penalties
20 for these multiple violations.

21 RCW 42.17A.750 sets forth the methods by which the Court can calculate and assess a
22 penalty once it finds multiple violations of the disclosure law. A court can assess one or more
23 of the following remedies for GMA's multiple violations: (1) a "per violation" penalty of not
24 more than \$10,000; (2) a penalty equal to \$10 per day for every day a required report is late; (3)
25 a penalty in an amount equal to the amount that went undisclosed. RCW 42.17A.750(1) (c),
26 (d), (f). The Court may also, if it finds any violation to be intentional, treble the penalty as
punitive damages. RCW 42.17A.765(5). Finally, the Court may award "to the state all costs

1 of investigation and trial, including reasonable attorneys' fees to be fixed by the court. *Id.*;
2 *Permanent Offense*, 136 Wn. App. at 577.

3 The penalty in this case should fit the significance of GMA's willful non-disclosure.
4 GMA deliberately hid the true sources of over \$14 million in contributions its Account
5 received. It structured the Account so that its member contributors could avoid the type of
6 public scrutiny they received for their opposition to GMO labeling in California. Ex. 2
7 (Finkel) at 32, 33, 121-22, 125-25. GMA stockpiled millions of dollars over which GMA
8 retained exclusive control. It collaborated with the No on 522 committee consultants and only
9 contributed the Account funds when they were needed by the campaign. Exs. 41, 42, 43; Ex.2
10 (Finkel) at 182. GMA even approved every No on 522 committee expense. Exs. 39, 43;
11 Ex. 40 (Clarke) at 22-25; Ex. 3 (Basu) at 62-65. But GMA never established a committee or
12 filed reports disclosing this activity in accordance with state law. Accordingly, the Court
13 should assess penalties against GMA under all three provisions of RCW 42.17A.750 cited
14 above. Applying even one of the statutory remedies, the Court should award—at a
15 minimum—a penalty equal to the over \$14 million GMA concealed from the public.
16 RCW 42.17A.750(1)(f).

17 GMA's conduct was so egregious that it ranks amongst the worst in state history.
18 GMA worked to "shield" the actions of major food companies from the very public entitled to
19 know who was trying to influence their vote on Initiative 522. *Human Life of Washington,*
20 *Inc.*, 624 F.3d at 1018. This type of blatant disregard for state disclosure laws and the
21 transparency demanded by the people of Washington deserves the Court's closest scrutiny.
22 GMA's significant wrongdoing deserves an equally significant response by this Court.
23 Anything less would undermine voters' faith in transparency and encourage others to try the
24 same behavior.
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1 **D. It Is Constitutional For Washington To Require Accurate Disclosure Of Campaign**
2 **Contributions**

3 GMA's filings have raised several affirmative defenses and counterclaims contending
4 that Washington's disclosure laws are unconstitutional. GMA Answer to Amended Compl. at
5 5-6, 11-13. But courts have repeatedly affirmed the constitutionality of the State's campaign
6 finance disclosure laws.

7 The U.S. Supreme Court unequivocally held disclosure requirements are constitutional
8 in *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d. 753
9 (2010), declaring that "transparency enables the electorate to make informed decisions and
10 give proper weight to different messages and speakers" and does "not prevent anyone from
11 speaking." *Id.* at 914, 916. Federal and state courts have specifically upheld Washington's
12 disclosure laws. *See, e.g., Human Life of Washington, Inc.*, 624 F.3d at 990;
13 *Utter*, 182 Wn. 2d at 398; *Voters Educ. Comm.*, 161 Wn. 2d at 470; *Fritz v. Gorton*,
14 83 Wn. 2d 275, 517 P.2d 911 (1974).

15 In upholding Washington's disclosure laws, Washington courts have emphasized
16 voters' right to information, recognizing the special role of transparency in Washington's
17 political culture. *Voters Educ. Comm.*, 161 Wn.2d at 483; *Fritz*, 83 Wn.2d at 283-84. And
18 both federal and state courts have recognized that disclosure generates many benefits. It
19 provides voters important information about who is funding efforts to sway their vote (*Human*
20 *Life of Washington, Inc.*, 624 F.3d at 1005), but also enables them to follow how their own
21 monetary contributions are being spent. Disclosure is also important to campaign opponent(s),
22 the media, and entities required to oversee and enforce the law. Ex. 50; Ex. 64 (Winner &
23 Mandabach) at 29-31; RCW 42.17A.105; RCW 42.17A.765. As our State Supreme Court has
24 noted, "disclosure requirements do not restrict political speech—they merely ensure that the
25 public receives accurate information about who is doing the speaking. As Justice Brandeis
26 famously observed, "[p]ublicity is justly commended as a remedy for social and industrial

1 diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient
2 policeman.” *Voters Educ. Comm.*, 161 Wn.2d at 498 (quoting *Buckley v. Valeo*,
3 424 U.S. 1, 67, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976)).

4 VII. CONCLUSION

5 Having violated Washington’s campaign finance laws, GMA should now be held to
6 account. The facts are not in dispute. GMA raised over \$14 million in 2013 and funneled \$11
7 million into a Washington election campaign in an attempt to “shield[] individual companies
8 from attack for providing funding.” Neither state law nor the constitution provides a defense
9 for such subterfuge. Washingtonians rightly expect more from those participating in
10 Washington elections. The State respectfully asks that this Court grant it summary judgment
11 on all claims, assess a substantial penalty, and award the State its costs and attorneys’ fees.

12 DATED this 22nd day of January, 2016.

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15 

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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 22nd day of January, 2016, at Olympia, Washington.



DIANE GRAF, Legal Assistant