Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Plaintiff Intervenors,

vs.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE, et al.,

Defendant Intervenors.

NO. CV05-0927-JCC

OPPOSITION OF WASHINGTON STATE REPUBLICAN PARTY TO STATE MOTION TO RECOVER ATTORNEY FEES AND COSTS

NOTED FOR HEARING: DECEMBER 12, 2008

I. INTRODUCTION

The State is not entitled to a refund of the attorneys' fees it agreed to pay in 2006 for two reasons. Even if the Republican Party were not a prevailing party, the State entered into

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a negotiated compromise of attorneys' fees before the Ninth Circuit in full knowledge of its plan to seek review of the Ninth Circuit's decision on the merits. The State's unexpressed intention to rescind the settlement in the event an appeal to the Supreme Court succeeded does not alter the settlement it actually entered.. . The strong public policy in favor of resolving matters by settlement outweighs the "buyer's remorse" of the State in settling the Ninth Circuit fee issue.

Further, the State's implementation of I-872 continues to infringe on the Republican Party's right to political association. The State's claim to be a prevailing party is premature.

Finally, this Court's Preliminary Injunction (Dkt. 87) materially altered the legal relationship between the Republican Party and the State, preventing the State's planned implementation of I-872 in 2005. The State's substantial changes to its planned implementation as a result of the preliminary injunction mean that the Republican Party was a prevailing party for purposes of awarding attorneys' fees, even though the summary judgment on the facial challenge was reversed, putting the State's current implementation of I-872 before the Court again.

II. FACTS

A. The State requested and obtained a final settlement of fees before the Ninth Circuit.

Shortly after the Ninth Circuit affirmed this Court's decision and issued a separate order granting attorneys' fees against the State but declining to do so against the Grange, counsel for the State contacted the Republican Party to settle the Party's claims for attorneys' fees. On September 11, 2006, the State's attorneys submitted a preliminary proposal to settle the parties' claims for fees and costs. *See* White Decl., Ex. E. The State's counsel wrote: "For now, we prefer to discuss only the attorney fees relating to the Ninth Circuit portion of the case, because (1) those are the ones immediately requiring decisions and (2) it appears likely that there will be further proceedings in the trial court." *Id.* The State's proposed settlement

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included no reservation of rights or caveat regarding setting the settlement aside should the State succeed in having the Ninth Circuit's decision reversed.

On September 15, the State's counsel formally proposed settlement of the claim for attorneys fees before the Ninth Circuit:

> I am prepared to make the following offer of compromise on the claims for costs and attorneys' fees relating to the Ninth Circuit Appeal in this case:
>
> 1. The state will agree to compromise fees and costs relating to the Ninth Circuit appeal. Since there will likely be further proceedings, fees and costs at the trial level will be deferred for later discussion…
>
> 2. The state will pay in full all court costs which the prevailing parties could reasonably claim under the applicable court rules.
>
> 3. The state will pay 90% of all attorneys fees claimed by each respondent as set forth in previous correspondence among the parties … If this compromise is agreeable, I suppose it should be incorporated in an agreed order . . .

White Decl., Ex. G. This proposed settlement still contained no reservation of rights or expressed any contingency based on further appellate proceedings. Counsel for the Democratic Party responded, "We understand this settlement will be final as to our claims for attorneys fees and costs for the Ninth Circuit . . . irrespective of further proceedings in the case." *Id.* As part of the email chain that same day, counsel for the Republican Party also responded:

> The Republican Party also agrees to the terms of the proposed settlement of its costs and fees in the Ninth Circuit proceeding relating to the appeal of Judge Zilly's July 2005 decision through the date of settlement, irrespective of further proceedings in the case.

Id.

At no point in the negotiations did the State express the intent it now asserts – that it intended to compromise fees only if a petition for *writ of certiorari* was unsuccessful.

The parties' settlement was further memorialized by a stipulated order. After the Supreme Court reversed the finding of facial invalidity, the State sought a refund of the amounts paid under the settlement and moved for an order vacating the stipulated order

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regarding fees. The Ninth Circuit vacated its stipulated order, but refused to order a refund. Instead, the Ninth Circuit authorized this Court to "make appropriate findings concerning the parties' settlement of fees and [to] determine whether restitution or further fee awards are appropriate."

B. This Court's preliminary injunction resulted in a material alteration of the legal relationship of the parties by enjoining the implementation of I-872, followed by major changes by the State to its planned implementation.

The State had implemented of the modified blanket primary before this action was filed. *See* Pharris Decl., Ex. C (Dkt. 66). Further, Defendants had, from the outset, represented to the voters that the I-872 primary ballot would look no different from the blanket primary ballot.

> Would the primary ballot look any different to the voter?
>
> *No.* At the primary, the candidates for each office will be listed under the title of that office, the party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary).

White Decl. in Supp. Mtn. Prelim. Inj., Ex 3 ("Frequently Asked Questions About the Proposed People's Choice Initiative") (emphasis added) (Dkt. 8). Sample ballots from elections under the then-existing blanket primary are attached. White Decl., Exs. B - C. The Grange presented several sample ballots to the Supreme Court in its reply brief.[1] *See* White Decl. Ex. A. The first is essentially identical to the sample ballots from Clark County in 2000 and 2002. *See* White Decl. Exs. B - C. Under the planned implementation, the ballot would list candidates' names, followed solely by the Republican Party name. No disclaimer to indicate that the party "preference" was

[1] This was the first instance of the Defendants suggesting that the primary ballot would look any different.

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merely a preference was part of the 2005 implementation.[2] In all likelihood, that ballot form creates an unconstitutional implementation of I-872. *See infra*, 8. However, whether this Court's summary judgment against the State's original implementation would have been upheld was never litigated because the State abandoned the ballot form after the injunction issued.

III. ARGUMENT

A. The State may not set aside the settlement of fees it requested. There are no extraordinary circumstances present that outweigh the strong public policy to uphold negotiated settlements.

The State is not entitled to set aside its settlement and compromise of its liability for fees. The strong public policy in favor of settlement outweighs the State's "buyer's remorse." " 'The construction and enforcement of settlement agreements are governed by principles of local law . . . .' " *United Comm. Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992) (quoting *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989)). Under Washington law, settlement agreements are contracts governed by general principles of contract law. *See In re Estate of Harford*, 86 Wn. App. 259, 936 P.2d 48, 50 (1997); *Morris v. Maks*, 69 Wn. App. 865, 850 P.2d 1357, 1359 (1993).

Washington has a long-standing public policy in favor of settlement of disputes and their finality. "The law favors amicable settlement of disputes, and is inclined to clothe them with finality." *Handley v. Mortland*, 54 Wn.2d 489, 342 P.2d 612, 616 (1959); *accord Buob v. Feenaughty Mach. Co.*, 4 Wn.2d 276, 103 P.2d 325, 334 (1940). Here, the State's agreement to pay fees and the subsequent entry of the stipulated order was the result of an open and fair negotiation between the State and the political parties. The State obtained a discount from the political parties on the fees due and owing, and also avoided additional fees that

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[2] In response to the proposed permanent injunction, on July 27, 2005, the State noted the near immediate deadlines for printing and distributing ballots. St. Resp. to Prop. Order, n.2 (Dkt. 90-1). These deadlines were also upcoming when the State issued its 2005 implementing regulations, but those regulations made no changes to the ballot. The State's implementation included no change to the ballot to disclose that party preference was not an expression of affiliation.

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would have resulted from opposing the award sought. The political parties expressly agreed to accept the State's offer, with its reduction of fees, "irrespective of further proceedings."[3]

The State relies on, but misreads, *Hearst Communications, Inc. v. Seattle Times Co*, 154 Wn.2d 493, 115 P.3d 262 (2005). The *Hearst* court considered, but expressly rejected, the State's contention that its unexpressed intention alters the settlement:

> Our holding in [an earlier case] may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.

154 Wn.2d at 503. Furthermore, the State's construction of the settlement would render the agreement illusory. The Republican Party would have permanently conceded a portion of the fees to which it was entitled, but the State had merely made a "refundable deposit." Both Washington and the Ninth Circuit require that contracts must be construed to avoid rendering contractual obligations illusory. *See Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 184, 110 P.3d 733 (2005)[4]; *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018 (9th Cir. 1989). *Hearst* also directs that terms in an agreement are to be given their common meaning. *See id.* at 504. The parties' negotiations and agreement used the terms "compromise," "settlement," and "final." The common meaning of these terms does not include the State's current gloss of "only if we do not prevail later."

The State could have, but did not seek a stay of the fee order pending the possibility of prevailing on a petition for writ of *certiorari*. In fact, the State suggested negotiations to resolve fees before the District Court as well, after the fees on appeal had been negotiated. *See*

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[3] The e-mails conducting the negotiations are admissible under Fed. R. Evid. 408(b), because they are not introduced to prove that the State was liable for the fees, but to show that the State did not enter into the settlement subject to a reserved right to undo the settlement should a further appeal succeed. *See, e.g., Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1160-61 (9th Cir. 2007). Here, the State's motion is, in effect, an effort to undo the settlement agreement, and the State makes representations that are inconsistent with the negotiations and agreement at the time it entered into the stipulation.

[4] The *Quadrant* court cited *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340 (1997), which, in turn, relied on the Ninth Circuit decision in *Kennewick*.

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White Decl., Ex. E. The State now seeks to add an unexpressed condition to the settlement, that the State was not bound if its as then unfiled petition for writ of *certiorari* should succeed. The State's planned petition for writ of *certiorari* on the merits undercuts its assertion that only the *amount* of fees remained at issue. *See* State Mot. at 3:18-22. The State's ultimate liability for the fees remained an open question at the time it proposed a compromise. The question whether the State would petition for *certiorari* was a matter entirely within its control. "Courts are especially loath to find a condition precedent when the alleged condition is peculiarly within the control of one of the contracting parties." *Lockwood v. Wolf Corp.*, 629 F.2d 603, 610 (9th Cir. 1980).

Settlements will be disturbed only upon a showing of misconduct by a party in obtaining the settlement, not merely because one party comes to view the resolution of the dispute as a bad bargain. *See Maynard v. First Bank of Colton*, 56 Wash. 486, 106 P. 182 (1910). Settlements necessarily involve compromise, and parties balance certainty against the possibility of success should the matter be fully litigated. As the U.S. Supreme Court has explained, "the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971).

The political parties did nothing to mislead the State. That the Supreme Court determined that Initiative 872 was not invalid on its face does not warrant allowing the State to set aside its bargain.

B. The Defendants changed their unconstitutional 2005 implementation of I-872 in response to this Court's injunction, entitling the Republican Party to its fees, even though the injunction was later dissolved.

As a result of the Court's injunction, the Defendants altered their implementation materially, abandoning the previously planned ballot format. The Defendants also materially

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altered the declaration of candidacy, from which the ballot would be derived. The ballot as originally planned as part of the 2005 implementation was unconstitutional.

At oral argument, the Attorney General and members of the Supreme Court engaged in colloquy regarding the ballot that mirrored Washington's historical primary ballot format,

> CHIEF JUSTICE ROBERTS: Do you agree that if it were that way, in other words if the ballot looked like the ballot on page 1 of the Grange reply brief, that that would be unconstitutional?
>
> MR. McKENNA: Yes, Your Honor, it would be harder to argue from our side. But Your Honor, the Ninth Circuit only assumed that the ballot would look like the ballot on page 1 of the Grange yellow brief. They assumed that the ballot would look exactly like the ballot in a nominating primary, and our point here is that it will not.

White Decl. Ex. D, (Tr. Or. Arg. 16:47-49). Yet, the ballot at page 1 of the Grange reply brief was precisely the ballot that the Defendants planned to use in 2005, because the ballot was to look no different than before.

Even though the Supreme Court reversed the Court on the question of the facial invalidity of the statute, the Defendants' implementation was also unconstitutional, and the injunction caused them to change their position with respect to the Republican Party and include disclaimers that would not otherwise have appeared on the ballot.

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. . . . In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar v. Hobby, 506 U.S. 10, 111-12 (1992). Here, the direct result of the Republican Party's success in challenging the State's proposed implementation was the abandonment of the implementtion and a representation to the Supreme Court that future ballots would not be as the State had planned before the injunction. In *Sole v. Wyner*, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007), the Court held that a final adjudication on the merits against a party who obtained a preliminary injunction would not warrant an award of fees because the plaintiff's victory was "ephemeral." The Court was not faced with a situation where the relationship of the parties

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was permanently altered in the plaintiff's favor as a result of a material change by the defendants in response to the injunction. Here, the Republican Party obtained a permanent material alteration of the relationship with the State as a result of the preliminary injunction, compelling the State to abandon its planned implementation of I-872 and develop an entirely different ballot. It is clear that this Court's preliminary injunction affected the State's behavior toward the Republican Party by forcing formal acknowledgment on the ballot that "preference" did not connote affiliation.[5]

C. The State's assertion that it is a prevailing party is premature.

The State's assertion that it is the prevailing party in this litigation is incorrect, because the State materially altered its implementation of I-872 in response to this Court's injunction. Even if it had not, the question of the validity of I-872 remains undetermined, and the assertion by the State of prevailing party status premature. If the Republican Party obtains at least some relief on the merits, it is a prevailing party for purposes of an award of fees under 42 U.S.C.§1988. *Farrar v. Hobby*, 506 U.S. 10, 111-12 (1992). In this case, the State's chances of eventual victory are small. The State implemented I-872 to enable blanket primary voters (regardless of affiliation with the Republican Party) to vote in the election of Republican Party officers (precinct committee officers). It is settled law in the Ninth Circuit that such a primary system violates core associational rights protected by the First Amendment. *Arizona Libertarian Party v. Bayless*, 351 F.3d 1277, 1281 (9th Cir. 2003) ("The district court correctly held that allowing nonmembers to vote for party precinct committeemen violates the Libertarian Party's associational rights.").

[5] Even though, as a practical matter the disclaimer does not cure the confusion over affiliation with the Party or avoid dilution of the Party's mark and message.

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CONCLUSION

The State's motion is contrary to the settlement of fees it sought and negotiated. The State materially altered its position in favor of the Republican Party after issuance of the Court's injunction by abandoning an implementation it conceded to the Supreme Court would have been unconstitutional. I-872, as implemented, still tramples fundamental rights to political association under the First Amendment. Any of these is sufficient grounds to deny the motion to recover fees that were rightfully paid.

DATED this 8th day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2008, I caused to be electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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