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November 9, 2017

VIA EMAIL AND OVERNIGHT DELIVERY

Mr. Fox Blackhorn
Compliance Coordinator
Public Disclosure Commission
711 Capitol Way
Room 206
Olympia, WA 98504-0908

Re: Washington Conservation Voters Action Fund (PDC Case No. 27059)

Dear Mr. Blackhorn:

Washington Conservation Voters ("WCV") has retained our firm to represent the organization and its political committee, Washington Conservation Voters Action Fund ("WCVAF"), regarding a complaint filed against WCVAF with the Public Disclosure Commission. On November 3, 2017, you notified WCV staff that Ms. Kimberly Wingett-Bertrand had complained to the PDC about a piece of mail sent by WCVAF regarding the Port of Vancouver election. For the reasons set forth below, Ms. Wingett-Bertrand's complaint fails to demonstrate a violation of state law.

The mail piece in question (enclosed), includes a quote from Mr. Robert Sabo, a former campaign aide to Kris Greene, who was running for election to become a Port Commissioner to the Port of Vancouver USA. The mailer attributes Mr. Sabo's quote to an October 12, 2017 article in *The Columbian*, Vancouver's paper of record, which identified him as Mr. Greene's "former campaign manager."¹ *The Columbian* and its reporters subsequently referred to Mr. Sabo as the Greene campaign's "former campaign manager" on at least two other occasions,² as

1 Dameon Pesanti, "Eying 'Big Oil's' influence on Green's port campaign," *The Columbian*, Oct. 12, 2017, available at <http://www.columbian.com/news/2017/oct/12/eyeing-big-oils-influence-on-greens-port-campaign/> (updated version with Mr. Sabo's identification corrected).

2 Katy Sword, "Mayor Leavitt stands by Kris Greene endorsement," *The Columbian*, published online Oct. 19, 2017, available at <http://blogs.columbian.com/all-politics-is-local/mayor-leavitt-stands-by-kris-greene-endorsement/>, and published in print on Oct. 22, 2017 on p. C1; *see also*, Twitter: @KatySword, "I'm at the #ClarkCounty District Court for Kris Greene hearing seeking a gag/protection order against former campaign manager Robert Sabo," posted Oct. 18, 2017, available at <https://twitter.com/KatySword/status/920685903990763520>.

have others following the race.³ The Greene campaign later asked *The Columbian* to issue a correction, identifying Mr. Sabo as a “former campaign strategist.”⁴

Importantly, the complaint against WCVAF does not allege that the mailer misquoted *The Columbian* or Mr. Sabo, nor that it distributed false information about Mr. Greene. Rather, the complaint alleges that WCVAF violated state campaign finance law by accurately quoting a newspaper article that only later was corrected.

To prove a violation of RCW 42.17A.335, a complaint must demonstrate that a speaker distributed “with actual malice” a communication “constituting libel or defamation per se” that, as relevant here, “contains a false statement of material fact about a candidate for public office.” RCW 42.17A.335(1). A violation of this statute must “be proven by clear and convincing evidence.” *Id.* at 42.17A.335(4).

Ms. Wingett-Bertrand’s complaint fails to demonstrate a violation of RCW 42.17A.335. First, WCVAF’s actions did not involve “actual malice.” A statement is made with “actual malice” only when a person “act[s] with knowledge of falsity or with reckless disregard as to truth or falsity.” RCW 42.17A.005(1) (defining “actual malice”). WCVAF relied on *The Columbian*’s repeated published references to Mr. Sabo as Mr. Greene’s “former campaign manager.” *The Columbian* is the most reputable newspaper providing frequent coverage of the Port of Vancouver USA Commission campaign. Relying on the accuracy of statements contained in that newspaper is reasonable, a conclusion supported by the fact that the Greene campaign does not dispute that the substance of the article is accurate. WCVAF did not act with knowledge of falsity or with reckless disregard to the truth when it printed and distributed its mailer. After WCVAF became aware of the Greene campaign’s assertion that Mr. Sabo was its “former campaign strategist,” WCVAF did not further distribute the mailer. Absent “actual malice,” the government may not censor a statement regarding a candidate for public office. *See Rickert v. Pub. Disclosure Comm’n*, 161 Wn.2d 843 (Wash. 2007).

Second, the statement did not constitute “libel or defamation per se.” The statute defines “libel or defamation per se” to mean communications that “expose a living person to hatred, contempt, ridicule, or obloquy, ... deprive him or her of the benefit of public confidence or social intercourse, or to injure him or her in his or her business or occupation, or ... injure any person, corporation, or association in his, her, or its business or occupation.” RCW 42.17A.335(2). The Washington Supreme Court has held that “in light of the heightened protections for political speech afforded by the First Amendment,” the state may suppress political speech only when it is “defamatory.” *Rickert* at 850-51. Ms. Wingett-Bertrand asserts

³ See Eric de Place, “Big Oil Aims to Buy Democracy in Washington,” *Sightline Institute*, posted Oct. 25, 2017, available at <http://www.sightline.org/2017/10/25/big-oil-aims-to-buy-democracy-in-washington/> (note comments section, with de Place stating on Oct. 30, 2017 that he changed his reference of Mr. Sabo’s title to reflect *The Columbian*’s correction).

⁴ “Corrections,” *The Columbian*, Oct. 31, 2017 at p. A3.

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her character was defamed, but she offers no evidence that she suffered any injury – let alone “hatred, contempt, ridicule, or obloquy.” The court in *Rickert* made clear that state law may be used to restrict political speech only if it truly defames a person; political opponents may not use the law to attack one another over a mere “factual blunder.” *Rickert* at 855 (quoting *Brown v. Hartlage*, 456 U.S. 45, 61 (1982)). *The Columbian* made a factual blunder, which WCVAF repeated. Then the Greene campaign corrected the record, and, when alerted to that fact, WCVAF did not further distribute the mailer. *Cf. Rickert* at 855-56 (“[T]he best remedy for false or unpleasant speech is more speech, not less speech.”)

Third, the misidentification of Mr. Sabo as “former campaign manager” rather than as “former campaign strategist” does not constitute “a false statement of material fact about a candidate” as required by the statute. The first prong of the statute applies to false statements about candidates, *see* RCW 42.17A.335(1)(a), not to campaign staffers.

The complaint against WCVAF is frivolous and without merit. WCVAF wrote its mailer based on an article in a reputable newspaper. When alerted that the newspaper article had an error, WCVAF did not distribute the mailer any further. As it did not act with “actual malice,” WCVAF did not violate RCW 42.17A.335; a failure to demonstrate “actual malice” ends the inquiry. In no way has the complainant proven a violation by “clear and convincing evidence,” as the law requires.

Because the complaint fails to show reason to believe a material violation of the statute occurred, we ask that it be dismissed expeditiously pursuant to WAC 390-37-070.

Sincerely,



Allen H. Mattison

Enclosure

cc: Ms. Shannon Murphy
President, Washington Conservation Voters

WASHINGTON
CONSERVATION
V O T E R S

Paid for by Washington Conservation Voters
Action Fund. P.O. Box 1907 Seattle, WA 98111 as
an in-kind contribution to Friends of Don Orange
1111 Main Street #400, Vancouver, WA 98660

VOTE
BY NOVEMBER 7

2017

ELECTION GUIDE

VANCOUVER PORT COMMISSIONER DISTRICT 1

OUR COMMUNITY'S HEALTH & SAFETY
IS AT STAKE IN THIS ELECTION.

GET THE FACTS
BEFORE YOU VOTE

USE THIS
INFORMATION TO

**GET THE
FACTS
TO BE AN
INFORMED
VOTER.**

DON ORANGE



is a small business owner and dedicated community advocate. He is endorsed by The Columbian, Washington Conservation Voters, Vancouver Firefighters Local 452 and supported by hundreds of local businesses and community members.

Don is opposed to the proposed oil terminal. He is concerned about the health and safety risks of oil spills and train derailments and wants to create jobs at the port in the long-term economic interest of Vancouver.

Don has received the support and funding from hundreds of community members. He refuses to accept donations from Big Oil and will be an independent voice when it comes to decisions that impact the fossil fuel industry.

Don would bring transparency and accountability to the Port, particularly in light of the recent Supreme Court ruling that Port Commissioners improperly discussed public matters behind closed doors.



KRIS GREENE



is an insurance agent and serves on the Columbia Heights Owners Association board. He is supported by Vancouver Energy, Tesoro and other advocates who support the oil terminal.

KRIS SUPPORTS THE OIL TERMINAL AND HAS SAID VANCOUVER SHOULD **“BRING THE OIL TERMINAL HOME.”**

THE COLUMBIAN, 9/29/17

KRIS IS FUNDED AND CONTROLLED BY BIG OIL. THE OUT OF STATE OIL COMPANY, TESORO, AND THEIR COMPANIES HAVE GIVEN \$370,000 TO KRIS GREENE AND ARE INFLUENCING HIS CAMPAIGN. IT'S THE MOST ANY CANDIDATE IN WASHINGTON HAS DIRECTLY RECEIVED FROM BIG OIL AND 90% OF HIS TOTAL CAMPAIGN FUND.

His former campaign manager said, "Big Oil is completely dictating where every penny [in his campaign] is going,"

WWW.PDC.WA.GOV
THE COLUMBIAN, 10/12/17

KRIS REFUSES TO HOLD THE PORT ACCOUNTABLE FOR SECRET BACKROOM MEETINGS.

KUOW, 6/8/17, THE COLUMBIAN, 9/29/17

