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The Honorable Thomas S. Zilly

**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,

v.

STATE OF WASHINGTON, et al.,

Defendant Intervenors,

WASHINGTON STATE GRANGE,  
et al.,

Defendant Intervenors.

NO. CV-05-00927-TSZ

MOTION TO RECOVER  
ATTORNEY FEES AND  
FOR COSTS

**NOTE ON MOTION  
CALENDAR:  
DECEMBER 12, 2008**

**I. PARTIES REQUESTING RELIEF**

The State of Washington, Rob McKenna, Attorney General of the State of Washington, and Sam Reed, Secretary of State of the State of Washington, (“the State”) Defendant Intervenors in the captioned action, hereby bring this Motion To Recover Attorney Fees and For Costs, pursuant to the Order of the United States Court of Appeals for the Ninth Circuit remanding this action.

**II. STATEMENT OF RELIEF SOUGHT**

The State respectfully requests an Order from this Court, compelling the Plaintiffs and Plaintiff Intervenors in this action to refund to the State all funds previously paid as attorney fees or costs in this action, based upon an appellate decision that has now been reversed by the United States Supreme Court. The State also requests an award of costs, to which Washington is now entitled as the prevailing party. The fees at issue relate solely to fees awarded by the Ninth Circuit related to work done before the Ninth Circuit; no fees have been awarded or paid related to proceedings in this Court, or in the United States Supreme Court.<sup>1</sup>

The Court of Appeals previously awarded, and the State paid, costs and attorney fees in favor of Plaintiffs and Plaintiff Intervenors. Because those parties, the Washington State Republican Party, et al. (“Republican Party”), the Washington Democratic Central Committee, et al. (“Democratic Party”), and the Libertarian Party of Washington State, et al. (“Libertarian Party”), are no longer prevailing parties, the State now requests that this Court order that they reimburse the full amount of fees and costs they were originally awarded and paid. Specifically, the State seeks an order requiring that each of the Plaintiffs and Plaintiff Intervenors provide restitution to the State of Washington in the following amounts:

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<sup>1</sup> Respondents are also filing the State’s Motion to Dismiss along with this motion. The two motions, taken together, raise all of the issues presented to this court on remand and facilitate the final resolution of this matter.

1 Republican Party: \$54,457.65 (attorneys' fees); \$639.60 (costs);

2 Democratic Party: \$37,460.77 (attorneys' fees); \$213.20 (costs); and

3 Libertarian Party: \$14,977.80 (attorneys' fees); \$1,323.32 (costs).

4 Finally, as the prevailing party, the State is entitled to recover its costs on appeal  
5 pursuant to FRAP 39(a)(3). The State submitted a cost bill in the amount of \$306.78 to the  
6 Court of Appeals, which referred that request to this Court. Decl. of Jeffrey T. Even, Ex. A  
7 (cost bill); *Id.* Ex. I (order remanding case to this Court).

### 8 III. BACKGROUND

9 The Plaintiffs, and Plaintiff Intervenors, are three political party and their respective  
10 officers: The Republican Party, Democratic Party, and Libertarian Party. They commenced  
11 this action as a facial challenge to the constitutionality of Initiative 872 (I-872). The  
12 initiative at issue established a "top two primary," under which all candidates for elected  
13 office appear on the primary ballot, and only the top two advance to the general election.  
14 While candidates for partisan office are permitted, under this system, to express their  
15 personal preference for a political party, that preference is not used when determining which  
16 candidates advance to the general election. This Court initially granted summary judgment  
17 in favor of the political parties, concluding that I-872 was unconstitutional. *Wash. State*  
18 *Republican Party v. Logan*, 377 F. Supp. 2d 907 (W.D. Wash. 2005).

19 The Court of Appeals affirmed. *Wash. State Republican Party v. Wash.*, 460 F.3d  
20 1108 (2006). On the same day that it issued its opinion on the merits, the appellate court also  
21 issued a separate Order concluding that the State was liable for attorneys' fees pursuant to  
22 U.S.C. § 1988. Even Decl., Ex. B (Order at 3 (August 22, 2006)). The court noted that in  
23 their briefs on the merits of the appeal, the three political parties had all moved for an award  
24 of attorneys' fees. Noting that 42 U.S.C. § 1988 provides for the award of attorneys' fees to  
25 prevailing parties in actions brought under § 1983, the Court of Appeals awarded attorneys  
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1 fees against the State, in favor of each of the political parties as prevailing parties. *Id.* (Order  
2 at 2-3).

3 The State's *liability* for attorneys fees having been litigated, only the determination of  
4 the *amount* remained. The State later negotiated the amount of attorneys' fees and costs—  
5 but not the liability for them—with the Republicans, Democrats and Libertarians, resulting in  
6 a stipulation dated September 18, 2006. Even Decl., Ex. C (Stipulation and Order Regarding  
7 Attorneys' Fees and Costs on Appeal). By that stipulation, the parties agreed only to the  
8 amount of costs and fees, and expressly did not waive claims based upon further proceedings.  
9 *Id.* Based upon that stipulation, the Court of Appeals entered an order awarding fees and  
10 costs in the amounts set forth in the stipulation. Even Decl., Ex. D (Order (October 3,  
11 2006)). The State promptly paid those awards, so as to avoid the accrual of post-judgment  
12 interest. Even Decl., Ex. E (letters transmitting payment); *Id.*, Ex. F (images of state  
13 warrants showing payment).

14 The United States Supreme Court ultimately reversed the Ninth Circuit, and held that  
15 Initiative 872 survives the constitutional challenge raised by the political parties. *Wash. State*  
16 *Grange v. Wash. State Republican Party*, \_\_\_ U.S. \_\_\_, 128 S. Ct. 1184, 1187, 170 L. Ed. 2d  
17 151 (2008) (decision on the merits in favor of the State and co-petitioner, the Washington  
18 State Grange). The State then proposed to the political parties that all parties stipulate for  
19 them to provide restitution for attorneys' fees and costs paid pursuant to the decision that has  
20 been reversed, but the political parties did not agree to do so. Even Decl., Ex G.

21 The appellate court's award of attorneys' fees and costs having been predicated upon  
22 the political parties having prevailed at that juncture, the State moved the Court of Appeals  
23 for an order requiring that the political parties refund the money to the state. Even Decl.,  
24 Ex. H. After receiving briefing from both sides on that motion, the Court of Appeals entered  
25 an Order vacating its prior award of fees and costs, and stating that this Court on remand:  
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1 may make appropriate findings concerning the parties' settlement of fees  
2 and should determine whether restitution or further fee awards are  
3 appropriate in response to appellee Washington State's motion to vacate  
award of attorney's fees and costs, for judgment awarding restitution of fees  
and costs and for costs.

4 *Wash. State Republican Party v. Wash.*, No. 05-35774, 2008 WL 4426713, at \*1 (9th Cir.  
5 Oct. 2, 2008) (*see also*, Even Decl., Ex. I (copy of order attached for ease of reference)).

#### 6 IV. ARGUMENT

7 Awards of attorneys' fees in § 1983 actions are predicated upon the party to whom  
8 fees are awarded qualifying as a "prevailing party." 42 U.S.C. § 1988. Similarly, costs are  
9 awarded on appeal only to a party who ultimately prevails. FRAP 39. The Court of Appeals  
10 initially awarded attorneys' fees and costs to the Republican, Democratic, and Libertarian  
11 Parties against the State, but the appellate decision upon which they initially prevailed was  
12 subsequently reversed. The United States Supreme Court has reversed the Ninth Circuit  
13 decision and upheld the constitutionality of I-872, thus depriving the political parties of their  
14 status as prevailing parties.

15 The Ninth Circuit has previously held that since a § 1988 fee award "is based on the  
16 merits judgment, reversal of the merits removes the underpinnings of the fee award." *Cal.*  
17 *Med. Ass'n v. Shalala*, 207 F.3d 575, 577-78 (9th Cir. 2000). Indeed, the court has termed it  
18 an "abuse of discretion" for a court to refuse to vacate an award of attorneys' fees when the  
19 decision on the merits upon which it is based is reversed. *Id.* at 578. An award "must  
20 obviously be vacated in light of" an appellate decision reversing on the merits of the case.  
21 *Id.* at 577 (quoting *Mother Goose Nursery Sch., Inc. v. Sendak*, 770 F.2d 668, 675 (7th Cir.  
22 1985)). As one commentator has described the matter, "some means must be found to avoid  
23 the unseemly spectacle of enforcing a fee award based on a judgment that has been  
24 reversed". 15B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL  
25 PRACTICE AND PROCEDURE, § 3915.6, at 344 (2d ed. 1992) (quoted in *Cal. Med. Ass'n*, 207  
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1 F.3d at 577). As one court has noted, this is simply consistent with the black letter  
2 proposition that a party is entitled to restitution of money paid under the terms of a judgment  
3 or decree when that judgment or decree is reversed on appeal. *McGill v. Faulkner*, 144  
4 F.R.D. 82, 84 (N.D. Ind. 1992) (citing 5B C.J.S. *Appeal and Error*, § 1980 (now 5 C.J.S.  
5 § 1157 (updated Feb. 2008))).

6 The Ninth Circuit accordingly vacated both its order of August 22, 2006, finding  
7 Washington *liable* for attorneys' fees and costs, and its order of October 3, 2006, setting the  
8 amounts of those fees and costs. Even Decl., Ex. I. In remanding this action to this court,  
9 the appellate court instructed that this court "may make appropriate findings concerning the  
10 parties' settlement of fees and should determine whether restitution or further fee awards are  
11 appropriate". *Id.*

12 Before the Ninth Circuit, the political parties contended the State was precluded from  
13 recovering attorney fees and costs to which the political parties are now clearly not entitled  
14 because the State stipulated as to the *amount* of those fees and costs. The political parties  
15 seek to construe this arrangement as a compromise covering the State's liability as well as  
16 the amount of fees to be paid. The political parties are wrong because the stipulation merely  
17 established the *amount* of attorney fees only after a contested judicial finding that the State  
18 was *liable* for them. The State never agreed to liability and was in the process of pursuing a  
19 petition for certiorari in the Supreme Court that ultimately succeeded. The underpinnings of  
20 the State's liability were subsequently removed by a reversal of the underlying decision, but  
21 the fact remains that the only point open to negotiation between the parties at the time they  
22 stipulated was the dollar amount to be paid. *See Hearst Commc'ns, Inc. v. Seattle Times Co.*,  
23 154 Wn.2d 493, 502, 115 P.3d 262 (2005) (under Washington law, the "intent of the  
24 contracting parties cannot be interpreted without examining the context surrounding an  
25 instrument's execution").

1 The parties stated directly in the stipulation that, “[n]o waiver is intended of any  
2 claims for further proceedings in the appeal or in any other aspect of the case (including  
3 district court proceedings).” Even Decl., Ex. C (Stipulation at 2). The parties to the  
4 stipulation thus held open the possibility that any award of fees and costs might be modified  
5 based upon “further proceedings”. The Court of Appeals has vacated the award of fees and  
6 costs, and an order requiring the political parties to return the money to the State would thus  
7 be consistent with the terms of the stipulation to which the political parties agreed. Even  
8 Decl., Ex. C (Stipulation at 2).

9 The political parties additionally asserted before the Ninth Circuit that they had a  
10 right to keep the fees stemming from an appeal on which they did not prevail, based upon  
11 speculation that they might someday prevail in some other proceeding in the future. This  
12 argument fails because the law is well established that a party that fails on its claims may not  
13 recover attorneys’ fees based upon subsequent success as to unrelated claims. *Schwarz v.*  
14 *Sec’y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995). The decision of the  
15 United States Supreme Court makes clear that, whatever may happen in the future, the claims  
16 as to which the Ninth Circuit awarded fees and costs avail them of nothing. *Wash. State*  
17 *Grange*, 128 S. Ct. at 1187 (decision on the merits in favor of Washington and co-petitioner,  
18 the Washington State Grange); *Wash. State Republican Party v. Wash.*, 2008 WL 4426718,  
19 at \*1 (vacating award of fees and costs and dismissing additional claims). On every issue  
20 adjudicated in the appellate courts, the political parties have been unsuccessful. Even if the  
21 political parties were to prevail on different claims at some later date, the fact would remain  
22 that they did not prevail on the arguments for which fees were awarded. Future hypothetical  
23 success on distinctly different claims does not support an award of fees based on claims that  
24 have already failed. *Schwarz*, 73 F.3d at 901.  
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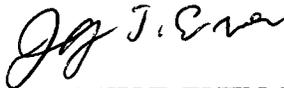
V. CONCLUSION

For these reasons, this Court should order the political parties to provide restitution to the State of Washington in the amount of the fees previously awarded and paid. This Court should additionally order the political parties to pay the State's cost bill initially filed in the Court of Appeals and referred to this Court.

RESPECTFULLY SUBMITTED this 14th day of November, 2008.

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