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May 12, 2008

Molly Dwyer
Clerk of the Court
Ninth Circuit Court of Appeals
95 Seventh Street
San Francisco, CA 94103

Re: *Washington State Republican Party, et al. v. State of Washington, et al.*
Ninth Circuit Court of Appeals Nos. 05-35774 and 05-35780

Dear Ms. Dwyer:

Enclosed for filing please find an original and four copies of: Reply Memorandum in Support of Motion to Vacate Award of Attorneys' Fees and Costs, for Judgment Awarding Restitution of Fees and Costs, and for Costs; and Affidavit of Service.

Sincerely,

JEFFREY T. EVEN
Deputy Solicitor General
360-586-0728

Encls.

cc/encls: All Counsel of Record

NO.05-35774; 05-35780

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al., Appellee/Plaintiffs, WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al., Appellee/Plaintiff Intervenors, LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Appellee/Plaintiff Intervenors, v. STATE OF WASHINGTON, et al., Appellant/Defendant Intervenor, WASHINGTON STATE GRANGE, Appellant/Defendant Intervenor.	REPLY MEMORANDUM IN SUPPORT OF MOTION TO VACATE AWARD OF ATTORNEYS' FEES AND COSTS, FOR JUDGMENT AWARDING RESTITUTION OF FEES AND COSTS, AND FOR COSTS

The fundamental premise underlying any award of attorneys' fees is that the party to whom the fees are awarded must qualify as a "prevailing party." 42 U.S.C. § 1988(b). The reversal of a decision on the merits "removes the

underpinnings of the fee award." *Cal. Med. Ass'n v. Shalala*, 207 F.3d 575, 578 (9th Cir. 2000). In this case, the State and the political parties entered into a stipulation as to the *amount* of attorney fees only after this Court had already entered an order declaring the State *liable* for those fees based upon the decision recently reversed by the Supreme Court. Order at 3 (Aug. 22, 2006). This Court has declared it an abuse of discretion to refuse to vacate a fee award when the underlying decision has been reversed. *Cal. Med. Ass'n*, 207 F.3d at 577.

The responses filed by the three political parties[1] fail to establish their continued entitlement to fees awarded based on a decision that the Supreme Court has reversed, for three reasons. First, the State and the political parties stipulated only as to the *amount* of attorney fees, only after *liability* for them was established through an order of this Court, and expressly provided in the stipulation that, "No waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case (including district court proceedings)." Stipulation and Order Regarding Attorneys' Fees and Costs on Appeal ("Stipulation") at 2 (copy attached as Ex. B to the State's motion). Second, the political parties ignore the

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[1] Appellee Washington State Republican Party's Opposition to State's Fee Motion; Washington State Democratic Central Committee's Response in Opposition to State's Motion to Vacate Award of Attorneys' Fees and Costs; Libertarian Party's Opposition to State's Motion For Relief From Fee Agreement.

language of the stipulation they signed, referring instead to parol evidence of discussions among counsel that are of no moment. Third, and finally, the political parties undeniably have not prevailed as to the appeal this Court heard, and no speculation as to future proceedings will support their claim of an entitlement to fees for the appeal they lost.

The State and the political parties entered into a stipulation as to the *amount* of attorney fees only after this Court had already issued an order finding the State liable for them. The underpinnings of the State's liability were subsequently removed by a reversal of the underlying decision, but the fact remains that the only point open to negotiation between the parties at the time they stipulated was the dollar amount to be paid. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502, 115 P.3d 262 (2005) (under Washington law, the "intent of the contracting parties cannot be interpreted without examining the context surrounding an instrument's execution").

To contest this point, the political parties ignore the language of the stipulation as to the amount of fees, and instead draw a misleading conclusion from parol evidence. The parties stated directly in the stipulation that, "No waiver is intended of any claims for further proceedings in the appeal or in any other aspect of the case (including district court proceedings)." Stipulation at 2. Ignoring this

language from the written stipulation, the political parties instead cite email messages among counsel, from which they draw the conclusion that the stipulation means something other than what it says. Such negotiating discussion gives way, however, to the terms to which the parties subsequently agreed. "Under the parol evidence rule, 'prior or contemporaneous negotiations and agreements are said to merge into the final, written contract,'[2] and evidence is not admissible to add to, modify or contradict the terms of the integrated agreement."[3] *Lopez v. Reynoso*, 129 Wash. App. 165, 170, 118 P.3d 398 (2005). The parties' agreement that, in stipulating to the amount of the fees, they did not waive claims based on further proceedings, such as reversal by the Supreme Court, is established by the language of the stipulation itself, into which the prior negotiations merged under Washington law. *Id.; see also Hearst Communications*, 154 Wn.2d at 504 (Washington courts "do not interpret what was intended to be written, but what was written").

The State, contrary to the political parties' rhetoric, thus seeks not to set aside the stipulation, but to enforce it. The State and the political parties agreed that the stipulation as to the dollar amount did not waive arguments based on

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[2] Quoting *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986).

[3] Citing *DePhillips v. Zolt Constr. Co.*, 136 Wn.2d 26, 32, 959 P.2d 1104 (1998).

further proceedings. Stipulation at 2. The parol evidence to which the political parties refer does not provide otherwise. The emails evidence no discussion or agreement that the political parties would be entitled to retain fees as the prevailing parties, even if the Supreme Court reversed the decision on the merits. Similarly, there is no parol evidence that the political parties agreed to discount their demand for attorney fees based on the risk of reversal. That the parol evidence reveals no such discussion merely emphasizes the point that the negotiations concerned only the *amount* of attorneys' fees and not the State's liability for them.[4]

The political parties additionally assert a right to keep the fees stemming from an appeal on which they did not prevail, based upon speculation that they might someday prevail in some other proceeding in the future. This argument fails, because the law is well established that a party that fails on its claims may not recover attorneys' fees based upon subsequent success as to unrelated claims. *Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 901 (9th Cir. 1995). The decision of the United States Supreme Court makes clear that, whatever may

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[4] Acceptance of the political parties' argument, moreover, would conflict with the policy of encouraging settlement. It would encourage parties to litigate the dollar amount of fees, lest stipulation as to the amount might be construed as waiving future arguments as to liability. This is particularly so given that the State and the political parties entered into a stipulation in which they did not waive arguments stemming from future proceedings.

happen in the future, the claims the political parties made in this Court avail them of nothing. *Washington State Grange v. Washington Republican Party*, ___ U.S. ___, ___ L. Ed. 2d ___, 128 S. Ct. 1184, 1187 (2008) (decision on the merits in favor of Washington and co-petitioner, the Washington State Grange). Even if the political parties were to prevail on different claims at some later date, the fact would remain that they did not prevail on the arguments for which fees were awarded in this Court. Future hypothetical success on distinctly different claims does not support an award of fees based on claims that have already failed.[5] *Schwarz*, 73 F.3d at 901.

For these reasons, and those set forth in the State's original motion, this Court should vacate its order awarding costs and attorneys' fees to the Republican, Democratic, and Libertarian Parties against the State of Washington, and further

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[5] The Republicans (not joined by either the Democrats or the Libertarians) misstate this Court's decision when they suggest that this Court "reserved" some undisclosed issue that it might still be asked to address. Republicans' Resp. at 2. This Court did not "reserve" anything, as the language the Republicans quote makes clear. Rather, the Court merely found it unnecessary to address certain arguments. *Id.* (quoting *Washington State Republican Party v. Washington*, 460 F.3d 1108, 1124 n.28 (9th Cir. 2006)). It is not unusual for an appellate court to find it unnecessary to address every argument made in support of a claim, and this does not equate with "reserving" claims for the future. Moreover, given the Supreme Court's explicit rejection of the District Court's preliminary injunction as an "extraordinary and precipitous nullification of the will of the people", *Washington State Grange*, 128 S. Ct. at 1196, it cannot seriously be suggested that the injunction remains in place.

order those political parties to provide restitution to the State in the amount of the fees previously awarded and paid, and should approve the Cost Bill that accompanied the State's motion.[6]

RESPECTFULLY SUBMITTED this 12th day of May, 2008.

ROBERT M. MCKENNA
Attorney General

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Solicitor General

Jeff T. Even

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Counsel for Appellants State of
Washington, Rob McKenna, and Sam Reed

[6] The political parties do not challenge the State's submission of a cost bill, and do not contest that the State is a prevailing party on this appeal.

No. 05-35774; 05-35780

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Appellee/Plaintiffs,

WASHINGTON DEMOCRATIC CENTRAL COMMITTEE, et al.,

Appellee/Plaintiff Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, et al.,

Appellee/Plaintiff Intervenors,

v.

STATE OF WASHINGTON, et al.,

Appellant/Defendant Intervenor,

WASHINGTON STATE GRANGE,

Appellant/Defendant Intervenor.

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss.
COUNTY OF THURSTON)

I, BECKY WALDRON, being first duly sworn on oath, depose and state as follows:

I am over the age of 18 years and am not a party to the within cause. I am a Legal Assistant in the Attorney General's Office. On the date below, I caused to be served a true and correct copy of: Reply Memorandum in Support of Motion to Vacate Award of Attorneys' Fees and Costs, for Judgment Awarding Restitution of Fees and Costs, and for Costs; and this Affidavit of Service, on all counsel of record as follows:

John White Livengood Fitzgerald & Alskog PO Box 908 Kirland WA 98083-0908	First Class Mail and Email: white@lfa-law.com
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Becky Waldron
Legal Assistant

SIGNED AND SWORN to before me this 12th day of May, 2008, by Becky Waldron.

PAMELA DUNGAN NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 11-29-10

Pamela Dungan
NOTARY PUBLIC in and for the State of Washington
My Commission expires 11-29-10