

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<table border="1"><tr><td>FILED IN THE SUPREME COURT</td></tr><tr><td>APR 28 2008</td></tr><tr><td>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</td></tr></table> <p>▲ COURT USE ONLY ▲</p>	FILED IN THE SUPREME COURT	APR 28 2008	OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
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<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2007) Appeal from Ballot Title Board</p>				
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #75 ("LIABILITY OF BUSINESS ENTITIES AND THEIR EXECUTIVE OFFICIALS-CIVIL LIABILITY") JOSEPH B. BLAKE, OBJECTOR,</p> <p>Petitioner,</p> <p>v.</p> <p>JOANNE KING AND LARRY ELLINGSON, PROPONENTS; AND WILLIAM A. HOBBS, DANIEL L. CARTIN AND DANIEL DOMENICO, TITLE BOARD,</p> <p>Respondents.</p>	<p>Case No.: 08SA119</p>			
<p>JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record</p>				
<p>OPENING BRIEF OF TITLE BOARD</p>				

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William A. Hobbs, Daniel L. Cartin and Daniel Domenico, in their capacities as members of the Title Board (hereinafter "Board"), hereby submit their Opening Brief. The measure and the titles are attached hereto.

STATEMENT OF THE ISSUES

The Board adopts the statement of issues set forth in the Objector's Petition for Review.

STATEMENT OF THE CASE

On March 7, 2008 the proponents filed Proposed Initiative #75 (#75) with the Secretary of State. The Board held a hearing to set the titles on March 19, 2008. The Board concluded that #75 had a single subject and set a title.

On March 26, 2008, Joseph Blake, Objector, filed a motion for rehearing. He alleged that #75 contained multiple subjects, the text of the measure was unclear; the titles were misleading, incomplete, confusing and inaccurate; and the titles included a catch phrase. On April 2, 2008, the Board granted the motion for rehearing in part and set the titles. The Objector filed this appeal.

STATEMENT OF THE FACTS

#75 adds a new section to article 21, of title 13, Colorado Revised Statutes. It authorizes a Colorado resident to file an action against any business entity for

conduct that violates § 18-1-606(1)(a), C.R.S. (2007) or against the business entity's executive officials when the officials knew of the specific duty to be performed under law and knew that the business entity failed to perform the duty. It defines "business entity", and "executive official." If the damages are awarded in a civil action, such damages will be given to the governmental entity that imposed the duty to be performed by the business entity. Such damages are exempt from revenue and spending limits. The individuals filing the lawsuits are entitled to attorneys fees and costs. Executive officials may assert an affirmative defense if they report facts of which they were aware concerning the business entity's violations prior to the filing of the civil action or applicable criminal charges.

SUMMARY OF THE ARGUMENT

#75 contains only one subject: civil liability for criminal conduct of a business.

The titles set by the Board are fair, clear and accurate. Although the titles do not describe all of the details of the proposed measure, they do include its central features.

The phrase "criminal conduct" is not a catch phrase.

ARGUMENT

I. #75 contains one subject: Establishing civil liability for criminal conduct by a business entity.

Objector contends that the Board should not have set titles because #75 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it “relate[s] to more than one subject and ... [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2002)(Colo. 2006) (#55) A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both

prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. #55, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02* #43, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. #43, 46 P.3d at 443. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #258(A), 4 P.3d 1094, 1097-98 (Colo. 2000). However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2001-2002* #21 and #22, 44 P.3d, 213, 216 (Colo. 2002). The single subject rule must be liberally construed to avoid unduly restricting the right of initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98* No. 74, 962 P.2d 927, 929 (Colo. 1998). Sections of a measure that include “implementation or enforcement details directly tied to the single subject will not, in and of themselves, constitute a single subject.” *Title, Ballot Title and Submission Clause, and Summary for 2005-2006* #73, 135 P.3d 736, 739 (Colo. 2006).

The measure has only one subject: establishing civil liability for criminal conduct by a business entity. All of the provisions are related to this subject. Section 1 authorizes a civil action brought by Colorado residents against a business entity for conduct in violation of § 18-1-606(1)(a) or against the executive officials of a business in circumstances in which the officials knew of the duty to be performed and knew that the business entity failed to perform. Section 2 defines two key terms, “business entity” and “executive official.” The measure specifies to whom damages, costs and attorneys fees may be awarded upon successful completion of a lawsuit by a Colorado resident. It also sets forth the details of an affirmative defense that executive officials may assert. These provisions describe grounds for liability, applicable defenses, and the means of enforcement.

Objector’s arguments to the Board regarding single subjects are without merit. With regard to the argument that the measure would criminalize traditional civil concepts such as breach of fiduciary duties and duty of loyalty, the claim is without any support. Part 6 of article, title 18 does not define or create offenses. It merely describes when a person is deemed a party to an offense. #75 says only that agents and high managerial agents of business entities will be subject to the same criminal penalties as the business entities for which they work.

Objector makes the following arguments in support of his contention that #75 contains multiple subjects: (1) the measure encompasses both criminal conduct and hundreds of governmental laws, regulations and ordinances; (2) it extends standing to all Colorado residents; (3) it would allow damages to all governmental entities and put governmental entities in conflict with competing interests of private citizens; (4) it provides attorneys fees for successful plaintiffs but not for successful defendants; (5) the measure does not address circumstances where the duty of a business arises from the common law rather than from statutes; (6) damages would be exempt from revenue and expenditure restrictions; and (7) the measure imposes a duty to report violations of the law in order to qualify for an affirmative defense.

The Court must reject the Objector's contentions. The measure does not establish new offenses. The offenses are already established by law. #75 authorizes civil liability for activities that already illegal. It does not establish new offenses.

Objector also contends that the enforcement of the civil penalties by any private resident constitutes a separate subject. The measure merely authorizes *qui tam* enforcement. *Qui tam* proceedings are enforcement mechanisms which can be brought by any citizen, acting as a private attorney general, to enforce statutes with

the proceeds divided between the citizen and the government. *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 19 n.2 (1st Cir. 1990), *cert. denied*, 499 U.S. 921 (1991).¹ The state is still the real party in interest. The enforcement details do not, by themselves, constitute a separate subject. *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.2d 237, 239 (Colo. 2006). The fact that action is brought by a private attorney general and the proceeds are paid to the state's general fund does not transform the enforcement provision into something other than an enforcement provision.

The exemption from spending and revenue limits does not create an additional subject. The measure entitles the state to collect damages because it deems the state harmed by illegal actions. Colo. Const art. X, § 20(2)(e) exempts damages collected by the state from spending and revenue limits. The measure merely reiterates existing law.

The assessment of attorneys fees and the elements necessary to establish an affirmative defense are part and parcel of the enforcement and prosecution of the

¹ *Qui tam* proceedings are authorized in the Colorado Constitution. Voters recently have authorized citizens to act as private attorneys general to enforce penalties. Colo. Const. art. XXVIII, § 9(1)(f); Colo. Const. art. XXIX, § 5(2)(f) (“Any person may file a written complaint with the independent ethics commission”)

measure. Objector's remaining arguments are directed to the policies behind the measure and are not relevant to the single subject analysis.

For these reasons, the Court must find that the measure contains a single subject.

II. The titles are fair, clear and accurate.

Section 1-40-106(3), C.R.S. (2005) establishes the standard for setting titles.

It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo.

2000). However, the Board is not required to set out every detail. #21, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure's efficacy, or its practical or legal effects. #256, 12 P.3d at 257; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e)*, 8 P.3d 1194, 1197 (Colo. 2000). The Court does not demand that the Board draft the best possible title. #256, at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).

Objector asserts that the titles are defective because they (1) fail to define the parties affected by the civil liability provisions, (2) suggest that an existing statute addresses civil liability for criminal conduct by business entities; (3) fail to indicate that the terms "resident", "civil damages" and "governmental entity" are not defined; (4) fail to indicate that governmental entities may be competing against other parties for damages; (5) fail to disclose who must pay attorneys fees and costs, (6) fail to explain the measure's application to traditional civil law concepts; and (7) fail to explain the details regarding the establishment of an affirmative defense under the measure.

The Court must reject Objector's contentions. Objector essentially argues that the titles must analyze the substance and legal impact of the measure. The Board cannot explain or analyze the legal effects of the measure. *Armstrong v. Davidson*, 10 P.3d 1278, 1282 (Colo. 2000). Nor is it required to address every aspect of the proposal. Its duty is merely to summarize the measure in a concise, non-argumentative fashion. *Id.* The titles set by the Board achieve this objective.

III. The measure does not include a catch phrase.

The Objectors contend that the term "criminal conduct" is a catch phrase. The Court must reject this argument.

"Catch phrases are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). The existence of a catch phrase is determined in the context of contemporary political debate. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 7 (Colo. 2000). The person asserting the existence of a catch phrase must offer convincing evidence. *Id.*

The measure imposes civil liability for actions or activities that meet the elements of criminal conduct under section 18-1-606(1)(a), C.R.S. (2007). The term is nothing more than shorthand for the phrase “conduct constituting the offense” used in section 18-1-606(1)(a) and (1)(b).

Wording which repeats or closely paraphrases operative language of the measure does not constitute a catch phrase. *In re Workers Comp. Initiative*, 850 P.2d 144, 147-48 (Colo. 1993). Subsection 1 of the measure discusses “conduct that meets the criteria set forth in section 18-1-606(1)(a).” The use of the term “criminal conduct” objectively summarizes the meaning of the measure.

In this case, Objector has not provided any evidence that the term is likely to be used as a catch phrase in a contemporary political debate. There has been no showing that “criminal conduct” is “a well-known, arguable inflammatory phrase.” *Id.* at 147.

CONCLUSION

For the above-stated reasons, the Board respectfully requests that the Court approve the titles set by the Board.

JOHN W. SUTHERS
Attorney General



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Deputy Attorney General

Public Officials

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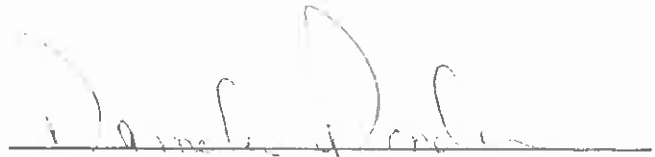
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same, overnight by DHL at Denver, Colorado, this 28th day of April 2008 addressed as follows:

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A handwritten signature in cursive script, appearing to read "Daniel J. Pender", is written over a horizontal line.

RECEIVED

MAR 07 2008

Ch. 218-1-606

*Proposed Initiative
2007-2008 #75
FINAL*

Be it enacted by the People of the State of Colorado:
SECRETARY OF STATE

SECTION 1. Article 21 of Title 13 of the Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

(1) ANY INDIVIDUAL RESIDING IN COLORADO MAY FILE A PRIVATE RIGHT OF ACTION AGAINST ANY BUSINESS ENTITY FOR ITS CONDUCT THAT MEETS THE CRITERIA SET FORTH IN SECTION 18-1-606(1)(a) OR AGAINST THE BUSINESS ENTITY'S EXECUTIVE OFFICIALS WHERE SUCH OFFICIALS KNEW OF THE SPECIFIC DUTY TO BE PERFORMED AS REQUIRED BY LAW AND KNEW THAT THE BUSINESS ENTITY FAILED TO PERFORM THAT DUTY.

(2) AS USED IN THIS SECTION:

(a) "BUSINESS ENTITY" MEANS A CORPORATION OR OTHER ENTITY THAT IS SUBJECT TO THE PROVISIONS OF TITLE 7, C.R.S.; FOREIGN CORPORATIONS QUALIFIED TO DO BUSINESS IN THIS STATE PURSUANT TO ARTICLE 115 OF TITLE 7, C.R.S., SPECIFICALLY INCLUDING FEDERALLY CHARTERED OR AUTHORIZED FINANCIAL INSTITUTIONS; A CORPORATION OR OTHER ENTITY THAT IS SUBJECT TO THE PROVISIONS OF TITLE 11, C.R.S.; OR A SOLE PROPRIETORSHIP OR OTHER ASSOCIATION OR GROUP OF INDIVIDUALS DOING BUSINESS IN THE STATE.

(b) "EXECUTIVE OFFICIAL" MEANS ANY NATURAL PERSON WHO IS AN OFFICER, DIRECTOR, MANAGING PARTNER, MANAGING MEMBER, OR SOLE PROPRIETOR OF A BUSINESS ENTITY.

(3) IN A CIVIL ACTION BROUGHT UNDER THIS SECTION, COMPENSATORY OR PUNITIVE DAMAGES MAY BE AWARDED TO ANY GOVERNMENTAL ENTITY THAT IMPOSED BY LAW THE SPECIFIC DUTY TO BE PERFORMED BY THE BUSINESS ENTITY.

(4) IT SHALL BE A COMPLETE AFFIRMATIVE DEFENSE FOR ANY EXECUTIVE OFFICIAL WHO IS A DEFENDANT IN AN ACTION FILED UNDER SUBSECTION (1) OF THIS SECTION THAT, PRIOR TO FILING OF SUCH CIVIL ACTION OR ANY CRIMINAL CHARGES UNDER SECTION 18-1-606(1)(a), HE OR SHE REPORTED TO THE OFFICE OF THE ATTORNEY GENERAL ALL FACTS OF WHICH HE OR SHE WAS AWARE CONCERNING THE BUSINESS ENTITY'S CONDUCT THAT MET THE CRITERIA SET FORTH IN SECTION 18-1-606(1)(a).

(5) SUCH MONEYS, WHEN APPROPRIATED, SHALL BE EXEMPT FROM ALL REVENUE AND SPENDING LIMITATIONS PROVIDED BY LAW.

(6) IF AN AWARD IS MADE UNDER THIS SECTION, THE INDIVIDUAL FILING THE LAWSUIT SHALL BE ENTITLED TO REASONABLE ATTORNEY FEES AND COSTS FOR DEFENDING THE INTERESTS OF THE STATE. NO SUCH AWARD SHALL BE MADE FOR CLAIMS THAT LACKED SUBSTANTIAL JUSTIFICATION OR WERE INTERPOSED FOR DELAY OR HARASSMENT.

Ballot Title Setting Board

Proposed Initiative 2007-2008 #75¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado Revised Statutes concerning civil liability for criminal conduct by business entities, and, in connection therewith, allowing a Colorado resident to bring a civil action against a business entity or its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning executive officials' liability upon their knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty to be performed by the business entity; permitting an individual who brings a successful civil action to be awarded attorney fees and costs; and allowing an executive official who discloses to the attorney general all facts known to the official concerning a business's criminal conduct to use that disclosure as an affirmative defense to the civil charges.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning civil liability for criminal conduct by business entities, and, in connection therewith, allowing a Colorado resident to bring a civil action against a business entity or its executive officials for the entity's failure to perform a specific duty imposed by law; conditioning executive officials' liability upon their knowledge of the duty imposed by law and of the business entity's failure to perform such duty; allowing an award of compensatory or punitive damages in the civil action to the governmental entity that imposed the specific duty to be performed by the business entity; permitting an individual who brings a successful civil action to be awarded attorney fees and costs; and allowing an executive official who discloses to the attorney general all facts known to the official concerning a business's criminal conduct to use that disclosure as an affirmative defense to the civil charges?

Hearing March 19, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 3:14 p.m.

Hearing April 2, 2008:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 3:00 p.m.

¹ Unofficially captioned "Criminal Conduct by Businesses – Civil Liability" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.