

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, CO 80203</p>	
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT AND SUBMISSION CLAUSE 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 style="text-align: center;">▲ COURT USE ONLY ▲</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>	
ANSWER BRIEF OF TITLE BOARD	

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William A. Hobbs, Daniel L. Cartin and Daniel Domenico, in their capacities as members of the Title Board (“Board”) hereby submit their Answer Brief.

The Board incorporates the statement of the issues, statement of the case, statement of the facts, and summary from its Opening Brief.

ARGUMENT

I. #75 Has A Single Subject.

Objector asserts in his opening brief that the measure contains three subjects: (1) a new form of civil liability allowing anyone living in Colorado to bring an action for compensatory and punitive on behalf of any governmental entity based upon criminal conduct; (2) an exemption from revenue limits for damages awarded to a governmental entity; and (3) an affirmative defense against any criminal action if, prior to the filing of a criminal charge or a civil action, the executive official notifies the attorney general of all facts of which he is aware concerning activities of the business entity. The Court must reject Objector’s argument.

#75 establishes the concept that civil society is harmed when a business or an executive official of a company commits an offense consisting of an omission to

discharge a specific duty of affirmative performance imposed on the business entity by law. Because civil society is harmed, the government, through civil actions filed by Colorado residents acting on behalf of the government, can seek civil and punitive damages. The damages are given to the government. An executive official of a business entity may avoid damages if, prior to the filing of a civil action or criminal action, the executive official has reported any applicable violation to the attorney general. The measure establishes a cause of action, an affirmative defense and penalties for violations of the law.

Objector's first argument is based on the assumption that a core set of facts cannot support both a criminal prosecution and a civil action. (Objector's Opening Brief, p. 7.) This argument is without merit. A set of facts can give rise to both criminal and civil liability. *Oja v. Grand Chapter of Theta Chi Fraternity, Inc.*, 684 N.Y.S.2d 344, 346 (1999). Violations of criminal law can result in civil actions, can establish a breach of a standard of care, or can be used to supplement criminal penalties. *Animal Legal Defense Fund v. Mendes*, 72 Cal. Rptr.3d 553, 556 (Cal. App. 2008).

Objector next asserts that the damages are awarded to a governmental entity rather than a private individual. (Objector's Opening Brief, p. 7.) The award of damages to governmental entities is closely connected to the question of liability.

Under the measure, society as a whole is the victim. Therefore, an award of damages to the government, acting on behalf of society, is appropriate.¹

Objector also contends that the measure establishes an affirmative defense to criminal liability; therefore, the measure encompasses both criminal and civil law. (Objector's Opening Brief, pp. 8-9.) Objector misreads the measure. Subsection (4) of the measure states, "It shall be a complete affirmative defense for any executive official who is a defendant in an action filed under subsection (1) of this 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)." Section (1) of the measure applies only to private rights of action. It does not in any manner address affirmative defenses under the criminal statutes.

II. The Titles Are Fair, Clear And Accurate.

Objector criticizes the titles because they do not articulate that the measure concerns both civil and criminal liability. As noted, this argument misreads the

¹ The measure's statement that the damages are exempt from Colo. Const. art. X, § 20 does not create a separate subject. The measure merely restates the provision in Colo. Const. art. X, § 20(2)(e) that damages awarded to the government are exempt from constitutional restrictions on spending and revenues.

measure. (Objector's Opening Brief, p. 11.) The measure, on its face, does not govern both civil and criminal liability. It concerns only civil liability.

Furthermore, as noted above, a measure encompassing both civil and criminal provisions is not a multi-subject measure if the provisions are linked to a common core of facts.

Next, Objector states that the measure omits what specific types of affirmative duties will subject an official to liability. (Objector's Opening Brief, p.11.) At this stage, any potential failings of the measure are not at issue. The only question is whether the titles accurately reflect the content of the measure.

Objector also contends that the titles are inadequate because they do not disclose that an executive official must make a full disclosure to the attorney general prior to being charged and that such disclosure provides complete immunity to criminal charges. (Objector's Opening Brief, p. 11.) Again, the measure does not address affirmative defenses to criminal charges. Thus, the argument is without merit.

Next, Objector asserts that the titles inaccurately summarize the identity of individuals who can file civil actions. The measure provides that "any individual residing in Colorado may file a private right of action." The titles state that the measure allows "a Colorado resident to bring a civil action against a business

entity.” According to Objector, an “individual” is a natural person, while a resident may be a natural person, or a business entity, a legal alien or any illegal alien. (Objector’s Opening Brief, pp. 12.)

Objector cites the definition of “individual” in *Black’s Law Dictionary* 777 (7th ed. 1999). The definition contradicts their argument. The term “individual” relates “to a single person or *thing*, as opposed to a group.” (Emphasis added.) A “thing” is not a natural person. The commonly-accepted definition of “individual” may include a natural person who is a citizen, a natural person who is a legal alien, a corporation or any other entity residing in the state. Thus, the term “Colorado resident” accurately summarizes the measure.

Underlying Objector’s argument is the concern that the measure does not include definitions of terms such as “individual” or “civil damages”. The Board is not usually required to define a term that is not defined in the measure. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #255*, 4 P.3d 485, 498 (Colo. 2000) (#255). As long as a measure contains a single subject, and the Board can discern the meaning of a measure, it must set a title. Any ambiguity in the terms of a measure can be addressed only after the measure passes.

Objector also asserts that the titles do not disclose that the measure exempts damages from the limits contained in Colo. Const. art. X, § 20. (Objector’s

Opening Brief, p. 13.) As noted earlier, this is not a key feature of the measure because the constitution already exempts damages awarded to governments. Colo. Const. art. X, § 20(2)(e).

III. The Term “Criminal Conduct” Is Not A Catch Phrase.

The term “criminal conduct” is a fair and accurate paraphrase of a language within the measure. The measure establishes civil liability against businesses for “conduct that meets the criteria set forth in section § 18-1-606(1)(a).” This section is a part of the criminal code. It provides that a business entity is “guilty of an offense” under specified circumstances. The word “offense” is synonymous with the word “crime”. Thus, the Board’s use of the phrase criminal conduct is a fair paraphrase of existing law.


Objector has not shown that measures containing similar phrases have generated slogans. To the contrary, similar phrases in titles have not been shown to be controversial. #255, 4 P.3d at 501 (“establishing criminal penalties” used in initiative requiring background checks at gun shows); *In re Title, Ballot Title and Submission Clause, and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 320 (Colo. 1994) (titles for campaign finance initiative included the phrase “to provide civil and criminal sanctions for violations of the proposed amendment”)

CONCLUSION

For the reasons set forth herein and in the Board's Opening Brief, the Court must affirm the action of the Board.

JOHN W. SUTHERS

Attorney General



MAURICE G. KNAIZER, Q5264*

Deputy Attorney General

Public Officials

State Services Section

Attorneys for Title Board

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same by Express Mail, postage prepaid, at Denver, Colorado, this 19th day of May 2008 addressed as follows:

Douglas J. Friednash
John M. Tanner
Susan F. Fisher
Fairfield and Woods, P.C.
1700 Lincoln St., Ste. 2400
Denver, CO 80203

Mark G. Grueskin
Isaacson Rosenbaum P.C.
633 17th St., Ste. 2200
Denver, CO 80202



A handwritten signature in black ink, appearing to read "Douglas J. Friednash", is written over a horizontal line.