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<input type="checkbox"/> EXPEDITE <input type="checkbox"/> No hearing set <input checked="" type="checkbox"/> Hearing is set Date: <u>March 27, 2009</u> Time: 9:00 a.m. Judge/Calendar: <u>Murphy</u> <input type="checkbox"/> No hearing is set.
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

)	No. 08-2-01674-6
IN RE: WASHINGTON)	
BUILDERS BENEFIT TRUST)	PETITIONERS' MOTION FOR
)	TRUST ACCOUNTING
<hr/>)	
RE SOURCES FOR)	
SUSTAINABLE COMMUNITIES)	
<i>ET AL,</i>)	
)	
Petitioners,)	
)	
v.)	
)	
BUILDING INDUSTRY)	
ASSOCIATION OF)	
WASHINGTON <i>ET AL.</i>)	
)	
Defendants.)	
)	

1 Petitioners Re-Sources for Sustainable Communities, A-1 Builders, SF
2 McKinnon Company, Inc., Living Space and Cabinetworks (collectively,
3 “Petitioners”), hereby move the Court for an order requiring the Washington
4 Builders Benefit Trust (“WBBT” or “Trust”) and its delegee, BIAW Member
5 Services Corporation (“MSC”), to file a trust accounting with this Court pursuant
6 to the Trustees’ Accounting Act (“TAA”). RCW Ch. 11.106. Petitioners seek an
7 order requiring the Trust and MSC to retain an independent third party to prepare
8 a comprehensive trust accounting for submission to this Court by a return date of
9 July 27, 2009. *See Proposed Order Requiring Accounting.*

11 **INTRODUCTION AND SUMMARY OF ARGUMENTS**

12 Petitioners are five beneficiaries of WBBT, an express trust that was set up
13 to hold, invest and distribute tax refunds issued by the State of Washington to
14 over 6,000 small employers that participate in a state tax refund program through
15 the Building Industry Association of Washington (“BIAW”). Their three-count
16 Petition seeks relief under the TAA, the Trust and Estate Dispute Resolution Act
17 (“TEDRA”) and the Consumer Protection Act (“CPA”). Petitioners seek an
18 Order from the Court requiring an accounting of the Trust pursuant to the TAA,
19 which states, “**any settlor or beneficiary** may file a petition under RCW
20 11.96A.080 with the superior court ... to direct the trustee or trustees to file in
21 the court an account.” RCW 11.106.040 (emphasis added).

22 Under the TAA, the Court’s ordering of a trust accounting is a preliminary
23 step of the statutory accounting process designed by the Washington legislature.
24 The TAA does not require notice to interested persons before the Court orders
25 the trustees to prepare an accounting. Rather, once the accounting is completed,
26 it will be filed with the Court, and at that time all persons with an interest in the

1 Trust will be notified and given the opportunity “to file written objections or
2 exceptions to the account filed or to any action of the trustee or trustees set forth
3 in the account.” RCW 11.106.050 and 11.106.060; *Nelson v. Griffiths*, 21
4 Wn.App. 489, 495 (1978). Then the Court “shall determine the correctness of
5 the account and the validity and propriety of all actions of the trustee.” RCW
6 11.106.070.¹

7
8 Distinguished accounting professor, Stephen Sefcik, Ph.D, from the
9 University of Washington’s Foster School of Business concludes that a
10 comprehensive trust accounting by a disinterested third party is necessary to
11 determine the state of trust assets and to precisely quantify the damages sustained
12 by the Trust and its beneficiaries. See Declaration of Stephen Sefcik, PhD.
13 (“Sefcik Dec.”) ¶ 14. His expert opinion describes the details of transactions that
14 had the effect of skimming interest off the trust and concludes that it has
15 deprived the beneficiaries of between \$600,000 and \$1.3 million in interest over
16 just the past four or five years. *Id. at* ¶ 10. This is hardly a “small” or
17 “incidental” amount of interest, as the Trust claims, and provides just one
18 example of the “good cause” justification for this Court to order an accounting.

19 Moreover, the improper procedures employed by the Trust and MSC raise
20 fundamental questions about the entirety of the Trust’s management, including
21 the protection and proper distribution of interest and principal. For example,
22 Professor Sefcik expresses concern that MSC is allowed to compute **its own**
23 multi-million dollar fee using calculations that are likely indecipherable to
24 anyone outside of MSC. He believes that MSC may have over paid and

25 ¹ Petitioners fully expect Defendants to claim that no accounting should be ordered until all
26 beneficiaries are served with the TEDRA Petition and have an opportunity to object, consistent with
27 their ongoing efforts to delay this case. The Courts have rejected this argument. *Nelson v. Griffiths*, 21
28 Wn.App. 489, 495 (1978).

1 prematurely paid itself, depriving the beneficiaries of as much as \$3.6 million in
2 lost principal and interest since 2003. *Id.*

3
4 Even absent these apparent breaches of trust, and the additional examples
5 described below, good cause exists to require an accounting because the Trust
6 has never provided the beneficiaries with annual trust accountings, as specifically
7 required by RCW 11.106.020.² The meeting minutes of the Trust acknowledge
8 that the beneficiaries have been left in the dark. The result is that neither
9 Petitioners nor any other beneficiaries have any idea of the scope of trust assets
10 or how they have been managed or mismanaged, as the case may be.

11 The Trust's failure to segregate and earmark trust funds and protect them
12 for the beneficiaries has so obfuscated the Trust's assets and proceeds that it will
13 take a comprehensive accounting merely to understand the current assets of the
14 Trust and the extent that mismanagement has harmed the Trust.

15 **DESCRIPTION OF CERTAIN PARTIES AND DOCUMENTS**

16 **The Washington Builders Benefit Trust**

17 The Court's protection of the Trust is vital to the public interest because
18 95% of its assets originate as State tax refunds earned by over 6,000 mostly small
19 employers through the State of Washington's "retrospective rating" ("Retro")
20 program. Sefcik Dec. ¶ 9.³ Each year, these employers earn between 30 and 50
21 million dollars in state tax refunds. *Id.* All of these refunds are paid in large
22 checks written by the Washington State Department of Labor and Industries

23 ²RCW 11.106.020 provides that trustees "shall mail or deliver at least annually to each adult income
24 trust beneficiary a written itemized statement of all current receipts and disbursements made by the
trustee of the funds of the trust both principal and income...." This has, to Petitioner's knowledge,
never occurred since the inception of the Trust. See Petitioners' Declarations submitted herewith.

25 ³ See WBBT's Accountant's Review Report (BIAW 21588), Sefcik Dec. Ex. C ("**Description of Operation** –
26 WBBT was formed in 1989 by the BIAW. WBBT is a complex trust for the purpose of receiving, reserving,
investing, distributing, and accounting for employer participant Return on Industrial Insurance ("ROI") Program
27 adjustments from the DLI.")

1 (“DLI”). *Id.* at Ex. A (tax refund checks). These funds, along with their
2 proceeds, constitute the *res* of the Trust.

3
4 Retro is a state tax refund program operated by the DLI. It promotes and
5 incentivizes workplace safety by providing a state tax refund⁴ to employers who
6 reduce their workers compensation claims.⁵ Pursuant to state regulations, “[a]ll
7 retro group refunds are paid directly to the sponsoring organization. It is the
8 responsibility of the sponsoring organization to distribute any refunds to the
9 group members.” WAC 296-17-90445. The Trust holds and distributes the
10 refunds earned by employers who participate in retro through the BIAW.

11 Defendants admit that WBBT, with the cooperation of MSC, receives the
12 refunds from DLI,⁶ and “[t]here is no question but that the Benefit Trust is an
13 “express trust” ... The existence of this trust, with all that it implies in terms of
14 *fiduciary duties, is not in dispute.*”⁷ Defendants admit that WBBT is “a trust
15 established by BIAW many years ago to hold and invest premium refunds from
16 DLI prior to their disbursement to the trust beneficiaries.”⁸ The WBBT
17 Investment Policy Statement states that the “main purpose” of the Trust is “to
18 hold and protect Industrial Insurance refund dollars that belong to members of
19

20 ⁴ Retro refunds a portion of the employers’ workers compensation premiums paid to DLI. While these payments
21 resemble and are commonly referred to as premiums, they are in fact taxes and are so defined by statute. RCW
22 51.08.015; *see also Crown Zellerbach Corp. v. Dep’t of Labor & Indus.*, 98 Wn.2d 102, 108-109 (1982)
23 (industrial insurance payments are taxes, not insurance premiums).

24 ⁵ “Retro is designed to reward employers participating in the program who are able to keep their claim costs
25 below the preselected level they have chosen.” WAC 296-17-90401 (emphasis added). The benefit is that
26 “Participating employers who are successful may be refunded a portion of the premiums they paid to [DLI].” *Id.*

27 ⁶ “Member Services performs administrative services for the WBBT, **including receiving the group’s refunds
28 from DLI and transferring them to the trust’s investment account.** When the trustees authorize distribution,
Member Services calculates the amounts due, and writes the checks.” *Opp’n of BIAW, Member Services and
Benefit Trust to Plntffs Mot. for Partial Summ. Judgmt.* Excerpt (“BIAW Fed. MSJ Opp.”) p. 7, attached as
Lowney Dec. Ex. A (emphasis added).

⁷ *Id.* at p. 10 (emphasis added). *See also p. 12* (“The trustees of the Benefit Trust unquestionably owe fiduciary
duties ... to the participants in the BIAW retro program.”).

⁸ *Id.* at 6.

1 the BIAW's retrospective Rating Program."⁹

2 **Member Services Corporation**

3 It is beyond dispute that MSC is a for-profit corporation that is an affiliate
4 of the Trust and the Trust's primary delegee. The President of MSC, by virtue of
5 being President of the BIAW, appoints the WBBT trustees¹⁰ and the Trust's chair
6 and vice-chair sit on the executive committee of MSC.¹¹ The Trust's accountants
7 label transactions with MSC as "related party transactions."¹²

8 The Trust acknowledges that MSC provides staff to carry out the Trust's
9 administrative functions, including receiving trust funds from DLI, accounting,
10 refund calculations, distribution of refunds, and trustee meeting preparation.¹³
11 "WBBT does not have staff" and instead utilizes MSC staff.¹⁴

12 **Governing Documents**

13 The parties agree that there are two documents that govern the trust, but
14 disagree as to their legal import. While not critical for this motion, this is a
15 central dispute to be later resolved in this case.

16 **ROII Instrument.** To join ROII, each employer signs a standardized
17 agreement ("ROII Instrument") in which it "absolutely assigns to the Trust all
18 Premium Returns that may be payable by DLI on behalf of the Member" with the
19 assurance that "[a]ny Premium Returns payable to BIAW from DLI under the
20 DLI Agreement *shall be held in trust by the Trust for Participants including the*
21 *Member.*"¹⁵ Petitioners believe that the ROII Instrument is the primary
22

23 ⁹ Sefcik Dec. Ex. D at BIAW 13832.

24 ¹⁰ The President of MSC also serves as the President of BIAW and in this capacity appoints the trustees. *Lowney Dec. Exhs B and C.*

25 ¹¹ *Id.* In addition, virtually every trustee in the past 10 years has also held leadership positions in MSC, and in many cases held those positions simultaneously. *See Lonnie Lopez Decl., attached as Lowney Decl. Ex. F*

26 ¹² BIAW Fed. MSJ Opp. p. 7, Sefcik Dec. Ex. C at BIAW 21588.

27 ¹³ Sefcik Dec. Ex. L (Response to Interrogatory No. 12.)

28 ¹⁴ *Id.* (Response to Interrogatory No. 14).

¹⁵ An excerpt of this document is attached to the Petition.

1 governing trust document because through signing that document, each
2 beneficiary transfers the tax return (the trust res) to the Trust to hold in trust, and
3 the documents sets standards for management and distribution of the trust funds.
4

5 **1994 Declaration of Trust.** Defendants place their reliance upon a 1994
6 declaration of trust that was signed only by the trustees and which, they admit,
7 has never been disclosed to the trust beneficiaries.¹⁶ Petitioners agree that this
8 document governs the trust to the extent that it is consistent with the ROII
9 Instrument. However, because the declaration is signed only by the trustees and
10 has not been disclosed to the settlors/beneficiaries, it cannot lower the trustees'
11 fiduciary duties. *See* RCW 11.97.010 (only trustor can relieve trustee of
12 fiduciary duties; trustee cannot relieve self from duties).

13 ARGUMENT

14 **A. GOOD CAUSE EXISTS FOR THIS COURT TO ORDER** 15 **DEFENDANTS TO ACCOUNT FOR TRUST FUNDS.**

16 "It is not essential for a beneficiary ... under a trust to allege waste and
17 mismanagement prior to seeking an accounting from the trustees." *Nelson v.*
18 *Griffiths*, 21 Wn.App. 489, 496 (1978). Moreover, "it is not necessary to allege
19 that there is any payment immediately due him under the trust or that the trustee
20 in some way is in default." Bogert, *The Law of Trusts and Trustees* § 963. Here,
21 however, in addition to the failure to adhere to the statutorily required provision
22 of an annual written accounting, Petitioners can show other examples of serious
23 mismanagement of trust assets and apparent breaches of trust.
24
25

26 ¹⁶ *See Stipulation of Fact*, Lowney Dec. Ex. D.

1
2 **1. The Trust has never provided beneficiaries with annual trust**
3 **reports, as required by the Trustees Accounting Act.**

4 Over the last fourteen years, the Trust has never provided any form of
5 accounting to the trust beneficiaries, and the beneficiaries continue to be unaware
6 of the assets of the Trust, the earnings on trust assets, and how they have been
7 managed and distributed. *See Petitioners' Declarations.* In its meetings, the
8 Trust has acknowledged that beneficiaries have been left completely in the dark
9 about the Trust. They recognize that Petitioners and others like them are income
10 beneficiaries but have no idea about the Trust's income:

11 The interest earned goes back to our members ... Most of our members are
12 in the program long-term. Most are not even aware that they are
13 benefitting from the investments earned . . . [t]he vast majority of our
14 members do not even know they get investment income.

15 2/10/05 WBBT Minutes, pp. 3-4 (Sefcik Dec. Ex. K at BIAW 4401-02). The
16 Trustees acknowledge that “[a]ll the companies look at is the check amount” and
17 “do not understand all the intricacies of the refunds.”¹⁷

18 This is an unacceptable state of affairs, violating both common and
19 statutory law. “[A] trustee is a fiduciary who owes the highest degree of good
20 faith, diligence and undivided loyalty to the beneficiaries.” *In re Estate of*
21 *Ehlers*, 80 Wash.App. 751, 757 (1996) (citing *Estate of Jordan v. Hartford*
22 *Accident & Indem. Co.*, 120 Wn.2d 490, 502 (1993)). These duties include the
23 responsibility to fully inform the beneficiaries of all facts that would aid them in
24 protecting their interests. *Esmieu v. Schrag*, 88 Wn.2d 490, 498
25 (1977); *accord Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 404 (1983) (if
26 beneficiaries are to hold trustee to proper standards of care and honesty, they

27 ¹⁷ 3/6/07 WBBT Minutes, p. 2 (Sefcik Dec. Ex. J at BIAW 24019).

1 must know what the trust property consists of and how it is being managed); *In*
2 *re Marriage of Petrie*, 105 Wn.App. 268, 275 (2001). It is also a direct violation
3 of the TAA, which provides:

4 *The trustee or trustees appointed by any will, deed, or agreement executed*
5 *shall mail or deliver at least annually to each adult income trust*
6 *beneficiary a written itemized statement of all current receipts and*
7 *disbursements made by the trustee of the funds of the trust both principal*
8 *and income, and upon the request of any such beneficiary shall furnish the*
9 *beneficiary an itemized statement of all property then held by that trustee,*
10 *and may also file any such statement in the superior court of the county in*
11 *which the trustee or one of the trustees resides.*

12 RCW 11.106.020 (emphasis added). The Court of Appeals has recognized that
13 under this provision trustees “must provide an accounting *at least annually* to
14 ‘each adult income beneficiary.’ There is no room for the exercise of a court’s
15 discretion.” *Nelson*, 21 Wn.App. at 493. (emphasis added).

16 Defendants cannot seriously dispute that Petitioners and other beneficiaries
17 are entitled to the Trust’s income, and therefore have a right to annual
18 accountings. The 1994 Declaration of Trust states that “The Trustees shall hold
19 in trust for the benefit of the Employer Participants ... all Adjustments
20 transferred to BIAW by the DLI *together with all accruals thereto and income*
21 *therefrom.*” 1994 Declaration of Trust, Article IV, § 1 (Sefcik Dec. Ex. B).¹⁸
22 *See also* Sefcik Dec. ¶ 19 (citing other exhibits including admissions of the Trust
23 establishing beneficiaries’ right to all trust income).

24 Moreover, it is not clear that the Trust has even conducted an independent

25 ¹⁸ It also states that the purpose of the Trust is “To distribute Adjustments *and any interest, return or other*
26 *property obtained as a result of administration of a Fund, to the Employer Participants* entitled to the Fund”. *Id.*
27 Article II, § 1.D. (emphasis added). “Fund” is defined as “all things of value held by the Trust for the benefit of
28 Employer Participants, including all Adjustments and *all interest, dividends, refunds or income of any sort earned*
on the Fund”. *Id.*, Article I, ¶ J. (emphasis added).

1 audit for years, if ever. In response to Petitioners' discovery, the Trust has been
2 unable to produce any independent audit or accounting of trust assets and
3 proceeds. See Sefcik Dec. Ex. L (RFP Nos. 2, 17). The Trust could produce
4 only a single 3-year accountant's report, which contained only "representation of
5 the management," was "substantially less in scope than an audit," and did not
6 express an opinion as to the financial statement as a whole. Sefcik Dec. Ex. C at
7 BIAW 21590.

8
9 Given the complexity and magnitude of the Trust and the lack of recent
10 accounting, in violation of state law, the Trust should be required to produce an
11 independent trust accounting.

12 **2. The Trust has allowed its affiliate to skim interest off trust funds
13 but continues to conceal the magnitude of this breach of trust.**

14 Although this Court need not find a breach of trust to order an accounting,
15 the dire necessity for an accounting is shown by the clear evidence that the Trust
16 has grossly mismanaged trust accounts and allowed its affiliate/delegee MSC to
17 skim interest from trust funds in apparent violation of fiduciary duties. As
18 discussed, the 1994 Declaration of Trust and other key documents leave no
19 question that interest earned from trust funds belongs solely to the trust
20 beneficiaries. In responding to Petitioners' Interrogatory Number 9, the Trust
21 was forced to admit that it has allowed its affiliate and delegee MSC to retain
22 interest earned on trust funds, which Plaintiffs contend constitutes an egregious
23 breach of trust. Sefcik Decl. Ex. L. Whether the trustees can hope to justify this
24 self-dealing is a question for a later day.

25 To justify an accounting, the Court need only note the *apparent*
26 impropriety of these transactions and the significant dispute over the magnitude
27 of these self-dealing transactions. The Trust tries to minimize its apparent breach

1 by claiming that MSC was allowed to retain only a “small amount” of “incidental
2 interest earned on funds that pass through its accounts for a few days.”

3 Responses to Interrogatories 9, 12 (Sefcik Dec. Ex. L). The Trust only will go so
4 far as admitting that MSC retained \$53,195 of interest on trust funds.

5 Professor Sefcik disputes the Trust’s claims as to the magnitude of this self-
6 dealing. He concludes that MSC has retained between \$600,000 and \$1.3
7 million in interest over just the past four to five years, which is hardly a “small”
8 or “incidental” amount. *See* Sefcik Dec. ¶ 12, 19 *et. seq.* The Trust and MSC
9 were able to secretly skim interest off of the Trust by repeatedly depositing tens
10 of millions of dollars of trust funds into the interest-bearing savings accounts of
11 MSC, where they remained for various periods of times ranging from days to an
12 entire year. *Id.* at ¶ 19 *et. seq.* While in MSC accounts, these trust funds were
13 not segregated or earmarked as belonging to the Trust, but instead were
14 commingled with other funds possessed by MSC. *Id.* at ¶ 15 *et. seq.* Professor
15 Sefcik found that MSC was allowed to hold millions of dollars of trust funds in
16 its own accounts for months and hundreds of thousands for an entire year. *Id.* at
17 ¶¶ 12, 21. He determined that it will take a detailed and independent accounting
18 to precisely quantify the interest that the beneficiaries lost due to these practices.
19 *Id.* at ¶¶ 14, 41.

20
21 Petitioners’ interrogatories asked WBBT to disclose exactly how the trust
22 proceeds were distributed and to whom. Sefcik Dec. Ex. L (Int. nos. 8 and 9).
23 Rather than giving this information, the Trust answered “*In general*, all of the
24 earnings are distributed to participants, less expenses of WBBT” and “*In general*,
25 net earnings are distributed to ROII participants as part of the refund checks
26 issued each July.” Response to Interrogatory Number 8 (emphasis added)
27 (Sefcik Dec. Ex. L). In addition to being false, the generality of these responses

1 **begs** for a detailed and independent accounting to produce the specific answers.
2 Professor Sefcik opines that it is unlikely that even the Trust or MSC could
3 answer these questions without such an accounting, due to the repeated failure to
4 segregate and earmark trust funds, as discussed below. Sefcik Dec. at ¶ 17.

5 **3. An accounting should be required because the trustees have**
6 **grossly mismanaged trust funds.**

7 **a. Trust funds have been repeatedly deposited into MSC**
8 **accounts and commingled.**

9
10 As the Professor Sefcik declaration confirms, the Trust has allowed trust
11 funds to be repeatedly deposited in the money market and checking accounts of
12 its affiliate/delegee MSC. Sefcik Dec. ¶¶ 15-18. They were not earmarked as
13 trust funds or segregated, but rather were commingled with other MSC funds. *Id.*

14 These actions violated reasonable standards of trust management. “It is
15 not only the duty of the trustee to earmark trust assets but also to keep them
16 separate from the property of the trustee and from that of other trusts or persons.
17 The trust investments should be set apart so that they can be easily located and
18 traced.” Bogert, *The Law of Trusts and Trustees* § 596. *See Wilkins v. Lasater*,
19 46 Wn. App. 766, 779 (1987) (comingling trust and non-trust expenses appeared
20 to breach the “strict duty to identify and segregate trust assets and expenses.”)
21 (citing Restatement § 179). “The trustee is under a duty to the beneficiary to
22 keep the trust property separate from his individual property, and, so far as it is
23 reasonable that he should do so, to keep it separate from property not subject to
24 the trust, and to see that the property is designated as property of the trust.”
25 Restatement (Second) of Trusts § 179. “Deposits of trust moneys in a bank
26 should be made in a separate account in the name of the trustee as trustee.” *Id at*
27 § 179 (comment d).

1
2 Depositing trust funds into MSC accounts also violates Washington
3 statutory law and seriously jeopardized the Trust's assets. At times as much as
4 **50 million dollars** of trust funds were deposited into MSC's money market and
5 regular checking accounts at South Sound Bank. Sefcik Decl. Ex. A (cancelled
6 checks showing deposit). Because neither the Trust nor its delegee earmarked
7 these as trust deposits, none of the statutory protections for trust funds were put
8 into place. For example, the funds were not collateralized by government-backed
9 assets, which is a precondition for such a trust deposit. RCW 11.100.030, .037.¹⁹
10 These laws are designed to protect trust assets from bank failures, which should
11 have been a serious concern here since the Trust's \$50 million deposit was more
12 than South Sound Bank's *total* branch deposits. Lowney Dec. Ex. E.

13 The primary purpose of earmarking and segregating is to make trust assets
14 and proceeds transparent. The Trust's practices have had the opposite effect.
15 Professor Sefcik concludes that "[t]he routine and successive commingling of
16 trust funds obfuscates the fate and disposition of trust funds, making it
17 impossible for a beneficiary to understand the movement of trust funds, the
18 precise amounts of trust funds held or their disposition, or to determine the extent
19 that the trust was damaged." Sefcik Dec. ¶ 17. This constitutes more than good
20 cause for ordering an accounting.

21 **b. The Trust failed has failed to oversee the actions of its**
22 **delegee.**

23 The limited financial documents recently given to Petitioners, as well as
24 other discovery, preliminarily show that the Trust has abrogated its responsibility
25 to protect trust assets by delegating all critical trust management functions to its

26 ¹⁹ This practice also likely violated RCW 11.100.037, which prohibits trust funds from remaining uninvested for
27 longer than reasonable periods.

1 for-profit affiliate, MSC.

2
3 The lack of past accounting has apparently left even the Chair of the Trust
4 in the dark about the apparent breaches of trust going on under his watch. In
5 deposition, the three-time Chair of the Trust was unaware that trust funds were
6 *ever* deposited into MSC accounts or that MSC earned interest on trust funds,
7 and questioned whether such practice would be authorized. *See* Tremaine Dep.
8 Tr. (excerpts attached as Lowney Dec. Ex. G). He assumed, wrongly, that the
9 Trust was acting prudently by depositing the government refund checks directly
10 into the Trust's accounts and then making distributions from those accounts. *Id.*

11 When asked to what steps are taken to account for Trust funds, Tremaine
12 had no idea. *Id.* In later interrogatory responses, the Trust admitted that it relies
13 upon MSC staff to take all of the steps to "assure that assets belong to the ROII
14 Refund Trust are properly accounted for". Response to Int. No. 6 (Sefcik Dec.
15 Ex. L).²⁰ The Trust claims that "Personnel of BIAW Member Services
16 Corporation implement proper distribution of and accounting for funds received
17 from the Department of Labor and Industries for WBBT." Unfortunately, the
18 Trust takes no steps to assure that MSC is acting in the best interest of the
19 beneficiaries. It will take an accounting to determine the full impact of these
20 procedural lapses on the Trust.

21
22 ²⁰ The Trust lists these steps as follows: "amounts of the refund checks are verified by MSC staff," "monthly A.G.
23 Edwards/Wachovia statements for the year are reviewed by MSC staff and reconciled," "amounts to be
24 distributed to each recipient are determined and verified by MSC Staff. The staff determines that amounts are
25 calculated correctly for each recipient, that all potential recipients are accounted for, that all rules governing the
26 calculations of amounts have been followed, and that totals balance." "MSC staff then prepare the thousands of
checks for the participants and for each local association and BIAW," "MSC staff verifies through monthly bank
reconciliations that all checks issued for each calendar year have been accounted for," and "[w]hen the third and
final payment for a play year is made, MSC staff confirms that the total paid to a participant for the plan year is
correct." Sefcik Dec. Ex. L (Response to Int. no. 6).

1 **4. WBBT appears to have let MSC overpay itself from trust funds.**

2 At a later date, Petitioners will seek to establish that the multi-million
3 dollar marketing assistance fee paid to MSC each year breached various fiduciary
4 duties. However, Professor Sefcik concludes that “even if one is to assume that
5 the Trust was authorized to pay its affiliates a ‘marketing assistance fee,’ it
6 appears that this fee was improperly calculated and prematurely paid, which
7 appears to have deprived the beneficiaries of an additional \$3.6 million in
8 principal and interest since 2003.” Sefcik Dec. at ¶¶ 10, 42 *et seq.* Specifically,
9 he found that the Trust’s financial documents showed a \$641,000 disparity
10 between what MSC was paid and what it was supposed to be paid. *Id.* He also
11 found that by paying its affiliates multi-million dollar fees years before they were
12 due, the Trust deprived the beneficiaries of approximately 3 million dollars in
13 interest since 2003. *Id.*

14 Finally, Professor Sefcik concluded that “given that MSC receives the
15 largest MAF [marketing assistance fee], I am troubled that the documents show
16 that MSC staff is allowed to calculate its **own** MAF. *See Exhs. L, V (WBBT*
17 *acknowledges that MSC staff carries out these functions).* In my opinion, it is
18 imprudent for a third party to calculate its own payments and this practice may
19 have significantly harmed the Trust in this instance.” *Id.* at ¶ 47.

20 **5. WBBT has failed to give forthright and accurate information to**
21 **beneficiaries.**

22 In discovery, Petitioners asked the Trust to specifically identify trust
23 assets, investments and earnings and answer basic questions about how the
24 Trust’s funds have been handled and distributed – information to which every
25 beneficiary is entitled. The Trust refused to answer virtually every one of these
26 questions and instead took the position that Petitioners were required to conduct
27

1 their own forensic analysis of the document. Sefcik Dec. Ex. L. Even after over
2 a month of analysis by attorneys and experts, Petitioners are unable to understand
3 the financial status of the Trust from these documents. Lowney Dec. at ¶ 8.

4
5 **6. MSC admits serious questions about basic Trust calculations.**

6 Professor Sefcik finds that “[t]he state of the Trust’s bookkeeping raises
7 serious questions about the accuracy of the Trust’s internal calculations used for
8 accounting for and distributing trust assets. Significant complex calculations are
9 made by hand and notes on such documents admit outstanding questions about
10 the accuracy of such calculations.” Sefcik Dec. ¶ 49, Ex. W. For example, in
11 reconciling the 2004 adjustment, the bookkeeper says “*the second adjustment*
12 *does not balance,*” “*check this next year to see if it works for balancing ... could*
13 *be wrong.*” The document refers to a \$171,873 figure and says “*Not sure how*
14 *this ties into balancing?*” *Id.* There are question marks adjacent to a \$31 million
15 figure. *Id.* One document shows efforts to balance the distribution of tens of
16 millions of dollars of trust funds, stating “*I believe this is part of the balancing*
17 *... will have to test this theory next year.*” *Id.* Three drafts of another calculation
18 each showed different amounts of trust funds supposedly in MSC checking
19 accounts, ranging from \$491,436.18, to \$549,709.65. *Id.* An accounting will
20 make sure that these critical calculations are accurate.

21 **B. ATTORNEYS FEES SHOULD BE ARGUED LATER.**

22 Petitioners will be entitled to fees if their action for accounting benefits the
23 Trust, but ask that this issue be deferred until after the accounting is submitted.

24 **CONCLUSION**

25 Petitioners have submitted a reasonable proposed order setting forth a
26 procedure for conducting the accounting. *See Proposed Order.* Petitioners
27 respectfully request it be entered by the Court.

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2 RESPECTFULLY SUBMITTED this 20th day of March, 2009.

3 SMITH & LOWNEY, PLLC

4 By: 

5 Knoll Lowney, WSBA # 23457

6 Richard A. Smith, WSBA # 21788

7 Bridget Baker-White, WSBA # 38790

8 Brian Knutsen, WSBA # 38806

9 Attorneys for Plaintiffs and Class

10 2317 E. John St., Seattle, WA 98122

11 Tel: (206) 860-2883 Fax: (206) 860-4187

12 Email: knoll@igc.org

13 rasmithwa@igc.org

14 bridget.bakerwhite@gmail.com

15 briank@igc.org

16 Andrew S. Friedman, PRO HAC VICE

17 Tonna K. Farrar, PRO HAC VICE

18 Attorneys for Plaintiffs and Class

19 Bonnett, Fairbourn, Friedman & Balint, P.C.

20 2901 N Central Ave, Suite 1000

21 Phoenix, AZ 85012

22 Tel: (602) 776-5902 Fax: (602)274-1199

23 Email: afriedman@bffb.com

24 tfarrar@bffb.com

Michael Withey, WSBA # 4787
Attorneys for Plaintiffs and Class
Law Offices of Michael Withey
Two Union Square
601 Union Street, Suite 4200
Seattle, WA 98101
(206) 405-1800