

1 EXPEDITE
2 No Hearing is set:
3 Hearing is set:
4 Date: December 10, 2021
5 Time: 9:00 a.m.
6 The Honorable James F. Dixon

7 SUPERIOR COURT OF WASHINGTON FOR THURSTON COUNTY

8 BUILDING INDUSTRY ASSOCIATION OF)
9 WASHINGTON, ASSOCIATED GENERAL)
10 CONTRACTORS OF WASHINGTON,)
11 DIANE GLENN, ALAN NOLAN, RON)
12 PERKEREWICZ, and DOUG ORTH,)
13 Plaintiffs,)

No. 21-2-01579-34

**PLAINTIFFS' MOTION FOR RELIEF
AND SANCTIONS**

14 v.)

15 GOVERNOR JAY INSLEE, in his Official)
16 Capacity; WASHINGTON STATE)
17 BUILDING CODE COUNCIL, a Washington)
18 State Agency; JAMES MILLBAUER, in his)
19 Official Capacity as an Appointee to the State)
20 Building Code Council, and ANTHONY)
21 MASCHMEDT, in his Official Capacity as an)
22 Appointee to the State Building Code Council,)
23 Defendants.)

24 **I. INTRODUCTION**

25 State Defendants filed a responsive brief and supporting declaration in opposition to
26 Plaintiffs' motion for temporary restraining order ("TRO") containing a critical
misrepresentation of fact. Rather than disclose their misrepresentation to the Court and to
Plaintiffs upon discovering their error, Defendants withheld their knowledge of the false
statement until they could cure their deficient conduct. Only once they corrected their flaw—
which confirmed Plaintiffs' allegations and petition for relief—did they inform Plaintiffs and
the Court of their errors. But if Defendants had timely performed a reasonable inquiry and

1 disclosed accurate facts, either Plaintiffs would not have needed to file their petition for relief,
2 or would have prevailed on their TRO.

3 Defendants' declaration and brief stated that Anthony Maschmedt had been nominated
4 to the Council by the Northwest EcoBuilding Guild (NWEBG). Whether Mr. Maschmedt was
5 properly nominated was a critical and material fact to Plaintiffs' motion. The statute directing
6 the Governor to appoint members to the Council requires that a member be nominated by a
7 relevant industry group. But in fact, the NWEBG had never submitted that nomination, nor
8 had any other industry group nominated Mr. Maschmedt. What is now clear is that *both*
9 members of the Council subject to Plaintiffs' challenge were statutorily unqualified to serve in
10 their seats on the Council. Mr. Maschmedt was never nominated by an industry group. James
11 Millbauer is not a member of the relevant industry in whose seat he sits.

12 The Court relied on Defendants' misrepresentation when it denied Plaintiffs' TRO,
13 indicating that preliminary relief should be denied because questions of fact existed as to
14 whether the appointments were proper. After Defendants discovered their error months later,
15 they did not promptly notify Plaintiffs and the Court of their error, which could have allowed
16 Plaintiffs or the Court to pursue an appropriate remedy. Instead, they first solicited a post-hoc
17 nomination from NWEBG, and rushed to have the Lieutenant Governor appoint Mr.
18 Maschmedt in an attempt to retroactively cure his invalid appointment. Only then did
19 Defendants contact Plaintiffs to inform them of the error and file a correction with this Court.
20 Defendants' actions violate the statutory appointment process, and violate their duties of
21 candor before this Court. Accordingly, this Court should issue an order temporarily
22 prohibiting Mr. Maschmedt from voting on Council actions while these issues are sorted out
23 and award Plaintiffs their litigation costs, including attorneys' fees, as sanctions for their
24 conduct.

1 apparently been acting as a duly confirmed member of the Council since that date. Algera
2 Declaration ¶ 22.

3 Plaintiffs filed their petition and moved for a TRO on September 8, 2021. Defendants
4 missed their deadline to respond, but were granted an extension to file their responsive brief a
5 day late, on September 15, 2021. Defendants' response included a declaration from Ambar
6 Algera, the Director of Boards and Commissions in the Governor's Office, stating that the
7 NWEBG had nominated Anthony Maschmedt to the Council. *See* Declaration of Ambar
8 Algera, ¶ 20. The Algera declaration stated that their office had received nominations for
9 James Millbauer from the Washington State Building and Construction Trades Council, the
10 Central Washington Building and Construction Trades, and Washington State Association of
11 United Association of Plumbing & Pipefitting Industry of the U.S. and Canada. *Id.* ¶ 12. The
12 Algera declaration included copies of the nominations from those organizations for Mr.
13 Millbauer. *Id.*; *id.* Exs. E, F, & G. But the Algera declaration did not include any copy of a
14 nomination for Mr. Maschmedt. Instead, it only included an email from the Governor's office
15 to the NWEBG. *Id.* ¶¶ 16, 20, & Ex. I. In fact, there was no nomination from the NWEBG or
16 any other organization before Mr. Maschmedt's appointment. *See* Nov. 12, 2021 Letter &
17 Errata.

18 At some point *after* the filing of the inaccurate Algera declaration and *after* this Court
19 had denied the TRO because of issues of fact, Defendants discovered that NWEBG had never
20 nominated Mr. Maschmedt—proving the basis of Plaintiffs' petition and TRO. On October
21 29, 2021, NWEBG transmitted a letter to the Governor's office formally nominating Mr.
22 Maschmedt. Lieutenant Governor Heck, as acting Governor, confirmed Mr. Maschmedt to his
23 seat on the Council on November 8, 2021. Defendants contacted Plaintiffs on November 10 to
24 inform them of these facts and that they intended to file an errata with the Court. On
25 November 12, 2021, Defendants filed an errata and submitted a letter to the Court correcting
26 the false statements in the Algera declaration.

1 **III. ISSUES PRESENTED**

2 1. Should this Court should enjoin Maschmedt from participating in official Council
3 actions pending determination of the facts of his improper appointment?

4 2. Should Defendants be sanctioned pursuant to CR 11 and the inherent powers of this
5 Court for misrepresenting material facts to obtain a favorable ruling on a motion for
6 temporary restraining order, for failing to perform a reasonable inquiry as to the accuracy of
7 those facts, and for failing to cure that misrepresentation timely and with candor?

8 **IV. EVIDENCE RELIED UPON**

9 Plaintiffs rely on this motion, Defendants’ November 12, 2021 Letter & Errata, and
10 the pleadings and papers on file in this action.

11 **V. AUTHORITY AND ARGUMENT**

12 Courts have substantial discretion to grant relief and impose sanctions for improper
13 litigation conduct. The Civil Rules allow sanctions for, among other things, submitting
14 pleadings that are not well grounded in fact, and failing to perform a reasonable inquiry as to
15 the facts of pleadings. CR 11. Courts also have inherent power to sanction parties and counsel
16 for bad faith litigation conduct. *See Geonerco, Inc. v. Grand Ridge Properties IV, LLC*, 159
17 Wn. App. 536, 544, 248 P.3d 1047, 1051 (2011), as corrected (Feb. 1, 2011), *as amended on*
18 *reconsideration* (May 3, 2011). Sanctions may be appropriate even where a lack of candor
19 may not have altered the outcome of an order. *See Deutscher v. Gabel*, 149 Wn. App. 119,
20 136, 202 P.3d 355, 363 (2009) (“Deutscher’s misrepresentation and lack of candor to the court
21 deserved sanction regardless of what would have happened if she had told the truth”).

22 Defendants’ conduct meets both these standards. First, Defendants’ submissions to the
23 Court make clear that they failed to perform a reasonable inquiry before submitting statements
24 that they knew, or should have known, were materially inaccurate. Second, rather than act
25 candidly with the Court and with Plaintiffs, Defendants withheld their knowledge of the
26 misrepresentations until they could first cure the defects, rather than risk the Court or

1 Plaintiffs pursuing an appropriate remedy because of the admitted invalidity of Maschmedt's
2 appointment.

3 **A. Defendants Failed to Conduct A Reasonable Inquiry As To Material Facts**

4 Defendants' opposition brief relied heavily on the Algera declaration to support their
5 arguments. In particular, Defendants argued that the NWEBG was a valid nominating trade
6 association representing the residential and multifamily building industry. *See* Defendants'
7 Response at 4, 6. More importantly, Defendants understood that a member of the Council
8 required a nomination before they could be appointed by the Governor. *See, e.g., Id.* at 1 ("the
9 plain language of RCW 19.27.070...contemplates that the Governor will make appointments
10 from nominations made by trade associations, as he did here"); *id.* at 3 ("For appointees
11 representing 'private sector industries[,] the Governor 'shall select appointees . . . from a list
12 of three nominations provided by the trade associations representing the industry, unless no
13 names are put forth by the trade associations.'"); *id.* at 6 ("[RCW 19.27.070] provides that the
14 Governor 'shall select appointees to represent private sector industries from a list of three
15 nominations provided by the trade associations representing the industry, unless no names are
16 put forth by the trade associations.'").

17 But even knowing that a nomination was required for the Governor to appoint a
18 candidate, and after submitting nomination letters for Mr. Millbauer (but not Mr. Maschmedt)
19 with the Algera declaration, Defendants failed to conduct a reasonable inquiry to determine
20 whether Mr. Maschmedt had been in fact nominated by NWEBG. Instead, they included an
21 email from the governor's office to NWEBG seeking nominees. Algera Decl. Ex. I. Without
22 any formal nomination letter, Defendants proceeded to declare to the Court and to Plaintiffs
23 that the NWEBG had nominated Mr. Maschmedt, thereby making him statutorily eligible for
24 appointment. *See* Defendants' Response at 3-4.

25 Defendants have now admitted that Mr. Maschmedt was not nominated to the Council
26 by NWEBG at the time of their opposition to Plaintiffs' TRO, and that no formal nomination

1 existed. Defendants should have been on notice at the time of their opposition brief that no
2 nomination existed when they failed to discover any nomination to include with their
3 opposition, unlike with Mr. Millbauer's nominations.¹ Defendants' errata and letter provide
4 no detail as to the inquiry conducted by Ms. Algera or by Defendants' counsel regarding Mr.
5 Maschmedt's nomination, other than stating that Ms. Algera erroneously believed a
6 nomination existed due to "an administrative oversight." But Defendants' duty to confirm
7 material facts relevant to Plaintiffs' TRO motion and Defendants' statutory obligations cannot
8 be so easily excused.

9 **B. Defendants' Untimely Disclosure Constitutes Bad Faith Litigation Conduct**

10 Defendants' letter to the Court regarding their error glaringly omits key facts. Even
11 absent those facts, it describes a process intended to violate RCW 19.27.070 and evade this
12 Court's oversight.

13 Defendants' letter fails to describe any details of Defendants' inquiry into Mr.
14 Maschmedt's nomination prior to filing the erroneous declaration on which their arguments
15 relied. It fails to identify *when* Defendants discovered their material misrepresentation to the
16 Court. It fails to identify *how* NWEBG came to send a nomination letter to the Governor's
17 Office on October 29, 2021, and whether there were any communications from the
18 Governor's Office seeking that nomination so that it could correct their errors before this
19 Court. And it fails to identify any corrective action taken regarding Council business
20 performed by Mr. Maschmedt when he was unlawfully appointed to the Council.

21 It is only reasonable to interpret Defendants' letter as describing a process where the
22 Governor unlawfully appointed Mr. Maschmedt to the Council, and then subsequently
23 requested a formal nomination from NWEBG to authorize him to do so. That procedure
24 clearly violates RCW 19.27.070. And it would turn the statutory nomination process inside-

25 ¹ Plaintiffs continue to oppose Mr. Millbauer's appointment as improper because the
26 nominating organizations do not represent the general construction industry.

1 out by allowing the Governor to identify and appoint Council members first, and seek after-
2 the-fact nominations from a willing industry representative to bless those appointments. But
3 the law does not allow the Governor free rein to do so.

4 The latest that Defendants could have learned that no formal nomination had occurred
5 would be when they received NWEBG’s October 29, 2021 letter. Even if that were true
6 (which would underscore their failure to conduct a reasonable inquiry as to his nomination), it
7 would mean that Defendants waited more than two weeks from the discovery of their
8 misrepresentation to the Court before notifying the Court and Plaintiffs of their error. Rather
9 than comply with their duty of candor to promptly disclose their error (RPC 3.3(a)(1); RPC
10 3.3(c)), Defendants spent that time rushing to have the Lieutenant Governor cure the
11 appointment of Mr. Maschmedt. Defendants’ failure to comply with these professional duties
12 is further magnified if Defendants learned of the error prior to October 29. If so—which is
13 more than likely true—the sequence of events makes clear that Defendants discovered their
14 error, solicited the NWEBG’s *post hoc* nomination, and then surreptitiously attempted to cure
15 Mr. Maschmedt’s appointment, all before informing the Court and opposing counsel.

16 **C. An Award of Litigations Costs, including Attorneys’ Fees, Is Appropriate**
17 **Sanction for Defendants’ Conduct**

18 It is well-accepted that “inappropriate and improper conduct” in litigation is
19 “tantamount to a finding of bad faith,” that warrants an equitable award of litigation costs,
20 including attorneys’ fees. *See, e.g. State v. S.H.*, 102 Wn. App. 468, 474-76, 8 P.3d 1058
21 (2000); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-28, 982 P.2d
22 131 (1999). Moreover, Civil Rule 11 sanctions are appropriate where an attorney fails to
23 make a reasonable inquiry as to the factual basis of their pleadings. *See Bryant v. Joseph Tree,*
24 *Inc.*, 119 Wn. 2d 210, 220, 829 P.2d 1099, 1105 (1992). Sanctions are also appropriate for
25 failing to meet an attorney’s duty of candor. *Deutscher*, 149 Wn. App. at 136.

1 DATED: November 22, 2021

2 LANE POWELL PC

3 By: s/ Callie A. Castillo

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10 Attorneys for Plaintiffs

1 **CERTIFICATE OF SERVICE**

2 The undersigned certifies under penalty of perjury under the laws of the State of
3 Washington that on this date I caused to be served in the manner indicated a copy of the
4 within and foregoing document upon the following persons:

<p>5 <i>Attorneys for Defendants:</i></p> <p>6 Emma Grunberg, WSBA No. 54659 Jeffrey T. Even, WSBA No. 20367 Deputy Solicitors General</p> <p>8 Dierk Meierbachtol, WSBA No. 31010 Alexio Diorio, WSBA No. 57280 Assistant Attorneys General</p> <p>10 Office of the Attorney General P.O. Box 40100 Olympia, WA 40100 206.521.3222 12 emma.grunberg@atg.wa.gov 13 jeffrey.even@atg.wa.gov dierk.meierbachtol@atg.wa.gov 14 alexia.diorio@atg.wa.gov</p>	<p><input type="checkbox"/> by CM/ECF</p> <p><input checked="" type="checkbox"/> by Electronic Mail</p> <p><input type="checkbox"/> by Facsimile Transmission</p> <p><input type="checkbox"/> by First Class Mail</p> <p><input type="checkbox"/> by Hand Delivery</p> <p><input type="checkbox"/> by Overnight Delivery</p>
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16 DATED this 22nd day of November, 2021, at Kenmore, Washington.

17 *s/Angela L. Craig*
18 _____
Angela L. Craig