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STATE OF WASHINGTON
BENTON COUNTY SUPERIOR COURT

STATE OF WASHINGTON,

Plaintiff,

v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,

Defendants.

ROBERT INGERSOLL and CURT FREED,

Plaintiffs,

v.

ARLENE'S FLOWERS, INC., d/b/a ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN,

Defendants.

No. 13-2-00871-5
(consolidated with 13-2-00953-3)

DEFENDANTS' JOINT REPLY SUPPORTING THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS AGAINST BARRONELLE STUTZMAN IN HER PERSONAL CAPACITY

I. INTRODUCTION

Plaintiffs do not claim that Mrs. Barronelle Stutzman knowingly engaged in alleged discrimination when she referred Mr. Rob Ingersoll to nearby florists. After all,

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Washington had legalized same-sex marriage only two months earlier and Mrs. Stutzman has worked with gay customers and employees over the years. Nor do they contend this Court has any basis to pierce the corporate veil. Arlene's Flowers has consistently complied with basic corporate requirements.

Instead, Plaintiffs argue that this Court should impose personal liability simply because Mrs. Stutzman made the referral as an officer of Arlene's Flowers. But Plaintiffs have not cited a single comparable case in which a Washington court holds a corporate officer personally liable for her official acts under the Washington Law Against Discrimination (WLAD) or the Consumer Protection Act (CPA). Plaintiffs not only ask this Court to resolve novel issues related to how Washington's redefinition of marriage impacts its public accommodation law, but also to substantially expand any potential liability in order to punish Mrs. Stutzman and her family personally. This expansion lacks legal support and is entirely unnecessary. This Court should grant summary judgment in Mrs. Stutzman's favor on the personal capacity claims.

II. ARGUMENT

A. Plaintiffs' Claims Arise Solely from Arlene's Flowers' Alleged Status As A Public Accommodation and Mrs. Stutzman's Conduct as the Owner and Operator of that Public Accommodation.

Plaintiffs' WLAD and CPA claims clearly focus on Barronelle Stutzman in her role as the owner/operator of a business, Arlene's Flowers. *See, e.g.*, State Compl., ¶ 2.2 ("Defendant Barronelle Stutzman is the president, owner, and operator of Arlene's Flowers"). For example, the State's cause of action under the WLAD, by means of the

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CPA, alleges "discrimination on the basis of sexual orientation in a *place of public accommodation.*" State's Compl., ¶ 5.7 (emphasis added). Arlene's Flowers is unmistakably the "place of public accommodation" at issue and all claims against Arlene's Flowers and Mrs. Stutzman rest on this premise. *See, e.g.*, RCW § 49.60.040(2) (defining a place of public accommodation as "any place ... kept ... for the sale of goods, merchandise, [or] services"). As the State's Complaint recognizes, the Arlene's corporate business entity—not Barronelle Stutzman—is the "facility, open to the public, for the sale of goods and services" which forms the basis of the Plaintiffs' public accommodation claims. State's Compl., ¶ 5.2.

Plaintiffs Robert Ingersoll's and Curt Freed's Complaint makes the point equally clear. Their cause of action under the WLAD repeatedly refers to "Arlene's Flowers" as the place of public accommodation that offers "the sale of goods merchandise, [or] services" that they allegedly desire to obtain. Ingersoll & Freed Compl., ¶ 20; *see id.* at ¶¶ 21-23 (alleging that "Arlene's Flowers" sells goods and services, that "Arlene's Flower's commercial practices are subject to the [WLAD]", and that "Arlene's Flowers is a place of public accommodation under the [WLAD]"). Moreover, Ingersoll and Freed phrase their WLAD injury in terms of a "depriv[ation] ... of the accommodations, advantages, facilities, or privileges of [a] *place of public resort, accommodation,* assemblage, or amusement." *Id.* at ¶ 25 (quotation omitted and emphasis added). Arlene's Flowers is the relevant "place of public accommodation." Barronelle Stutzman is involved in this action—as recognized in Ingersoll's and Freed's Complaint—only

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because she serves as Arlene's Flowers' owner and corporate president. *See, e.g., id.* at ¶ 3 (suing "Defendant Barronelle Stutzman [as] the president, owner, and operator of Arlene's Flowers.").

In their responses, Plaintiffs attempt to make much of the fact that Arlene's Flowers' "policy" against participating in same-sex wedding ceremonies rests on Mrs. Stutzman's "personal" belief that God ordained marriage between one man and one woman. *See* State's Response to Defendants' Motion for Partial Summary Judgment on Plaintiffs' Claims Against Barronelle Stutzman in Her Personal Capacity ("State's Response") at 3-4; Plaintiffs Ingersoll & Freed's Opposition to Defendants' Motion for Partial Summary Judgment on Plaintiffs' Claims Against Barronelle Stutzman in Her Personal Capacity ("Ingersoll's & Freed's Response") at 3; *see also* Berry Decl., Ex. D (Stutzman Dep.) at 44:10-17. That is no doubt true, but it does not render the decision "personal" rather than "corporate" in nature.

The policies and practices of closely-held businesses may qualify as "an extension of the beliefs of members of the ... family" that owns them. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1120 (9th Cir. 2009); *accord Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014) (recognizing that "[a] corporation is simply a form of organization used by human beings to achieve desired ends," including religious ones). It is undisputed that Ms. Stutzman consulted her "husband as vice president of Arlene's Flowers," and they jointly decided to refer Mr. Ingersoll to nearby florists because of their "biblical belief that marriage is between a man and a woman," Berry Decl., Ex. D

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(Stutzman Dep.) at 77:17-22; 78:3-7.

And it is equally well-established that a closely-held business, like Arlene's Flowers, is free to "assert the free exercise rights of its owners" when faced with a government mandate that violates their religious beliefs. *Stormans,* 586 F.3d at 1120 (recognizing that a closely-held "corporation is an 'extension of the beliefs' of the owners" and that their beliefs are "'the beliefs and tenets of the ... [c]ompany'" (quoting *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 620 (9th Cir. 1988)). Consequently, any attempt to draw a line between the beliefs of Arlene's Flowers and those of Mrs. Stutzman are simply wrong: they are one and the same. *Id.*; *accord Hobby Lobby*, 134 S. Ct. at 2768 ("[P]rotecting the free-exercise rights of [closely-held] corporations ... protects the religious liberty of the humans who own and control those companies.").

B. Plaintiffs Have Waived Any Reliance on a Theory of Recovery That Would Require Piercing the Corporate Veil.

The traditional means of holding corporate officers liable for their official actions is the "alter ego" or "piercing-the-corporate-veil" theory, which Defendants discussed previously in their motion. *See, e.g., Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 551-53 (1979), *Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 321-22 (1976). As Plaintiffs acknowledged, piercing the corporate veil is inappropriate here. The record contains no evidence that Ms. Stutzman failed to "keep the affairs of [Arlene's Flowers] separate from [her] personal affairs" or that she perpetuated "fraud or manifest injustice ... upon third-persons who deal[t] with the corporation." *Grayson*, 92 Wn.2d at 553. Plaintiffs thus concede that Arlene's Flowers' status as a "separate [corporate] entity

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should be respected." *Id.*; *see also* State's Response at 2 (disclaiming reliance on "the traditional 'veil piercing' standard"); Ingersoll's & Freed's Response at 3-4 ("This is not a case in which a veil piercing analysis is ... appropriate"); *id.* at 4 n.2.[1] Because Plaintiffs cannot pierce the corporate veil, they must propose alternative theories for personal liability, theories that no court has embraced in similar situations.

C. Plaintiffs Cannot Prevail on Their WLAD Claim Against Mrs. Stutzman in Her Individual Capacity.

Plaintiffs Ingersoll and Freed cite a few isolated provisions of the WLAD, claiming these impose "direct statutory liability" on Mrs. Stutzman. Plaintiffs fail to consider the context of those sections or how Washington courts have applied the statute in cases like the one at bar. *See, e.g.*, Ingersoll's & Freed's Response at 4-5. The WLAD is a complex statute with many oblique terms. For instance, the WLAD expends copious pages outlining "unfair practices" in a number of areas, including: (1) HIV or hepatitis C infection, RCW § 49.60.172; (2) credit worthiness determinations, RCW § 49.60.175; (3) insurance transactions, RCW § 49.60.178; (4) employment, RCW § 49.60.180; (5) union membership, RCW § 49.60.190; (6) age discrimination, RCW § 49.60.205; (7) access to places of public accommodation, RCW § 49.60.215; and (8) real estate transactions, RCW § 49.60.222.

The Legislature specifically empowered the Washington Human Rights "[t]o receive, impartially investigate, and pass upon complaints alleging [such] unfair practices." RCW § 49.60.120. But no section of the WLAD actually proscribes an

[1] Plaintiffs Ingersoll and Freed also concede that their claims against Ms. Stutzman for aiding and abetting discrimination lack merit. *See* Ingersoll's & Freed's Response at 2.

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"unfair practice" of any kind. *See, e.g.*, RCW § 49.60.030(1) (simply proclaiming the "right to the full enjoyment of any of the accommodations ... of any place of public resort, [or] accommodation"). Given such fundamental ambiguities, interpretation of the WLAD is highly dependent on the statute's prior application and judicial gloss.

No Washington court has imposed personal liability in this context. Plaintiffs are unable to cite a single case holding an owner/operator of a business personally liable under the WLAD for an alleged act of discrimination undertaken in her official capacity outside of the employment context. That fact is particularly telling when one considers that the WLAD has existed in essentially the same form for over forty years.

Plaintiffs Ingersoll and Freed are forced to analogize to employment cases discussing "employer" liability for what they call "on-the-job discrimination."[2] Ingersoll's & Freed's Response at 5; *see also Brown v. Scott Paper Worldwide Co*, 143 Wn.2d 349, 361 (2001) (holding that "individual supervisors, along with their employers, may be held liable for their discriminatory acts") (emphasis added); *Marquis v. City of Spokane*, 130 Wn.2d 97, 104 (1996) (considering only whether an independent contractor was covered by the WLAD's protection against employment discrimination and whether the plaintiff made out a prima facie case).

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[2] Plaintiffs Ingersoll and Freed also rely on *Lewis v. Doll*, 53 Wn.App. 203, 205 (1989), which merely answered the question of whether a plaintiff alleging race discrimination "was entitled to a directed verdict as a matter of law" in a case where a store clerk refused to serve him based on his race and then stated "a[] subsequent rationale ... for his actions." But the store owner in *Lewis* never denied her personally liability for her conduct. She merely contended that an admittedly discriminatory policy was "a legitimate business" practice intended to protect her property and thus excepted from the WLAD's scope. *Id.* at 208 (citing RCW § 49.60.215). As such, the *Lewis* Court never considered the question at issue here and Plaintiffs' attempt to rely on its dicta is inappropriate. *See Hildahl v. Bringolf*, 101 Wn.App. 634, 650-51 (2000) (recognizing that language in an opinion that does not "directly address[]" the question presented is "dicta" and neither "binding nor persuasive").

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But this case has nothing to do with "employment," "employer liability," or discrimination against someone "on the job." Plaintiffs Ingersoll and Freed have made clear that their claims rest solely on an alleged act of "discrimination in public accommodation." Ingersoll's & Freed's Response at 4. Not only is the harm perpetuated on a plaintiff in an employment case of a completely different kind, *i.e.*, his or her very livelihood is placed in jeopardy, but Mrs. Stutzman's relationship to Mr. Ingersoll is starkly different than the role an employer or supervisor has with an employee. Their dealings were always at arm's length and no fundamental right or economic dependency was at play. *See Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 372 (1983) (noting citizens' basic "right to earn a livelihood by pursuing the occupation in which they are employed" (quotation omitted)); *State v. Clausen*, 65 Wn. 156, 192 (1911) (explaining that citizens have a Fourteenth Amendment right "to earn [a] livelihood by any lawful calling" (quotation omitted)); *United States v. W.M. Webb, Inc.*, 397 U.S. 179, 185 (1970) (recognizing that "employees are ... as a matter of economic reality ... dependent upon the business to which they render service" (quotation omitted)).

Moreover, the WLAD explicitly distinguishes between discrimination in employment and discrimination in public accommodations. The WLAD's definition of "employer" is extraordinarily broad on its face, applying not only to an employer "who employs eight or more persons," but also to "*any person acting in the interest of an employer, directly or indirectly.*" RCW 49.60.040(11) (emphasis added). Hence, the Supreme Court found that "RCW 49.60.040[], by its very terms, contemplates individual

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supervisor liability." *Brown*, 143 Wn.2d at 358. But the WLAD's definition of a "place of public ... accommodation," is far more circumscribed. It extends only to business entities that occupy certain "property or facilities," "public halls," or "buildings and structures." RCW 49.60.040(2). Thus, the plain text of the WLAD excludes natural persons, like Ms. Stutzman, from the definition of a place of public accommodation.

Indeed, the WLAD's sections on public accommodations and employment differ in both function and purpose. The sections dedicated to public accommodations regulate businesses' external affairs and dealings with the general public, *see, e.g.*, RCW § 49.60.215, whereas those relating to employment focus internally on protecting employees who serve others on the businesses' behalf, *see, e.g.*, RCW § 49.60.180. Recognizing this essential difference, the Legislature prohibited an unfair practice, under the WLAD, "committed by an employer against an employee" from serving as the predicate for a CPA claim, while those in public accommodations may do so in certain instances. RCW § 49.60.030(3).

In sum, Plaintiffs Ingersoll and Freed fail to cite a single Washington case holding a corporate officer individually liable for her official actions in a WLAD, public accommodation case. And their analogies to employment discrimination actions fail. *Compare* 49.60.040(2) (reaching only the types of places, *i.e.*, public accommodations, the general public has a right to access), *with* 49.60.040(11) (encompassing not only the types of businesses whose particular employees are protected from discrimination, but also "any person acting in [their] interest ..., directly or indirectly"). This Court should

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grant Defendants' motion for partial summary judgment on Plaintiffs Ingersoll's and Freed's WLAD claims against Mrs. Stutzman in her personal capacity.

D. Plaintiffs Cannot Prevail on Their CPA Claim Against Mrs. Stutzman in Her Individual Capacity.

Plaintiff, the State of Washington, makes two assertions regarding its CPA claim against Mrs. Stutzman in her personal capacity: (1) the CPA's plain language exposes Mrs. Stutzman to personal liability, and (2) Plaintiffs' personal capacity claims do not implicate Mrs. Stutzman's position "as a corporate officer of Arlene's Flowers." State's Response at 6. The State's own arguments undermine both these points.

First, Plaintiffs cannot cite a single case in which a Washington court has held a corporate officer individually liable for her official acts based on the CPA's plain language. Rather, Washington courts consider two legal theories that provide for personal liability for corporate officers. One is the "alter ego" or "piercing-the-corporate-veil" doctrine, which Defendants discussed in their motion. *See, e.g.*, *Grayson*, 92 Wn.2d at 551-54; *Ralph Williams*, 87 Wn.2d at 321-22. Plaintiffs have disclaimed any reliance on that theory here. *See supra* Part II.B.

The other is known as the "responsible corporate officer doctrine." *K.P. McNamara Nw., Inc. v. State*, 173 Wn. App. 104, 142 (2013); *State v. Lundgren*, 94 Wn. App. 236, 243 (1999); *see also Grayson*, 92 Wn.2d at 553-54; *Ralph Williams*, 87 Wn.2d at 322. But this theory requires the presence of a "corporate officer," which just so happens to form the sole basis of the CPA claims. Thus, the State cannot distance its CPA claim from Mrs. Stutzman's position as a corporate officer: the State's sole basis for

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recovery, the responsible corporate officer doctrine, depends upon it. While Plaintiffs Ingersoll's and Freed's response makes this point clear, *see id.* at 8 ("If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer ... is liable for the penalties" (quotation omitted)), the State wrongly masks this point by lumping "corporate officers" among other "individual plaintiffs" [sic] to whom the doctrine obviously has no application. State's Response at 6.

Although Washington courts have recognized the responsible corporate officer doctrine for almost forty years, they have never applied it in a CPA or related action outside of the fraud context. The two cases that Plaintiffs rely upon aptly demonstrate this point. *Ralph Williams* involved the corporate officers of a car dealership who engaged in fraudulent practices too numerous to number, including, among other things, deceptive advertising and misrepresenting vehicle warranties, credit terms, and car quality. *See* 87 Wn.2d at 305-06. Personal liability attached to a corporate officer in that case because the court determined that he was personally responsible for these "deceptive practices." *Id.* at 322 (emphasis added); *see also Grayson*, 92 Wn.2d at 554 (explaining that "*Ralph Williams* ... considered a deceptive practice in violation of the Consumer Protection Act to be a type of wrongful conduct which justified imposing personal liability on a participating corporate officer") (emphasis added).

Grayson is exactly the same, turning on deceptive advertising about financing by a construction company that undertook repairs of the plaintiff's home. *See* 92 Wn.2d at 550-51, 554. *Grayson* held a corporate officer personally liable because he "directed the

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mailing of [an] advertising brochure ... received by" the plaintiff which the trial court found "to be a misleading act and a violation of the Consumer Protection Act." *Id.* at 554 (emphasis added). Yet again, the corporate officer engaged in activity that "had the capacity or tendency to deceive" and was therefore fraudulent in nature. *Id.*(emphasis added). That is why the Supreme Court applied *Ralph Williams'* holding and found personal liability. *See id.* (applying *Ralph Williams'* holding that "a deceptive practice in violation of the Consumer Protection Act to be a type of wrongful conduct which justified imposing personal liability on a participating corporate officer") (emphasis added).

More recent precedents have not departed from this rule. All of the CPA or related actions that Defendants have cited have required fraud or deceit under the responsible corporate officer doctrine. *See One Pac. Towers Homeowners' Ass'n v. Hal Real Estate Invs., Inc.*, 108 Wn. App. 330, 347-48 (2001), *reversed in part on other grounds by* 148 Wn.2d 319 (2002) (holding that the responsible corporate officer doctrine did not apply because the plaintiffs did "not allege fraud or misrepresentation" and the corporate officer did not "engage[] in conduct so wrongful or deceptive that it would justify imposing personal liability") (emphasis added); *Consulting Overseas Mgmt. v. Shtikel*, 105 Wn. App. 80, 84-85 (2001) (summarizing cases in which corporate officers assisted in "conversion," or "fraud" in which Washington courts have applied the doctrine and declining to apply it under facts where corporate officers' actions "did not constitute conversion") (emphasis added); *Jackson v. Harkey*, 41 Wn. App. 472, 480

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(1985) (noting that the CPA "focuses on a defendant's deceptive acts or practices" and that corporate officers may be personally liable where they are "aware of, or [have] condoned such activity" but declining to identify a CPA violation under the case's particular facts) (emphasis added).

Defendants do not claim that Ms. Stutzman engaged in any form of fraud or misrepresentation. Instead, they wrongly suggest that she should have personal liability exposure even though she acted honestly and in good faith. State's Response at 7-8; Ingersoll's & Freed's Response at 9.

In so doing, they undermine their ability to hold Ms. Stutzman personally liable for her official acts. Plaintiffs may be able to recover against Arlene's Flowers, the corporation, under the CPA without demonstrating any intentional wrongdoing. But as with the equitable, corporate-veil-piercing theory that allows for personal liability in cases of fraud, deception, or theft, *see, e.g., Truckweld Equip Co., Inc. v.* Olson, 26 Wn.2d 638, 644-45 (1980), the extraordinary step of imposing personal liability under the responsible corporate officer doctrine—in the CPA context—requires personal engagement in fraud, such as a deceptive practice, misleading act, or some form of conversion, *see, e.g., One Pac. Towers*, 108 Wn. App. at 347 (reiterating that *Ralph Williams*, the modern foundation of the doctrine, simply determined that "deceptive practices, which violated the [CPA], constituted the type of wrongful conduct that warranted the imposition of personal liability on a participating corporate officer") (emphasis added).

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Fraud and theft are decidedly lacking here. The responsible corporate officer doctrine therefore plainly does not apply. This Court should grant Defendants' motion for partial summary judgment on Plaintiffs' CPA claims against Ms. Stutzman in her personal capacity.

III. Conclusion

Whether and how Washington's redefinition of marriage applies in the public accommodation context presents issues of first impression. Plaintiffs not only seek to set new legal precedent that could expose Arlene's Flowers to liability, but they ask the Court to personally punish Mrs. Stutzman without any evidence that she knowingly engaged in alleged discrimination or fraudulent conduct. Plaintiffs are unable to cite a single comparable case in which a Washington court has found a business owner personally liable under the WLAD or CPA for an alleged discriminatory act undertaken in her official capacity. Plaintiffs are able to obtain the remedy they seek, *i.e.*, access to Arlene's Flowers' services as a public accommodation, via a judgment against the corporation. Their claims against Ms. Stutzman in her personal capacity are nothing more than a personal attack designed to intimidate her into compromising her sincerely held religious beliefs.

RESPECTFULLY SUBMITTED this 1st day of December, 2014.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on the date indicated below I caused this document to be served via email pursuant to agreement of counsel and sent for delivery via U.S. mail to the Attorneys for Plaintiffs at their respective electronic and physical addresses of record and on file with the WSBA.

Signed at Kennewick on December 1, 2014.

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