



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THURSTON COUNTY

IN RE: WASHINGTON
BUILDERS BENEFIT TRUST

No. 08-2-01674-6

**FIRST AMENDED PETITION
AND CLASS ACTION
COMPLAINT**

RE SOURCES FOR
SUSTAINABLE COMMUNITIES,
A-1 BUILDERS, SF MCKINNON
COMPANY INC.,
CABINETWORKS, LIVING
SPACE, and all others similarly
situated,

Plaintiffs,

v.

BUILDING INDUSTRY
ASSOCIATION OF
WASHINGTON, BIAW MEMBER
SERVICES CORPORATION,
MASTER BUILDERS
ASSOCIATION OF KING AND
SNOHOMISH COUNTIES,
WASHINGTON BUILDERS
BENEFITS TRUST, DAVE
BAKER, JOHN MILLER, DICK
ROKES, ROB STEWART, JERRY

PETITION AND CLASS ACTION COMPLAINT - 1

SMITH & LOWNEY, P.L.L.C.
2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883

COPY

STURGILL, STEVE THOSATH,)
RUSS TYE, PAUL NOLAN, PAUL)
ABENROTH, RANDY GOLD,)
GARY CRONCE, DICK LOWELL,)
JOHN PIAZZA, JENNI STACK,)
CATHY GINGROW, RICK
TREMAINE, TED CLIFTON,
CATHY SANDERS, MARK
SMITH, JERRY CLARK, MARK
SHAFFER, AND DOES 1-40.

Defendants.

NATURE OF THE ACTION

1
2 1. This Petition and Class Action Complaint is filed by employers who have
3 participated in the "Return on Industrial Insurance" program ("ROII") operated by the
4 Building Industry Association of Washington ("BIAW"). Under this government-
5 sponsored "retrospective rating" ("retro") program, employers earn refunds of the
6 taxes they pay to the Washington State Department of Labor and Industries ("DLI")
7 for workers' compensation insurance.
8

9 2. Over the past six years alone, approximately 7,000 mostly small and
10 medium sized employers have participated in ROII ("ROII Beneficiaries").¹
11 Collectively over this period, they earned over \$190 million in "retro" refunds. DLI
12 paid this entire \$190 million directly to the BIAW. BIAW agreed to hold these tax
13 refunds "*in trust*" for the program members.
14

15 3. As beneficiaries of an express trust, these employers should have been
16 able to rely on the trustees to return to them all the money they are owed, including
17 their share of the tax refund and any interest earned on it. Instead, the Defendants in
18 this lawsuit have never acted like trustees and have colluded to take every advantage
19 of this trust, at the expense of the ROII Beneficiaries.
20
21

22
23
24
25

¹ In this Petition and Class Action Complaint, Petitioners exclude from their representation "employers whose principals or senior managers served as an officer or director of BIAW, BIAW Member Services Corporation or any of its local affiliates, or as a trustee of the Washington Builders Benefit Trust."

1 4. In the preceding federal lawsuit,² Defendants have admitted that the
2 trustees skimmed a full 20% of these trust funds, hiding half of the proceeds in an
3 affiliated for-profit corporation and distributing the other half to their local affiliates.
4 Over the past six years alone, the trustees made improper payments to their affiliates
5 (“affiliate payments”) exceeding \$38 million. Nothing in the uniform trust instrument
6 signed by the ROII Beneficiaries authorizes this self dealing. The trust instrument
7 allows trustees to “transfer” trust funds to their affiliates only “for marketing a
8 promotion of the plan.” Defendants admit that they instead comingle these trust funds
9 and consider them profit.
10
11

12 5. This misappropriation of trust funds is just one example of the egregious
13 self dealing engaged in by Defendants. In addition, Defendants have mishandled trust
14 funds by funneling them through the bank accounts of their affiliates, thereby
15 depriving the beneficiaries of valuable interest.
16

17 6. To conceal the misappropriation of trust funds, the BIAW Defendants
18 never provided the ROII Beneficiaries with the statutorily required accounting of the
19

20
21 ² The original federal action was *Re Sources for Sustainable Communities et al v. Building Industry Association of*
22 *Washington et al*, No. 2:07-CV-01519-RSM (W. Dist. Wa). In an order dated June 11, 2008, Judge Martinez declined
23 jurisdiction over the state pendant claims in that matter, which are pled as the second and third causes of action herein.
24 Plaintiff SF McKinnon Company, Inc. was not a party to the federal action. On June 27, 2008, Plaintiffs re-filed their
25 action as *RE Sources for Sustainable Communities et al v. Building Industry Association of Washington et al*, Thurston
County Cause No 08-2-01548-1. Despite Judge Martinez’ order dismissing the state causes of action, Defendants
removed the *entire* Thurston County matter, including the state law claims, to the Western District of Washington in
Tacoma. This would have had the effect of delaying adjudication of the state law claims for months, while the
Defendants continued to dissipate trust assets at a record pace. Due to Plaintiffs’ urgent need for injunctive relief,
Plaintiffs chose to voluntarily dismiss the Tacoma federal action and to re-file the state law claims without inclusion of
any federal claims. The instant Petition and Class Action complaint is that re-filing.

1 trust accounts or any disclosures on how trust funds are invested and distributed.
2 Moreover, Defendants' marketing materials and routine correspondence carefully
3 concealed the mismanagement and embezzlement of trust funds. They falsely
4 promised that the only costs to participate in ROII are membership dues and an up
5 front enrollment fee. By concealing the largest cost of ROII participation – that taken
6 on the back end -- Defendants violated their duties of honesty owed to ROII
7 Beneficiaries and the Washington State Consumer Protection Act, RCW Chapter
8 19.86.
9

10
11 7. In the past months, Defendants have increased the pace of their self-
12 dealing in the trust assets at issue in this case. Immediate injunctive relief from this
13 Court is necessary to protect these trust assets pending the outcome of this case.
14

15 PARTIES

16 8. RE-Sources for a Sustainable Communities ("RE-Sources") is a non-
17 profit corporation that has an earned income venture, The RE Store. The RE Store
18 offers demolition services to builders and owns and operates several retail stores
19 selling recycled building supplies. Re-Sources has been a member of ROII since
20 approximately 2003.
21

22 9. A-1 Builders Inc. is a small building and design company operating in
23 Bellingham, Washington. It has been a member of ROII since approximately 1995.
24
25

1 10. SF McKinnon Company Inc. is a furniture manufacturer and retailer
2 operating in Seattle, Washington. It has been a member of ROII since approximately
3 1999.

4 11. Cabinetworks is a cabinet manufacturing company operating in Seattle,
5 Washington. It has been a member of ROII since at least 1997.

6 12. Living Space is a general contracting company operating in Walla Walla,
7 Washington. It has been a member of ROII since approximately 2005.

8 13. The Building Industry Association of Washington is a Washington non-
9 profit corporation, headquartered in Olympia, Washington.³

10 14. BIAW Member Services Corporation ("MSC") is a Washington for-profit
11 corporation.

12 15. On information and belief, Washington Builders Benefits Trust
13 ("Builders Benefits Trust") is an unincorporated entity that was formed on or around
14 1994 by the BIAW and the Seattle Master Builders Association. The trustees of the
15 Builders Benefits Trust are appointed by the president of BIAW. As used herein, the
16 term "Builders Benefit Trust" includes both the entity and its trustees. Former and
17 current trustees (1997-2008) are Dave Baker, John Miller, Dick Rokes, Rob Stewart,
18
19
20
21
22

23
24
25
³ Based upon discovery conducted in the federal lawsuit, Plaintiffs allege that Defendants have not treated BIAW, BIAW Member Services Corporation ("MSC"), and the Washington Builders Benefit Trust as separate entities, but instead have operated them as a unified operation. Even Rick Tremaine, who served as Secretary and Executive Committee member of BIAW and MSC did not understand where one organization ended and the other began, or that he even served as an officer of both. Thus, to the extent the context does not indicate otherwise, Plaintiffs use the term "BIAW" to refer to BIAW, MSC, and BIAW's internal organizations and committees, including the Washington Builders Benefit Trust.

1 Jerry Sturgill, Steve Thosath, Russ Tye, Paul Nolan, Paul Abenroth, Randy Gold, Gary
2 Crounce, Dick Lowell, John Piazza, Jenni Stack, Cathy Gingrow, Rick Tremaine, Ted
3 Clifton, Cathy Sanders, Mark Smith, and Jerry Clark, and Mark Shaffer.

4 16. Does 1-20 are current and past trustees of the Builders Benefits Trust.

5
6 17. The Master Builders of King and Snohomish County (“Master Builders”),
7 previously known as the Seattle Master Builders Association, is a Washington non-
8 profit corporation, headquartered in Bellevue, Washington.

9
10 18. Does 21-40 are other recipients of wrongly-withheld trust funds that do
11 not qualify as bona fide purchasers for various reasons, including: their knowledge of
12 the existence of the trust, their failure to give consideration; their collusion with the
13 trustees; and/or or their duties as delegees of trust responsibilities.

14
15 19. Plaintiffs sue each defendant possessing fiduciary duties in its individual
16 capacity and in its capacity as trustee.

17 JURISDICTION AND VENUE

18 20. This Court has jurisdiction over Plaintiffs’ Petition pursuant to the
19 Trustees’ Accounting Act, RCW 11.106, and the Trust and Estates Dispute Resolution
20 Act (“TEDRA”), RCW 11.96A.040, .050. All claims herein arise from the same set of
21 facts and circumstances.

22 FACTUAL ALLEGATIONS

23
24 **A. Background on the Retrospective Rating Program and ROII.**

1 21. Washington State's "retrospective rating" program is a government-
2 sponsored program under which qualifying employers may obtain a refund of a
3 portion of the taxes they paid for industrial insurance.

4 22. While larger employers can participate in retro individually, smaller
5 employers wishing to participate in the program and take advantage of the potentially
6 substantial refunds must join a "retro group." Due to regulations and DLI decisions,
7 most retro groups are sponsored by business trade associations ("retro sponsor"), such
8 as the BIAW.
9

10 23. BIAW's ROII program is the largest and one of the oldest retro groups,
11 with almost 6,000 members and an annual turnover of approximately 10%.

12
13 **B. Defendants agree to hold retro refunds in trust for the ROII Beneficiaries.**

14 24. In order to participate in the ROII program during a given year, each
15 ROII beneficiary entered into a uniform agreement with the BIAW ("ROII
16 Instrument"). The material provisions of the ROII Instrument have remained
17 substantially unchanged during the past ten years. An example from the 2007-2008
18 Program Year is attached as Appendix A and incorporated herein by reference.⁴
19

20 25. The ROII Instrument confirms the existence of a trustee / beneficiary
21 relationship. The ROII Instrument provides that "BIAW will be entitled to receive any
22
23

24
25 ⁴ Plaintiffs assert that the governing trust instrument is the entire application packet, with its three forms and program descriptions, and incorporates the same by reference. For brevity Plaintiffs have only attached Form 3 from those packets.

1 Premium Returns from DLI with respect to the Coverage Period *on behalf of Members*
2 *and Other Participants.*” App B. at ¶ 2 (emphasis added). “Any Premium Returns
3 payable to BIAW from DLI under the DLI Agreement *shall be held in trust by the*
4 *Trust for Participants* including the Member.” *Id.* at ¶ 6 (emphasis added). The ROII
5 Instrument promises that these trust funds will be held by the Builders Benefit Trust,
6 and repeatedly refers to “the Trust.” *Id.*

8 **C. Defendants breached fiduciary duties owed to the ROII Beneficiaries.**

9 26. To comply with fiduciary obligations imposed by state law, trustees must
10 act only in the interest of the trust beneficiaries and not for the benefit of themselves or
11 their affiliates. Each of the Defendants owed and breached these duties.
12

13 27. First, the Builders Benefit Trust allowed the trust funds to be repeatedly
14 funneled through the bank accounts of BIAW’s wholly-owned for-profit subsidiary,
15 MSC, with no possible justification. For example, checks written by the State of
16 Washington to BIAW (the non-profit) for as much as \$50 million were deposited
17 directly into the account of MSC, without even a proper endorsement.
18

19 28. BIAW’s answer in the preceding federal lawsuit (“Federal Answer”)
20 admits the following course of conduct:
21

22 ...BIAW receives any premium returns from DLI and delivers them to BIAW
23 Member Services Corporation which promptly transfers any such premium
24 returns to the Washington Builders Benefit Trust. ...[T]he trustees pay 10% of
25 the overall group refund to BIAW Member Services Corporation. From 2002
through 2007, those payments were approximately \$19,341,933. In addition,
the trustees pay 10% of the overall group refund to any local association with

1 members who are employer participants in the plan. To accomplish such
2 payment, the Washington Builders Benefit Trust pays the funds to BIAW
3 Member Services Corporation. BIAW Member Services Corporation calculates
4 and makes the payments to local associations. From 2002 through 2007, local
5 associations have received approximately \$19,341,933.

6 Federal Answer ¶ 2.

7 29. The trustees also funnel all disbursements to the ROII Beneficiaries
8 through the accounts of MSC, and such disbursements are drawn on MSC checks.

9 30. Thus, the Builders Benefit Trust allows each dollar of trust funds to pass
10 through the accounts of MSC – its for profit affiliate – not just once, but *twice*. Yet, in
11 deposition, the three-time chair of Builders Benefit Trust, Rick Tremaine, was
12 unaware that trust funds ever pass through MSC's accounts and questioned the
13 appropriateness of such practice.

14 31. Trust funds remain in the accounts of MSC for sufficient time to generate
15 substantial interest for MSC. On information and belief, MSC never accounts for this
16 interest and it has never been returned to the trust. This practice has profited the
17 trustees' affiliates at the expense of the ROII Beneficiaries.

18 32. Second, the Builders Benefit Trust allowed their affiliates to manage trust
19 funds, to calculate payment to ROII Beneficiaries, and to make sizable transfers
20 without adequate supervision and without requiring proper accounting. On
21
22
23
24
25

1 information and belief, the trustees allowed unauthorized employees of the BIAW to
2 access trust funds.⁵

3 33. The trustees allowed their affiliates to apply improper methodology to
4 calculate payments to the ROII Beneficiaries. The ROII Instrument promises that the
5 ROII Beneficiaries will receive a pro rata share of the refund, based upon the
6 computerized print outs of DLI. Defendants underpaid ROII Beneficiaries and, on
7 information and belief, pocketed the difference.
8

9 34. Third, Defendants admit that for years the Builders Benefit Trust has
10 diverted 20% of the trust funds to the trustees' affiliates, including MSC and Master
11 Builders. Defendants admit that these affiliate payments totaled over \$38.6 million
12 from 2002 through 2007. These affiliate payments have been made on an annual basis
13 since at least 1997.
14

15 35. Nothing in the ROII Instrument allows the BIAW to withhold funds in
16 excess of expenditures necessary to operate the trust and the retro program. For
17 example, Paragraph 3 gives the "Trust" discretion only to make "*expenditures from the*
18 *Trust for administrative costs and expenses of the Plan.*" App. B. at ¶ 3 (emphasis
19 added).
20
21
22
23

24 ⁵ The 1994 Declaration of Trust is enforceable against the trustees to the extent that it protects the ROII Beneficiaries. It
25 provides that only the chair of the trust and his designee may be signatories on accounts holding trust funds. Yet, Rick
Tremaine, the three-time chair of the Builders Benefit Trust was unaware of where trust assets were kept or who had
access to them. He was unaware who had signing authority on such accounts.

1 36. Consistent with this limited authority, the ROII Instrument only
2 authorizes the trustees to “transfer” trust funds to their affiliates for plan-related
3 expenses. Prior to 2001, the ROII Instrument authorized the “Trust ... to *transfer* 10%
4 to local associations and 10% to BIAW of the excess premiums returned *for marketing*
5 *and administrative costs.*” App. A ¶ 3(b) (emphasis added). After being revised in
6 2002, Paragraph 4(b) of the ROII Instrument read: “The Member further *authorizes*
7 *the Trustee to transfer* ten percent (10%) of the Participants’ Premium Returns
8 applicable to the Coverage Period to local associations and 10% to BIAW *for*
9 *marketing and promotion of the Plan.*” App B ¶ 4(b) (emphasis added).⁶

12 37. Instead of using these transfers for “marketing and administrative costs”
13 or “marketing and promotion of the plan,” Defendants admit that these funds are
14 comingled in their accounts and treated as profits.

16 38. At the time the Builders Benefit Trust authorized and made these affiliate
17 payments, they had reason to know that the trust funds were not going to be used in
18 accordance with the trust. The affiliate payments were far in excess of any amounts
19 that could conceivably be used for trust-related purposes, the trustees knew that they
20 would not be used for trust-related purposes, and the trustees took no effort to protect
21 these assets on behalf of the ROII Beneficiaries.

24 ⁶ In response to litigation, the BIAW has now revised the ROII Instrument applicable to future coverage periods to
25 provide: “*In consideration for their efforts* in marketing and promoting the Plan, the Member further authorizes the
Trustees to *pay* ten percent (10%)...to local associations and 10% to BIAW.” (emphasis added).

1 39. The ROII Instrument is unambiguous and does not authorize the BIAW to
2 withhold or distribute from the trust amounts in excess of foreseeable trust-related
3 expenses. However, to the extent any ambiguity exists, it must be resolved in favor of
4 the ROII Beneficiaries, to protect the assets of the trust, and consistent with the intent
5 evidenced in the ROII Instrument. According to the ROII Instrument, the BIAW is to
6 administer ROII “*on behalf of the Member and other Participants.*” *Id.* at ¶ 3
7 (emphasis added).
8

9 40. The Master Builders and MSC are the largest recipients of affiliate
10 payments. They took such trust funds subject to the trust and all corresponding
11 obligations and were delegated certain duties in administering the trust funds, thereby
12 assuming all fiduciary duties of a trustee. The Master Builders and MSC breached
13 their fiduciary duties by, among other things, commingling trust funds, failing to
14 account for trust funds, and using trust money for purposes not authorized by the ROII
15 Instrument or by law.
16
17

18 41. Defendants claim that the affiliate payments are a “marketing assistance
19 fee” that the trustees paid for marketing services rendered by their affiliates. Even
20 under this theory, the trustees engaged in indefensible self-dealing by contracting with
21 their affiliate to provide these services and paying them fees that grossly exceeded the
22 value of such services. Absent their self-interest, the trustees would *never* have paid
23
24
25

1 \$10 million annually for such limited marketing assistance. This is the essence of self-
2 dealing.

3 42. No version of the ROII Instrument authorized the trustees to pay an
4 inflated "marketing assistance fee" to their affiliates or to transfer any trust funds to
5 MSC. Such self dealing cannot be authorized by the "Washington Builders Benefit
6 Declaration of Trust," as Defendants have claimed in the federal lawsuit, because that
7 1994 document was signed only by the trustees and has never even been disclosed to
8 the vast majority of ROII Beneficiaries. However, to the extent that the trustees are
9 otherwise authorized to pay a "marketing assistance fee" to their affiliates, the 1994
10 Declaration of Trust is enforceable against the trustee to protect the ROII
11 Beneficiaries. The trustees breached their fiduciary duties by allowing MSC to
12 calculate the "marketing assistance fee" without adequate oversight and by paying
13 such fees years before they were due under the terms of the 1993 Declaration of Trust.
14 Rather than paying the fee after the final adjustment (almost four years after the close
15 of the coverage period), as the 1994 Declaration of Trust specifies, the trustees paid
16 the fees to their affiliates on a pro rata basis after each adjustment, with the majority of
17 the fee paid less than a year after the close of the coverage period. This had the effect
18 of depriving the beneficiaries of years of interest on these multi-million dollar
19 payments.
20
21
22
23
24
25

1 43. These breaches went undiscovered for so long due, in part, to the trustees'
2 breaches of other duties owed to the ROII Beneficiaries. For example, the trustees had
3 a statutory obligation to provide an annual trust accounting to the ROII Beneficiaries.
4 RCW 11.106.020. Defendants have never provided the ROII Beneficiaries with any
5 trust accounting or with information concerning how trusts assets are invested or how
6 and to whom the assets and their proceeds are disbursed. They thereby made it
7 impossible for the ROII Beneficiaries to discovery the breach and protect their
8 interests in the trust.
9

10
11 44. In addition, Defendants have violated their duties of candor owed to the
12 ROII Beneficiaries by distributing documents to them that misrepresented material
13 facts relating to the management of the trust including. For example, BIAW materials
14 represented that the retro refunds are calculated by "taking the...premiums paid by its
15 members, subtracting all [DLI] claims against its members, and distributing the
16 difference among all members." These materials never disclosed the fact that
17 Defendants funnel 20% of the retro refund to themselves before distributing any
18 money to the members. These breaches helped to conceal from the ROII Beneficiaries
19 the most significant breaches of fiduciary duties, including the mismanagement,
20 commingling and embezzlement of trust funds.
21
22

23 45. Defendants also were untruthful in repeatedly telling the ROII
24 Beneficiaries that the BIAW "receives and distributes" the retro refund in July. *See*
25

1 App B. Pursuant to state law and in fact, DLI pays the retro refund to BIAW in May,
2 and the BIAW and its affiliates hold these funds for approximately two months. This
3 misrepresentation is material because it concealed the mismanagement and self-
4 dealing of trust fund assets and proceeds during the two month period. Substantial
5 interest is or should be earned on these tens of millions of dollars during this period.
6

7 46. Such misrepresentations led to a very high renewal rate among ROII
8 Beneficiaries. Having no knowledge of the breaches of fiduciary duties, they relied
9 upon the misrepresentations of Defendants in deciding to renew their ROII
10 participation.
11

12 47. Defendants have breached their duties to act in good faith and with honest
13 judgment and other fiduciary duties in taking the actions described above.
14

15 48. Defendants have colluded and conspired to breach their fiduciary duties
16 as alleged herein. For example, Defendants admit that each retro refund transfer made
17 by DLI is transferred from the BIAW to MSC to the Builders Benefit Trust; and then
18 back again to MSC before being disbursed. The Builders Benefit Trust delegates all
19 day to day trust management responsibilities to the staff of BIAW and MSC. Master
20 Builders has colluded and conspired with BIAW and Builders Benefit Trust
21 continuously since 1994 when it assisted BIAW to form the Builders Benefit Trust.
22 Master Builders also assists in marketing the ROII program. With the knowledge of
23 the Builders Benefit Trust, employees of MSC and BIAW participated in all aspects of
24
25

1 the breaches. Given this collusion and conspiratorial conduct, it would be futile to
2 demand any one of such defendants to take legal action against another for such
3 breaches.

4 49. All Defendants took on the role of co-trustees and/or third parties who are
5 jointly and severally liable for the breaches of trust asserted herein. Each defendant
6 took possession of trust funds with knowledge of the trust. Each participated in the
7 breaches of trust asserted herein and improperly benefited from such breaches, either
8 directly or indirectly. Furthermore, the Builders Benefit Trust has delegated certain
9 trustee duties to the other Defendants in administering the trust, which subjects these
10 defendants to trustee obligations and duties owed to the ROII Beneficiaries.
11
12

13 50. Successor trustees of the Builders Benefit Trust are jointly and severally
14 responsible for the breaches of their predecessor trustees. They have conspired and
15 colluded with predecessor trustees with regard to the breaches asserted herein.
16 Moreover, despite having knowledge of their predecessors' breaches, successor
17 trustees failed to take action to remedy the breaches and/or to protect the beneficiaries
18 and the trust assets.
19
20

21 51. As a practical matter, the BIAW, Builders Benefit Trust and MSC operate
22 as a single entity and a benefit derived by any one of these organizations benefits all.
23 For example, in the past ten years, virtually every trustee of the Builders Benefit Trust
24 was a member of the BIAW's Board of Directors and held leadership roles in the
25

1 BIAW. The BIAW President appoints the trustees of the Builders Benefit Trust. The
2 Chair and the Vice Chair of the Builders Benefit Trust automatically serve on the
3 Executive Committee of both BIAW and MSC. The Builders Benefit Trust does not
4 have staff or offices and instead relies upon the staff and offices of BIAW, including
5 its accountant and general counsel. Similarly, MSC is a wholly owned subsidiary of
6 BIAW and has interlocking directorates. BIAW officers and members of the BIAW
7 Executive Committee serve parallel roles for MSC. The two organizations utilize a
8 consolidated budget.
9
10

11 52. These organizations are also related to the Master Builders and benefit
12 from any profits obtained by the Master Builders. For example, Master Builders fills a
13 plurality of seats on the BIAW Board. Each year, one of Master Builders' largest
14 expenditures is dues paid to BIAW and BIAW's national affiliate, the National
15 Association of Home Builders. Master Builders also is one of the largest contributors
16 to BIAW's Political Action Committee.
17

18 53. Prior to 2007, plaintiffs A-1 and Re Sources were unaware of the facts
19 alleged in this action and that they possessed a cause of action for violation of
20 fiduciary duties, constitutional rights and the Consumer Protection Act, as asserted
21 herein. Plaintiff McKinnon was unaware of such information until 2008.
22
23
24
25

1 **D. Facts related to violation of the Consumer Protection Act.**

2 54. In marketing ROII and in its routine correspondence with ROII
3 Beneficiaries, the BIAW and Master Builders conceal the fact that the trustees will
4 divert 20% of the groups tax refund to affiliates as a "back end fee." They repeatedly
5 state that the only costs to participate in ROII are membership dues and the up front
6 fee, and falsely describe the program as refunding the entire tax refund to the ROII
7 Beneficiaries. In the past ten years, none of the Defendants' marketing materials have
8 honestly disclosed the material fact that BIAW Defendants take 20% of the retro
9 refunds, amounting to \$38 million in the last six years alone. This deception
10 undermines the ability of employers to compare different retro plans as DLI
11 recommends.
12

13
14 55. This deception continues after an employer joins its ROII program. In its
15 standardized correspondence with participants, the BIAW and MBA conceal that
16 Defendants are withholding twenty percent of the DLI retro refunds for unauthorized
17 purposes and leads participants to believe they are receiving the entire refund. Other
18 misrepresentations described above further mislead potential and current ROII
19 Beneficiaries.
20

21
22 56. BIAW actively conceals its "back end" fee by taking improper revenue
23 and expenditures "off books," tracking them in the accounts of MSC rather than in the
24 more public accounts and federal tax returns of the BIAW.
25

FIRST CAUSE OF ACTION
(Action for Trust Accounting)
(Pursuant to Trustees' Accounting Act)

1
2
3 57. Plaintiffs incorporate by reference all prior paragraphs in this Petition and
4 Class Action Complaint as if they were completely restated here.
5

6 58. Plaintiffs are beneficiaries of the Builders Benefit Trust and have a
7 statutory right to petition the Court for a trust accounting for good cause shown. Good
8 cause exists because in the history of the Builders Benefit Trust, the beneficiaries have
9 never been provided with the annual trust statement required by RCW 11.106.020 or
10 any other information relating to the principal and income of the trust and its
11 disposition.
12

13 59. Additional just cause will be briefed to the Court. Such cause includes
14 the facts and breaches of trust alleged herein, as well as the deposition of three-time
15 chair of the Builders Benefit Trust, Rick Tremaine. Mr. Tremaine's deposition
16 revealed significant discrepancies and uncertainties about the handling and disposition
17 of trust assets and demonstrated that the trustees have failed to properly manage the
18 trust.
19
20

21 60. The Court should order the Defendants to render a trust accounting,
22 determine the accuracy and validity of such accounting, and surcharge the trustees for
23 all losses, if any, caused by negligent or willful breaches of trust, pursuant to the
24 procedures of the Trustees' Accounting Act, RCW 11.106. Surcharges should be
25

1 ordered for all breaches of trust alleged in this action or that may be uncovered
2 through the trust accounting, including but not limited to the breaches of fiduciary
3 duties set forth in this action.

4
5 **SECOND CAUSE OF ACTION**
6 **(Violation of Fiduciary Duties)**
7 **(Pursuant to Trustees Accounting Act and TEDRA)**

8 61. Plaintiffs incorporate by reference all prior paragraphs in this Petition and
9 Class Action Complaint as if they were completely restated here.

10 62. Each of the Defendants owed fiduciary duties to the ROII Beneficiaries
11 pursuant to an express trust. The DLI has paid rebates earned by ROII Beneficiaries to
12 the BIAW and the BIAW took legal title to such rebates. BIAW agreed to hold these
13 funds in trust for the benefit of the ROII Beneficiaries. BIAW delegated certain trust
14 responsibilities to MSC and Master Builders, and both entities took possession of trust
15 funds with full knowledge of the express trust. The Builders Benefit Trust also
16 knowingly took possession of trust funds and agreed to serve as trustees of the trust,
17 and delegated trust responsibilities to MSC and BIAW. Thus, each Defendant took on
18 fiduciary duties to the ROII Beneficiaries by becoming as a trustee of an express trust,
19 by accepting a delegation of trust responsibilities from such trustees, and/or by
20 knowingly taking legal title to trust funds.
21
22
23

24 63. Each Defendant had a fiduciary duty to protect the trust assets and to use
25 good faith and honest judgment in administering the trust. They were required to

1 administer the trust money solely for the benefit of the ROII Beneficiaries and for only
2 purposes authorized by the ROII Agreement. They could not commingle funds with
3 their general account and could withhold and/or distribute funds from the trust only for
4 the purposes of administering the trust or otherwise expressly authorized by the trust
5 instrument.
6

7 64. Most importantly, Defendants could not administer the trust in a manner
8 that provided them or their affiliates with a financial benefit beyond that clearly
9 authorized under the express terms of the trust instrument, which is to be interpreted
10 consistent with their fiduciary duties and the constitutional rights of the ROII
11 Beneficiaries.
12

13 65. Defendants have breached their fiduciary duties established under
14 statutory and common law, including by their failure to prudently invest and manage
15 the trust assets for the sole benefit of the ROII Beneficiaries and have violated the
16 terms of the trust. Specifically, the trustees breached the trust and engaged in self
17 dealing by (1) repeatedly funneling trust funds through the accounts of their for-profit
18 affiliate; (2) allowing their for-profit trustee to earn interest on such trust funds; (3)
19 improperly delegating trust functions to their affiliates; (4) allowing their affiliates to
20 underpay ROII Beneficiaries and profit thereby; (5) diverting 20% of the trust funds to
21 their affiliates in violation of the terms of the trust; (6) allowing their affiliates to
22 comingle trust assets and to treat them as profits; (7) contracting with their affiliates to
23
24
25

1 provide "marketing assistance" and paying them a fee that far exceeded the value of
2 such services; and (8) to the extent the payment of a "marketing assistance fee" was
3 authorized, paying such fee years in advance of its due date and thereby depriving the
4 ROII Beneficiaries of interest.

5
6 66. Defendants have breached their duty to provide trust accounting and
7 honest information to the ROII Beneficiaries as stated herein. They failed to provide
8 them with accurate information sufficient to protect their interests in trust assets. For
9 example, Defendants have not provided the ROII Beneficiaries accurate and sufficient
10 information concerning the extent of trust assets, how trust assets are invested and
11 managed, or how interest and profit from trust assets is withheld, transferred or
12 disbursed. Information that was provided to beneficiaries was inaccurate and/or
13 misleading.
14

15
16 67. Defendants have colluded in carrying out these breaches and are therefore
17 jointly and severally liable for such breaches.

18
19 68. Equity requires Defendants to provide an accounting and to restore any
20 withheld and/or transferred interest, income and other benefits earned by the
21 investment and management of trust assets.

22
23 69. Affiliate payments should be unwound, accounted for, and restored to the
24 trust for eventual distribution to the ROII Beneficiaries pursuant to the terms of the
25 trust.

1 73. Plaintiffs incorporate by reference all prior paragraphs in this Petition and
2 Class Action Complaint as if they were completely restated here

3 74. Defendants' conduct constitutes unfair or deceptive acts made in trade or
4 commerce under Washington State's Consumer Protection Act (RCW Chapter 19.86).
5

6 75. Defendants' conduct affects the public interest. ROII Beneficiaries are
7 participating in a workers' compensation program, which is imbued with the public
8 interest. DLI instructs employers to speak with retro sponsors about their policies in
9 making the decision about whether to participate in this government program and
10 which retro group to join. Employers have a right to rely upon the representations
11 made by Defendants and the ROII Instrument.
12

13 76. ROII marketing materials and uniform correspondence to ROII
14 Beneficiaries have the capacity and tendency to deceive a substantial portion of the
15 public and, more specifically, that portion of the public that is eligible to participate in
16 retro.
17

18 77. Defendants' actions caused direct and substantial damage to ROII
19 Beneficiaries.
20

21 Pursuant to RCW 19.146.100 and RCW Chapter 19.86, ROII Beneficiaries are entitled
22 to treble damages, plus actual costs associated with bringing this action, including
23 reasonable attorneys' fees.
24
25

1 78. Whether Defendants violated the Consumer Protection Act in their
2 conduct towards ROII Beneficiaries is a “question arising in the administration of an
3 estate or trust”. RCW 11.96A.030. Therefore it is a “matter” that should be resolved
4 pursuant to TEDRA. *Id.* Should the Court determine otherwise, Plaintiffs plead the
5 CPA claim individually and on behalf of the following Class:
6

7 All participants in the Building Industry Association of Washington’s Return
8 On Industrial Insurance program, excluding employers whose principals or
9 senior managers served as an officer or director of BIAW, BIAW Member
10 Services Corporation or any of its local affiliates, or as a trustee of the
11 Washington Builders Benefit Trust.

12 79. Should Plaintiffs’ CPA claim need to proceed as a class action, it would
13 be maintainable as such because the Class would exceed 7,000 employers and all
14 factual and legal issues are common to all members of the Class. Plaintiffs would
15 fully and adequately represent and protect the interests of members of the Class
16 because of the common injuries and interests of the Class and the singular conduct of
17 BIAW applicable to all Class members. Plaintiffs have retained counsel competent
18 and experienced in the prosecution of class action litigation. Finally, Plaintiffs have
19 no interests that are contrary to, or in conflict with, those of the Class they would seek
20 to represent.
21

22 **PRAYER FOR RELIEF**

23 WHEREFORE, Plaintiffs pray that Plaintiffs’ claims be resolved pursuant
24 to the Trustees’ Accounting Act, RCW 11.016, the Trust and Estate Dispute
25

1 Resolution Act, RCW 11.96A, and/or certified and maintained as a class action and for
2 judgment against Defendants as follows:

3 1. To not resolve all legal and factual issues at the initial hearing. RCW
4 11.96A.100(8).

5 2. For orders requiring Defendants to render a trust accounting, determining
6 the accuracy and validity of such accounting, and surcharging the trustees for all
7 losses, if any, caused by negligent or willful breaches of trust, pursuant to the
8 procedures of the Trustees' Accounting Act, RCW 11.106.

9 3. For an order declaring Defendants subject to express or constructive trust
10 and owing fiduciary duties to the Class;

11 4. For an order declaring Defendants to be in violation of their fiduciary
12 duties to the Class;

13 5. For an order requiring accounting of trust funds, wherever they lie;

14 6. For imposition of a constructive trust upon all recipients of trust funds
15 who were not subject to the express trust and who are not bona fide purchasers,
16 requiring such recipients to account for and return such funds;

17 7. For an order granting plaintiffs the right to elect remedies against each
18 defendant after the extent of their liabilities and assets are determined;

19 8. For an order establishing the Defendants to be jointly and severally liable
20 for the full extent of damages sustained by the Class;

21 9. For an order appointing a new and disinterested trustee, pursuant to the
22 Court's powers under RCW 11.98.039(4);

1 10. As against each Defendant, for an order requiring it to return trust funds
2 to the trust and/or for money judgment of the full amount of damages;

3 11. For an order declaring the affiliate payments to be improper and requiring
4 them to be returned to the trust;

5 12. For an order requiring Defendants to distribute corrective disclosures to
6 beneficiaries to remedy breaches of duties of disclosure and candor;

7 13. For judgment against the BIAW, MSC, and Master Builders of treble
8 and/or punitive damages, and statutory minimum penalties, and recovery of costs and
9 attorneys fees, as provided for under RCW §§ 19.86 *et seq.*,

10 14. For pre-judgment and post-judgment interest.

11 15. For reasonable attorneys' fees and reimbursement of all costs for the
12 prosecution of this action, based upon benefit achieved for the common fund; and
13

14 16. For such other and further relief as this Court deems just and appropriate.
15
16
17
18
19
20
21
22
23
24
25

1 RESPECTFULLY SUBMITTED this 6th day of February, 2009

2
3
4 Smith & Lowney, PLLC

5 By 
6 4787

Michael Withey, WSBA #

7 Knoll Lowney, WSBA # 23457
8 Richard A. Smith, WSBA # 21788

Attorneys for Plaintiffs and Class
Law Offices of Michael

9 Withey

Bridget Baker-White, WSBA # 38790

10 Brian Knutsen, WSBA # 38806

Two Union Square
601 Union Street, Suite 4200
Seattle, WA 98101

11 Attorneys for Plaintiffs and Class

2317 E. John St., Seattle, WA 98122

(206) 405-1800

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

13 Email: knoll@igc.org

14 rasmithwa@igc.org

15 bridget.bakerwhite@gmail.com

16 briank@igc.org

17 Andrew S. Friedman,

18 Tonna Farrar,

19 Attorneys for Plaintiffs and Class

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

21 2901 N Central Ave, Suite 1000

22 Phoenix, AZ 85012

23 (602) 776-5902



2007 - 2008

Building Industry Association of Washington
Return On Industrial Insurance (R.O.I.I.) Program
BIAW Group Retrospective Rating Program Agreement
Form 3



PLEASE COMPLETE THE FOLLOWING:

X

Signature (Owner/Officer)

Date

Print or Type Name

Title

Company Name

L & I Account ID #

THIS AGREEMENT is made and entered on the date listed above and between the BUILDING INDUSTRY ASSOCIATION OF WASHINGTON, a Washington nonprofit corporation (hereinafter "BIAW"), and the above listed company, a member in good standing of BIAW (the "Member"), and a member in good standing of the local home building association affiliated with BIAW.

RECITALS:

A. BIAW has entered into a "Group Retrospective Rating Agreement" (the "DLI Agreement") with the Washington State Department of Labor & Industries ("DLI") pursuant to Chapter 61.18 RCW. Under the DLI Agreement, DLI will rate the industrial insurance premiums of participating members of the Association as a group (the "Participants") during the coverage period described in this Agreement (the "Plan").

B. Member wishes to be a Participant in the Plan.

Therefore, in consideration of the mutual promises and covenants contained in this Agreement, the parties hereto agree as follows:

1. **Definitions.** The following definitions apply to this Agreement:

(a) "Coverage Period" means the period commencing July 1, 2007 and ending June 30, 2008, provided; however, that if the Member becomes a participant in the plan after July 1, 2007, then the coverage period commences on the first day of the first calendar quarter beginning after the date this agreement is executed by BIAW, and ends on June 30, 2008.

(b) "Premium" means the industrial insurance premiums the Member and other Participants pay to DLI for workers' compensation coverage (not including penalties or security deposit) during the Coverage Period. DLI calculates the Member's Premium using the "Assigned Industrial Insurance Rate" described in DLI's rate notice to the Member.

(c) "Premium Returns" means DLI's payment to BIAW of dividends and the contingent retrospective return of a portion of Premiums paid by Participants during the Coverage Period, pursuant to the DLI Agreement and DLI regulations.

(d) "Penalties" means sums which, upon demand by DLI, are payable by Participants through BIAW to DLI with respect to the loss experience of the Plan during the Coverage Period. The limit of the Member's obligation for Penalties under the Plan is described in paragraph 6 of this Agreement.

2. **The Plan.** Under the terms of the DLI Agreement, BIAW will be entitled to receive any Premium Returns from DLI with respect to the Coverage Period on behalf of the Member and other Participants. Alternatively, DLI may demand Penalties from the Member and other Participants with respect to the Coverage Period. BIAW has selected "Plan B" under DLI regulations, which limits Participants' additional liability to DLI for Penalties to forty percent (40%) of Premiums paid by each Participant during the Coverage Period (see paragraph 6 for other financial obligations of the Member).

3. **Plan Administration.** BIAW will administer the Plan on behalf of the Member and other Participants. BIAW will provide the Member enrollment procedures, claims management assistance, and administration of the Plan. BIAW may delegate these administrative duties to a subsidiary controlled by BIAW. The "Washington Builders Benefits Trust" (hereinafter "the Trust") will receive, on behalf of Participants, all Premium Returns paid by DLI pursuant to this Agreement, and hold some or all of such Premium Return until the expiration of the period DLI may adjust such Premium Return or claim Penalties with respect to the Coverage Period. The Trust is comprised of seven trustees appointed by the president of BIAW from among the BIAW general membership. All actions and decisions by the Trust regarding the disposition of the Premium Returns, including establishing reserves, investment of funds, the timing and amount of distributions or payments to Participants, and expenditures from the Trust for administrative costs and expenses of the Plan shall be within the sole discretion of the Trust. The Trust, in its discretion, may hire attorneys, consultants, or accountants necessary to accomplish its obligations and may pay from the Trust such compensation for such services as it deems reasonable and proper.

4. **Obligations and Agreements of the Member.**

(a) The Member agrees to pay to BIAW or its subsidiary a Member Enrollment Fee equal to one and one-half percent (1.5%) of the Member's Premium for the period of July 1, 2004 through June 30, 2006, or One Hundred Fifty and no/100 Dollars (\$150.00), whichever amount is greater. The Member Enrollment Fee is payable on submission of this Agreement to BIAW. If Member becomes a participant in the plan after July 1, 2007 then the fee will be prorated based on the percentage of the Member's coverage period bears to the period from July 1, 2007 through June 30, 2008, however, that in no event shall the fee be less than \$150.00.

(b) By execution of this Agreement, the Member absolutely assigns to the Trust all Premium Returns that may be payable by DLI on behalf of the Member, to protect the Member and BIAW from Penalties and from other future obligations to DLI with respect to industrial insurance for the Coverage Period and any other period. The Member further authorizes the Trustees to pay from the Premium Returns the balance of the Enrollment Fee and such costs and expenses for the operation and administration of the Plan as the Trustees may direct. The Member further authorizes the Trustees to transfer ten percent (10%) of the Participants' Premium Returns applicable to the Coverage Period to local associations and 10% to BIAW for marketing and promotion of the Plan.

(c) The Member agrees to complete and file with DLI such documents as DLI may require.

(d) The Member hereby authorizes DLI to release all present and future workers' compensation insurance data regarding the Member and its account to BIAW. "Worker's compensation insurance data" for purposes of this Agreement includes the Member's claims history, Premium payment history, losses, statistics, experience modification factors, and other industrial insurance data. This authorization shall remain in effect throughout the entire period of Member's obligation under the Plan and any other plans in which the Member is a Participant and may not be withdrawn during such period.



BIAW Group Retrospective Rating Program Agreement Form 3



(e) The Member shall be bound by and comply with all rules and regulations issued by DLI, by the terms of the DLI Agreement, by such rules and regulations as may from time to time be issued by the BIAW or the Trust, and by the decisions of BIAW or the Trust as to any aspect of the Plan.

(f) The Member shall participate in loss prevention control efforts, and cooperate with BIAW or its subsidiary in safety programs and other efforts to reduce industrial insurance claims.

(g) The Member shall maintain in good standing one or more accounts with DLI, and make timely payment to DLI of quarterly Premiums based upon the Member's assigned risk classification(s) and individual experience rating, and pay all Premiums, Penalties or other assessments arising from the Coverage Period.

(h) The Member shall remain a member in good standing in BIAW and the Member's local association for the period the Member has any obligation to BIAW under this Agreement.

5. **Acknowledgments by Member.** The Member represents and acknowledges the following:

(a) Any computerized reports prepared by DLI which establish the allocation of Premium credits and/or Penalties shall represent the determinative basis for establishing amounts due to or from the Member and that this procedure is nondiscriminatory.

(b) DLI is authorized to pay all retrospective Premium Returns arising from Member's payment of Premiums during the Coverage Period to BIAW or the Trust.

(c) The Trust is vested with the sole authority to receive the Premium Return from BIAW or DLI, to hold some or all of such Premium Return until the expiration of the period DLI may adjust such Premium Return or claim Penalties with respect to the Coverage Period, and distribute all Premium Returns to Participants, and all decisions of the Trust with regard to reserves, investments, expenditures, and disbursements shall be absolute and binding upon Member.

6. **Distribution of Premium Return.** THE RETROSPECTIVE PREMIUM RETURN IS DETERMINED BY DLI AND IS BASED UPON PREMIUM SIZE, CLAIMS COSTS, AND RELATED FACTORS AND THEREFORE IS NOT GUARANTEED. Any Premium Returns payable to BIAW by DLI under the DLI Agreement shall be held in trust by the Trust for Participants including the Member and shall be subject to the exclusive management and control of the Trust. The Member shall have no legal right or entitlement to any portion of said sums or any interest or benefit accruing from the investment of any such sums, until such time as the Trust, in its sole discretion, declares a distribution of any portion of the Premium Return to Participants. The Member may not assign or pledge any portion of such sums and they may not be attached voluntarily or by operation of law by any creditor of the Member.

The timing and amount of any distribution of all or any part of the Premium Return and any earnings on such Premium Return shall be determined by the Trust in its sole and absolute discretion, based upon such reasonable distribution system as may now or hereafter be adopted by the Trust. Any decision by the Trust to either pay to Participants all or any portion of any Premium Return or to accrue or invest any or all of the Premium Return shall not be subject to challenge or modification by the Member or any other Participants or any assignee or creditor thereof.

7. **Default by Member.** If the Member is in default of any of the Member's obligations under this Agreement, including termination of membership in BIAW or the Members' local association, or failure to remain a member in good standing in BIAW or the Member's local association, or expulsion according to the bylaws of BIAW or the Members' local association (hereinafter "Defaulting Member"), the Defaulting Member shall from and after the date of such default be deemed to have forfeited any and all rights to any sums held by the Trust. Any Premium Return held, invested or accrued by the Trust pursuant to the discretion granted the Trust and any interest or profit associated with such Premium Return shall not be subject to any claim by the Defaulting Member or any creditor or assignee thereof. Any forfeited sums shall be distributed or held for the benefit of the Participants, according to the discretion of the Trust.

8. **Payment of Penalties, Limits, or Member Liability.**

(a) Payment of all Penalties and additional Premium with respect to the Coverage Period will be on a pro-rata basis between the Participants, including the Member. The Member's liability for such penalties shall not exceed: (a) the sum of any money previously returned by the Trust to the Member pursuant to this Agreement, plus, (b) an amount equal to forty percent (40%) of Premium paid by Member during the Coverage Period.

(b) DLI makes three (3) annual retrospective adjustments to the Premium Return and may demand Penalties for up to three (3) years beyond the Coverage Period. As a result, the Member's liability to BIAW or the Trust pursuant to the provisions of this Agreement will extend beyond the Coverage Period and shall continue until all Penalties and additional Premiums due (if any) have been fully paid. The Member's liability under this Agreement shall not be extinguished by the Member's withdrawal, expulsion or membership termination with BIAW or the Members' local association.

(c) The provisions of this Agreement do not limit DLI's legal right to collect from the Member any defaulted Premiums, penalties or assessments arising from coverage provided by DLI. If DLI withholds any of such amounts owed by the Member from any aggregate retrospective Premium Return paid to BIAW, such amounts shall be deemed an obligation of the Member to BIAW and, upon demand by BIAW to the Member, the Member shall immediately pay the sum to BIAW in full.

(d) The Member shall, upon demand by BIAW or the Trust, remit any sums owing under the terms of this Agreement. In the event the Member fails or refuses to pay any sum claimed by the Trust to be owing, that sum shall bear interest at a rate of eighteen percent (18%) per annum until the sum is collected.

(e) Should BIAW determine that the Member has not fully or properly reported in appropriate risk classifications, has understated hours worked by the Member's employees, or has based Premium payments on any methodology which causes payments to be understated, including but not limited to estimates of hours or piecework hours, then in such event, BIAW at its option may collect from the Member the difference between the Member's retrospective premium and the Premium actually paid by the Member. For purposes of this paragraph "retrospective premium" shall be as calculated by DLI.

9. **Attorneys' Fees.** In the event BIAW or the Trust is required to hire legal counsel to enforce the Member's obligations under this Agreement, the Member agrees to pay all legal fees and cost incurred by the Trust or BIAW in any action or proceeding.

10. **Limitations of Liability and Indemnification.** The Member hereby releases and agrees to indemnify and hold BIAW, its subsidiary, the Trust, and all of the members of the Trust harmless from any and all liability for any decision which may now or hereafter be made by BIAW, its subsidiary, or the Trust with regard to the Plan, any Premium Returns (including interest, principal and profit), the payment of any such sums or the investment of any such sums.

11. **Acceptance in Plan.** The Member acknowledges that DLI will accept BIAW's participation only if BIAW complies with statutory and regulatory requirements, and that the Member's participation is also subject to approval by DLI and BIAW. This Agreement will become effective only upon approval of the Plan and the Member's participation. This Agreement shall be binding upon the Member, its successors and assignees.

IN WITNESS WHEREOF the parties hereto have executed this Agreement the day and date first above written.

Your signature required at top of page 3a.