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11 **IN THE OFFICE OF ADMINISTRATIVE HEARINGS**

12 In the Matter Of,

Case No. 14F-001-AAG

13 TOM HORNE, Tom Horne for Attorney
14 General Committee (SOS Filer ID 2010
00003); KATHLEEN WINN, Business
15 leaders for Arizona (SOS Filer ID 2010
00375)

**TRIAL MEMORANDUM RE:
BURDEN OF PROOF**

(Honorable Tammy Eigenheer)

16
17 If the County Attorney were successful in this action, it would establish the basis for
18 remedies that can be regarded as punitive in nature. It is therefore respectfully submitted that the
19 appropriate standard for the burden of proof in this case is clear and convincing evidence.

20 In the County Attorney's Order, Page 24, the County Attorney orders the following:

21 If Horne, Winn, the Horne Campaign, and/or BLA fail to take the
22 ordered corrective action within twenty days, this Office will issue
23 an Order Assessing a Civil Penalty pursuant to A.R.S. § 16-
24 924(B). The violation of the contribution limits carries a civil
penalty of three times the amount of money of the violation.
A.R.S. § 16-905(J). (Order p. 24, emphasis added).

1 The amount of the remedy's specified at pages 22-23 of the Order is \$397,374. If
2 Respondents were unable to pay that within the 20 days of the final Order as specified in the
3 above quotation, then they would be facing a penalty of approximately \$1.2 million, which is
4 clearly punitive in nature.

5 In Arizona, the Burden of Proof for punitive damages is by clear and convincing
6 evidence. *Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986).
7 Treble damages generally have the same burden of proof as punitive damages. In *Simpson*
8 *Consulting, Inc., v. Barclays Bank PLC*, 227 GA. App. 648, 490 S.E.2d 184, (1997), the Court,
9 dealing with the issue of treble damages in RICO cases held as follows:

10 The purposes of treble damages and punitive damages are
11 substantially the same, thereby requiring the same standard of
12 proof, i.e., "clear and convincing" evidence".
13 490 S.E.2d 192.

14 In *Desmond v. Yale-New Haven Hospital*, 138 Conn. App. 93, 50 A.3d 910 (2012) a
15 statute provided treble damages for the civil remedy of "statutory theft". The Court held that
16 "clear and convincing proof" was required when seeking treble damages under that statute50
17 A.30 at 913 (citing *Second Injury Fund v. Lupachino*, 45 Conn.App. 324, 346, 695 A.2d 1072
18 (1997)).

19 In *Mya Sara LLC v. Al-Amir*, 831 F. Supp. 2d 922 (E.D. Virginia, 2011), a federal statute,
20 35 U.S.C. § 284, provided for treble damages for willful infringement of a patent. The Court
21 held that the Plaintiff must prove its case "by clear and convincing evidence" 831 F.Supp.2d 940
22 (citing *Crystal Semiconductor Corp. v. Tri Tech Microelectronics Int'l. Inc.*, 246 F.3d 1336, 1346
23 (Fed.Cir.2001)).

24 Similarly, in *Powell v. Home Depot U.S.A.*, 715 F. Supp. 2d 1285 (S.D. Florida 2010), an
accused infringer of a patent could recover "enhanced damages" from the owner of a patent, if he

1 could show “inequitable conduct”. The Court held that the accused infringer had to prove the
2 elements by “clear and convincing evidence”. 17 F. Supp. 2d 1793.

3 In *Lykins v. Tata*, WL2435948 (Bkrtcy. D. Colo, 2011), a Colorado statute provided for
4 treble damages for bad faith conduct in deceptive trade practices. The Court held that Plaintiff
5 had to prove its case by “clear and convincing evidence.”

6 Similarly in *ASPEX Eyewear, Inc. v. E’lite Optik, Inc.*, 276 F.Supp.2d 1084 (D. Nevada,
7 2003), there could be a discretionary award for up to three times compensatory damages if it was
8 shown that the infringers conduct was willful, intentional, or deliberate. The Court held that to
9 recover the increased damages, the elements must be proved by “clear and convincing evidence.”
10 276 F. Supp. 1090.

11 As the County Attorney seeks an Order which could lead to the imposition of treble
12 punitive damages of \$1.2 million, it is respectfully submitted that the standard of proof in this
13 case should be clear and convincing evidence.

14 RESPECTFULLY SUBMITTED this 10th day of February, 2014.

15
16 /s/ Michael D. Kimerer

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10 **ORIGINAL** of the foregoing
11 electronically filed with the Office of
12 Administrative Hearings on this 10th day
13 of February, 2014, to:

14 Honorable Tammy Eigenheer
15 Administrative Law Judge
16 ARIZONA OFFICE OF ADMINISTRATIVE
17 HEARINGS
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21 **COPIES** of the foregoing served via OAH
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