70299-8

70299-8

No. 70299-8-I

King County Superior Court No. 12-2-15842-8 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Plaintiff / Respondent,

v.

KONINKLIJKE PHILIPS ELECTRONICS N.V., PHILIPS ELECTRONICS NORTH AMERICA CORPORATION, TOSHIBA CORPORATION, TOSHIBA AMERICA ELECTRONIC COMPONENTS, INC., LG ELECTRONICS, INC., LG ELECTRONICS U.S.A., INC., HITACHI, LTD., HITACHI DISPLAYS, LTD. (N/K/A JAPAN DISPLAY INC.), HITACHI ELECTRONICS DEVICES (USA) INC., AND HITACHI ASIA, LTD.,

Defendants / Appellants.

REPLY BRIEF OF APPELLANTS

Robert D. Stewart, WSBA #8998
KIPLING LAW GROUP PLLC
3601 Fremont Avenue N., Suite 414
Seattle, WA 98103
206.545.0345
206.545.0350 (fax)
stewart@kiplinglawgroup.com

John M. Taladay (*pro hac vice*)
Erik. T. Koons (*pro hac vice*)
Charles M. Malaise (*pro hac vice*)
BAKER BOTTS LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2400
202.639.7700
202.639.7890 (fax)
john.taladay@bakerbotts.com
erik.koons@bakerbotts.com
charles.malaise@bakerbotts.com

Counsel for Defendants/Appellants Koninklijke Philips Electronics, N.V. and Philips Electronics North America Corporation

Mathew L. Harrington, WSBA #33276
Bradford J. Axel, WSBA #29269
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
206.626.6000
206.464.1496 (fax)
MLH@stokeslaw.com
BJA@stokeslaw.com

Lucius B. Lau (*pro hac vice*)
Dana E. Foster (*pro hac vice*)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
202.626.3600
202.639.9355 (fax)
alau@whitecase.com
defoster@whitecase.com

Attorneys for Defendants/Appellants Toshiba Corporation and Toshiba America Electronic Components, Inc.

David C. Lundsgaard, WSBA #25448
GRAHAM & DUNN PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
206.624.8300
206.340.9599 (fax)
dlundsgaard@grahamdunn.com

Hojoon Hwang (*pro hac vice*)
Laura K. Lin (*pro hac vice*)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
415.512.4000
415.512.4077 (fax)
Hojoon.Hwang@mto.com
Laura.Lin@mto.com

Attorneys for Defendants/Appellants LG Electronics, Inc. and LG Electronics U.S.A., Inc.

Molly A. Terwilliger, WSBA #28449
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
206.676.7000
206.676.7001 (fax)
mollyt@summitlaw.com

Eliot A. Adelson (*pro hac vice*)
James M. Cooper (*pro hac vice*)
Andrew Wiener (*pro hac vice*)
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
415.439.1400
415.439.1500 (fax)
eliot.adelson@kirkland.com
max.cooper@kirkland.com
andrew.wiener@kirkland.com

Attorneys for Defendants/Appellants Hitachi, Ltd.; Hitachi Displays, Ltd. (n/k/a Japan Display Inc.); Hitachi Electronic Devices (USA), Inc.; and Hitachi Asia, Ltd.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Plaintiff does not dispute that the Washington Consumer Protection Act ("CPA") applies a four-year limitations period to claims for monetary relief under RCW 19.86.090 that are brought by the State or private persons for their own benefit. Yet, Plaintiff argues that a CPA claim for monetary relief under RCW 19.86.080, that is brought by the State for the sole benefit of private persons, has an infinite limitations period. This interpretation would wholly undermine the CPA's statute of limitations, RCW 19.86.120, and create discord with federal law. Plaintiff's interpretation, based on a distortion of '080's text, thus violates principles of statutory construction and must be rejected.

Plaintiff's reliance on RCW 4.16.160 also must fail. This statute is irrelevant to the question of what limitations period applies to '080 restitution claims because it only abrogates limitations periods; it does not create them. Nor is there any indication the Legislature intended RCW 4.16.160 to apply to '080 restitution claims and, indeed, the Legislature's application of '120 to claims under '090 that are brought by the State forecloses such an intent. Further, RCW 4.16.160 only applies when a claim is brought for the State's benefit. CPA '080 restitution claims do not meet this requirement as they seek solely to restore money or property to private persons, not the State.

Thus, '120's four-year limitations period applies to '080 restitution claims. Because Plaintiff's '080 restitution claim was not timely filed, this claim—as well as Plaintiff's '090 damages claim and its RCW 19.86.140 civil penalties claim—must be dismissed.

II. ARGUMENT

A. The Court Should Apply the Same Four-Year Limitations Period to Restitution Claims Under RCW 19.86.080 that Applies to Damages Claims Under RCW 19.86.090

The key question for the Court is what limitations period applies to '080 restitution claims. In interpreting '080 to answer this question, the Court's "fundamental objective is to ascertain and carry out the legislature's intent." *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 361 (2011) (citing *State v. Jacobs*, 154 Wn.2d 596, 600 (2005)). This legislative intent is primarily determined by the "plain meaning" of the statutory provision, which is to be "discerned from the ordinary meaning of the language at issue as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Jacobs*, 154 Wn.2d at 600. In addition, the Legislature has made clear its intent that "in construing [the CPA], the courts [are to] be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters." RCW 19.86.920.

These principles of statutory construction can only lead to the conclusion that the four-year limitations period in '120 applies to '080 restitution claims. While Plaintiff singularly focuses on the purported "ordinary meaning" of '120's text, this text does not answer the question at hand. Instead, the Court must look at the context of '080 restitution claims within the "statute [CPA] in which that provision is found" as well as "related provisions" like '090. *Jacobs*, 154 Wn.2d at 600. The Legislature has determined that four years is an appropriate limitations period for *all* '090 damages claims. Allowing '080 restitution claims to be brought after this period expires undermines the purpose of this limitations period and thus could not have been the Legislature's intent. The Legislature's intent that the CPA's construction be guided by federal precedent similarly requires that a four-year limitations period be applied to '080 restitution claims as that is the period for similar federal claims.

1. The Court must determine what limitations period applies to restitution claims under RCW 19.86.080.

Plaintiff relies heavily on the text of '120, noting that '120 only explicitly applies to '090 damages claims and then leaping to the conclusion that '120 therefore must not apply to '080 restitution claims. Resp. Br. at 11. Plaintiff's superficial analysis, however, misses the point. The text of '120 is not dispositive or even instructive because it does not

answer the question before the Court: what limitations period *does* apply to '080 restitution claims?[1]

The *Imperato* Court faced the same question. The statute of limitations in that case—like '120—specifically established the limitations period for unfair labor practices claims filed with the Public Employees Relations Commission ("PERC"), but was "silent as to what statute of limitations applies when an unfair labor practice claim is filed directly in superior court." 160 Wn. App. at 356. The court, however, refused to end its analysis based on this omission from the statute's text, instead finding that "[t]he question then becomes: what statute of limitations applies to the case here where Mr. Imperato went directly to superior court and did not file with PERC?" *Id.* at 361. The *Imperato* Court used the same interpretive principles that Defendants seek to apply here in determining that the Legislature intended the same statute of limitations to apply to claims filed before PERC and in superior court. *Id.* at 362–364; *see also* Br. at 31–36 (applying *Imperato* to the facts in this case). Here, the Court should follow the approach used in *Imperato* and ask the salient question that Plaintiff seeks to ignore.

---

[1] Nor does Plaintiff's argument about the applicability of RCW 4.16.160 exempt it from addressing this primary question. RCW 4.16.160 only abrogates the application of statutes of limitation for certain claims brought by the State, but does not itself create any limitations periods.

Plaintiff also asserts that "the Legislature could easily have included '080 claims" when it enacted '120, Resp. Br. at 14, but this ignores the fact that '080's restitution provisions were enacted after '120. When '080 and '120 were subsequently amended, there is no indication that the Legislature intentionally declined to include '080 restitution claims in '120. Instead, as Defendants assert, it is far more likely that the Legislature intended the CPA's sole statute of limitations in '120 to apply to all CPA claims for monetary relief. Thus, it is wrong to divine from '120's text some intent to exclude '080 restitution claims.

2. Plaintiff's interpretation of the CPA wholly undermines the purpose of RCW 19.86.120 and must be rejected.

Given that the CPA's text does not directly state what limitations period applies to '080 restitution claims, the Court must analyze other aspects of the CPA's "plain meaning" to determine the Legislature's intent. In looking at '080 restitution claims within the "context" of the CPA as a whole, *Jacobs*, 154 Wn.2d at 600, it becomes clear that a four-year limitations period must apply so as not to undermine the CPA's limitations period for damages claims under '090.

Statutes of limitations "shield defendants and the judicial system from stale claims" after "evidence may be lost and memories may fade." *Burns v. McClinton*, 135 Wn. App. 285, 293 (2006). They also grant

"finality" and "repose" to potential defendants by "eliminat[ing] the fears and burdens of threatened litigation." *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 382 (2007); *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714 (1985). The Legislature applied these principles in imposing a four-year limitations period on all '090 damages claims, determining that later-filed claims would deprive defendants of the "fair opportunity to defend" themselves. *Stenberg*, 104 Wn.2d at 714. The legislative determinations embodied in '120 are undermined if a four-year limitations period is not applied equally to '080 restitution claims. There is no basis for distinguishing these two types of relief within the CPA.

Plaintiff asserts that concerns about undermining the Legislature's intent are "hyperbole" because '080 restitution claims and '090 damages claims do not overlap as only '080 claims can be brought on behalf of indirect purchasers. Resp. Br. at 15. Plaintiff's argument is irrelevant and wrong. An '080 restitution claim brought after '120's expiration undermines the purpose of '120 regardless of whether the '080 restitution claim represents indirect or direct purchasers. Further, CPA '080 restitution claims *do* overlap with '090 damages claims as both claims can seek to restore the very same relief to the very same direct purchasers. There is thus a very real danger that—if Plaintiff's interpretation is adopted—identical claims on behalf of the same persons could be subject

to two different limitations periods depending on whether they are brought by private counsel or the State.

a. Plaintiff's ability to seek restitution for indirect purchasers is irrelevant.

Regardless of whether Plaintiff seeks relief for direct or indirect purchasers, a limitless or unclear limitations period for '080 restitution claims would still undermine '120's purpose and thus must be rejected. Regardless of the type of purchasers Plaintiff represents, after four years, memories will have faded and evidence will have been lost and defendants would be deprived of the "fair opportunity to defend themselves." *Stenberg*, 104 Wn.2d at 714. Potential defendants also would have no "repose" after four years because stale '090 claims could be resurrected—forever—as '080 restitution claims. *Id.* The assurance that such claims would only represent indirect purchasers—who are even further removed from the alleged CPA violation—is cold comfort.

b. The persons who can assert '090 damages claims overlap with those persons on whose behalf Plaintiff can assert '080 restitution claims.

CPA '080 restitution claims and '090 damages claims do overlap as both claims can seek relief on behalf of direct purchasers. There is nothing in '080 limiting the persons the State can represent to only indirect purchasers. Instead, all '090 private direct purchasers could also be represented in an '080 restitution claim and Plaintiff concedes that it

represents some direct purchasers. Resp. Br. at 7. If direct purchasers file '090 damages claims, '120's four-year limitations period indisputably applies. Under Plaintiff's interpretation, however, an '080 restitution claim on behalf of the same plaintiffs would have no statute of limitations. Far from being "hyperbole," the "spectre of identically situated parties bringing antitrust claims for the same damages under separate statutes and under separate statutes of limitation," Resp. Br. at 15, is very real.

Plaintiff's assertion that it represents few direct purchasers in this case[2] is of little import as there are many circumstances in which '080 restitution and '090 damages claims will overlap. In determining the Legislature's intended limitations period for '080 restitution claims, the Court must consider the universe of potential claims, which includes numerous cases in which Plaintiff could assert '080 restitution claims on behalf of direct purchasers who could also file '090 damages claims. For example, if this case involved retailers of CRT products, Plaintiff could assert an '080 restitution claim on behalf of Washington consumers who purchased CRT products and those same consumers—as direct purchasers

---

[2] While Plaintiff states that "approximately 99% of the persons for whom the State seeks redress" are indirect purchasers, it has offered no support for this assertion. Resp. Br. at 21. Further, such a per capita analysis is improper because direct purchasers of CRTs purchase more CRTs and CRT products than indirect purchasers, and thus the percentage of restitution attributable to direct purchasers would be far greater than 1%.

from the retailers—could also bring an '090 damages action. In such a case, there would be almost 100% overlap between those represented in the '080 restitution and '090 damages claims.

For such a case or any involving direct purchasers, Plaintiff's interpretation creates a total disparity in the limitations periods applicable to the exact same claims depending on whether they are asserted under '080 or '090. Indeed, in such cases, time-barred '090 plaintiffs could simply ask Plaintiff to assert an '080 restitution claim on their behalf and their claims would suddenly be timely again, even though the claim seeks relief for the same injury based on the same faded evidence. Plaintiff's position therefore effectively guts the Legislature's very purposes for imposing a statute of limitations in '120 and must be rejected.

c. The relief sought through '080 restitution claims overlaps with that sought through '090 damages claims.

Plaintiff also argues that concerns about inconsistent limitations periods are unmerited because there is no overlap between the remedies sought in '080 restitution and '090 damages claims. Plaintiff asserts that, unlike '090 damages claims, '080 restitution claims are "not brought to recover damages for specific parties, but in order to seek restitution for the State's consumers and economy as a whole." Resp. Br. at 4–5. The plain language of '080—which Plaintiff fails to fully quote—exposes the error

in this argument. CPA '080 provides that a court may order restitution to "restore to any person in interest any moneys or property." RCW 19.86.080(3). The CPA's definition of "person" notably does not include the State or municipalities. *See* RCW 19.86.010. There is thus nothing in the text of this statute authorizing the State to recover for alleged harm to its "economy"[3] and any restitutionary relief is limited to that necessary to "restore" any moneys or property to injured persons.

The relief sought in '080 restitution claims will therefore often overlap with that in '090 damages claims. For example, applying the alleged injury in this case to our hypothetical concerning a CPA claim against CRT finished products retailers, Plaintiff would seek restitution for the payment of "supracompetitive prices for CRT products," Compl. ¶ 106, and a class of '090 plaintiffs would seek the exact same measure of relief for the same alleged injury. Thus, again, the purposes underlying the limitations period in '120 requires that the same limitations period

---

[3] Such an interpretation of the CPA is consistent with other state courts' interpretation of similarly worded consumer protection acts. These courts have recognized that language like that in '080(3) does not authorize courts to disgorge consumer overpayments to the State. *See, e.g., State ex rel. Horne v. AutoZone, Inc.*, 275 P.3d 1278, 1282–83 (Ariz. 2012); *State ex rel. Miller v. Santa Rosa Sales and Mktg., Inc.*, 475 N.W. 2d 210, 219 (Iowa 1991) ("This statutory language authorizes the attorney general to recover restitution for Iowa consumers. However, there is no language [in the relevant statute] which gives authority to award unclaimed restitution funds to the State.").

apply to both '080 restitution claims and '090 damages claims, so that the limitations periods for claims seeking the same relief do not conflict.

The parallel nature of the relief sought through '080 restitution and '090 damages claims—including in this case—has further *dispositive* consequences. In Washington, "statutory provisions limiting the period within which actions shall be prosecuted are manifestly intended to cover any and every form of action maintainable either in law or equity." *Hotchkin v. McNaught-Collins Improvement Co.*, 102 Wash. 161, 166 (1918). "[I]f the statute would bar an action at law, it will be equally a bar in equity" and "[c]ourts of equity apply the statue [of limitations] as it would have been applied at law." *Id.* Applying this well-established principle,[4] the statute of limitations in '120 that applies to the CPA's *legal* remedy, '090, must apply to the parallel *equitable* remedy in an '080 restitution claim.

---

[4] *See Cope v. Anderson*, 331 U.S. 461, 463–64 (1947) ("[E]quity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy."); *Fed. Election Comm'n v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996) ("because the claim for injunctive relief is connected to the claim for legal relief, the statute of limitations [applicable to the legal relief] applies to both"); *Nemkov v. O'Hare Chicago Corp.*, 592 F.2d 351, 355 (7th Cir. 1979) ("[If] the sole remedy is not in equity and an action at law can be brought on the same facts, the remedies are concurrent," in which case, "if an action at law for damages would be barred, so too is the action in equity.").

3. Plaintiff's interpretation of the CPA would clash with federal law and must be rejected.

In determining the Legislature's intent, the Court should also heed the Legislature's direction in RCW 19.86.920 that interpretation of the CPA be guided by federal precedent. The Sherman Act imposes a four-year limitations period for both *parens patriae* and private damages claims. 15 U.S.C. § 15b. Therefore, based on '920, the Court should apply this same period to '080 restitution claims. Binding precedent requires this result. In *Blewett v. Abbot Laboratories*, 86 Wn. App. 782 (1997), the court relied on federal law when the CPA was not "facially clear." *Id.* at 787. Plaintiff does not dispute that the CPA does not say what limitations period applies to '080 restitution claims. Therefore, it is appropriate to look to federal law to determine the appropriate limitations period. *Id.* ("Washington courts have uniformly followed federal precedent in matters described under the [CPA].")

Plaintiff also repeatedly asserts that it is improper to apply the federal limitations period because *parens patriae* actions like those in '080 "cannot even be brought under federal law." *See, e.g.*, Resp. Br. at 17. Under the Sherman Act, however, state attorneys general may assert *parens patriae* actions on behalf of direct purchasers, *see* 15 U.S.C. § 15c, just like Plaintiff is authorized to do under '080. For this class of

represented persons, Plaintiff's interpretation would result in a direct conflict between the statute of limitations under federal and state law.

This outcome could not have been the intent of the Legislature, which enacted '920 to "minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct." *Blewett*, 86 Wn. App. at 788. Plaintiff's interpretation would have this undesired effect: once the limitations period has expired on Plaintiff's Sherman Act claim, Plaintiff could file an '080 restitution action on behalf of the very same persons and for the very same injury five, ten, or even twenty years later.

Nor is there any merit to Plaintiff's argument that a longer limitations period is warranted for '080 restitution claims because the Legislature "has most explicitly diverged from federal law." Resp. Br. at 20. Plaintiff assumes that because the Legislature diverged from federal law by allowing *parens patriae* claims on behalf of indirect purchasers, that the Legislature also intended to diverge from federal law on the limitations period for such claims. *Id.* But the Legislature did not depart from federal law regarding the statute of limitations for direct purchasers and Plaintiff fails to provide any evidence that the Legislature intended a different result for indirect purchasers.

B. RCW 4.16.160 Has No Application to Restitution Claims under RCW 19.86.080

Plaintiff asserts that RCW 4.16.160 exempts its '080 restitution claim from any applicable statute of limitations, but Plaintiff is wrong.

RCW 4.16.160 has no application to '080 restitution claims. This statute only applies to "[t]he limitations prescribed in" RCW Chapter 4.16, and does not apply to provisions—like '080—governed by statutes of limitation in RCW Chapter 19.86. Further, even if '120 does not apply to '080 restitution claims, it does not mean that RCW 4.16.160 necessarily applies as that statute does not itself create a statute of limitations. As Defendants have explained, there are multiple general statutes of limitation that could apply instead, under any of which Plaintiff's '080 restitution claim would be time-barred.[5] Br. at 38–39. Thus, for Plaintiff's '080 restitution claim to be timely, Plaintiff must establish that '120 does not apply and that RCW 4.16.160 is applicable. This it cannot do. Plaintiff points to nothing in the CPA's text or legislative history indicating an intent to apply RCW 4.16.160 to '080 restitution claims. Nor is there any reason to believe the Legislature had such an intent given

---

[5] Plaintiff's sole objection to these general statutes of limitation is that they are too short for CPA violations. Resp. Br. at 22. But this only further supports Defendants' position that the four-year limitations period in '120 should apply as this is the legislatively determined limitations period for CPA damages claims. Plaintiff's objection does not justify an effectively limitless limitations period.

that an '080 restitution claim is not for the State's benefit and thus does not even qualify as the type of claim exempted by RCW 4.16.160.

1. The CPA's text reflects the Legislature's intent to apply a fixed limitations period to '080 restitution claims.

Plaintiff complains that Defendants are attempting to "forc[e] a statute of limitations onto ['080 restitution] claims which intentionally have none." Resp. Br. at 2. Yet, Plaintiff has pointed to no legislative history giving the slightest hint that the Legislature intended RCW 4.16.160 to apply to '080 restitution claims or that the Legislature even contemplated the interaction of two statutes separated by 15 titles of code.

Instead, what rationally can be inferred from the CPA dictates that the Legislature did not intend RCW 4.16.160 to apply to '080 restitution claims. The purpose of statutes like RCW 4.16.160 "is to insure recovery by the State of tangible losses it has suffered." *Bellevue School Dist. No. 405 v. Brazier Constr. Co.*, 100 Wn.2d 776, 783 (1984). Yet, in enacting '120, the Legislature applied a four-year limitations period to CPA claims brought by the State for its own direct benefit. In imposing this limitations period, the Legislature explicitly disregarded RCW 4.16.160's exemption for purposes of State claims under the CPA. This is highly probative of the Legislature's intent concerning the appropriate limitations period for CPA claims, including '080 restitution claims. Such claims seek recovery

for private persons—not "tangible losses [the State] has suffered"—and are thus further removed from the interests protected by RCW 4.16.160 than '090 damages claims brought by the State. Given the Legislature's explicit decision not to extend RCW 4.16.160's reach to '090 State damages claims, there is no rational basis to infer that the Legislature intended '080 restitution claims to come within that statute's grasp.

The State's prior practice is consistent with this interpretation. Plaintiff has not pointed to any case in which it asserted RCW 4.16.160 as a defense to the statute of limitations on an '080 restitution claim, even though a statute of limitations has previously been imposed on such a claim. *See State v. Pacific Health Center, Inc.*, 135 Wn. App. 149, 157 n.7 (2006). In *Pacific Health Center*, the trial court awarded restitution under '080 based on the CPA violations committed "within the statute of limitations' allowable period on the State's claim." *Id.* While the decision does not specify what this limitations period was, a limitations period was clearly imposed and, thus, either the State did not assert that RCW 4.16.160 applied, or the trial court rejected such an application.

2. RCW 4.16.160 does not apply to RCW 19.86.080 restitution claims because such claims are not for the State's benefit.

Even beyond the CPA's text, there is no reason to believe the Legislature understood that RCW 4.16.160 would apply to '080 restitution

claims. Plaintiff agrees that an "action must . . . be for the benefit of the State" to qualify for RCW 4.16.160's exemption; no other types of claims are reached by RCW 4.16.160. Resp. Br. at 26. CPA '080 restitution claims do not satisfy this requirement. Such claims are not an inherently sovereign function as the CPA's enforcement is equally delegated to, and far more frequently enforced by, private plaintiffs. Further, the only "benefit" '080 restitution claims seek to obtain is restitution for private persons—there is no benefit to the State.

a. RCW 19.86.080 restitution claims are not an inherently sovereign function.

RCW 4.16.160 requires that a qualifying claim be an inherently sovereign duty and power. Br. at 15–28. Plaintiff asserts that '080 restitution claims are an inherently sovereign function because it alone is authorized to bring claims on behalf of indirect purchasers. But this fact is hardly conclusive of the Legislature's intent as to the applicability of RCW 4.16.160 to '080 restitution claims. Plaintiff is not the only entity entrusted to assert claims to enforce the CPA. Rather, private citizens similarly "represent the public interest" as "private attorneys general" by bringing damages and injunctive relief claims under '090. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007). Because CPA enforcement is an activity "normally associated with private . . . acts,"

'080 restitution claims cannot be considered part of the "traditional notions of powers that are inherent in the sovereign," which is a precondition to the application of RCW 4.16.160's exemption. *See Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 687 (2009).

b. RCW 4.16.160 does not apply to RCW 19.86.080 restitution claims as such claims are for the benefit of specific private persons, not the State.

Plaintiff's assertion that RCW 4.16.160 applies to '080 restitution claims because such claims "obtain restitution for harm incurred by State consumers, and protect the economy of the State," Resp. Br. at 23, stems from the same withered root as Plaintiff's flawed argument that '080 restitution and '090 damages claims seek fundamentally different relief. As explained above, *see supra* pp. 9–10, CPA '080(3)'s statutory language makes clear that it is only private persons who will "benefit" from any restitutionary relief under '080, as only these individuals can have moneys "restored" to them. Thus, such claims are not for the State's general benefit and do not result in any monetary gain to the State.

c. Plaintiff's authority to enforce the CPA does not merit applying RCW 4.16.160 to restitution claims brought under RCW 19.86.080.

Plaintiff makes much of its duty to enforce the CPA, but this does not mean that '080 restitution claims are for the State's benefit as the

"interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 602 (1982); *see also Pennsylvania v. Mid-Atlantic Toyota Distribs., Inc.*, 704 F.2d 125, 129 n. 8 (4th Cir. 1983) ("No state has a legitimate quasi-sovereign interest in seeing that consumers or any other group of persons receive a given sum of money."). The only persons with an interest in the '080 restitution remedy are those private citizens to whom money or property will be "restored;" and these persons alone will "benefit."

The holding in *Nevada v. Bank of America Corporation*, 672 F.3d 661 (9th Cir. 2012)—upon which the Superior Court incorrectly relied—is not to the contrary.[6] That case concerns the tangential issue of whether a *parens patriae* action under Nevada's Deceptive Trade Practices Act constituted a "mass action," subject to removal under the Class Action Fairness Act ("CAFA"). *See* Br. at 27–28. Plaintiff argues that *Nevada*'s analysis establishes that the State is the real party in interest for consumer protection claims seeking restitution for private persons, Resp. Br. at 33–

[6] Many of the other cases cited by Plaintiff do not even address restitutionary relief and are thus inapposite to whether RCW 4.16.160 applies to '080 restitution claims. *See, e.g., Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Maryland v. Louisiana*, 451 U.S. 725 (1981).

34, but this overstates the Ninth Circuit's analysis. In *Nevada*, the Nevada Attorney General sought injunctive relief, civil penalties, and restitution. 672 F.3d at 666. Instead of separately determining the real party in interest for each form of relief, the court looked at "the case as a whole" and found that Nevada was the real party in interest based on "the essential nature and effect of the proceeding." *Id.* at 670. Far from finding that Nevada was the real party in interest for restitution claims, the court found that such claims were "on behalf of [Nevada's] consumers," but that Nevada's "sovereign interest in protecting its citizens and economy . . . is not diminished merely because it has *tacked on* a claim for restitution." *Id.* at 671 (emphasis added). The outcome was based instead on the presence of other claims, including the state's request for injunctive relief and civil penalties. *Id.* at 671–72.

Even if the analysis in *Nevada* is applicable here, it only further supports Defendants' position. Unlike in *Nevada*, the '080 restitutionary relief sought in this case is not merely "tacked on," but rather is the primary focus of Plaintiff's action. In this situation, "the State cannot reasonably be considered the real party in interest." *See California v. Northern Trust Corp.*, No. CV 12-01813, 2013 WL 1561460, at *3 (C.D. Cal. Apr. 10, 2013) (denying remand and distinguishing *Nevada* where the requested restitution was the "primary benefit" sought). In addition, the

injunctive relief Plaintiff seeks is not only secondary to the requested restitutionary relief, but it can also be equally obtained by direct purchasers. *See* RCW 19.86.090; *Dep't of Fair Emp't & Hous. v. Lucent. Techns., Inc.*, 642 F.3d 728, 739 (9th Cir. 2011) (finding no "substantial state interest" where equitable remedies "could be obtained by the individual aggrieved").

Further, even if the "whole case" analysis applied in *Nevada* makes some sense in the context of a removal question, it makes no sense to apply this analysis to the pending limitations issue. The question of removability is all-or-nothing: either an entire case is removed or remanded and, thus, considering the case as a whole has some appeal. In statutes of limitations questions, however, one claim can be found untimely and dismissed with no impact on timely claims; the rationale underlying the "whole case" approach is absent. Instead, the "claim-by-claim" analysis utilized by the Fifth Circuit in *Mississippi v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012), *rev'd on other grounds*, 571 U.S. --, No. 12-1036, slip op. (U.S. Jan. 14, 2014),[7] is more appropriate.

---

[7] The Supreme Court's reversal on other grounds of the Fifth Circuit's decision has no bearing on the applicability of the Fifth Circuit's analysis to the present inquiry. The Supreme Court's holding is based solely on CAFA's text; the Court concluded that, given the language of CAFA, Congress did not intend "the background inquiry [of analyzing the real parties in interest] to apply to the mass action provision" of CAFA. 571

In *AU Optronics*, Mississippi brought an action under the Mississippi CPA seeking, among other relief, restitution for indirect purchasers of LCD panels—the successor product to CRTs—who "paid supra-competitive, artificially inflated prices for LCD products." 701 F.3d at 800. The court found that there was jurisdiction under CAFA because the purchasers of the LCD panels—while nominally represented by the State of Mississippi—were the "real parties in interest" for Mississippi's restitution claims. *Id.* The court found that this conclusion was supported by the fact that—like the CPA here—the Mississippi CPA "does not authorize public collection of private damages." *Id.* at 800–01. Applying this analysis, the Court should separately determine whether Plaintiff is the real party in interest for its '080 restitution claim—irrespective of any interest the State might have in injunctive relief or civil penalties. Doing so makes clear that RCW 4.16.160 does not apply because '080 restitution claims are brought for the benefit of private persons and not the State.

This analysis also lays bare the irrelevance of *Herrmann v. Cissna*, 82 Wn.2d 1 (1973). In that case, Washington's Insurance Commissioner, as statutory rehabilitator of a failed insurance company, brought an action

---

U.S. --, slip op. at 12. The Court therefore did not evaluate the Fifth Circuit's "claim-by-claim" analysis and did not determine whether Mississippi or the consumers on whose behalf it seeks restitution are the real parties in interest for restitution claims.

against former officers and directors of the company whose wrongdoing resulted in losses to the company. *Id.* at 2–3. While any judgment in the case would "inure to the benefit of the company and its policyholders," *id.* at 5, this was a secondary, indirect benefit of the claim's greater purpose to "preserv[e] inviolate the integrity of insurance." *Id.* at 6 (quoting then RCW 48.01.030). Whereas, in *Hermann*, the private benefit could not be stripped from the benefit to the general public, here, the Court can easily (and cleanly) impose a limitations period on '080 restitution claims that clearly only inure to the benefit of private persons.

C. Plaintiff's Claims for Damages and Civil Penalties Should Be Dismissed as Untimely

Plaintiff's '090 damages claim and its '140 civil penalties claim are untimely. CPA '120 explicitly applies to all '090 damages claims and there is no exception for State claims. Br. 39–41. The Washington Supreme Court has held that RCW 4.16.160 does not apply to civil penalties claims and thus, under any applicable limitations period, Plaintiff's '140 civil penalties claim is untimely. *Id.* at 41.

Plaintiff does not respond to these arguments, instead asserting that the Court should ignore these dispositive and clear-cut issues because they were not properly raised. The Court should not excuse Plaintiff's silence. In their motion to dismiss, Defendants asserted that all of Plaintiff's

claims—thus including those under '080, '090, or '140—were time-barred. CP 29–44. In pursuing review of the superior court's denial of this motion, Defendants properly raised the applicability of '120 to '090 State damages claims in their Motion for Discretionary Review to this Court, asserting that review was proper under RAP 2.3(b)(1)–(3). During the hearing on this motion, the Commissioner discussed the applicability of '120 to '090 State damages claims. When the Commissioner granted the request for discretionary review, she did not refuse to grant certification of this issue. The Commissioner's order is simply silent on this issue.[8]

Even if Plaintiff's assertions were true—which they are not—the Court should not skip these important issues for two further reasons. First, whether '120 applies to Plaintiff's '090 damages claim bears directly on whether '120 or RCW 4.16.160 applies to '080 restitution claims. Thus, even if this issue had not been raised, the Court should consider this issue under its "inherent authority to consider issues . . . if doing so is necessary to a proper decision." *Falk v. Keene Corp.*, 113 Wn.2d 645, 659 (1989) (citations omitted). Second, whether Plaintiff's '090 and '140 claims were

[8] The ambiguity in the Commissioner's order renders Plaintiff's authorities inapposite as there is no indication that the Commissioner denied Defendants' request for review of this issue, which Defendants clearly raised for the Court's consideration.

time-barred was raised in Defendants' motion to dismiss and is "'arguably related' to issues raised in the trial court" and, thus, the Court "may exercise its discretion to consider newly-articulated theories for the first time on appeal." *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, (2007) *aff'd*, 166 Wn.2d 264 (2009).

III. CONCLUSION

For the foregoing reasons and those raised in Defendants' opening brief, the Court should reverse the Superior Court's order denying Defendants' motion to dismiss and direct the Superior Court to dismiss Plaintiff's claims.

DATED this 14th day of January, 2014.

Robert D. Stewart, WSBA #8998
KIPLING LAW GROUP PLLC
3601 Fremont Avenue N., Suite 414
Seattle, WA 98103
206.545.0345
206.545.0350 (fax)
stewart@kiplinglawgroup.com

John M. Taladay (*pro hac vice*)
Erik. T. Koons (*pro hac vice*)
Charles Malaise (*pro hac vice*)
BAKER BOTTS LLP
1299 Pennsylvania Ave., NW
Washington, DC 20004-2400
202.639.7700
202.639.7890 (fax)
john.taladay@bakerbotts.com
erik.koons@bakerbotts.com
charles.malaise@bakerbotts.com

Counsel for Defendants/Cross-Appellants Koninklijke Philips Electronics, N.V. and Philips Electronics North America Corporation

Mathew L. Harrington, WSBA #33276
Bradford J. Axel, WSBA #29269
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101-2393
206.626.6000
206.464.1496 (fax)
MLH@stokeslaw.com
BJA@stokeslaw.com

Lucius B. Lau (*pro hac vice*)
Dana E. Foster (*pro hac vice*)
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
202.626.3600
202.639.9355 (fax)
alau@whitecase.com
defoster@whitecase.com

Attorneys for Defendants/Cross-Appellants Toshiba Corporation and Toshiba America Electronic Components, Inc.

David C. Lundsgaard,
WSBA # 25448
GRAHAM & DUNN PC
Pier 70
2801 Alaskan Way, Suite 300
Seattle, WA 98121-1128
206.624.8300
206.340.9599 (fax)
dlundsgaard@grahamdunn.com

Hojoon Hwang (*pro hac vice*)
Laura K. Lin (*pro hac vice*)
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
415.512.4000
415.512.4077 (fax)
Hojoon.Hwang@mto.com
Laura.Lin@mto.com

Attorneys for Defendants/Cross-Appellants LG Electronics, Inc. and LG Electronics U.S.A., Inc.

Molly A. Terwilliger, WSBA No. 28449
SUMMIT LAW GROUP PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
206.676.7000
206.676.7001 (fax)
mollyt@summitlaw.com

Eliot A. Adelson (*pro hac vice*)
James Maxwell Cooper (*pro hac vice*)
Andrew Wiener (*pro hac vice*)
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
415.439.1400
415.439.1500 (fax)
eliot.adelson@kirkland.com
max.cooper@kirkland.com
andrew.wiener@kirkland.com

Attorneys for Defendants/Cross-Appellants Hitachi, Ltd.; Hitachi Displays, Ltd. (n/k/a Japan Display Inc.); Hitachi Electronic Devices (USA), Inc.; and Hitachi Asia, Ltd.

CERTIFICATE OF SERVICE

I do hereby certify that on this 14th day of January, 2014, I caused to be served a true and correct copy of the foregoing *Reply Brief of Appellants* by method indicated below and addressed to the following:

David M. Kerwin
Antitrust Division
Attorney General of Washington
800 Fifth Ave, Suite 2000
Seattle, WA 98104-3188
Telephone: (206) 464-7030
Email: Davidk3@atg.wa.gov
Counsel for Respondent State of Washington

Delivery Via:
[ ] U.S. Mail
[ ] Overnight Mail
[ ] Facsimile
[ ] Hand Delivery
[X] Email

Carol A. Cannon
Legal Assistant