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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC.,  
d/b/a NATIONAL SERVICE BUREAU, INC., and  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Appellants.

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*Defendant*  
BRIEF OF APPELLANT  
STATE FARM MUTUAL  
AUTOMOBILE INSURANCE  
COMPANY

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## INTRODUCTION

The certified questions in this case allow this Court to resolve a critical issue: whether the Washington Consumer Protection Act can be invoked by plaintiffs who are not Washington consumers. The answer is plainly no. As a matter of plain meaning and choice of law—and under the doctrine of constitutional avoidance—the statute cannot be read to create a private cause of action for residents of other states. And it certainly does not create a claim for a non-Washington plaintiff against a non-Washington defendant like State Farm.

The plaintiff here is a resident of Texas who received letters demanding payment on a subrogated State Farm insurance claim—letters she contends were deceptive. All the facts underlying the plaintiff's claim arise in Texas—from the underlying auto accident itself to the alleged deception, the alleged reliance on the deception, and the alleged injury. The plaintiff declined to sue under the law of her home state, no doubt because the Texas consumer protection statute does not recognize a claim based on deceptive debt collection practices. But the Washington statute does allow such a claim, so the

plaintiff brought her claim here, under Washington law, on the theory that the service provider that State Farm charged with pursuing the claim happened to be a Washington corporation. She has asserted this claim against both the service provider itself, which prepared and sent the letters, and State Farm, which processed the insurance claim at its headquarters in Illinois. Ultimately, though, the plaintiff has something larger in mind—to apply Washington law across the country, in a 50-state class action.

This theory distorts the statute beyond all recognition. By its terms, the Washington Consumer Protection Act (“Washington statute” or “CPA”) protects *Washington* consumers, prohibiting “unfair or deceptive acts or practices” in “any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.020; RCW 19.86.010(2). The private right of action is no broader than the right of the attorney general—a right defined in the CPA to include only the power to sue “in the name of the state, or as *parens patriae* on behalf of persons *residing in the state.*” RCW 19.86.080(1) (emphasis added). The CPA thus cannot be read to create a

cause of action on behalf of persons residing in Texas (or elsewhere). To hold otherwise would be to allow Washington law to trump the law of the other sovereign states, each of which has the power to create its own, unique consumer protection regime for its own residents. There is nothing in the text indicating that the legislature had something so dramatic in mind.

To the extent the CPA's text leaves any room for doubt, it must be interpreted consistently with governing rules on choice of law. Under this Court's cases, a claim for deception is governed by the law of the plaintiff's home state, based on that state's interest in protecting its citizens from deception and harm within its borders. Although the allegedly deceptive letters here were sent by a Seattle-based service provider, Washington's interest in the dispute is less significant than the interest of Texas, where the alleged deception took place. And for defendant State Farm—which is headquartered somewhere else entirely—Washington has no significant interest at all. Nothing in the CPA suggests that the legislature intended to use Washington law to reach a claim so far outside its ordinary

sphere of interest, in derogation of the sovereign rights of states with a more significant relationship to the claim.

Any other approach would defy the principles of federalism and due process embodied in the U.S. Constitution. A state does not have the power to regulate conduct outside its own territory. This Court would not permit the Texas legislature to export its laws to govern the rights of consumers in Washington; by the same token, it should not assume that the Washington legislature intended its laws to apply in Texas (or in any other state). Moreover, to adjudicate a defendant's rights (or a plaintiff's, for that matter) based on the law of a state that lacks sufficient connection to the claim would violate the constitutional guarantee of due process. Thus, even if the language of the CPA were ambiguous, it would still need to be interpreted in a way that excludes claims by non-residents injured elsewhere, to avoid this problematic result.

#### **STATEMENT OF THE CASE**

The allegations underlying this case begin and end in Texas. The dispute began with an automobile accident in San Antonio, Texas, involving two Texas residents. Dkt. 2 (Compl.)

¶ 6. One of the two drivers was insured in Texas by State Farm. *Id.* ¶ 7. After paying the insured's claim, State Farm attempted to pursue a subrogated claim for \$9,126.18 against the other party involved in the accident—Andrew Thornell, the son of Plaintiff Sandra Thornell. *Id.* ¶¶ 9–13.

Ms. Thornell and her son received three letters about this claim at her home in San Antonio. *Id.* According to Ms. Thornell, these letters were deceptive because they suggested that the sum was the “balance due” on a “debt,” rather than “a potential, unliquidated claim based on a subrogated interest from its insured.” *Id.* ¶¶ 9–18. Ms. Thornell was apparently not convinced; she did not pay the demanded amount and instead wrote to Defendants seeking verification. *Id.* ¶ 22. Still, she alleges that she “became concerned about her credit rating” and so “obtained her credit reports,” “enrolled in a credit monitoring program,” and “sought and retained legal counsel experienced in debt collection and consumer protection laws.” all allegedly at her own expense. *Id.* ¶¶ 20–21. There is no dispute that she read the letters and took these actions (and incurred any costs) solely in her home state of Texas.

The only connection between these events and the state of Washington is a matter of happenstance—the residence of the subrogation service firm that actually sent the letters. State Farm itself is incorporated and headquartered in Illinois. *Id.* ¶ 4. Its insurance business in Texas (like in any other state) is governed by that particular state’s law. *See* 15 U.S.C. §§ 1011, 1012 (McCarran-Ferguson Act). For subrogation claims, State Farm uses a variety of service providers around the country, one of which is Defendant Seattle Service Bureau (“SSB”), a Washington corporation. *Id.* ¶ 3. State Farm happened to assign the claim at issue here to SSB, which decided how to pursue it and sent Ms. Thornell the letters. According to the Complaint, one of SSB’s letters stated that “State Farm had ‘assigned this claim to [SSB’s] office to pursue collections’” against Ms. Thornell. *Id.* ¶ 9.

On the basis of these allegations, Ms. Thornell is now attempting to state a claim against both SSB and State Farm under the CPA. *Id.* ¶¶ 35–50. She seeks to represent a class of similarly situated individuals “against whom Defendants have utilized collection agencies and/or debt collection-type

practices.” *Id.* ¶¶ 26–27. This alleged class is not limited to Washington consumers, nor could it possibly be, as Ms. Thornell herself is not a resident of Washington. Instead, Ms. Thornell seeks certification of a class of “individuals across the United States.” *Id.* ¶ 25. She asserts a claim against both SSB and State Farm, apparently based on a theory that State Farm acted through SSB as its agent.

Ms. Thornell initially brought this action in King County Superior Court. State Farm removed the case to the Western District of Washington pursuant to the Class Action Fairness Act, codified in relevant part at 28 U.S.C. §§ 1332(d) and 1453. Ms. Thornell moved to remand, but her motion was denied.

On Defendants’ motions to dismiss, Chief Judge Marsha J. Pechman certified two questions to this Court (Dkt. 41 at 5–8; Dkt. 42):

1) Does the Washington Consumer Protection Act create a cause of action for a plaintiff residing outside Washington to sue a Washington corporate defendant for allegedly deceptive acts?

2) Does the Washington Consumer Protection Act create a cause of action for an out-of-state plaintiff to sue an out-of-state defendant for the allegedly deceptive acts of its in-state agent?

## ARGUMENT

**I. The plain meaning of the CPA, as interpreted under this Court’s cases, requires holding that the CPA cannot be invoked by out-of-state plaintiffs.**

Statutory interpretation in Washington “begins with the statute’s plain meaning.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526 (2010). The Court “must not add words where the legislature has chosen not to include them . . . .” *Id.* (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682 (2003)). The “[p]lain meaning ‘is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’” *Id.* (quoting *State v. Engel*, 166 Wn.2d 572, 578 (2009)).

The plain meaning of the statutory language here—as determined by its text, context, and the statutory scheme as a whole—unambiguously dictates the answer to both of the certified questions. By definition, the Washington Consumer Protection Act protects *Washington consumers*, prohibiting “unfair or deceptive acts or practices” in “any commerce directly or indirectly affecting the people of the state of Washington.”

RCW 19.86.020, 19.86.010(2). In light of these and other clear statements in the CPA, it cannot be interpreted as Plaintiff alleges here—to apply to claims by the residents of all 50 states, no matter what their own states’ laws provide. And this Court’s precedents—including a key statutory construction decision issued just a few weeks ago—only confirm this interpretation.

**A. The plain language of the CPA shows that it was intended to apply only in Washington.**

As relevant here, the CPA bars “unfair or deceptive acts or practices in the conduct of any trade or commerce . . . .” RCW 19.86.020. It specifically defines “trade” and “commerce” as “the sale of assets or services, and any commerce directly or indirectly *affecting the people of the state of Washington.*” RCW 19.86.010(2) (emphasis added). Similarly, while it allows service on out-of-state defendants, it does so only if the person to be served engaged in actions that have “impact in this state.” RCW 19.86.160.

In the face of this clear language—including the very definition of “commerce”—the CPA cannot be understood to allow a claim for an unfair or deceptive practice on behalf of people *not* “of the state of Washington” who did *not* suffer any

“impact in this state.” Indeed, as a matter of statutory construction, the law presumes that a statute will not apply extraterritorially unless the legislature’s intention to have it do so is “clear[].” *See* 73 AM. JUR. 2D STATUTES § 243 (“[U]nless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it.”). This common-sense rule flows from the idea that “the laws of each state are designed to regulate and protect the interest of that state’s own residents and citizens,” which gives “each state . . . a measurable, and usually predominant, interest in having its own substantive laws apply.” Alba Conte & Herbert B. Newberg, 4 NEWBERG ON CLASS ACTIONS § 13:37, at 438 (4th ed. 2002).

Nowhere in the CPA is there any “clear[]” expression of an intent to create a cause of action for unfair or deceptive practices based on their effect on plaintiffs in other states. To the contrary, the plain text is specifically limited to unfair and deceptive acts “affecting the people of the state of Washington.”

The geographical limitation traces its roots to the role and power of the Washington attorney general as *parens patriae*. The CPA specifically grants the attorney general the power to bring an action “*in the name of the state*, or as *parens patriae on behalf of persons residing in the state*, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful . . . .” RCW 19.86.080(1) (emphasis added). When the CPA was originally enacted in 1961, the attorney general was the *only* person who could sue to enforce it. *Indoor Billboard/Wn., Inc. v. Integra Telecom of Wn., Inc.*, 162 Wn.2d 59, 74 (2007). As then-Attorney General John O’Connell explained, this new statute enabled the attorney general to regulate unfair business practices “on the *local* or ‘*intra-state*’ level.” John J. O’Connell, *Washington Consumer Protection Act—Enforcement Provisions and Policies*, 36 Wn. L. REV. & ST. B. J. 279, 279 (1961) (emphasis added).

A private right of action was added in 1971 (*Indoor Billboard*, 162 Wn.2d at 74), but the CPA maintained its original geographic scope. At the time, Senior Assistant Attorney General Roger Reed described the new private right of

action as bringing “consumer protection in Washington . . . down to the grassroots.” D. Roger Reed, *Consumer Protection in Washington: An Overview*, 10 GONZAGA L. REV. 391, 394 (1975). Mr. Reed’s article described the new private remedy as belonging specifically to “[v]ictimimized Washington Consumers.” *Id.* at 394.

This Court has already recognized that the private right of action was and is no broader than the attorney general’s right. *Indoor Billboard*, 162 Wn.2d at 74. For that reason, this Court requires that in any private suit under the CPA, the plaintiff must show that the challenged practices “affect the public interest.” *Id.*; see also *Lightfoot v. MacDonald*, 86 Wn.2d 331, 333 (1976) (“It is the obvious purpose of the Consumer Protection Act to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally.”); *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784 (1986) (“After private individuals began to pursue their remedies under this section, we construed the language . . . to require a showing that the

public interest should be served by each private plaintiff's lawsuit.”).

This public interest requirement ensures “that an act or practice of which a private individual may complain must be one which also would be vulnerable to a complaint by the Attorney General under the act.” *Lightfoot*, 86 Wn.2d at 334. In other words, as this Court has recognized, “[p]rivate citizens act as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007) (citing *Lightfoot*, 86 Wn.2d at 335–36)); see also Susan K. Storey, Note, *On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act*, 10 U. OF PUGET SOUND L. REV. 143, 145–46 (1986). Despite “harsh criticism,” the Court has maintained this public interest requirement because of the statute’s “clear intent to protect the general public.” *Hangman Ridge*, 105 Wn.2d at 787–89. And again, by the CPA’s terms, the public interest it protects relates to trade and commerce “affecting the people of the state of Washington.” RCW 19.86.010(2).

Out-of-state plaintiffs cannot avoid these limitations by pointing to the attorney general's power to sue "in the name of the state," separate from the *parens patriae* power to sue "on behalf of persons residing in the state." RCW 19.86.080(1). As discussed further below, it would be absurd to suggest that a resident of Texas could bring a suit "in the name of" the state of Washington to recover damages for harm she allegedly suffered in Texas. *See Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d 27, 38 (2009) ("The *Hangman Ridge* ['public interest'] test incorporates the issue of standing, particularly the elements of public interest impact and injury."). There is simply nothing in the CPA that would authorize such a peculiar result.

**B. This Court's *Wieber* decision supports this geographically restricted reading.**

Just a few weeks ago, this Court refused to recognize extraterritorial application for a statute that was far less explicit than the CPA about limiting its geographic reach. *See Wieber, et ux. v. Kiessling*, No. 90331-0, Slip Copy, at 7–8 (Wn. Apr. 2, 2015) (answering certified questions). This Court's analysis in *Wieber* supports a similarly limited reading of the CPA, even aside from the statute's specific limiting language.

In *Wieber*, this Court considered whether the debtors in a bankruptcy pending in the U.S. Bankruptcy Court for the Western District of Washington were entitled to claim the protection of the Washington homestead exemption, which would have protected their claimed homestead from a forced sale. *Id.* at 2–3, 6. The claimed homestead itself, however, was located in Alaska. *Id.* at 3. On certified questions from the bankruptcy court, this Court concluded that the statute did not allow extraterritorial application. *Id.* at 8.

The Court began with the premise that while the homestead statute did not purport to contain any geographical limitation, the relevant provisions must be read in the context of the entire statute. *Id.* at 7–8. The statute includes a variety of specific procedures, many of which require actions by courts and agencies. *Id.* at 8. Allowing extraterritorial application of the homestead act would necessarily “require the same actions be taken by out-of-state courts and agencies.” *Id.* at 9. The Court found this “unlikely” to be the intent of the legislature, however, given that “the state lacks the authority to direct actions and procedures of foreign courts or foreign agencies.” *Id.* And as the

Court recognized, the various provisions in the statute must be read to “avoid constructions that yield unlikely, absurd or strained consequences.” *Id.* at 9 (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 21 (2002)).

The Court also noted its respect for the power of other states to regulate matters within their own borders. As the Court explained,

States have an interest in ensuring that their homestead exemption policies apply within their own jurisdiction because each state has unique laws that dictate the existence, scope, and nature of their homestead exemptions. Applying Washington’s homestead exemption law to property located in another state may place competing policies at odds, as would application of another state’s homestead exemption law to property located within Washington.

*Id.* at 12 (proceeding to analyze differences between this state’s homestead statute and the homestead statutes of other states). This too militated in favor of interpreting the homestead act to have a more limited geographic scope. *Id.* at 13.

This same analysis of “legislative intent in context” requires rejecting any extraterritorial application of the CPA. Again, unlike the homestead exemption statute, the CPA *does* expressly limit its focus to “the people of the state of

Washington.” *See supra* I.A. But even if it were less explicit, “a harmonious reading of the statutes” (*Wieber*, Slip Op. at 9) precludes any private suit by a Texas resident based on harm suffered entirely in Texas.

As an initial matter, it would be “unlikely, absurd, and strained” to hold that a non-Washington resident could sue as a private attorney general in the name of this state (or on behalf of residents of this state). *Kilian*, 147 Wn.2d at 21. Of course, Ms. Thornell has not attempted to do either of those things here; like any private plaintiff, she has standing only to assert her *own* injury, which was not suffered in this state or by any resident of this state. But even if her complaint could be so construed, it is highly unlikely that the legislature would have intended to grant such power to litigants in far-flung locations.

Moreover, just as “each state has unique laws that dictate the existence, scope, and nature of their homestead exemptions” (*Wieber*, Slip Op. at 12), each state also has unique protections for commerce affecting its own state’s residents. Consumer protection is a state police power. *See Chae v. SLM Corp.*, 593 F.3d 936, 944 (9th Cir. 2010) (“consumer protection laws have

traditionally been in state law enforcement hands.”); *see also* *State v. 28 Containers of Thick & Frosty*, 82 Wn.2d 722, 731 (1973). “Consumer protection laws are a creature of the state in which they are fashioned. They may impose or not impose liability depending on the policy choices made by state legislatures or, if legislators left a gap or ambiguity, by state supreme courts.” *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 591 (9th Cir. 2012).

Based on its particular approach to protecting consumers, each state’s legislature is free to adopt its own, unique consumer protection law. For example, some state statutes require a showing of scienter to establish a claim, while others do not. *See Mazza*, 666 F.3d at 591 (collecting statutes). Some states prohibit private class actions. *See, e.g.*, Ala. Code § 8-19-10(f); Miss. Code Ann. § 75-24-15(4); Mont. Code Ann. § 30-14-133(1); La. Rev. Stat. Ann. § 51:1409(A). Some states exempt insurance companies from consumer fraud provisions altogether. *See e.g.* Fla. Stat. ch. 501.212(4)(a); Md. Code Ann., Com. Law § 13-104(1); Va. Code Ann. § 59.1-199(D); Wis. Stat. § 100.18(12)(a). And whereas some states (like Texas) require a showing of

knowing or intentional misconduct before treble damages are available, other states (like Washington) do not. *Compare* Tex. Bus. & Com. § 17.50(b)(1) *with* RCW 19.86.090.

Indeed, the differences between state consumer protection laws could not be more stark in this case, as the Texas consumer protection act *would not allow Ms. Thornell to sue at all*.

The Texas legislature has concluded that its residents should not be allowed to avail themselves of statutory consumer protections unless they are “consumers,” defined as “an individual . . . who seeks or acquires by purchase or lease, any goods or services.” Tex. Bus. & Com. Code Ann. § 17.45(4).

Under the Texas Deceptive Trade Practices Act, in fact, “seeking or acquiring some good or service must be at the core of the plaintiff’s and defendant’s relationship.” *Dodeka, L.L.C. v. Garcia*, No. 04-11-00016-CV, 2011 WL 4825893, at \*2 (Tex. App. Ct. Oct. 12, 2011) (citing *Kennedy v. Sale*, 689 S.W.2d 890, 892-93 (Tex. 1985)).

With these limitations in mind, Texas courts have specifically rejected claims nearly identical to the one alleged by Ms. Thornell on the ground that the plaintiff was not a

“consumer” under the Texas act. See *Dodeka*, 2011 WL 4825893, at \*2 (rejecting claim that defendant had used false and misleading methods to recover a credit card debt because plaintiff “never purchased, sought, leased, or acquired anything from” the defendant debt collector, meaning that the plaintiff was not a “consumer”); *Garcia v. Jenkins/Babb LLP*, No. 3:11-CV-3171, 2013 WL 6388443, \*1–2, \*10–11 (N.D. Tex. Dec. 5, 2013) (appeal docketed No. 14-10012 (5th Cir. Jan. 6, 2014)) (granting summary judgment on a deceptive trade practices claim because the victim of the unfair debt collection practices was not a “consumer”); *DeVoll v. Demonbreun*, No. 04-14-00116-CV, 2014 WL 7440314, at \*1–2 (Tex. App. Dec. 31, 2014) (dismissing a Texas claim “related to unreasonable debt collection” because the plaintiff was “not a consumer as defined by the pertinent statutes”). Contrast *Panag v. Farmers Ins. Co. of Wn.*, 166 Wn.2d at 43–44 (“We hold that a private [consumer protection] action may be brought by one who is not in a consumer or other business relationship with the actor against whom the suit is brought.”).

Just as in *Wieber*, then, applying the Washington CPA to protect consumers in other states “may place competing policies at odds, as would application of another state’s [consumer protection] act to [the claims of consumers] located within Washington.” *Wieber*, Slip Op. 12. Doing so would also infringe upon Texas’ right to protect its consumers in the manner it sees fit and its clear choice to limit consumer protection litigation to those meeting its narrow definition of “consumer.” *See Coca-Cola Co. v. Harmar Bottling Co.*, 50 Tex. Sup. Ct. J. 21, 218 S.W.3d 671, 681–82 (Tex. 2007) (“One state’s legislature cannot dictate to other states what can and cannot be tolerated in economic competition.”).

As this Court reasoned in *Wieber*, it is “unlikely” (to say the least) that the legislature intended the CPA to interfere with the policy choices of another sovereign state in respect to consumers living within its borders. And such a strained reading certainly cannot be squared with the explicit language limiting the CPA to commerce “affecting the people of the state of Washington.” *See supra* I.A. For this reason as well, both certified questions should be answered in the negative.

Regardless of who the defendant is, the CPA cannot be invoked by an out-of-state plaintiff.

**II. Choice of law rules confirm that the CPA does not create a claim for non-residents injured elsewhere.**

To the extent the plain language allows any room for doubt, it is resolved by the rules this Court applies when faced with a conflict of laws. Under this Court’s “most significant relationship” approach, a claim for deception is governed by the law of the plaintiff’s home state—the place where the plaintiff allegedly relied on the deception and was injured. It is *not* governed by the law of the home state of the defendant, which necessarily has a lesser interest. And indeed, Washington has no interest at all in applying its statutes to Ms. Thornell’s claim against State Farm, which has its principal place of business in Illinois. For these reasons as well, this Court should answer both of the statutory interpretation questions certified by the district court in the negative.

When there is a conflict between Washington law and the law that might apply in another relevant jurisdiction—and there is plainly such a conflict here (*see supra* at 19–22)—this Court applies the law of the state with the most significant

relationship. See *FutureSelect Portfolio Mgmt., Inc. v. Tremont, Grp. Holdings, Inc.*, 180 Wn.2d 954, 968 (2014) (adopting Restatement (Second) Conflict of Laws § 148 (1971)). For cases involving fraud and misrepresentation, that means looking principally to the location where the plaintiff received and relied on the alleged misrepresentation and allegedly suffered her injury. See *id.* at 969. As the Restatement explains, “[t]he domicil[e], residence and place of business of the plaintiff are more important than similar contacts on the part of the defendant.” Restatement § 148, cmt. i.

The analysis also takes into account the different states’ competing interests and public policies. As this Court explained, it must consider the extent of each potentially interested state’s interest, including “the purpose sought to be achieved by their relevant local law rules and the particular issue involved.” *FutureSelect*, 180 Wn.2d at 968–69 (citing *Southwell v. Widing Transp. Inc.*, 101 Wn.2d 200, 204 (1984)); accord *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (“[s]tate consumer-protection laws vary considerably, and courts

must respect these differences rather than apply one state's law to sales in other states with different rules").

Applying these principles, Washington courts evaluating consumer claims like the one in this case have applied the law of the consumer's home state, rather than the defendant's. In *Coe v. Phillips Oral Healthcare Inc.*, No. C13-518, 2014 WL 5162912 (W.D. Wn. Oct. 14, 2014), for example, the court addressed the conflict of laws question in the context of a class action asserted specifically under the CPA. Employing the "most significant relationship" test under Restatement § 148, the court held that the locations of "the alleged misrepresentation to consumers and the consumers' pecuniary injuries . . . should be considered the most significant contacts." *Id.* at \*3. Those contacts take precedence over the location of the defendant's corporate headquarters. *Id.* For that reason, the Court in *Coe* declined to apply the CPA to govern the claims, given that the plaintiffs were all from outside Washington and participated in the relevant transactions in their home states. *Id.*

The Court of Appeals reached a similar result in *Kammerer v. Western Gear Corporation*, 27 Wn. App. 512, 520

(1980) (overruled on other grounds by *Barr v. Interbay Citizens of Tampa, Fl.*, 96 Wn.2d 692 (1981)). In *Kammerer*, the defendant was a Washington manufacturer and the plaintiff was a California resident. The plaintiff negotiated a contract with the defendant in California and received and relied on the alleged misrepresentations there as well. *Id.* The court thus concluded that California had the most significant relationship to the plaintiff's claims for fraud in the inducement. *Id.*

Other courts applying similar choice of law rules have likewise held that a consumer's claims should be governed by the consumer protection laws of the consumer's home state. In *Pilgrim v. Universal Health Card, LLC.*, for example, the U.S. Court of Appeals for the Sixth Circuit explained:

No doubt, States have an independent interest in preventing deceptive or fraudulent practices by companies operating within their borders. ***But the State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by its consumer-protection laws—are harmed by it.*** That is especially true when the plaintiffs complain about the conduct of companies located in separate states . . . diluting the interest of any one State in regulating the source of the harm yet in no way minimizing the interest of each

consumer's State in regulating the harm that occurred to its residents.

660 F.3d 943, 946–47 (6th Cir. 2011) (emphasis added) (class certification was inappropriate because the court would need to apply the home-state law of each potential class member); *see also, e.g., In re Ford Motor Co.*, 174 F.R.D. 332, 349 (D.N.J. 1997) (“Each plaintiff’s home state has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws.”); *cf. Conte & Newberg, supra* at 10, § 13:37, at 438 (“laws of each state are designed to regulate and protect the interests of that state’s own residents and citizens,” and “each state has measurable, and usually predominant interest in having its own substantive laws apply”).

As one court observed, in fact, “States have a strong interest in protecting consumers with respect to sales within their borders, but they have a relatively weak interest, if any, in applying their policies to consumers or sales in neighboring states.” *In re Relafen Antitrust Litig.*, 221 F.R.D. 260, 278 (D. Mass. 2004) (internal citations omitted). For Ms. Thornell’s claim, of course, the “strong” interest belongs to Texas, where

she lives, received the letter, allegedly acted in reliance upon it, and allegedly incurred damages. The “relatively weak” interest belongs to Washington, the state where SSB’s allegedly unlawful letters happen to have been written and mailed.<sup>1</sup>

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<sup>1</sup> For this reason, court after court has held that the parties seeking certification of a nationwide class may not avoid conflicts in the law that applies to the class members’ claims simply by relying on the law of the defendant’s home state. *E.g.*, *Mazza*, 666 F.3d at 589–94 (9th Cir. 2012) (refusing to apply California law to consumer protection claims of a nationwide class even though the defendant’s corporate headquarters and the advertising agency that produced the allegedly fraudulent misrepresentations were located in California); *Zinser v. Accufix, Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001) (refusing to apply Colorado law on product liability to claims of plaintiffs injured in other states, even though the manufacturer was headquartered in Colorado); *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 312–13 (5th Cir. 2000) (reversing certification of a nationwide class under Georgia law because the laws of other states would apply, even though the defendant was incorporated and manufactured the products in Georgia); *Gianino v. Alacer Corp.*, 846 F. Supp. 2d 1096, 1101–03 (C.D. Cal. 2012) (refusing to apply the law of the state where the defendant was headquartered, manufactured the product at issue, and made decisions about the allegedly deceptive marketing and packaging); *Compaq Computer Corp. v. Lapray*, 47 Tex. Sup. Ct. J. 522, 135 S.W.3d 657, 681 (Tex. 2004) (refusing to apply law of the manufacturer’s home state to breach of warranty claims by plaintiffs in the other states); *accord Barbara’s Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 316 Ill. Dec. 522, 879 N.E.2d 910, 920–24 (2007); *Harvell v. Goodyear Tire & Rubber Co.*, 2006 OK 24, 164 P.3d 1028, 1035–37 (Okla. 2006); *Beegal v. Park West Gallery*, 394 N.J. Super. 98, 925 A.2d 684, 696–702 (N.J. App. Div. 2007).

In recognition of those relative interests, it is no surprise that courts all around the nation have held that state consumer protection laws do not apply to claims by out-of-state plaintiffs arising from out-of-state harms. *See, e.g., Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 296 Ill. Dec. 448, 835 N.E.2d 801, 805–52 (2005) (Illinois act); *Cooper v. Samsung Elecs., Am., Inc.*, 374 F. App'x 250, 254 (3d Cir. 2010) (New Jersey act); *Goshen v. Mutual Life Ins. Co. of N.Y.*, 746 N.Y.S.2d 858, 774 N.E.2d 1190, 1194–96 (N.Y. 2002) (New York act); *Western Dermatology Consultants, P.C. v. Vital Works, Inc.*, 146 Conn. App. 169, 78 A.3d 167, 187–89 (2013) (Connecticut act).

Importantly, the same choice of law analysis would have applied in this case had Ms. Thornell brought it in her home state of Texas. When reviewing consumer protection actions, Texas follows the same principles outlined in Restatement § 148. *St. Gregory Cathedral Sch. v. L.G. Elecs., Inc.*, No. 6:12-cv-739, 2014 WL 979196, at \*5 (E.D. Tex. Mar. 5, 2014); *see also Michiana Easy Livin' Country, Inc. v. Holten*, 48 Tex. Sup. Ct. J. 789, 168 S.W.3d 777, 790 n.73 (Tex. 2005) (citing Restatement § 148) (“The place where a plaintiff relies on fraud may

determine the choice of law . . . .”); *Vanderbilt Mortg. & Finance Ins. v. Posey*, 146 S.W.3d 302, 314–17 (Tex. App. 2004). In *GJP Inc. v. Ghosh*, for example, the Texas Court of Appeals explained that the state of Texas had the most significant relationship with a claim for fraud and misrepresentation where the plaintiff was a Texas domiciliary and the alleged misrepresentations were received and relied upon in Texas. 251 S.W.3d 854, 883–85 (Tex. App. 2008). As the court noted, the Restatement places more weight on the plaintiff’s domicile than the defendant’s “because a financial loss will usually be of greatest concern to the state with which the person suffering the loss has the closest relationship.” *Id.* (quoting Restatement § 148(2) cmt. i.) Thus the choice of law rules in *both* states agree that Texas has a significantly greater interest than Washington in applying its own law to Ms. Thornell’s claims. The statutory provisions at issue in this case must be interpreted with those choice-of-law rules in mind.

Whatever interest Washington may have in respect to SSB, moreover, it has *no* relevant interest in applying its laws to the claim against State Farm. Even if the defendant’s

domicile were otherwise an important factor—and under Restatement § 148, it plainly is not—the domicile for defendant State Farm is Illinois, not Washington. Thus, whatever interest the Washington legislature may have wished to assert in governing the conduct of Washington defendants, that interest is lacking for State Farm. For Plaintiff’s claim against State Farm, Washington’s “most significant relationship” test would point to Texas first, Illinois second, and Washington last (if at all). Accordingly, even if this Court were willing to hold that the CPA creates a cause of action for an out-of-state plaintiff against SSB (Question #1), the Court has no basis for reaching the same conclusion with respect to State Farm (Question #2).

**III. Limiting the extraterritorial application of the CPA is necessary to avoid violating the Constitution.**

Even assuming *arguendo* that the CPA’s plain meaning and Washington’s choice of law rules would otherwise allow a claim by an out-of-state plaintiff with an out-of-state injury, the U.S. Constitution nevertheless would preclude it. As set forth below, Plaintiff’s attempt to apply the Washington statute in this case—where both she and State Farm are citizens of other states, and the alleged conduct and the underlying claim arose

in and would not be actionable in her home state—would be inconsistent with both the Due Process Clause and principles of federalism. Any ambiguity in the statute must be resolved in a way that avoids such an interpretation. *United States v. Int'l Union United Auto., Aircraft & Agr. Implement Workers*, 352 U.S. 567, 589, 77 S. Ct. 529, 1 L. Ed. 2d 563 (1957) (describing “the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred”) (citation omitted).

As this Court has already recognized, “the United States Constitution puts limits on the application of state law to national class action lawsuits,” including lawsuits purportedly brought under the CPA. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 198 (2001) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814–18, 823, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985)). These limits stem from the basic principle—embedded throughout the Constitution—that each of the states is a sovereign of “equal dignity.” *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529, 79 S. Ct. 962, 3 L. Ed. 2d 1003 (1959).

“A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). As the U.S. Supreme Court observed more than a century ago, “it would be impossible to permit the statutes of [one state] to operate beyond the jurisdiction of that State . . . without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends.” *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161, 34 S. Ct. 879, 58 L. Ed. 1259 (1914); *see also Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582–83, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986) (rejecting New York’s attempt to “project its legislation” into other states).

Consistent with these principles of federalism, the Due Process and Full Faith and Credit Clauses of the Constitution

place limits on choice of law. Under those Clauses, “for a State’s substantive law to be selected [and applied to a particular case] in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13, 101 S. Ct. 633, 66 L. Ed. 2d 521 (1981); *see also Shutts*, 472 U.S. at 814–18, 823 (holding that it was unconstitutional to apply Kansas law to every claim in a class action where Kansas law conflicted with the laws of other states with a more significant relationship to the individual claims).

Applying the Washington statute to Ms. Thornell’s claim—and then, presumably, to the claims of class members in other states around the country who also happened to receive a letter from SSB—would violate these basic principles of federalism and due process. To impose one state’s law on claims that arise in other states simply because that state is the domicile of one of the defendants would, in effect, impose the law of a single state upon the conduct of the defendants all across the country, even where other states might have the most

significant interest. *See supra* Part II. Yet only Congress itself has the power to impose a uniform system of regulation across the states. U.S. CONST. art. 1, § 8, cl. 3. As for the states, each one alone has the power to “determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *Campbell*, 538 U.S. at 422.

It was for precisely this reason that the Seventh Circuit in *In re BridgeStone/Firestone* rejected the idea that a proposed nationwide class could avoid the complication of applying the statutes of 50 states by relying on the law of the defendant’s home state. 288 F.3d 1012 (7th Cir. 2002). As the court explained: “Differences across states may be costly . . . but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.” *Id.* at 1020 (concluding that the relevant choice-of-law rules would have selected the law of the states “where the buyers live, and not the place of the sellers’ headquarters”).

The due process concerns in respect to extraterritorial application are particularly acute when a state attempts to “punish a defendant for conduct that may have been lawful

where it occurred.” *Campbell*, 538 U.S. at 421; *cf. BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (“Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.”).

Here, the alleged conduct that forms the basis of Ms. Thornell’s claim took place entirely in Texas, where it would not give rise to a consumer protection claim. The claim is based on the alleged deception of Ms. Thornell through letters she received at her residence. SSB may have issued the letter from its headquarters in Washington, but the central elements of the alleged claim—deception, reliance/causation, and injury—will be satisfied (if at all) by reference to events that took place entirely in Texas. And as for State Farm, it did nothing relating to Ms. Thornell in the state of Washington at all; it simply handled the claim at its headquarters in Illinois, ultimately sending the claim out to a service provider (which happened to be in Washington) to pursue with other parties in Texas.

As discussed above, Ms. Thornell would not be able to assert a claim under Texas’s consumer protection statute.

Under the Texas statute, the plaintiff in a consumer protection case must be a “consumer,” defined as “an individual . . . who seeks or acquires by purchase or lease, any goods or services.” Tex. Bus. & Com. Code Ann. § 17.45(4). But Ms. Thornell “never purchased, sought, leased, or acquired anything” from Defendants. *Dodeka*, 2011 WL 4825893, at \*2. As discussed above, Texas courts have squarely rejected consumer protection claims based on allegations just like those here. *See supra* at 19–22. To grant a claim to Ms. Thornell under Washington law would thus “punish [Defendants] for conduct that may have been lawful where it occurred.” *Campbell*, 538 U.S. at 421.

The practical difficulties and unfairness of a rule applying the Washington statute in this case—particularly to an insurance company like State Farm—cannot be overstated. As an insurance company, State Farm must handle each insurance policy or claim in accordance with the laws of the insured’s home state. *See* 15 U.S.C. §§ 1011, 1012 (McCarran-Ferguson Act). But under Plaintiff’s view of the law, State Farm’s conduct in any particular case would be subject the laws of not only the state where the insurance was issued (here, Texas), but also

State Farm's home state (Illinois) and the home state of any service provider it contracts with (here, Washington). Indeed, under Plaintiff's view, two insurance companies conducting business side-by-side within Texas could be subject to different laws about competition and business practices, depending on where they (or their service providers) maintain their headquarters. This makes no sense, and it cannot be countenanced under our constitutional system.

As the Supreme Court of Texas has observed, “[i]t is an especially sensitive matter for a jurisdiction to extend its laws governing economic competition beyond its borders,” because “[s]uch laws necessarily reflect fundamental policy choices that the people of one jurisdiction should not impose on the people of another.” *Coca-Cola*, 218 S.W.3d at 680–81. Thus “one state’s legislature cannot dictate to other states what can and cannot be tolerated in economic competition.” *Id.* at 682. The Texas Supreme Court found that “this is so ‘obviously the necessary result’ that it needs no supporting authority.” *Id.* Yet if authority were needed, the authority cited above—from *Shutts*

to *Campbell* to this Court's decision in *Pickett*—is more than sufficient to require the same result.

For this reason as well, to the extent the CPA's plain meaning allows any doubt about the scope of its application, the statute should not be interpreted to allow a claim by an out-of-state plaintiff based on injury suffered out of state—particularly when the claim is asserted against an out-of-state defendant.

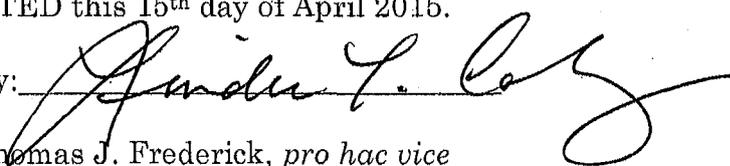
### CONCLUSION

In light of the statute's plain meaning—read against the backdrop of this Court's cases on choice of law and the constitutional principles of federalism and due process—this Court should answer both of the certified questions in the negative. The Washington Consumer Protection Act does *not* allow a claim by an out-of-state plaintiff, based on alleged deception and injury that took place out of state. And even if it did permit such a claim against a Washington corporate defendant, it certainly would not permit a such a claim against a defendant that is itself from out of state. To hold otherwise would allow this state to impose its laws to govern trade and

commerce across the entire country—a result that the legislature did not intend and the Constitution does not permit.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of April 2015.

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**CERTIFICATE OF SERVICE**

I, Valerie D. Marsh, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts, Patterson & Mines, P.S., whose address is One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on April 15, 2015, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Brief Of Appellant State Farm Mutual Automobile Insurance Company;**
- **Certificate of Service.**

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I declare under penalty of perjury under the laws of the  
State of Washington that the foregoing is true and correct.

DATED this 15th day of April, 2015.

Valerie D. Marsh  
Valerie D. Marsh

No. 91393-5

RECEIVED BY E-MAIL

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SANDRA C. THORNELL,

Respondent,

v.

SEATTLE SERVICE BUREAU, INC.,  
d/b/a NATIONAL SERVICE BUREAU, INC., and  
STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Appellants.

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**APPENDIX OF STATUTORY PROVISIONS  
AND UNPUBLISHED CASES PROVIDED BY  
APPELLANT STATE FARM MUTUAL  
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Title 19. Business Regulations--Miscellaneous (Refs & Annos)  
Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.010

19.86.010. Definitions

Currentness

As used in this chapter:

- (1) "Person" shall include, where applicable, natural persons, corporations, trusts, unincorporated associations and partnerships.
- (2) "Trade" and "commerce" shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.
- (3) "Assets" shall include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value.

**Credits**

[1961 c 216 § 1.]

Notes of Decisions (152)

West's RCWA 19.86.010, WA ST 19.86.010

Current through Chapter 4 of the 2015 Regular Session

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West's Revised Code of Washington Annotated Title 19. Business Regulations--Miscellaneous (Refs & Annos) Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)
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West's RCWA 19.86.020

19.86.020. Unfair competition, practices, declared unlawful

Currentness

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

**Credits**

[1961 c 216 § 2.]

Notes of Decisions (832)

West's RCWA 19.86.020, WA ST 19.86.020

Current through Chapter 4 of the 2015 Regular Session

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West's Revised Code of Washington Annotated  
Title 19. Business Regulations--Miscellaneous (Refs & Annos)  
Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)

West's RCWA 19.86.080

19.86.080. Attorney general may restrain prohibited acts--Costs--Restoration of property

Effective: April 18, 2007

Currentness

(1) The attorney general may bring an action in the name of the state, or as *parens patriae* on behalf of persons residing in the state, against any person to restrain and prevent the doing of any act herein prohibited or declared to be unlawful; and the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee.

(2) The court may make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired by means of any act herein prohibited or declared to be unlawful.

(3) Upon a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, the court may also make such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property, real or personal, which may have been acquired, regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers. The court shall exclude from the amount of monetary relief awarded in an action pursuant to this subsection any amount that duplicates amounts that have been awarded for the same violation. The court should consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery.

**Credits**

[2007 c 66 § 1, eff. April 17, 2007; 1970 ex.s. c 26 § 1; 1961 c 216 § 8.]

Notes of Decisions (32)

West's RCWA 19.86.080, WA ST 19.86.080

Current through Chapter 4 of the 2015 Regular Session

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West's Revised Code of Washington Annotated Title 19. Business Regulations--Miscellaneous (Refs & Annos) Chapter 19.86. Unfair Business Practices--Consumer Protection (Refs & Annos)
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West's RCWA 19.86.160

19.86.160. Personal service of process outside state

Currentness

Personal service of any process in an action under this chapter may be made upon any person outside the state if such person has engaged in conduct in violation of this chapter which has had the impact in this state which this chapter reprehends. Such persons shall be deemed to have thereby submitted themselves to the jurisdiction of the courts of this state within the meaning of RCW 4.28.180 and 4.28.185.

**Credits**

[1961 c 216 § 16.]

Notes of Decisions (7)

West's RCWA 19.86.160, WA ST 19.86.160

Current through Chapter 4 of the 2015 Regular Session

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**FILE**  
IN CLERKS OFFICE  
SUPREME COURT, STATE OF WASHINGTON  
DATE APR 02 2015  
*Madsen C. J.*  
CHIEF JUSTICE

This opinion was filed for record  
at 8:00AM on April 2, 2015

*[Signature]*  
Ronald R. Carpenter  
Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Certification from the United States  
Bankruptcy Court for the Western  
District of Washington in

In the Matter of the Bankruptcy Petition  
of

LARRY CHARLES WIEBER and  
ROSE WOUDE WIEBER,

Debtor(s).

NO. 90331-0

EN BANC

Filed APR 02 2015

STEPHENS, J.—The United States Bankruptcy Court for the Western District of Washington has asked us whether Washington’s homestead exemption law, chapter 6.13 RCW, applies extraterritorially to real property located in other states. We answer this certified question in the negative. We hold that Washington’s homestead exemption law does not apply to real property outside of Washington.

FACTS AND PROCEDURAL HISTORY

The relevant facts in this case are undisputed. Debtors Larry and Rose Wieber filed for chapter 13 bankruptcy relief in the United States Bankruptcy Court for the Western District of Washington. After abandoning any claim of homestead to their

residence in Blaine, Washington—in which they hold no equity—the Wiebers claimed a homestead exemption for real property located in Ketchikan, Alaska.

Creditor Bruce Kiessling objected to the Wiebers' homestead exemption, arguing that Washington's homestead exemption law has never been interpreted to apply extraterritorially. The bankruptcy court found that the Wiebers were domiciled in Washington, so Washington law governs the exemption question. Following a hearing, the bankruptcy court concluded that Washington's homestead exemption law does not expressly indicate whether its terms apply to property located outside of Washington. To resolve this issue, the court agreed to certify the following question to this court: "Does the Washington homestead exemption law, RCW 6.13.010-.240, apply extra-territorially to real property located in other states?" Order Certifying Question to Wash. State Supreme Ct. at 3.

#### ANALYSIS

At the outset, we recognize that our interpretation of the homestead exemption law is not limited to its application in bankruptcy proceedings. The homestead exemption arises in proceedings involving probate, foreclosure, family law, and the general enforcement of judgments. However, because this case arose through the bankruptcy court, it is important to understand how homestead exemption laws relate to federal bankruptcy law.

##### 1. Homestead Exemptions in Bankruptcy Court

Bankruptcy filings create a bankruptcy estate consisting of the debtor's legal or equitable interests in property. 11 U.S.C. § 541(a). Debtors may claim certain property

as exempt from the bankruptcy estate. 11 U.S.C. § 522(b)(1). They may choose between federal exemptions under 11 U.S.C. § 522(d) and exemptions provided under state law. 11 U.S.C. § 522(b)(2). If a debtor elects to assert a state's exemption, the bankruptcy court looks to the forum state's law to determine the applicability of the exemption.

Bankruptcy courts throughout the country have considered the extraterritorial effect of state homestead exemption laws. The majority of jurisdictions decline extraterritorial application of the homestead exemption to property located in another state. *See, e.g.*, WILLIAM H. BROWN, LAWRENCE R. AHERN III & NANCY F. MACLEAN, BANKR. EXEMPTION MANUAL § 4:7, at 95 (2011-2012 ed.) (“[T]he majority of courts have held that one state cannot assert extraterritorial jurisdiction over property in other states.”); Dale Joseph Gilsinger, *Extraterritorial Application of State’s Homestead Exemption Pursuant to Bankruptcy Code § 522*, 47 A.L.R. FED. 2D 335, § 2, at 343 (2010) (“State courts have repeatedly, and almost uniformly, held that a state’s homestead exemption only extends to property located within that state.”); *In re Sipka*, 149 B.R. 181, 182 (D. Kan. 1992) (believing the “majority rule is correct” and declining extraterritorial application of Kansas’s homestead law).

*In re Capps* is illustrative of the majority rule. 438 B.R. 668 (Bankr. D. Idaho 2010). There, the court held that Idaho’s homestead exemption law did not apply extraterritorially to property located outside of Idaho. *Id.* at 672. Noting that Idaho state courts had not addressed the issue, the bankruptcy court relied on the public policy discouraging “exemption shopping,” as recognized by the bankruptcy code and

Idaho's public policy protecting creditors' expectations. *Id.* While acknowledging that some courts have allowed extraterritorial application of state homestead exemptions where the statutes do not expressly prohibit it, the trial court in *Capps* reaffirmed its previous holding in *In re Halpin*, 94 I.B.C.R. 197, 198, 1994 WL 594199 (Bankr. D. Idaho) that Idaho's exemption law does not allow debtors to claim a homestead in another state. *Id.* at 672-73 (distinguishing *In re Arrol*, 170 F.3d 934 (9th Cir. 1999)).

The Wiebers rely on the handful of decisions holding that a state's homestead exemption law may apply extraterritorially to property located outside of that state if the law does not expressly exclude such application. *Arrol*, 170 F.3d 934 (applying California's homestead exemption law to a Michigan home); *In re Drenttel*, 403 F.3d 611 (8th Cir. 2005) (applying Minnesota's homestead exemption law to an Arizona home); *In re Stratton*, 269 B.R. 716 (Bankr. D. Or. 2001) (relying on *Arrol*; applying Oregon's homestead exemption law to a California home). The cases that support extraterritorial application can be categorized in two groups: those based on policy and those based on comparing homestead exemptions with similar laws that are expressly limited to state residents.

Some courts reason that public policy supports extraterritorial application of a state's homestead law. The most prominent of these policy-based cases is *Arrol*, in which the court held that California's homestead exemption statute permitted debtors to claim an exemption for a homestead located in Michigan. 170 F.3d at 936. First, the court opined that the purpose of California's homestead exemption exists independently from state boundaries, "provid[ing] a place for the family and its

surviving members, where they may reside and enjoy the comforts of a home.” *Id.* (alteration in original) (quoting *Strangman v. Duke*, 140 Cal. App. 2d 185, 190, 295 P.2d 12 (1956)). The court further reasoned that the homestead exemption law is similar in policy to a California automobile exemption law, which had been applied extraterritorially. *Id.* Lastly, the court said it found “nothing” in the state statutory scheme, its legislative history, or its interpretation by California courts to limit application of the exemption to homes within California. *Id.* at 937.

On similar reasoning, the court in *Drenttel* held that “the location of the home is not relevant” under Minnesota’s homestead exemption law, and the exemption is therefore not limited to property located in Minnesota. 403 F.3d at 615. The court in *Drenttel* relied on *Arrol* and a Minnesota statute to find that Minnesota’s policy and statutory construction permits extraterritorial application. *Id.*

Other courts allowing extraterritorial application of homestead exemption laws look to whether similar exemption laws are limited to state residents. *See In re Stephens*, 402 B.R. 1 (10th Cir. B.A.P. 2009); *In re Williams*, 369 B.R. 470 (Bankr. W.D. Ark. 2007). These courts reason that if similar exemption laws are restricted to state residents, the absence of restrictive language in the homestead exemption law should allow extraterritorial application. *Stephens*, 402 B.R. at 7-8; *Williams*, 369 B.R. at 474-75. Iowa’s homestead exemption law is silent as to extraterritorial application, while its personal property exemption law expressly restricts the exemption to Iowa residents. Through the logic of statutory construction, the court in *Stephens* therefore reasoned that the legislature’s choice to omit such language in the homestead

exemption evidenced its intent for extraterritorial application. *See also Williams*, 369 B.R. at 476 (similarly holding that Iowa's homestead exemption applies extraterritorially).

We recognize that these cases arise in a bankruptcy context and are thus of limited value here. The bankruptcy courts did not consider the full scope of the state homestead exemption laws or their application in other contexts. Nonetheless, these cases highlight that the answer to whether a state's homestead exemption laws apply extraterritorially turns largely on a statutory analysis. We therefore turn to an analysis of Washington's homestead exemption statutes.

## 2. Analysis of Relevant Statutory Provisions

Washington's territorial legislature first recognized in statute the right to a homestead exemption over 150 years ago. LAWS OF 1854, ch. 27, § 253, at 178. This right was incorporated into article XIX, section 1 of the Washington Constitution, providing that "[t]he legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." WASH. CONST. art. XIX, § 1. Pursuant to this constitutional power, the legislature enacted the homestead act in 1895.<sup>1</sup> LAWS OF 1895, ch. 64, at 109-14.

A "homestead" is defined as "real or personal property that the owner uses as a residence. . . . Property included in the homestead must be actually intended or used as the principal home for the owner." RCW 6.13.010(1). A residence that meets this definition is "exempt from attachment and from execution or forced sale for the debts

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<sup>1</sup> Currently codified under chapter 6.13 RCW. *See* LAWS OF 1987, ch. 442; § 1121.

of the owner up to” a statutory maximum of \$125,000 in value. RCW 6.13.070(1), .030.

Determining whether the homestead exemption law applies extraterritorially is a matter of statutory construction. When construing statutes, the court’s goal is to “ascertain and carry out the legislature’s intent.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Arborwood Idaho, LLC v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004)). While engaging in statutory construction, we first examine the plain meaning of the statute. *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). In so doing, the court may examine the provision at issue, other provisions of the same act, and related statutes. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-12, 43 P.3d 4 (2002).

We have repeatedly held that the homestead statutes are favored in the law and should be liberally construed. *Lien v. Hoffman*, 49 Wn.2d 642, 649, 306 P.2d 240 (1957); see also *Macumber v. Shafer*, 96 Wn.2d 568, 570, 637 P.2d 645 (1981) (“Homestead statutes are enacted as a matter of public policy in the interest of humanity and thus are favored in the law and are accorded a liberal construction.”); *First Nat’l Bank of Everett v. Tiffany*, 40 Wn.2d 193, 202, 242 P.2d 169 (1952) (“[Homestead exemption laws] do not protect the rights of creditors. In fact, they are in derogation of such rights.”).

This court’s answer to the certified question is not limited to the analysis of a single statutory provision defining “homestead”; instead, we must consider the entire homestead exemption chapter—chapter 6.13 RCW—as contemplated by the

bankruptcy court. The chapter contains no language expressly supporting or prohibiting extraterritorial application of the exemption to property located outside of Washington. The statutes defining “homestead” (RCW 6.13.010, .020), creating the homestead exemption (RCW 6.13.030), and limiting its application (RCW 6.13.080) do not expressly address this issue. It is clear the law does not directly speak to any extraterritorial application.

Significantly, chapter 6.13 RCW includes statutes with specific procedures that apply in nonbankruptcy contexts, many of which require actions by courts and agencies. *See* RCW 6.13.040(2)-(4), .050 (describing procedures to file declarations of homesteads, abandonments, and nonabandonments with “the recording officer of the county in which the property is situated” and specifying that declarations “must contain” certain statements), .090 (describing how a judgment creditor may file a lien on a homestead property in excess of the homestead exemption and specifying timing procedures for liens transferred from a “district court of this state”), .130, .150, .160, .190, .240 (specifying court procedures on various issues and requiring courts to act, stating the court “may,” “shall,” or “must” act in some manner). While these statutes also do not expressly address the issue of extraterritoriality, they are informative of legislative intent. “Statutes are to be read together, whenever possible, to achieve a ‘harmonious total statutory scheme . . . which maintains the integrity of the respective statutes.’” *State ex rel. Peninsula Neigh. Ass’n v. Dep’t of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (alteration in original) (internal quotations marks omitted)

(quoting *Employco Pers. Servs., Inc. v. City of Seattle*, 117 Wn.2d 606, 614, 817 P.2d 1373 (1991)).

These procedures plainly apply only to courts and agencies in Washington. If we were to interpret the homestead exemption to apply to real property located outside of Washington, a consistent reading would also require the same actions to be taken by out-of-state courts and agencies. It is unlikely the legislature intended such extraterritorial application of these procedures, however, because the state lacks the authority to direct actions and procedures of foreign courts or foreign agencies. Nor can the procedural aspects of the law be jettisoned. The homestead exemption law operates through its statutory procedures that direct courts and agencies. For this reason, the homestead exemption law cannot apply to real property located outside of Washington without necessarily triggering its procedural requirements. It would be inconsistent with the comprehensive legislative scheme to apply some but not all portions of the homestead law extraterritorially. “The court must . . . avoid constructions that yield unlikely, absurd or strained consequences.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Instead, a harmonious reading of the statutes under chapter 6.13 RCW supports limiting the law’s application to real property located in Washington. This interpretation is supported by RCW 6.13.090, which states, in relevant part:

A judgment against the owner of a homestead shall become a lien on the value of the homestead property in excess of the homestead exemption from the time the judgment creditor records the judgment with the recording officer of the county where the property is located. However, if a judgment of a district court of this state has been transferred to a superior court, the judgment becomes a lien from the time of recording with such recording officer a duly certified

abstract of the record of such judgment as it appears in the office of the clerk in which the transfer was originally filed.

(Emphasis added.) This statute sheds light on the question before us. The homestead exemption law is designed to allow debtors to shield certain—not all—assets from creditors, so this statute is a crucial component of the law. It describes how the excess value of a homestead property, i.e., value exceeding \$125,000, may be subject to a lien by a creditor’s judgment. In the context of recording a lien, the statute emphasizes that it applies to district courts “of this state.” *Id.* Just as with the court procedures described earlier, these types of liens are governed by state law and cannot be applied in a foreign jurisdiction. *See* RCW 4.56.190.

Our interpretation is strongly supported by considering the context of Title 6 RCW in which Washington’s homestead exemption law is found: that portion is entitled “Enforcement of Judgments.” (Emphasis omitted.) Title 6 RCW grants Washington courts the power to enforce judgments, describes the procedures required to enter judgments, and sets forth limitations on the enforcement of judgments. The homestead exemption law, like the other exemptions in Title 6 RCW, places limitations on a Washington court’s power to enforce judgments. *See* ch. 6.15 RCW, entitled “Personal Property Exemptions.” (Emphasis omitted.)

General provisions of Title 6 RCW *expressly* limit the application of exemptions, including chapter 6.13 RCW (the homestead exemption), to courts in Washington. RCW 6.01.010 states, “[T]he provisions of this chapter and of chapter[ ] 6.13 . . . apply to both the superior courts and district courts of *this state*.” (Emphasis added.) This provision should be understood to limit the homestead exemption law to

its application in Washington courts.<sup>2</sup> This language is in contrast to California's homestead exemption law, as interpreted in *Arrol*, where the court found "nothing" in the statutory scheme indicating a legislative intent to limit extraterritorial application of the law. 170 F.3d at 937. When the legislature created our statute, it made comprehensive amendments to the homestead exemption law in the same bill. LAWS OF 1987, ch. 442, §§ 201-225. While those amendments are not directly relevant to the question before us, they indicate that the legislature considered the entirety of chapter 6.13 RCW when it provided for its application to "courts of this state." RCW 6.01.010.

While we have repeatedly held that the homestead exemption law is entitled to a liberal construction, the structure of the homestead exemption law indicates a legislative intent to limit application to homestead protection in Washington. A comprehensive reading of the homestead exemption law, which includes consideration of Title 6 RCW, shows that the exemption is intertwined with procedures and requirements that can apply only to courts and agencies in Washington. Further, Title 6 RCW expressly states that the homestead exemption law applies to the courts of "this state." RCW 6.01.010.

The Wiebers have not shown how the Washington-specific procedures under chapter 6.13 RCW can be harmonized with an extraterritorial application of the

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<sup>2</sup> An alternative reading of the statute may suggest that it describes only Washington court procedures but does not limit a debtor's ability to exempt a homestead in another state. However, there is no language in this statute, chapter 6.13 RCW, or Title 6 RCW that supports such an interpretation. As noted, the statute provides a comprehensive scheme.

homestead exemption law. We cannot ignore the procedural aspects of the law, as the certified question asked whether the homestead exemption law, in its entirety, applies to real property located in other states. That this question arises in the context of bankruptcy proceedings cannot change the answer; our interpretation of the statute must appreciate all of its applications.

States have an interest in ensuring that their homestead exemption policies apply within their own jurisdiction because each state has unique laws that dictate the existence, scope, and nature of their homestead exemptions. Applying Washington's homestead exemption law to property located in another state may place competing policies at odds, as would application of another state's homestead exemption law to property located within Washington.

The following homestead exemption policies of several states illustrate this principle. For example, some states do not afford debtors a homestead exemption at all. *See* N.J. STAT. ANN. § 2A:17-17 (indicating that generally, all real estate shall be liable for judgments); 42 PA. CONS. STAT. ANN. § 8124 (exempting particular property from execution but not including homesteads). In stark contrast, several states allow exemptions for the value of the *entire* homestead, with some acreage limitations, unlike Washington, which has a statutory maximum value of \$125,000. *See* IOWA CODE ANN. § 561.2; FLA. CONST. art. X, § 4; TEX PROP. CODE ANN. § 41.002. Other states place varying exemption limits on homesteads located in urban or rural areas. *See* ARK. CODE ANN. § 16-66-210 (limiting homesteads located inside cities, towns, or villages to 1 acre and those outside to 160 acres); LA. REV. STAT. ANN. § 20:1 (limiting

homesteads located inside municipalities to 5 acres and those outside to 200 acres); OR. REV. STAT. § 18.402 (limiting homesteads located inside towns or cities to one block and those outside to 160 acres). Lastly, some states afford more protections to debtors depending on their marital status, custody of minor children, age, or disability. *See* ARK. CODE ANN. § 16-66-210 (allowing a homestead exemption only for debtors who are married or the head of the family); CAL. CIV. PROC. CODE § 704.730 (allowing more protections for debtors or spouses who are 65 years of age or older or who are physically or mentally disabled); TENN. CODE ANN. § 26-2-301 (allowing more protections for debtors with minor children, married debtors, and debtors who are 62 years of age or older). Washington, too, affords debtors unique protections. Since the homestead act was enacted in 1895, married debtors have been able to claim homesteads from community property, a principle of family law that very few states recognize. *See* LAWS OF 1895, ch. 64, § 2, at 109, *codified at* RCW 6.13.020.

In sum, the context of our homestead exemption law shows a legislative scheme that limits its application to property located in Washington. Legislative intent to provide only for an in-state homestead exemption is further evidenced by the express limitation of related homestead procedures of courts in Washington under RCW 6.01.010. Further, states have an interest in limiting application of their homestead exemption laws to property located within their jurisdiction because each sovereign has unique homestead exemption policies.

## CONCLUSION

We answer the certified question in the negative. While the homestead exemption law does not expressly prohibit extraterritorial application, reading the statutes in context shows a legislative intent to limit application to Washington. We hold that Washington's homestead exemption law does not apply to property located in other states.

Steyer, J.

WE CONCUR:

Madsen, C.J.

Johnson

Quinn, J.

Fairhurst, J.

Conzalez, J.

Green, J.

Jin, J.

No. 90331-0

WIGGINS, J. (dissenting)—I would decline to answer the certified question because I believe that the United States Bankruptcy Court for the Western District of Washington has inadvertently presented us with a question whose answer actually turns on federal law rather than Washington law. The relevant statute whose scope determines the applicability of our homestead exemption in a federal bankruptcy case is not Washington's homestead act in and of itself (ch. 6.13 RCW), but rather the federal statute that permits a debtor to invoke our homestead act in a federal bankruptcy court. Because construing the scope of a federal statute is not a question of "the local law of this state," RCW 2.60.020 does not apply and we should decline to answer the certified question.

The majority opinion examines our homestead act in isolation, ignoring the possibility that, owing to the operation of federal law, our homestead exemption might reach further in the federal bankruptcy context than in the context of cases filed in our own district and superior courts. The majority correctly recognizes that a court's goal when construing statutes is to ascertain and carry out the legislature's intent, but it fails to recognize that in federal bankruptcy, the relevant legislature whose intent must be ascertained is the one that created the federal bankruptcy system and its attendant exemptions—the United States Congress.

## ANALYSIS

When the debtors in this case filed their bankruptcy petition, they invoked the federal bankruptcy code's exemption statute, 11 U.S.C. § 522(b). That statute gives debtors the ability to choose between two sets of exemptions. 11 U.S.C. § 522(b)(1). Specifically, a debtor may claim either an enumerated list of federal exemptions, see 11 U.S.C. § 522(d), or the exemptions available under the "State or local law" of the debtor's domicile, 11 U.S.C. § 522(b)(3)(A). Under § 522's definition of "domicile," a debtor who moves to a new state within two years of filing a federal bankruptcy petition is deemed to be domiciled in his former state and thus may not claim the state law exemptions of his new state.<sup>1</sup> The parties do not appear to dispute that Washington is the debtors' domicile in this case under § 522.<sup>2</sup>

The determinative issue in this case is how to interpret the scope of § 522 because it is only through § 522 that our homestead act is relevant in a federal

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<sup>1</sup> Congress defined the debtor's "domicile" for the purposes of claiming exemptions as the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located in a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place.

11 U.S.C. § 522(b)(3)(A). Section 522 appears to supersede state conflict-of-law rules with respect to exemptions in federal bankruptcy; if a state's rules would lead to the application of the law of a state other than that of the debtor's domicile, it would impermissibly undercut § 522(b)(3)(A)'s domicile-based exemption scheme and thus would be invalid under the supremacy clause. U.S. CONST. art. VI, cl. 2; see, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941) (a state law provision is invalid if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in a federal statute).

<sup>2</sup> A state may partially opt out of this exemption scheme and bar its residents from using the enumerated list of federal exemptions, 11 U.S.C. § 522(b)(2), although federal exemptions

bankruptcy case. The majority seems to assume that when Congress chose to permit debtors to claim state law exemptions under § 522(b)(3)(A), it intended for federal courts to be subject to the same geographic and jurisdictional constraints that state courts face. But that is not necessarily true. Another possible construction is that Congress intended through § 522(b)(3)(A) to incorporate state law provisions covering the categories and amounts of exempt property, but without restrictions, including geographic limitations, that prejudice recently relocated debtors. See Laura B. Bartell, *The Peripatetic Debtor: Choice of Law and Choice of Exemptions*, 22 EMORY BANKR. DEV. J. 401, 418-20 (2006). This interpretation, which the debtors urge in their brief, seems consistent with the liberal, prodebtor construction that federal courts apply to exemptions under § 522. See, e.g., *In re Arrol*, 170 F.3d 934, 937 (9th Cir. 1999) (“[W]e are mindful of the strong policy underlying both California law and federal bankruptcy law to interpret exemption statutes liberally in favor of the debtor.”); *In re Glass*, 164 B.R. 759, 764 (B.A.P. 9th Cir. 1994) (recognizing “that the availability of exemptions is to be liberally construed in favor of the debtor”).

Despite the fact that the bankruptcy court has sought our opinion on this matter, I do not believe it is our place to tell a federal bankruptcy court which of these interpretations of a federal statute is correct. The bankruptcy court, which handles exemptions arising under § 522 on a daily basis, is better positioned than this court to

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specified in other subsections of § 522 still apply, 11 U.S.C. § 522(b)(3)(A). While a state may bar a resident from claiming the federal exemptions, § 522 does not contain a parallel provision giving states the authority to bar its residents from using the state's own exemptions. Washington has not opted out of the federal exemption scheme, thus leaving § 522 undisturbed with respect to Washington residents.

discern Congress's intent in § 522. Regardless, construing a federal statute is not a matter of Washington state or local law, and RCW 2.60.020 therefore does not give us the authority to answer this certified question.

To the extent our own legislature's intent is relevant here—and for the reasons stated above, I do not believe it is—the legislative intent behind Washington's homestead act supports permitting a federal bankruptcy court to apply our homestead exemption to property owned by Washingtonians wherever that property is located. As the majority correctly recognizes, the homestead act is a remedial statute that is entitled to liberal construction. Majority at 7, 11. The majority further acknowledges the homestead act “contains no language expressly supporting or prohibiting extraterritorial application of the exemption to property located outside of Washington.” *Id.* at 8. The plain language of the homestead act thus does not preclude a Washingtonian from exempting a homestead that is located in another state. Nevertheless, the majority concludes that our legislature did not intend for our homestead exemption to be applied to property physically located outside Washington because chapter 6.13 RCW contains provisions specifying that Washington state agencies and courts would be responsible for enforcement. *Id.* at 8-11 (citing RCW 6.13.040(2)-(4), .050, .090, .130, .150, .160, .190, .240).

This conclusion misses the point. At most, the statutes cited by the majority merely recognize that *our own* courts and other state institutions lack the authority to apply Washington law extraterritorially. They say nothing about whether a federal court—a court not subject to the same geographic and jurisdictional restrictions as our

own courts—has the power to do so.<sup>3</sup> Because we must construe the homestead act liberally, I do not believe its references to local courts and agencies can be construed as limiting the manner in which the exemption may be applied by a federal bankruptcy court.

In any case, our own legislature's intent is not relevant to whether § 522 grants federal bankruptcy courts the authority to apply Washington's homestead exemption to a Washingtonian's homestead in Alaska. If the bankruptcy court determines that Congress did not intend to incorporate certain state law restrictions into the § 522 exemption scheme, then it may apply our homestead exemption to the disputed property in this case. If it reaches the opposite conclusion, it may reject the debtors' attempt to claim an exemption on their Alaska property. Either way, the question ultimately turns on an interpretation of a federal statute, not on an interpretation of Washington law.

### CONCLUSION

For these reasons, I would decline to answer the certified question.

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<sup>3</sup> It is worth noting that most of the references to local courts that the majority cites appeared in the version of the homestead act that our legislature enacted in 1895. See LAWS OF 1895, ch. 64, at 109; *id.* §§ 13 (corresponding to today's RCW 6.13.130), 17 (.150), 18 (.160), 22 (.190), 29 (.240); see also *id.* §§ 9, 11, 16, 26 (other provisions referring to actions by Washington courts). Given that Congress did not pass the first uniform federal bankruptcy law until 1898 and did not create the current federal bankruptcy exemption scheme until 1978, our legislature could not possibly have had modern federal bankruptcy law in mind when it created the homestead exemption. It would be anachronistic, then, to look to the legislative intent behind the statutes the majority cites when considering how our homestead exemption applies in federal bankruptcy.

I dissent.

  
\_\_\_\_\_

2011 WL 4825893

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR  
DESIGNATION AND SIGNING OF OPINIONS.

**MEMORANDUM OPINION**

Court of Appeals of Texas,  
San Antonio.

DODEKA, L.L.C., Appellant

v.

Maria GARCIA, Appellee.

No. 04-11-00016-CV. | Oct. 12, 2011.

From the 38th Judicial District Court, Uvalde County, Texas,  
Trial Court No. 09-09-27,250-CV; Honorable Mickey R.  
Pennington, Judge Presiding.

**Attorneys and Law Firms**

Jason D. Anderson, Weinstein & Riley, P.S., Seattle, WA, for  
Appellant.

Rogelio M. Munoz, The Munoz Law Firm, Uvalde, TX, for  
Appellee.

Sitting: CATHERINE STONE, Chief Justice, PHYLIS J.  
SPEEDLIN, Justice.

**MEMORANDUM OPINION**

Opinion by PHYLIS J. SPEEDLIN, Justice. MARIALYN  
BARNARD, Justice.

\*1 Dodeka, L.L.C. appeals the trial court's judgment rendered in favor of Maria Garcia in her action against Dodeka under the Deceptive Trade Practices Act ("DTPA"). See TEX. BUS. & COM.CODE ANN. § 17.45(4) (West 2011). Because we conclude that Garcia does not qualify as a consumer under the statute, we reverse and render a take-nothing judgment in favor of Dodeka.

**FACTUAL AND PROCEDURAL BACKGROUND**

This case stems from two earlier lawsuits and efforts by Dodeka to collect a credit card debt from the wrong person.

Several undisputed findings of fact by the trial court help clarify the underlying basis of the instant suit:

- On January 29, 2009, [Dodeka] sued [Garcia] on the debt in Justice Court of Uvalde County, Texas ...;
- [Garcia] had to retain the services of an attorney to answer the lawsuit and respond to the discovery requests;
- During this discovery it was established that the debt in question had been incurred by a person with a social security number that did not match the social security number of [Garcia] and that [Garcia] did not owe the debt;
- On May 22, 2009, [Dodeka] nonsuited its lawsuit against [Garcia];
- On June 22, 2009, an attorney representing [Dodeka] wrote a letter to [Garcia] demanding payment for the same debt;
- On July 17, 2009, [Garcia] through her attorney responded to [Dodeka] stating that [Garcia] did not owe the debt and that they should stop harassing her;
- On September 1, 2009 [Dodeka] sued [Garcia] again in the Justice Court of Uvalde County, Texas ...;
- [Garcia] was required to retain the services of an attorney to respond to this lawsuit and answer the discovery requests; and
- When the lawsuit of September 1, 2009 was called for trial [Dodeka] never bothered to appear and the case was dismissed.

Garcia subsequently sued Dodeka, claiming Dodeka committed a false, misleading, or deceptive act or practice when it "[m]isrepresented the authority of its attorney by dismissing the first lawsuit and filing another lawsuit against [Garcia]." See TEX. BUS. & COM.CODE ANN. § 17.50(a) (West 2011). Garcia further alleged she was entitled to recovery under the DTPA "tie-in" statute for violations of the Texas Debt Collection Act and the federal Fair Debt Collection Practices Act. See *id.* § 17.50(h) (West 2011). In a bench trial, Garcia testified that she never borrowed or attempted to borrow money from Dodeka and was confused by Dodeka's demand letters and suits for a debt she did not owe. Garcia further testified she developed anxiety and nervousness as a result of Dodeka's attempt to collect the debt. Garcia's daughter testified that Garcia worried about the

collection efforts and that Dodeka's action had damaged her mother's credit. At the conclusion of the evidence, Dodeka moved for a directed verdict on the basis that Garcia did not establish her status as a consumer. The trial court denied Dodeka's motion and concluded that Garcia was a consumer. The court further concluded that Dodeka knowingly violated the DTPA by attempting to collect a debt it knew Garcia did not owe, and that Dodeka had also violated the Texas Debt Collection Act and the Federal Fair Debt Collection Practices Act. Garcia was awarded \$15,000 in actual and/or economic damages and \$15,000 in attorney's fees. This appeal followed.

### STANDARD OF REVIEW

\*2 The DTPA protects a consumer from false, misleading, or deceptive acts or practices, from an unconscionable action or course of action by any person, and from the breach of an implied or express warranty in the conduct of any trade or commerce that is the producing cause of actual damage. *Id.* §§ 17.46(a), 17.50(a)(1), (2), (3) (West 2011). Within the DTPA, "consumer" is defined as "an individual, partnership, [or] corporation ... who seeks or acquires by purchase or lease, any goods or services." *Id.* § 17.45(4). Determining consumer status is generally a question of law for the court to decide. *Bohls v. Oakes*, 75 S.W.3d 473, 479 (Tex.App.-San Antonio 2002, pet. denied). We review de novo the trial court's determination that Garcia was a consumer under the DTPA. *Id.*

### ANALYSIS

In order to qualify as a consumer and thus have standing to sue under the DTPA, a plaintiff must show that (1) she sought or acquired goods or services by purchase or lease, and (2) that the goods or services purchased or leased form the basis of her suit. *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 650 (Tex.1996). The person need not have actually acquired the services or goods—merely seeking to acquire services or goods is sufficient to establish consumer status; money does not need to change hands. *Bohls*, 75 S.W.3d at 479. Moreover, the plaintiff need not herself be the one who purchases or leases the goods or services to be a consumer. *Kennedy v. Sale*, 689 S.W.2d 890, 892–93 (Tex.1985). Rather, a plaintiff establishes consumer standing by her relationship to the transaction, not by contractual relationship to the defendant. *Id.* Thus, privity between a plaintiff and defendant is not a dispositive factor in evaluating the plaintiff's consumer status

under the DTPA. *Amstadt*, 919 S.W.2d at 649. Nevertheless, seeking or acquiring some good or service must be at the core of the plaintiff's and defendant's relationship. *Kennedy*, 689 S.W.2d at 892–93.

Dodeka argues that Garcia was not a consumer under the DTPA and asserts that Garcia did not "seek or acquire" anything from Dodeka. Garcia responds that she was a consumer because she was a credit card customer, which is the type of debt Dodeka attempted to collect from her. We agree with Dodeka. The facts are undisputed that Garcia never purchased, sought, leased, or acquired anything from Dodeka. In fact, the basis of Garcia's entire defense in the two underlying debt collection lawsuits is that she had no relationship to Dodeka. Accordingly, Garcia was not a consumer and cannot recover under the DTPA. *See Lukasic v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 401 (Tex.App.-San Antonio 2000, no pet.).

A plaintiff may also bring a cause of action under the DTPA if granted that right by another law. TEX. BUS. & COM. CODE ANN. § 17.50(h). Here, Garcia pleaded that she was entitled to recover under the DTPA for Dodeka's violations of the Texas Finance Code<sup>1</sup> and the federal Fair Debt Collection Practices Act.<sup>2</sup> However, the DTPA "tie-in" statute does not exempt a plaintiff from proving consumer status. *Id.*; *Hansberger v. EMC Mortg. Corp.*, No. 04–08–00438–CV, 2009 WL 2264996, at \*2 (Tex.App.-San Antonio July 29, 2009, pet. denied) (mem.op.) (holding that a plaintiff who pleaded causes of action under the DTPA for six "tie-in" statute violations, including Texas Finance Code chapter 392, did not satisfy the DTPA consumer status requirement and was therefore not entitled to judgment as a matter of law); *Mendoza v. Am. Nat'l Ins. Co.*, 932 S.W.2d 605, 608 (Tex.App.-San Antonio 1996, no writ). Accordingly, Garcia's causes of action under the DTPA "tie-in" provision necessarily fail because she did not establish her consumer status under the DTPA.

### CONCLUSION

\*3 Because the issue of consumer status under the DTPA is dispositive, we need not address Dodeka's remaining issues. For the reasons stated above, we reverse the trial court's judgment and render a take-nothing judgment in favor of Dodeka.

Footnotes

- 1 Texas Finance Code chapter 392 states, in relevant part, “[a] violation of this chapter is a deceptive trade practice under [the DTPA], and is actionable under [the DTPA].” TEX. FIN.CODE ANN. § 392.404(a) (West 2006).
- 2 We find nothing in the Fair Debt Collection Practices Act that specifically grants a plaintiff the right to bring a cause of action under a state's deceptive trade practices laws, and Garcia does not cite us to any such authority. *See* 15 U.S.C. §§ 1692–1692p.

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2013 WL 6388443

Only the Westlaw citation is currently available.  
United States District Court,  
N.D. Texas,  
Dallas Division.

Israel GARCIA Jr., et al., Plaintiffs,

v.

JENKINS/BABB LLP, et al., Defendants.

No. 3:11-CV-3171-N-BH. | Dec. 5, 2013.

**Attorneys and Law Firms**

Israel Garcia Jr., Red Oak, TX, pro se.

Melissa R. Garcia, Red Oak, TX, pro se.

W. Keith Wier, Bush & Ramirez LLC, Houston, TX, for Defendant.

**ORDER ACCEPTING FINDINGS  
AND RECOMMENDATION OF THE  
UNITED STATES MAGISTRATE JUDGE**

DAVID GODBEY, District Judge.

\*1 After reviewing all relevant matters of record in this case, including the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and any objections thereto, in accordance with 28 U.S.C. § 636(b)(1), the undersigned District Judge is of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court. Accordingly, *Defendants Primary Financial Services, Margaret Morrissey, Chris Gilbert, Dustin T. Dudley, Attorney at Law, and Dustin T. Dudley's Motion for Summary Judgment* (doc. 56), filed January 27, 2012, is **GRANTED**. By separate judgment, Plaintiffs' claims against Defendants for violations of the FDCPA, the TDCPA, and the DTPA will be dismissed with prejudice.

**FINDINGS, CONCLUSIONS  
AND RECOMMENDATION**

IRMA CARRILLO RAMIREZ, United States Magistrate Judge.

Pursuant to *Special Order No. 3--251*, this action has been automatically referred for pretrial management. Before the Court for recommendation is *Defendants Primary Financial Services, Margaret Morrissey, Chris Gilbert, Dustin T. Dudley, Attorney at Law, and Dustin T. Dudley's Motion for Summary Judgment* (doc. 56), filed January 27, 2012. Based on the relevant filings, evidence, and applicable law, the motion should be **GRANTED**.

**I. BACKGROUND**

On November 16, 2011, Israel Garcia, Jr. and Melissa R. Garcia (Plaintiffs) filed this *pro se* action against Jenkins/Babb, LLP (Jenkins/Babb), Robert E. Jenkins (Jenkins), Jason Babb (Babb) (collectively, the Jenkins/Babb Defendants); and the law firm of Dustin T. Dudley, Attorney at Law (Dudley law firm), Dustin T. Dudley (Dudley), Primary Financial Services (Primary), Margaret Morrissey (Morrissey), Chris Gilbert (Gilbert), and Billi J. Geneser Gannon (Gannon)<sup>1</sup> (collectively, the Primary Defendants). (doc. 3.) Plaintiffs asserted claims against all defendants for violations of the federal Fair Debt Collections Practices Act (FDCPA), the Texas Debt Collection Practices Act (TDCPA), and the Texas Deceptive Trade Practices Act (DTPA). (*Id.* at 1.) Their claims arise from a state court action filed by Jenkins/Babb in state court on behalf of Wells Fargo Bank, N.A. (WFB) to collect a debt, as well as from communications exchanged by the parties prior to the lawsuit. (*See id.* doc. 49 at 5–11.)

Primary mailed Plaintiffs a letter dated August 4, 2010, (the Primary letter) notifying them that their past due “account” with WFB “ha[d] been forwarded” to Primary for collection. (doc. 56–2 at 1.) The balance due was \$17,018.68. (*Id.*) Plaintiffs were advised that if they did not dispute the “debt” within 30 days, the debt would be assumed to be valid. (*Id.*) If Plaintiffs disputed the debt, Primary would “obtain verification of the debt or obtain a copy of a judgment and mail [them] a copy of such judgment or verification.” (*Id.*) In closing, the letter stated that it was “a communication from a debt collector” and “an attempt to collect a debt.” (*Id.*)

\*2 Sometime after that, Dudley, Primary's “in-house counsel,” mailed Plaintiffs a letter dated November 11, 2010, regarding the same debt (the Dudley letter). (doc. 56–3 at 6.) The letter stated that if Plaintiffs failed to make a payment “within the next 20 days,” Dudley would recommend that a lawsuit be filed to collect the outstanding balance of

\$17,018.68. (*Id.*) In response, Plaintiffs sent Dudley a written communication demanding that Dudley and Primary “cease and desist” in their collection efforts “until validation of the alleged debt was provided.” (*Id.* at 1–5.)<sup>2</sup>

Jenkins/Babb mailed Plaintiffs a similar letter dated January 14, 2011, referencing an “account” with WFB relating to a “Personal Loan Agreement” (the Jenkins letter). (doc. 49 at 16–18.) The letter, signed by Jenkins, provided that Jenkins/Babb was “attempting to collect a debt” on behalf of WFB and unless Plaintiffs disputed the debt in writing within 30 days, the debt would “be assumed to be correct.” (*Id.*) Plaintiffs were instructed to pay the balance of \$15,954.32 “plus 13% interest ... from April 17, 2010 through [the] date of payoff.” (*Id.* at 17.) Payment was to be made “in the form of a cashier’s check or other certified funds made payable to [WFB]” and mailed to Jenkins/Babb’s business address. (*Id.*) If payment was not received within 40 days, Jenkins/Babb would “file a lawsuit to collect [the] debt.” (*Id.*) The letter was copied to Morrissey, a Primary employee. (*Id.*)

Plaintiffs received a second letter from Jenkins/Babb dated February 15, 2011, purportedly verifying the debt (the Jenkins verification). (doc. 56–4 at 1). The letter was sent in response to a communication sent by Plaintiffs “dated January 26, 2010, disputing the debt.” (*Id.*) The letter was copied to Gilbert, another Primary employee, via email. (*Id.*) Jenkins/Babb also sent Plaintiffs copies of the following documents: (1) a “Transaction Statement” listing Plaintiffs as the borrowers on a “personal loan” (the WFB loan) and detailing their payment history from March 3, 2007 to March 15, 2010; (2) a billing statement dated May 5, 2010, reflecting a past due balance of \$3,431.40 and a principal balance of \$15,954.32; (3) a “personal loan agreement”, signed by Plaintiffs on January 22, 2007; (4) a ledger sheet listing five credit card companies, including “Target National Bank” and “Chase Card Services”; and (5) copies of five cashier’s checks drawn on WFB made payable to these companies. (*Id.* at 2–29.)

All claims in the live third amended complaint against the Jenkins/Babb Defendants have been dismissed. (*See* doc. 73.) Only the claims against the Primary Defendants (Defendants) remain, they now move for summary judgment on those claims. (*See* doc. 56.) With timely-filed responses and replies, the motion is now ripe for recommendation.

## II. EVIDENTIARY OBJECTION

In their sur-reply, Plaintiffs object to the copy of the Primary letter. (*See* doc. 65.)<sup>3</sup> They argue that the affidavit of Primary’s custodian of records attached to Defendants’ response did not lay the proper foundation for the business records exception to the hearsay rule because it contains “numerous errors.”<sup>4</sup> (*Id.* at 1–2.)

\*3 The Fifth Circuit has held that the testimony of a record custodian or “other qualified witness” is sufficient to lay the foundation for a business record. *United States v. Brown*, 553 F.3d 768, 792 (5th Cir.2008); *see also United States v. Towns*, No. 11–50948, 2013 WL 1809758, at \*3 (5th Cir. Apr.30, 2013) (unpublished). “There is no requirement that the witness who lays the foundation be the author of the record or be able to personally attest to its accuracy.” *Brown*, 553 F.3d at 792 (citation and internal quotation marks omitted); *accord Jackson v. Blockbuster, Inc.*, No. CIV.A.4:09–CV–119, 2010 WL 2268086, at \*3 (E.D.Tex. June 4, 2010) (explaining that “personal knowledge of all the contents of a business record affidavit is not required”) (citing *Tex. A & M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir.2003)). Accordingly, “[a] qualified witness” is simply “one who can explain the record keeping system of the organization and vouch that the requirements of Rule 803(6) are met.”<sup>5</sup> *Brown*, 553 F.3d at 792 (quotation omitted); *see also Towns*, 718 F.3d 404, 2013 WL 1809758, at \*3 (“A proper foundation is laid for business records simply by an affidavit that attests to the requisite elements of FRE 803(6).”) The inquiry focuses on whether “the witness’s testimony [is] sufficient to support the document’s reliability.” *Albright v. IBM Lender Bus. Process Servs., Inc.*, No. 4:11–CV–1045, 2013 WL 1089053, at \*2 (S.D.Tex. Mar.14, 2013) (citing *Travland v. Ector Cnty., Texas*, 39 F.3d 319, at \*4 (5th Cir.1994) (per curiam)).

Here, the custodian’s affidavit states that she is “the custodian of records of [Primary]” and is “personally acquainted with the facts” stated in her affidavit. (doc. 62–1 at 1.) She explains that the Primary letter and a document titled “Client Audit Report”—to which Plaintiffs did not object—meet the requirements of Rule 803(6).<sup>6</sup> (*Id.* at 1–2.) She affirms that the letter “was prepared by [Primary] and placed in an envelope addressed to” Plaintiffs at their home address, “was picked up by [Primary’s] courier[,] and taken to a post office maintained and operated by the [USPS] ... where it was

delivered into the possession of the USPS for mailing.” (*Id.* at 2.) She also affirms that Primary’s “records”, i.e., the client status report, “do not indicate that the letter was returned [to Primary] undeliverable.” (*Id.*)

Because the custodian’s affidavit shows the requirements of Rule 803(6) are satisfied and evidences the “reliability” of the Primary letter, it is a “qualifying affidavit” and therefore properly lays the foundation for the business records exception. *See Brown*, 553 F.3d at 792; *see also Albright*, 2013 WL 1089053, at \*2. Accordingly, Plaintiffs’ evidentiary objection is overruled and the copy of the Primary letter is admitted for purposes of Defendants’ summary judgment motion.

### III. SUMMARY JUDGMENT STANDARD

\*4 Summary judgment is appropriate when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). “[T]he substantive law [determines] which facts are material.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists “if the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Id.* The movant must inform the court of the basis of its motion and identify the evidence that shows there are no genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Once the movant makes this showing, the non-movant must then direct the court’s attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. To carry this burden, the non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The non-movant must show that the evidence is sufficient to support a resolution of the factual issue in her favor. *Anderson*, 477 U.S. at 249.<sup>7</sup>

All of the evidence must be viewed in a light most favorable to the motion’s opponent. *Anderson*, 477 U.S. at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158–59, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)). Yet, neither conclusory allegations nor unsubstantiated assertions satisfy the non-

movant’s summary judgment burden. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir.1992). Generally, the courts liberally construe the pleadings of a *pro se* plaintiff. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam); *Miller v. Stanmore*, 636 F.2d 986, 988 (5th Cir.1981); *Martin v. United States Post Office*, 752 F.Supp. 213, 218 (N.D.Tex.1990). However, the courts have no obligation under Fed.R.Civ.P. 56 “to sift through the record in search of evidence to support a party’s opposition to summary judgment.” *Adams v. Travelers Indem. Co.*, 465 F.3d 156, 164 (5th Cir.2006) (quoting *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998)). Instead, the party opposing summary judgment must “identify specific evidence in the record” that supports the challenged claims and “articulate the precise manner in which that evidence supports [those] claim[s].” *Ragas*, 136 F.3d at 458 (citing *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir.1994)). Summary judgment in favor of the movant is proper if, after adequate time for discovery, the motion’s opponent fails to establish the existence of an element essential to her case and as to which she will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322–23.

### IV. FDCPA

Defendants move for summary judgment on all of Plaintiffs’ FDCPA claims, arguing that the WFB loan was not a “consumer debt” for purposes of the Act because Plaintiffs have denied its existence. (doc. 56–1 at 4.) They also argue that Plaintiffs are unable to show that the loan proceeds were used primarily for personal, family, or household purposes.<sup>8</sup> (*Id.*)

\*5 The FDCPA was enacted to eliminate “abusive, deceptive, and unfair debt collection practices by debt collectors.” 15 U.S.C. § 1692(e). It also seeks to “ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers.” *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S.Ct. 1605, 1608, 176 L.Ed.2d 519 (2010) (citing 15 U.S.C. § 1692(e)). Among other things, the FDCPA prohibits debt collectors from engaging “in any conduct the natural consequence of which is to harass, oppress, and abuse,” and from making “false, deceptive, and misleading misrepresentations in connection with debt collection.” 15 U.S.C. §§ 1962d and 1962e.

Notably, “[t]he FDCPA applies only to debts as they are defined in the statute.” *Vick v. NCO Fin. Sys., Inc.*, No. 2:09–CV–114–TJW–CE, 2011 WL 1195941, at \*4 (E.D.Tex. Mar.7, 2011), *rec. adopted*, 2011 WL 1157692 (E.D.Tex. Mar.28, 2011). The statute defines a “debt” as “any obligation or alleged obligation of a consumer<sup>9</sup> to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes.” 15 U.S.C. § 1692a(5). “Whether an obligation is a ‘debt’ within the meaning of the statute is ‘a question of law for the Court’s determination.’ ” *Fleming v. Pickard*, No. C07–0223–JCC, 2007 WL 3129575, at \*2 (W.D.Wash. Oct.22, 2007), *aff’d*, 581 F.3d 922 (9th Cir.2009); *Graham v. Manley Deas Kochalski LLC*, No. 08–CV–120, 2009 WL 891743, at \*7, \*10 (S.D. Ohio Mar.31, 2009) (citation omitted). “It is a plaintiff’s burden to show that the obligation at issue was incurred ‘primarily for personal, family, or household purposes.’ ” *Hunter v. Washington Mut. Bank*, No. 2:08–CV–069, 2012 WL 715270, at \*2 (E.D.Tenn. Mar.1, 2012) (citations omitted); *Graham*, 2009 WL 891743, at \*4.

#### A. Applicable Standard

The Fifth Circuit has not specifically addressed the applicable standard for construing the term “consumer debt” in cases involving the FDCPA. “Due to the small number of cases interpreting ‘debt’ under the FDCPA, some federal courts [have used] the standards under the Truth in Lending Act (TILA)<sup>10</sup> to determine whether a debt is primarily for personal, family, or household purposes.” *Graham*, 2009 WL 891743, at \*7 (citing *Bloom v. I.C. Sys., Inc.*, 972 F.2d 1067, 1068 (9th Cir.1992)); *see also Hetherington v. Allied Int’l Credit Corp.*, No. CIV H–07–2104, 2008 WL 2838264, at \*3 (S.D.Tex. July 21, 2008) (looking to the Fifth Circuit’s interpretation of a “consumer credit transaction” under TILA in *Riviere v. Banner Chevrolet, Inc.*, 184 F.3d 457, 461–63 (5th Cir.1999) to determine whether the alleged obligation was a “consumer debt” under the FDCPA); *Perk v. Worden*, 475 F.Supp.2d 565, 569 (E.D.Va.2007) (in determining whether the debt at issue was “incurred for personal use” for purposes of the FDCPA, the court followed the Fifth Circuit’s interpretation of a “consumer credit transaction” under TILA in *Tower v. Moss*, 625 F.2d 1161, 1166 (5th Cir.1980) and *Riviere*, 184 F.3d at 461–63). These courts have looked to TILA for guidance because both TILA and the FDCPA contain “analogous” definitions of a “consumer” transaction, i.e., both statutes define it as a transaction in

which the underlying obligation is incurred for “personal, family, or household purposes.” *See Bloom*, at 1068; *Perk*, 475 F.Supp.2d at 569; *see also* 15 U.S.C. §§ 1692a(5), 1602(i); 12 C.F.R. § 226.2(a)(12) (2012) (Regulation Z, promulgated by the Federal Reserve Board to implement TILA, provides that “consumer credit” is “credit offered or extended to a consumer primarily for personal, family, or household purposes”).

\*6 The Court agrees that the case law interpreting TILA’s definition of a “consumer credit transaction” is instructive in construing “consumer debt” under the FDCPA. In addition to their analogous language, TILA and the FDCPA share a common purpose: both are remedial statutes that seek to protect individuals as opposed to business entities. *See Fairley v. Turan–Foley Imports, Inc.*, 65 F.3d 475, 479 (5th Cir.1995), (“The purpose of the TILA is to protect the *consumer* from inaccurate and unfair credit practices.”) (citing 15 U.S.C. § 1601(a)) (emphasis added); *see also Miller v. McCalla, Raymer, Padrick, Cobb, Nichols, & Clark, L.L.C.*, 214 F.3d 872, 875 (7th Cir.2000) (explaining that the FDCPA “regulates the debt collection tactics employed against *personal* borrowers on the theory that they are likely to be unsophisticated about debt collection and thus prey to unscrupulous collection methods”) (emphasis in original);<sup>11</sup> *Burns v. First Am. Bank*, No. 04 C 7682, 2005 WL 1126904, at \*4 (N.D.Ill. Apr.28, 2005) (noting that TILA and the FDCPA “are designed to protect consumers and appear under the capacious umbrella of the Consumer Credit Protection Act”) (citation and internal quotation marks omitted).

In classifying a credit transaction under TILA, the Fifth Circuit has held that courts “must examine the transaction as a whole and the purpose for which the credit was extended in order to determine whether th[e] transaction was primarily consumer or commercial in nature.” *Riviere*, 184 F.3d at 462 (citing *Tower*, 625 F.2d at 1165). Courts must focus on “the substance of the transaction ..., rather than the form alone.” *Id.*; *Poe v. First Nat. Bank of DeKalb Cnty.*, 597 F.2d 895, 896 (5th Cir.1979) (per curiam). Although the documents memorializing the transaction are relevant, these are not dispositive. *See Riviere*, 184 F.3d at 462 (“That the documents relevant to this transaction label it as ‘consumer’ is not dispositive.”). For example, in *Poe*, the plaintiffs obtained three loans on behalf of their business and later consolidated the loans into the single loan that was the subject of the lawsuit, signed personal guarantees on the loan, and secured the loan by granting a lien on their residence. *Poe*, 597 F.2d at 896. The Fifth Circuit affirmed summary judgment for

the defendant lender on the plaintiffs' TILA non-disclosure claim, holding that despite the plaintiffs' personal guarantees and the lien on their home, the loan was commercial rather than consumer in nature because the funds from "each transaction" were used to "finance a corporation and its business." *Id.* By contrast, in *Tower*, the Court found that the home improvement loan at issue was primarily "personal" in nature and therefore a consumer credit transaction under TILA even though the plaintiff was leasing the mortgaged property; it found significant that the plaintiff had "resided in the [ ] home for a long period of time, visited that home periodically over the years, [ ] fully expect[ed] to reside in the home upon her retirement [,] ... [and] the intervening lessee [was] staying there largely in a custodial role paying nominal rent"). As these cases demonstrate, regardless of the loan's structure, the borrower's ultimate use of the loan proceeds is what constitutes the "substance" of the transaction. *See id.*; *see also Garcia v. LVNF Funding*, No. A-08-CA-514-LY, 2009 WL 3079962, at \*3 (W.D.Tex. Sept.18, 2009) (citation omitted).

#### B. Application of the TILA Standard

\*7 Where as here, the non-movant bears the burden of proof, the movant's burden may be discharged by pointing out the absence of evidence to support the non-movant's case. *See Celotex*, 477 U.S. at 325. By pointing to the lack of evidence to show that the WFB loan was used primarily for personal, family, or household purposes, Defendants have met their initial summary judgment burden. *See id.* at 323. To defeat the motion for summary judgment, Plaintiffs must now identify facts that support this essential element of their FDCPA claims and establish a genuine issue of material fact for trial. *See Vela v. City of Houston*, 276 F.3d 659, 666 (5th Cir.2001). ("[I]f the non-movant fails to present sufficient facts to support an essential element of his claim, summary judgment is appropriate.") (citing *Celotex*, 477 U.S. at 322-23.)

In their third amended complaint, Plaintiffs state only that the "obligation" "ar[ose] from a transaction in which the money, property, insurance, or services that are the subject of the transaction were incurred primarily for personal, family, or household purposes." (doc. 49 at 5.) They argue in their verified response brief that the obligation is a consumer debt because it arose from a "personal loan agreement," and because the dunning letters "were not addressed to a business but instead to the Plaintiffs at their residence." (doc. 61 at 7.) The label of "personal loan" is conclusory. As discussed, the documents relating to the lending transaction

are not dispositive. *See Riviere*, 184 F.3d at 462. Even if considered, the document titled "Personal Loan Agreement" Plaintiffs executed does not provide any indication as to how the loan proceeds were used. (*See* doc. 56-4 at 7-15.) Likewise, Plaintiffs' allegation that the WFB loan is a consumer debt because Defendants mailed the dunning letters to their home address is not determinative. The mere fact that communications regarding a debt are mailed to the plaintiff's home address does not by itself determine the debt's character. *See Holman v. W. Valley Collection Servs., Inc.*, 60 F.Supp.2d 935, 936 (D.Minn.1999) (explaining that "[l]etters delivered to [a plaintiff's] home do not change Congress's explicit words" as stated in 15 U.S.C. § 1692a(5)).

Plaintiffs also point to attachments to Defendants' summary judgment motion consisting of copies of a bank ledger and five cashier's checks made payable to third parties, and they assert that "the funds from the debt were used to consolidate [their] existing consumer credit accounts." (doc. 61 at 7; *see also* doc. 56-4 at 17-19.) Courts' approaches differ on characterizing a loan that was obtained to refinance or consolidate existing credit obligations. *See Graham*, 2009 WL 891743, at \*7 (describing at least three different approaches to determine this issue). In *Poe*, the Fifth Circuit focused on the three original loans that the current loan (the loan at issue) was consolidating to determine the character of the current loan. *See Poe*, 597 F.2d at 896. It found that the current loan was commercial because the existing, consolidated loans were commercial since they had been used "to finance the [plaintiffs'] corporation." *Id.*

\*8 Here, given Plaintiffs' statement that they used the WFB loan proceeds solely to consolidate existing "consumer" credit card debt, under a "substance over form" analysis, it is still their burden to produce summary judgment evidence sufficient to create a genuine issue of material fact that they used the alleged credit cards (i.e., the existing debt being consolidated) for personal, family, or household purposes. *See Hunter*, 2012 WL 715270, at \*2. In the case of accounts that are subject to indefinite transactions, such as credit cards and deposit accounts, what matters is the "nature of the debt that was [actually] incurred, and not the purpose for which the [a]ccount was [originally] opened." *Vick*, 2011 WL 1195941, at \*5; *Hetherington*, 2008 WL 2838264, at \*3-4. In *Hetherington*, although the plaintiff's business checking account was purportedly opened for commercial purposes, he submitted bank statements showing "that there were a significant number of transactions from the [ ] Account for expenses such as gas, groceries, [family] meals [ ], and other

personal items.” *Hetherington*, 2008 WL 2838264, at \*4. The court held that this evidence established triable issues of material fact as to whether the insufficient funds sought to be collected by the defendant bank constituted a “consumer debt” under the FDCPA. *Id.* In *Vick*, the court likewise found that the plaintiffs created an issue of material fact by submitting evidence showing that they made purchases with their corporate credit card that were primarily for personal, family, or household purposes. *Vick*, 2011 WL 1195941, at \*5. By contrast, in *Bloom* (cited with approval by the Fifth Circuit in *Riviere*, 184 F.3d at 462), the plaintiff obtained a \$5,000 loan from a friend (the defendant) and used the funds as venture capital for his software company. *Bloom*, 972 F.2d at 1068. The Ninth Circuit affirmed summary judgment for the defendant, holding that the obligation was not a “consumer debt” because the plaintiff used the funds for a business purpose. *Id.* at 1068–69. Citing *Bloom*, the court in *Holman* held that because a “credit card processing unit is simply not used primarily for personal, family, household purposes,” “[e]ven if [the] plaintiff’s [personal] credit card was used to purchase the device,” the resulting obligation was “not covered by the [FDCPA].” *Holman*, 60 F.Supp.2d at 936.

Plaintiffs have failed to bring forth any evidence showing that they used the alleged credit cards for purchases that were primarily for personal, family, or household purposes. Rule 56’s allowance for affidavits opposing summary judgment is not intended to “replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.” *Lujan v. Natl. Wildlife Federation*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990) (citations omitted). To preclude summary judgment, Plaintiffs cannot rely on the bare allegations in their complaint, but must come forward with evidence outside the pleadings sufficient to create a factual dispute regarding the issue of whether the WFB loan was a “consumer debt” as contemplated by the FDCPA. *See Celotex*, 477 U.S. at 324; *Hunter*, 2012 WL 715270, at \*2. As discussed, when a moving party has carried its summary judgment burden, the non-movant must do more than simply create “some metaphysical doubt as to the material facts” and “must come forward with specific facts showing that there is a genuine issue for trial.” *Matsushita*, 475 U.S. at 586–587. Plaintiffs’ verified response simply restates their bare conclusory assertion that they obtained the WFB loan for consumer purposes, but it provides no additional facts that could lead a rational trier of fact to find in their favor on this issue. *See Browne v. Portfolio Recovery Associates, Inc.*, No. CIV.A. H–11–02869, 2013 WL 871966, at \*4 (S.D.Tex. Mar.7, 2013) (“[W]ithout at

least some evidence that this particular alleged debt meets the [FDCPA] statutory definition, plaintiff cannot establish a genuine dispute of material fact as to his consumer status.”) Because there is no genuine issue of material fact with respect to whether the WFB loan was a consumer debt, Defendants’ motion for summary judgment should be granted on Plaintiffs’ claims under the FDCPA.

## V. STATE LAW CLAIMS

\*9 Defendants also seek summary judgment on Plaintiffs’ claims under the TDCPA and the DTPA. (doc. 56–1 at 12–15.)

### A. Supplemental Jurisdiction

Pursuant to § 1367(a), federal courts “have supplemental jurisdiction over all other claims that are so related to claims in the action within [its] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. § 1367(a). In essence, § 1367(a) grants courts the “power to hear a state law claim under pendent or supplemental jurisdiction if (1) the federal issues are substantial, even if subsequently decided adverse to the party claiming it; and (2) the state and federal claims derive from a common nucleus of operative fact.” *McKee v. Texas Star Salon, LLC*, No. CIV.A.3:06–CV–879BH, 2007 WL 2381246, at \*4 (N.D.Tex. Aug.21, 2007) (citations omitted); *see also United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

When all federal claims are dismissed prior to trial, the general rule in this Circuit is for the district court to decline exercising jurisdiction over the remaining state law claims. *Nagy v. George*, No. 3:07–CV–368–K, 2007 WL 2122175, at \*10 (N.D.Tex. July 23, 2007), *aff’d*, 286 F. App’x 135 (5th Cir.2008); *LaPorte Constr. Co. v. Bayshore Nat’l Bank*, 805 F.2d 1254, 1257 (5th Cir.1986); *see also* 28 U.S.C. § 1367(c)(3).<sup>12</sup> Nonetheless, this rule is “neither mandatory nor absolute.” *Smith v. Amedisys Inc.*, 298 F.3d 434, 447 (5th Cir.2002) (citation omitted). Rather, district courts are given wide discretion in deciding whether to exercise jurisdiction under such circumstances. *See Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir.2000); *Noble v. White*, 996 F.2d 797, 799 (5th Cir.1993); *see also United Mine Workers*, 383 U.S. at 726 (“[P]endent jurisdiction is a doctrine of discretion, not of [a] plaintiff’s right.”). In determining whether to exercise supplemental jurisdiction, courts should

consider issues of judicial economy, convenience, and fairness to the litigants. *LaPorte Constr. Co.*, 805 F.2d at 1257; Nagy, 2007 WL 2122175, at \*10.

Here, all three factors weigh in favor of retaining jurisdiction over Plaintiffs' state law claims under the TDCPA and DTPA. First, Plaintiffs' state claims arise from the same "common nucleus of operative facts" as their federal claims, namely, Defendants' alleged conduct in attempting to collect a debt from Plaintiffs on behalf of WFB. Requiring Plaintiffs to litigate these claims in state court would "necessarily require consideration by two distinct courts of the same operative facts" and the "same legal issues." See *McKee*, 2007 WL 2381246, at \*4. Moreover, because the action has been pending in this Court for nearly two years and Plaintiffs have amended their complaint three times, the Court has spent a substantial amount of time and resources reviewing the pleadings and researching the legal issues involved, and has become familiar with the merits of their claims. See *McCall v. Peters*, No. CIV.A. 3:00-CV-2247-D, 2003 WL 21488211, at \*12 (N.D.Tex. May 12, 2003), *aff'd*, 108 F. App'x 862 (5th Cir.2004) (in determining whether to exercise pendent or supplemental jurisdiction, the court may consider factors such as the amount of time and resources that it has spent adjudicating the case). Notably, the Court has already exercised supplemental jurisdiction over Plaintiffs' state law claims against the Jenkins/Babb Defendants. See *Garcia v. Jenkins/Babb LLP*, No. 3:11-CV-3171-N-BH, 2013 WL 3789830, at \*1 (N.D.Tex. July 22, 2013) (accepting findings and recommendations of U.S. Magistrate Judge dismissing with prejudice all of Plaintiffs' claims against the Jenkins/Babb Defendants). The Court should therefore exercise supplemental jurisdiction over Plaintiffs' claims under the TDCPA and the DTPA against the Primary Defendants and review the claims on the merits.

#### **B. TDCPA**

\*10 Defendants seek summary judgment on Plaintiffs' claims under the TDCPA<sup>13</sup> on grounds that Plaintiffs have failed to show that the WFB loan is a "consumer debt" as defined by the TDCPA. (doc. 56-1 at 13.)

"The TDCPA prohibits debt collectors from using various forms of threatening, coercive, harassing or abusive conduct to collect debts from consumers." *Merryman v. JPMorgan Chase & Co.*, No. 3:12-CV-2156-MBH, 2012 WL 5409735, at \*4 (N.D.Tex. Oct.12, 2012), *rec. adopted*, 2012 WL 5409749 (N.D.Tex. Nov.5, 2012) (citation omitted). The

TDCPA "applies only to debts incurred by a 'consumer,' defined as 'an individual who owes or allegedly owes a debt created primarily for personal, family, or household purposes.'" *McDonald v. Bennett*, 674 F.2d 1080, 1089 (5th Cir.1982); *see also* Tex. Fin.Code §§ 392.001(2), (5). Because "consumer debt" has the same definition in the TDCPA as in the FDCPA, the same analysis may be applied to both statutes. See *Hetherington*, 2008 WL 2838264, at \*3-4 (explaining that whether an obligation is a "consumer debt" under either the FDCPA or the TDCPA is determined by the borrower's "use of [the] loan proceeds"). As with the FDCPA, "[w]hat legally constitutes a debt under [the TDCPA]" is determined "as a matter of law." *Dickey v. Healthcare Recoveries, Inc.*, No. 03-97-00351-CV, 1998 WL 20728, at \*2 (Tex.App.-Austin Jan.23, 1998, no pet.) (mem.op.).

To meet their summary judgment burden, Defendants argue that there is no evidence in the record showing that Plaintiffs obtained the WFB loan for personal, family, or household purposes. (doc. 56-1 at 13.) By directing the Court's attention to the absence of evidence supporting an essential element of Plaintiffs' TDCPA claims, on which they will bear the burden of proof at trial, Defendants have properly discharged their summary judgment burden. See *Celotex*, 477 U.S. at 325.

The burden now shifts to Plaintiffs to identify evidence sufficient for a rational trier of fact to find that the WFB loan is a "consumer debt" under the TDCPA. As previously discussed, given Plaintiffs' allegation that they used all of the loan proceeds to consolidate existing consumer credit card debt, they must proffer evidence sufficient to show that they used those cards primarily for personal, family, or household purposes. Because they have failed to direct the Court's attention to any such evidence in the record, Defendants' motion for summary judgment should be granted with respect to Plaintiffs' claims under the TDCPA.

#### **C. Tie-in Claims under the DTPA**

Defendants next move for summary judgment on Plaintiffs' claims under the "tie-in" provision of the DTPA arguing that Plaintiffs are not "consumers" for purposes of the DTPA.<sup>14</sup> (doc. 56-1 at 13-15.)

"The TDCPA is a 'tie-in' statute to the [DTPA]." *Guajardo v. GC Servs., LP*, 498 F. App'x 379, 382 (5th Cir.2012) (per curiam); *see also* Tex. Fin.Code Ann. § 392.404(a) ("A violation of this chapter is a deceptive trade practice under

Subchapter E, Chapter 17 [of the DTPA] and is actionable under that subchapter.”); Tex. Bus. & Com.Code § 17.50(h). “To succeed under such a tie-in claim, however, the claimant must show that he is a ‘consumer’ as defined in the DTPA.” *Garcia*, 2013 WL 3789830, at \* 12 (alterations and quotations omitted); *Bray v. Cadle Co.*, No. CIV.A. 4:09–CV–663, 2010 WL 4053794, at \*9 (S.D.Tex. Oct.14, 2010) (explaining that all Texas state and federal courts addressing the issue “seem to have concluded that ‘the party bringing a claim under the DTPA for a violation of a tie-in statute must still satisfy the requirement of being a ‘consumer’ ” under the DTPA) (collecting cases).

\*11 The DTPA defines “consumer” in relevant part, as “an individual ... who seeks or acquires by purchase or lease, any goods or services.” Tex. Bus. & Com.Code Ann. § 17.45(4) (West 2007). To be a consumer, “a person must have sought or acquired goods or services by purchase or lease” and those goods or services “must form the basis of the complaint.” *Hurd v. BAC Home Loans Servicing, LP*, 880 F.Supp.2d 747, 765 (N.D.Tex.2012) (citing *Cameron v. Terrell & Garrett*, 618 S.W.2d 535, 539 (Tex.1981)). Because the lending of money is not a good or service, a borrower whose sole objective is to get a loan is not a consumer under the DTPA. *Walker v. Fed. Deposit Ins. Corp.*, 970 F.2d 114, 123 (5th Cir.1992) (citing *Riverside Nat'l Bank v. Lewis*, 603 S.W.2d 169, (Tex.1980)). A borrower may be a consumer if he seeks to acquire goods or services with the loan, and the goods or services form the basis of his DTPA complaint. *See id.* (citing to *Flenniken v. Longview Bank & Trust Co.*, 661 S.W.2d 705 (Tex.1983) and *Knight v. Int'l Harvester Credit Corp.*, 627 S.W.2d 382 (Tex.1982)).

To meet their summary judgment burden, Defendants contend there is no evidence showing that Plaintiffs “sought or acquired goods or services by purchase or lease from Defendants or that any goods or services acquired form the basis of their complaint.” (doc. 56–1 at 17.) Defendants have discharged their burden by pointing to the lack of evidence supporting an essential element of Plaintiffs' tie-in claims on which they will bear the burden of proof. *See Celotex*, 477 U.S. at 325.

The burden now shifts to Plaintiffs to proffer evidence sufficient for a reasonable jury to find they are consumers under the DTPA. Not only do Plaintiffs fail to produce any evidence showing they obtained the WFB loan to seek or acquire goods or services that now form the basis of their complaint, but they even state they obtained the loan to “consolidate existing consumer credit accounts.” (doc. 61 at 7.) Given their concession that their sole objective was to consolidate existing debt rather than to finance the purchase or lease of any goods or services, Plaintiffs have failed to meet their burden to establish a genuine material fact issue with respect to their “consumer” status under the DTPA. Defendants' motion for summary judgment on Plaintiffs' tie-in claims under the DTPA should therefore be granted.

## VI. RECOMMENDATION

Defendants' motion for summary judgment should be **GRANTED**, and all of Plaintiffs' claims against them should be **DISMISSED with prejudice**.

**SO RECOMMENDED** on this 29th day of October, 2013.

### Footnotes

- 1 Gannon was subsequently dismissed pursuant to a joint stipulation of dismissal. (*See* doc. 42.)
- 2 The communication was a standard, pre-printed form listing several consumer rights under the FDCPA, Regulation Z, and other federal consumer protection laws. (*See* doc. 56–3 at 1–5.) The date at the top of the letter is “November 19, 2009,” but the signature line and notarization portion show a date of “November 19, 2010.” (*See id.* at 1, 5.) Plaintiffs assert, without offering any evidence in support, that their communication was delivered by the U.S. Postal Service (USPS) on November 26, 2010, but they never received “any response” from either Dudley or Primary. (doc. 49 at 6–7.)
- 3 Plaintiffs' motion for leave to file a sur-reply was granted by order dated May 29, 2013 (doc. 64).
- 4 Plaintiffs claim the affidavit “fails to state”: (1) that the custodian “was employed by [Primary] at the time” the Primary letter was prepared and mailed; (2) the custodian's position and her “duties, responsibilit[ies], and authority” at the time; (3) that the custodian “personally prepared the letter and placed it into an envelope addressed” to Plaintiffs; (4) the “exact date those actions allegedly took place”; and (5) that the custodian “accompanied [Primary's] courier to the post office to witness” his or her mailing the letter “firsthand.” (doc. 63–1 at 1–2.)

- 5 These requirements are: (1) that the document record “an act, event, condition, opinion, or diagnosis;” (2) the record was made “at or near the time” those events or conditions took place; (3) the record was made “by, or from information transmitted by, someone with knowledge;” (4) “the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;” and (5) “making the record was a regular practice of that activity.” Fed.R.Evid. 803(6).
- 6 The custodian affirms that the letter and client audit report were “records from [Primary];” were kept by Primary “in the regular course of business;” “it was the regular course of business of [Primary] for an employee or representative ... with knowledge of the act, event, condition, opinion, or diagnosis recorded to make the record[s] or transmit the information thereof to be included in [them];” they were “made at or near the time or reasonably soon thereafter;” and the records “are the original or exact duplicates of the original.” (doc. 62-1 at 1-2.)
- 7 “The parties may satisfy their respective burdens by ‘citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ... admissions, interrogatory answers, or other materials.’ ” *Rooters v. State Farm Lloyds*, 428 F. App'x 441, 445 (5th Cir.2011) (citing Fed.R.Civ.P. 56(e)(1)).
- 8 Plaintiffs may sue under the FDCPA even if the WFB loan did not belong to them. The FDCPA “is designed to protect consumers who have been victimized by unscrupulous debt collectors, *regardless of whether a valid debt actually exists.*” *McCartney v. First City Bank*, 970 F.2d 45, 47 (5th Cir.1992) (citing *Baker v. G.C. Serv. Corp.*, 677 F.2d 775, 777 (9th Cir.1982)) (emphasis added); *accord Azar v. Hayter*, 66 F.3d 342 (11th Cir.1995) (holding that a plaintiff's ability to recover under the FDCPA has “nothing to do with whether the underlying debt is valid” because the statute regulates “the method of collecting the debt”); *see also* H.R.Rep. No. 131, 95th Cong. 1st Sess. 8 (“This bill also protects people who do not owe money at all. In the collector's zeal, collection efforts are often aimed at the wrong person either because of mistaken identity or mistaken facts.”). Only Defendants' second argument is therefore discussed in detail.
- 9 A “consumer” is defined as “any natural person obligated or allegedly obligated to pay any debt.” 15 U.S.C. § 1692a(3).
- 10 TILA, 15 U.S.C. § 1601 *et seq.*, was enacted as part of the Consumer Credit Protection Act of 1968. *See* Pub.L. 90-321, Title I, § 102, May 29, 1968, 82 Stat. 146. Among other things, TILA requires lenders to make numerous disclosures when conducting a “consumer credit transaction”, including the amount financed, the finance charge, the total sale price, and information regarding debt cancellation. *See* 15 U.S.C. § 1639(a); 12 C.F.R. § § 226.1(a), 226.17-18.
- 11 Both statutes exempt commercial transactions from their reach. TILA contains an explicit exemption for “[c]redit transactions involving extensions of credit primarily for business, commercial, or agricultural purposes.” 15 U.S.C. § 1603(1). Similarly, the FDCPA's legislative history states that the Act “applies only to debts contracted by *consumers* for *personal, family, or household purposes*; it has no application to the collection of commercial accounts.” Consumer Credit Protect Act, S.Rep. No. 95-382, at 3 (1977), *reprinted in* 1977 U.S.Code Cong. & Admin. News 1695 (emphasis added).
- 12 Under § 1367(c), a court may decline to exercise supplemental jurisdiction over a state claim if:
- (1) the claim raises a novel or complex issue of state law,
  - (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
  - (3) the district court has dismissed all claims over which it has original jurisdiction, or
  - (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c).
- 13 Plaintiffs allege that Defendants engaged in “unfair and unconscionable means ... to collect a debt” under § 392.303(a) (2) and “made false, deceptive, or misleading representations” under §§ 392.304(a)(8) and 392.304(a)(19) of the TDCPA. (doc. 49 at 5-13.) They assert their § 392.304(a)(19) claim as a stand-alone claim under the TDCPA and attempt to recover for all three claims under the DTPA. (*See id.* at 6, 8, 12-13.)
- 14 Plaintiffs attempt to recover for their TDCPA claims under §§ 392.303(a)(2), 392.304(a)(8), and 392.304(a)(19) pursuant to Tex. Bus. & Com.Code § 17.50(h), the “tie-in” provision of the DTPA. (*See* doc. 49 at 6, 8, 12-13.)

2014 WL 7440314

Only the Westlaw citation is currently available.

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OPINION

Court of Appeals of Texas,  
San Antonio.

Norris J. DeVoll, Appellant

v.

Rebecca Demonbreun and  
William Dowds, Appellees

No. 04-14-00116-CV | Delivered  
and Filed December 31, 2014

Synopsis

**Background:** Judgment creditors brought fraudulent transfer action against judgment debtor's wife and others, arising out of the transfer of a partnership interest that was the subject of a turnover order. Debtor filed petition in intervention, asserting various claims against creditors. The 285th Judicial District Court, Bexar County, Antonia Arteaga, J., granted creditors' motion to dismiss the petition in intervention. Debtor appealed.

**Holdings:** The Court of Appeals, Rebeca C. Martinez, J., held that:

[1] debtor's claims for violation of the Texas Debt Collection Act (TDCA) and the Texas Deceptive Trade Practices Act (DTPA) had no basis in law, and

[2] debtor's fraud claim had no basis in law.

Affirmed.

West Headnotes (5)

[1] Appeal and Error

Cases Triable in Appellate Court

The determinations of whether a cause of action has any basis in law and in fact, so as to avoid dismissal under civil rule governing dismissal of a baseless cause of action, are legal questions that Court of Appeals reviews de novo, based on the allegations of the live petition and any attachments thereto. Tex. R. Civ. P. 91a.

Cases that cite this headnote

[2] Appeal and Error

Striking out or dismissal

In conducting its de novo review as to whether a cause of action has any basis in law and in fact, for purposes of civil rule governing dismissal of a baseless cause of action, Court of Appeals must construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact. Tex. R. Civ. P. 91a.

Cases that cite this headnote

[3] Antitrust and Trade Regulation

Persons and transactions covered

Judgment debtor's claims against judgment creditors for violation of the Texas Debt Collection Act (TDCA) and the Texas Deceptive Trade Practices Act (DTPA) arising out of their efforts to collect the judgment, which claims were asserted in debtor's petition in intervention filed in creditors' fraudulent transfer action against debtor's wife and others, had no basis in law, warranting dismissal of the claims pursuant to civil rule governing dismissal of baseless claims; debtor failed to allege facts that would show that the judgment was a consumer debt or that he was a consumer as to goods or services provided by creditors. Tex. Bus. & C. Code § 17.50(a)(1); Tex. Fin. Code Ann. § 392.001; Tex. R. Civ. P. 91a.

Cases that cite this headnote

[4] Fraud

↔ Reliance on Representations and Inducement to Act

### Fraud

↔ Injury and causation

Judgment debtor's fraud claim against judgment creditors arising out of their alleged creation of a forged court order, which claim was asserted in debtor's petition in intervention filed in creditors' fraudulent transfer action against debtor's wife and others, had no basis in law, warranting dismissal of the claim pursuant to civil rule governing dismissal of baseless claims; debtor did not allege that he relied on the document in question or that he suffered damages as a result of its filing. Tex. R. Civ. P. 91a.

Cases that cite this headnote

### [5] Fraud

↔ Elements of Actual Fraud

The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Cases that cite this headnote

From the 285th Judicial District Court, Bexar County, Texas, Trial Court No. 2014-CI-01296, Honorable Antonia Arteaga, Judge Presiding

### Attorneys and Law Firms

Norris J. Devoll, San Antonio, TX, for Appellant.

Charles A. Riley, Law Office of Charles A. Riley, P.C., San Antonio, TX, for Appellee.

Sitting: Catherine Stone, Chief Justice, Karen Angelini, Justice, Rebeca C. Martinez, Justice

### OPINION

Opinion by Rebeca C. Martinez, Justice

\*1 Norris J. DeVoll appeals the trial court's order granting Rebecca Demonbreun's and Williams Dowds's "Motion to Dismiss Plea in Intervention" pursuant to Rule 91a of the Texas Rules of Civil Procedure. We affirm the judgment of the trial court.

### BACKGROUND

In February 2010, Rebecca Demonbreun and William Dowds (hereinafter, collectively referred to as Demonbreun) were awarded judgment in the amount of \$96,540.12 against DeVoll. *See DeVoll v. Demonbreun*, No. 04-10-00375-CV, 2012 WL 983107 (Tex.App.—San Antonio March 21, 2012, pet. denied) (mem.op.). Demonbreun later discovered that DeVoll owned non-exempt property subject to execution, including his community property interest in the 206 Camedia Partnership. The 206 Camedia Partnership was held in Paulette DeVoll's name; Paulette is DeVoll's wife. Demonbreun filed an Application for Turnover Relief, seeking to have DeVoll turn over his community property interest in the 206 Camedia Partnership. In August 2011, the trial court signed a turnover order that included Norris's undivided one-half interest in the income and receipts from the 206 Camedia Partnership. The turnover order also ordered DeVoll and Paulette not to transfer or dispose of any of Norris's community property described in the order. DeVoll and Paulette appealed the turnover order, and this court affirmed it. *See DeVoll v. Demonbreun*, No. 04-11-00775-CV, 2012 WL 5873698, at \*4 (Tex.App.—San Antonio Nov. 21, 2012, no pet.) (mem.op.).

Thereafter, Demonbreun sued Paulette, Gene DeVoll, and the 206 Camedia Partnership seeking damages related to the fraudulent transfer of the 206 Camedia Partnership by Paulette to Gene DeVoll to avoid the effect of the turnover order; Demonbreun also sought a temporary restraining order and temporary and permanent injunction against Gene DeVoll to prevent further disposition of the property and/or partnership interest. DeVoll, in turn, filed a petition in intervention, asserting the following claims against Demonbreun: (1) unreasonable collection efforts and violation of the Texas Debt Collection Act; (2) fraud/filing of

fraudulent court record or claim against a property interest; (3) violation of the Deceptive Trade Practices Act; (4) mental anguish; (5) loss of consortium; (6) damages/exemplary damages; and (7) injunctive relief. In response, Demonbreun filed a motion to dismiss the plea in intervention under Rule 91a, alleging that DeVoll's intervention was baseless in law and in fact. TEX.R. CIV. P. 91a. After a hearing, the trial court granted Demonbreun's motion to dismiss DeVoll's plea in intervention.

## DISCUSSION

DeVoll contends that the trial court erred by granting Demonbreun's Rule 91a motion and dismissing his entire plea in intervention because the rule only permits dismissal of specific "causes of action" that have no basis in law or in fact.

Rule 91a allows a party to move to dismiss a baseless cause of action on the grounds that it has no basis in law or fact. TEX.R. CIV. P. 91a.1. "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought." *Id.* "A cause of action has no basis in fact if no reasonable person could believe the facts pleaded." *Id.* The motion must identify each cause of action to which it is addressed and specifically state the reasons the action has no basis in law, no basis in fact, or both. TEX.R. CIV. P. 91a.2. The trial court must decide the motion based solely on the pleading of the cause of action, together with any exhibits permitted by Rule 59. TEX. R. CIV. P. 91a.6.

\*2 [1] [2] The determinations of whether a cause of action has any basis in law and in fact are legal questions that we review de novo, based on the allegations of the live petition and any attachments thereto. *Wooley v. Schaffer*, 447 S.W.3d 71, 73–77 (Tex.App.—Houston [14th Dist.] 2014, no pet.). "In conducting our review, ... we must construe the pleadings liberally in favor of the plaintiff, look to the pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact." *Id.* at \*4; *see also Drake v. Chase Bank*, No. 02–13–00340–CV, 2014 WL 6493411, at \*1 (Tex.App.—Fort Worth Nov. 20, 2014, no pet. h.) (mem.op.) (applying de novo standard of review to ruling on Rule 91a motion to dismiss); *City of Dallas v. Sanchez*, No. 05–13–01651–CV, —S.W.3d—, —, 2014 WL 5426102, at \*2 n. 3 (Tex.App.—Dallas Oct. 27, 2014, no pet.) (same); *Dailey v. Thorpe*, 445 S.W.3d

785, 787–88 (Tex.App.—Houston [1st Dist.] 2014, no pet.) (same).

DeVoll's petition in intervention asserted the following claims against Demonbreun: (1) unreasonable collection efforts and violation of the Texas Debt Collection Act; (2) fraud/filing of fraudulent court record or claim against a property interest; (3) violation of the Deceptive Trade Practices Act; (4) mental anguish; (5) loss of consortium; (6) damages/exemplary damages; and (7) injunctive relief. We examine each claim in turn.

DeVoll pleaded a claim against Demonbreun for common law unreasonable collection efforts and violations of the Texas Debt Collection Act (TDCA) and the Texas Deceptive Trade Practices Act (DTPA). A consumer may sue under the TDCA for threats, coercion, harassment, abuse, unconscionable collection methods, or misrepresentations made in connection with the collection of a debt. *See* TEX. FIN.CODE ANN. §§ 392.301–392.404 (West 2006). A consumer is "an individual who has consumer debt." *See id.* § 392.001(1) (West 2006). "Consumer debt" means "an obligation, or an alleged obligation, primarily for personal, family, or household purposes and arising from a transaction or alleged transaction." *Id.* § 392.001(2) (West 2006). A consumer may maintain a DTPA action where the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically listed in section 17.46(b) and relied on by the consumer to his detriment is a producing cause of the consumer's economic damages. TEX. BUS. & COM.CODE ANN. § 17.50(a)(1) (West 2011). A "consumer" is an individual, partnership, or corporation who seeks or acquires by purchase or lease goods or services. *Id.* § 17.45(4) (West 2011).

[3] In her motion to dismiss, Demonbreun alleged that DeVoll's claims related to unreasonable debt collection should fail because DeVoll is not a consumer as defined by the pertinent statutes, and because the debt in question is not a consumer debt. We agree. DeVoll failed to allege facts that would show that (1) the judgment at issue is a consumer debt or (2) he is a consumer as to goods or services provided by Demonbreun. To the contrary, it is apparent that DeVoll's claims relate to the judgment he has been ordered to pay to Demonbreun, not to a consumer debt. Thus, DeVoll's TDCA and DTPA claims have no basis in law, and the trial court did not err by granting Demonbreun's Rule 91a motion to dismiss in relation to those claims.

[4] Next, under a subheading titled “Fraud / Filing of a Fraudulent Court Record or Claim Against a Property Interest,” DeVoll alleged in his plea in intervention that Demonbreun “knowingly and intentionally generat[ed] a back-dated, forged document titled “ORDER SETTING CAUSE FOR TRIAL” “purporting to be signed by a visiting Judge setting Jury Trial on October 7, 2013 with intent that it be relied upon by Defendants while an actual non-jury trial was set much earlier for July 15, 2013.”

\*3 [5] The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337 (Tex.2011). In her motion to dismiss, Demonbreun alleged that even if DeVoll's false allegation were to be believed, the fraud claim must fail because DeVoll does not allege that he relied on such document or that he suffered damages as a result of the filing of such document. We agree. Because DeVoll did not allege facts demonstrating reliance or harm, his fraud claim has no basis in law. Accordingly,

the trial court did not err in granting Demonbreun's Rule 91a motion to dismiss in relation to DeVoll's fraud claim.

Finally, DeVoll's petition in intervention included claims for mental anguish, loss of consortium, damages/exemplary damages, and injunctive relief. DeVoll alleged that because of Demonbreun's fraud and her violations of the TDCA and the DTPA, he suffered mental anguish and loss of consortium. We have already determined, however, that DeVoll's common law and statutory unreasonable debt collection claims have no basis in law. Accordingly, DeVoll's claims for mental anguish and loss of consortium stemming from the alleged TDCA and DTPA violations must also fail. Similarly, because we have determined that DeVoll has not alleged any viable causes of action, his claims for damages and for injunctive relief lack a basis in both law and in fact. Thus, the trial court did not err in granting Demonbreun's Rule 91a motion to dismiss in relation to these claims.

Because each of DeVoll's seven claims lacked a basis in law or in fact, or both, the trial court did not err in dismissing his plea in intervention in its entirety. DeVoll's issues on appeal are thus overruled, and the judgment of the trial court is affirmed.

2014 WL 5162912

Only the Westlaw citation is currently available.  
United States District Court, W.D. Washington,  
at Seattle.

Amy COE, et al., Plaintiffs,

v.

PHILIPS ORAL HEALTHCARE INC., Defendant.

No. C13-518 MJP. | Signed Oct.  
10, 2014. | Filed Oct. 14, 2014.

#### Attorneys and Law Firms

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### ORDER ON MOTION TO DENY CLASS CERTIFICATION AND MOTION FOR PARTIAL SUMMARY JUDGMENT

MARSHA J. PECHMAN, Chief Judge.

\*1 THIS MATTER comes before the Court on Defendant's motion to deny certification of a nationwide class under the Washington Consumer Protection Act (Dkt. No. 69) and motion for partial summary judgment on Plaintiffs' fifth and sixth causes of action (Dkt. No. 102). Having reviewed the motions, Plaintiffs' responses (Dkt.Nos.83, 111), and Defendant's replies (Dkt.Nos.87, 113), and all related papers, the Court GRANTS the motion to deny class certification and GRANTS the motion for summary judgment on Plaintiff's sixth cause of action. Plaintiffs' fifth cause of action is DISMISSED for lack of subject matter jurisdiction.

#### Background

This putative class action seeks damages and equitable relief for purchasers of Defendant's allegedly defective Sonicare Diamond Clean, FlexCare, FlexCare+, Healthy White,

EasyClean, and Sonicare for Kids powered toothbrushes and related replacement parts (collectively, the "Toothbrushes"). (Dkt.Nos.20, 90.)

The suit began when Plaintiff Amy Coe filed a class action on behalf of Toothbrush purchasers citing, among other things, breach of Washington and New Jersey state law. (Dkt. No. 1.) Approximately two months later, Plaintiffs Sam Chawla and Lance Ng filed a separate action with similar claims under Washington, Connecticut, and New York state law. *Chawla v. Philips Oral Healthcare, Inc.*, No. 13-cv-875-MJP, Dkt. No. 1. Plaintiffs Coe, Chawla, and Ng then filed a consolidated complaint incorporating all claims. (Dkt. No. 20).

Defendant asks the Court to preemptively deny certification of a single nationwide class under Washington law, and to grant summary judgment on Plaintiff Chawla's Connecticut Unfair Trade Practices Act claim, Conn. Gen.Stat. § 42-110a *et seq.* (Dkt. No. 20 at 39) and Plaintiff Ng's claim under New York's General Business Law §§ 349, 350 (Dkt. No. 20 at 42). Defendant argues that under Washington's choice-of-law rules, the laws of the consumers' home states, and not Washington law, must apply to their claims. (Dkt. No. 69 at 7-8.) Defendant also argues the claims of Plaintiffs Ng and Chawla are barred by the applicable statute of limitations. (Dkt. No. 102 at 3-10.) Plaintiffs contend Washington law applies, certification is appropriate, and Plaintiffs' claims are not time-barred. (Dkt.Nos.83, 111.)

#### Discussion

##### I. Legal Standards

##### A. Class Certification

"A class action may be maintained if two conditions are met—the suit must satisfy the criteria set forth in subdivision (a) (i.e., numerosity, commonality, typicality and adequacy of representation), and it must also fit into one of the three categories described in subdivision (b)." *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir.2010). Certification in this matter is sought under Fed.R.Civ.P. 23(b)(3), which necessitates a finding that common questions of law or fact predominate and that maintaining the suit as a class action is superior to other methods of adjudication. Fed.R.Civ.P. 23(b)(3). Class certification is proper if and only if "the trial court is satisfied, after a rigorous analysis," that Plaintiffs have met their burden under Rule 23. *Wal-mart*

*Stores, Inc. v. Dukes*, — U.S. —, —, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011).

### B. Choice of Law

\*2 A federal court sitting in diversity applies the choice-of-law rules of its forum state to determine which substantive law controls. *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Tex.*, — U.S. —, —, 134 S.Ct. 568, 582, 187 L.Ed.2d 487 (2013). Washington uses a two-step approach to choice-of-law questions. *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 550 (W.D.Wash.2008). First, courts determine whether an actual conflict between Washington and other applicable state law exists. *Id.* A conflict exists when the various states' laws could produce different outcomes on the same legal issue. *Id.* In the absence of a conflict, Washington law applies. *Id.* If a conflict exists, courts then determine the forum or fora that have the “most significant relationship” to the action to determine the applicable law. *Id.*

### C. Summary Judgment

Federal Rule 56(a) provides that the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). In determining whether a factual dispute requiring trial exists, the court must view the record in the light most favorable to the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). All material facts alleged by the nonmoving party are assumed to be true, and all inferences must be drawn in that party's favor. *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1088 (9th Cir.2008).

A dispute about a material fact is “genuine” only if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. There is no genuine issue for trial “[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

### II. Preemptive Motion to Deny Class Certification

Fed.R.Civ.P. 23 does not preclude affirmative motions to deny class certification. In *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935 (9th Cir.2009), the Ninth Circuit affirmed the right of defendants to bring preemptive motions,

provided that plaintiffs are not procedurally prejudiced by the timing of the motion. *Id.* at 944.

No procedural prejudice exists here. Resolution of the class certification issue turns primarily on the choice-of-law analysis, which determines whether Washington law or the laws of putative class members' home states should apply. If Washington law applies, common questions will predominate for a nationwide class, and a class action may be efficient and desirable. On the other hand, if the consumer protection laws of the consumers' home states apply, variations in the laws will overwhelm common questions, precluding certification. The relevant inquiry then is whether sufficient discovery has taken place to allow for the choice-of-law analysis.

Plaintiffs argue consideration of the motion is premature because they received Defendant's first production of documents on the same day that their opposition to this motion was due. (Dkt. No. 83 at 4 .) Plaintiffs assert that it would be contrary to *Vinole* to deny certification without permitting them to develop facts to inform the Court's choice-of-law analysis. *Id.* However, this Court now has pending before it Plaintiffs' affirmative motion for class certification, filed after Plaintiffs had sufficient time to review documents and inform the Court of relevant facts.

\*3 Because Plaintiffs have had sufficient time to inform the Court of facts relevant to its choice-of-law analysis, and have presented those facts in their Motion for Class Certification (Dkt. No. 90), the Court may now properly consider Defendant's motion to deny certification.

### III. Choice of Law

Defendant asserts, and Plaintiffs do not contest, that an actual conflict exists between the Washington Consumer Protection Act (“WCPA”) and the consumer protection laws of other states. (Dkt. No. 69 at 9.) Because a conflict exists between WCPA and the consumer protection laws of the various states where the Toothbrushes were purchased and used, the Court must apply Washington's most significant relationship test in order to determine which law to apply. *Kelley*, 251 F.R.D. at 551. In adopting the approach of the Second Restatement of Law on Conflict of Laws (1971), Washington rejected the rule of *lex loci delicti* (the law of the place where the wrong took place). *Id.* Instead, Washington's test requires courts to determine which state has the “most significant relationship” to the cause of action. *Id.* If the relevant contacts to the cause of action are balanced, the court considers the interests and

public policies of potentially concerned states and the manner and extent of such policies as they relate to the transaction. *Id.*

Washington has a significant relationship to alleged deceptive trade practices by a Washington corporation. Washington has a strong interest in promoting a fair and honest business environment in the state, and in preventing its corporations from engaging in unfair or deceptive trade practices in Washington or elsewhere. Washington recognizes WCPA claims asserted by non-resident consumers against Washington corporations. *Keithly v. Intelius Inc.*, 2:09-cv-1485-RSL, 2011 WL 2790471, \*1 (W.D.Wash. May 17, 2011).

Conversely, the putative class members' home states have significant relationships to allegedly deceptive trade practices resulting in injuries to their citizens within their borders. The Toothbrushes were sold and purchased, and representations of their quality made and relied on, entirely outside of Washington. No Plaintiff resides in Washington. While Plaintiffs contend Philips Oral Healthcare spent considerable time and resources analyzing the problem and attempting to fix it at their Washington facilities, thus increasing Washington's relationship to the action, the crux of Plaintiffs' action involves the marketing and sale of the Toothbrushes, which took place in other states. Furthermore, the Ninth Circuit recently recognized the strong interest of each state in determining the optimum level of consumer protection balanced against a more favorable business environment, and to calibrate its consumer protection laws to reflect their chosen balance. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581 (9th Cir.2012).

In *Kelley*, this Court explained that in deceptive trade practice cases, the place of injury is often of lower importance than the place in which the fraudulent conduct arose. This is especially true in cases where the alleged injuries are scattered throughout the country but stemmed from a defendant's deceptive practice in one state. *Kelley*, 251 F.R.D. at 552. Since *Kelley*, however, Washington has formally adopted § 148 of the Restatement in the fraud and misrepresentation context. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash.2d 954, 331 P.3d 29, 36 (2014). Section 148 of the Restatement and its comments make clear that the alleged misrepresentation to consumers and the consumers' pecuniary injuries, both of which occurred in consumers' home states and not in Washington, should be considered the most significant contacts in this particular

case. Restatement (Second) of Law on Conflict of Laws § 148 cmts. i, j (1971).

\*4 The Court agrees with Defendant that consumers' home states have the most significant relationship to their causes of action. Therefore, the consumer protection laws of those states, and not WCPA, apply. Material differences between the various consumer protection laws prevent Plaintiffs from demonstrating Rule 23(b)(3) predominance and manageability for a nationwide class. Accordingly, the Court GRANTS Defendant's motion to deny certification of a nationwide class under WCPA.

#### IV. Connecticut Unfair Trade Practices Act

The Parties agree this Court lacks jurisdiction over Plaintiff Chawla's Connecticut Unfair Trade Practices Act ("CUTPA") claim if the WCPA claim is dismissed. (Dkt. No. 113 at 2.) There is no jurisdiction over Chawla's claim under the Class Action Fairness Act of 2005 ("CAFA") because Plaintiff Chawla does not seek class certification for his CUTPA claim. (Dkt. No. 111 at 8.) There is no diversity jurisdiction over Plaintiff Chawla's claim because it fails to meet the amount in controversy requirement of 28 U.S.C. § 1332. *Id.*

As determined in Section III, above, Washington's choice-of-law rules mandate application of the laws of the consumers' home states, not WCPA. Plaintiff Chawla's CUTPA claim is therefore DISMISSED for lack of subject matter jurisdiction.

#### V. New York General Business Law §§ 349, 350

Defendant contends that Plaintiff Ng's claims under New York General Business Law ("NYGBL") §§ 349, 350 are time-barred by New York's three-year statute of limitations. N.Y. C.P.L.R. § 214 (MCKINNEY 2014). Plaintiff Ng admits to filing his original complaint more than three years after purchasing his toothbrush, the date which would have triggered the statute of limitations. (Dkt. No. 103-1 at 41-42.) Ng contends, however, that Plaintiff Coe's filing of her class action—which contained no NYGBL claims—tolled his statute of limitations. (Dkt. No. 111 at 5; Dkt. No. 1.) In other words, Plaintiff Ng claims cross-jurisdictional tolling, arguing his New York state law claim was tolled when Plaintiff Coe filed her claims under the law of another state.

To support this use of cross-jurisdictional tolling, Plaintiff Ng cites the Supreme Court's holding in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). There, the State of Utah was denied class

action status for a price rigging claim against American Pipe under the Sherman Act. Several towns, municipalities and water districts—all would-be members of the unsuccessful class—then filed motions to join in Utah's individual action. *Am. Pipe & Constr. Co.*, 414 U.S. at 544. The district court denied all of the motions because they were filed after expiration of the statute of limitations. *Id.* Members of the unsuccessful class argued that their statute of limitations should have been tolled when the State of Utah filed the (unsuccessful) motion for class action status. *Id.* The Supreme Court agreed—filing a class action on a federal claim tolls the statute of limitations for the claims of all potential class members regardless of ultimate class certification. *Am. Pipe & Constr. Co.*, 414 U.S. at 554 (“[T]he rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.”).

\*5 Here, Plaintiffs contend the rule of *American Pipe*—which allows tolling within the federal court system in federal question class actions—permits cross-jurisdictional tolling as a matter of New York state procedure. (Dkt. No. 111.) This is incorrect. Cross-jurisdictional tolling may be permitted where a class action is filed in New York and makes claims under New York state law; it is not, however, permitted where the class action was filed outside of New York and make no New York claims. *In re Bear Stearns Cos., Secs., Derivative, & ERISA Litig.*, 2014 U.S. Dist. LEXIS 14751, 48–49 (S.D.N.Y. Feb. 3, 2014) (“In certain circumstances, a New York statute of limitations may be tolled by the pendency of a class action, but New York currently does not recognize tolling where that class action is filed outside New York state court (so-called ‘cross-jurisdictional tolling’”).

When a state legal system is unclear on cross-jurisdictional tolling Federal courts do not generally introduce a rule. *See*,

*e.g.*, *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir.2008) (declining to import cross-jurisdictional class action tolling into California law). *See also In re Fosamax Prods. Liab. Litig.*, 694 F.Supp.2d 253, 258 (S.D.N.Y.2010) (gathering cases). Because New York state law does not expressly permit cross-jurisdictional tolling, this Court will not allow Plaintiff Ng to rely on Plaintiff Coe's class action filing to toll his NYGBL statute of limitations.

The Court rejects Plaintiff Ng's argument for cross-jurisdictional tolling of the statute of limitations and holds that his claims are time-barred. Defendant's motion for summary judgment on the NYGBL cause of action is GRANTED.

### Conclusion

Under Washington's choice-of-law provisions, the laws of the consumers' home states, and not Washington law, apply to their claims. Material differences between the consumer protection laws of the relevant states overwhelm common questions, and Plaintiffs are unable to demonstrate the predominance or manageability required for class certification. Defendant's motion to deny certification of a nationwide class under WCPA is GRANTED.

Having determined that WCPA does not apply, the Court DISMISSES Plaintiff Chawla's CUTPA claim for lack of subject matter jurisdiction. Plaintiff Ng's claims are time-barred by the applicable statute of limitations, and Defendant's motion for summary judgment as to his claims is GRANTED.

The clerk is ordered to provide copies of this order to all counsel.

2014 WL 979196

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Texas, Tyler Division.

St. Gregory Cathedral School, et al.

v.

LG Electronics, Inc., et al.

Case No. 6:12-cv-739 | Signed 03/05/2014

#### Attorneys and Law Firms

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#### MEMORANDUM ORDER AND OPINION

MICHAEL H. SCHNEIDER, UNITED STATES DISTRICT JUDGE

\*1 Currently before the Court is Defendants LG Electronics, Inc. and LG USA, Inc.'s Motion to Dismiss Plaintiffs' Second Amended Complaint (Doc. No. 61). In this class action lawsuit, Plaintiffs assert federal and state law causes of action. The federal causes of action all arise under RICO. The state causes of action are all brought under New Jersey law. Defendants urge this Court to find no RICO enterprise exists and that either New Jersey law does not apply or does not support Plaintiffs' claims. After considering the parties' arguments, the applicable law, and the facts as pleaded, the Court is of the opinion Defendants' motion should be **GRANTED**.

#### Background<sup>1</sup>

Defendant LG Electronics, Inc. (LG Korea) designs and manufactures heating, ventilation, and air conditioning units (HVACs) in Korea, and then enlists its wholly owned subsidiary, Defendant LG Electronics U.S.A., Inc. (LG USA), to market and sell those HVACs through licensed distributors in the United States. LG USA uses a wholly owned subsidiary, LG Alabama, Inc. (LG AL), to provide service and support to purchasers.<sup>2</sup>

Plaintiffs allege that LG Korea initiated a conspiracy to conceal defects common to all LG HVACs manufactured and sold between 2007 and 2011. LG Korea first learned of defects in its HVACs in 2007 after an internal report indicated 179 out of 2,911,639 units failed due an issue with the thermistor. LG Korea also discovered issues with fan motors, PC boards, coils, compressors, and source code across various HVAC product lines. LG Korea did not disclose these issues to LG USA and LG AL until 2009.

During the time period relevant to this suit, LG USA provided uniform marketing materials to its licensed distributors utilizing specifications LG Korea supplied. The marketing materials for LG HVACs contained representations about the quality of the units, such as their energy usage, noise level, fan speed, and durability. Plaintiffs allege that these representations were uniformly false. In late 2010, LG USA directed its licensed distributors to account for and "quarantine" certain models still in the distributors' warehouses. LG USA directed the distributors to not disclose the defects to customers already in possession of defective models.

LG Korea also provided customer service, technical support, and troubleshooting information to LG AL. These materials did not disclose issues with LG HVACs, which prevented warranty claims.

The Named Plaintiffs are four entities located in Texas and North Carolina that purchased LG HVACs. Plaintiff St. Gregory Cathedral School (St.Gregory) is a private school in Tyler, Texas that purchased twelve units from a licensed distributor. Plaintiffs ADK Quarter Moon, LLC (ADK), Lexmi Hospitality, LLC (Lexmi), and Shri Balaji, LLC (Shri Balaji) are North Carolina entities that own hotels and motels in North Carolina and bought units from licensed distributors. The Named Plaintiffs purchased units from four different

product lines over a threeyear period. They claim that their LG HVACs, and all other LG HVACs manufactured between 2007 and 2011, failed to perform as LG represented.

### *Legal Standard*

\*2 Motions to dismiss under Rule 12(b)(6) for failure to state a claim “are viewed with disfavor and are rarely granted.” *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir.2005); *Lormand v. U.S. Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir.2009). The Court utilizes a “two-pronged approach” in considering a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, the Court identifies and excludes legal conclusions that “are not entitled to the assumption of truth.” *Id.* Second, the Court considers the remaining “well-pleaded factual allegations.” *Id.* The Court must accept as true all facts alleged in a plaintiff’s complaint, and the Court views the facts in the light most favorable to a plaintiff. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007). A plaintiff’s complaint survives a defendant’s Rule 12(b)(6) motion to dismiss if it includes facts sufficient “to raise a right to relief above the speculative level.” *Id.* (quotations and citations omitted). In other words, the Court must consider whether a plaintiff has pleaded “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

### *Discussion*

#### **A. RICO**

Plaintiffs allege five violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* Four are brought under § 1962(c) of title 18, which prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering activity. *See Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5th Cir.2003). The fifth is brought under § 1962(d) of title 18, which prohibits a person from conspiring to violate any other section of § 1962. Plaintiffs also allege similar violations of New Jersey’s RICO statutes.

Defendants contend that Plaintiffs’ first four RICO claims fail because they have not alleged a RICO enterprise. Because they maintain that the first four claims fail, Defendants argue that Plaintiffs’ § 1962(d) claim must, too, because no underlying RICO claim exists that could support a conspiracy to violate RICO. Defendants also argue that Plaintiffs’ New

Jersey RICO claims fail for the same reason as the Federal RICO claims.

#### **i. § 1962(c)**

A RICO “ ‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). A RICO enterprise must be distinct from the defendant serving as the RICO person. *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 439 (5th Cir.1987). Under § 1962(c), no RICO enterprise exists where a subsidiary merely acts on behalf of, or to the benefit of, its parent. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1412 (3d Cir.1993); *accord ISystems v. Spark Network Ltd.*, No. 10–10905, 2012 WL 3101672, at \*4–5 (5th Cir. Mar. 21, 2012). Further, no RICO enterprise exists where a corporation’s agents commit predicate acts in the conduct of the corporation’s business. *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989). These general rules control unless the use of subsidiaries or agents somehow allowed a corporation to carryout the predicate acts in a way it could not have if it were vertically integrated. *See Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*, 329 F.3d 923, 934 (7th Cir.2003); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227–28 (7th Cir.1997).

Plaintiffs’ complaint fails to set forth well pleaded facts that could establish how LG’s use of subsidiaries and licensed distributors allowed it to accomplish its purported fraud. Plaintiffs come closest to alleging sufficiently distinct roles between LG Korea, LG USA, LG AL, and their licensed distributors with one allegation: LG Korea had more information about the defects of various components in LG HVACs than any other entity at various points in time and kept the downstream entities in the dark (11 25–33). Plaintiffs conclude that the asymmetry in knowledge between the LG entities allowed varying combinations of entities to use the less informed entities to cover up defects in LG HVACs (11 38–39, 42–43, 47–50).

\*3 But everything Plaintiffs allege could have taken place if LG operated as one company that manufactured, sold, and serviced its HVACs. What is more, Plaintiffs do not allege any facts that show how the asymmetrical knowledge of corporate entities and agents allowed LG to carry out its fraud. Instead, Plaintiffs supply only a conclusion that the asymmetry in knowledge did (Doc. No. 35 at ¶¶ 37, 46–47).

As alleged, neither LG’s entities nor its agents were exploited in such a way to trigger RICO liability. Indulging all

reasonable inferences, LG entities and licensed distributors carried out their role in making, testing, marketing, selling, and servicing LG HVACs. For two years, the marketing, selling, and servicing arms of LG's operation relied on false information supplied by the manufacturing arm even after that manufacturing arm discovered defects existed in the HVACs. Once the manufacturing arm admitted the defects, it brought everyone in, and then LG—collectively—attempted to staunch the fallout. In view of those allegations, “[w]hat possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that [a manufacturer] sells its products to the consumer through [licensed] dealers ... or sells abroad through subsidiaries?” *See id.* at 227. The answer is that it does not because RICO is not aimed at punishing corporate structure. RICO is aimed at preventing organized crime from infiltrating legitimate businesses. *See United States v. Turkette*, 452 U.S. 576, 593 (1981).

Culling a distinct RICO enterprise out of a corporate structure like LG's requires more than what Plaintiffs have alleged:

Just how much more is uncertain. But it is enough to decide this case that *where a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise within the meaning of the statute.*

*See Fitzgerald*, 116 F.3d at 228 (emphasis added).

Therefore, the Court **GRANTS** Defendants' Motion to Dismiss with respect to Plaintiffs' § 1962(c) claims.

## ii. § 1962(d)

Having determined that Plaintiffs failed to allege an independent violation of § 1962, Plaintiffs cannot maintain a claim under § 1962(d). *See Paul v. Aviva Life & Annuity Co.*, 3:09-cv-1490-B, 2011 WL 2713649, at \*4 (N.D.Tex. July 12, 2011), *aff'd*, 487 F. App'x 924 (5th Cir.2012) (dismissing

§ 1962(d) claim after dismissing all other RICO claims for lack of RICO enterprise).

Accordingly, the Court **GRANTS** Defendants' Motion to Dismiss as to Plaintiffs' § 1962(d) claim.

## iii. New Jersey RICO

Although Defendants contend that Plaintiffs' New Jersey RICO claims should be dismissed if the federal RICO claims fall, New Jersey law does not support Defendants' position. Two intermediate New Jersey appellate courts have explicitly held that New Jersey's RICO statute does not require a distinct person and enterprise. *See State v. Ball*, 632 A.3d 1222, 1239 (N.J.Super.Ct.App.Div.1993); *Maxim Sewerage Corp v. Monmouth Ridings*, 640 A.2d 1216, 1221 (N.J. Super Ct. Ch.Div.1993). As Defendants' note, the New Jersey Supreme Court later declined to endorse one of those intermediate appellate court's “very broad definition of enterprise,” while noting that it would generally “heed federal legislative history and case law in construing [New Jersey's] statute.” *State v. Ball*, 661 A.2d 251, 258, 271 (N.J.1995). But the vast majority of courts construing New Jersey's RICO statute conclude it imposes no distinctiveness requirement. *See, e.g., In re Refco Inc. Sec. Litig.*, 826 F.Supp.2d 478, 532–33 & n.47 (S.D.N.Y.2011) (collecting cases). Thus, the RICO person and the RICO enterprise may be one and the same under New Jersey law.

\*4 But an enterprise satisfies only one element of a viable RICO claim. With regards to the Defendants' predicate acts, Plaintiffs allege only that the LG enterprises engaged in mail and wire fraud by transmitting marketing materials containing false representations. Each alleged predicate act relies solely on a violation of federal law (Doc. No. 35 at ¶¶ 76–77, 130, 138, 145, 152, 158).

To plead mail fraud, Federal Rule of Civil Procedure 9(b) requires a plaintiff to state the time, place, and content of the fraudulent mail and wire communications with particularity. *See Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138–39 (5th Cir.1992). Plaintiffs contend they have done so by identifying several marketing statements disseminated over several years that were fraudulent when made (Doc. No. 77 at 5–7, 22 & n.6).

Plaintiffs claim that “[d]espite knowing of [ ] product defects since at least 2007, LG Korea ... supplied LG USA with product specifications and uniform advertising literature” that

were fraudulent (Doc. No. 35 at ¶ 37). But Plaintiffs' factual allegations undercut their argument.

The defects Plaintiffs allege LG Korea knew of are defects in certain product lines discovered in a piecemeal fashion over four years (Doc. No. 35 at ¶¶ 25–33). And according to the technical service bulletins Plaintiffs rely on to bolster their claims, defects existed only on a limited numbers of models within LG's various product lines (Doc. Nos. 35–14, 35–15, 35–16, 35–17, 35–18, 35–19). The same technical service bulletins indicate that LG discovered the existence of defects after those models were initially marketed. (Doc. Nos. 35 at ¶¶ 25–33, 35–14, 35–15, 35–16, 35–17, 35–18, 35–19). Plaintiffs also allege that LG modified defective parts in later models, conducted field tests, discovered, and diagnosed issues *post hac* (Doc. No. 35 at ¶¶ 26, 28, 30–31). Thus, instead of pleading mail fraud with particularity, Plaintiffs' factual allegations state with particularity that LG investigated its products, discovered issues after-the-fact, and developed solutions to those problems. Those allegations are insufficient to plead mail fraud. *See Anctil v. Ally Fin., Inc.*, 2014 WL 587364 at \*11–12 (S.D.N.Y. Feb. 10, 2014) (holding mail fraud not pleaded with particularity because no allegations tended to indicate defendants made statements with intent to defraud); *cf. Durso v. Samsung Electronics Am., Inc.*, 2:12–CV–05352, 2013 WL 5947005, at \*10 (D.N.J. Nov. 6, 2013) (finding no basis for consumer fraud claims under Rule 9(b) when no factual allegation suggested defendant knew of defect before marketing product).

Finally, while Plaintiffs allege a fraud by omission theory, this Court declines to view technical bulletins as evidence of fraudulent concealment. *Alban v. BMW of N. Am.*, CIV. 09–5398, 2011 WL 900114, at \*12 (D.N.J. Mar. 15, 2011). To do so would “discourage manufacturers from responding to their customers in the first place.” *Id.*

Therefore, the Court **GRANTS** Defendants' Motion to Dismiss Plaintiffs' New Jersey RICO claims.

## B. State Law Claims

Plaintiffs allege four non-RICO state law causes of action against LG: (1) a violation of the New Jersey Consumer Fraud Act (NJCFCA), (2) breach of express warranty, (3) breach of implied warranty, and (4) unjust enrichment. Each cause of action invokes New Jersey law (Doc. No. 35 at 55–56). Plaintiffs' complaint details which allegations justify applying New Jersey's substantive law (Doc. No. 35 ¶¶ 119–123).

\*5 Defendants challenge the application of New Jersey law to Plaintiffs' consumer fraud and express warranty claims. Defendants do not demonstrate a conflict between Texas, North Carolina, and New Jersey law regarding unjust enrichment and implied warranty. Instead, Defendants challenge the substance of those claims. Plaintiffs argue that the Court should not engage in a choice-of-law analysis at the motion to dismiss stage and defend the adequacy of their state law claims as pleaded.

### i. Choice of Law

Initially, the Court notes that it may properly conduct a choice-of-law analysis at the pleading stage. *See Yelton v. PHI, Inc.*, 669 F.3d 577, 584–85 (5th Cir.2012); *Cooper v. Samsung Elec. Am., Inc.*, 374 F. App'x 250, 255 n.5 (3rd Cir.2010).

A federal court sitting in diversity applies the choice of law rules of the state in which it sits. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496–97 (1941). As this Court sits in Texas, it is obligated to apply Texas choice of law rules. *Burleson v. Liggett Grp., Inc.*, 111 F. Supp.2d 825, 828 (E.D.Tex.2000). Texas courts first determine whether the potentially applicable laws conflict. *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 311 (5th Cir.2000). When a conflict exists, Texas courts use the “most significant relationship test” of Restatement (Second) of Conflict of Laws (the Restatement) to resolve the conflict. *See id.* The Restatement sets out both general principals and claim-specific factors to consider. *See Hughes Wood Prods., Inc. v. Wanger*, 18 S.W.3d 202, 205 (Tex.2000). Texas courts look to § 148 of the Restatement for consumer fraud claims and to § 188 of the Restatement for contract-based claims. *See Scottsdale Ins. Co. v. Nat'l Emergency Servs., Inc.*, 175 S.W.3d 284, 293–96 (Tex.App.–Houston [1st Dist.] 2004, pet. denied)

### a. Consumer Fraud Claims

Plaintiffs take no position regarding whether New Jersey, North Carolina, and Texas's law conflict (Doc. No. 77 at 33–35). But Texas courts conclude that the consumer protection statutes of the various states conflict. *See Tracker Marine, L.P. v. Ogle*, 108 S.W.3d 349, 354–55 & n.44 (Tex.App.–Houston [14th Dist.] 2003, no pet.) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568–69 (1995); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir.2002)). Thus,

the Court finds that the substantive laws proposed by the parties conflict.

Plaintiffs allege that LG Korea and LG USA made their false statements about LG HVACs from their respective principal places of businesses, Korea and New Jersey (Doc. No. 35 at ¶¶ 1–4, 37, 51–52, 119, 168–73). Accordingly, the Court looks to the six factor test provided in § 148(2), which applies when fraudulent statements are made, received, and relied in on different forums:

- (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
- (b) the place where the plaintiff received the representations,
- (c) the place where the defendant made the representations,
- (d) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and
- (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

*Restatement (Second) of Conflicts* § 148(2) (1971).

The Court finds that the Named Plaintiffs' home states possess a stronger connection to the consumer fraud claims than New Jersey. Plaintiffs allege that the Named Plaintiffs acted in reliance on the misrepresentations, received the misrepresentations, do business, possess the HVACs, and rendered performance under their contracts in Texas and North Carolina. (Doc. No. 35 ¶¶ 1–4, 51 n.14). LG USA does business in New Jersey and disseminated LG's marketing materials from New Jersey (Doc. No. 35 at ¶¶ 6, 119, 168–73). LG Korea does business in Korea and transmitted the information incorporated into LG's marketing materials from Korea. (Doc. No. 35 at ¶¶ 6, 37, 51–52, 119, 168–73). Thus, as a matter of wrote application, the factors weigh in favor of the Named Plaintiffs' home states.

\*6 Applying the appropriate weight to each factor gives Texas and North Carolina an even greater advantage. First, comment g. to § 148 of the Restatement indicates that the state where the plaintiff relied on the defendant's representations

(Texas and North Carolina) is of greater importance than where the defendant made them. *See Tracker*, 108 S.W.3d at 356. Then comment j. indicates that when any two factors (other than the defendant's residence and place where the defendant made the representations) occur in one state, that state “will usually be the state of applicable law.” *See id.* As pleaded by the Plaintiffs, four factors implicate Texas and North Carolina (Doc. No. 35 ¶¶ 1–4, 51 n.14). Finally, comment h. undercuts New Jersey's significance by lessening the importance of the place where the defendant made the representation when more than one forum is implicated, which it is here (Doc. No. 35 at ¶¶ 5–6, 37, 51–52, 119, 168–73). *See Restatement (Second) of Conflict of Laws* § 148 cmt. h. Thus, the Court finds that the Plaintiffs have failed to plead facts that if true give rise to a plausible inference that New Jersey's substantive law governs the consumer law claims.

Therefore, it **GRANTS** Defendant's motion to dismiss as to the NJCFA claims.

#### b. Express Warranty

Plaintiffs take no position regarding whether New Jersey, North Carolina, and Texas's law conflict (Doc. No. 77 at 33–35). But Texas courts recognize that the Uniform Commercial Code's express warranty provisions—as adopted by the states—are not uniform. *See Compaq Comps. v. Lampray*, 135 S.W.3d 657, 673–80 (Tex.2004). Accordingly, the Court finds that the substantive laws proposed by the parties conflict.

In resolving conflicts for express warranty claims, Texas courts look to § 188 of the Restatement, which provides the following factors:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

*Restatement (Second) of Conflict of Laws* § 188.

The Court finds that these factors overwhelmingly favor the application of Texas and North Carolina law to Named

Plaintiffs' express warranty claims. Texas and North Carolina serve as the place of contracting, negotiation, performance, and location of the HVACs (Doc. No. 35 ¶¶ 1–4). New Jersey is only implicated by the fifth factor (the location of the parties), as are Texas, North Carolina, and Korea (Doc. No. 35 ¶¶ 1–6). Thus, the Court finds that on the basis of the facts as pleaded by Plaintiffs, Texas and North Carolina's substantive law governs the Named Plaintiffs' express warranty claims. See *Compaq*, 135 S.W.3d at 680–81.

Therefore, the Court **GRANTS** Defendants' motion to dismiss as to these claims.<sup>3</sup>

### ii. Implied Warranty

Defendants argue that no implied warranty claim may lie because LG affirmatively disclaimed implied warranties (Doc. Nos. 61 at 28–29, 61–1, 61–2, 62–3, 62–4). Plaintiffs respond that the disclaimer is not controlling because LG acted unconscionably in crafting the limited warranty while knowing about the defects in their HVAC lines.

New Jersey generally enforces the disclaimer of implied warranties, provided that disclaimer is conspicuous and enforcing the disclaimer would not be unconscionable. See *Stiogum Holdings, Inc. v. Ropes*, 800 A.2d 915, 921 (N.J.Super.Ct. Ch. Div.2002); N.J.S.A. § 12A:2–316. Plaintiffs do not dispute that the disclaimer was conspicuous (Doc. No. 77 at 31–32). Instead, Plaintiffs argue that enforcing the disclaimer is unconscionable (Doc. No. 77 at 32). New Jersey courts look to two factors to determine whether a contractual provision is unconscionable “(1) unfairness in the formation of the contract, or procedural unconscionability, and (2) excessively disproportionate terms, or substantive unconscionability.” See *Payne v. Fujifilm U.S.A., Inc.*, Civil Action No. 07–385, 2007 WL 459128, at \*4 (D.N.J. Dec. 28, 2007).

\*7 To begin with, the Court notes that Plaintiffs make no specific allegations regarding either unconscionability factor. But Plaintiffs argue that LG concealed defects, implicating the fairness of their contract's formation. The facts Plaintiffs allege belie their argument.

As noted above, Plaintiffs allege that LG learned about defects on certain product lines in a piecemeal fashion over a period of four years (Doc. No. 35 at ¶¶ 25–33, 208). That knowledge pertained to a limited numbers of models within LG's various product lines (Doc. Nos.35–14, 35–15, 35–16,

35–17, 35–18, 35–19). Of the models Plaintiffs allege were defective with anything more than conclusory allegations, none appear to be the models the Named Plaintiffs purchased (Doc. Nos. 35 at ¶¶ 1–4, 25–33, 35–14, 35–15, 35–16, 35–17, 35–18, 35–19).<sup>4</sup> Thus, Plaintiffs' allegations do not provide a plausible inference that LG sold any models *with knowledge of existing defects*.

Also as noted above, this Court declines to view technical bulletins as evidence of fraudulent concealment. *Alban*, 2011 WL 900114, at \* 12.

Accordingly, the Court finds that Plaintiffs failed to adequately plead facts that if true give rise to a plausible inference of unconscionability, and thus, there is no basis to set aside LG's disclaimer of implied warranties. Therefore, the Court **GRANTS** Defendants' motion to dismiss as to Plaintiffs' breach of implied warranty claim.

### iii. Unjust Enrichment

Defendants move to dismiss Plaintiffs' unjust enrichment claims for lack of privity. New Jersey “requires a ‘direct relationship’ between the parties or a mistake on the part of the party conferring the benefit.” See *Alin v. Am. Honda Motor Co.*, Civil Action No. 08–4825, 2010 WL 1372308, at \*14–15 (D.N.J. Mar. 31, 2010).

Plaintiffs failed to plead facts that support their claim for unjust enrichment because they do not allege privity with LG. According to Plaintiffs complaint, the Named Plaintiffs purchased their LG HVACs from licensed distributors—not LG (Doc. No. 35 at ¶¶ 1–4). Purchases made from someone other than the defendant do not give rise to a claim for unjust enrichment under New Jersey law. See, e.g., *Henderson v. Volvo Cars of N. Am., LLC*, Civil Action No. 09–4146, 2010 WL 2925913, \*10–11 (D.N.J. July 21, 2010).

Therefore, the Court **GRANTS** Defendants' motion to dismiss as to Plaintiff's unjust enrichment claim.

### Conclusion

For the reasons discussed more thoroughly above, Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint is **GRANTED** and Plaintiffs' claims are **DISMISSED WITHOUT PREJUDICE**.

It is further **ORDERED** that if Plaintiffs seek to amend their complaint in light of this order, they shall move to do so by April 4, 2014.

**It is SO ORDERED.**

Footnotes

- 1 All statements are taken from the allegations made in Plaintiffs' Second Amended Complaint (Plaintiffs' complaint) (Doc. No. 35).
- 2 LG Korea is incorporated and headquartered in Korea, LG USA is incorporated under the laws of Delaware, but has its principal place of business in New Jersey, and LG AL is both incorporated and headquartered in Alabama.
- 3 The Court notes that the Limited Warranty as to LG's Multi-V VRF System appears to contain a choice of law clause provision (Doc. No. 61-2 at 3 ("The laws of the State of Georgia govern this Limited Warranty and all of its terms and conditions, without giving effect to any principles of conflict of laws.")). Neither party addressed the impact this provision has on Plaintiffs' claims.
- 4 Plaintiffs listed some of model numbers specifically and others only by product line (Doc. No. 35 at ¶¶ 1-4).

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Good afternoon.

Attached for filing with the Washington State Supreme Court is the Brief of Appellant State Farm Mutual Automobile Insurance Company and an appendix in the above matter. If I may be of further assistance, please give me a call.

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