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IN THE SUPREME COURT RECEIVED BY E-MAIL
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CERTIFICATION FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

IN

SANDRA C. THORNELL, on behalf of herself and all others
similarly situated,

Plaintiff,

v.

SEATTLE SERV. BUREAU, INC. d/b/a NATIONAL SERV. BUREAU,
INC. and STATE FARM MUT. AUTO INS. CO.,

Defendants.

**PLAINTIFF'S RESPONSE TO BRIEFS OF AMICI CURIAE
SUPPORTING DEFENDANTS**

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I. INTRODUCTION

The amici supporting Seattle Service and State Farm offer little or nothing in the way of statutory interpretation. Instead, they focus on choice of law, pro-business policy arguments, and potential federal constitutional challenges to application of the CPA to a nationwide class. The arguments offered by Defendants' amici are divorced from the facts of this case and unpersuasive.

Ms. Thornell's dispute with Defendants does not arise from her purchase of software, cruise tickets, or other consumer goods or services, either online or in a brick-and-mortar store. Ms. Thornell's claim arises from Seattle Service's demand that she pay the full amount of an unliquidated subrogation claim purportedly owed to State Farm. Ms. Thornell did not buy insurance from State Farm. Ms. Thornell had no interactions with Seattle Service until Seattle Service began sending her threatening letters, demanding that she mail thousands of dollars to an address in Bothell, Washington. This Court held that the exact same conduct violates the CPA more than six years ago. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 204 P.3d 885 (2009). As a matter of policy, this Court should not allow Washington debt collectors to circumvent that

rule by sending their unfair and deceptive letters to consumers in other states. Neither choice of law nor federalism principles dictate such a result.

II. AUTHORITY AND ARGUMENT

1. Ms. Thornell never conducted business with Defendants.

The Washington-Based Companies make the puzzling argument that this Court should not adopt a rule that would undermine the enforceability of choice-of-law clauses in consumer contracts. WBC Br. at 15. While amici are correct that *Erwin v. Cotter Health Centers*, 161 Wn.2d 676, 167 P.3d 1112 (2007) sets forth rules governing the enforceability of contractual choice-of-law provisions, those rules are irrelevant because Ms. Thornell did not contract with either of the Defendants. No contractual choice-of-law clause exists that could possibly have any impact on the choice of law analysis here.

Nor did Ms. Thornell “read advertising, shop, buy, use products or services, [or] make payments from [her] state of residence,” WBC Br. at 8; *id.* at 14, because she did not voluntarily do business with the Defendants. *See Panag*, 166 Wn.2d at 43–44 (holding that a plaintiff need not be in “a consumer or other business relationship” with the defendant to bring a claim under the CPA and that there is no standing requirement

separate from the five elements of a CPA claim). Instead, State Farm hired Seattle Service to print and send Ms. Thornell collection letters from Washington. These letters demanded that she send over \$9,000 back to them in Washington. To the extent it is necessary, the choice-of-law analysis here is different than it would be in a case where a consumer alleges that she made a purchase outside of Washington, based on advertising that she saw outside of Washington.

2. Applying Washington law is consistent with choice-of-law principles.

The Washington-Based Companies wrongly assert that courts must conduct a choice-of-law analysis every time a dispute implicates multiple states' laws. WBC Br. at 3–4. To the contrary, “[p]rovided it is constitutional to do so, the court will apply a statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.” Restatement (Second) of Conflict of Laws § 6, cmt. b (1971). As the Washington State Association for Justice Foundation points out, Washington courts have applied Washington law based on such statutory choice of law. *See* WSAJ Br. at 6 (citing *In re Marriage of Abel*, 76 Wn. App. 536, 539–40, 886 P.2d 1139 (1995)).

As the Attorney General of the State of Washington explains in his brief, the CPA's legislative history, purpose, and plain language establish that the CPA permits non-Washington plaintiffs to bring CPA actions. *See generally* AG Br. "Interpreting the CPA to prohibit out-of-state plaintiffs from bringing suit is inconsistent with the Legislature's directive that the statute be liberally construed to serve its beneficial purposes" and "would have a detrimental effect on the ability of private citizens to act as private attorneys general." *Id.* at 20. The CPA should be applied as the legislature intended. No choice-of-law analysis is necessary.

3. Applying Washington law is not contrary to *FutureSelect*.

The Washington-Based Companies maintain that Ms. Thornell's choice-of-law analysis "runs counter" to this Court's decision in *FutureSelect Portfolio Management, Inc. v. Tremont Group*, 180 Wn.2d 954, 331 P.3d 29 (2014). The Washington-Based Companies are wrong. *FutureSelect* involved a plaintiff investment fund management company, FutureSelect, which alleged that defendants induced it to invest in Bernie Madoff's Ponzi scheme. FutureSelect alleged defendant Tremont Partners, Inc. visited FutureSelect's office in Redmond Washington and claimed it offered FutureSelect "a rare, and potentially fleeting

opportunity to invest with Madoff” and “made assurances about its oversight and understanding of Madoff’s operation.” *FutureSelect*, 180 Wn.2d at 960. Relying on Tremont’s representations, FutureSelect invested \$195 million with Tremont over a 10-year period. On those facts and applying Restatement (Second) of Conflict of Laws § 148 (1971), this Court determined that Washington law—the law of the consumer’s home state—applied.

Unlike *FutureSelect*, this case does not involve consumers who purchased something from companies based on misrepresentations or omissions. Instead, this case involves companies who tried to trick consumers, including Ms. Thornell, into paying thousands of dollars they did not owe by sending form letters containing threats and untruths. Indeed, this case is a far cry from the “typical consumer deception case” that the Washington-Based Companies assert warrants application of Restatement § 148. *See* WBC Br. at 9.

For example, the Washington-Based Companies state that application of Restatement § 148 “recognizes the reality that consumers reasonably expect their home states’ laws to regulate their in-state purchases.” *Id.* This case does not involve an in-state purchase. The

Washington-Based Companies also state that “companies serving customers in other states expect to follow local rules that govern their conduct.” *Id.* This case does not involve companies “serving” out-of-state consumers. The Washington-Based Companies assert principles of federalism prevent Washington from having the power “to prescribe rules of liability not only for resident corporations but also for consumers across the nation who do business with the corporation.” *Id.* at 10. But this case does not involve a consumer “doing business” with defendants and the dispute does not “aris[e] from transactions with [a foreign state’s] consumers.” *See id.* (citing *Zinser v. Accufix, Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001)).

The Washington-Based Companies fail to set forth a single reason why Defendants would expect Texas law to apply to their conduct because they cannot: This Court determined in *Panag* that the very conduct at issue in this case is actionable under the Washington CPA. Any Washington-based company would expect that law to apply.

The Washington-Based Companies rely on cases involving businesses marketing goods and services to consumers in other states. Under that fact pattern, courts have found that the consumers’ home state

has an interest in regulating those business transactions. *See Zinser*, 253 F.3d at 1184 (involving consumers who purchased allegedly defective pacemakers); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (involving consumers who purchased allegedly defective tires from defendants); *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 585 (9th Cir. 2012) (involving consumers who purchased or leased cars equipped with allegedly defective brakes); *Johnson v. Nextel Commc'n*, 780 F.3d 128, 131–32 (2d Cir. 2015) (involving clients who contracted with defendants for legal services that allegedly fell below the standard of care); *Maniscalco v. Brother Int'l Corp.*, 709 F.3d 202, 204 (3d Cir. 2013) (involving consumers who purchased allegedly defective printer/scanner/copier devices); *Spence v. Glock*, 227 F.3d 308, 310 (5th Cir. 2000) (involving purchasers of allegedly defective guns); *Pilgrim v. Univ. Health Card, LLC*, 660 F.3d 943, 945 (6th Cir. 2011) (involving consumers who alleged companies used deceptive advertising to sell services); *Barbara's Sales, Inc. v. Intel Corp.*, 879 N.E.2d 910, 912 (Ill. 2007) (involving consumers who purchased computers based on allegedly false representations); *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1031 (Okla. 2007)

(involving consumers who purchased car repair services and were charged for shop supplies regardless of whether shop supplies were used); *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 678 (Tex. 2003) (involving consumers who purchased allegedly defective dental office software). By contrast, this case does not involve companies “doing business” with consumers in Texas and other states. Instead, it involves companies deceptively sending letters to consumers wholly unrelated to them.

Simply put, cases like *FutureSelect*, which involve misrepresentations in business transactions, are wholly distinguishable from cases like this one, where Defendants’ goal is to employ deceptive tactics to collect money from people with no relationship—contractual or otherwise—to them. This Court has determined such conduct is actionable under Washington’s CPA. The fact that Defendants mailed their deceptive form letters that were created in Washington to out-of-state consumers should not absolve them from liability.

4. Public policy does not endorse the unfair business practices at issue here.

The Chamber of Commerce of the United States of America rehashes here the tired policy arguments that the Chamber offers in its frequent amicus briefs opposing consumers in class action cases. There is

no evidence in the Chamber's brief supporting its argument that Washington businesses would be competitively disadvantaged by application of the CPA in accordance with its terms.

The twin purposes of the CPA are to “protect the public and foster fair and honest competition” by prohibiting unfair and deceptive business practices. RCW 19.86.920. Those purposes are complementary not contradictory. According to the Chamber, those policies are balanced by the Legislature's statement that the CPA should not be construed to prohibit “acts or practices which are reasonable in relation to the development and preservation of business.” *Id.* But “acts and practices that are reasonable in relation to the development and preservation of business” are permissible because they foster fair and honest competition. The practice challenged here—the collection of unliquidated subrogation claims as though they are judgments—is not reasonable in relation to the development and preservation of business because it is unfair and deceptive. *See Panag*, 166 Wn.2d at 47–49.

Nothing in the purpose section of the CPA supports the Chamber's suggestion that Washington businesses should be permitted to direct at out-of-state consumers practices that violate the CPA “in order to

encourage the development and preservation of business in the State.” Chamber Br. at 3. To the contrary, this Court has explained that “[t]he CPA is a particularly appropriate vehicle for reaching the collection practices at issue” in this case because the intent of the statute is to “provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation.” *Panag*, 166 Wn.2d at 49.

Defendants’ amici make alarmist claims about the impact on Washington businesses of permitting an out-of-state plaintiff to sue Washington businesses under the CPA. *See, e.g.*, Chamber Br. at 13–14, AWB Br. at 4, WBC Br. at 7, Wash. Legal Found. Br. at 1. But Washington courts have for years permitted out-of-state plaintiffs, including plaintiffs representing nationwide classes, to bring CPA claims against Washington businesses. *See, e.g., Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 553 (W.D. Wash. 2008) (holding that the CPA applied to a nationwide class suing Microsoft and explaining: “Washington has a paramount interest in applying the law to this action. The CPA targets all unfair trade practices either *originating* from Washington businesses or harming Washington citizens. Application of the CPA to Plaintiffs’ claims effectuates the broad purpose of CPA and its deterrent purpose,

especially as applied to one of Washington's most important corporate citizens."); *Peterson v. Graoch Assoc.*, No. C11-5069BHS, 2012 WL 254264, at *2 (W.D. Wash. Jan. 26 2012) (finding that New Mexico citizens could bring claim under the CPA and explaining that "the CPA recognizes claims asserted by non-resident consumers against Washington corporate entities" and "targets all unfair trade practices either originating from Washington businesses or harming Washington citizens.>"). Washington business have not shuttered their doors, nor have Washington courts become a "locus" for class actions.

5. Allowing Ms. Thornell to make a claim under the CPA does not violate the United States Constitution.

State Farm asserts that permitting Ms. Thornell to bring a claim under the CPA would violate the Due Process Clause of the United States Constitution. That argument fails because there is simply nothing "arbitrary or fundamentally unfair" about expecting a Washington business to comply with Washington law. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985). Defendants' amici make a related argument that Ms. Thornell advocates a rule that would allow a plaintiff to choose "any law" that she perceives as favorable. *See, e.g.*, AWB Br. at 1. Amici are wrong. Ms. Thornell does not advocate a rule that allows a

plaintiff to choose any forum or law she likes and readily concedes that such a rule would violate the Due Process Clause.

Amici Washington-Based Companies and the Chamber of Commerce shift course and argue that permitting a Texas resident to bring a claim under the CPA offends the Commerce Clause. That argument falters as well. All of the cases on which amici rely involve a state's attempts to impose a regulatory scheme on businesses outside their borders. *See Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) (holding that a Connecticut regulation of the beer industry that had the practical effect imposing price controls in other states violates the Commerce Clause); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (precluding application of an Illinois regulation requiring specific types of mud flaps on interstate trucking companies). The United States Supreme Court has explained that it is one state's attempt to regulate commerce that takes place "wholly outside of the State's borders" that raises problems under the Commerce Clause. *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982). It simply does not follow that application of Washington law to a Washington business printing and sending deceptive letters from

Washington and demanding payment be sent to a Washington address raises Commerce Clause problems.

III. CONCLUSION

Ms. Thornell respectfully requests that the Court answer both certified questions “yes.” The choice of law, policy, and constitutional arguments raised by Defendants’ amici provide no persuasive reason to do otherwise.

RESPECTFULLY SUBMITTED AND DATED this 6th day of
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I certify under penalty of perjury under the laws of the State of
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Subject: No. 91393-5--Sandra C. Thornell v. Seattle Serv. Bureau et al.: Plaintiff's Response to Defendants' Amicus Briefs

Greetings,

Attached for filing with the Court is Plaintiff's Response to Briefs of Amici Curiae Supporting Defendants in the above-reference matter.

Thank you.

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