No. 101687-5

SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner,

v.

STARKIST COMPANY, et al.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case arises under a statutory provision authorizing the Attorney General, acting as "parens patriae," to "restrain and prevent" violations of the Consumer Protection Act (CPA). RCW 19.86.080(1). Upon finding a "violation" of the CPA, a 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" through that violation. RCW 19.86.080(3).

For decades, this Court has explained that actions arising under RCW 19.86.080 are "distinct" from "claims for damages" arising under the CPA. *State v. LG Electronics, Inc.*, 186 Wn.2d 1, 9, ¶9, 375 P.3d 636 (2016). The legislature "did not contemplate that the courts should inquire into the question of damages in an injunction action by the Attorney General." *Seaboard Surety Co. v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 81 Wn.2d

740, 744, 504 P.2d 1139 (1973). Instead, the legislature specifically enacted "separate provisions" allowing damages and penalty remedies under the CPA. *Seaboard*, 81 Wn.2d at 744-45. The equitable restitution remedy set forth at RCW 19.86.080 is a "speedy remedy" in aid of injunctive relief, and is meant to avoid "unduly lengthened or . . . burden[some]" trial proceedings. *Id.* at 745-46.

The State itself has previously recognized that different CPA remedies serve different purposes, most recently convincing the Court that claims under RCW 19.86.080 are not subject to the four-year statute of limitations applicable to damages actions in RCW 19.86.090, principally because such damages actions are "qualitatively different from .080 claims." *LG Electronics*, 186 Wn.2d at 11, ¶12. In this case, however, the State seeks to blur fundamental statutory distinctions by transforming RCW 19.86.080 into a wide-ranging vehicle for damages actions. According to the State, RCW

19.86.080 silently imports concepts unique to damages actions in tort, such that a court sitting in review of an action arising under RCW 19.86.080 shall hold a defendant jointly and severally liable for any injuries caused by its co-conspirators.

The Court of Appeals properly rejected this idea, holding that RCW 19.86.080 "does not mandate joint and several liability." Slip op. 1. The statute by its plain terms calls for a determination of what amount "'may be necessary' to restore to consumers the money acquired" through violations of state consumer protection law. *Id*. It contemplates equitable "discretion," not an imposition of joint and several liability "as a matter of law." Slip op. 17.

The State's petition for review presents a garbled reading of RCW 19.86.080, resting on a failure to distinguish actions for equitable relief under RCW 19.86.080 from actions for damages in tort. The petition ignores the text of RCW 19.86.080 and this Court's case

law construing that text, and asserts that the decision below conflicts with decisions of this Court addressing actions for damages. But those damages cases are inapposite, and they do not establish any conflict warranting this Court's review.

The State also asserts that the decision below will undermine the CPA's "enforcement scheme" and prevent violators from being held "fully accountable." Pet. 19. That argument ignores the damages available to the State and all residents of the State in CPA actions brought under RCW 19.86.090. It is settled that joint and several liability applies in such actions. The availability of joint and several liability under RCW 19.86.090 only underscores the infirmity of the State's arguments here.

Because the State presents no basis for further review, the petition should be denied. If this Court grants review of the State's petition, however, it should also reject the reasoning of the Court of Appeals insofar as that

decision would permit the State to seek from StarKist restitution of money that is not traceable to StarKist's unlawful profits. RAP 13.4(d). That reasoning contradicts this Court's decisions, which make clear that the purpose of RCW 19.86.080 is to "assure[ ] [that] a wrongdoer is compelled to restore illegal gains." *State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 277, 510 P.2d 233 (1973). And it disregards the basic principle of equitable restitution: to restore to the plaintiff only property that can "clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002).

Only nine percent of the amount the State seeks in this case is allegedly attributable to StarKist. *See* slip op. 3. The remaining 91 percent is not the proper subject of an equitable restitution order against StarKist. If this Court grants the State's petition, it should adhere to its

precedents and hold that restitution here is limited to StarKist's illegal gains.

II. ISSUES PRESENTED FOR REVIEW

The State presents the question whether "the Court of Appeals erred in ruling that joint and several liability is a matter of the trial court's discretion where a conspirator's participation in a price-fixing conspiracy is established as a matter of law." Pet. 4.

Should this Court grant review, it should also consider whether the Court of Appeals erred by declining to recognize that an equitable restitution order under RCW 19.86.080 must be tied to the amount of money or property "acquired" by the defendant through its violation of the Consumer Protection Act. RAP 13.4(d).

III. STATEMENT OF THE CASE

A. Statutory Background

The Washington State Legislature enacted the Consumer Protection Act in 1961 in order to "complement

the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition." RCW 19.86.920. The CPA broadly prohibits all "[u]nfair methods of competition and unfair or deceptive acts or practices," RCW 19.86.020, and—as relevant here—"[e]very contract, combination, . . . or conspiracy in restraint of trade," RCW 19.86.030.

From the beginning, the CPA authorized three distinct means of enforcement. First, the CPA offered a remedy to "[a]ny person who is injured in his business or property by a violation of RCW 19.86.030," in the form of a "civil action" to "recover the actual damages sustained by him together with the costs of the suit." RCW 19.86.090 (1961 ch. 216 §2). This provision also contemplated suits brought by "the state of Washington" for any "actual damages sustained by it" by "reason of a violation of RCW 19.86.030." *Id.*

Second, the CPA authorized the Attorney General, "acting in the name of the state," to "seek recovery" of "civil penalties" against "[e]very person who shall violate RCW 19.86.030." RCW 19.86.140 (1961 ch. 216 §14).

Third, the CPA allowed the Attorney General to "bring an action in the name of 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 (1961 ch. 216 §8).

The first two means of enforcement (damages actions and civil penalties) have remained largely unchanged. But in 1970, the legislature amended RCW 19.86.080 to allow for "such additional orders or judgments as may be necessary to restore to any person in interest any moneys or property . . . which may have been acquired by means of any act herein prohibited or declared to be unlawful." RCW 19.86.080 (1970 ex.s. ch. 26 §2).

This Court first addressed this amendment in *Seaboard*, *supra*. There, the Attorney General brought "an injunction suit" against an automobile dealer in order to "enjoin alleged 'unfair methods of competition and unfair or deceptive acts or practices.'" 81 Wn.2d at 740-41. The complaint sought restitution on the grounds that "the dealer ha[d] gained possession of property of . . . members of the public and ha[d] unlawfully withheld it." *Id.* at 742. When the dealer demanded that its insurer defend the suit pursuant to a policy providing coverage for any suit "seeking damages," *id.* at 741, the insurer brought a declaratory action to "obtain a judicial determination that it ha[d] no duty to defend [the] injunction suit" brought by the Attorney General. *Id.* at 740. The dealer argued that because the Attorney General also sought restitution under RCW 19.86.080, the suit was "one which seeks damages for unfair competition," and therefore came within the scope of the insurance policy. *Id.* at 742.

This Court rejected that argument. As it explained, "the dealer is not faced with the prospect of a judgment for damages for unfair competition" because "the statute does not authorize the Attorney General to recover such damages." *Id.* at 744. Rather, under RCW 19.86.080, a court "is authorized to order restitution . . . only as an incident to the granting of the injunction," where "such an order may be appropriate and necessary to give full effect to the injunction relief ordered by the court." *Id.*

Indeed, *Seaboard* noted, "the legislature did not contemplate that the courts should inquire into the question of damages in an injunction action by the Attorney General" because—unlike the damages remedy supplied by RCW 19.86.090—the injunction remedy authorized by RCW 19.86.080 "indicates a legislative concern that a speedy remedy should be available to the state." *Id.* at 744-45. In an action under RCW 19.86.080, this Court explained, "proof that the defendants have

acquired possession of and are holding property of a customer unlawfully can be reasonably expected as part of the proof of the allegations" of unlawful conduct. *Id.* at 745. Thus, "the court can order restitution without the necessity of hearing additional evidence." *Id.* at 746.

This Court reaffirmed that understanding of RCW 19.86.080 in a string of follow-on cases recognizing that "[r]estitution orders are appropriate and necessary as part of equitable relief," and the "recovery of that which has been illegally acquired and which has given rise to the necessity for the injunctive relief . . . insures future compliance where it is assured a wrongdoer is compelled to restore illegal gains." *Ralph Williams' N.W. Chrysler Plymouth*, 82 Wn.2d at 277; *see also State v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 320, 553 P.2d 423 (1976) (affirming restitution award where the "record indicates that [defendants] are in

unlawful possession of consumer money and property"), *dismissed by* 430 U.S. 952 (1977).

In 2007, the legislature again amended RCW 19.86.080 to provide restitution on behalf of indirect purchasers of goods or services that were the subject of a violation of the CPA: "Upon a violation of RCW 19.86.030, . . . 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." 2007 ch. 66 §1. The legislature further directed that any "monetary relief awarded in an action" under RCW 19.86.080 should not "duplicate[ ] amounts that have been awarded for the same violation." *Id.*

Following that amendment, this Court once again reaffirmed the equitable, restitutionary nature of relief

under RCW 19.86.080 in *LG Electronics*. As the Court explained, "although consumers may benefit from restitution, the legislature clearly intended for the attorney general's enforcement under .080 to benefit the public generally." 186 Wn.2d at 15, ¶21. State actions to "recover money or property as restitution under .080" remain distinct from "damages claims by private persons for injuries to business and property and by the State for its direct and indirect injuries" under RCW 19.86.090. *Id.* at 11, ¶12. Damages claims under the latter provision are not only "distinct from claims under .080," *id.* at 9, ¶9, but are "qualitatively different from .080 claims." *Id.* at 11, ¶12.

B. Proceedings Below

In 2015, the U.S. Department of Justice announced an antitrust investigation of StarKist and two other branded packaged tuna producers, Bumble Bee and Chicken of the Sea International (COSI). StarKist,

Bumble Bee, and COSI all subsequently admitted their participation in a conspiracy from November 2011 to December 2013. Slip op. 2.

In June 2020, the State filed this lawsuit, seeking a determination that StarKist's participation in this conspiracy was a "violation of RCW 19.86.030." CP 52. The State sought an injunction restraining StarKist "from entering into any other" such conspiracy and an award of "restitution to the State of Washington on behalf of its residents to the maximum extent allowed under applicable state law." CP 52-53. The State thereafter obtained partial summary judgment on "StarKist's liability under RCW 19.86.030" for the 2011-2013 period. CP 107.

The State then moved to strike StarKist's demand for a jury trial on the grounds that the State's claim "is entirely equitable in nature." CP 89 (noting that "[t]he relief sought—restitution and an injunction—are equitable remedies."). The State argued that an action under RCW

19.86.080 is of "a different character entirely" than a case sounding in "tort." CP 113 n.4. The State disclaimed any intent to "pursu[e] a damages case," citing "decades of established case law" distinguishing the CPA's restitution remedy from damages claims. CP 110. The trial court struck StarKist's jury demand. CP 117.

Yet no sooner had the State prevailed on this point than it moved for partial summary judgment to hold StarKist "jointly and severally liable for the acts of [its] two co-conspirators," CP 118, citing cases holding that conspirators are "liable for *all damages* caused by the conspiracy's entire output," CP 125 (emphasis added) (quoting *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir. 2002)). The trial court granted the State's motion, holding StarKist "jointly and severally liable for the harm caused by its co-conspirators." CP 315.

C. The Court of Appeals' Decision

The Court of Appeals granted discretionary review and reversed. It held that the trial court erred by treating RCW 19.86.080 as if it "mandate[d] joint and several liability," slip op. 1, and by ruling "as a matter of law" that StarKist is "liable for the conspiracy's profits." Slip op. 17.

As the Court of Appeals explained, RCW 19.86.080 calls for a determination of what amount "'may be necessary' to restore to consumers the money acquired" through violations of the CPA. Slip op. 1. That entails an exercise of equitable "discretion." Slip op. 17. And here, the Court of Appeals noted, the State's own expert economist calculated that only a small portion—just under nine percent—of alleged consumer losses were attributable to StarKist. *See* slip op. 3. Yet the "trial court held StarKist liable for the conspiracy's profits without explaining its rationale for exercising its discretion in this

manner," which was an "abuse of discretion." Slip op. 17. The Court of Appeals reversed and remanded to the trial court "to determine, in the exercise of discretion, the amount of restitution it deems necessary under RCW 19.86.080." Slip op. 18.

In doing so, the Court of Appeals declined to hold that a restitution award under RCW 19.86.080 must be limited to those "illegal gains StarKist itself enjoyed." Slip op. 7. Instead, the Court of Appeals concluded that the trial court could "impute to one conspirator the actions of all coconspirators and, as a result, may order StarKist to pay an amount equal to all consumer losses from the entire conspiracy if the court deems it necessary to do so." Slip op. 4. The Court of Appeals reasoned that the trial court's authority under RCW 19.86.080 "to restore monies acquired through . . . a conspiracy . . . included the pre-existing power under common law to hold one conspirator liable for all of the acts done in pursuance of the

conspiracy, even if they were not a party to all of the wrongful acts." Slip op. 13.

IV. ARGUMENT

A. The Petition Should Be Denied

1. The Petition Does Not Identify A Conflict Between This Court's Decisions And The Decision Below

The State's petition ignores the statutory language governing this case and invokes unrelated precedents to posit a conflict of authority meriting this Court's review. But there is no conflict. The State's petition should be denied.

First, the State neglects to address the text of the governing statute: RCW 19.86.080. Here, the State brought an action against StarKist under RCW 19.86.080 to restrain a violation of RCW 19.86.030. CP 52-53. The trial court determined that StarKist violated RCW 19.86.030. CP 107. Thus, StarKist may be subjected to an injunction pursuant to RCW 19.86.080(1). And the

trial court "*may* also make such additional orders or judgments as *may* be necessary to restore . . . moneys or property . . . which may have been acquired" in the course of that violation. RCW 19.86.080(3) (emphases added).

As the Court of Appeals correctly recognized, the permissive language of RCW 19.86.080(3)—which provides that a trial court "*may* . . . make such additional orders . . . as *may* be necessary"—"confers discretion on the trial court" as to the need and extent of any award of money or property. Slip op. 1. That is distinct from the legislature's mandate elsewhere in the same provision that courts "*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." RCW 19.86.080(3) (emphasis added).

"Where a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to

distinguish between them, 'shall' being construed as mandatory and 'may' as permissive." *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435 (1982). And this Court has recognized that "permissive language" governing a court's powers necessarily vests that court "with discretion" in the exercise of those powers. *See Petrarca v. Halligan*, 83 Wn.2d 773, 776, 522 P.2d 827 (1974). Here, RCW 19.86.080(3) makes clear on its face that a court's award of monetary relief is discretionary, not mandatory.

The State nevertheless asserts that the Court of Appeals erred by "permit[ting] the trial court to decline to hold StarKist liable for the acts of its coconspirators," Pet. 18, and claims this error was rooted in the Court of Appeals' conflation of "the trial court's discretion to determine the amount of restitution" with "the initial, separate issue of the extent of StarKist's liability," *id.* at 16. The State then assumes that determining "the extent

of StarKist's liability" requires consideration of "joint and several liability." *Id.*

But for purposes of RCW 19.86.080, the extent of StarKist's liability (that is, the extent of its fault) has been resolved: StarKist violated RCW 19.86.030 from November 2011 to December 2013. *See* CP 107. The State sought relief for that violation under RCW 19.86.080, which offers only two remedies: injunction, and discretionary restitution as may be necessary to restore ill-gotten money or property. Neither entails inquiry into "joint and several liability," which is a mechanism for apportioning *damages*. *See* RCW 4.22.070(1) (providing for a calculation of "fault" "attributable to every entity which caused the claimant's damages," for purposes of proportionate or joint and several liability); *see also, e.g.*, *Kottler v. State*, 136 Wn.2d 437, 442, 963 P.2d 834 (1998) ("[A]bsent . . . joint and several liability one party will have no duty to pay another's liability for damages."); Dan

B. Dobbs et al., *The Law of Torts* § 487 (2d ed. July 2022 update) (joint and several liability is one means of determining "responsibility for damages").

This Court has said time and again that RCW 19.86.080 has nothing to do with damages; indeed, it has said that damages claims are "qualitatively different from .080 claims," *LG Electronics*, 186 Wn.2d at 11, ¶12, and that "the statute does not authorize the Attorney General to recover . . . damages." *Seaboard*, 81 Wn.2d at 744. That point disposes of the State's claim that an action under RCW 19.86.080 mandates the application of principles of joint and several liability. The State not only ignores the text of RCW 19.86.080, but this Court's decisions recognizing that the restitution remedy supplied by RCW 19.86.080 does not "contemplate . . . inquir[y] into the question of damages." *Id.*

Instead, the State unearths a scattered body of damages cases standing for the proposition that co-

conspirators are "jointly and severally liable for the damages resulting from [their] conduct." Pet. 13 (quoting *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Grp., Inc.*, 114 Wn. App. 151, 161, 52 P.3d 30 (2002)); *see Sears v. Int'l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Loc. No. 524*, 8 Wn.2d 447, 454, 112 P.2d 850 (1941) (upholding jury verdict that defendants "were guilty of a conspiracy" causing the plaintiff to "suffer[ ] damages"); *State ex rel. Woodworth & Cornell v. Superior Court*, 9 Wn.2d 37, 38, 113 P.2d 527 (1941) (addressing a conspiracy claim in which the plaintiff sought "expect[ation]" damages); *see also Beltz Travel Serv., Inc. v. Int'l Air Trans. Ass'n*, 620 F.2d 1360, 1362 (9th Cir. 1980) (addressing an "action for treble damages"); *State v. Am. Pipe & Constr. Co.*, 280 F. Supp. 802, 805 (W.D. Wash. 1968) (in an action for treble damages, antitrust defendant "must share the

responsibility for any damages proved which were occasioned by the sales of co-conspirators").

That parties to a conspiracy are jointly and severally liable *in damages actions*, including under RCW 19.86.090, is undisputed. But this action arises under RCW 19.86.080, which "does not authorize the Attorney General to recover . . . damages." *Seaboard*, 81 Wn.2d at 744. The damages case law cited by the State in its petition is inapposite.

The State also relies upon this Court's decision in *Lyle v. Haskins*, which noted that where "the liability of the conspirators is joint and several, an[ ] action may be brought against only one of the conspirators." 24 Wn.2d 883, 900, 168 P.2d 797 (1946) (Pet. 12-13). That principle, too, is irrelevant here: the Court of Appeals did not hold that an action under RCW 19.86.080 must be brought against all members of an antitrust conspiracy; it held that RCW 19.86.080 "confers discretion" on the trial

court as to the amount of restitution that may be awarded in an action arising thereunder. Slip op. 1. That determination does not conflict with *Lyle*.

In short, the State's assertion that the decision below "is in direct conflict with this Court's holdings," Pet. 15, is wrong. The petition simply fails to engage with the text of RCW 19.86.080 and ignores this Court's precedents recognizing that claims under RCW 19.86.080 are fundamentally "distinct" from "claims for damages," *LG Electronics*, 186 Wn.2d at 9, ¶9. The Court should deny the petition.

2. The State's Arguments Distort The CPA

The State also asserts that this case warrants review under RAP 13.4(b)(4) because "[i]f conspirators are not liable for the wrongful acts of their coconspirators," that will "undermine[ ] the CPA enforcement scheme and its protections for Washington consumers." Pet. 19. That

argument rests on the mistaken premise that the decision below forbids conspirators from being held liable for the acts of their co-conspirators.

Yet the CPA clearly provides for joint and several liability in damages actions under RCW 19.86.090, which permits claims by "[a]ny person" and by "the state of Washington" for injuries suffered on account of conduct proscribed by the CPA. *See, e.g.*, *Wilkinson v. Smith*, 31 Wn. App. 1, 13, 639 P.2d 768 (holding defendant "jointly and severally liable" in an action brought under RCW 19.86.090), *rev. denied*, 97 Wn.2d 1023 (1982). Indeed, RCW 19.86.090 not only allows for joint and several liability; it permits joint and several liability for *treble damages*. *See* RCW 19.86.090; *Matheny v. Unumprovident Corp.*, 594 F. Supp. 2d 1212, 1226 (E.D. Wash. 2009) (recognizing joint and several liability as to an award of treble damages). The notion that the decision below will prevent conspirators from being held fully

"liable for the wrongful acts of their coconspirators," Pet. 19, is incorrect.

Indeed, the CPA gives the State a variety of remedies—damages (RCW 19.86.090); injunctive and restitution remedies (RCW 19.86.080); and substantial penalty provisions (RCW 19.86.140). Each plays a distinct role in the CPA's enforcement scheme. "The fact that separate provisions are made in the statute for injunction actions on behalf of the state, in which no mention is made of damages, and damage actions on the part of persons injured" shows that the legislature intended each remedial provision to function in different ways. *Seaboard*, 81 Wn.2d at 745.

The State has benefitted from those distinctions for a half-century. It is the State's attempt to ramp up the scope of available relief under RCW 19.86.080, and not the Court of Appeals' adherence to these clear statutory

distinctions, that "undermines the CPA enforcement scheme." Pet. 19.

B. If Review Is Granted, This Court Should Limit The Scope Of The Restitution Remedy

For the reasons set out above, this Court should deny the State's petition. But if this Court grants review, it should recognize that restitution under RCW 19.86.080 is limited to money or property wrongly "acquired" by the defendant from whom restitution is sought. The Court of Appeals' decision to the contrary was error.

1. The Decision Below Conflicts With This Court's Precedents Regarding The Scope Of Restitution Under RCW 19.86.080

Although the Court of Appeals rightly held that RCW 19.86.080 "confers discretion on the trial court," and "does not mandate joint and several liability," slip op. 1, it wrongly concluded that "when the legislature . . . gave courts the authority to restore monies acquired through" a conspiracy in restraint of trade, "that authority included

the pre-existing power under common law to hold one conspirator liable for all of the acts done in pursuance of the conspiracy." Slip op. 13. The latter conclusion—that RCW 19.86.080 permits courts to "hold [a] conspirator liable for . . . the acts" of others, *id.*—is contrary to this Court's precedents.

Those precedents make clear that the purpose of an action under RCW 19.86.080 is to "protect the public," and "not to seek redress for private individuals." *LG Electronics*, 186 Wn.2d at 15, ¶21 (quoting *Seaboard*, 81 Wn.2d at 746). While the statute gives the Attorney General power to seek "restitution," it does so only to "give full effect to the injunction relief" otherwise available under RCW 19.86.080. *Seaboard*, 81 Wn.2d at 744. Forcing a defendant to give up ill-gotten gains accomplishes that injunctive purpose: "[R]ecovery of that which has been illegally acquired and which has given rise to the necessity for the injunctive relief . . . insures future

compliance where it is assured a wrongdoer is compelled to restore illegal gains." *Ralph Williams*, 82 Wn.2d at 277.

Thus, a court order to "restore . . . moneys or property . . . which may have been acquired" must target "moneys or property" in the possession of the person against whom the order is directed, and which were "acquired" through conduct proscribed by the CPA. *See* RCW 19.86.080(3). That commonsense construction is consistent with statutory context: In contrast to damages actions, RCW 19.86.080 is supposed to provide "a speedy remedy" requiring only "proof" that the defendant "acquired possession of and [is] holding property of a customer unlawfully." *Seaboard*, 81 Wn.2d at 745.

Consistent with that design, a restitution order under RCW 19.86.080 must be limited to the restoration of the defendant's own illegal gains. The Court of Appeals' contrary conclusion that RCW 19.86.080 permits an award "for the full amount of the *conspiracy's* illegal gains," slip

op. at 17 (emphasis added), disregards the language of RCW 19.86.080 and this Court's prior cases.

The Court of Appeals' decision also disregards background principles of equitable restitution. As StarKist explained in the proceedings below, equitable restitution targets "particular funds or property in the defendant's possession," where such wrongly held property could be specifically "traced" from the plaintiff to the defendant. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 213, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002). Such restitution is distinct from "the imposition of personal liability" with respect to "*some* funds" belonging to the defendant, regardless of whether the funds are the traceable property of the plaintiff. *Id.* at 214. This Court's precedents embrace that understanding of RCW 19.86.080. *See Seaboard*, 81 Wn.2d at 742 ("[T]he only property which could be 'restored' by an order of the court in the injunction suit would appear to be

the property of customers wrongfully withheld."). If this Court grants review, it should recognize that this Court's precedents limit equitable restitution to restoration of the *defendant's* "illegal gains" to those the defendant has wronged. *Ralph Williams*, 82 Wn.2d at 277.

2. Equitable Restitution Here Is Limited To The Amount Of StarKist's Gains

Proper application of equitable restitution principles is especially vital here because the recovery sought by the State is so disproportionate to the sum that StarKist is asserted to wrongfully hold. As the State's own expert has calculated, of the $11.98 million that Washington consumers were allegedly overcharged for tuna, only $1.07 million (just under nine percent) is attributable to StarKist. Slip op. 3. The remaining *91 percent* is attributable to StarKist's competitors. And as to those competitors, the State either chose not to pursue them, or settled with them for pennies on the dollar (as in the case

of COSI and Bumble Bee CEO Christopher Lischewski). *See id.*

Yet the State seeks to recover the full amount from StarKist. The State has never offered a substantive justification for this stark disproportionality. In any event, RCW 19.86.080 does not permit it. Rather, RCW 19.86.080 allows for a restitution order restoring to Washington consumers only those "illegal gains" that StarKist itself "acquired" in the course of its violation of the CPA. *Ralph Williams*, 82 Wn.2d at 277. If this Court grants review, it should clarify that any restitution order on remand may not exceed the sum of those gains.

V. CONCLUSION

This Court should deny review. But if it grants review, it should hold that, pursuant to RCW 19.86.080, any restitution order running against StarKist must be limited to StarKist's own profits.

I certify that this answer is in 14-point Times New Roman font and contains 4,992 words, excluding the parts of the document exempted from the word count under RAP 18.17.

Respectfully submitted this 6th day of March, 2023.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 6, 2023, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-File
Paul R. Taylor Byrnes Keller Cromwell LLP 1000 2nd Ave Ste 3800 Seattle, WA 98104-1062 ptaylor@byrneskeller.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Holly A. Williams Chief Litigation Counsel --Antitrust Division Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 holly.williams@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail

Luminita Nodit Assistant Attorney General - Antitrust Division Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle WA 98104 3188 luminita.nodit@atg.wa.gov	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
Christopher S. Yates (*pro hac vice*) Belinda S Lee (*pro hac vice*) Ashley M. Bauer (*pro hac vice)* 505 Montgomery Street, Suite 2000 San Francisco, CA 94111-6538 Chris.Yates@lw.com Belinda.Lee@lw.com Ashley.Bauer@lw.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail
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DATED at Brooklyn, New York this 6th day of March, 2023.

/s/ Andrienne E. Pilapil
Andrienne E. Pilapil

SMITH GOODFRIEND, PS

March 06, 2023 - 3:28 PM

Transmittal Information

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Appellate Court Case Number:	101,687-5
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