NO. 101687-5

SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Petitioner,

v.

STARKIST COMPANY, et. al.,

Respondent.

STATE OF WASHINGTON'S REPLY TO STARKIST'S ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Holly A. Williams, WSBA No. 41187
Luminita Nodit, WSBA No. 50972
Assistant Attorneys General
Cynthia Alexander, WSBA No. 46019
Deputy Solicitor General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.464.7744

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

StarKist asks this Court to accept review of a new issue, whether "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." Answer at 6. Such a restrictive misreading of the statute would defeat the purpose of the legislature's 2007 amendment of the CPA expressly codifying restitution for indirect purchasers—those who did not purchase products directly from CPA violators, but from third-parties. Limiting restitution to money acquired by a defendant is incompatible with the statute's plain language, ignores decades of precedent affirming trial courts' broad discretion to restore money to consumers under RCW 19.86.080, and eviscerates the legislature's grant of authority to order full restitution for indirect purchasers in the 2007 amendment.

The Court of Appeals did not err in rejecting StarKist's argument, concluding that "RCW 19.86.080 does not limit

restitution to monies acquired by a single coconspirator." *StarKist Co. v. State*, No. 82725-1, slip op. at 7 (Wash. Ct. App. Jan. 3, 2023). StarKist's self-serving argument is a radical departure from antitrust precedent. It would deprive trial courts of authority to restore to consumers the money they overpaid for price-fixed products—to make consumers whole and restore the status quo from the effects of illegal conspiracies. The Court of Appeals' rejection of this faulty theory of restitution is not in conflict with decisions of this Court. StarKist does not meet that or any other criteria for review under RAP 13.4(b) and this Court should decline review of this issue.

II. ARGUMENT

A. Restitution Was Not Decided By the Trial Court or Before the Court of Appeals on Discretionary Review

The trial court did not consider or decide what restitution may be appropriate in the summary judgment order the Court of Appeals reviewed. CP 314-15. The Court of Appeals is mistaken when it says that "the trial court held StarKist liable for the conspiracy's profits." *StarKist Co.*, slip op. at 17. The matter

came before the trial court on a motion for partial summary judgment on StarKist's joint and several liability for the acts of its coconspirators, Bumble Bee and Chicken of the Sea. CP 118-131. The trial court granted summary judgment, ordering that "StarKist is jointly and severally liable for the harm caused by its co-conspirators Bumble Bee and Chicken of the Sea as a result of the price-fixing conspiracy." CP 314-15.

The trial court's order did not address what amount of restitution may be appropriate to restore money acquired from consumers in the conspiracy. *Id.* Nor did it address whether restitution in this case should be measured by the ill-gotten gains of the coconspirators or by the amounts Washington consumers overpaid for illegally price-fixed products. *Id.* The trial court simply has not considered or decided what restitution it may order, an issue that remains outstanding for trial.

While the issue was not before or decided by the trial court, the Court of Appeals nevertheless discussed what measure of restitution may be appropriate: "The trial court may impute to

one conspirator the actions of all coconspirators and, as a result, may order StarKist to pay an amount equal to the conspiracy's gains if the court deems it necessary to do so." *StarKist Co.*, slip op. at 2.

Reaching the issue of restitution was not necessary for the Court of Appeals to decide the joint and several liability issue. Even so, the court correctly concluded that "the plain language of RCW 19.86.080 does not limit restitution to monies acquired by a single coconspirator." *Id.*, slip op. at 7. "Neither RCW 19.86.080(2) nor .080(3) says restitution must be limited to any moneys which the defendant may have acquired from their participation in the conspiracy." *Id.*, slip op. at 8.

StarKist's attempt to limit monetary relief in a conspiracy case to a single defendant's profits cannot be reconciled with the language and purpose of the CPA. This Court should decline review of this issue because StarKist is wrong about restitution, the Court of Appeals did not err, and because the trial court has yet to make any orders about restitution.

B. RCW 19.86.080 Does Not Limit Restitution to the Profits of a Single Defendant

1. The legislature amended RCW 19.86.080 to expressly confirm the trial court's authority to restore money to indirect purchasers

StarKist's effort to restrict the trial court's discretion to only a profit-based measure of restitution would render meaningless the legislature's 2007 amendment of the CPA codifying the Attorney General's authority to bring claims on behalf of indirect purchasers. *See State v. LG Elecs., Inc.*, 186 Wn.2d 1, 9-10, 375 P.3d 636 (2016) (citing Laws of 2007, ch. 66, § 1). "[T]he legislature amended .080 to add the language 'or as *parens patriae* on behalf of persons residing in the state' and to expressly provide that for certain violations of the act, restitution may be awarded to persons in interest regardless of whether they were direct or indirect consumers of goods." *Id.* The Final Bill Report for the amendment provides: "In cases in which the Attorney General has brought an action under the CPA for antitrust violations, the court is authorized to order restoration for an injured party regardless of whether the injury was the

result of a direct or indirect purchase of goods or services." FINAL B. REP. ON SUBSTITUTE S.B. 5228, 60th Leg., Reg. Sess. (Wash. 2007).

This amendment lays bare both the folly and mischief of StarKist's interpretation of RCW 19.86.080. By definition, indirect purchasers did not purchase tuna directly from the price-fixing companies—they are everyday consumers who overpaid for price-fixed tuna at their local markets, grocery stores, and other retailers. The money they overpaid due to illegal price-fixing was paid to third-party sellers, not to any defendant. The legislature's 2007 amendment ensured that the Attorney General has authority to seek, and the trial court has authority to order, restitution for indirect purchasers "injured by violations of the CPA." *Id.*

As the Court of Appeals recognized, "[t]he legislature added subparagraph (3) to RCW 19.86.080 in 2007, not as a way of restricting the scope of restitution that a court could order, but as a way to expand the class of customers on whose behalf the

Attorney General could bring suit." *StarKist Co.*, slip op. at 9. The amendment expressly clarifies the types of consumers protected by the statute; it does not limit the trial court's discretion to determine the appropriate measure and amount of restitution for those consumers.

StarKist's argument invites this Court to conclude the 2007 amendments to the CPA are a nullity. StarKist is wrong. Such a misconstruction of RCW 19.86.080 frustrates the purpose of the CPA "to protect the public and foster fair and honest competition," and ignores the mandate of RCW 19.86.920 that the CPA "shall be liberally construed that its beneficial purposes may be served." As this Court has said, "'Liberal construction' is a command that the coverage of an act's provisions in fact be liberally construed and that its exceptions be narrowly confined." *Vogt v. Seattle-First Nat. Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991) (citation omitted).

The language and purpose of the 2007 amendment, codifying the Attorney General's authority to seek restitution on

behalf of injured indirect purchasers, and the command of liberal construction are all incompatible with StarKist's curtailment of the trial court's discretion. The goal of the statute will not be served in this case if restitution is reduced to the profits that made their way back to an individual conspirator, rather than the amounts overpaid by consumers because of the conspiracy.

2. The statute's plain language does not limit restitution to a defendant's profits

RCW 19.86.080(2) provides that a trial 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." For violations of the CPA's antitrust provisions, the court may do so "regardless of whether such person purchased or transacted for goods or services directly with the defendant or indirectly through resellers." RCW 19.86.080(3). The statute is a broad grant of discretion to the trial court that by its plain language does not

limit the monetary relief the trial court may order to CPA violators' profits.

StarKist's flawed interpretation of RCW 19.86.080 is inconsistent with the statute's unambiguous language and basic principles of statutory construction. A court's primary duty when interpreting a statute, "is to discern and implement legislative intent," and if a statute's meaning is plain on its face, "then the court must give effect to that plain meaning as an expression of legislative intent." *State v. LG Elecs., Inc.*, 185 Wn. App. 123, 132, 340 P.3d 915 (2014), *aff'd,* 186 Wn.2d 1, 375 P.3d 636 (2016) (internal quotations and citations omitted). While the court may examine the ordinary meaning of the language used, the context of the statute where the provision is found, and the statutory scheme as a whole, the court "must not add words where the legislature has chosen not to include them, and must construe statutes such that all of the language is given effect." *Id.* (internal quotations and citations omitted).

Consistent with these principles of statutory construction, the Court of Appeals rejected StarKist's arguments limiting restitution because "the plain language of RCW 19.86.080 does not limit restitution to monies acquired by a single coconspirator." *StarKist Co.*, slip op. at 7. As the Court of Appeals recognized, the "prohibited" or "unlawful" acts referred to in RCW 19.86.080(2) are the acts explicitly outlawed by other provisions of the CPA, including the prohibition in RCW 19.86.030 against conspiracies in restraint of trade. *StarKist Co.*, slip op. at 8. The trial court may thus make orders or judgments necessary to restore to *any* indirect purchaser *any* money acquired by means of a conspiracy in restraint of trade in violation of RCW 19.86.030.

StarKist is simply wrong in asserting that RCW 19.86.080 limits restitution to profits it acquired from the conspiracy. The plain text supports no such limitation. In testament to StarKist's distortion of the CPA's plain language, it would have this Court add words to the statute—"acquired by defendant"—that the

legislature did not use. Adding those words is consequential for the indirect purchasers the statute was amended to protect. To do so would deprive the trial court of discretion to restore to those consumers money acquired by price fixing, depending on whether the money was acquired by a defendant, by a co-conspirator, or by a third-party reseller—a restriction not present in the statute.

The statute's focus is on restoring the status quo which, in the present case, means returning money to consumers who overpaid for price-fixed tuna. If the legislature had meant that a defendant's profits were the only money a trial court could restore to indirect purchasers, the statute would say that. It does not. Rather, the CPA says what it means—that the trial court has authority to enter any necessary orders or judgments to restore money to consumers to make them whole.

3. This Court's decisions affirm the trial court's broad discretion and do not limit restitution to money or property acquired by a defendant

StarKist's argument that restitution must be limited to its own profits from the conspiracy is unsupported by, and in conflict with, this Court's prior decisions. This Court discussed the discretionary powers of trial courts under RCW 19.86.080 in a series of companion cases arising from the same CPA enforcement action by the Attorney General against a car dealership and its owners for engaging in unfair and deceptive acts and practices toward their customers. *See Seaboard Sur. Co. v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 81 Wn.2d 740, 504 P.2d 1139 (1973); *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 510 P.2d 233 (1973); *State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 321, 553 P.2d 423 (1976).

Rather than narrowly construe the trial court's authority under RCW 19.86.080, in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, this Court explained that it is

"statutorily required to provide a liberal construction of the act's provision" and, accordingly, "*decline[d] to limit the traditional equity powers of the court*." 82 Wn.2d at 277-78 (emphasis added). In doing so, it recognized that "equitable powers of remedy must be broad and flexible." *Id.* at 278 (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 64 S. Ct. 587, 88 L. Ed. 754 (1944)). It reaffirmed these principles three years later, emphasizing that the purpose of restitution under RCW 19.86.080 is to "enforce the laws of the particular jurisdiction in the public interest by restoring the status quo." *Ralph Williams*, 87 Wn.2d at 298.

When courts award restitution, they "act in the public interest by restoring the status quo and ordering the return of that which rightfully belongs to the purchaser," an action that "is within the recognized power and within the highest tradition of a court of equity." *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S. Ct. 1086, 1091, 90 L. Ed. 1332 (1946). These powers are even greater in an enforcement action by the government; "since the public interest is involved in a proceeding of this

nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398. Courts exercising equitable authority have the power to mold "each decree to the necessities of the particular case." *Id.*

Disregarding the trial court's broad and flexible discretion and the statutory mandate for liberal construction, StarKist relies on *Seaboard* and *Ralph Williams* for the proposition that the only relief a trial court may order under RCW 19.86.080 is the return of money or property in a defendant's possession. StarKist essentially argues that because the court *in that case* ordered the return of money and property in the defendants' possession, that is the only relief a trial court can order in *any* case under RCW 19.86.080. But *Ralph Williams* involved a direct purchaser relationship—customers cheated by a car dealership—so the money acquired by the CPA violation was acquired directly by the defendants. The same is not true in an indirect purchaser case like this one, where customers purchased their price-fixed tuna

from local grocery stores or markets and their money was not acquired by StarKist.

While the *Seaboard* and *Ralph Williams* cases affirm the trial court's authority to order the return of money and property in a defendant's possession, this Court did not hold that the trial court's authority is limited solely to returning property in a defendant's possession. That issue was not before the Court. StarKist selectively quotes language from *Seaboard*, that "the 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." Answer at 31-32 (citing *Seaboard*, 81 Wn.2d at 742). But that language was from an introductory discussion of the allegations pled by the Attorney General and preceded by the phrase, "Within the allegations of the complaint." *Seaboard*, 81 Wn.2d at 742. It was not a holding by the Court.

StarKist has cherry-picked language from these decisions to paint a distorted and self-serving view of the CPA. It ignores

that the *Seaboard* and *Ralph Williams* cases pre-date the 2007 indirect purchaser amendment for violation of the CPA's antitrust provisions. The cases did not deal with indirect purchasers and simply do not stand for the proposition StarKist asserts.

StarKist's reliance on *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 220, 122 S. Ct. 708, 151 L. Ed. 2d 635 (2002), is similarly misplaced. *Great-West* is not an enforcement action or an antitrust conspiracy case; rather it involved a woman injured in a car accident who received benefits from her health insurance plan. After she settled her tort claim, the insurer sued seeking reimbursement of the benefits paid under a provision of the Employment Retirement Income Security Act (ERISA) authorizing suits to obtain "appropriate equitable relief." 534 U.S. at 207-08. The Supreme Court held that the remedy sought, specific performance of the ERISA plan's reimbursement provision, a contract remedy, was not "appropriate equitable relief" authorized by ERISA. *Id.* at 210-11, 221.

RCW 19.86.080 does not include the phrase "appropriate equitable relief" as the ERISA provision does, so discussion of what relief qualifies as "appropriate equitable relief" for purposes of ERISA provides no guidance here. In RCW 19.86.080, the legislature has provided a statutory remedy instilling broad, flexible discretion in the trial court to make orders or judgments necessary to restore *any* money to *any* consumer injured by a CPA violation.

Lastly, StarKist makes a fairness argument for why the trial court's discretion should be curtailed. StarKist asserts that ordering it to restore money consumers overpaid for price-fixed tuna would be inequitable and disproportionate because less than nine percent of the total amount consumers were overcharged is attributable to its sales, with 91 percent attributable to sales of its coconspirators' tuna. Answer at 32. This argument fails to acknowledge that 100 percent of the money consumers overpaid for price-fixed tuna is attributable to StarKist's conspiracy with its competitors. Bumble Bee filed for bankruptcy and Chicken of

the Sea agreed to cooperate with the State's investigation and entered into an early settlement. CP 414; 447-62. It is not unfair that StarKist may be left responsible for the full amount; it assumed that risk by entering into an illegal price-fixing conspiracy. That conspiracy injured Washington consumers and the real inequity would be the failure to make those consumers whole and restore the money they overpaid. It is well within the trial court's discretion, and consistent with this Court's decisions, to order full restitution of the money Washington consumers overpaid for price-fixed tuna.

III. CONCLUSION

The Court of Appeals correctly concluded that "StarKist's restrictive interpretation of RCW 19.86.080 conflicts with RCW 19.86.920 and [Washington] case law liberally interpreting the restitution provision of the CPA." *StarKist Co.*, slip op. at 10. StarKist's restrictive interpretation is incompatible with the purpose of the 2007 CPA amendment, the unambiguous language of the statute, and this Court's decisions affirming the

trial court's broad discretion under RCW 19.86.080. The Court of Appeals' rejection of StarKist's ill-founded restitution arguments is not in conflict with decisions of this Court. StarKist does not meet that basis or any other criteria for review under RAP 13.4(b) and the Court should decline review of this issue.

This document contains 3,100 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 21st day of March 2023.

ROBERT W. FERGUSON
Attorney General

s/ Holly A. Williams
Holly A. Williams, WSBA No. 41187
Luminita Nodit, WSBA No. 50972
Assistant Attorneys General
Cynthia Alexander, WSBA No. 46019
Deputy Solicitor General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206.464.7744

DECLARATION OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington, that on March 21, 2023, a true and correct copy of the foregoing State of Washington's Reply to StarKist's Answer to Petition for Review was served to the Court and the parties to this action as follows:

Office of Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☒ E-File
Catherine W. Smith, WSBA No. 9542 Howard M. Goodfriend, WSBA No. 14355 1619 8th Avenue North Seattle, WA 98109 cate@washingtonappeals.com howard@washingtonappeals.com	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☒ E-Mail
Paul R. Taylor, WSBA No. 14851 Byrnes Keller Cromwell LLP 1000 2nd Avenue, Suite 3800 Seattle, WA 98104 ptaylor@byrneskeller.com	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☒ E-Mail

Christopher S. Yates (*pro hac vice*) Belinda S. Lee (*pro hac vice*) Ashley M. Bauer (*pro hac vice*) Latham & Watkins LLP 505 Montgomery Street, Suite 2000 San Francisco, CA 94111 Chris.Yates@lw.com Belinda.Lee@lw.com Ashley.Bauer@lw.com	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☒ E-Mail
Charles S. Dameron (*pro hac vice*) Latham & Watkins LLP 555 11th Street NW, Suite 1000 Washington, DC 20004-1359 charles.dameron@lw.com	☐ Facsimile ☐ Messenger ☐ U.S. Mail ☒ E-Mail

Dated at Seattle, Washington, this 21st day of March 2023.

s/ Holly A. Williams
HOLLY A. WILLIAMS

WA STATE AGO - ANTITRUST DIVISION

March 21, 2023 - 1:00 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,687-5
Appellate Court Case Title:	Starkist Company v. State

The following documents have been uploaded:

- 1016875_Answer_Reply_20230321125845SC210108_7223.pdf
  This File Contains:
  Answer/Reply - Reply to Answer to Petition for Review
  The Original File Name was WA_ReplyBrief.pdf

A copy of the uploaded files will be sent to:

- Chris.Yates@lw.com
- SGOOlyEF@atg.wa.gov
- andrienne@washingtonappeals.com
- ashley.bauer@lw.com
- belinda.lee@lw.com
- cate@washingtonappeals.com
- charles.dameron@lw.com
- cynthia.alexander@atg.wa.gov
- howard@washingtonappeals.com
- jrussell@byrneskeller.com
- lumi.nodit@atg.wa.gov
- ptaylor@byrneskeller.com

Comments:

Sender Name: Grace Monastrial - Email: atseaef@atg.wa.gov
Filing on Behalf of: Holly Anne Williams - Email: holly.williams@atg.wa.gov (Alternate Email: atseaef@atg.wa.gov)

Address:
800 5th Ave., Ste. 2000
Seattle, WA, 98056
Phone: (206) 233-3395

Note: The Filing Id is 20230321125845SC210108