70244-8 70299-8

No. 91263-7

No. 70299-8-I
King County Superior Court No. 12-2-15842-8 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Plaintiff / Respondent,

v.

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

Defendants / Appellants.

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I. INTRODUCTION

The Attorney General of Washington ("Attorney General" or "Plaintiff") filed this action too late. This is a state antitrust case filed on May 1, 2012—six months after the expiration of the statute of limitations governing antitrust damages claims. Based on this untimeliness, Defendants[1] moved to dismiss. The Superior Court erred in denying that motion based on the erroneous conclusion that Plaintiff's antitrust claims were immune from any statute of limitations. Defendants were granted discretionary appellate review of the Superior Court's order because it presented a "novel" issue "on which fair-minded jurists might reach contradictory conclusions." The Court should reverse the Superior Court's order and direct that Plaintiff's claims be dismissed as untimely.

Plaintiff's suit alleges a violation of Washington's Consumer Protection Act ("CPA"), RCW 19.86.030, based on alleged price-fixing of cathode ray tubes ("CRTs"). Plaintiff asserts a claim for damages on behalf of state agencies under RCW 19.86.090, and a *parens patriae* claim for restitution on behalf of Washington residents under RCW 19.86.080

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[1] Defendants/Appellants Koninklijke Philips N.V., Philips Electronics North America Corporation, Toshiba Corporation, Toshiba America Electronic Components, Inc., LG Electronics, Inc., LG Electronics U.S.A., Inc., Hitachi, Ltd., Hitachi Displays, Ltd., Hitachi Electronics Devices (USA) Inc., and Hitachi Asia, Ltd. (collectively, "Defendants") joined in the motion to dismiss.

(Plaintiff's "'080 *parens patriae* claim"). Plaintiff also seeks civil penalties under RCW 19.86.140 and injunctive relief under RCW 19.86.080 and RCW 19.86.090.

There can be no dispute that Plaintiff's claims are untimely under the CPA's sole statute of limitations, RCW 19.86.120. To excuse this untimeliness, Plaintiff argues that its claims are either immunized from any statute of limitations by RCW 4.16.160 or subject to an infinite statute of limitations. Under Plaintiff's interpretation of the relevant statutes, it can bring claims under the CPA literally whenever it wants, no matter how stale the claim may be.

The Court should reject Plaintiff's position. As to Plaintiff's argument that its *parens patriae* claim—what Plaintiff called the "meat" of its case—is immune to any statute of limitations, RCW 4.16.160 simply has no application to this claim. Plaintiff cannot point to a single instance in the more than 150 years since the enactment of RCW 4.16.160 that it has been applied to a *parens patriae* claim. Nor can it cite to a single instance in the more than 50 years since the CPA's enactment where RCW 4.16.160 was applied to any CPA claim. This silence is telling.

The law is clear; the immunity granted by RCW 4.16.160 applies when there is a specific delegation of an inherently sovereign duty and power. There is nothing inherently sovereign about Plaintiff's CPA

claim—the CPA specifically authorizes ***private plaintiffs*** to enforce state antitrust law. Indeed, private plaintiffs have filed dozens of direct and indirect purchaser class action and opt-out claims against the same defendants here, for the same injury, caused by the same alleged antitrust violations.

Nor should the Court embrace Plaintiff's assertion that its *parens patriae* claim is subject to an infinite limitations period on the theory that there is no statute of limitations that explicitly applies to such a claim. This contention is wrong. It is well-settled that claims for relief that are not governed by an expressly applicable statute of limitations are subject to more general or "catch-all" statutes of limitations, rather than being granted an infinite limitations period.

Defendants submit that the Court should hold that the CPA's four-year statute of limitations is applicable to Plaintiff's *parens patriae* claim. Application of the CPA's four-year limitations period to such claims is consistent with the Washington legislature's intent that the CPA conform to federal antitrust law. Such an interpretation is also necessary so that the CPA's statute of limitations is not undermined by the assertion of time-barred claims—in the form of a *parens patriae* action—that impair a defendant's right to fairly defend itself before evidence is lost and memories fade. If the Court finds that the CPA's statute of limitations

does not apply to Plaintiff's *parens patriae* claim, then it should apply a more general or catch-all statute of limitations—under any of which Plaintiff's claim would still be untimely.

Plaintiff's claim for damages on behalf of state agencies is also untimely. The CPA's four-year statute of limitations explicitly applies to this claim and there is no exception in that statute for claims by the Attorney General. Similarly, Plaintiff's claim for civil penalties is untimely under either the CPA's statute of limitations or the general limitations provisions for statutory penalties. The Washington Supreme Court has held that RCW 4.16.160 does not apply to claims for penalties.

There is simply no justification in Washington's statutory or case law to give Plaintiff free reign to assert CPA claims whenever it wants. The Court should thus reverse the Superior Court's order and direct that Plaintiff's claims against Defendants be dismissed.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

(1) The Superior Court erred in entering the order on March 28, 2013, denying Defendants' motion to dismiss Plaintiff's claims under RCW 19.86.030 based on the expiration of the statute of limitations.

B. Issues Pertaining to Assignments of Error

(1) Whether the Superior Court erred in applying RCW 4.16.160 to Plaintiff's *parens patriae* antitrust claim when the legislature did not specifically delegate enforcement of the CPA to Plaintiff, and instead gave substantial enforcement authority to private plaintiffs, thus making clear that Plaintiff's *parens patriae* claim is not an inherently sovereign act.

(2) Whether the four-year statute of limitations under RCW 19.86.120 applies to Plaintiff's *parens patriae* claim under RCW 19.86.080, when any contrary position would create discord with federal antitrust law, undermine RCW 19.86.120, and be inconsistent with the structure of the CPA.

(3) Whether, even if RCW 19.86.120 does not apply, Plaintiff's *parens patriae* claim is untimely under the general or "catch-all" statutes of limitations in RCW 4.16.080(2) and RCW 4.16.130, whose application is mandated for statutes that otherwise have no applicable statute of limitations.

(4) Whether the Superior Court erred in denying Defendants' motion to dismiss Plaintiff's claims for damages under RCW 19.86.090 and civil penalties under RCW 19.86.140, given that these claims are time-barred and not subject to the protections of RCW 4.16.160.

III. STATEMENT OF THE CASE

A. The Attorney General's Complaint

Plaintiff filed this action in the Superior Court for the State of Washington in and for the County of King on May 1, 2012. CP 1–28. In its Complaint, Plaintiff alleges that Defendants violated the CPA, RCW 19.86, by "conspiring to suppress and eliminate competition by agreeing to raise prices and agreeing on production levels in the market for cathode ray tubes, commonly referred to as CRTs." CP 2, ¶ 1. The purported purpose and effect of this alleged conspiracy was to "rais[e] and/or stabiliz[e] prices or price levels" for CRTs or products incorporating CRTs, in violation of RCW 19.86.030. CP 27, ¶ 105. Plaintiff asserts that it brought the "action on behalf of itself and as *parens patriae* on behalf of persons residing in the State." CP 2, ¶ 2. As relief, Plaintiff requests, *inter alia*, the award of "full damages and restitution to the state of Washington on behalf of its state agencies and residents," "civil penalties

allowed by law," and "appropriate injunctions to prohibit illegal activity." CP 28.

B. Statutory Background

In order to understand Plaintiff's claims and Defendants' motion to dismiss, it is first necessary to understand the structure of the CPA as well as RCW 4.16.160. The CPA begins with a series of substantive provisions that mainly mirror and expand upon the provisions of the federal Sherman and Clayton Antitrust Acts. Plaintiff's claims are based on RCW 19.86.030, which provides that, "[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful." RCW 19.86.030 ("CPA '030" or "'030"), attached hereto as Appendix A. This provision parallels Section 1 of the Sherman Act, *see* 15 U.S.C. § 1. Like Section 1 of the Sherman Act, CPA '030 does not itself establish a cause of action or authorize particular parties to enforce its provisions.

Instead, in separate sections, the CPA (like the Sherman Act, *see* 15 U.S.C. §§ 15, 15a, 15c, 15f) authorizes specific causes of action and specifies the individuals or entities who can bring those actions. Plaintiff has clarified that—while its Complaint pleads only one cause of action—it is actually asserting at least three claims, under three separate provisions

of the CPA: RCW 19.86.090 ("CPA '090" or "'090"), RCW 19.86.080 ("CPA '080" or "'080"), and RCW 19.86.140 ("CPA '140" or "'140").

CPA '090 is the CPA's sole cause of action for the recovery of damages. It allows "[a]ny person who is injured in his or her business or property" by a violation of the CPA's substantive provisions to "bring a civil action in superior court to enjoin further violations [and/or] to recover the actual damages sustained by him or her." RCW 19.86.090, attached hereto as Appendix B. CPA '090 also creates a cause of action for the state of Washington when it "is injured, directly or indirectly," by violations of, *inter alia*, CPA '030.

CPA '080 authorizes the Attorney General to seek injunctive relief by "bring[ing] 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), attached hereto as Appendix C. In addition, '080 authorizes courts to "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." RCW 19.86.080(2); *see also* RCW 19.86.080(3). This remedy constitutes restitution to specific Washington residents injured by the alleged illegal conduct.

CPA '140 authorizes the Attorney General, "acting in the name of the state," to seek recovery of civil penalties for violations of, *inter alia*, '030. *See* RCW 19.86.140, attached hereto as Appendix D. These penalties can be up to $100,000 for any person, other than a corporation, and $500,000 for a corporation. *Id.*

The CPA has a single statute of limitation: RCW 19.86.120 ("CPA '120" or "'120"). CPA '120 provides: "[a]ny action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues . . . ." RCW 19.86.120, attached hereto as Appendix E.

RCW 4.16.160 is not part of the CPA. Nor is it contained in Chapter 19.86 of the RCW. Instead, it is found in Title 4 of the RCW, which concerns "Civil Procedure," and the chapter on "Limitation of Actions." It provides, in pertinent part, that "[t]he limitations prescribed in this chapter [*i.e.* RCW 4.16] shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That . . . there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state . . . ." RCW 4.16.160, attached hereto as Appendix F.

C. Defendants' Motion to Dismiss

On September 9, 2012, Defendants filed a motion to dismiss asserting that Plaintiff's CPA claim under '030 was untimely under the CPA's statute of limitations in '120. CP 29–44. Defendants asserted that the limitations period began running, at the latest, on November 25, 2007. CP 30 (citing CP 2, ¶ 1 ("This action alleges that defendants engaged in violations of state antitrust law prohibiting anticompetitive conduct from at least March 1, 1995, through at least November 25, 2007 . . . .")). Under the CPA's four-year statute of limitations, Plaintiff's complaint needed to be filed by November 25, 2011. Plaintiff did not file until over six months later on May 1, 2012, thus mandating dismissal.

Plaintiff responded that it was actually asserting multiple claims under '030 and that '120 did not apply to these claims because they were brought "in the name or for the benefit of the state," and thus were exempt from all statutes of limitations by RCW 4.16.160. CP 45–53. Plaintiff argued in the alternative that because there was no specific statute of limitations for '080 *parens patriae* claims, such claims were not subject to any statute of limitations. *Id.*; *see also* Hr'g Tr. 30:18–19, attached hereto as Appendix G. Defendants disputed the application of RCW 4.16.160 because the claims, *inter alia*, do not exemplify "traditional notions of power that are inherent in the sovereign." CP 29–44.

D. The Superior Court Denied the Motion to Dismiss and Certified Its Order for Discretionary Appellate Review

The Superior Court, Judge Richard D. Eadie, denied Defendants' motion to dismiss during oral argument and by written order on March 28, 2013. *See* Hr'g Tr. 35:1–36:10, App. G; CP 95–98. The court found that Plaintiff's claims were not subject to a statute of limitations defense because they were brought "for the common good," and thus subject to RCW 4.16.160. *See* Hr'g Tr. 35:1–36:10, App. G.

Defendants then sought—and the Superior Court granted—certification of the order denying the motion to dismiss for discretionary, appellate review under Rule of Appellate Procedure 2.3(b)(4). CP 99–115; CP 144–150. The Order Granting Certification states that the statute of limitations issue presents a controlling question of law as to which "there is . . . substantial ground for a difference of opinion on the merits of the [order denying the motion to dismiss], given the issue is a novel one presenting an issue on which fair-minded jurists might reach contradictory conclusions." CP 145.[2] On August 2, 2013, Commissioner Mary Neel of

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[2] The Superior Court certified the following questions for "immediate appeal:" "(1) Whether the four-year statute of limitations under RCW 19.86.120 applies to the Washington Attorney General's Complaint brought pursuant to its *parens patriae* authority under RCW 19.86.080 that seeks actual damages for violations of RCW 19.86.030? (2) Whether RCW 4.16.160 should be applied to the Washington Attorney General's

this Court found that "the trial court's certification is well taken" and granted review of the Superior Court's decision. 8/2/2013 Notation Ruling by Commissioner Mary Neel.[3]

IV. SUMMARY OF ARGUMENT

In denying Defendants' motion to dismiss, the Superior Court held that Plaintiff's claims were subject to RCW 4.16.160 because they were brought "for the common good" and thus immune to any statute of limitations defense. For the following reasons, the Court should reverse the Superior Court's decision and direct that Plaintiff's claims be dismissed as untimely.

1. The Superior Court should not have found that RCW 4.16.160 applies to Plaintiff's *parens patriae* claim. As an initial matter, the Superior Court should have determined whether '120 applies to '080 *parens patriae* claims because RCW 4.16.160 only applies to statutes of limitations in Chapter 4.16 and thus would not apply to any claim subject to the statute of limitations in RCW 19.86.120. Further, RCW 4.16.160

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parens patriae antitrust lawsuit seeking actual damages and restitution for citizens of Washington?" CP 145.

[3] Plaintiff has also appealed the Superior Court's order dismissing certain defendants for lack of personal jurisdiction (Case No. 70298-0-1), with which this appeal has been linked. Granting the relief requested in this appeal would moot the need to consider Plaintiff's appeal as to any defendant involved in this appeal, as well as any related corporate entities.

applies when there is a specific delegation of an inherently sovereign duty and power, and does not apply to claims that are equally available to and, indeed, normally associated with private plaintiffs. The Superior Court's analysis, which focused solely on whether the governmental act was for the "common good," was unduly narrow and thus resulted in an overly expansive view of RCW 4.16.160. The case law is clear; RCW 4.16.160 does not apply to Plaintiff's '080 *parens patriae* claim because Plaintiff has no distinct duty to enforce the CPA. Rather, such enforcement is ***routinely*** accomplished by ***private plaintiffs*** and thus is not inherently sovereign. *See* RCW 19.86.090 ("***Any person*** who is injured in his or her business or property by a violation of . . . 19.86.030 . . . may bring a civil action . . . .") (emphasis added). Indeed, private plaintiffs are seeking to enforce state and federal antitrust statutes in dozens of class and individual actions related to the same facts involved in this case.

2. The Court must determine what statute of limitations applies to Plaintiff's '080 *parens patriae* claim. Plaintiff argues that there is no statute of limitations in the CPA that explicitly applies to '080 *parens patriae* claims, and thus asserts that such claims have an *infinite* statute of limitations. This argument is not supported by any legal authority and should be rejected. Looking at the issue in the overall context of the CPA, it is clear that the CPA's four-year statute of

limitations in '120 applies to '080 *parens patriae* claims, just as it applies to '090 claims. Applying the same statute of limitations to both '080 and '090 claims for the same relief is necessary to comply with the Washington legislature's clear intent that the CPA conform to federal antitrust law. There can be no dispute that under the federal Sherman Act, Plaintiff's '080 *parens patriae* claim would be subject to the same four-year statute of limitations as private plaintiffs, and would be untimely. *See* 15 U.S.C. § 15b. Consistency between the statutes of limitation applicable to '080 and '090 claims is also necessary to ensure the integrity of the CPA's statute of limitations, which would be undermined if time-barred '090 claims can be reasserted as part of an '080 *parens patriae* claim. This interpretation is further supported by the structure of the CPA.

3. Even if '120 does not apply to '080 claims, Plaintiff's argument that its *parens patriae* claim should enjoy an infinite statute of limitations is wrong. The legislature has created multiple general or "catch-all" statutes of limitations to ensure that all causes of action are subject to a defined, finite statute of limitations. These statutes—not an infinite statute of limitations—would apply to Plaintiff's '080 *parens patriae* claim in the absence of a more specific statute of limitations. Under any of these statutes, Plaintiff's claim is untimely.

4. Regardless of whether RCW 4.16.160 applies to Plaintiff's

'080 *parens patriae* claim, Plaintiff's claim for damages on behalf of state agencies under '090 is explicitly covered by the CPA's statute of limitations in '120 and should have been dismissed. Similarly, Plaintiff's claim for civil penalties is subject either to '120 or to the general limitations periods for civil penalties and should have been dismissed. The Washington Supreme Court has held that RCW 4.16.160 is inapplicable to claims for civil penalties.

V. ARGUMENT

A. Standard of Review

"A trial court's ruling on a motion to dismiss for failure to state a claim upon which relief can be granted under CR 12(b)(6) is a question of law and is reviewed *de novo*." *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755 (1994). Whether a statute of limitations applies to a particular claim is also a question of law that the Court reviews *de novo*. *See State v. Contreras*, 162 Wn. App. 540, 544, *review denied*, 172 Wn.2d 1026 (2011) ("the appropriate application of a statute of limitations . . . [is a] question[] of law that we will review de novo." (citing *State v. Flores*, 164 Wn.2d 1, 10 (2008))).

B. RCW 4.16.160 Does Not Apply to Plaintiff's RCW 19.86.080 *Parens Patriae* Claim

If the CPA's four-year statute of limitations in '120 applies to Plaintiff's '080 *parens patriae* claim, then this claim is time-barred.

Plaintiff has sought to excuse its untimeliness by asserting that RCW 4.16.160 applies to all of its claims. CP 45–53. The Superior Court agreed with Plaintiff in broadly holding that Plaintiff's claims were brought for "the common good." Hr'g Tr. 35:4–36:10, App. G. The Court should reverse this decision and hold that RCW 4.16.160 does not apply to Plaintiff's '080 *parens patriae* claim because, *inter alia*, the enforcement of the CPA is not solely delegated to Plaintiff and thus is not an inherently sovereign duty and power.

1. RCW 4.16.160 does not apply to Plaintiff's RCW 19.86.080 *parens patriae* claim because it is not brought "for the benefit of the state."

RCW 4.16.160 provides that "there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state." *Id.*

As an initial matter, RCW 4.16.160 has no relevance here because—as explained below—the CPA's statute of limitations in '120 applies to Plaintiff's CPA *parens patriae* claim. *See infra* Section C. RCW 4.16.160's own text makes clear that it only applies to "limitations prescribed in this chapter," *i.e.* Chapter 4.16. *See* RCW 4.16.160. Therefore, it does not apply to any cause of action subject to the statute of

limitations in CPA '120, which is in Chapter 19.86. This includes claims under '090 as well as under '080.

In addition, RCW 4.16.160 does not apply to Plaintiff's '080 *parens patriae* action because it is not brought "for the benefit of the state."[4] *See* RCW 4.16.160. In analyzing the "for the benefit of the state" aspect of RCW 4.16.160, the Washington Supreme Court has held that it is "properly understood to refer to the *character or nature* of [the governmental] conduct." *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 165 Wn.2d 679, 686 (2009) ("*MLB*") (emphasis in original) (citing *Washington Pub. Power Supply Sys. v. Gen. Elec. Co.*, 113 Wn.2d 288, 293 (1989) ("*WPPSS*")). Under this analysis, the "only inquiry is whether the [governmental] action arises from an exercise of powers traceable to delegated sovereign state powers or whether such action is proprietary and thus subject to the statute of limitation." *Id.* at 686–87 (citing *WPPSS*, 113 Wn.2d at 296). This distinction between sovereign or proprietary actions in turn requires that courts "look to constitutional or statutory provisions

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[4] Neither Plaintiff nor the Superior Court suggest that a '080 *parens patriae* claim is brought "in the name . . . of the state" under RCW 4.16.160. By its very text, such a claim is not brought in the "name . . . of the state," as '080 allows Plaintiff to "bring an action 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).

indicating the sovereign nature of the power" and "consider traditional notions of powers that are inherent in the sovereign." *Id.* at 687 (citing *WPPSS*, 113 Wn.2d at 296). Factors relevant to this analysis include the "general power and duties" upon which the governmental entity acted, the purpose of those powers, and "***whether the activity or its purpose is normally associated with private or sovereign acts***." *Id.* (citing *WPPSS*, 113 Wn.2d at 296) (emphasis added). Thus, a governmental act is "for the benefit of the state" when it involves "a duty and power inherent in the notion of sovereignty or embodied in the state constitution." *Id.* at 689 (citing *WPPSS*, 113 Wn.2d at 296). Conversely, an act is ***not*** "for the benefit of the state" if it is one commonly or routinely exercised by private parties or, as here, private plaintiffs. Based on this precedent, RCW 4.16.160 applies when the governmental entity is specifically delegated an inherently sovereign duty and power. It does not apply when the governmental action is normally associated with private—rather than governmental—acts.

Applying this analysis to Plaintiff's '080 *parens patriae* claim makes clear that it is not subject to RCW 4.16.160. It is thus not surprising that Plaintiff could not point to a single case in which RCW 4.16.160 has been applied to a *parens patriae* action since the statute's

enactment in 1854. Nor could Plaintiff point to a single case in which RCW 4.16.160 has been applied to ***any*** claim under the CPA.

There is simply no "constitutional or statutory provisions [in the CPA] indicating the sovereign nature of the power" by delegating the enforcement of the CPA exclusively to Plaintiff. *See MLB*, 165 Wn.2d at 687 (citing *WPPSS*, 113 Wn.2d at 296). Thus, the enforcement of the CPA is not part of the "traditional notions of powers that are inherent in the sovereign." *Id.* (citing *WPPSS*, 113 Wn.2d at 296). Plaintiff points to language in RCW 19.86.920 that the purposes of the CPA are "to protect the public and foster fair and honest competition." But the CPA makes clear that the legislature believed that ***private plaintiffs*** are equally capable of forwarding these purposes. Indeed, the legislature expressly authorized direct purchasers to bring claims under '090 for damages and injunctive relief. *See* RCW 19.86.090. The legislature further encouraged private plaintiffs to enforce the provisions of the CPA by authorizing the award of attorney's fees and treble damages—a remedy ***not*** permitted for *parens patriae* actions. *Compare* RCW 19.86.090 *with* RCW 19.86.080.

Given this statutory scheme, it is not surprising that the Supreme Court has commented that "[p]rivate actions by private citizens are . . . an integral part of CPA enforcement." *See Scott v. Cingular Wireless*, 160 Wn.2d 843, 853 (2007) (citing RCW 19.86.090). Thus, private citizens

who bring '090 claims "act as ***private attorneys general*** in protecting the public's interest against unfair and deceptive acts and practices in trade and commerce." *Id.* (emphasis added) (citing *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335–36 (1976)). These "private attorneys general" "do not merely vindicate their own rights; they ***represent the public interest*** and may seek injunctive relief even when the injunction would not directly affect their own private interests." *Id.* (emphasis added) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790 (1986); *Hockley v. Hargitt*, 82 Wn.2d 337, 349–50 (1973)). Far from being Plaintiff's specifically delegated authority, the enforcement of the CPA is also delegated to private plaintiffs, whose actions equally protect the public interest. Thus it cannot be said that the enforcement of the CPA is "normally associated with . . . sovereign acts" or is inherently sovereign. *See MLB*, 165 Wn.2d at 687 (citing *WPPSS*, 113 Wn.2d at 296).[5]

When the underlying facts of this case are considered more broadly, it becomes even clearer that Plaintiff's action is not an inherently "sovereign" act. Nationwide class actions of primary and secondary indirect purchasers, as well as large private retailers of CRT products, have filed claims against Defendants based on the same alleged violations

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[5] For the same reasons, Plaintiff's request for an injunction is not protected by RCW 4.16.160, as "private attorneys general" are equally empowered to seek injunctive relief. *See* RCW 19.86.090.

of antitrust law (Sherman Act Section 1 and parallel state law claims) seeking damages based on the same type of injury Plaintiff asserts. Indeed, Plaintiff's complaint largely reiterates the allegations in these private actions. When considered in this context, it is clear that the enforcement of antitrust laws is far from inherently sovereign.

Plaintiff is correct that it is authorized to assert claims on behalf of indirect purchasers. *See* RCW 19.86.080(3). But this authority is of little assistance to its statute of limitations argument. CPA '080 explicitly limits Plaintiff's recovery on behalf of indirect purchasers by requiring that courts "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." *Id.* In enacting this provision, the legislature made clear that enforcement of the CPA can potentially be wholly accomplished by '090 ***private plaintiff*** claims, who are not subject to the same limitations on monetary relief.[6] *See* RCW 19.86.090.

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[6] In this case, the limitation on Plaintiff's ability to recover is even more salient. In a related action, many of the nation's largest retailers of CRT products—who would normally be considered indirect purchasers of CRTs—have been granted antitrust standing under the "owned or controlled" exception to *Illinois Brick*. *See In re Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857 (N.D. Cal. 2012), *motion to certify appeal denied*, 2013-1 Trade Cas. (CCH) ¶ 78270, 2013 WL 567281 (N.D. Cal. Feb. 13, 2013). To the extent these primary indirect purchasers obtain relief, Plaintiff cannot obtain any further relief on their behalf or for

This case is far different than those in which RCW 4.16.160 has been held to apply. In each of these cases, there was a specific delegation of an inherently sovereign duty and power. Thus, in *MLB*, the Supreme Court found that RCW 4.16.160 applied to a breach of contract claim brought by the operators of a baseball stadium. 165 Wn.2d at 694. In that case, there was an explicit grant of authority from the state legislature for the specific purpose of maintaining and operating the baseball stadium to further the State's interest in providing public recreation. *See id.* at 692–93.[7] Similarly, in *Bellevue School District No. 405 v. Brazier Construction Company*, 103 Wn.2d 111 (1984), the Supreme Court found that RCW 4.16.160 applied to a school district's breach of contract claim where there was an identifiable sovereign function—public education—and a specific delegation of authority to the school district to "establish, maintain, and operate public schools and to erect and maintain school

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secondary indirect purchasers (*i.e.* consumers) for the same level of alleged price inflation. *See* RCW 19.86.080(3).

[7] Similar duties and powers that are inherently sovereign and specifically delegated to the governmental body can be found in other cases in which RCW 4.16.160 has been found to apply. The Supreme Court has held, for example, that a city's improvements to a public park, *Russell v. City of Tacoma*, 8 Wash. 156 (1894), a county's power to collect taxes, *Gustaveson v. Dwyer*, 83 Wash. 303 (1915), and the Port of Tacoma's actions in leasing log yards to further harbor development, *Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565 (9th Cir. 1994) (applying Washington State law), are the type of sovereign activities that are immune from the application of a statute of limitations.

buildings." *Id.* at 115–16 (quoting *Edmonds School Dist. No. 15 v. City of Mountlake Terrace*, 77 Wn.2d 609, 611–612 (1970)).[8]

Instead, this case is more like the situation in *WPPSS*, where RCW 4.16.160 was held inapplicable to a claim by the Washington Public Power Supply System related to a contract for a steam supply system. 113 Wn.2d at 300–01. The Supreme Court held that there was "no indication in the Washington Constitution or in the statutes that the development, production, or sale of electric power to the citizens of Washington is a sovereign duty of the State." *Id.* To the contrary, the Court found that the production of electricity had been traditionally "considered either a ***private business*** or a proprietary municipal function for the advantage of each community." *Id.* at 301 (emphasis added). Similarly, the plain language of the CPA and the routine "enforcement" of its provisions by "private

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[8] *Herrmann v. Cissna*, 82 Wn.2d 1 (1973), upon which Plaintiff has relied, is consistent with these cases. *In Herrmann*, the Insurance Commissioner, in his capacity as statutory rehabilitator of an insurance company, brought claims against former officers and directors of a defunct insurer. The Insurance Commissioner—unlike Plaintiff here—was specifically "charged under the insurance code with the responsibility of carrying out the public policy of the state," and was the ***sole*** entity authorized by statute to take over insurance companies and seek recovery of the companies' losses. *Id.* at 5–6. Thus, the Insurance Commissioner had a specific and unique delegation of authority to act to protect the public in the highly regulated area of insurance. Such a situation stands in stark contrast to the structure of the CPA, which makes clear that private plaintiffs are equal—if not the predominant—enforcers of the statute's protections. *See supra* pp. 19–21.

attorneys general" defeats any claim that Plaintiff has been specifically delegated an inherently sovereign duty to enforce the CPA. *See Scott*, 160 Wn.2d at 853 (private plaintiffs routinely play "integral part of CPA enforcement.").

2. The Superior Court incorrectly focused on whether Plaintiff's RCW 19.86.080 *parens patriae* claim was "for the common good."

Against the weight of this authority, the Superior Court's analysis for determining the application of RCW 4.16.160 incorrectly focused on whether Plaintiff's '080 *parens patriae* claim was brought "for the common good." In analyzing Defendants' motion to dismiss, the Superior Court asserted that the application of RCW 4.16.160 hinged on "whether the State is exercising the sovereign power agreement [sic] in bringing this action." Hr'g Tr. 31:2–10, App. G. The Superior Court contrasted a sovereign power with a government's proprietary function and asserted that the "principal test" in determining whether an action is a "sovereign or proprietary function is 'whether the act is for the common good or whether it is for the specific benefit of the corporate [agency]' like a contract, like a construction contract." Hr'g Tr. 35:4–16, App. G (quoting *MLB*, 165 Wn.2d at 687).

The Superior Court offered the following example of a proprietary function: "If somebody, if the State contracts, it seems to me, for a

highway, and then seeks to bring a suit against the contractor -- breach of contract suit -- that would be subject to the statute of limitations in that case, because that is for the specific benefit or profit of the corporate agency, which is the State in that case, or a city, or anything else such as that."[9] Hr'g Tr. 35:17–24, App. G. The Superior Court contrasted such a situation with Plaintiff's '080 *parens patriae* claim, which it found to be an act "brought for the common good" and thus a "sovereign" act governed by RCW 4.16.160. Hr'g Tr. 35:25–36:10, App. G.

In reaching its conclusion, the Superior Court based its understanding of the law primarily on the above-quoted passage from *MLB*. *See MLB*, 165 Wn.2d at 679. The Superior Court, however, placed far too much weight on this passage in isolation, failing to interpret it in the greater context of the Supreme Court's opinion. The Supreme Court clarified later in its opinion that, "***[t]he mere fact that a government project serves a public purpose . . . does not elevate it to the level of a sovereign act***;" nor are "[p]ublic health and safety . . . the basis for distinguishing between governmental and proprietary functions." *Id.* at

[9] This example of a "proprietary" function is inconsistent with *MLB*, in which the Washington Supreme Court held that a breach of contract claim related to the building of a baseball stadium constituted a sovereign act subject to RCW 4.16.160. *See* 165 Wn.2d at 694. Similarly, in *Bellevue*, the Washington Supreme Court held that RCW 4.16.160 applied to a breach of contract claim related to the building of a public school. *See* 103 Wn.2d 115–16.

688–89 (emphasis added) (citations omitted). As these later passages make clear, simply because a governmental act is "for the common good" or for a "public purpose" is insufficient to render it a "sovereign function," if the act does not involve "a duty and power inherent in the notion of sovereignty or embodied in the state constitution." *Id.* at 689 (citing *WPPSS*, 113 Wn.2d at 296).[10]

The error in the Superior Court's analysis is evident when it is compared to the analysis in *MLB*. In that case, in deciding the applicability of RCW 4.16.160, the Supreme Court did not rely on whether the building of the baseball stadium was "for the common good." Instead, the Court focused on the "sovereign function of providing for public recreation" and the fact that the municipal corporation was created by the "state legislature and the King County Council" and was "delegated broad state powers to 'acquire, construct, own, remodel, maintain, equip, reequip, repair, and operate a baseball stadium.'" *Id.* at 692–93 (citations omitted).

WPPSS further demonstrates the insufficiency of focusing solely on whether an action is brought "for the common good." In that case, the

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[10] Notably, Plaintiff did not even mention *MLB* in its briefing or at oral argument—a clear indication of Plaintiff's recognition that, when properly applied, *MLB* confirms that RCW 4.16.160 does not apply to Plaintiff's '080 *parens patriae* claim.

Supreme Court noted that the State had interests in the actions of the Washington Public Power Supply System, but held that RCW 4.16.160 was nevertheless inapplicable where the agency was "not charged with the responsibility of overseeing the State's policy" on those interests. 113 Wn.2d at 299–300. The Court further found that the fact that some of the WPPSS's actions were "in the public interest and for a public purpose," did not "transform the production of electric energy into a sovereign duty." *Id.* at 300.

3. The Superior Court erred in relying on inapposite Ninth Circuit precedent related to jurisdictional issues.

The Superior Court improperly relied on the Ninth Circuit's decision in *Nevada v. Bank of America Corporation*, 672 F.3d 661 (9th Cir. 2012) ("*Nevada*") for the proposition that "Washington State has a sovereign interest in the enforcement of [the CPA]," and thus *parens patriae* actions are "sovereign matter[s]" subject to RCW 4.16.160. *See* Hr'g Tr. 32:10–15, App. G.

In *Nevada*, however, the Ninth Circuit did not address whether RCW 4.16.160 applied to a *parens patriae* claim, or whether such a claim is a "sovereign function," as described in *MLB*. Instead, the court considered whether a *parens patriae* claim under Nevada's Deceptive Trade Practices Act was a "mass action" and thus subject to removal under

the Class Action Fairness Act ("CAFA"). *Nevada*, 672 F.3d at 665. In this context, the court determined that Nevada was the real party in interest because it had a "sovereign interest in protecting its citizens and economy from deceptive mortgage practices," which the state directly regulated. *Id.* at 671–72.

The holding in *Nevada* has no relevance to the issues here. The context of this case is much different and requires a different result. The analysis for CAFA removal differs from that under RCW 4.16.160. Whether Plaintiff has some "sovereign interest" in the CPA's enforcement is irrelevant here. Plaintiff has a "sovereign" interest in the enforcement of ***all of Washington's laws***, but "[t]he mere fact that a government project serves a public purpose . . . does not elevate it to the level of a sovereign act." *MLB*, 165 Wn.2d at 688. Nor is "[p]ublic health and safety" a "basis for distinguishing between governmental and proprietary functions." *Id.* at 688–89 (citations omitted). Thus, even if a *parens patriae* claim "protect[s] [Washington's] citizens," *Nevada*, 672 F.3d at 671, it does not mean that RCW 4.16.160 applies unless the claim reflects a specific delegation of an inherently sovereign duty and power.

C. **Plaintiff's RCW 19.86.080 *Parens Patriae* Claim is Untimely Under Any Potentially Applicable Statute of Limitations**

Because RCW 4.16.160 has no application to Plaintiff's '080 *parens patriae* claim, the Court must determine what statute of limitations applies. Plaintiff's position is that there is ***no*** statute of limitations because '120's statute of limitations does not explicitly apply to '080 claims. Plaintiff, however, offers no legal authority for this position and it is wrong. Even if—as Plaintiff asserts—'120 does not explicitly apply to '080 *parens patriae* claims, that does not mean that Plaintiff should enjoy an infinite statute of limitations. Instead, the Court must "ascertain and carry out the legislature's intent" in determining the statute of limitations. *Imperato v. Wenatchee Valley College*, 160 Wn. App. 353, 361 (2011) (citing *State v. Jacobs*, 154 Wn.2d 596, 600 (2005)). In doing so, the Court must "give effect to the plain meaning of the statute, if any, by taking into account the ordinary meaning of the words used as well as the context in which the statute appears, including related provisions." *Id.* (citing *Jacobs*, 154 Wn.2d at 600).

In *Imperato*, the court faced the question of what statute of limitations to apply when the statute was silent. *See* 160 Wn. App. at 355. The plaintiff in that case had filed an unfair labor practices claim in superior court, but the six-month statute of limitations for such claims only

explicitly applied to claims filed before the Public Employees Relations Commission ("PERC"). *Id.* at 360–61 (quoting RCW 41.56.160(1); RCW 41.80.120(1)). The plaintiff asserted—as the Attorney General does here—that because the statute of limitations did not explicitly apply to the plaintiff's claim, the court was required to apply a longer statute of limitations. *Id.* at 362.

The court rejected the plaintiff's argument. *Imperato*, 160 Wn. App. at 364. It found that the six-month statute of limitations for claims filed before the PERC also applied to claims filed in superior court because having a consistent limitations period for both types of claims "would serve several important policies." *Id.* These included "impos[ing] a greater degree of certainty and fairness to the process," and conforming to federal law, which would "place[] state employees and private employees on equal footing" by having the same statute of limitations applicable to both types of employees. *Id.* The court found that an equal statute of limitations for all claims irrespective of where they were filed would provide "consistency and predictability to both employees and employers," while "[d]ifferent limitation periods for different employees [would be] inherently unfair and would produce unreasonable results." *Id.*

Similarly, in *Eastwood v. Cascade Broadcasting Co.*, 106 Wn.2d 466 (1986), the Supreme Court assessed the statute of limitations for a

common law false light invasion of privacy claim, which had no explicit statute of limitations. *Id.* at 469. Contrary to Plaintiff's position that no explicit statute of limitations equals an infinite statute of limitations, the Court applied the two-year statute of limitations for libel and slander because of the similarity of these torts to a false light claim. *Id.* at 474.

Applying the same principles utilized in *Imperato* and *Eastwood*, there is no basis to conclude that the legislature intended to give Plaintiff an infinite period of time in which to file an '080 *parens patriae* claim. Instead, the Court should hold that '120's four-year statute of limitations for damages claims under '090 applies to Plaintiff's '080 *parens patriae* claim. CPA '120 must apply to such claims so that the statute of limitations for '080 and '090 claims are consistent. Such consistency—for claims that seek the same damages against the same defendants for the same alleged injury—is necessary to achieve conformity with federal antitrust law, as the Washington legislature intends. It is also necessary to ensure the integrity of '120, and is supported by the overall context of the CPA. Because Plaintiff did not assert its '080 *parens patriae* claim within four years of its accrual, it is untimely and must be dismissed.

If the Court finds that '120 does not apply to '080 *parens patriae* claims, however, the Court should still find that Plaintiff's claim is untimely. The inapplicability of '120 does not mean that there is an

infinite statute of limitations for '080 *parens patriae* claims. Instead, the legislature and the Washington Supreme Court have made clear that where there is not a more specific statute of limitations, the court should apply a general or "catch-all" statute of limitations to ensure that all causes of action are subject to a defined, finite limitations period. Plaintiff's '080 *parens patriae* claim would be untimely under any such statute of limitations.

1. Applying RCW 19.86.120 to RCW 19.86.080 *parens patriae* claims is necessary to ensure conformity with Federal law, as intended by the Washington legislature.

In enacting the CPA, the Washington legislature made clear its "intent . . . that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . . ." RCW 19.86.920; *see also State v. Black*, 100 Wn.2d 793, 799 (1984) ("When the Legislature enacted the [CPA], it anticipated that our courts would be guided by the interpretation given by federal courts to their corresponding federal statutes." (citing RCW 19.86.920)).

Pursuant to this statutory direction, "Washington courts have uniformly followed federal precedent in matters described under the [CPA]." *Blewett v. Abbot Laboratories*, 86 Wn. App. 782, 787 (1997)

(collecting cases). The purpose of this consistency is to "minimize conflict between the enforcement of state and federal antitrust laws and to avoid subjecting Washington businesses to divergent regulatory approaches to the same conduct." *Id.* at 788. Thus, a Washington court should only depart from federal law "for a reason rooted in [Washington's] own statutes or case law and not in the general policy arguments that [the] court would weigh if the issue came before [it] as a matter of first impression." *Id.*

Therefore, if—as Plaintiff asserts—there is ambiguity in the CPA about what statute of limitations applies to '080 *parens patriae* claims, the Court should turn to federal law in determining the appropriate limitations period. *See Blewett*, 86 Wn. App. at 787 (relying on federal law where CPA was not "facially clear"). Following this statutory direction compels the conclusion that a four-year statute of limitations should apply to '080 *parens patriae* claims. Plaintiff's only substantive claim is under CPA '030, which parallels Section 1 of the Sherman Act. Under the federal antitrust statutes, *all* Section 1 claims are subject to a four-year limitations period regardless of whether they are filed by private plaintiffs or by state governments as *parens patriae*. *See* 15 U.S.C. §§ 15b ("[a]ny action to enforce any cause of action under section 15 [private actions], 15a [federal government actions], or 15c [state *parens patriae* actions] shall be forever

barred unless commenced within four years after the cause of action accrued.").

Thus, in conformity with federal law, the Court should hold that '080 *parens patriae* claims are subject to the same four-year limitations period that applies to '090 private actions. *See Imperato*, 160 Wn. App. at 364 (determining appropriate statute of limitations where state statute was silent based, in part, on statute of limitations that applied to state statute's federal equivalent). Such a holding is necessary to avoid "subjecting Washington businesses to divergent regulatory approaches to the same conduct" by imposing dramatically different limitations periods for *parens patriae* claims brought under federal versus state antitrust law. *Blewett*, 86 Wn. App. at 788. There is simply no "reason rooted in [Washington's] own statutes or case law" for undermining the finality provided by the federal statute of limitations. *Id.* Plaintiff's interpretation would allow Plaintiff to bring '080 *parens patriae* claims under the CPA long after Plaintiff's federal statute of limitations has expired.

2. Applying a statute of limitations to Plaintiff's RCW 19.86.080 *parens patriae* claim is necessary to fulfill the purposes of RCW 19.86.120.

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

limitations "compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend." *Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 714 (1985) (citing 51 Am. Jur. 2d *Limitation of Actions* § 17 (1970)). Statutes of limitations also grant "finality" and "repose" to potential defendants by "eliminat[ing] the fears and burdens of threatened litigation." *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372 (2007); *Stenberg*, 104 Wn.2d at 714 (citing *Ruth v. Dight*, 75 Wn.2d 660, 664 (1969)).

Plaintiff's position—that its '080 *parens patriae* claim has no statute of limitations and thus can be brought whenever it so chooses—wholly undermines this legislative intent. A class action by direct purchasers who are represented by a private attorney are unquestionably subject to a four-year limitations period. *See* RCW 19.86.090; RCW 19.86.120. Under Plaintiff's interpretation of the CPA, however, that same class represented by Plaintiff as *parens patriae* would have a literally unlimited period in which to assert their claims. Actions brought 5, 10, 20, or more years after the allegedly offending conduct stopped would still be actionable. Such a double standard could not have been the legislature's intent in enacting the CPA.

Under Plaintiff's interpretation, after the four-year statute of limitations has run, potential defendants have no assurance that they will

not have to defend against the very same direct purchaser claims at some later time—potentially much later—if Plaintiff decides to assert these claims as part of a *parens patriae* action. Thus, the very goal of statutes of limitations like '120—"to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims" after evidence is lost and memories fade—would be defeated. *See Stenberg*, 104 Wn.2d at 714 (citing *Ruth*, 75 Wn.2d at 664). Such an intent to undermine the purposes of '120 should not be lightly imputed to the legislature. *See Imperato*, 160 Wn. App. at 364 (determining the appropriate statute of limitations where a statute was silent based, in part, on the need to give potential defendants "consistency and predictability").

3. Applying RCW 19.86.120 to Plaintiff's RCW 19.86.080 *parens patriae* claim is consistent with the structure and context of the CPA.

Plaintiff's position that there is an infinite statute of limitations for its '080 *parens patriae* claim is also inconsistent with the structure and context of the CPA and thus should be rejected. Statutory "provisions must be considered in relation to each other, and harmonized to ensure proper construction." *See King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560 (2000) (citation omitted). Further, the Court should construe the CPA so as to avoid "absurd results." *See Thompson v. Hanson*, 168 Wn.2d 738, 750 (2009) ("We

construe statutes to effect their purpose and avoid unlikely or absurd results." (citing *State v. Neher*, 112 Wn.2d 347, 351 (1989))).

Plaintiff's interpretation of the CPA would cause discord within the CPA and cause "absurd result[s]" that could not have been the legislature's intent. For example, it simply makes no sense to believe that the legislature would precisely limit the time for the State to assert claims for damages it has sustained under '090, but then allow the State an unlimited time period to file *parens patriae* claims on behalf of wholly separate individuals or entities, particularly where those same individuals or entities are direct purchasers who would otherwise face a four-year statute of limitations. There is no language in the CPA indicating that the legislature intended such a dramatic distinction.[11]

Further, an infinite limitations period for '080 *parens patriae* claims is inconsistent with '080's directive that courts reviewing such claims "consider consolidation or coordination with other related actions, to the extent practicable, to avoid duplicate recovery." RCW 19.86.080(3). This legislative intent contemplates that '080 *parens*

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[11] Plaintiff has attempted to distinguish between '080 and '090 on the basis that its '080 claim seeks "restitution," while its '090 claim is for "damages." CP 48. Such a distinction, however, is meaningless in this case. Plaintiff's complaint makes clear that the injury sustained by direct and indirect purchasers was the same: the alleged payment of "supracompetitive prices for CRT products." CP 27, ¶ 106.

patriae claims will be asserted in the same four-year time period as direct purchaser claims under '090.

4. Even if RCW 19.86.120 does not apply to RCW 19.86.080 *parens patriae* claims, Plaintiff's claim is still untimely under alternative statutes of limitations.

Plaintiff asserts that if '120 does not apply to its '080 *parens patriae* claim then this claim has no statute of limitations. CP 45–53; *see also* Hr'g Tr. 30:18–19, App. G. This false dichotomy between either '120 ***or*** an infinite statute of limitations is simply not the law.

The Washington legislature has created a statutory presumption that, unless specifically exempted, all causes of action are subject to defined, finite statutes of limitation. If the Attorney General's '080 *parens patriae* claim is not subject to '120's four-year statute of limitations then it should be subject to the general three-year statute of limitations for "any other injury to the person or rights of another," RCW 4.16.080(2),[12] or the even shorter two-year "catch-all" statute of limitations in RCW 4.16.130 ("An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued."). The

[12] Three years is also the statute of limitations for common-law restitution claims. *See Davenport v. Washington Educ. Ass'n*, 147 Wn. App. 704, 737–38 (2008) (citing RCW 4.16.080(3); *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 139 Wn.2d 824, 837–38 (2000)), *review granted* 166 Wn.2d 1005 (2009). This would be an appropriate limitations period given that Plaintiff's '080 *parens patriae* claim seeks restitution on behalf of Washington residents. *See* CP 28.

Washington Supreme Court has made clear that the purpose of such general or "catch-all" statutes of limitations is "to ensure a limitation provision for any possible cause of action not covered by [other provisions in Chapter 4.16]." *Stenberg*, 104 Wn.2d at 721 (citation omitted). Thus, these "catch-all provision[s] serv[e] as a limitation for ***any cases*** not fitting into the other limitation provisions." *Id.* (emphasis added, citation omitted). Even if Plaintiff is correct that '120 does not apply to its '080 *parens patriae* claim, it simply means that this claim is subject to an even shorter limitations period. Under either of these statutes of limitation, Plaintiff's '080 *parens patriae* claim is untimely and must be dismissed.

D. RCW 4.16.160 Does Not Apply to Plaintiff's Claims for Damages and for Civil Penalties and Thus These Claims Are Untimely and Must Be Dismissed

Regardless of which statute of limitations applies to Plaintiff's '080 *parens patriae* claim and whether RCW 4.16.160 applies to this claim, Plaintiff's '090 claim for damages and '140 claim for civil penalties are not subject to RCW 4.16.160 and clearly are untimely. These claims must therefore be dismissed.[13]

Plaintiff's claim for damages under '090 is untimely and must be dismissed. CPA '120's statute of limitations explicitly applies to "***[a]ny***

[13] The Superior Court did not differentiate between Plaintiff's various claims, and thus did not separately determine whether RCW 4.16.160 applied to Plaintiff's '090 and '140 claims.

action to enforce a claim for damages under [CPA '090]." *See* RCW 19.86.120 (emphasis added). By its text, this provision applies to Plaintiff's damages claim under '090 and there is no exception for claims by the Attorney General.

In opposition to this straight-forward application of '120,[14] Plaintiff asserts that '120 does not apply to '090 claims by the Attorney General because of RCW 4.16.160. CP 45–53. Again, Plaintiff cites no legal authority in support of this position and it should not be followed. RCW 4.16.160, by its own terms, only applies to statutes of limitations "prescribed in this chapter," (*i.e.* Chapter 4.16), and thus would not override '120, which is in Chapter 19.86.[15] Further, '120 was enacted long after RCW 4.16.160 and, yet, against this statutory backdrop, the legislature explicitly stated that "***[a]ny*** action to enforce a claim for damages under ['090] shall be forever barred unless commenced within four years after the cause of action accrues." *See* RCW 19.86.120 (emphasis added). The legislature did not include any exception for '090

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[14] Indeed, Plaintiff has consistently recognized that '120's statute of limitations applies to damages claims under '090. *See*, *e.g.* CP 46, 48.

[15] This restriction on the reach of RCW 4.16.160 to "limitations prescribed in this chapter," further means that RCW 4.16.160 has no application to any cause of action subject to CPA '120's statute of limitations. Given that Plaintiff's '080 *parens patriae* claim should be subject to '120, RCW 4.16.160 is irrelevant to the limitations period for this claim.

claims by the Attorney General. Thus, Plaintiff's '090 claim for damages sustained by state agencies is subject to '120's four-year statute of limitations and should be dismissed as untimely.

Plaintiff's claim for civil penalties under '140 is also untimely. Either '120 or the more general statutes of limitations for claims for civil penalties apply to this claim. RCW 4.16.080(6) imposes a three-year statute of limitations for "an action upon a statute for penalty or forfeiture, where an action is given to the party aggrieved, or to such party and the state, except when the statute imposing it prescribed a different limitation." Similarly, RCW 4.16.100(2) provides that "[a]n action upon a statute for a forfeiture or penalty to the state" shall be commenced within two years. The Washington Supreme Court has explicitly held that statutes of limitations related to government claims for civil penalties are not subject to RCW 4.16.160. *See U.S. Oil & Ref. Co. v. State of Wash., Dep't of Ecology*, 96 Wn.2d 85, 90 (1981). Plaintiff's claim for civil penalties is untimely under any applicable statute of limitations, and thus must be dismissed.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse the Superior Court's order denying Defendants' motion to dismiss and direct the Superior Court to dismiss the Attorney General's claims.

DATED this 14th day of October, 2013.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 14th day of October, 2013, I caused to be served a true and correct copy of the foregoing *Brief of Appellants* by method indicated below and addressed to the following:

David M. Kerwin Antitrust Division Attorney General of Washington 800 Fifth Ave, Suite 2000 Seattle, WA 98104-3188 Telephone: (206) 464-7030 Email: Davidk3@atg.wa.gov *Counsel for Respondent State of Washington*	*Delivery Via:* [ ] U.S. Mail [ ] Overnight Mail [ ] Facsimile [ ] Hand Delivery [X] Email

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APPENDICES TABLE

Appendix	Description
A	RCW 19.86.030
B	RCW 19.86.090
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APPENDIX A

RCW 19.86.030
Contracts, combinations, conspiracies in restraint of trade declared unlawful.

Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful.

[1961 c 216 § 3.]

Notes:

Monopolies and trusts prohibited: State Constitution Art. 12 § 22.

APPENDIX B

RCW 19.86.090
Civil action for damages — Treble damages authorized — Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW 19.86.020 may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW 3.66.020, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[2009 c 371 § 1; 2007 c 66 § 2; 1987 c 202 § 187; 1983 c 288 § 3; 1970 ex.s. c 26 § 2; 1961 c 216 § 9.]

Notes:

Application -- 2009 c 371: "This act applies to all causes of action that accrue on or after July 26, 2009." [2009 c 371 § 3.]

Effective date -- 2007 c 66: See note following RCW 19.86.080.

Intent -- 1987 c 202: See note following RCW 2.04.190.

Short title -- Purposes -- 1983 c 288: "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter 19.86 RCW, and to repeal the unfair practices act, chapter 19.90 RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter 19.86 RCW. In repealing chapter 19.90 RCW, it is the intent of the legislature that chapter 19.86 RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [1983 c 288 § 1.]

APPENDIX C

RCW 19.86.080

Attorney general may restrain prohibited acts — Costs — Restoration of property.

(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.

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

Notes:

Effective date -- 2007 c 66: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 17, 2007]." [2007 c 66 § 3.]

APPENDIX D

RCW 19.86.140
Civil penalties.

Every person who shall violate the terms of any injunction issued as in this chapter provided, shall forfeit and pay a civil penalty of not more than twenty-five thousand dollars.

Every person, other than a corporation, who violates RCW 19.86.030 or 19.86.040 shall pay a civil penalty of not more than one hundred thousand dollars. Every corporation which violates RCW 19.86.030 or 19.86.040 shall pay a civil penalty of not more than five hundred thousand dollars.

Every person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation: PROVIDED, That nothing in this paragraph shall apply to any radio or television broadcasting station which broadcasts, or to any publisher, printer or distributor of any newspaper, magazine, billboard or other advertising medium who publishes, prints or distributes, advertising in good faith without knowledge of its false, deceptive or misleading character.

For the purpose of this section the superior court issuing any injunction shall retain jurisdiction, and the cause shall be continued, and in such cases the attorney general acting in the name of the state may petition for the recovery of civil penalties.

With respect to violations of RCW 19.86.030 and 19.86.040, the attorney general, acting in the name of the state, may seek recovery of such penalties in a civil action.

[1983 c 288 § 2; 1970 ex.s. c 26 § 7; 1961 c 216 § 14.]

Notes:

Short title -- Purposes -- 1983 c 288: See note following RCW 19.86.090.

APPENDIX E

RCW 19.86.120
Limitation of actions — Tolling.

Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues: PROVIDED, That whenever any action is brought by the attorney general for a violation of RCW 19.86.020, 19.86.030, 19.86.040, 19.86.050, or 19.86.060, except actions for the recovery of a civil penalty for violation of an injunction or actions under RCW 19.86.090, the running of the foregoing statute of limitations, with respect to every private right of action for damages under RCW 19.86.090 which is based in whole or part on any matter complained of in said action by the attorney general, shall be suspended during the pendency thereof.

[1970 ex.s. c 26 § 5; 1961 c 216 § 12.]

Notes:

Action to enforce claim for civil damages under chapter 19.86 RCW must be commenced within six years. Unfair motor vehicles business practices act: RCW 46.70.220.

Limitation of actions: Chapter 4.16 RCW.

APPENDIX F

RCW 4.16.160
Application of limitations to actions by state, counties, municipalities.

The limitations prescribed in this chapter shall apply to actions brought in the name or for the benefit of any county or other municipality or quasimunicipality of the state, in the same manner as to actions brought by private parties: PROVIDED, That, except as provided in RCW 4.16.310, there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: AND FURTHER PROVIDED, That no previously existing statute of limitations shall be interposed as a defense to any action brought in the name or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to February 27, 1903, nor shall any cause of action against the state be predicated upon such a statute.

[1986 c 305 § 701; 1955 c 43 § 2. Prior: 1903 c 24 § 1; Code 1881 § 35; 1873 p 10 §§ 34, 35; 1869 p 10 §§ 34, 35; 1854 p 364 § 9; RRS § 167, part.]

Notes:

Preamble -- 1986 c 305: "Tort law in this state has generally been developed by the courts on a case-by-case basis. While this process has resulted in some significant changes in the law, including amelioration of the harshness of many common law doctrines, the legislature has periodically intervened in order to bring about needed reforms. The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance.

The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through higher taxes, loss of essential services, and loss of the protection provided by adequate insurance. In order to improve the availability and affordability of quality governmental services, comprehensive reform is necessary.

The legislature also finds comparable cost increases in professional liability insurance. Escalating malpractice insurance premiums discourage physicians and other health care providers from initiating or continuing their practice or offering needed services to the public and contribute to the rising costs of consumer health care. Other professionals, such as architects and engineers, face similar difficult choices, financial instability, and unlimited risk in providing services to the public.

The legislature also finds that general liability insurance is becoming unavailable or unaffordable to many businesses, individuals, and nonprofit organizations in amounts sufficient to cover potential losses. High premiums have discouraged socially and economically desirable activities and encourage many to go without adequate insurance coverage.

Therefore, it is the intent of the legislature to reduce costs associated with the tort system, while assuring that adequate and appropriate compensation for persons injured through the fault of others is available." [1986 c 305 § 100.]

Report to legislature -- 1986 c 305: "The insurance commissioner shall submit a report to the legislature by January 1, 1991, on the effects of this act on insurance rates and the availability of insurance coverage and the impact on the civil justice system." [1986 c 305 § 909.]

Application -- 1986 c 305: "Except as provided in sections 202 and 601 of this act and except for section 904 of this act, this act applies to all actions filed on or after August 1, 1986." [1986 c 305 § 910.]

Severability -- 1986 c 305: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 305 § 911.]

APPENDIX G

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 WASHINGTON STATE,)
PLAINTIFF,) CASE NO.
4)
VERSUS)12-2-15842-8SEA
5)
LG ELECTRONICS, et al.,)
6 DEFENDANTS.)

7 Proceedings Before Honorable RICHARD D. EADIE

8

KING COUNTY COURTHOUSE
9 SEATTLE, WASHINGTON

10

DATED: NOVEMBER 15, 2012
11

12 A P P E A R A N C E S:

13

FOR THE PLAINTIFF:
14

15 BY: ASSISTANT ATTORNEY GENERAL:
DAVID KERWIN, ESQ.,
16 JONATHAN MARK, ESQ.,

17

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1

2 A P P E A R A N C E S:

3

FOR THE DEFENDANTS:

4

LG ELECTRONICS:

5

BY: DAVID LUNDSGAARD, ESQ.,
6 HOJOON HWANG, ESQ.,

7 PHILIPS ELECTRONICS, ET AL.,

8 BY: DAVID EMANUELSON, ESQ.,
TIMOTHY MORAN, ESQ.

9

HITACHI LTD., ET AL.,

10

BY: MICHELLE PARK CHIU, ESQ.,
11 MOLLY TERWILLIGER, ESQ.,

12 SAMSUNG, ET AL.,

13 BY: ARIC JARRETT, ESQ.,
JOHN R. NEELEMAN, ESQ.,
14 LARRY S. GANGES, ESQ.,

15 TOSHIBA CORPORATION, ET AL.,

16 BY: MATHEW HARRINGTON, ESQ.,
DANA E. FOSTER, ESQ.,

17

PANASONIC CORPORATION:

18

BY: DAVID YOLKUT, ESQ.

19

20

21

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1 P R O C E E D I N G S

2 (Open court.)

3

09:02:13 4 THE BAILIFF: All rise, court is in session.

09:02:13 5 The Honorable Richard D. Eadie presiding in the

09:02:13 6 Superior Court in the State of Washington in and for

09:02:13 7 King County.

09:06:43 8 THE COURT: Please be seated. Thank you.

09:06:56 9 We only have two hours this morning and two

09:06:59 10 hours this afternoon. We have to squeeze it all in

09:07:04 11 during that time.

09:07:05 12 I have gone over the materials. I am open

09:07:10 13 to any order of proceeding that you think is going to

09:07:16 14 work the best. But it occurred to me that it may be

09:07:20 15 best to take the statute of limitations issue first

09:07:24 16 and address that, because that was the first one that

09:07:33 17 I came to -- that was developed, and not everyone

09:07:39 18 raised that issue, and it was raised by the Hitachi

09:07:43 19 parties.

09:07:44 20 So, would it make sense to hear from the

09:07:48 21 Hitachi parties on the statute of the limitations?

09:07:54 22 MR. KERWIN: I think that it would make

09:07:57 23 sense; David Kerwin for the State.

09:07:59 24 I think that probably makes sense, when we

09:08:02 25 get into the motions on the summary judgment. I think

09:08:06 1 that there is probably more efficient ways that we can
09:08:08 2 handle -- for instance, the State only needs to reply
09:08:11 3 once to all of the motions for personal jurisdiction,
09:08:15 4 but we can tackle that one.
09:08:17 5 THE COURT: All right.
09:08:21 6 Mr. Kerwin, I think that I misspoke to you
09:08:24 7 earlier about citation form. I think that I was
09:08:28 8 meaning to speak to the Kipling firm lawyer. All
09:08:31 9 right. My apologies.
09:08:33 10 MR. KERWIN: All right; Your Honor.
09:08:35 11 THE COURT: All right.
09:08:37 12 I think that -- let's just do the statute
09:08:41 13 of the limitations first. And then my question to you
09:08:45 14 is does the rest of the case really turn on the stream
09:08:58 15 of commerce argument?
09:09:01 16 Is that the dispositive issue for virtually
09:09:05 17 every other case?
09:09:06 18 MR. KERWIN: David Kerwin, Your Honor, the
09:09:08 19 State's position is that it almost entirely does, yes.
09:09:12 20 THE COURT: All right.
09:09:13 21 Connected with that, there is really no
09:09:18 22 general jurisdiction issue being raised.
09:09:20 23 MR. KERWIN: David Kerwin, Your Honor. The
09:09:23 24 State concedes that we do not have general
09:09:25 25 jurisdiction in this case.

09:09:26 1 THE COURT: We are down to the long-arm, or
09:09:35 2 personal jurisdiction, based on the stream of commerce
09:09:39 3 issue. That seems to be the dispositive issue. All
09:09:44 4 right.
09:09:44 5 So, then, we will talk about how to address
09:09:56 6 that after we address the statute of limitations. Let
09:09:58 7 me get my note pad.
09:10:04 8 Hitachi is going to do the statute of
09:10:07 9 limitations argument?
09:10:09 10 MR. EMANUELSON: David Emanuelson for the
09:10:11 11 Phillips entities.
09:10:13 12 The statute of limitations argument, all of
09:10:16 13 the defendant are similarly situated.
09:10:18 14 THE COURT: But not all of them raised it.
09:10:21 15 MR. EMANUELSON: Correct. The entities
09:10:22 16 that raised are the Phillips entities, Hitachi
09:10:26 17 entities, Toshiba entities and the LG entities.
09:10:30 18 Myself, as well as my colleague, Dana Foster, with
09:10:34 19 White & Case will be arguing.
09:10:36 20 THE COURT: Why don't you argue that and
09:10:38 21 then I am going to ask if any one has anything to add
09:10:41 22 to your argument. How is that?
09:10:42 23 MR. EMANUELSON: That sounds great, Your
09:10:44 24 Honor.
09:10:44 25 THE COURT: On the statute of limitations I

09:10:46 1 would tell you that the two cases that I have in front
09:10:49 2 of me are State of Nevada versus the Bank of America
09:10:54 3 Corporation, and the Major League Baseball case.
09:10:57 4 All right.
09:10:58 5 MR. EMANUELSON: Thank you, Your Honor.
09:11:00 6 THE COURT: The other thing that I would
09:11:01 7 say for all of you, you don't have to stand when you
09:11:05 8 speak. You may, probably 50 percent of lawyers, when
09:11:10 9 we talk about that choose to, but it is not required.
09:11:13 10 As long as we can hear you, as long as everybody can
09:11:16 11 hear you, that is all we need.
09:11:17 12 MR. EMANUELSON: All right.
09:11:19 13 Your Honor, this case involves an attempt
09:11:27 14 by the State of Washington, Attorney General, to
09:11:31 15 repackage and save an antitrust damages claim under
09:11:36 16 the Washington Consumer Protection Act, or CPA, that
09:11:40 17 through its own inactivity the Attorney General has
09:11:43 18 allowed to become stale.
09:11:45 19 The Attorney General admits that it has not
09:11:49 20 filed -- failed to file suit within over four and a
09:11:54 21 half years, since first receiving notice of its
09:11:58 22 claims.
09:11:58 23 It further admits that it has no tolling
09:12:00 24 argument against the particular moving defendants.
09:12:04 25 THE COURT: Right.

09:12:05 1 MR. EMANUELSON: Because of this, its claim
09:12:08 2 violates the CPA's four-year statute of the
09:12:12 3 limitations. For the simple reason that the CPAs
09:12:17 4 limitation provision provides a four-year limitations
09:12:22 5 for any action that seeks damages under Section 90 of
09:12:27 6 the CPA.
09:12:28 7 And the Attorney General brings a claim for
09:12:30 8 damages on -- full damages on behalf of both State
09:12:35 9 agencies and under its parens patriae authority for
09:12:40 10 representing Washington consumers. The Attorney
09:12:45 11 General claims that there are two arguments in
09:12:48 12 response to that.
09:12:49 13 First, that its single cause of action
09:12:52 14 should actually be split into two. That only its
09:12:57 15 State claim on behalf of State agencies is subject to
09:13:01 16 the CPA four-year limited provision, but the other
09:13:06 17 request on behalf of the consumer is not subject to
09:13:11 18 any provision. Then they also assert that there is
09:13:14 19 another statute that immunizes them from the
09:13:19 20 limitations.
09:13:20 21 Before I explain why that is an incorrect
09:13:24 22 reading of the law, Your Honor, I would just like to
09:13:26 23 provide a little bit of an overview of road map of how
09:13:29 24 we got here today.
09:13:30 25 In November of 2007 news broke of an

09:13:36 1 international investigation by the United States
09:13:40 2 Department of Justice and the European Commission into
09:13:44 3 actions by manufacturers of cathode tubes or CRTs that
09:13:51 4 go into television and monitors.
09:13:53 5 Immediately, private action claims,
09:13:55 6 literally, within a week of the news breaking brought
09:13:58 7 various federal claims in various federal courts.
09:14:01 8 Those claims have now been consolidated into the
09:14:04 9 Northern District of California and they are pending,
09:14:07 10 and being litigated by the same parties here today.
09:14:10 11 Overtime other parties got involved in the
09:14:14 12 action. Many are large purchasers of products contain
09:14:19 13 CRTs opted out of the claims, for example, Costco
09:14:23 14 which is a Washington based company and also the State
09:14:26 15 Attorney General got involved. California brought a
09:14:28 16 claim, and of course, the State of Washington. The
09:14:32 17 State of Washington actually started its investigation
09:14:34 18 in February of 2009. It issued a series of CIDs to
09:14:40 19 many of defendants in this room. They also obtained
09:14:43 20 tolling agreements with some of the defendants in this
09:14:45 21 case.
09:14:46 22 However, they did not obtain any tolling
09:14:48 23 agreements with any of the defendants that are
09:14:50 24 bringing this motion. That is critical. Because it
09:14:54 25 was not until May 1st of 2012, four and a half years

09:15:00 1 after receiving notice, that they brought their case.
09:15:01 2 That case mirrors the federal private cases
09:15:05 3 in both substance and style. It alleges the same
09:15:11 4 parties as the private federal cases. Essentially, it
09:15:15 5 is the same substantive violation, even though that
09:15:20 6 the Washington case is under the State Act. It is the
09:15:23 7 same -- the language which prohibits conspiracy and
09:15:26 8 the restrain of trade is parrots the language of the
09:15:29 9 Federal Sherman Act.
09:15:31 10 The claim actually goes so far as to copy
09:15:34 11 and paste many of the allegations in the private class
09:15:39 12 action complaints. In response to that the defendants
09:15:42 13 here filed a motion to dismiss on the statute of the
09:15:45 14 limitations grounds.
09:15:46 15 So first, Your Honor, I would like to talk
09:15:49 16 about why the Attorney General's claims violate the
09:15:55 17 four-year limitations provision of the CPA. Just to
09:16:01 18 provide an overview of the CPA. There are several
09:16:04 19 sections of it that, again, substantively mirror
09:16:09 20 federal law. Section 30 mirrors the Section 1 of the
09:16:12 21 Sherman Act. Section 40 prohibits monopolization,
09:16:18 22 mirrors another section of the federal law. That is
09:16:20 23 substantive layout of the CPA.
09:16:22 24 Beyond that there are two sections in the
09:16:25 25 CPA that give the Attorney General authority to bring

09:16:28 1 a lawsuit.

09:16:29 2 The first is Section 80, which explicitly

09:16:32 3 refers to their parens patriae authority. However,

09:16:36 4 that section only allows the Attorney General to bring

09:16:39 5 a claim for injunctive relief or restitution.

09:16:43 6 It is only Section 90 of the CPA that

09:16:47 7 allows the Attorney General to bring a claim for

09:16:50 8 damages. It also allows private parties to bring a

09:16:53 9 claim for damages, but it allows -- it specifically

09:16:59 10 invokes the AG's right to bring a claim. There is

09:17:03 11 nothing in that statute that would preclude

09:17:06 12 application of that statute to parens partiae suits.

09:17:10 13 Finally, Section 120 of the CPA, which

09:17:14 14 provides, I quote, a four-year limitation provision to

09:17:20 15 "any action to enforce a claim for damages under

09:17:23 16 Section 90." So any action that enforces Section 90.

09:17:29 17 So, three points on why the CPA should

09:17:32 18 apply here.

09:17:33 19 First, just an application of the CPA to

09:17:37 20 the plain language, plain reading of the Attorney

09:17:40 21 General's complaints.

09:17:42 22 THE COURT: Do I have a copy of the

09:17:44 23 attorney general's complaint any of the attachments

09:17:50 24 that any of you filed?

09:17:51 25 MR. KERWIN: We didn't file it as an

09:17:53 1 attachment, Your Honor. It is in the underlying file,
09:17:55 2 but we didn't file it as attachment.
09:17:58 3 MR. EMANUELSON: I have one. Would you like
09:18:00 4 one, Your Honor?
09:18:01 5 THE COURT: I can't tell you, in general,
09:18:04 6 summary judgment type cases how useful that can be.
09:18:08 7 Not in every case, but in general it is very useful
09:18:11 8 for judge reading that to be able to see the complaint
09:18:15 9 -- sometimes the answer, but the complaint --
09:18:18 10 MR. EMANUELSON: Would you like.
09:18:20 11 THE COURT: I have finished my studying
09:18:22 12 now. I was just wondering if I missed that some
09:18:24 13 where. I didn't want to miss that opportunity to beat
09:18:28 14 that drum a little.
09:18:30 15 Go ahead.
09:18:31 16 MR. EMANUELSON: Thank you, Your Honor.
09:18:32 17 Again, our first argument is a plain
09:18:37 18 language, plain application of the language of the CPA
09:18:40 19 to the language of the complaint.
09:18:42 20 The second, is that even if this court were
09:18:45 21 to accept the Attorney General's construction of his
09:18:49 22 complaints, that it alleges only damages for State
09:18:52 23 agencies and does not allege -- seek damages on behalf
09:18:58 24 of parens partiae authority. It is still incumbent
09:19:03 25 upon there court to apply a four-year limitation

09:19:07 1 provision across the board.

09:19:08 2 Then, finally, if there were any doubts,

09:19:11 3 ambiguity in this court's interpretation of the

09:19:15 4 statute, this court should look to guidance to the

09:19:17 5 federal law and as provided under the language of the

09:19:21 6 statute and the Blewett case, which is cited by both

09:19:24 7 parties in their papers.

09:19:28 8 So starting with the plain language

09:19:32 9 argument, Your Honor. The only logical reading of the

09:19:35 10 Attorney General's complaint is that the complaint

09:19:44 11 itself brings a damages action, on behalf of State

09:19:49 12 agencies and under its parens patriae authority.

09:19:54 13 The complaint alleges a single cause of

09:19:56 14 action in violation of Section 30 of the CPA. There

09:20:00 15 is no citation or delineation of its claims by

09:20:04 16 reference to Section 80 or Section 90. The claim, in

09:20:10 17 the request for relief, I am quoting here, the AG asks

09:20:16 18 the court "to award full damages and restitution to

09:20:22 19 the State of Washington, on behalf of its state

09:20:24 20 agencies and residents."

09:20:27 21 Any normal construction of that request

09:20:31 22 should be that it is -- the State AG is requesting

09:20:35 23 damages both for the State agencies and on behalf of

09:20:39 24 its residents. Because of that, it brings an action

09:20:45 25 in Section 90 and in the CPA applies and it should be

09:20:48 1 subject to the four-year limitations provision.

09:20:50 2 Now, the Attorney General in their response

09:20:56 3 brief have essentially disavowed their pleadings.

09:20:59 4 They actually want to split their single cause of

09:21:02 5 action into two causes of action.

09:21:04 6 First, a claim on behalf of the State

09:21:07 7 agencies. That is subject to Section 90 and the

09:21:14 8 four-year limitations provision. Then its claim on

09:21:17 9 behalf of the consumers that is not subject to Section

09:21:21 10 90, only under Section 80, and should not have any

09:21:24 11 limitations provision applied to it at all.

09:21:27 12 As a threshold matter, if that is truly the

09:21:31 13 Attorney General's intent, then its complaint does not

09:21:35 14 meet the basic standards for notice pleading. Because

09:21:38 15 it does not provide notice to the defendants on the

09:21:41 16 relief that it is requesting for its claims.

09:21:44 17 However, even if this court accepted the

09:21:47 18 Attorney General's construction, four-year statute of

09:21:51 19 limitations provision should apply across the board.

09:21:56 20 That is because you would have an absurd result where

09:22:00 21 one single cause of action has two different

09:22:03 22 limitations provision s -- limitations periods applied

09:22:06 23 to it.

09:22:07 24 Just to go back to Section 120, that

09:22:11 25 section applies to any action to enforce a claim for

09:22:15 1 damages. Well, even if only a portion of their action
09:22:18 2 is seeking damages, it still invokes the statute of
09:22:22 3 limitations provision under Section 120.
09:22:27 4 Then, finally, Your Honor, the final point
09:22:30 5 under the CPA is why there court should look to
09:22:33 6 federal law for guidance.
09:22:35 7 As, again, in Section 92 of the CPA, the
09:22:43 8 Washington legislature explicitly makes clear that the
09:22:47 9 CPA is designed to compliment the federal body of law
09:22:50 10 and that court should look to it for guidance.
09:22:52 11 The Blewett court, which is Appellate Court
09:22:56 12 decision in the first district division, puts some
09:23:00 13 color on that. Held that the intent of the
09:23:04 14 legislature here was to "minimize the conflict between
09:23:07 15 the enforcement of the State and federal antitrust
09:23:10 16 laws and avoid subjecting Washington businesses to
09:23:14 17 divergent regulatory approaches for the same conduct."
09:23:18 18 So, by construing the statute here, in
09:23:25 19 opposition to how the federal law applies the statutes
09:23:30 20 of limitations, would be a violation to the policies
09:23:37 21 behind both the statute itself and the reasoning of
09:23:40 22 the Blewett court. Here the federal law is clear.
09:23:43 23 There is a single provision under the
09:23:46 24 federal law at Section 15 (b) of the Clayton Act. It
09:23:51 25 subjects "any type of action brought any by party to

09:23:54 1 the same four-year limitation provision. That would
09:24:00 2 be by a private party, a federal government or State
09:24:03 3 Attorney General that are bringing claims under the
09:24:05 4 federal law.
09:24:06 5 So, just to add a little bit of spin on
09:24:10 6 that, it is not a situation where we are asking the
09:24:15 7 court to -- the Washington legislature has spoken and
09:24:20 8 we are saying, "no, you need to construct your laws
09:24:23 9 differently and change the construction of the CPA to
09:24:26 10 an accord with the federal law."
09:24:29 11 At the very least, this is an open question
09:24:31 12 of construction. The legislature has not spoken.
09:24:35 13 There is no precedent on it. The idea that you should
09:24:38 14 apply -- the legislator has spoken that there should
09:24:41 15 be a four-year limitation provision to the damages
09:24:45 16 claims.
09:24:45 17 Then to say, "we will have a four-year
09:24:50 18 limitation provision for that. But the other claim is
09:24:51 19 not going to be subject to any limitation provision"
09:24:54 20 would be certainly a divergent regulatory approach as
09:24:58 21 opposed to the federal law.
09:24:59 22 THE COURT: All right. Go ahead.
09:25:02 23 MR. EMANUELSON: I am finished on the CPA
09:25:05 24 portion of the argument.
09:25:07 25 THE COURT: All right. Go ahead.

09:25:10 1 MR. EMANUELSON: Given that the CPA applies
09:25:12 2 here, Your Honor, the Attorney General's only option
09:25:16 3 here is to turn to a different provision of the
09:25:19 4 Washington code, and that is section, RCW 4.16.160. I
09:25:26 5 will refer to it as Section 160 for ease of
09:25:31 6 application, Your Honor.
09:25:32 7 That provision applies to:
09:25:35 8 "Actions brought in the name of or for the
09:25:37 9 benefit of the State."
09:25:40 10 However, as the Major League Baseball
09:25:45 11 Facilites case held, and as clear under other line of
09:25:47 12 precedent, it does not -- Section 160 does not apply
09:25:52 13 to actions that are normally associated with private
09:25:58 14 X.
09:25:58 15 If you look at the cases overtime here,
09:26:07 16 this is quite an old statute dates back to 1864. It
09:26:12 17 typically applied to taxing actions by the government,
09:26:17 18 involvement of maintaining parks, buildings, schools,
09:26:20 19 or in the Major League Baseball case a public
09:26:23 20 corporations construction of a baseball stadium.
09:26:26 21 It has never been and the Attorney General
09:26:29 22 cites no case where Section 160 has been applied to a
09:26:33 23 parens partiae action. That is for good reason.
09:26:38 24 This action, which is a representative
09:26:41 25 action, on behalf of private individuals, is clearly

09:26:45 1 associated with a private act.

09:26:49 2 As kind of, I explained in the background,

09:26:52 3 Your Honor, the private acts have been ongoing. They

09:26:56 4 have been ongoing for now upwards of five years. This

09:27:00 5 case is a follow-on action. It is a representative

09:27:03 6 action, representing the same injury to consumers that

09:27:06 7 those private actions bring. It involves the same

09:27:10 8 parties and the same substantive facts.

09:27:13 9 So, Your Honor, it would be a perverse

09:27:15 10 application to allow the Attorney General -- I am

09:27:18 11 sorry, perverse application of Section 160 to allow

09:27:21 12 the Attorney General a limited time for copycat

09:27:26 13 damages claims based on a purported sovereign

09:27:35 14 interest.

09:27:35 15 Your Honor, what does the State the

09:27:39 16 Attorney General cite in support of his claim?

09:27:43 17 They cite the Cissna case, Hermann versus

09:27:48 18 Cissna, Your Honor, which is the only case that they

09:27:50 19 bring to its support in their argument or under 160.

09:27:56 20 In that case actually involved the highly regulated

09:28:01 21 insurance industry, where an insurance commissioner

09:28:04 22 actually took over a defunct company as its

09:28:07 23 rehabilitator and brought an action -- brought an

09:28:11 24 action against the prior management of the insurance

09:28:15 25 company.

09:28:15 1 In that case, essentially, the insurance
09:28:20 2 company was the State. It was not bringing a case on
09:28:22 3 behalf of private interests. It actually was the
09:28:27 4 insurance company at that point.
09:28:31 5 THE COURT: Well, is that really so?
09:28:34 6 I mean, the insurance commissioner is the
09:28:36 7 receiver, essentially, of an insolvent insurance
09:28:41 8 company.
09:28:41 9 We have an insurance indemnity fund, which
09:28:47 10 pays claims on an insolvent insurance company. Is it
09:28:51 11 really the State or really the indemnity fund that is
09:28:54 12 the party there?
09:28:55 13 It doesn't make any difference. Maybe not.
09:29:00 14 MR. EMANUELSON: Your Honor, I probably was
09:29:03 15 a little bit loose with my language there in terms
09:29:06 16 of -- certainly indemnity fund. But in terms of, it
09:29:11 17 had taken over a company. It was not suing on behalf
09:29:14 18 of a company as an outside third-party.
09:29:14 19 THE COURT: Right.
09:29:20 20 MR. EMANUELSON: That circumstance the
09:29:23 21 insurance industry is very similar to the banking
09:29:25 22 industry, the company is insolvent. It is not about
09:29:27 23 the company itself. It is about all of the
09:29:30 24 policyholders that if the State cannot restore
09:29:34 25 solvency or provide some type of indemnity then all of

09:29:39 1 those policyholders are out. It is not applicable
09:29:43 2 here to what is essentially a private action in a
09:29:46 3 different form.
09:29:46 4 THE COURT: I am not aware that it is a
09:29:48 5 general charge, though, that the claims against the
09:29:50 6 insolvent insurance company are generally charged
09:29:52 7 against the State rather than against the indemnity
09:29:55 8 fund. I don't know that for sure. But I am certainly
09:29:58 9 not aware that it becomes a State obligation.
09:30:01 10 MR. EMANUELSON: All right, Your Honor.
09:30:02 11 I did not mean that it would be a State
09:30:04 12 obligation.
09:30:07 13 THE COURT: All right.
09:30:09 14 MR. EMANUELSON: So, finally, the State --
09:30:14 15 the Attorney General, what they do and as you
09:30:19 16 mentioned you read the -- you are familiar with the
09:30:22 17 Nevada case.
09:30:22 18 THE COURT: I have it before me the Nevada
09:30:24 19 case, which says in part, it is the 9th Circuit case,
09:30:28 20 apparently, there is some agreement that we should
09:30:30 21 refer to federal law at some point in this.
09:30:33 22 It says at one point "the States,
09:30:36 23 California and Washington, are the real parties in the
09:30:38 24 interest" -- that is the issue there, apparently --
09:30:40 25 "because both States have a sovereign interest in the

09:30:44 1 enforcement of the Consumer Protection and antitrust
09:30:48 2 laws."
09:30:48 3 That is the point that I picked up out of
09:30:50 4 the arguments on that.
09:30:53 5 MR. EMANUELSON: Sure, exactly, Your Honor.
09:30:55 6 THE COURT: Isn't this about whether the
09:30:57 7 State is bringing this, and as a sovereign, is
09:31:00 8 pursuing a sovereign interest, and if it is a
09:31:03 9 sovereign interest, aren't they except under
09:31:08 10 41.16.160?
09:31:09 11 MR. EMANUELSON: Your Honor, if the
09:31:10 12 standard was the real party in interest, or whether
09:31:13 13 the State had a sovereign interest in enforcing its
09:31:16 14 laws, then there would be no --
09:31:18 15 THE COURT: Actually, the State Supreme
09:31:21 16 Court case refers to it as the State's sovereign
09:31:25 17 powers. It was an exercise of the State's sovereign
09:31:28 18 powers.
09:31:29 19 MR. EMANUELSON: Your Honor, if that was
09:31:32 20 the standard -- first of all, that case is not the
09:31:36 21 standard. That is a case that applies a very specific
09:31:42 22 jurisdictional issue, whether a case is a mass action
09:31:46 23 under the federal legislation. It is not an
09:31:52 24 application of the act here.
09:31:55 25 If it was an application, there would be no

09:31:56 1 limiting principle. Any action by any State agency,
09:32:01 2 to enforce any law would ultimately fall under Section
09:32:07 3 160. That is not what the actual case law of Section
09:32:11 4 160 says. So, it has to be more than that. It has to
09:32:11 5 be more than that.
09:32:15 6 Just because the State is bringing a
09:32:16 7 lawsuit they have an interest in the lawsuit, does not
09:32:20 8 make it a sovereign act within the meaning of Section
09:32:23 9 160.
09:32:23 10 THE COURT: My understanding is that would
09:32:25 11 be a correct statement.
09:32:30 12 MR. EMANUELSON: Your Honor, to conclude,
09:32:39 13 this action it is untimely. It applies under the
09:32:44 14 plain language of the CPA. Section 160 does not
09:32:47 15 exempt it from the application. Therefore, the claim
09:32:50 16 should be dismissed.
09:32:51 17 THE COURT: All right.
09:32:53 18 I think that I have a general agreement
09:32:55 19 that this was going to be the primary, at least,
09:32:57 20 argument on the statute of limitations on behalf of
09:33:00 21 the defendants. Does any -- I hope that was an
09:33:03 22 understanding that we all had.
09:33:04 23 Is there any other party representing or
09:33:10 24 any other party that wants to be heard on this
09:33:15 25 statute? Any other defendant who wants to be heard on

09:33:18 1 this statute of limitations argument, basically?
09:33:22 2 I would ask if you have anything to add to
09:33:24 3 the argument that has already been made? All right.
09:33:27 4 For the record, no response.
09:33:31 5 We will proceed then. I will do that on
09:33:34 6 the same on the reply, when we come around to the
09:33:35 7 reply.
09:33:36 8 Go ahead, Mr. Kerwin.
09:33:37 9 MR. KERWIN: Thank you, Your Honor, David
09:33:40 10 Kerwin for the State.
09:33:41 11 No matter how much you squint at the RCW
09:33:44 12 you can't find a statute of limitation that applies to
09:33:48 13 the 080 parens claims brought by the State. RCW
09:33:56 14 19.86.030 is Washington basic antitrust statute.
09:34:06 15 There are three types of claims that can be
09:34:08 16 brought under 030, that the State can bring under 030,
09:34:12 17 080 claims and 090 claims and 140 claims.
09:34:16 18 140 authorizes the State to seek civil
09:34:18 19 penalties. 090 authorizes two types of suits for
09:34:23 20 violating -- for violations of the Consumer Protection
09:34:26 21 Act.
09:34:26 22 The first is a suit brought by the private
09:34:29 23 plaintiffs. The second is a suit brought by the State
09:34:31 24 for damages incurred by itself, such as, by State
09:34:34 25 agencies.

09:34:36 1 080, on the other hand, allows the State to
09:34:40 2 bring suit of the parens patriae, when the residents
09:34:44 3 and citizens of the state are injured. Two sections
09:34:46 4 compliment each other, but they represent two distinct
09:34:49 5 types of claims. The State could seek restitution
09:34:52 6 under any three of these statutes, without necessarily
09:34:54 7 implicating the other. It is worth stressing how
09:34:57 8 different the claims are under 080 and 090.
09:35:00 9 Under 090, the State seeks damages for
09:35:03 10 State purchases. For instance, in an over-charge that
09:35:07 11 say to the Department of Transportation, that the
09:35:09 12 plaintiff incurred when bought a CRT television at
09:35:13 13 some point.
09:35:13 14 The meat of our case is -- are 080 parens
09:35:20 15 claims. Under 080, the State represents all consumer
09:35:22 16 indirect purchasers in the State as parens partiae
09:35:26 17 seeking restitution. 080 claims include equitable
09:35:31 18 claims. There is no case law on this, Your Honor.
09:35:34 19 This is the first time that we know of that
09:35:36 20 the defendants have attempted to take the statute of
09:35:40 21 the limitations from 120 and apply it to 080 claims.
09:35:44 22 That is accurate. There is no case law on this that
09:35:47 23 we could look at.
09:35:48 24 The defendants, obviously, believe strongly
09:35:50 25 that there should be a statute of limitations on a 080

09:35:53 1 claims. But that doesn't make it so in this case.
09:35:55 2 The analysis for this court is really quite
09:35:58 3 straightforward.
09:35:58 4 The defendants don't point to a statute of
09:36:01 5 limitations that lists 080 -- that claims 080.
09:36:06 6 120 contains the four-year statute of
09:36:10 7 limitations on 090 claims. The argument seems to be
09:36:13 8 that because the State brought 080 and 090 claims that
09:36:18 9 the statute of limitations somehow applies to both.
09:36:20 10 I would submit, Your Honor, this defies
09:36:23 11 common sense. If the court were to decide that our
09:36:27 12 090 claims, or our 140 claims, were barred by the
09:36:30 13 statute of limitations and 140 and 120, they could
09:36:33 14 quite easily allow the 080 claims to go forward.
09:36:37 15 In the most simple terms, in the statute of
09:36:40 16 the limitations of 120 in the clearest possible
09:36:42 17 language it applies to the 090 claims. 080 parens
09:36:46 18 claims are very different than the 090 claims. There
09:36:48 19 is no reason to believe that 120 applies to 080.
09:36:51 20 There is several straw men that the
09:36:55 21 defendants raise and we could address those quickly.
09:36:59 22 First, this motion that the State might pick and
09:37:02 23 choose, that it might bring a 080 claim or a 090
09:37:05 24 claim, depending upon when it brought it, in order to
09:37:08 25 avoid the statute of limitations.

09:37:10 1 There is really no reasonable argument
09:37:13 2 because there is no overlap between 080 and 090 claims
09:37:16 3 in a way that makes this a concern.
09:37:18 4 These are entirely different statutes
09:37:21 5 covering entirely different claims. They claim that
09:37:23 6 there is some inequity, because the statute of
09:37:26 7 limitations would apply to a private party, when it is
09:37:29 8 bringing its claims, but not to the State, when it is
09:37:31 9 bringing the same exact claim on behalf of the same
09:37:33 10 exact party.
09:37:34 11 Again, Your Honor, this ignores the
09:37:36 12 difference in 080 and 090 claims, indirect purchasers,
09:37:39 13 indirect purchasers in Washington cannot bring their
09:37:42 14 own claims. Only the State can bring those claims for
09:37:45 15 those purchasers under 080.
09:37:47 16 I know that there is no way around it.
09:37:52 17 Sounds like a broken record between 080 and 090
09:37:54 18 claims, but there is absolutely the key here.
09:37:57 19 I think that we could trust if the
09:38:00 20 legislature wanted 120 to apply to 080, it would have
09:38:03 21 said that in 120.
09:38:07 22 Defendants make much of the fact that in
09:38:09 23 our complaint, while we do layout the restitution that
09:38:14 24 we seek, we don't necessarily link it directly to
09:38:18 25 Sections 080 and 090 and 140. I don't think that

09:38:22 1 anybody here had any trouble discerning which claim
09:38:28 2 went back to which statute. But we would be happy to
09:38:32 3 add the -- to amend our complaint and add that, if
09:38:35 4 that would somehow save us from the statute of
09:38:38 5 limitations. I don't think that that is the issue
09:38:40 6 here.
09:38:41 7 THE COURT: All right.
09:38:43 8 MR. KERWIN: Defendants argue that the
09:38:44 9 tolling provision found in 120 would somehow be
09:38:47 10 meaningless, if 120 statute of limitations isn't
09:38:50 11 extended to cover 080 parens claims.
09:38:52 12 Your Honor, it is the simple reading of 120
09:38:55 13 shows that the private claims brought pursuant to the
09:38:58 14 090 would be stayed pending any state action which
09:39:01 15 relates to the same subject matter. That is what 120,
09:39:03 16 the tolling in 120 does.
09:39:05 17 We all know that the anti-trust cases --
09:39:08 18 direct claims, indirect claims -- are quite distinct,
09:39:11 19 but they also deal with the same general subject
09:39:13 20 matter. There is a ton of overlap there. It makes
09:39:17 21 perfect sense that the legislature would want to
09:39:21 22 choose to toll private claims, while the same subject
09:39:26 23 matter is being litigated by the State as well as the
09:39:29 24 parens.
09:39:29 25 I think that this is just what you see when

09:39:32 1 the legislature seeks judicial efficiency and you
09:39:35 2 avoid duplicative litigation. It gives the State the
09:39:41 3 first crack at the case for benefit of the privates.
09:39:43 4 The defendants say that there is a public
09:39:45 5 policy issue that the court must address. Your Honor,
09:39:49 6 I would submit that this is not the case.
09:39:50 7 Cases where we see the courts bring public,
09:39:54 8 decides that there is a public policy or a judicial
09:39:57 9 policy questions, that needs to be decided. There is
09:40:00 10 cases where there is a statute of limitations
09:40:02 11 involved. The question involved is has it started to
09:40:05 12 run, has it been tolled or what is the timing
09:40:08 13 involved?
09:40:08 14 There is simply no statute of limitation
09:40:11 15 that applies to 080 parens claims, Your Honor. There
09:40:15 16 is no issue. There is no policy issue here.
09:40:17 17 The defendants argument at its basic is
09:40:20 18 that the statute of limitations in 120 applies to 090
09:40:23 19 claims.
09:40:24 20 The State 080 claims are mixed in. And
09:40:26 21 they kind of look the same, therefore, the statute of
09:40:30 22 limitations must apply to 080 as well.
09:40:33 23 Each is clear and have distinct differences
09:40:36 24 through the 080 and 090 claims. The court's analysis
09:40:39 25 of 080 and our parens claims of 080 doesn't need to go

09:40:43 1 any further than this.

09:40:45 2 However, if the court was to consider the

09:40:49 3 statute of limitations, or to consider the State's 090

09:40:51 4 claims, or 140 claims separately, something that the

09:40:55 5 defendants haven't necessarily argued, but if the

09:40:57 6 court were to do that, I think that it would also find

09:41:00 7 that RCW 4.16.160 provides an obvious exception to the

09:41:06 8 statute of limitations on those claims.

09:41:07 9 Of course, 160 is -- it says, "there should

09:41:10 10 be no limitation to actions brought in the name of or

09:41:12 11 for the benefit of the State."

09:41:15 12 Of course, this doesn't mean literally that

09:41:17 13 any action where the State is the plaintiff is exempt

09:41:19 14 from the statute of limitations.

09:41:22 15 But it does mean that where the State

09:41:25 16 actions is for the primary benefit of the public that

09:41:28 17 160 does apply. This case is the perfect example of

09:41:31 18 that kind of an action.

09:41:32 19 The State seeks restitution and injunctive

09:41:35 20 relief on behalf of the public. It brings these

09:41:37 21 claims that only the State can bring in its role as a

09:41:41 22 parens. We know from the 9th Circuit and others, very

09:41:44 23 recently, in these parens cases the State is the real

09:41:47 24 party in interest. This is the very definition of the

09:41:49 25 purely State function being carried out.

09:41:52 1 The best example of the court applying 160,
09:41:55 2 I think, is Hermann v Cissna. The Hermann case is an
09:41:59 3 insurance case. And the State Supreme Court
09:42:03 4 considered whether the action brought by the State
09:42:06 5 Insurance Commissioner is for the benefit of the State
09:42:08 6 under 160. It decided that it was, also, the statute
09:42:13 7 of limitations do apply.
09:42:14 8 In holding that the State actions benefit
09:42:16 9 the State, the court declared that the statute, under
09:42:19 10 the State -- under which the State brought the action
09:42:21 11 is for the benefit of the public and the legislature
09:42:23 12 clearly had in mind in enacting the insurance code
09:42:26 13 that such actions on the part of the commissioner
09:42:28 14 would benefit the public generally.
09:42:29 15 The CPA, we have this language: "The CPA
09:42:33 16 is to protect the public and Foster fair and honest
09:42:35 17 competition in bringing its claims under the CPA, that
09:42:38 18 is what the State seeks to do."
09:42:42 19 There is no question, like as in Hermann,
09:42:45 20 that there are a set of potentially -- as a part of
09:42:49 21 the claims -- private individuals that are going to
09:42:51 22 benefit. It is an only a subset of the case. But as
09:42:56 23 in Hermann, you could argue, obviously, that there are
09:43:00 24 certain sets of private individuals that would
09:43:02 25 benefit. But that doesn't change the fact that the

09:43:05 1 case is brought for the -- primarily for the public
09:43:07 2 interests.
09:43:09 3 As we outlined in our brief, as Your Honor
09:43:12 4 discussed, the 9th Circuit fundamentally answered this
09:43:17 5 question, in Washington v. Chimei and in Nevada V.
09:43:25 6 Bank of America.
09:43:26 7 The question that the court was considering
09:43:28 8 there, as you discussed, was removal under the CAFA.
09:43:32 9 But the question was much the same. Is the State the
09:43:35 10 real party in the interest, or is it merely
09:43:38 11 representing private parties, and should be treated as
09:43:40 12 any other private party or class representative?
09:43:43 13 The 9th Circuit said that the State is the
09:43:46 14 real party in interest, because it is a sovereign
09:43:49 15 interest in the supporting of the Consumer Protection
09:43:52 16 and Antitrust Laws in securing an honest marketplace
09:43:55 17 and the economic well being.
09:43:58 18 Your Honor, there is no statute that
09:44:00 19 applies to the 080 parens claims.
09:44:05 20 THE COURT: Reply is generally brief.
09:44:09 21 MR. EMANUELSON: Yes, Your Honor.
09:44:11 22 First of all, Your Honor, the Attorney
09:44:17 23 General -- much of his argument under the opposition
09:44:21 24 to our CPA argument was a policy based argument. We
09:44:24 25 are not making a policy based argument here. That is

09:44:28 1 only -- I think that is our secondary argument.
09:44:32 2 THE COURT: Let me ask you. Is this issue
09:44:37 3 resolved in determining whether the State is
09:44:40 4 exercising the sovereign power agreement in bringing
09:44:44 5 this action?
09:44:45 6 Because it seems to me that from your
09:44:48 7 opening arguments, it is my understanding that any
09:44:50 8 action brought by the State exercising its sovereign
09:44:53 9 power has no statute of limitations, is that correct?
09:44:56 10 Is that your understanding?
09:44:57 11 MR. EMANUELSON: That would -- if you found
09:45:00 12 it that way, that would resolve it.
09:45:02 13 THE COURT: The question is is this a
09:45:04 14 sovereign power?
09:45:05 15 MR. EMANUELSON: That is the question. It
09:45:06 16 is not a sovereign power.
09:45:08 17 THE COURT: Then how do we deal with the
09:45:10 18 Nevada case?
09:45:13 19 There is language -- let me make clear.
09:45:16 20 That there is language also in the baseball case that
09:45:20 21 says that "the principal test for determining
09:45:24 22 whether" -- that was in the municipality. A
09:45:28 23 municipality in that case that was acting under a
09:45:31 24 delegated power that the court, the Supreme Court,
09:45:35 25 determined to be an exercise of the sovereign power of

09:45:38 1 the State. It is a sovereign power of the State issue
09:45:41 2 analysis.
09:45:42 3 The principal test is determining whether
09:45:45 4 ones acts involve a sovereign or proprietary function
09:45:51 5 the court said, "is whether the act is for the common
09:45:55 6 good or whether it is for the specific benefit or
09:45:59 7 profit of the corporate entity."
09:46:01 8 The corporate entity being in that case the
09:46:03 9 municipal corporation of the State.
09:46:06 10 Then lay that over the Nevada case, which
09:46:14 11 is not a controlling authority, but which we look to
09:46:22 12 -- you all agreed that we look to that -- That the
09:46:24 13 State has sovereign interests, specifically Washington
09:46:27 14 State has a sovereign interest in the enforcement of
09:46:29 15 its Consumer Protection and Antitrust Law.
09:46:32 16 So does that make it a sovereign matter?
09:46:35 17 If it is a sovereign matter? Doesn't that
09:46:40 18 fall outside of the statute of limitations?
09:46:42 19 MR. EMANUELSON: It does not, Your Honor.
09:46:43 20 Just by using the word sovereign does not all of a
09:46:46 21 sudden make -- just because the case used the word
09:46:50 22 sovereign, does not make it an action that falls under
09:46:53 23 the definition.
09:46:54 24 THE COURT: But if the Washington Supreme
09:46:56 25 Court defines it, then we do.

09:46:58 1 MR. EMANUELSON: Sure, but that case
09:47:00 2 involved an actual construction of a facility for the
09:47:04 3 public interest.
09:47:04 4 THE COURT: Right.
09:47:05 5 MR. EMANUELSON: This involves run of the
09:47:06 6 mill, antitrust damages action that follows on the
09:47:11 7 private action.
09:47:12 8 Your Honor, if I may I would like to point
09:47:15 9 the court's attention to the Washington Power case and
09:47:17 10 also the Pacific Northwest Bell case that the
09:47:21 11 defendants provided in the reply brief.
09:47:23 12 Both of those cases involved a government
09:47:26 13 action to enforce laws. So, again, they are the real
09:47:29 14 party in the interest. They have some type of
09:47:33 15 interests in enforcing their laws. But in both of
09:47:36 16 those cases the court said that the Section 160 did
09:47:39 17 not apply.
09:47:40 18 THE COURT: Right.
09:47:41 19 MR. EMANUELSON: The first one, Pacific
09:47:44 20 Northwest Bell case, said that the State's interest is
09:47:49 21 "merely derivative of the private interests."
09:47:51 22 They were just suing, they had tried to
09:47:55 23 propagate a law that, essentially, stood in the shoes
09:48:00 24 of private parties. That is very similar to the
09:48:02 25 representative action that the Attorney General is

09:48:05 1 here.

09:48:06 2 The second one, I think that the Washington

09:48:08 3 Power case is even more instructive. Because the

09:48:11 4 court looked and that involves a municipal corporation

09:48:17 5 bringing a breach of contract action against General

09:48:23 6 Electric. The municipal corporation made the power.

09:48:25 7 The court looked at what did the municipal

09:48:30 8 corporation do?

09:48:30 9 They said, yes, the municipal corporation

09:48:33 10 has -- the State, in general, over all, has an

09:48:36 11 interest in energy policy, in clean and efficient use

09:48:41 12 of energy. But what the specific task that was

09:48:44 13 delegated to the entity that was bringing the suit

09:48:46 14 there did not fall under the sovereign interest.

09:48:50 15 Because the State in that capacity was not acting in

09:48:52 16 any way different than a private entity, who made its

09:48:55 17 power would act.

09:48:56 18 The State here, similarly, is bringing a

09:49:00 19 lawsuit. Sure, they have some aspects of it that they

09:49:07 20 can ask for civil penalties.

09:49:10 21 However, the injunctive relief and the --

09:49:14 22 most importantly -- the damages is what makes this no

09:49:20 23 different and at its core no different than a private

09:49:23 24 right of action.

09:49:24 25 THE COURT: Thank you.

09:49:25 1 Any further parties subject to this motion
09:49:29 2 wants to add anything to the reply? All right. I did
09:49:33 3 it.
09:49:34 4 I do focus on the baseball case, which the
09:49:40 5 language of the baseball case is taken from the Public
09:49:45 6 Power Supply System, which we use today refer to
09:49:49 7 somewhat unfortunately as WOOPS, the WPPS versus
09:49:55 8 General Electric case. It relies on that.
09:49:58 9 In determining the State's sovereign
09:50:03 10 powers, it goes on to say -- it seems to me an
09:50:07 11 important in this case:
09:50:08 12 "The principal test is whether it is
09:50:13 13 sovereign or proprietary function is whether the act
09:50:15 14 is for the common good or whether it is for the
09:50:19 15 specific benefit of the corporate agency like a
09:50:24 16 contract, like a construction contract."
09:50:26 17 If somebody, if the State contracts, it
09:50:29 18 seems to me, for a highway, and then seeks to bring a
09:50:36 19 suit against the contractor -- breach of contract
09:50:38 20 suit -- that would be subject to the statute of
09:50:43 21 limitations in that case, because that is for the
09:50:47 22 specific benefit or profit of the corporate agency,
09:50:50 23 which is the State in that case, or a city, or
09:50:53 24 anything else such as that.
09:50:55 25 But in this case, I am persuaded that this

09:51:00 1 is a case that is brought for whatever other reasons
09:51:05 2 is one that would fall under the definition that the
09:51:08 3 Supreme Court gives us as for the act or action
09:51:12 4 brought for the common good.
09:51:13 5 I think that is how our Supreme Court would
09:51:15 6 view this. I think that the Supreme Court would say
09:51:17 7 that this is a 4.16.160 case.
09:51:22 8 I am going to deny the motions, all of the
09:51:24 9 motions, then, for dismissal under the statute of
09:51:29 10 limitations.
09:51:29 11 That brings us on to part two.
09:51:31 12 Part two is the issue with respect to --
09:51:42 13 narrowing it down to the stream of commerce analysis
09:51:46 14 issue. So, a couple of things, I want to tell you, I
09:51:50 15 have a group coming in at 11 o'clock. But I will keep
09:51:53 16 them here until 11:30 and give you until 11:30, if you
09:51:58 17 wish. We will hold them off a little bit, any way.
09:52:04 18 Then I have, not previously scheduled, but
09:52:10 19 kind of an emergency thing came up on a sentencing,
09:52:15 20 which we will do at 1 o'clock. Very likely we will be
09:52:20 21 through at 1:30 or very close to 1:30. We would be
09:52:24 22 able to resume at 1:30, if you are not finished this
09:52:27 23 time.
09:52:28 24 We have statutory requirements for breaks.
09:52:35 25 We will honor those statutory requirements. I will

09:52:38 1 check with the court reporter, because reporting oral
09:52:41 2 argument is often more demanding than in a trial,
09:52:47 3 where there are a lot more pauses and instances like
09:52:50 4 that. I am going to confer on that. I don't set any
09:52:54 5 time limit. I haven't set any time limit. I don't
09:52:57 6 generally. Although, when I generally have a summary
09:53:00 7 judgment motion, we consider it an hour. But this was
09:53:04 8 an extraordinary setting, because of the number of the
09:53:06 9 parties involved. So we haven't set time limits. I
09:53:10 10 have never done that in closing arguments or opening
09:53:13 11 statements in cases. And it has never stung me until
09:53:17 12 a month or so ago in which a closing argument that was
09:53:22 13 estimated at an hour was 2 1/2. But still it usually
09:53:29 14 works out. I don't put any time limits on that, but
09:53:32 15 that is the schedule that we will have. That is the
09:53:34 16 schedule that you will have. If you want to try to
09:53:37 17 fit this in this morning, then it is on you to do
09:53:43 18 that.
09:53:44 19 How are you doing? We will just take a
09:53:49 20 short break and then we will resume.
09:53:54 21 THE BAILIFF: All rise. Court is in recess.
09:53:55 22 (Court was recessed.)
10:00:56 23 THE BAILIFF: All rise. Court is in
10:00:57 24 session.
10:00:57 25 THE COURT: Please be seated. Have you

10:00:59 1 decided who is going to speak?
10:01:00 2 I take it that was a little disagreement
10:01:03 3 with my suggestion. Did you decide who was going to
10:01:07 4 present your argument?
10:01:39 5 MR. HWANG: Yes, we are ready, Your Honor,
10:01:44 6 Hojoon Hwang for the LG entities.
10:01:44 7 THE COURT: Which are the entities that you
10:01:46 8 represent?
10:01:46 9 MR. HWANG: LG Electronics, Inc., and LG
10:01:51 10 USA.
10:01:52 11 THE COURT: All right.
10:01:53 12 MR. HWANG: Your Honor, just to respond to
10:01:59 13 your comments regarding the scheduling, barring any
10:02:02 14 unforeseen, and frankly, from my perspective
10:02:05 15 undesirable development, we should be done by 11:30.
10:02:08 16 THE COURT: All right.
10:02:11 17 MR. HWANG: Your Honor, to address the
10:02:14 18 personal jurisdiction motion that LG Electronics has
10:02:18 19 brought, I will note at the outset that the facts are
10:02:21 20 undisputed.
10:02:23 21 We have submitted an affidavit affirming
10:02:26 22 that LG Electronics, Inc., has conducted no business
10:02:30 23 in Washington, has no customers, offices or employees
10:02:34 24 in Washington.
10:02:36 25 It has no contacts to speak of with the

10:02:42 1 State of Washington. The State has conceded this
10:02:44 2 morning that general jurisdiction is not being
10:02:47 3 asserted over any of the defendants. So that we are
10:02:49 4 really down to specific jurisdiction based on the
10:02:53 5 stream of commerce. I will turn to that.
10:02:57 6 THE COURT: All right.
10:02:58 7 MR. HWANG: So based on the record, Your
10:03:01 8 Honor, because of the facts that are undisputed, it
10:03:04 9 doesn't much matter from my perspective whether this
10:03:07 10 is a summary judgment or a pleading motion.
10:03:10 11 But, we have a record that shows no
10:03:13 12 particular activity by LG Electronics, or any other
10:03:17 13 defendant that it is directed to Washington State. So
10:03:24 14 close to serving the United States market as a whole,
10:03:28 15 indifferent as to which State the product might end
10:03:32 16 up, or even for that matter, which country the product
10:03:35 17 might go to.
10:03:36 18 Under those facts, or any conceivable
10:03:40 19 standard for finding specific jurisdiction, those
10:03:43 20 facts are just not good enough.
10:03:45 21 Unless you take the most extreme reading of
10:03:52 22 Justice Brennan's concurrence in the Hitachi Metal
10:03:56 23 case that once a retailer places goods in commerce,
10:04:00 24 that retailer is subject to jurisdiction anywhere and
10:04:04 25 everywhere those products might end up in.

10:04:07 1 Now, that standard is no longer the law, I
10:04:11 2 would submit, because that is exactly what the Supreme
10:04:15 3 Court emphatically rejected in the most recent case on
10:04:19 4 the specific jurisdiction the McIntyre Machinery case.
10:04:23 5 In that case, the defendant British
10:04:29 6 manufacturer had conducted marketing campaigns in the
10:04:34 7 United States, held trade shows in San Diego, San
10:04:38 8 Francisco, New Orleans, et cetera. So some of their
10:04:41 9 products ended up in the State of New Jersey, where it
10:04:45 10 gave rise to the cause of action.
10:04:47 11 The New Jersey Supreme Court said that
10:04:50 12 there was personal jurisdiction and articulated the
10:04:53 13 standard as follows. They said:
10:04:56 14 "Whenever a manufacturer knows or
10:04:59 15 reasonably should know that its products are
10:05:02 16 distributed through a nationwide distribution
10:05:06 17 system, that might lead to those products being sold
10:05:09 18 in any of the 50 states, then all of the 50 states
10:05:14 19 do have personal jurisdiction."
10:05:15 20 That standard was rejected. Specifically,
10:05:21 21 was also rejected not only in the plurality opinion,
10:05:26 22 which adopted a fairly strict standard, but also
10:05:30 23 Justice Briar and Justice Oleado concurrent at 130.124
10:05:35 24 and 27.93. Supreme Court Justice Briar quotes that
10:05:38 25 language that I just quoted and said "that is not the

10:05:40 1 law."

10:05:41 2 Why is that significant?

10:05:43 3 Because, of course, this court is bound by

10:05:46 4 the ground of the decision that commanded a majority

10:05:49 5 of the United States Supreme Court.

10:05:51 6 Here we have a plural opinion, concurring

10:05:54 7 opinion, both agreeing that it is just simply not

10:05:57 8 enough for the manufacturer to have known or

10:06:00 9 reasonably should have known that a product put into a

10:06:04 10 national system of distribution may end up in a wrong

10:06:07 11 State and the manufacturer would be amenable to the

10:06:10 12 jurisdiction there. That is exactly what we have in

10:06:12 13 this case.

10:06:16 14 The Attorney General, having put no facts

10:06:18 15 in dispute, and in its response, the entirety of their

10:06:24 16 allegation, the prima facie case for the personal

10:06:27 17 jurisdiction that they need to make when they admit

10:06:30 18 that burden is that "the defendants knew, or expected

10:06:35 19 that the products contained their CRTs would be sold

10:06:39 20 in the United States and in the Washington," that is

10:06:41 21 paragraph 5 of their complaint.

10:06:43 22 This is exactly the kind of

10:06:46 23 undifferentiating national marketing of the products,

10:06:52 24 indifference to which state it might end up in, with

10:06:55 25 no particular activity directed at the State of

10:06:58 1 Washington that the courts have including both in the
10:07:02 2 McIntyre Machinery and in the plurality is that the
10:07:06 3 courts have said is not enough.
10:07:07 4 THE COURT: May I ask you a question?
10:07:10 5 I don't remember if it was in your
10:07:11 6 briefing. I was looking and I couldn't see it. It
10:07:14 7 was in one of the defendants briefing, that
10:07:16 8 criticized, if I understood it correctly, the State
10:07:19 9 for relying on Grange, our State case in Grange
10:07:26 10 Insurance Company.
10:07:28 11 MR. HWANG: I believe that more than one
10:07:30 12 defendant has said that, Your Honor.
10:07:31 13 THE COURT: That is why I remember it.
10:07:33 14 It caused me, based on my reading of that,
10:07:36 15 to wonder why -- what is it about Grange that you
10:07:41 16 think is inconsistent?
10:07:42 17 I look at the Grange decision and I see in
10:07:45 18 the Grange decision this language:
10:07:53 19 "A retailer's mere placing of the product
10:07:56 20 into interstate commerce is not by itself sufficient
10:07:59 21 basis to infer the existence of purposeful minimum
10:08:04 22 contacts."
10:08:05 23 Isn't that what you just argued?
10:08:07 24 MR. HWANG: Yes, Your Honor, I have that
10:08:08 25 highlighted in my copy of Grange. I was going to

10:08:11 1 bring that up.

10:08:12 2 I think that our criticism of the State's

10:08:15 3 argumentation on this, at least the way that -- when I

10:08:18 4 wrote the reply brief was not so much that they rely

10:08:21 5 on Grange, because, in fact, I believe that Grange

10:08:23 6 supports our point of view. But that they didn't

10:08:26 7 deal with McIntyre Machinery at all --

10:08:28 8 THE COURT: All right. Fine.

10:08:31 9 MR. HWANG: -- which is the more recent

10:08:33 10 authority.

10:08:34 11 But in Grange, too -- I would, the State

10:08:37 12 relies on various parts of the language from the

10:08:40 13 Grange case. It is dicta, in fact, because the court

10:08:47 14 ultimately said that there was no personal

10:08:49 15 jurisdiction on some different grounds.

10:08:50 16 THE COURT: Correct.

10:08:51 17 MR. HWANG: But even in Grange itself, at

10:08:53 18 the page 761 and 762, the court says exactly what Your

10:08:58 19 Honor just read.

10:08:59 20 "A retailer's mere placing of the product

10:09:01 21 into interstate commerce is not by itself sufficient

10:09:05 22 basis to infer the existence and purposeful minimum

10:09:09 23 contact."

10:09:10 24 On that basis, too, the motion should be

10:09:12 25 granted, because that is exactly what we have here and

10:09:15 1 nothing more.

10:09:16 2 Other than the allegation that the

10:09:19 3 defendants have placed products into commerce, there

10:09:22 4 is nothing alleged, nothing shown, that goes

10:09:26 5 specifically to the State of Washington as a target,

10:09:32 6 or as a -- some activity directed to the State of

10:09:36 7 Washington, as opposed to the State of New Jersey.

10:09:39 8 The McIntyre Machinery court said, clearly,

10:09:42 9 that that's not enough. There is a distinction

10:09:45 10 between our national campaign and purposefully

10:09:49 11 availing oneself of a particular forum.

10:09:51 12 I was looking for, you know, some of the

10:09:55 13 lower court's discussions of that concept and we cited

10:10:00 14 in the LG papers the Opticon case from the District of

10:10:04 15 New Jersey. It doesn't yet have a Federal Supplement

10:10:08 16 number.

10:10:09 17 But in that case, Judge Wolfson said,

10:10:12 18 "looking at both the plurality opinion and

10:10:15 19 concurrence, one thing that really comes out clear

10:10:18 20 is that the national marketing campaign is not

10:10:21 21 enough."

10:10:21 22 That is ultimately what Judge Inveen of

10:10:23 23 this court said with respect to the LTD Powell

10:10:27 24 defendants in the AUO Electronics case. She said she

10:10:29 25 recognized correctly that she needs to look at both

10:10:32 1 the plurality and the concurrence and says that there
10:10:35 2 has to be something more.
10:10:37 3 She read Judge Briar's opinion saying that:
10:10:40 4 "There has to be something more that distinguishes
10:10:43 5 the situation from the under differentiated national
10:10:50 6 market and places one in a category them of
10:10:52 7 purposefully directing their activities in the State
10:10:55 8 of Washington."
10:10:55 9 Therefore, she granted the motion to
10:10:59 10 dismiss. We think that it should be applied here.
10:11:02 11 THE COURT: She commented that she had gone
10:11:04 12 through the entire complaint and couldn't find more
10:11:07 13 there or the --
10:11:08 14 MR. HWANG: Right. I am sure that Your
10:11:10 15 Honor has, or will, but I would submit to you that the
10:11:12 16 paragraph that I read is the entirety.
10:11:15 17 THE COURT: I understand that you cited
10:11:18 18 fairly the portions that you think are appropriate.
10:11:21 19 So go ahead, I didn't mean to interrupt.
10:11:24 20 MR. HWANG: With that, we will end, Your
10:11:26 21 Honor.
10:11:27 22 THE COURT: Any of the other defendants
10:11:30 23 wish to be heard on the rest of the issues in this
10:11:39 24 case, now dealt with issue?
10:11:42 25 MS. CHIU: For the Hitachi defendants,

10:11:44 1 Michele Park Chiu. We join in the argument that
10:11:49 2 Mr. Hwang has submitted on behalf of his clients. We
10:11:51 3 would like to highlight a couple of other facts that
10:11:56 4 the State raised in their reply to the motion that the
10:11:59 5 Hitachi defendants raised.
10:12:02 6 In particular, in response to the AUO
10:12:07 7 Electronics decision, the State noted that extensive
10:12:09 8 discovery had been taken in that case, which permitted
10:12:12 9 them -- or excuse me, permit ted the judge to make the
10:12:15 10 decisions that she had at that point.
10:12:17 11 The Hitachi defendants would like to note
10:12:19 12 that extensive discovery has also taken place in this
10:12:22 13 matter. Since December 30, 2011 to the present the
10:12:27 14 Hitachi defendants alone have produced over 319,000
10:12:32 15 pages of discovery to the State.
10:12:35 16 This is discovery that was produced in the
10:12:37 17 multi-district litigation in the Federal Court. The
10:12:42 18 State has had access to those documents. No where in
10:12:45 19 their papers have the State been able to raise any
10:12:49 20 facts or documents that were produced to indicate that
10:12:52 21 there is any facts to support personal jurisdiction in
10:12:56 22 this case.
10:12:56 23 In fact, the facts -- excuse me, the
10:12:59 24 affidavits that were submitted by the Hitachi
10:13:02 25 defendants, substantiating the fact that there are no

10:13:06 1 substantial contacts between the Hitachi defendants
10:13:08 2 and the Washington State have been unrebutted by
10:13:11 3 anything that was produced by the Hitachi defendants.
10:13:14 4 So, we would like to note that there should
10:13:18 5 be nothing regarding the discovery that would prevent
10:13:20 6 this court from also granting the motions to dismiss
10:13:23 7 in this case. And we believe that, in addition to the
10:13:26 8 Hitachi defendants, other defendants also have
10:13:29 9 produced the essential discovery to the State as well.
10:13:34 10 THE COURT: All right.
10:13:35 11 Is that it?
10:13:36 12 MS. CHIU: Yes, Your Honor.
10:13:44 13 MR. YOLKUT: David Yolkut, on behalf of
10:13:45 14 Panasonic Corporation. I, too, would like to join in
10:13:48 15 Mr. Hwang's and Ms. Chiu's argument.
10:13:50 16 We believe that the Panasonic Corporation
10:13:53 17 is situated from similar to the LG defendant, and the
10:13:57 18 Hitachi defendant.
10:13:58 19 We would also like to point out that
10:14:00 20 Panasonic Corporation is only the one of three
10:14:05 21 Panasonic defendants to have moved on personal
10:14:08 22 jurisdiction grounds. Panasonic Corporation of North
10:14:11 23 America is another defendant, and Toshiba Picture
10:14:15 24 Display Code, LTD., is also a defendant. They have
10:14:19 25 both answered the complaint and they don't contest the

10:14:21 1 personal jurisdiction.

10:14:22 2 But as to the Panasonic Corporation, which

10:14:24 3 is a foreign entity, headquartered in Osaka, Japan and

10:14:29 4 incorporated in the laws of Japan. We have submitted

10:14:32 5 the evidence that the Panasonic corporation does not

10:14:35 6 manufacture anything, including CRT tubes, or products

10:14:38 7 containing CRT tubes, to this State, or directed to

10:14:41 8 its any of its consumers.

10:14:43 9 That Panasonic Corporation has had no CRT

10:14:47 10 television or computer monitor sales in this State.

10:14:51 11 Additionally, although jurisdiction has not

10:14:54 12 been contested, Panasonic Corporation last no office,

10:14:58 13 no facility, no records, no bank accounts, no assets

10:15:01 14 or mailing address here.

10:15:02 15 On these facts, which remain unrebutted and

10:15:05 16 unchallenged by the State, Panasonic Corporation, too,

10:15:11 17 would like to stress that the State has wholly failed

10:15:15 18 to site or distinguish the G. McIntyre decision from

10:15:21 19 the Supreme Court. We would rest on that authority.

10:15:23 20 Thank you, Your Honor.

10:15:24 21 THE COURT: Thank you. Any further

10:15:25 22 parties?

10:15:28 23 MR. NEELEMAN: John Neeleman for Samsung

10:15:32 24 SDI companies.

10:15:33 25 We would reiterate that the Samsung is,

10:15:35 1 also -- the Samsung entities are also parties in the
10:15:39 2 multi district in California, have made substantial
10:15:42 3 discovery. And other than that we would join in the
10:15:45 4 prior argument and would reserve the reply.
10:15:50 5 MR. EMANUELSON: David Emanuelson, again,
10:15:52 6 for the Phillips entities.
10:15:53 7 Specifically, in this part of the motion,
10:15:57 8 Phillips Electronics, a Dutch corporation and Phillips
10:16:04 9 electronics Industries, in Taiwan limited, a Taiwanese
10:16:06 10 Corporation. Again, we join in the motion.
10:16:10 11 The Taiwanese corporation is similarly
10:16:13 12 situated to the defendants in the fact that it has no
10:16:17 13 sales or contacts in Washington.
10:16:20 14 I will refer it as KPE.
10:16:22 15 It does not have any sales at all. It is a
10:16:24 16 wholly company, and again, we would refer to the
10:16:28 17 brief, to the affidavits attached to our briefs.
10:16:31 18 THE COURT: I read your papers.
10:16:33 19 MR. YOLKUT: David Yolkut, on behalf of
10:16:35 20 Panasonic Corporation.
10:16:37 21 This is certainly not a game of one
10:16:41 22 up-mannship.
10:16:42 23 Ms. Chiu referenced 319,000 pages. I would
10:16:46 24 also note that the Panasonic defendants have produced
10:16:49 25 over two million pages of the discovery to the

10:16:52 1 Attorney General. They have not cited any discovery
10:16:54 2 in their opposition papers that would warrant any
10:16:58 3 further discovery in this matter.
10:17:06 4 THE COURT: Any other defendant parties
10:17:08 5 that want to be heard at this point?
10:17:11 6 All right. The State's reply?
10:17:15 7 MR. KERWIN: Thank you, Your Honor.
10:17:18 8 Your Honor, we are not talking here about
10:17:23 9 mere foreseeability or possibility. We are talking
10:17:26 10 about inevitability. We are talking about a huge
10:17:29 11 volume of commerce here. We are not talking about a
10:17:31 12 huge inevitability. We are talking about knowing and
10:17:35 13 intentional inevitability.
10:17:37 14 If there is a stream of commerce to be had
10:17:39 15 in State of Washington, this is it. This notion, I
10:17:43 16 have a little bit of trouble getting my mind around
10:17:45 17 the notion if you target State of Washington and
10:17:49 18 other states, there is probably jurisdiction. If you
10:17:51 19 target State of Washington and 40 others states there
10:17:55 20 might be jurisdiction. If you target Washington State
10:17:55 21 and 49 states, all of a sudden it can have a statue of
10:17:59 22 limitation as to four years.
10:18:00 23 THE COURT: My understanding is that there
10:18:01 24 is no targeting of Washington, period.
10:18:04 25 And that in my understanding is that the

10:18:06 1 argument includes that part of the law that refers to
10:18:15 2 putting the product into interstate commerce is not,
10:18:19 3 by itself, sufficient.
10:18:20 4 Now, if you take that as a proper statement
10:18:22 5 of the law, and in terms of the specific jurisdiction,
10:18:31 6 then -- isn't there -- it just seems to me that
10:18:38 7 logically there has got to be something more there,
10:18:42 8 something more than putting it into the stream of
10:18:47 9 commerce.
10:18:48 10 MR. KERWIN: Under the stream of commerce
10:18:50 11 analysis, I think it defies logic that at some point
10:18:57 12 you aren't saturating a market so much, and putting so
10:19:00 13 many -- I will make two points on this.
10:19:02 14 The first is that you are saturating the
10:19:04 15 market so much and putting so many products into the
10:19:09 16 stream of commerce, that it is not possible for you
10:19:12 17 not to know that your products are reaching Washington
10:19:16 18 State.
10:19:16 19 Also, we plead in this case that the
10:19:19 20 defendants knowingly and intentionally did reach
10:19:22 21 Washington State with their products.
10:19:24 22 Now, they sold through middle-men. They
10:19:27 23 didn't send advertisements to the State of Washington.
10:19:30 24 They didn't set up offices in the Washington State.
10:19:33 25 We are not arguing that the physical minimal contacts

10:19:37 1 generally existed, although some defendants did admit
10:19:39 2 to some amounts of actual physical contacts.
10:19:43 3 THE COURT: There is some other language in
10:19:45 4 a couple of cases that I want to share with you, if
10:19:48 5 you will give me a second.
10:19:49 6 But one, if we go back to Grange again.
10:19:53 7 Grange said that "extending jurisdiction is justified,
10:19:56 8 only if the defendant has purposefully availed itself
10:20:00 9 of the forum State's markets."
10:20:04 10 Your argument, I take it, on that is
10:20:06 11 saturation in that there is nothing in your response
10:20:10 12 to that that says that there was a specific targeting
10:20:15 13 of Washington State. It is just the saturation of the
10:20:20 14 entire country.
10:20:21 15 MR. KERWIN: That is my shorthand for it,
10:20:23 16 yes, Your Honor.
10:20:24 17 THE COURT: All right.
10:20:24 18 MR. KERWIN: Now, we do make the allegation
10:20:27 19 that the defendants knowingly targeted Washington
10:20:30 20 State. We expect, during the discovery, to find
10:20:33 21 evidence that they targeted all 50 states, including
10:20:37 22 Washington State.
10:20:38 23 The concept that they didn't intend to sell
10:20:42 24 television and monitors containing their price fixed
10:20:45 25 products in Washington State, just defies logic.

10:20:53 1 If the State were to take a pass on a case
10:20:55 2 like this, we would say to the large corporations, go
10:20:58 3 ahead and pump your CPA violated products into
10:21:02 4 Washington State, as fast as you want. Just be
10:21:04 5 careful not to set up any offices here. Be careful
10:21:07 6 not to have too many physical contacts. Don't drive
10:21:10 7 through Washington State on your way to somewhere
10:21:13 8 else. You want plausible deniability for your clients
10:21:16 9 in court here to argue about it.
10:21:16 10 Go ahead and do that, and you cannot be
10:21:18 11 held responsible for your actions and victimization of
10:21:21 12 Washington State consumers.
10:21:23 13 THE COURT: You just described something to
10:21:25 14 me that sounds a little bit about the distinction
10:21:29 15 between general jurisdiction and specific
10:21:31 16 jurisdiction, if that is the term that you are using
10:21:33 17 here.
10:21:35 18 MR. KERWIN: Your Honor, let me say that
10:21:38 19 the stream of commerce analysis satisfies the element
10:21:43 20 of personal jurisdiction in its analysis.
10:21:46 21 THE COURT: You all cited, but nobody has
10:21:48 22 argued the Worldwide Volkswagen case.
10:21:52 23 MR. KERWIN: Yes, Worldwide Volkswagen is
10:21:55 24 the law in Washington State. That is what controls.
10:21:58 25 THE COURT: When they talk about the due

10:21:59 1 process part of specific jurisdiction there, the part
10:22:02 2 that I am looking at is at page 297, and it talks
10:22:06 3 about foreseeability.
10:22:07 4 The court says at 297:
10:22:15 5 "But the foreseeability that is critical to
10:22:18 6 due process analysis is not the mere likelihood that
10:22:21 7 a product will find its way into the forum State,
10:22:25 8 rather it is that the defendant's conduct and
10:22:29 9 connection with the forum State are such that he
10:22:34 10 should reasonably anticipate being hailed into the
10:22:37 11 court there." End of quotation.
10:22:40 12 They go on with a number of examples, like
10:22:43 13 the tire manufacturer, who sells tires, or the -- I
10:22:50 14 don't know if it is a manufacturer or the dealer, who
10:22:52 15 sells tires in the California and you have a flat tire
10:22:54 16 in Pennsylvania. Can you bring the California party,
10:23:01 17 who sold the tire, to trial in Pennsylvania?
10:23:05 18 They talk about soda pop from California to
10:23:08 19 Alaska, things -- a number of situations like that,
10:23:11 20 where you get a product one place and it causes a
10:23:15 21 problem some place else.
10:23:16 22 They said, "no, that doesn't -- that
10:23:18 23 doesn't meet the standard."
10:23:20 24 MR. KERWIN: Right.
10:23:21 25 THE COURT: You get here and in the part of

10:23:22 1 this, when I hear your argument, that raised the
10:23:27 2 question in my mind it is not the likelihood that the
10:23:32 3 product is going to be in the Washington State. That
10:23:36 4 is not the test of the foreseeability, when we talk
10:23:40 5 about the due process part of the special
10:23:45 6 jurisdiction.
10:23:45 7 The court says:
10:23:45 8 "Rather it is the defendant's conduct and
10:23:49 9 connection with the forum State, if there are such
10:23:56 10 that he should reasonably anticipate being hailed
10:24:02 11 into court."
10:24:04 12 There that seems -- that language seems to
10:24:09 13 implicitly require that there would be some
10:24:12 14 defendants' conduct in connection with the forum
10:24:14 15 State. That seems to be absent in all of this, other
10:24:18 16 than your saturation argument.
10:24:20 17 MR. KERWIN: I see what you are saying,
10:24:22 18 Your Honor.
10:24:22 19 I would say, first, that the conduct is
10:24:26 20 putting this massive amount of products in this stream
10:24:30 21 of commerce and knowingly targeting all 50 States.
10:24:33 22 The connection comes through the stream of commerce
10:24:36 23 argument that we have.
10:24:37 24 In this case, Worldwide Volkswagen, the
10:24:40 25 cases that it cites, this highlights the transition

10:24:43 1 that we see from the older cases, where you have a car
10:24:46 2 purchased in New York that is driven to, you know,
10:24:51 3 McIntyre, Ford products brought into the State of New
10:24:51 4 Jersey.
10:24:57 5 In Grange the court says "look Worldwide
10:25:03 6 Volkswagen is the law here in Washington."
10:25:04 7 THE COURT: Right.
10:25:05 8 MR. KERWIN: Asai isn't; for the same
10:25:09 9 reasons that would I argue that McIntyre isn't. The
10:25:11 10 language on Worldwide Volkswagen anticipates a larger
10:25:15 11 and more purposeful stream of commerce bringing
10:25:19 12 jurisdiction to the State.
10:25:20 13 They say:
10:25:21 14 "If the State does not violate the due
10:25:23 15 process, if it asserts personal jurisdiction
10:25:26 16 over the company, that delivers the products into
10:25:28 17 the stream of commerce, the expectation that they
10:25:30 18 will be purchased by the consumers in the forum
10:25:33 19 State."
10:25:34 20 THE COURT: That is not enough; is it?
10:25:37 21 MR. KERWIN: I believe that stream of
10:25:40 22 commerce analysis, it is, Your Honor.
10:25:42 23 When you have this volume of commerce --
10:25:46 24 THE COURT: All right.
10:25:47 25 MR. KERWIN: -- if there is such thing as

10:25:48 1 stream of commerce in Washington State, this is it.
10:25:54 2 That connection to the State in a case like this is
10:25:59 3 satisfied by -- Your Honor, I want to be clear.
10:26:01 4 We are pleading that these companies
10:26:04 5 intentionally targeted Washington State, just as they
10:26:09 6 did every other state.
10:26:11 7 We see the court adopt the standard from
10:26:13 8 Worldwide Volkswagen in Grange.
10:26:15 9 THE COURT: Yes.
10:26:16 10 MR. KERWIN: It said that:
10:26:18 11 "Purposeful minimum contacts are
10:26:27 12 established, when an out-of-state manufacturer
10:26:29 13 places its products in the stream of the interstate
10:26:33 14 commerce, because under those circumstances it is
10:26:35 15 fair to charge the manufacturer with knowledge that
10:26:37 16 its conducts might have consequences in another
10:26:40 17 State."
10:26:41 18 It is undoubtable that these defendants
10:26:44 19 knew that their products would be purchased by
10:26:48 20 consumers in Washington State and that Washington
10:26:51 21 State consumers would be harmed by their price fixing
10:26:55 22 activities.
10:26:55 23 THE COURT: We seem to have a law that
10:26:57 24 says, just put it into the stream of commerce
10:26:59 25 throughout the country is not enough.

10:27:02 1 MR. KERWIN: I think -- when applied to
10:27:07 2 those earlier cases, where you had a limited number of
10:27:11 3 products and a lot more -- I think that the language
10:27:17 4 of these cases anticipates that there can be more,
10:27:21 5 that there can be a stream of commerce.
10:27:23 6 THE COURT: You are really advocating for
10:27:26 7 an expansion, or a change in the law, to reflect
10:27:30 8 current business practices, that result in a
10:27:33 9 saturation that should put any one on notice.
10:27:36 10 MR. KERWIN: I don't believe that this is
10:27:39 11 in any kind of a way a new law, or a change in the
10:27:42 12 law.
10:27:43 13 I think that, absolutely, when you look at
10:27:45 14 Worldwide Volkswagen, even when you look at cases like
10:27:47 15 Asai and McIntyre that don't apply here, that you see
10:27:51 16 the court anticipating that there would be the stream
10:27:58 17 of commerce situation that will grant -- but those
10:28:00 18 cases aren't it. They aren't quite there yet. Those
10:28:05 19 facts fall short.
10:28:06 20 THE COURT: I hate to go off on a tangent
10:28:08 21 and but let me try it. It is products liability law.
10:28:13 22 When products liability -- talking specifically about
10:28:17 23 asbestos products. Our courts have said a couple of
10:28:21 24 times recently -- very recently, that manufacturer,
10:28:26 25 who creates a product that is safe, which later

10:28:30 1 becomes unsafe because of asbestos being put on it,
10:28:34 2 that the original manufacturer has no liability; that
10:28:40 3 is, cannot be held responsible to warn of the dangers
10:28:45 4 because they haven't provided the dangers even --
10:28:49 5 unless they put that into the stream of commerce.
10:28:51 6 That is getting to that point, the stream of commerce,
10:28:54 7 that you have an innocent product, even though that it
10:28:56 8 goes in the stream of commerce at some point and
10:28:59 9 becomes a kind of a product that requires warnings
10:29:05 10 that there is no liability on that initial
10:29:10 11 manufacturer, even though that they end up in the
10:29:14 12 stream of commerce where there may be some.
10:29:16 13 It just -- that sounded to me a little bit
10:29:23 14 like this this case or the issues in this case.
10:29:28 15 MR. KERWIN: I think that it is on --
10:29:30 16 THE COURT: If you can have a product that
10:29:32 17 goes into market in this State of Washington, sold in
10:29:38 18 the State of Washington and may be harmful and require
10:29:42 19 or products, such as these, which are over-priced.
10:29:47 20 But that that doesn't reach back to the
10:29:53 21 original manufacturer, or in this -- in our context,
10:29:58 22 with our cases, that the original entity that puts it
10:30:03 23 into a national kind of a market rather than targeting
10:30:09 24 the State of Washington, but that seemed to repeat or
10:30:14 25 reinforce.

10:30:15 1 MR. KERWIN: There are certainly
10:30:16 2 similarities. The key difference there is liability
10:30:21 3 versus jurisdiction. It also reminds me here that a
10:30:24 4 big part of the analysis and a big part of the minimum
10:30:27 5 contact analysis is fairness. The second step that we
10:30:32 6 have to take to get jurisdiction would this defendant
10:30:35 7 traditional claims of fair play and substantial
10:30:40 8 justice.
10:30:41 9 THE COURT: It sounds like -- I don't
10:30:43 10 recall reading anywhere in any brief -- but it sounds
10:30:46 11 like virtually all of the defendants in this case are
10:30:53 12 subject to federal action, as well; is that correct?
10:30:59 13 MR. KERWIN: They are subject to all types
10:31:00 14 of actions every where. It is an oppressive list.
10:31:04 15 THE COURT: When you talk about --
10:31:05 16 MR. KERWIN: But the Washington State
10:31:08 17 indirect consumers, this is their only avenue for
10:31:12 18 restitution. This is it. If they don't have
10:31:13 19 jurisdiction here, millions of consumers in Washington
10:31:17 20 State go without restitution.
10:31:18 21 THE COURT: -- is there federal
10:31:20 22 jurisdiction over this alleged conspiracy and price
10:31:25 23 fixing?
10:31:26 24 MR. KERWIN: If they were to bring suit?
10:31:28 25 THE COURT: No. With the suits that are

10:31:29 1 presently -- I don't want to get into factual matters
10:31:31 2 that aren't in the record here.
10:31:34 3 But if these folks are subject to the
10:31:36 4 federal lawsuit, because it certainly involves -- may
10:31:41 5 involve interstate commerce -- aren't they subject to
10:31:49 6 whatever damages that the law provides for their
10:31:53 7 wrongful action?
10:31:54 8 MR. KERWIN: Not in terms of Washington
10:31:58 9 State and direct consumers and indirect purchasers,
10:32:02 10 no.
10:32:03 11 They are not represented in any of the
10:32:06 12 NBLs, or any of the actions going on. They can't be.
10:32:10 13 The Attorney General is the lone representative of the
10:32:14 14 millions of citizens, Your Honor.
10:32:16 15 The CPA intends that cases should be
10:32:19 16 brought by the Attorney General to represent those
10:32:22 17 plaintiffs.
10:32:22 18 THE COURT: So, the more -- when you are
10:32:27 19 looking for whatever more is there, the more is a
10:32:32 20 saturation. That is the kind of a term that I think
10:32:35 21 that you used and I grabbed on to, because I think
10:32:38 22 that it is a good term to describe what you were
10:32:41 23 saying.
10:32:42 24 MR. KERWIN: I think that it is, Your
10:32:43 25 Honor. I don't necessarily think that you need the

10:32:45 1 more in this case. But if you do need the more, that
10:32:49 2 is absolutely it.
10:32:50 3 THE COURT: All right.
10:32:52 4 MR. KERWIN: Talking a little bit about how
10:32:57 5 this is their only venue, this is the only form for
10:33:01 6 purchaser of CPA, CRT products in the Washington
10:33:05 7 State, the State is their only representative, that
10:33:08 8 equity element weighs very heavy for the jurisdiction
10:33:12 9 here. The defendants lists all of the contacts that
10:33:14 10 they don't have all with the State offices and the FAX
10:33:18 11 numbers.
10:33:18 12 What they don't do is they don't deny that
10:33:21 13 they fix the prices. They don't deny that maybe they
10:33:24 14 would profit from Washington State's citizens
10:33:26 15 purchasing these products.
10:33:28 16 THE COURT: But in this case, we have this
10:33:31 17 case, we have, apparently, some other defendants that
10:33:34 18 aren't here.
10:33:35 19 MR. KERWIN: Yes, Your Honor.
10:33:36 20 THE COURT: At this motion, are those
10:33:39 21 distributors to this case those persons have more
10:33:42 22 direct connection with distributing the products in
10:33:45 23 this State?
10:33:46 24 MR. KERWIN: I don't think that I can say
10:33:47 25 that in a blanket manner.

10:33:50 1 THE COURT: Why aren't they here in this
10:33:52 2 motion?
10:33:52 3 MR. KERWIN: I couldn't answer that, Your
10:33:54 4 Honor. To some varying degree the defendants
10:33:57 5 participated in the actual production and distribution
10:34:01 6 of these products.
10:34:01 7 THE COURT: I did hear a concession by one
10:34:05 8 party that they -- some of their subsidiaries and
10:34:09 9 related organizations did have those kinds of contacts
10:34:12 10 that they were contesting.
10:34:14 11 MR. KERWIN: Right.
10:34:15 12 THE COURT: They were contesting the
10:34:16 13 specific jurisdiction.
10:34:18 14 MR. KERWIN: The State pleads that all of
10:34:20 15 the defendants engaged in the price fixing, engaged in
10:34:23 16 some way in the distribution of these products and
10:34:27 17 knew and intended that they are products would reach
10:34:31 18 Washington State. We have made a prima facie case for
10:34:33 19 that, Your Honor.
10:34:34 20 THE COURT: Are the other defendants still
10:34:35 21 in the case that are not contesting specific
10:34:38 22 jurisdiction, do they represent all of the products
10:34:43 23 that were alleged that were distributed in this State?
10:34:48 24 MR. KERWIN: They do not, Your Honor, not
10:34:50 25 even close. I think that the burden for the State is

10:34:52 1 a humble one. I think that it is one that we have met
10:34:55 2 in the pleadings. This is not a summary judgment
10:34:57 3 motion. The State need only make a prima facie case
10:35:01 4 that the jurisdiction is proper.
10:35:02 5 The defendants pointed out everything that
10:35:05 6 they have in their declarations. We have looked
10:35:08 7 forward to finding out who these people might be, what
10:35:10 8 these executives -- what else they have to say about
10:35:13 9 the price fixing that they engaged in their companies
10:35:15 10 and how they might have profited from it from
10:35:18 11 Washington citizens.
10:35:19 12 But at this point, they don't contest the
10:35:22 13 fact that they fix prices. They don't contest the
10:35:27 14 facts that these products intentionally reached
10:35:30 15 Washington State.
10:35:31 16 THE COURT: They probably don't admit it
10:35:34 17 either.
10:35:34 18 MR. KERWIN: No, they don't admit it
10:35:36 19 either. But that is important, because the State has
10:35:38 20 made its prima facie case in its pleadings. We
10:35:41 21 deserve to take discovery on this, Your Honor.
10:35:45 22 I completely reject the notion that there
10:35:49 23 has been extensive discovery in this case.
10:35:52 24 CID is a different animal, treated
10:35:54 25 different ly, handled differently.

10:35:57 1 What number of documents were produced,
10:36:01 2 what number of useful document were produced, we have
10:36:07 3 -- the State shouldn't be held to a double standard
10:36:12 4 that the other parties wouldn't be held to. I don't
10:36:15 5 think that we need to get deeply into that. But, Your
10:36:18 6 Honor, we certainly deserve to take discovery in this
10:36:21 7 matter.
10:36:24 8 THE COURT: On that, are we just talking
10:36:26 9 about the discovery part now?
10:36:27 10 You have concluded your argument on the
10:36:31 11 stream of commerce?
10:36:31 12 MR. KERWIN: Yes, Your Honor.
10:36:32 13 THE COURT: Except for the -- I want to ask
10:36:36 14 you about the discovery part.
10:36:38 15 I am trying to get my rule books so I don't
10:36:43 16 embarrass myself. But the CR 56, I believe that it is
10:36:49 17 56 (f) that provides for continuance for discovery, if
10:36:57 18 I have got that letter wrong, I am sorry. It is in CR
10:37:03 19 56.
10:37:05 20 MR. KERWIN: Under the summary judgment
10:37:07 21 rule.
10:37:07 22 THE COURT: You put my mind at rest. There
10:37:10 23 are some specific requirements under CR 56 (f) that
10:37:15 24 say that in terms of getting a deferral of a judgment
10:37:22 25 on the summary judgment for further discovery -- I

10:37:25 1 didn't see any reflection of any of those.
10:37:28 2 MR. KERWIN: Your Honor, we don't think --
10:37:30 3 we certainly don't think that we are arguing the
10:37:32 4 summary judgment here.
10:37:33 5 THE COURT: No.
10:37:34 6 MR. KERWIN: There is obfuscation on the
10:37:36 7 defendant's part on what rule they were filing under
10:37:39 8 we assumed that it was 12 (b) (2).
10:37:42 9 THE COURT: I don't mean that this is a
10:37:44 10 summary judgment motion. I am not trying to convert
10:37:46 11 this into a summary judgment motion.
10:37:48 12 I am saying, when you get a dispositive
10:37:50 13 motion to come up, and then, which is often summary
10:37:56 14 judgment rather than CR 12 motion, or a motion to
10:38:03 15 dismiss for lack of jurisdiction, I am not sure that
10:38:06 16 you have to characterize that as a CR 12 motion or
10:38:12 17 not, but any way, no jurisdiction. We see those, if
10:38:17 18 there is that request, I think, what about that?
10:38:20 19 I look just for comparison purposes and to
10:38:25 20 guide me somewhat about how it is handled in the
10:38:28 21 summary judgment motion. In the summary judgment
10:38:30 22 motion there is usually some showing of exactly what
10:38:32 23 you would do, exactly what you have done.
10:38:35 24 We have talked about millions of documents.
10:38:43 25 You weigh benefits and the burdens of a continuing for

10:38:47 1 discovery. You do take into consideration somewhat
10:38:51 2 the costs and the expense of discovery before you put
10:38:58 3 something over just for discovery.
10:39:01 4 MR. KERWIN: In terms of cost of the
10:39:02 5 discovery, there is already quite a bit of litigation
10:39:08 6 going on, not that we are involved in, but the
10:39:11 7 defendants are involved in.
10:39:13 8 A great deal of discovery have been
10:39:16 9 produced duplicate discovery can be produced easily, I
10:39:21 10 would guess, from those -- that litigation.
10:39:25 11 It is certainly something that we would
10:39:28 12 request. It is certainly -- we would expect to
10:39:31 13 develop our case, you know, against the assertion that
10:39:35 14 is we see in the declarations that have been provided
10:39:38 15 by the defendants.
10:39:40 16 THE COURT: All right. Thank you. Hold on
10:39:45 17 for a second before I get replies. I want to get my
10:39:50 18 cases in front of me. All right.
10:40:41 19 Reply.
10:40:41 20 MR. HWANG: Your Honor, with respect to the
10:40:43 21 discovery, it is interesting that the State now says
10:40:46 22 that they want to test the assertions in the
10:40:48 23 affidavits, because earlier today we heard they don't
10:40:52 24 contest any of those facts.
10:40:53 25 They don't think that it matters that we

10:40:55 1 didn't have offices; we didn't have employees or
10:40:57 2 customers in the Washington State. They think that
10:41:00 3 the saturation theory is where they are going with it.
10:41:02 4 I don't see how that discovery is relevant.
10:41:06 5 As we were noting in the previous motion --
10:41:09 6 argument on the previous motion, the State has known
10:41:12 7 about these allegations for four and a half years.
10:41:15 8 They have the CID power and they have been
10:41:19 9 coordinating in the discovery, as my colleague has
10:41:25 10 pointed out. We don't see that there is any basis for
10:41:28 11 discovery. I don't think that the State has
10:41:30 12 articulated any reasons for that.
10:41:32 13 The next point that I want to make is that
10:41:34 14 the State's argument that it is just not fair that
10:41:37 15 these defendants arguably, allegedly conspired to fix
10:41:41 16 prices, they are not subject to jurisdiction.
10:41:44 17 The fair play, the motions, the notions of
10:41:49 18 fairness that is additional requirement in that two
10:41:52 19 step test under the Worldwide Volkswagen, the first
10:41:54 20 has to be purposeful availment. They don't get over
10:41:58 21 that, because we, they have alleged no facts. They
10:42:01 22 have shown no facts that says that the defendants at
10:42:04 23 issue in this motion targeted Washington State.
10:42:08 24 Now, whether or not it defies logic to say
10:42:14 25 that a State doesn't have personal jurisdiction over a

10:42:17 1 defendant that conducts an undifferentiated marketing
10:42:20 2 campaign for the entire United States, that is a law.
10:42:23 3 Worldwide Volkswagen, I would suggest, supports us,
10:42:27 4 but it has to be read in conjunction with McIntyre
10:42:30 5 Machinery.
10:42:30 6 This court is actually bound and it
10:42:34 7 cannot -- it has to follow the position taken by those
10:42:40 8 justicees who concurred in the judgment of the Supreme
10:42:44 9 Court in the McIntyre case on the narrow case, the
10:42:48 10 State versus Higman case in the Washington Supreme
10:42:51 11 Court. But it comes from the Marks versus The United
10:42:53 12 States case about how you deal with the plurality of
10:42:56 13 the opinions.
10:42:56 14 The law is now that -- perhaps, it has
10:43:00 15 always been -- that the mere knowledge or expectation,
10:43:05 16 while they must have known that the products were
10:43:09 17 going to wind up in Washington, that is not the test.
10:43:12 18 The test is it has to be more than target the
10:43:14 19 Washington State. That is exactly what the Supreme
10:43:16 20 Court said.
10:43:17 21 Finally, I would note that there would be
10:43:21 22 entities, who have not moved with respect to LG, we
10:43:25 23 have moved with respect to LG Electronics, Inc., the
10:43:29 24 Korean Corporation. We have not moved with respect to
10:43:32 25 the LG Electronics USA, the American Corporation. By

10:43:37 1 no means do we mean to suggest that they have any
10:43:40 2 liability.
10:43:40 3 However, that is going to be determined in
10:43:42 4 this case, regardless of how you Your Honor rules on
10:43:46 5 the jurisdiction issue.
10:43:47 6 THE COURT: Thank you.
10:43:48 7 MS. CHIU: Michele Park Chiu for the
10:43:50 8 Hitachi defendants.
10:43:51 9 In addition, we would also like to rebut
10:43:55 10 the State's comment earlier during their argument that
10:43:59 11 there is inevitability that the products, these moving
10:44:02 12 defendants were manufacturing would end up in the
10:44:06 13 Washington State.
10:44:08 14 The State is making broad brush arguments
10:44:11 15 without applying the specifically them to the moving
10:44:13 16 defendant. For example, Hitachi Asia, which is one of
10:44:17 17 the Hitachi defendants moving here today, in the
10:44:20 18 affidavit that they submitted, never sold anything
10:44:24 19 into the United States. So there could be no
10:44:26 20 inevitability or foreseeability that those products
10:44:29 21 would end up in State of Washington, as opposed to the
10:44:34 22 even the greater national market.
10:44:36 23 It further exposes the fact that the
10:44:38 24 Attorney General is making very broad brush statements
10:44:40 25 about the defendants without looking to specific

10:44:44 1 facts. But more importantly, and more relevant, is
10:44:47 2 that the foreseeability, even if it were true, which
10:44:50 3 it is not for all of the defendants, simply is not
10:44:53 4 enough to establish the personal jurisdiction,
10:44:55 5 specific personal jurisdiction notice required.
10:44:58 6 We also joined in the statements made by LG
10:45:01 7 counsel that the law always has been as seen in
10:45:04 8 Worldwide Volkswagen and further narrowed in the Jay
10:45:09 9 McIntyre case that mere foreseeability and entrance to
10:45:13 10 the stream of commerce specifically cannot support
10:45:17 11 specific and personal jurisdiction.
10:45:17 12 We submit on that, Your Honor.
10:45:20 13 MR. YOLKUT: Your Honor, I think that your
10:45:22 14 question.
10:45:22 15 THE COURT: You start with your name.
10:45:25 16 MR. YOLKUT: Sorry, David Yolkut, on behalf
10:45:27 17 of Panasonic.
10:45:28 18 Your question to Mr. Kerwin got it exactly
10:45:31 19 right. They are looking for an expansion in the law.
10:45:33 20 For all of the reasons that my colleagues have noted,
10:45:36 21 McIntyre and the plurality opinion in the McIntyre
10:45:39 22 combined with Justice Briar's concurrence is indeed
10:45:43 23 the law that foreseeability is not enough.
10:45:45 24 Furthermore, with respected to the State's
10:45:48 25 invocation of equitable principals, Mr. Hwang is

10:45:53 1 absolute correct that you don't need to reach that,
10:45:55 2 third, or second test in Volkswagen, because there is
10:45:57 3 no purposeful availment here. There is no something
10:46:01 4 more.
10:46:02 5 In the concurrence in the Asai, justice --
10:46:07 6 the concurrence looked to the designing the product,
10:46:09 7 advertising the product, that is the type of something
10:46:12 8 more that is wholly absent here.
10:46:14 9 With respect to the equitable principles,
10:46:16 10 even if you want to consider them as I noted, with
10:46:19 11 respect to the Panasonic, there are two other
10:46:21 12 defendants that answered the complaints, they
10:46:23 13 certainly do deny the price fixing of the State. That
10:46:27 14 is news to me. There is certainly isn't denial to
10:46:31 15 each and every one of those allegations. They will be
10:46:35 16 denied. The State is not being being deprived of a
10:46:38 17 forum here.
10:46:39 18 Your Honor is correct, and my clients are
10:46:41 19 in the MDL as well.
10:46:43 20 With that I will submit.
10:46:47 21 MR. NEELEMAN: John Neeleman for Samsung.
10:46:50 22 We have nothing more to add at this time.
10:46:52 23 MR. EMANUELSON: Your Honor, David
10:46:57 24 Emanuelson, again, for the Phillips entities.
10:46:59 25 I just wanted to add as it applies to us

10:47:04 1 that the same point about the only -- we are only
10:47:09 2 moving to dismiss on behalf of KPE, and the entities,
10:47:13 3 Phillips Electronics North America has not joined in
10:47:17 4 this motion, other all of the other statements would
10:47:19 5 apply to us.
10:47:21 6 Really what this goes to a respected and
10:47:23 7 corporate forum, the State's personal jurisdiction you
10:47:28 8 cannot blur the forum. You have to look at each
10:47:33 9 entity specifically in their context in the State.
10:47:36 10 THE COURT: All right.
10:47:39 11 Anything further?
10:47:40 12 MR. KERWIN: Your Honor, if I may.
10:47:41 13 THE COURT: At a great risk, we can't go on
10:47:44 14 forever. But go ahead, briefly, if there is something
10:47:47 15 very specific. Everybody else will get an opportunity
10:47:49 16 to reply. We have a few minutes.
10:47:50 17 MR. KERWIN: Very briefly respond to what
10:47:52 18 they satisfied. McIntyre is not binding law here in
10:47:55 19 Washington. This is a plurality opinion. There is
10:47:59 20 not any narrowest grounds between the plurality and
10:48:03 21 the concurrence.
10:48:04 22 The very point of concurrence was that the
10:48:08 23 commerce was changing. That these facts aren't taken
10:48:12 24 into consideration, there is no broad new rule that
10:48:14 25 was going to be announced.

10:48:16 1 This is very similar to Asai, a fractured
10:48:19 2 ruling from the Supreme Court on this exact issue
10:48:21 3 Asai. Our Supreme Court said, "no, this is Worldwide
10:48:26 4 Volkswagen applies."
10:48:27 5 We absolutely have not conducted any
10:48:30 6 discovery. We have not conducted discovery. CID is
10:48:36 7 different. I would wholly reject the argument that
10:48:40 8 our indirect purchasers have some forum in the
10:48:43 9 federal. They are not represented in the MDL. This
10:48:46 10 is -- we are their only representative. This is the
10:48:49 11 only way that our indirect purchasers can seek relief.
10:48:55 12 THE COURT: I have said it in the cases and
10:49:00 13 quoted from them, Worldwide Volkswagen in particular
10:49:05 14 at 440 US 297 that:
10:49:17 15 "The foreseeability that is critical to due
10:49:19 16 process analysis is not mere likelihood that a
10:49:23 17 product will find its way into a forum State.
10:49:26 18 Rather it is that the defendant's conduct in
10:49:28 19 connection with the forum State are such that he
10:49:32 20 should reasonably anticipate being hailed into
10:49:37 21 court."
10:49:39 22 There is more language in that case. The
10:49:45 23 basis for that kind of a determination, the
10:49:48 24 foreseeability, because it gives a degree of
10:49:52 25 predictability, allows potential defendants to

10:49:55 1 structure their conduct so that they will know where
10:49:58 2 they are subject to lawsuits and then provide for
10:50:03 3 insurance and those kinds of avenues in those
10:50:07 4 jurisdictions. There is a reason, I think, that the
10:50:12 5 court in Worldwide Volkswagen reached those
10:50:16 6 conclusions. But in fact, they did. I think that
10:50:18 7 those conclusions are reinforced by Grange Insurance
10:50:21 8 Association, 110 Wn.2nd 752.
10:50:27 9 I read that and sometimes I get on a
10:50:31 10 defining issue. There may be a distinction that would
10:50:33 11 be drawn between what is dicta and what is a holding
10:50:40 12 in a case. I tell you, when I read clear language
10:50:44 13 from the Supreme Court saying that this is a standard
10:50:48 14 to be applied, I will give deference to that. I will
10:50:50 15 pay attention to that, whether it is a holding or not.
10:50:55 16 I will not ignore it.
10:50:57 17 Perhaps if it is not fully binding, but I
10:51:00 18 will certainly recognize that the Supreme Court does
10:51:04 19 not speak casually or carelessly about any legal
10:51:08 20 issues.
10:51:09 21 I have that in mind, when I read that
10:51:12 22 Supreme Court saying that a retailer's mere placement
10:51:16 23 of the product placed in the intrastate commerce is
10:51:19 24 not, by itself, sufficient.
10:51:23 25 I think then they go on to say that "the

10:51:25 1 standing jurisdiction is justified only if the
10:51:28 2 defendant has purposefully availed itself of the forum
10:51:31 3 State's markets," that has been purposefully availing
10:51:36 4 has been described elsewhere.
10:51:37 5 I do think that in this case that there has
10:51:44 6 been no showing of these moving defendants having
10:51:49 7 purposefully availing themselves of markets in the
10:51:53 8 State of Washington.
10:51:55 9 They are entitled to their motion. I will
10:51:58 10 grant the motion to dismiss for all of the defendants
10:52:05 11 here on the jurisdictional grounds.
10:52:08 12 I am not going to order or continue this
10:52:15 13 for a discovery. I think that there has been no clear
10:52:20 14 indication of what discovery would actually be.
10:52:22 15 In a CR 56 motion we require that. I think
10:52:26 16 that we require it for a good reasons that there would
10:52:29 17 be some indication, both of what the discovery would
10:52:32 18 be, the materiality of the discovery, what the
10:52:34 19 evidence would show, and why it hadn't been done
10:52:38 20 before this time.
10:52:39 21 So, I think for all of those are, perhaps
10:52:43 22 not directly binding on this motion, under this Rule
10:52:46 23 12, but they are considerations that guide the court
10:52:51 24 in making the decision on whether to continue this
10:52:53 25 motion to allow allow discovery in their case.

10:52:55 1 I will deny your motion for further
10:52:57 2 discovery.
10:52:58 3 Is there anything further that needs to be
10:53:03 4 addressed with these motions?
10:53:04 5 MR. YOLKUT: Yes, David Yolkut on behalf of
10:53:07 6 Panasonic corporation. We also move for our
10:53:09 7 attorneys' fees as the long arm statute 4.28.185. We
10:53:14 8 have included that in our proposed order. We would
10:53:17 9 ask for an award of the attorneys' fees.
10:53:18 10 THE COURT: My understanding is under
10:53:24 11 motions such as this, there is an issue about your
10:53:26 12 entitlement to the attorneys' fees. As you may well
10:53:29 13 be, and as you have cited -- but that comes as a post
10:53:42 14 hearing motion.
10:53:42 15 Unless you show me that there is something
10:53:46 16 that would impair your rights to attorneys' fees by
10:53:52 17 requiring you to make those as a post hearing motion,
10:53:56 18 I am not going to make award of attorneys' fees at
10:54:01 19 this time.
10:54:01 20 MR. YOLKUT: Thank you, Your Honor. We will
10:54:02 21 reserve our rights.
10:54:03 22 THE COURT: All right. Do we have orders?
10:54:08 23 Is that going to be a problem?
10:54:10 24 You will have to look at them.
10:54:12 25 MR. KERWIN: I haven't seen them yet. If I

10:54:14 1 did, I missed it. I am sorry.
10:55:58 2 THE COURT: I have what I believe are -- I
10:56:06 3 am trying to make sure that I don't give you my, your
10:56:09 4 brief with my notes on it. I will give you everything
10:56:12 5 else that you gave me. That is one. You might check
10:56:19 6 there.
10:56:22 7 THE BAILIFF: Yes, Phillips needs his
10:56:25 8 papers, because they don't have a copy of their
10:56:29 9 orders.
10:56:33 10 THE COURT: I don't see that I have
10:56:35 11 anything more from Phillips than that.
10:56:41 12 MR. MORAN: We will send one later.
10:56:43 13 MR. HWANG: Your Honor, LG will send an
10:56:46 14 order in later as well,.
10:56:48 15 MS. CHIU: As well as Hitachi, Your Honor.
10:56:51 16 THE COURT: All right. Thank you.
11:00:09 17 MR. KERWIN: Your Honor, do you have an
11:00:10 18 order for the statute of limitations ruling?
11:00:14 19 THE COURT: I don't think so. I haven't
11:00:16 20 seen one.
11:00:17 21 MR. KERWIN: We will send you one, Your
11:00:18 22 Honor.
11:00:18 23 THE COURT: Thank you.
11:02:09 24 THE BAILIFF: All rise. Court is in
11:02:10 25 session.