The Honorable Brian McDonald
Hearing Date: Thursday, May 21, 2020
Hearing Time: 9:30 a.m.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

WASHINGTON LEAGUE FOR INCREASED TRANSPARENCY & ETHICS, a Washington non-profit corporation. Plaintiff, v. FOX CORPORATION, a Delaware corporation; FOX NEWS NETWORK, LLC, a Delaware corporation d/b/a FOX NEWS CHANNEL; FOX BUSINESS NETWORK, a for profit company d/b/a/ FOX BUSINESS; JOHN MOE and JANE MOE, 1-100,, Defendants.	**No. 20-2-07428-4 SEA** **WASHLITE'S RESPONSE ON MOTION TO DISMISS**

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

TABLE OF CONTENTS

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Table of Authorities

Cases

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Statutes

Other Authorities

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Rules

Constitutional Provisions

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

I. INTRODUCTION

In a very generalized brief, the Fox defendants (Fox) claim broad protection under the First Amendment claiming to be on equal footing with newspapers and broadcast television stations. In so doing, Fox cites no authority supporting the proposition that a cable television programmer, operating on a private cable television system owned and operated by another entity, has such protections. Rather, it seeks protection within the case law relating to print media such as the Seattle Times or the New York Times or the Washington Post or other newspaper. WASHLITE does not disagree that newspapers and broadcast television stations enjoy certain protections under the First Amendment[1] as the numerous cases on the point make clear. *E.g. Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 117-18 (1973) ("A broadcast licensee has a large measure of journalistic freedom but not as large as that exercised by a newspaper.*"); Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 256-258 (1974); *New York Times Co. v. Sullivan,* 376 U.S. 245 (1964). However, Fox is not a newspaper and is not sued in this action for the programming on its broadcast television stations. *Amended Complaint, passim*. Rather, Fox is a cable programmer providing content to be presented on a private cable system owned by entities such as AT&T, Comcast, Spectrum and others. As is shown below, this case raises an entirely different set of questions than the

[1] The term "First Amendment" as used in this brief refers, generally to the First Amendment of the Federal Constitution which states: " U.S. CONST. AMEND I. The right to speak and publish under the Washington Constitution is Article 1, §5 which provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." CONST. ART. I, §5.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

protection of the First Amendment rights afforded to newspapers and broadcast television stations.

The United States Supreme Court has long recognized that cable programmers do not have First Amendment rights on the cable medium. *Denver Area Educ. Telcoms. Consortium, v. FCC*, 518 U.S. 727, 812-826 (1996) (J. Thomas, Rehnquist & Scalia concurring). Rather, the law is that only cable operators, such as AT&T, Comcast and Spectrum, enjoy First Amendment rights on their privately owned cable systems. *Id. and cases cited therein.*

Additionally, cable television has long been subject to consumer protection statutes. The Cable Television Consumer Protection and Competition Act of 1992 (Cable Act), which governs cable television, is itself a consumer protection act. 47 USC §521-571. Under Washington's Consumer Protection Act, RCW 19.86, unfair and deceptive acts may be enjoined, damages and fees may be recovered. Fox's repeated claims that the COVID-19 pandemic was/is a hoax is not only an unfair act, it is deceptive and therefore actionable under Washington's Consumer Protection Act. RCW 19.86.

II. EVIDENCE RELIED UPON

This response is based on the pleadings and files herein and the following evidence:

1. Declaration of Arthur West;
2. Declaration of Lori Shavlik;
3. Declaration of David Koenig; and,
4. Declaration of Jacob Cuzdey.

III. FACTS

The facts stated in the Amended Complaint (DKT 25) are incorporated herein.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

IV. ISSUES PRESENTED

Whether a cable television channel is entitled to First Amendment protections for content it broadcasts on a private cable television system owned by another entity?

Whether a cable television channel has violated the Washington Consumer Protection Act RCW 19.86, by broadcasting content claiming that COVID-19 is a hoax to subscribers of a private cable television system thereby deceiving Washington consumers?

V. AUTHORITIES & ARGUMENT

A. STANDARDS APPLICABLE TO A MOTION TO DISMISS

Fox identifies its motion as a "motion to dismiss" and at page 15 claims "plaintiffs [sic] fail to state claim under Washington law." However, it fails to identify under which standard its motion is brought as it does not cite to the Civil Rules. Both CR 12 and CR 56 provide a process by which a case may be dismissed. Both are addressed below.

1. Under CR 12, the facts allected in the Amended Complaint are treated as true

In Washington state, a liberal standard is applied to pleadings subject to a motion to dismiss under CR 12.[2] Here, it seems the most applicable portions of CR 12 are subsections (b)(6) and (c). "Motions under CR 12(b)(6) and 12(c) raise identical issues, whether a request

[2] The federal standard set forth under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) does not apply in Washington State. *McCurry v. Chevy Chase Bank,* 169 Wn.2d 96, 101-102, 233 P.3d 861 (2010). In *McCurry*, the *Twombly* standard was rejected, in part, because that standard allows a judge to dismiss a claim "if that judge does not believe it is plausible the claim will ultimately succeed." *Id.* at 102. The Washington Supreme Court has a general distaste for the summary dismissal of claims before discovery occurs and outside the province of a fact finder. *See cases cited herein and Davis v. Cox,* 183 Wn.2d 269, 351 P.2d 862 (2015) (RCW 4.24.525(4)(b) violates the right to a jury trial as it requires a judge to adjudicate factual questions in non-frivolous claims without a trial.); *see also* L. Knapp*, Origin*

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

for relief states a claim for which a court can grant relief …" *Didlake v. State*, 186 Wn. App. 417, 422, 345 P.3d 43 (2015). On a motion under CR 12(b)(6) and CR 12(c), "The factual allegations contained in the complaint are accepted as true."[3] *Parilla v. King County*, 138 Wn. App. 427, 431-432, 157 P.2d 879 (2007). "[A]ll reasonable inferences are drawn in the plaintiff's favor." *Gorman v. City of Woodinville*, 175 Wn.2d 68, 71, 283 P.3d 1082 (2012). The "court may consider hypothetical facts not included in the record." *Holiday Resort Comm. Assoc. v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 135 P.3d 499 (2006). Additionally, under CR 8,

> It is well established that pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process. If a complaint states facts entitling the plaintiff to some relief, it is immaterial by what name the action is called. Furthermore, initial pleadings which may be unclear may be clarified during the course of summary judgment proceedings.

(Citations omitted.) *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987).

> CR 12(b)(6), read together with CR 8(a)(1), requires the court to decide whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief. The court need not accept legal conclusions as correct. When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion.

(Other citations omitted.) *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). As is shown below, this case is not properly dismissed under CR 12.

---

of the Constitution of the State of Washington, The Washington Historical Quarterly, Vol. IV, No. 4, 234-236 (1913) (on the importance of a jury trial).

[3] Given this standard, a recitation of the facts in this response has been omitted.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

2. Under CR 56, all inferences are in WASHLITE's favor

Here, Fox has asked the court to take judicial notice of certain "transcripts" attached to its motion. *Motion, p. 4.* In so doing, it is asking the court to consider matters beyond the Amended Complaint thus appearing to convert its motion to one for summary judgment.

> A CR 12(b)(6) motion may be granted only where there is not only an absence of facts set out in the complaint to support a claim of relief, but there is no hypothetical set of facts that could conceivably be raised by the complaint to support a legally sufficient claim. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Consideration of extraneous materials on a CR 12(b)(6) motion is permissible so long as the court can say "no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 121, 744 P.2d 1032, 750 P.2d 254 (1987). Otherwise, the complaint must be transmuted into a motion for summary judgment. CR 56. For the foregoing reasons, CR 12(b)(6) motions are granted only "'sparingly and with care.'" *Orwick v. City of Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (quoting 27 FEDERAL PROCEDURE PLEADINGS AND MOTIONS §62:465 (1984)).

Worthington v. WestNET, 182 Wn.2d 500, 505-06, 341 P.3d 995 (2015).

ER 201 provides that judicial notice may be taken only of adjudicative facts. An "adjudicative fact" is a "controlling or operative fact, rather than a background fact; a fact that concerns the parties to a judicial or administrative proceeding and that helps the court or agency determine how the law applies to those parties." *In re Disciplinary Proceeding Against Sanai*, 177 Wn. 2d 743, 753 n.3, 302 P.3d 864 (2013). ER 201(b) defines a judicially noticed fact as one which is **"**not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." ER 201(b).

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Here, the content within the offered "transcripts" do not meet the definition of an adjudicative fact. There is no accompanying affidavit with these "transcripts" certifying their authenticity or accuracy. *Cf.* CR 30(f). Further, Fox, in a telling omission, does not claim that the "transcripts" are self-authenticating as a news story under ER 902(f).[4] There is no case in Washington or in any court in the United States[5] extending ER 902(f) to unauthenticated documents purporting to be "transcripts" of cable television programming.

Given this, the motion has been converted to a motion for summary judgment by Fox. "Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The court considers "all facts and reasonable inferences in the light most favorable to the nonmoving party, but the nonmoving party may not rely on speculation." *Specialty Asphalt & Constr., LLC v. Lincoln Cty.*, 191 Wn. 2d 182, 191, 421 P.3d 925 (2018). "If reasonable minds could draw different conclusions from undisputed facts, or if all of the facts necessary to determine the issues are not present, summary judgment is improper." *Ward v. Coldwell Banker/San Juan Props.*, 74 Wn. App. 157, 161, 872 P.2d 69 (1994).

Not all the necessary facts are present to determine this case as a matter of law. This case is in its infancy. No discovery has occurred. On this basis alone the motion should be denied to allow for discovery and a full development of the relevant facts. CR 56(f).

---

[4] The rule provides: "Extrinsic Evidence of authenticity as a condition precedent to admissibility is not required with respect to the following: … (f) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals."

[5] The undersigned was not able to locate any such case through a search on Lexis.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

B. CABLE TELEVISION DOES NOT STAND ON EQUAL FOOTING AS PRINT MEDIA OR BROADCAST TELEVISION

Fox cites to no Washington case or federal case which confirms that a cable television programmer/content provider has an independent First Amendment right when using a system owned and operated by a cable operator. Nor has it cited to a case that equates a content provider on a cable system to that of a newspaper or broadcast television station. In fact, the law is just the opposite: cable programmers, such as Fox is, have no such rights when using a cable system owned by a separate entity.

Denver Area Educ. Telcoms. Consortium, v. FCC, 518 U.S. 727 (1996) is instructive.[6] There, the Supreme Court was asked to decide upon the constitutionality of certain provisions of the Cable Act which contained provisions requiring access to cable television systems for public access channels and restricted programming which "depicted sexual or excretory activities or organs in a patently offensive manner." *See* 47 USC §532(h) and (j). The Court concluded that portions of the challenged provisions were constitutional, and others were not.

Justices Thomas, Rehnquist and Scalia concurred in part and dissented in part and filed a separate opinion. 518 U.S. at 812-826. By way of a summary, these Justices stated that cable programmers using a private cable system owned by another have no independent constitutional right to speak through the cable medium as recognized by the progression of the law through a number of cases.[7] Justice Thomas stated:

---

[6] This concurring opinion provides a summary of the development of the law relating to cable operators and cable programmers at 518 U.S. at 812-817.

[7] The cases reviewed by Justices Thomas, Rehnquist and Scalia include, in the following order: *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969); *Columbia Broad. Sys., Inc. v. Democratic*

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

> We implicitly recognized in *Turner*[8] that the programmer's right to compete for channel space is derivative of, and subordinate to, the operator's editorial discretion. Like a free-lance writer seeking a paper in which to publish newspaper editorials, a programmer is protected in searching for an outlet for cable programming, but has no free-standing First Amendment right to have that programming transmitted. Cf. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. at 256-258.

518 U.S. at 816-17. This statement is consistent with other cases which hold that First Amendment rights do not exist on private property. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972) (First Amendment rights not applicable to a shopping mall which is not dedicated to public use). In *Lloyd*, the court stated:

> We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights.

Id. at 570. Here, the same is true: there is no evidence that any cable operator operating in Washington State has dedicated any portion of their cable systems to public use. Given this, no First Amendment rights exist on them.

There is no discernable difference between the cable systems operated by AT&T, Comcast, Spectrum and other cable operators and the owner of a shopping mall—both constitute private property. Further, Fox is not a "cable operator" under the Cable Act. The term is defined as follows:

> the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more

---

Nat'l Comm., 412 U.S. 94 (1973); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Leathers v. Medlock,* 499 U.S. 439 (1991); *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994); and *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1996).

[8] *Turner Broad. Sys. v. FCC,* 512 U.S. 622 (1994).

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

> affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;[9]

47 USC §521(5). There is no evidence in this record that Fox owns and operates a cable service over a cable system in Washington State. As stated in the Amended Complaint, the cable operators known to operate in Washington State include AT&T, Comcast, and Spectrum and perhaps others. *Amended Complaint,* ¶4.4-4.11. Fox, on the other hand, operates as a cable programmer[10] as that term is used in case law as above cited. As such, it does not have First Amendment protections on the cable medium.

Moreover, constitutional rights are not unlimited. *See District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited.). It has long been the rule of law in the United States that the exercise of such rights is not an unrestricted license to do as one pleases.

> the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law.

Crowley v. Christensen, 137 US 86, 89–90 (1890). And in *Jacobson v. Massachusetts*, 197 US 11 (1905), the Supreme Court noted:

---

[9] "[T]he term "cable service" means—(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 USC §521(6).

[10] The Cable Act does not define what a cable programmer is.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

> Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others.

Id. at 26; *see also O'Connor v. Donaldson*, 422 U.S. 563, 582-83 (1975) ("There can be little doubt that in the exercise of its police power a State may confine individuals solely to protect society from the dangers of significant antisocial acts or communicable disease.").

C. FOX HAS VIOLATED THE WASHINGTON CONSUMER PROTECTION ACT

Washington's Consumer Protection Act, RCW 19.86 (CPA), may be enforced either by the state or a citizen. RCW 19.86.090. The purpose of the CPA is to "complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive and fraudulent acts and practices in order to protect the public and foster fair and honest competition." RCW 19.86.020. The CPA is liberally construed so that its beneficial interest may be served. RCW 19.86.920.

> To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation.

Panag v. Farmers Ins. Co., 166 Wn.2d 27, 37, 204 P.3d 885 (2009). An action under the CPA does not require privity of contract. *Holiday Resort Cmty. Ass'n v. Echo Lake Assoc., LLC*, 134 Wn. App. 210, 219, 135 P.3d 499 (2006).

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

1. Cable television is subject to consumer protection laws

The Cable Act specifically states that state consumer protection laws are not wholesale pre-empted by it and may be enforced. 47 USC §552(d)(1).[11] Billing practices are the only area which pre-empt state consumer protection acts. 47 USC §543(a)(1);[12] *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1994) (upholding a Wisconsin consumer protection statute--§100.20--relating to unfair trade practices as not preempted by the Cable Act). In Washington, a private right of action exists under the CPA. RCW 19.86.090 and .093.

2. WASHLITE has standing to bring the action on behalf of its members

Fox argues that WASHLITE may not bring a claim under the CPA on behalf of its members citing to *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 181, 159 P.3d 460 (2007), *overruled on other grounds at* 167 Wn.2d 781 (2009), *citing Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 719 P.2d 531 (1986). While the Amended Complaint identifies Jane and John Does 1-1000 and thus individual plaintiffs are identified, the law has changed on whether organizations may represent their members since *Satomi* and *Hangman* were decided.

---

[11] The provision provides: "Consumer protection laws. Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title."

[12] The provision provides: "In general. No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction."

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

In *Riverview Cmty. Grp. v. Spencer & Livingston*, 181 Wn.2d 888, 337 P.3d 1076 (2014), the Washington Supreme Court held

> "Organizations have standing to assert the interests of their members, so long as members of the organization would otherwise have standing to sue, the purpose of the organization is germane to the issue, and neither the claim nor the relief requires the participation of individual members." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 304, 268 P.3d 892 (2011) (citing *Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186, 50 P.3d 618 (2002) (*Firefighters*)).

181 Wn. 2d at 894. As is shown by the declarations filed contemporaneously with this brief, members of WASHLITE have standing to sue under the CPA. First, they all declare they, as cable television consumers, have been damaged by Fox's deceptive acts. Second, WASHLITE was formed with the intention of protecting the various members interest relating to matters of public interest litigation such as the instant case. Third, relative to the relief requested, injunctive relief against Fox under the CPA does not require the members participation. Relative to damages, it has long been the rule in Washington State, that a "consumer need not show specific monetary damages to recover under the" CPA. *E.g. St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 656 P.2d 1130 (1983). Thus, participation of the individual members of WASHLITE is not necessary for this result either. In short, WASHLITE is a proper party to this action and has standing to bring it.

3. Fox has deceived consumers in Washington State in a number of ways

The Consumer Protection Act also does not define the term "deceptive," but the Washington Supreme Court has declared that "[d]eception exists 'if there is a representation, omission or practice that is likely to mislead' a reasonable consumer." *Panag*, 166 Wn.2d at 50.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

To establish the deceptive element of a CPA claim, "a plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public." *Hangman Ridge,* 105 Wn.2d at 785. Because "the purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs," the statute's reach extends to the deterrence of deceptive conduct that aggravates and prolongs an existing and ongoing injury such as declaring an international and national health emergency a "hoax." *Id.*

> A claimant need not prove reliance or deceptive misrepresentation but only that the actions have a tendency or capacity to deceive a substantial portion of the public.

Tallmadge v. Aurora Chrysler Plymouth, 25 Wn. App. 90, 93, 605 P.2d 1275 (1979).

a. COVID-19 is a serious and lethal threat to human life

There can be no intelligent debate that COVID-19 is a serious and lethal threat to human life. According to the Centers for Disease Control and Prevention, as of Monday, May 11, 2020, 49,867 persons in the United States have died in the period beginning in early February, 2020[13] from COVID-19.[14] An additional 21,974 have died from a combination of pneumonia and COVID-19.[15] In January 2020, both the World Health Organization (WHO), the Federal Government through Secretary Azar declared health emergencies. *Amended Complaint*, ¶4.25 & 4.26. On February 29, 2020, Governor Inslee declared a statewide

---

[13] University of Minnesota Center for Infectious Disease & Policy: https://www.cidrap.umn.edu/news-perspective/2020/04/coroner-first-us-covid-19-death-occurred-early-february

[14] Centers for Disease Control & Prevention, https://www.cdc.gov/nchs/nvss/vsrr/COVID19/

[15] *Id.*

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

emergency. *Amended Complaint,* ¶4.45.2. In late February 2020, Microsoft and Amazon, two of Washington State's largest employers, directed that their employees work at home because of the threat posed by COVID-19. Despite all this and other readily available information from reliable sources both governmental and private, Fox started its campaign of deceiving Washington consumers by repeatedly stating that COVID-19 was a hoax.

b. Fox deceives Washington consumers by disclaiming that it is a "news" source

The two television channels cited in this case, Fox News Network and Fox Business, are both cable television channels operated by Fox News Network LLC (FNN). A variety of chyrons[16] are used on both channels during broadcasting hours (both channels are on the air 24 hours a day, seven days a week) which include an image with the text "Fox News" rotating through as follows:

This chyron appears in all programming on Fox News and Fox Business. In at least one other forum however, consisting of a variety of websites used by FNN where the broadcasts from Fox News and Fox Business are made available, it represents that its services are "for your personal enjoyment[17] and entertainment"[18] and makes no mention that it is a news

[16] A chyron is "a caption superimposed over usually the lower part of a video image." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/chyron

[17] The term "enjoyment" is defined as "something that gives keen satisfaction." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/enjoyment.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

source.[19] In this case, Fox claims the protections afforded to a known and authentic news source such as the Washington Post but limits itself as an entertainment source thus disclaiming that it is a news source. Fox's own words condemn it claims. ER 801(d)(2). And because it disclaims itself as a news source, Fox is not entitled to the protection of a newspaper. *Cf. Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005).

By disclaiming that it is a "news" source, Fox is deceiving consumers in Washington State. Neither Fox News or Fox Business distinguishes between news as authentic information and news as entertainment/enjoyment, thus conveying that all statements broadcast on its channels are authentic.

> With the existence of a truth, with physical facts per se, neither plaintiff nor defendant is concerned; for them facts in that absolute sense are but as ore in a mountain or fish in the sea -- valueless unless and until by labor mined or caught for use. Nor are facts, even after ascertainment, news, unless they have that indefinable quality of interest, which attracts public attention. Neither is news always synonymous with facts, in the sense of verity; indeed, much news ultimately proves fictitious, yet it is excellent news notwithstanding. **The word [news means] no more (laying aside hoaxing and intentional falsehood) than apparently authentic reports of current events of interest.**

Associated Press v. Int'l News Serv., 245 F. 244, 248 (2d Cir. 1917), *affirmed*, 248 U.S. 215 (1918) (Emphasis added).

Even news as entertainment/enjoyment has a basis in authenticity. An example of this is sports reporting. Consumers of sports news are, as one example, not only informed by learning that their favorite collegiate football player has been drafted to an NFL team, such information

---

[18] The term "entertainment" is defined as "amusement or diversion provided especially by performers." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/entertainment.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

is necessarily authentic where facts result in entertainment and enjoyment in addition to conveying knowledge. *E.g.* M. Vorel, *Former UW Huskies C Nick Harris selected by Cleveland Browns in fifth round of NFL Draft*, SEATTLE TIMES (April 25, 2020).[20]

In the acts complained of in this action, various television personalities speaking on Fox News and Fox Business stated that COVID-19 was (and is) a hoax, thus stating, as a matter of fact, that COVID-19, and the threat imposed by it, was non-existent.[21] It did so after the WHO, the Federal Government and Washington State all declared a health emergency as a direct result of the spread of COVID-19. It does all of this solely as an entertainment source by its own admission. And frankly, there can be no entertainment or enjoyment by a viewer who is exposed to a patent falsehood, particularly on an issue of such grave importance. Stating that COVID-19 is a hoax does not constitute "news" as a matter of law but, rather, is a patent and intentional falsehood as "news" necessarily implies authenticity.

c. The existence of COVID-19 and its lethality is not a political issue

Fox bitterly complains that WASHLITE is attempting to restrict its First Amendment rights on the cable medium by characterizing the existence of COVID-19 as a deadly plague as a political issue. Fox conflates the existence of the virus as a threat to human life with a

---

[19] See www.foxnews.com, Terms of Use found at this link: https://www.foxnews.com/terms-of-use

[20] The story is found at this link: https://www.seattletimes.com/sports/uw-husky-football/former-uw-huskies-c-nick-harris-selected-by-cleveland-browns-in-fifth-round-of-nfl-draft/

[21] The term "hoax" is defined as: **"**to trick into believing or accepting as genuine something false and often preposterous." MERRIAM WEBSTER ONLINE, https://www.merriam-webster.com/dictionary/hoax

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

discussion on the appropriate response to it. The former is a fact, not an idea. The latter involves a discussion of ideas. This is a critical difference.

> While we recognize that a precise definition of that elusive term "political issue" is at best a semantic improbability and that the term is best described by example rather than by sweeping generalizations, there are enough consistently recurring characteristics to render the term definable. These are best summarized by Mr. Justice Brennan in *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962):
>
> > It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Buchanan v. Rhodes, 249 F. Supp. 860, 863-64 (N.D. Ohio 1966). Under this standard, the existence of COVID-19 as a grave threat to human life does not involve any of these elements and thus, is not a political issue. While the response to the threat involves governmental actors, the necessary governmental response does not create a political issue here.

4. Fox's statements denying the lethality of COVID-19 are also unfair under the CPA as immoral and unethical

In determining whether an act is unfair under the CPA, the court considers the following:

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5, 31 L. Ed. 2d 170, 92 S. Ct. 898, 905 (1972).

Magney v. Lincoln Mut. Sav. Bank, 34 Wn. App. 45, 57, 659 P.2d 537 (1983).

Claiming that something as lethal as COVID-19 is nothing but a hoax certainly qualifies as unfair, in addition to being deceptive, under these standards. At a minimum, such statements are immoral and unethical given the immediate and grave threat to human life that COVID-19 is. Moreover significant public policy issues are at stake.

D. FOX DOES BUSINESS IN WASHINGTON STATE—IT MAINTAINS ITS OFFICE IN BELLTOWN

The CPA also provides that a defendant be engaged in trade or commerce in Washington State. RCW 19.86.020. In addition to providing cable television programming in Washington State, Fox, through FNN, maintains a physical presence in Downtown Seattle, with its principle place of business in the state located in Belltown. *Amended Complaint,* ¶1.5. It is further registered with the Washington Secretary of State's office as a foreign corporation doing business in the state. *Amended Complaint,* ¶1.3.[22]

Fox engages in substantial and pervasive commercial activity to the extent that its cable television content cannot be divorced from the broad definition of commerce within the meaning of the CPA. "Fox Corporation produces and distributes compelling news, sports and

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

entertainment content through its iconic domestic brands including: FOX News Media, FOX Sports, FOX Entertainment, and FOX Television Stations."[23] Fox claims that not only do "[t]hese brands hold cultural significance with consumers" but they also have significant "commercial importance for distributors and advertisers." [24]According to its own statement, "[t]he breadth and depth of [its] footprint allows [Fox] to deliver content that engages and informs audiences, develop deeper consumer relationships and create more compelling product offerings."[25] Therefore, Fox cannot escape liability under the CPA by claiming that its conduct did not occur in trade or commerce. In the same breath as expressed in the Motion, Fox argues that its COVID-19 commentary is not commercial, while boasting about the commercial influence of its cable television channel coverage.

Although Washington courts have declined to endorse the position "that all reporting is inherently commercial," the opposite conclusion is just as problematic.[26] Categorically exempting non-print broadcast, cable and subscription entertainment "brand" distributors from the scope of the CPA would give a free pass to any corporate empire with a dominant market share (Fox distributes its "brand" to over 90% of Washington consumers) wishing to skirt consumer protection laws.

---

[22] See also Washington Secretary of State https://ccfs.sos.wa.gov/#/BusinessSearch/BusinessInformation

[23] These statements are found on a news release on the Fox Corporation's website: https://www.foxcorporation.com/news/archives/2020/fox-corporation-completes-acquisition-of-seattle-duopoly-and-milwaukee-stations/

[24] *Id.*

[25] *Id.*

[26] This point is noted in *Delashaw v. Seattle Times Co.*, 2018 U.S. Dist. LEXIS 143675, an unpublished decision from the United States District Court for the Western District of Washington.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Under this standard, even a traditional print news article may be "properly characterized as occurring in trade or commerce under the CPA," if it is sufficiently connected with business-related activity. *Fidelity,* 131 Wn. App. at 468-69 (a newspaper may be properly characterized as occurring in trade or commerce if a person paid the newspaper to be included in the article).

As a threshold matter, this element is satisfied as applied to Fox's misrepresentations because it is not traditional print media obtaining the bulk of its revenue from advertising. Rather, it is a corporation selling entertainment content, broadcasting, and maintaining subscription services to paying consumers to distribute its "brands" described above. As such, these "entrepreneurial aspects" of the Fox corporation places its conduct "within the 'trade or commerce' definition of the CPA" by default. *Short v. Demopolis,* 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984).

This approach is consistent with Washington law, which holds that courts may ascertain the CPA's meaning through a "'gradual process of judicial inclusion and exclusion." *State v. Reader's Digest Ass'n,* 81 Wn.2d 259, 274, 501 P.2d 290 (1972) (citing *Federal Trade Comm'n v. Raladalm Co.,* 283 U.S. 643, 648, 51 S. Ct. 587, 75 L. Ed. 2d 1324 (1931)); *see also Ivan's Tire Serv., v. Goodyear Tire & Rubber Co.,* 10 Wn. App. 110, 123, 517 P.2d 229 (1973), *affirmed,* 86 Wn.2d 513 (1976) (when defining the bounds of the CPA, courts should consider the facts of each CPA case and "let the law develop on a case-by-case basis"). Whether the "commerce" at issue in a given case directly or indirectly affects the people of the State of Washington must be decided on the facts of that case. *See Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 800, 636 P.3d 587 (2015) (""In order to give effect to the phrase 'indirectly affecting,' claims are not limited to those having only a direct affect" on the people

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

of Washington."). In this case, the facts as they appear now, and as they will be developed through discovery, demonstrate that Fox was (and is) involved in deceptive commerce negatively impacting consumers in Washington State.

E. SPREADING MISINFORMATION ABOUT COVID-19 ADVERSELY AFFECTS THE PUBLIC INTEREST

Fox argues at page 18, footnote 6 of the Motion, that RCW 70.26, the Pandemic Influenza Preparedness Act (PIP), does not apply to Fox but only to public health officials and therefore cannot be the basis of a CPA clam. This is incorrect.

RCW 19.86.093 provides:

> In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it: …
>
> (1) Violates a statute that incorporates this chapter;
>
> (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
>
> (3) (a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

As is shown below, the PIP clearly qualifies under RCW 19.86.093 as a basis for a private claim under the CPA.

1. The PIP declares that accurate and authentic information about a pandemic is in the public interest

RCW 70.26.010 specifically identifies a broad public interest in an effective response to a pandemic influenza such as COVID-19. PIP also identifies how an effective response to such a plague:

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

> **An effective response to pandemic influenza in Washington** must focus at the local level and will depend on preestablished partnerships and collaborative planning on a range of best case and worst case scenarios. It will require flexibility and real-time decision making, guided by accurate information. It **will also depend on a well-informed public that understands the dangers of pandemic influenza and the steps necessary to prevent the spread of the disease.**

RCW 70.26.010(5). This is a clear and unambiguous statement of legislative intent.

> In judicial interpretation of statutes, the first rule is "the court should assume that the legislature means exactly what it says. Plain words do not require construction." *Snohomish v. Joslin*, 9 Wn. App. 495, 498, 513 P.2d 293 (1973). This court will not construe unambiguous language. *Vita Food Prods., Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978).

Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 329, 815 P.2d 781 (1991), *citing King Cy. v. Taxpayers of King Cy.*, 104 Wn.2d 1, 5, 700 P.2d 1143 (1985).

There can be no clearer statement of a legislative declaration of public interest impact than a well informed public that understands the dangers of pandemic influenza and the steps necessary to prevent the spread of the disease is necessary to prevent the spread of the disease." Any suggestion to the contrary is not credible. The direction to state and local agencies to take action to develop plans to combat a pandemic influenza is based on the desire for an effective response as identified in RCW 70.26.010(5), not independent of it.

2. False statements regarding the lethality of COVID-19 has the capacity to injure Washington consumers

RCW 19.86.093(3) provides that actions which injured other persons, had the capacity to injure other persons, or has the capacity to injure other persons are also actionable under CPA. As is shown herein, Fox's claim that COVID-19 is a hoax, and its continuing related statements, certainly have injured persons, and had/has the capacity to injure persons.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

Recent scholarly research into the impact of misinformation proves this point. The Becker Friedman Institute at the University of Chicago, in a study directly examining Fox's misrepresentations on COVID-19, noted that "[e]fforts to contain a pandemic depend crucially on citizens holding accurate beliefs"[27] and concluded that greater exposure to the falsehoods broadcast by Mr. Hannity as one example were "associated with a greater number" of deaths.[28] Additionally, the Harvard Kennedy School Misinformation Review, recently concluded:

> Public understanding of needed preventative measures and rejection of bogus ones is important because SARS-CoV-2 is highly contagious and potentially lethal (cdc.gov). Pollsters have identified partisan differences in views on SARS-CoV-2. In particular, a number of March 2020 polls showed that Republicans were less worried than were Democrats about exposure to the virus (Gallup 2020), less likely to consider the SARS-CoV-2 outbreak a major health threat (Pew 2020), and more likely to approve of President Donald Trump's handling of the "coronavirus pandemic" (Marist, 2020). Like this work, our early March data registered differences tied to partisanship in their concern about SARS-CoV-2, specifically that Republicans were less knowledgeable about the relative lethality of SARS-CoV-2. **In addition, our data suggested an association between exposure to some kinds of media, conservative and social media in particular, and being misinformed, associations that persist when partisanship is considered.** ...[29]

Therefore, even the possibility that Fox's coverage misled a portion of its viewership demonstrates an unprecedented capacity to cause injury to the public, satisfying this element as defined by the statute. The CPA provides, in relevant part that "a claimant may establish that the act or practice *is injurious to the public interest* because it: … (a) Injured other persons; (b)

---

[27] Leonardo Bursztyn, Aakaash Rao, Christopher Roth, and David Yanagizawa-Drott, *Misinformation During a Pandemic*, Working Paper No. 2020-44, p. 1, BECKER FRIEDMAN INSTITUTE FOR ECONOMICS AT THE UNIVERSITY OF CHICAGO (April 2020). Copy attached as Exhibit A.

[28] *Id. p. 2.*

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093. (Emphasis added). Fox's brand distribution reaches 90% of the households in Washington, firmly establishing its capacity to disseminate false information about the dangers of COVID-19 is injurious to the public interest as a matter of law. Additionally, this misinformation has contributed, at a minimum, to an increased reaction to COVID-19 as demonstrated by Governor Inslee's extensions of the "stay at home" order and the planned staged reopening of the State of Washington.[30] Consumers in Washington State are directly impacted by this more severe reaction to COVID-19.

F. WASHLITE MEMBERS AND WASHINGTON CONSUMERS HAVE BEEN INJURED BY FOX'S FALSE STATEMENTS

WASHLITE alleges at Paragraphs 5.6, of the Amended Complaint that its members have been injured by Fox's misrepresentations regarding the lethality of COVID-19. If the motion is made under CR 12, then that element of the claim has been met as such a statement is treated as true. *Parilla,* 138 Wn. App. 427, 431-432, 157 P.2d 879 (2007). If the motion is considered under CR 56, then the court should consider the declarations submitted with this response as evidence of the damages suffered by the members of WASHLITE. Under either standard, injury to Washington consumers is established.

---

[29] Kathleen Hall Jamieson & Dolores Albarracin, *The Relation between Media Consumption and Misinformation at the Outset of the SARS-CoV-2 Pandemic in the US,* HARVARD KENNEDY SCHOOL MISINFORMATION REVIEW, Vol. 1 p. 2 (April 2020). Copy attached as Exhibit B.

[30] A selection of Governor Inslee's Proclamations are attached as Exhibit C.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

G. A CAUSAL LINK BETWEEN FOX'S FALSE STATEMENTS AND DAMAGE HAS ALREADY BEEN ESTABLISHED

Fox misstates the test for causation under the CPA. *Motion, p. 16.* Only some "causal link is required between the … deceptive acts and the injury suffered by the plaintiff," in order to satisfy this element. *Hangman Ridge,* 105 Wn.2d at 793. The requirement that "the defendant induced the plaintiff to act or refrain from acting" is a mislaid prong of the long-abandoned public interest analysis." *Hangman,* at 789-90. Although Washington courts have been a little slow on the uptake, 'inducement' has no bearing on the current test for causation. According to the relevant case law, "causation is a factual question for the jury," and the CPA relies on the much simpler 'but for' test to establish this element. *E.g. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.,* 162 Wn.2d 59, 83, 170 P.3d 10 (2007).

This element is satisfied as there is a robust correlation between Fox viewers' consumption of misinformation about the dangers of COVID-19, and negative impacts on community-wide health outcomes, and economic impacts as the pandemic has continued to spread. *See Footnotes 27 and 29 above cited.* The economic impacts of the pandemic cannot be overstated as acknowledged by Kidder Mathews in its May 2020 publication on the impacts on commercial real estate as one example. *Copy attached as Exhibit D.*

Additionally, although many WASHLITE members pay for Fox cable channels content directly,[31] the CPA does not require that the person injured be the actual consumer of goods or

[31] Washington consumers do not have the choice to "opt-out" of Fox channels or any other channel but only have the ability to choose a package of cable television channels. *Amended Complaint*, ¶4.10.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

services. *See Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp*., 122 Wn.2d 299, 314, 858 P.2d. 1054 (1993).

Moreover, Fox's reliance on *Fidelity Mort. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 128 P.3d 621 (2005) is misplaced as it does not provide a blanket exclusion for newspapers from the CPA. In *Fidelity*, a mortgage rate chart published in the Seattle Times failed to satisfy this element because the causal chain was "too remote." Where unknown third-parties "*might* have been considering Fidelity for their residential loan, *might* have read the Times' chart, *might* have been misled by rate quotes that were not precise enough, and *might* have refrained from obtaining a Fidelity mortgage as a result," the causal link was insufficient. *Id*. at 469 (Emphasis added). Further, *Fidelity* makes no mention of an exception to the CPA for a cable programmer on a cable system owned by someone other that the cable programmer. *Fidelity* is distinguishable because the present case does not solely rely upon attenuated third-party conduct to establish a link between Fox's deception and plaintiffs' injury. Further, in light of the University of Chicago study and the Harvard study cited above, the causation in this case is not subject to reasonable dispute.

The Washington consumers who were deceived by Fox's misrepresentations are among the people suffering as a result. The fact that more people than those included in the complaint were induced to act as a result of Fox's deceptive conduct strengthens it in regard to the effects of causally related third-party actions and effects.

VI. PROPOSED ORDER

A proposed form of order is attached hereto as Exhibit C.

LAW OFFICE OF
CATHERINE C. CLARK PLLC
2200 6th Avenue, Suite 1250, Seattle, WA 98121
Phone: (206) 838-2528 Facsimile: (206) 374-3003

VII. CONCLUSION

For the above stated reasons, the motion should be denied.

This response is 7,772 words consistent with the local rules.

Dated this 11th day of May, 2020.

LAW OFFICE OF CATHERINE C. CLARK PLLC

By: */s/ Catherine C. Clark*
Catherine C. Clark, WSBA 21231
2200 Sixth Avenue, Suite 1250
Seattle, WA 98121
Phone: (206) 838-2528
Fax: (206) 340-3003
Email: cat@loccc.com
Attorney for Plaintiff Washington League for Increased Transparency & Ethics