

HONORABLE JOHN C. COUGHENOUR  
Hearing Date: November 20, 2009  
Oral Argument Requested

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHAEL TODD, et al.,

Plaintiffs,

v.

CITY OF ABERDEEN, et al.

Defendants.

No. 09-cv-01232 JCC

PLAINTIFFS' RESPONSE TO ATS'  
MOTION TO DISMISS

NOTE ON MOTION CALENDAR:  
November 20, 2009

**I. INTRODUCTION**

The Plaintiffs in this case are vehicle owners who were sent a ticket or Notice of Infraction (NOI) by one of the Defendant camera companies, either Redflex Traffic Systems, Inc. ("Redflex") or American Traffic Solutions LLC ("ATS"), on behalf of one or more of the Defendant Washington cities. The ticket cited the vehicle owner for having run a right light or sped through a school zone based solely on the use of a traffic camera to record the infraction and the vehicle's license plate number.

In this case, Plaintiffs allege that the Defendant cities abused the limited authority granted them by the Washington State Legislature to issue tickets to a vehicle owner for running a red light or speeding through a school zone, when the sole basis for issuing the ticket was the use of a traffic camera to record the license plate of the vehicle going through

PLAINTIFFS' RESPONSE TO  
ATS' MOTION TO DISMISS - 1  
[Cause No. 09-cv-01232 JCC]

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1 the red light rather than any evidence that the vehicle's owner was the driver who violated the  
2 law or was even the actual owner of the vehicle at the time. Plaintiffs allege that because of  
3 the obvious due process concerns for the rights of innocent citizens who did not violate the  
4 law and/or did not own the vehicle at the time of the infraction, the Washington Legislature  
5 expressly restricted the cities' power to issue such a ticket or NOI in a variety of ways which  
6 the cities systematically violated.

7 The restrictions imposed by the Legislature included limiting the amount of the fine  
8 that could be imposed on the vehicle owner to no more than the amount of a standard parking  
9 ticket rather than the amount charged for a violation observed and cited by a police officer.  
10 Plaintiffs allege that despite this express Legislative restriction on their power, the cities used  
11 their power instead to set the fine at the exact same amount as the fine imposed on a driver  
12 who is observed by a police officer running a red light and is identified at the scene as the  
13 driver of the vehicle who violated the law.

14 Plaintiffs also allege that the Washington Legislature (in RCW 46.63.060(2)) and the  
15 Supreme Court (IRLJ 2.1(a)) restricted the cities' power to issue red light camera tickets by  
16 requiring the cities to obtain advance approval of their form of Notice of Infraction from the  
17 Administrative Office of the Courts (AOC) prior to sending the notices to vehicle owners.  
18 Approval was required because the notice was the means by which owners would be informed  
19 of their rights. Despite this restriction on their power, a number of the Defendant cities failed  
20 to obtain such approval or they issued Notices of Infraction that were in fact expressly rejected  
21 by the AOC.

22 The Plaintiffs further allege that the Legislature restricted the cities' power to issue  
23 "red light camera" tickets by prohibiting certain contractual arrangements with the Defendant  
24 camera companies that would encourage the companies to issue more tickets so that more  
25 revenue would be generated for the cities and the revenue generated would always exceed the  
26 cost of operating the cameras and issuing the tickets. Despite this restriction, many of the

1 Defendant cities have included such prohibited provisions in their contracts with the  
2 Defendant camera companies.

3 Plaintiffs seek a Declaratory Judgment that the cities violated the law by setting fines  
4 higher than the Legislature expressly intended to permit. They seek reimbursement of the  
5 excessive fines paid by vehicle owners and fines paid in response to unapproved or  
6 disapproved Notices of Citation or Notices issued pursuant to contracts that contained  
7 prohibited provisions. Finally, Plaintiffs seek injunctive relief to prevent the cities from  
8 continuing any practice that exceeds the limited lawful authority granted by the Legislature  
9 with regard to the issuances of Notices of Infraction arising from the use of red light cameras.

10 Against the Defendant camera companies, Plaintiffs allege that Redflex and ATS  
11 entered into contracts with some of the cities that contained prohibited provisions and issued  
12 Notices of Infraction on behalf of the cities that were not approved by the AOC or were  
13 expressly disapproved by the AOC. They also allege that Redflex and ATS issued Notices of  
14 Infraction which failed to clearly disclose to the vehicle's owner that he or she could not  
15 challenge the ticket by stating that he or she was not the driver, without also identifying who  
16 the driver was. Finally, Plaintiffs allege that Redflex and ATS collected excessive fines from  
17 the Plaintiffs that exceeded the cities' lawful authority to set the fine. The defendant's  
18 improper use of the system in order to obtain a profit and collect excessive fines constitutes  
19 the tort of abuse of process and their practices described above were unfair or deceptive  
20 practices that violated the Washington Consumer Protection Act. Plaintiffs seek damages on  
21 their tort and CPA claim and fees and injunctive relief provided under the CPA.

22 There are five motions pending before the Court: (1) Defendant Redflex's motion to  
23 dismiss (dkt# 48); (2) Defendant ATS' motion to dismiss (dkt# 45); (3) the Defendant cities  
24 joint motion for judgment on the pleadings (dkt# 56); (4) the Defendant City of Bremerton's  
25 motion to dismiss (dkt# 55); and the Defendant City of Renton's motion for judgment  
26 (dkt#64). The motions rely on and incorporate similar arguments made in the different

1 motions. Plaintiffs will respond in opposition to the motions in similar manner by relying on  
2 and incorporating arguments made in their separate responses filed in opposition to each  
3 motion as though all arguments and evidence were presented in each response rather than  
4 presenting the same evidence and reiterating the same arguments.<sup>1</sup>

5 The Defendants' first and primary argument for dismissal and judgment is that the  
6 Plaintiff's claims are barred by *res judicata*. In this response in opposition to Defendant  
7 Redflex's motion, Plaintiffs address this procedural argument for dismissal and show that *res*  
8 *judicata* does not bar their claims because: (1) there was no final judgment entered in the  
9 municipal court action disposing of the Plaintiffs' tort claim for abuse of process or statutory  
10 claim for violation of the CPA against the camera companies, nor could there have been  
11 because the municipal court has no subject matter jurisdiction to hear such claims or enter any  
12 relief on such claims if proven; (2) the parties in the municipal court action and the present  
13 action were not the same, nor could they have been because the municipal court has no  
14 jurisdiction over the camera companies; and (3) there was no identity between the cause of  
15 action in the municipal court and this class action nor could there have been because the  
16 municipal court has no authority the Declaratory Judgment Act to declare that the city's fine  
17 violated plaintiff's rights under state law or the Constitution, or to enter equitable or injunctive  
18 relief enjoining further violation of the law, or to provide the systemic relief sought by  
19 Plaintiffs in this class action. *Orwick v. City of Seattle*, 103 Wn. 2d 249, 692 P.2d 793 (1984).

20 The erroneous underlying premise of the Defendants' *res judicata* argument is that the  
21 municipal court had jurisdiction to dispose of the Plaintiffs' claims brought in this action,

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22 <sup>1</sup> Plaintiffs address the *res judicata* procedural argument made by all defendants in this response in opposition to the  
23 Redflex motion and incorporate the arguments made herein into their responses in opposition to the ATS' motion to  
24 dismiss (dkt# 45); the Defendant cities' motion for judgment (dkt# 56); the Defendant City of Bremerton's motion  
25 (dkt# 55); and the Defendant City of Renton's motion (dkt#64). Plaintiffs address the Defendants' substantive  
26 arguments seeking dismissal of their abuse of process and CPA claims in their Response in Opposition to ATS'  
arguments seeking dismissal of their unjust enrichment, declaratory relief and injunction claims in their  
Response in Opposition to the Defendant cities motion (dkt#56) and incorporate by reference those arguments in  
this Response in Opposition to Defendant Reflex's motion as if fully set forth herein.

1 when it did not. Defendants cite no legal authority that the municipal court possessed such  
2 jurisdiction. Instead, Defendants' interpretation of the relevant statutes demarking the  
3 limitations of the municipal court's jurisdiction and conveying jurisdiction in the Superior  
4 Court to adjudicate the types of claims brought herein by the Plaintiffs would render the  
5 Defendants' unlawful practices immune from any effective review. Defendants would be  
6 permitted to continue their unlawful practices on a systematic basis against all Washington  
7 citizens without any judicial review of these practices because the municipal court lacks  
8 jurisdiction to review them, the appeal process from the proceeding in the municipal court in  
9 any individual case is limited solely to a determination of the judgment that a traffic violation  
10 has occurred, and the Superior Court is the only court that possesses subject matter jurisdiction  
11 to review Defendants' systematic violation of state law and render the relief sought by  
12 Plaintiffs. *Orwick*, 103 Wn. at 252-254.

13 On a CR 12(b)(6) motion, the Court must accept as true the factual allegations of the  
14 Plaintiffs' Complaint and must also consider all reasonable inferences from those facts most  
15 favorable to the Plaintiffs. See, e.g., *Reid v. Pierce County*, 136 Wn. 195, 201, 961 P.2d 333  
16 (1998); *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). The Court  
17 may also consider facts set forth in documents that are referred to in the Complaint or  
18 necessarily incorporated into the Complaint, as well as any submittal showing that there are  
19 hypothetical facts that could be alleged which would provide a basis for relief. A motion to  
20 dismiss or for judgment on the pleadings may not be entered, where as here, the Complaint  
21 and the parties' submittals shows that there is "a claim for relief that is plausible on its face."  
22 *Zucco Partners, LLC v. Digimac Corp.*, 552 F.3d 981, 989 (9<sup>th</sup> Cir. 2009); *Rodriguez v.*  
23 *United States*, 2009 U.S. Dist. LEXIS 36711 (W.D. Wash. April 28, 2009).

## 24 **II. PERTINENT FACTS**

25 The operative Complaint at the time the Defendants filed their motions was the  
26 Plaintiffs' First Amended Complaint ("FAC"). The Plaintiffs have since file a motion for

1 leave to file a Second Amended Complaint (“SAC”), which adds additional plaintiffs, some of  
2 whom have not yet had any hearing on their Notices of Infraction or paid any fines. The SAC  
3 also drops the malicious prosecution claim and clarifies that the denial of due process claim is  
4 not based exclusively on the statutory presumption that the vehicle’s owner was the driver  
5 who violated the law. The claim is also based on the cities’ violation of the express limitations  
6 imposed on their power by the Legislature. These included the issuance of Notices of  
7 Infraction (“NOI”) that were to be treated as parking tickets, not moving violations, fines set at  
8 the amount of a parking ticket, approval of the form of NOI by the AOC and contracts that did  
9 not surrender control to the camera companies to issue infractions and/or provisions that gave  
10 incentives to increase revenues.

11 **A. The Traffic Camera Legislation and Legislative History**

12 The Washington law that authorizes the use of traffic cameras to issue infractions for  
13 violating a red light traffic signal or excessive speed in a school zone was passed in 2005 and  
14 is codified in RCW 46.63.170. The legislative history shows that the Legislature intended  
15 that the maximum amount of the fine for an infraction using a traffic camera would be the  
16 same as the ordinary parking ticket issued by the municipality. The Legislature meant by this  
17 that the fine would be around \$20, not \$101 or \$124. The legislative history is found in the  
18 Plaintiff’s response in opposition to the Cities’ motion and is incorporated herein by reference.

19 **B. The Cities Implemented Excessive Fines**

20 As reflected in the Pertinent Facts set forth as section II of the Plaintiffs’ Response in  
21 Opposition to the Defendant cities’ motion to dismiss and incorporated herein, the cities set  
22 the fine for an infraction using a traffic camera at first \$101 and then \$124. These were same  
23 amounts the city had set for the fine for a moving violation, if someone was caught by a police  
24 officer running a red light or speeding through a school zone. The amount of the fine was  
25 three to four times the average, ordinary or normal parking ticket issued by the city.  
26

1                   **C.     The Law Prohibited “Stop-Loss” and Other Contract Provisions**

2                   As discussed above, the purpose and intent of the Legislature in permitting  
3 municipalities to issue Notices of Infraction based on traffic cameras was to improve safety  
4 and not the financial bottom line of the municipality or the camera company with whom the  
5 municipality contracted for the cameras and related services. Despite this Legislative intent,  
6 the cities of Auburn, Bellevue, Bremerton, Burien, Federal Way, Fife, Issaquah, Lacey, Lake  
7 Forest Park, Lakewood, Lynnwood, Puyallup, Renton, Seatac, Spokane and Tacoma have  
8 “cost-neutrality” or “stop-loss” clauses in their contracts with the cities.<sup>2</sup> These clauses  
9 provide that the local governments do not have to pay the camera companies unless the local  
10 government collects more than a certain amount of money each month. FAC at ¶ 3.16.

11                   Other contracts contain a clause that the camera companies will be paid on a “per  
12 ticket” basis if enough fines are collected. Nearly all of the contracts provide that the  
13 companies will be paid in part on a portion of the fine or penalty imposed or the revenue  
14 generated by the equipment. This violates the Legislature’s intent as codified in RCW  
15 46.63.170(1)(h). FAC at ¶ 3.18-20.

16                   **D.     The Law Required Approval by the AOC of the Form of NOI**

17                   Prior to issuing a Notice of Infraction (“NOI”) using a traffic camera, the cities were  
18 required to get approval of the form of notice from the Washington Supreme Court’s  
19 administrative agency, the Administrative Office of the Courts (“AOC”). FAC at ¶ 3.4. There  
20 are fifteen city defendants in this action that issued Notices of Infraction to the Plaintiffs using  
21 traffic cameras. FAC at ¶ 2.2. Because Plaintiffs have not yet conducted discovery, they are  
22 not able to accurately state how many cities attempted to issue infractions on unapproved  
23 forms. According to Plaintiffs understanding of when cities began issuing camera infraction,  
24 and based on approval information provided by AOC, Plaintiffs can state that Fife, Lynnwood  
25

26 <sup>2</sup> See, FAC at ¶ 3.17. Plaintiffs have voluntarily dismissed their claims against Monroe and Wenatchee because they have chosen not to use traffic cameras after initially passing an ordinance authorizing their use.

1 and Renton issued notices before obtaining approval. FAC at ¶ 3.8. Despite the fact that all the  
2 other cities sought approval from the AOC, these cities claim they were not required to do so.

3 At least three of the cities who sought approval from the AOC for their form of notice  
4 had the notice rejected. FAC at ¶ 3.9. These cities, Auburn, Lakewood and Seatac,  
5 nevertheless chose to use rejected form of NOI instead of changing the form to obtain AOC  
6 approval. Id. The argument relating to the unapproved NOIs is partially contained in the  
7 Plaintiffs' Response to Renton's Motion on the Pleadings and incorporated herein by  
8 reference.

### 9 III. LEGAL ARGUMENT

#### 10 A. PLAINTIFFS' CONSUMER PROTECTION ACT CLAIMS

11 Plaintiffs alleged that the Defendant camera companies engaged in the following unfair  
12 or deceptive practices with regard to the issuance of red light camera citations:

13 1. Issuing citations with a fine of \$124 without clearly disclosing that the fine was  
14 excess under Washington law and illegal, and/or without clearly and unequivocally disclosing  
15 that the owner of the vehicle could contest the \$124 as exceeding the maximum permissible fine  
16 permitted by the Washington Legislature, and instead leading the owner to believe that he or she  
17 could only contest the amount of the fine vis a vis "mitigating circumstances" relating to the  
18 underlying facts concerning the traffic violation itself. Nothing in the citation issued by  
19 Defendants provides any notice of any nature that would alert the "least sophisticated reader"  
20 that he or she could contest the power of the municipal government to exceed the will of the  
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1 Legislature by setting a fine that was three to six times the amount set for a normal parking  
2 ticket.<sup>3</sup>

3           2.       Issuing illegal citations that were not approved or which were submitted for  
4 approval and were disapproved by the approval authority.

5           3.       Issuing citations pursuant to illegal contracts that violate the express will of the  
6 Legislature in permitting the issuance of such citations.

7           4.       Issuing citations that do not clearly and conspicuously notify the owner of the  
8 vehicle that he can contest the violation if he or she was not in fact the driver without having to  
9 identify the actual driver of the vehicle or without having to submit anything other than a  
10 statement that he or she was not the driver.

11                   Defendants argue that Plaintiffs cannot state that its practices were “deceptive” or caused  
12 them injury. Defendants’ motion is made on the grounds that Plaintiffs cannot establish that their  
13 notices and contracts were improper or that the fines imposed were excessive. Of course, if the  
14 notices and contracts were found to be illegal and the \$124 fine found to be excessive then it is  
15 clear under Washington law that Defendants’ practices would be have been deceptive under the  
16 Washington CPA and would have caused each of the Plaintiffs injury and damages, when the  
17 Plaintiffs paid the fine. In other words, but for Defendants issuance of the notices of infraction,  
18 Plaintiffs would not have ended up paying any fine at all, let alone \$124.  
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25 <sup>3</sup> As discussed above, the normal parking ticket for the Defendant Cities ranges from \$20 to \$35. *See, Panag v.*  
26 *Farmers Ins. Co. of Wash.*, 166 Wn. 2d 27, 50, 204 P.3d 885 (2009) (quoting with approval, *Jeter v. Credit Bureau,*  
*Inc.* 760 F.2d 1168, 1175 (1985) that under CPA’s deceptive prong: “In evaluating the tendency of language to  
deceive, the [FTC] should look not to the most sophisticated readers but rather to the least.” )

1 **1. The Practices are “Deceptive”**

2 The Washington Supreme Court in *Panag*, supra., recently held that a collection agency  
3 engaged in a “deceptive” practice under the CPA as a matter of law, when it sent notices to  
4 consumers that they owed a past due “debt” to the insurance company of a specified amount  
5 based on the insurer’s subrogation rights to a portion of the consumer’s recovery from a third  
6 party. The court held that the practice was deceptive as a matter of law because it did not clearly  
7 and conspicuously disclose that the amount was not in fact yet “owed,” was not in fact a “debt”  
8 that was past due and was in fact a claim and an amount which the consumer could contest. The  
9 high court so held even though the notice accurately and correctly noted the subrogation rights of  
10 the insurer and that federal law permitted it to refer to the insurer’s claim as a “debt” and “an  
11 amount due.” The court held that “a communication may contain accurate information yet be  
12 deceptive,” [because] [d]eception exists if there is a representation, omission or practice that is  
13 likely to mislead a reasonable consumer.” Id. at 50. (internal quotations and cite omitted).

16 A reasonable owner reading Defendants’ citations would not understand that he or she  
17 could contest the amount of the fine as being excessive because it exceeded the maximum  
18 amount permitted by Washington law. Rather, the “least sophisticated” owner of a vehicle  
19 reading the citations would believe that he or she had only three choices for responding: (1)  
20 contesting the violation occurred; (2) requesting a “mitigation” hearing to explain the  
21 circumstances of the violation; or (3) admitting the violation occurred. <sup>4</sup>

23 \_\_\_\_\_  
24 <sup>4</sup> Thus if an owner believed he or she committed the offense, the owner was not notified in the notice of infraction  
25 issued by the Defendants that that he or she could still contest the maximum fine imposed of \$124 as being in  
26 excess of a normal parking ticket and therefore, contrary to law. Similarly, an owner who paid the \$124 fine without  
knowing that he notice of infraction was invalid and he had not legal liability to pay, was not altered by the notice  
that it was potentially invalid because it had not been approved.

1 Nor would the reasonable owner reading Defendants' citations be informed that he or she  
2 could contest the form of the citation as illegal or procedurally defective and avoid the citation  
3 and fine. Nothing in the notice of infraction informs the reader that he or she has been issued a  
4 non-complying citation or one which was not approved as required. Nor does the notice of  
5 infraction advise the owner of the vehicle that it was issued through an illegal contract that  
6 provided financial incentives to the Defendant camera companies to issue the infractions that  
7 violate Washington law. See, *Holiday Resort Cmty. Ass'n v. Echo Lake Assocs, LLC*, 134 Wn.  
8 App. 210, 135 P.3d 499 (2006) (renters could sue non-profit under CPA for rental argument it  
9 drafted that violated the Washington Mobile Home Landlord Act and was used by the landlord,  
10 even though non-profit did not itself use the agreement with renters and had no relationship to  
11 them).

12  
13  
14 In their motions, neither Defendant camera company even mentions *Panag* or *Holiday*  
15 *Resort*, let alone attempts to present any argument for why *Panag* is not dispositive. Rather,  
16 Defendants merely argue that their contracts are proper, their notices were valid, the \$124 fine  
17 was not excessive and they acted as a mere contractor processing the paperwork. But, as  
18 discussed above, the contracts violated the law, the notices were either not approved or were  
19 rejected for many of the cities and were defective in failing to advise of rights the very right  
20 which Defendants now allege the owners had to contest the maximum \$124 fine as excessive  
21 under state law.<sup>5</sup>  
22

23  
24 <sup>5</sup> Defendants also argue that they did not "issue" the notices of infraction and cannot be held liable for the failure of  
25 the cities to obtain approval for the notice. Defendants' arguments are unpersuasive. First, it is undisputed that the  
26 notices were in fact issued by the Defendants, not the cities, and second, Defendants are being held liable for the  
deceptive nature of the notices sent by them in the same way that the collection agency in *Panag* was being held  
liable for a deceptive collection notice issued on behalf of the Insurance company. The Defendants could have  
provided clear and conspicuous notice of issues relating to the validity of the notices or the excessiveness of the

1 Further, the undisputed fact is that the Defendants did issue the notices of infraction and  
2 did collect the allegedly excessive fines. Defendants may have third party claims over and  
3 against the Defendant Cities, but they cite no Washington authority that Plaintiffs lack standing  
4 to sue them under the CPA for their own actions in issuing illegal or improper notices, pursuant  
5 to illegal or improper contracts, and for excessive fines under Washington law. Defendants'  
6 arguments cannot be squared with *Panag*, which is controlling on the issue.<sup>6</sup>  
7

## 8 **2. Plaintiffs Allege Causation**

9 Plaintiffs allege that they paid fines in response to and reliance on the allegedly illegal  
10 notices of infraction issued by the Defendant camera companies that deceptively stated that the  
11 fine was \$124, when in fact the fine was excessive under state law and could not lawfully be  
12 imposed. Defendants do not dispute that the Plaintiffs responded to the notices of infraction they  
13 served on them or that they collected the disputed fines.  
14

15 Plaintiffs' injury and damages in this case is similar to the injury and damages sustained  
16 by the Plaintiffs in *Panag*, i.e. the payment of an amount which they did not owe. Here, Plaintiffs  
17 allege that they did not owe the amount paid because the notices issued by the Defendants were  
18 illegal and rendered the notices of infraction void, that the notices were issued pursuant to illegal  
19 contract provisions which rendered their issuance devoid of legal authority and that the fines paid  
20

21  
22 fines. The fact that Defendants believed the notices to be accurate, valid and the fine proper is no different than the  
23 collection agency arguing in *Panag* that the disputed terms "debt" and "amount owed" in its collection notice were  
24 proper and that stated amount in the notice was in fact owed based on the insurer's subrogation rights. Defendants  
25 cite no Washington authority that they are immune from liability under the CPA because they were acting for  
26 another and relied on the other party to properly comply with the law.

<sup>6</sup> A federal court sitting in diversity, as is the case here since removal was under CAFA, must apply the law of the state consistent with the decisions of the state's highest court, and with intermediate appellate courts in the absence of clear decisional law by the state's highest court.

1 exceeded the amount authorized by the Legislature. Plaintiffs did not owe a \$124 fine, because  
2 the amount of the fine was beyond the maximum amount authorized by the Legislature.

3 Plaintiffs did not owe a fine of any amount when paid in response to a notice of infraction  
4 that was not approved as required by law. Similarly, Plaintiffs did not owe a fine of any amount  
5 when paid in response to a notice that was issued pursuant to an illegal contract. In such cases,  
6 the contract is null and void and can provide no authority to act in compliance with the illegal  
7 provisions of the agreement. See, *Woekner v. Macdonald*. (cite)

8  
9 Beyond this, Plaintiffs have alleged other consequential damages. As the Washington  
10 Supreme Court in *Panag* made clear, a Plaintiff can established causation and damages by  
11 showing that he or she incurred expenses related to responding to a deceptive notice for payment,  
12 even if the amount owed by the Plaintiff was in fact more than what he paid. Id. at 55, stating  
13 with emphasis added: “Flores does not hold that remanding payment in response to an improper  
14 collection notice is a necessary precondition to establish injury. **Nor does it hold that injury**  
15 **cannot be established if the plaintiff actually owes more than the amount paid.”**

16  
17 For example, the court held that “out of pocket expenses for postage, parking and  
18 consulting an attorney,” are all compensable injury under the CPA that may be caused by a  
19 defendant’s deceptive collection notice. The same is true in our case, that payment of out-of-  
20 pocket expenses for postage, parking, consulting attorneys, and other expenses associated with  
21 responding to the notice of infraction are recoverable damages under the CPA and constitute  
22 “injury” caused by the Defendants’ deceptive notices. Id. at 58-59.

23  
24 In both *Panag* and *Holiday Resort*, the court held that the issue of causation was one of  
25 fact for the jury to resolve. Here, it is undisputed that the Plaintiffs’ injury was the payment of  
26

1 fines and out-of-pocket expenses in response to Defendants’ notices of infraction. But for the  
2 issuance of these notices of infraction, Plaintiffs would not have ultimately paid fines that  
3 exceeded the normal parking ticket.

4 **B. PLAINTIFFS’ ABUSE OF PROCESS CLAIM**

5 In the First Amended Complaint, Plaintiffs indicate a Cause of Action described as  
6 “Malicious Prosecution/Abuse of Process.” (See FAC 7.1-7.2, page 13) This claim is alleged  
7 against Defendants ATS and Redflex only. Defendants appropriately distinguish these causes of  
8 action in their request for dismissal under Fed Rule Civ Proc 12(b)(6). Plaintiffs have since  
9 conceded (in their Motion to Amend the complaint, filed November 5, 2009) that the Malicious  
10 Prosecution cause of action should be dismissed, but Plaintiffs request that this Court deny  
11 Defendants’ attempt to dismiss the “Abuse of Process” claim.<sup>7</sup>

12 An “abuse of process” cause of action requires the Plaintiffs to show (1) the existence of  
13 an ulterior purpose to accomplish an improper objective, and (2) a subsequent improper act in the  
14 use of the legal process. Saldivar v. Momah, 145 Wn. App. 365, 186 P.3d 1117, 1130 (2008),  
15 cited by this Court with approval in Gibson v. City of Kirkland, 2009 U.S. Dist. LEXIS 30085  
16 (W.D. Wash. Apr. 9, 2009).

17 The crucial inquiry for abuse of process is whether the judicial process, made available to  
18 ensure the presence of the defendant in court, has been misused to achieve an inappropriate end.  
19 Gem Trading Co., Inc. v. Cudahy Corp., 92 Wn.2d 956, 603 P.2d 828, 833 n.2 (1979).

20  
21  
22  
23  
24 <sup>7</sup> See Fed Rule Civ Proc 8 (d)(2): Alternative Statements of a Claim or Defense. A party may set out 2 or  
25 more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or  
26 in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is  
sufficient.

1 In this instance, the judicial process initiated by the Defendant Companies included both  
2 an ulterior purpose to accomplish an improper objective; and utilized an improper act in their use  
3 of the judicial process.

4 The “ulterior purpose” is of course an issue to be proven at trial. Plaintiffs claim that the  
5 motive of the Companies is and has been enhanced revenue. Specifically, revenue at the expense  
6 of due process, valid state concerns related to maximum fines, and constitutionally protected  
7 notions of fundamental fairness.

8 The various causes of action filed by Plaintiffs detail numerous instances of “improper  
9 acts” by the Defendants in their use of the judicial process, including but not limited to:

- 11 (1) Use of improper, misleading, confusing forms without approval by AOC. (see  
12 **Plaintiffs’ Response to Cities’ Motion for Judgment on the Pleadings** for full  
13 argument and briefing of this issue)
- 14 (2) Assessment of inflated and legislatively prohibited penalties, far in excess of what  
15 is authorized by statute. (see **Plaintiffs’ Response to Cities’ Motion for  
16 Judgment on the Pleadings** for full argument and briefing of this issue)
- 17 (3) Improper issuance of violations in the City of Seattle (and potentially other Cities,  
18 to be determined via discovery) from cameras located at a three-arterial  
19 intersection (namely, the intersection of Sand Point Way, Union Bay Place, and  
20 35<sup>th</sup> Avenue NE; a/k/a “Five Corners”). RCW 46.63.170(1)(b) prohibits use of  
21 safety cameras beyond “two-arterial intersections, railroad crossings, and school  
22 speed zones.”

23 The “ulterior motive” to be shown at trial is the aim for profit, above any legitimate  
24 concerns for public safety and lawful due process. This Court itself has addressed the issue of  
25 “abuse of process” in the context of the even greater burden inherent in a summary judgment  
26 motion, finding that dismissal is improper when the “ulterior motive or purpose” is something *a  
reasonable jury could conclude:*

Defendants argue that Plaintiffs have offered no evidence that Plaintiffs were arrested for  
an ulterior purpose. . . . Plaintiffs, however, argue that the officers used the criminal legal

1 process "to cover for the use of excessive force and false arrest of [P]laintiffs." If a  
2 reasonable jury believed Plaintiffs' allegations that the officers (1) used excessive force  
3 against Edward and Elliot, and (2) arrested the brothers without probable cause to suggest  
4 that they had committed any crime, it would not be unreasonable to infer that the arrest  
5 was intended to cover up the use of excessive force. *Batten v. Abrams*, 28 Wn. App. 737,  
6 626 P.2d 984 (Wash. Ct. App. 1981) ("The ulterior motive or purpose may be inferred  
7 from what is said or done about the process . . .") (quoting W. Prosser, *Law of Torts* §  
8 121 at 856 (4th ed. 1971)). Because a reasonable jury could conclude that the officers  
9 initiated the arrest for an ulterior purpose, the Court DENIES Defendants summary  
10 judgment as to Plaintiffs' abuse of process claims.

11 Gibson v. City of Kirkland, 2009 U.S. Dist. LEXIS 30085 (W.D. Wash. Apr. 9, 2009)  
12 (some internal citations omitted).

13 This Court can and should conclude that a reasonable jury could easily find an "ulterior  
14 motive or purpose" lurked behind the continued use of the judicial process. It can do so by  
15 looking no further than the plentiful online news coverage, blogs, and other resources, where  
16 many citizens express the belief that these cameras are "money makers" for the cities and  
17 companies.<sup>8</sup>

18 As this Court can and should conclude that a reasonable jury may impugn the Defendant  
19 Companies' motives and find profit driving their actions, the Defendant Companies' motions to  
20 dismiss the "abuse of process" cause of action must be denied.

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21 <sup>8</sup> A sampling: See <http://www.kirotv.com/traffic/21529563/detail.html> (reader comment: "The politician entity will  
22 alleged that they have been installed to promote public safety, when in fact they are purely a money-making  
23 scam,"); [http://www.tdn.com/articles/2009/05/14/area\\_news/doc4a0b8cb98964b750543714.txt](http://www.tdn.com/articles/2009/05/14/area_news/doc4a0b8cb98964b750543714.txt) (The Daily News  
24 May 14, 2009: "The city wants the cameras as a means to generate revenue, rather than a way to make intersections  
25 safer, [community activists] argued Wednesday [opposing installation of a Longview camera] ..."); <http://www.b-townblog.com/2009/06/24/class-action-lawsuit-filed-against-19-washington-cities-including-burien-over-red-light-camera-fines/>  
26 (Comment from a reader regarding Burien article: "Pure and simple these red light cameras is a  
revenue generator masquerading as safety device." June 25, 2009);  
<http://www.techdirt.com/articles/20090913/1659426171.shtml> ("There's been significant growing opposition to red  
light camera programs, which have a long history of showing absolutely **no safety benefit**, and are often run for-  
profit by local governments in combination with private companies")<http://www.latimes.com/news/local/la-me-redlight19-2008may19,0,5321069.story> ("L.A. red light cameras clicking for safety or revenue?" (May 19, 2008 –  
LA Times).



1 The Washington State Legislature saw fit to restrain the cities across the state from  
2 entering contractual arrangements with “safety camera” companies which includes compensation  
3 based on anything but a straight payment for the services provided:  
4

5 If a county or city has established an authorized automated traffic safety camera program  
6 under this section, the compensation paid to the manufacturer or vendor of the equipment  
7 used must be based only upon the value of the equipment and services provided or  
8 rendered in support of the system, and may not be based upon a portion of the fine or  
9 civil penalty imposed or the revenue generated by the equipment.

RCW 46.63.170(1)(i)

10 When a statute is clear and unambiguous, its meaning is to be derived from the language  
11 of the statute alone and it is not subject to judicial construction. Washington State Coalition for  
12 the Homeless v. Department of Soc. & Health Servs., 133 Wn.2d 894, 904, 949 P.2d 1291  
13 (1997). An ambiguity exists if the language at issue is susceptible to more than one reasonable  
14 interpretation. State ex rel. Royal v. Board of Yakima County Comm'rs, 123 Wn.2d 451, 459,  
15 869 P.2d 56 (1994). A statute is not ambiguous simply because different interpretations are  
16 conceivable. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order  
17 of Eagles, 148 Wn.2d 224, 239-40, 59 P.3d 655 (2002).  
18

19 Regardless of how the Defendants provide analysis and input as to how the contract isn't  
20 a public policy problem, it is clear that the Legislature intended a cost per services contract  
21 ONLY. There is no room for interpretation.

22 As stated above in the “Facts” section, a number of ATS contracts contain a unique  
23 additional profit-driving motivation in their contracts. ATS is permitted to jointly determine  
24 “rejection criteria” with the City, having input into which infractions are issued and which are  
25 declined. Without question this brings to the forefront the very problem the Legislature  
26

1 attempted to avoid by prohibiting contracts of this nature. It impermissibly intertwines profit  
2 into the charging decision, to an even greater degree than the Cost Neutrality provision alone.

3 Other ATS contracts state that the vendors will be paid a per ticket fee if enough fines are  
4 “generated”. These contracts give the cities and the vendors an illegal incentive to issue  
5 improper tickets and to err on the side of issuing a ticket versus declining to issue the ticket.  
6 This clearly violates state law which was enacted to prevent this exact situation. It is particularly  
7 problematic with ATS contracts, given the obvious consideration for vendor input into citation  
8 decisions.

9  
10 ATS contracts even include bonus payments if enough tickets are both issued and paid in  
11 a given month. For example, the ATS contract with Lynnwood states that ATS shall receive  
12 \$5.00 per every citation issued over 800, as long as Lynnwood recovers enough money to cover  
13 the base ATS monthly fees. (See Robertson Decl., Exhibit 4- Lynnwood contract, at pg. 15).  
14 This section, when read in conjunction with the stop-loss clause, means that Lynnwood would  
15 have to pay a per citation fee only if the revenue generated from citations is greater than the base  
16 monthly fee. This violates both parts of RCW 46.63.170(1)(i). First, it calls for a payment that  
17 is not “based only on the value of the equipment and services provided” as the payment is  
18 contingent on the number of tickets issued. Second, it calls for a payment that is “based upon a  
19 portion of the fine or civil penalty imposed or the revenue generated by the equipment” because  
20 the stop-loss clause indicates that Lynnwood won’t have to pay this \$5.00 unless enough revenue  
21 is generated.  
22

23  
24 The contracts are replete with violations of RCW 46.63.170(1)(i). Bellevue’s contract  
25 with ATS clearly calls for a contingent payment by requiring Bellevue to pay ATS 25% of the  
26

1 amount sent to collections:

2 Collections services – includes collections activity on all instate and out of state 3 delinquent payments remaining after the second notice. Service includes noticing, 4 phone contact, and credit reporting. ATS will add the collections fee to the outstanding notice balance such that City net equals \$101.	25% of collection s
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5 See Robertson Decl., Exhibit 8, Bellevue contract, at page 22. Several other cities have this  
6 same provision in their contracts.

7 Each of these provisions illegally gives the Defendant Companies incentives to issue  
8 more tickets and collect more money. The state legislature was rightfully concerned about the  
9 necessary public-private business partnership necessary in camera tickets. The legislature  
10 enacted RCW 46.63.170(1)(i) in order to protect Washington citizens from just these sorts of  
11 schemes which provide profit incentives to businesses but have no place in traffic enforcement.  
12

13 Defendant Companies cite a California court decision upholding such a contract.  
14 However, at least two other courts have disagreed, ruling that this sort of contract violates  
15 California law, which is almost identical to Washington law. See decision in *CA. v. Nagai*,  
16 (Robertson Decl., Exhibit 10).  
17

18 In all of Plaintiffs' cases, Defendants gathered evidence with cameras that were placed  
19 throughout Washington in violation of state law and public policy.<sup>10</sup> Such evidence cannot be  
20 used to prosecute claims, even traffic infraction claims. If this Court did not exclude<sup>11</sup> evidence  
21 obtained in this unlawful "for profit" scheme, then RCW 46.63.170(1)(i) will be rendered  
22 meaningless. This Court's remedy is to find "system-wide violations of mandatory statutory  
23

24 <sup>10</sup> An agreement that has a tendency "to be against the public good, or to be injurious to the public" violates public  
policy [and is void and unenforceable]. *Scott v. Cingular Wireless*, 160 Wn.2d 843, 852 (2007)

25 <sup>11</sup> The Plaintiffs pose the following hypothetical to illustrate this point: Assume that a contract between the State  
26 and a lab that performed DNA analysis included a provision that the lab would be paid a bonus of \$100 every time  
the lab's analyst issued a DNA report that resulted in a conviction. Such a contract would not only be void as  
against public policy, but any convictions tainted by this profit scheme would no doubt be thrown out or overturned.

1 requirements by a municipal court and from alleged repetitious violations of constitutional rights  
2 by a municipality in the enforcement of municipal ordinances,” just as the Washington Supreme  
3 Court found in the *Orwick v. Seattle* matter, 103 Wash.2d 249 251 (1984), and thereby rule that  
4 all infractions issued based on this illegally gathered evidence must be vacated.  
5

6 **D. PLAINTIFFS ARGUMENT ON UNJUST ENRICHMENT**

7 The Plaintiffs have set forth an unjust enrichment claim. Defendants ATS and Redflex  
8 contend that Plaintiffs have not alleged any claim for unjust enrichment against them. They  
9 haven't. Plaintiffs' claims for unjust enrichment are made against the Defendant cities for  
10 collecting fines that were procured through unapproved notices of infraction, contracts that  
11 contained prohibit provisions, and for collecting fines in an amount higher than allowed by law.  
12 Plaintiffs also allege that the Defendant cities were unjustly enriched by assessing excessive  
13 fines above the amount of a normal or ordinary parking ticket in contravention of the  
14 Legislature's intent.

15 Since the Defendant cities in their joint motion merely adopt the argument made by ATS  
16 and Redflex in their motions and the argument made by ATS and Redflex has nothing to do with  
17 the Plaintiffs' claims against the Defendant cities, the cities have made no argument for dismissal  
18 of the unjust enrichment claim against them and the claims should not be dismissed.<sup>12</sup> Even so,  
19 Plaintiffs can clearly meet the elements of an unjust enrichment claim: (1) the Plaintiffs  
20 conferred on the cities a benefit when they paid the disputed fines; (2) the cities had knowledge  
21 of receiving this benefit; and (3) if the fines were procured through improper means or were  
22 excessive then it would inequitable for the cities to retain the benefit conferred on them by the  
23 Plaintiffs.

24 \_\_\_\_\_  
25 <sup>12</sup> An unjust enrichment claim sounds in equity, not torts, and the award made is not “damages” but restitution or  
26 disgorgement. Accordingly, Plaintiffs were not required to file a pre-suit tort claim with the city before bringing  
their unjust enrichment claim against them.

1 Defendants' motion seeking to dismiss the unjust enrichment claim should be denied.  
2 See, Armer v. OpenMarket, Inc., 2009 U.S. Dist. LEXIS 72434 (W.D. Wash. July 27, 2009).<sup>13</sup>  
3

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Defendants' motions to dismiss should be denied.  
6

7 DATED this 9 day of November, 2009.

8 Breskin Johnson & Townsend  
9 Attorneys for Plaintiffs

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16 **CERTIFICATE OF SERVICE**

17 I, Leslie A. Listy, hereby certify that on November 9, 2009, I electronically filed the  
18 foregoing document with the Clerk of the Court using the CM/ECF system which will send  
19 notification of such filing to all attorneys of record.

20 s/Leslie A. Listy  
21 Leslie A. Listy, legal assistant

22 <sup>13</sup> Defendants ATS and Redflex assert that the Plaintiffs are barred from recovering under the doctrine of "voluntary  
23 payment." But that doctrine requires "full knowledge" of all facts showing that the cities' demand for payment of  
24 the fine was illegal at the time it was paid. *Hawknison v. Conneff*, 53 Wn.2d 454, 458 (1959). There is no evidence  
25 that any of the Plaintiffs knew that the form of notice received was not approved, that the contracts entered into  
26 between the cities and the camera companies had prohibited provisions or that the fines imposed were excess.  
Nothing in the FAC remotely suggests that the Plaintiffs had any knowledge of any of these facts. Voluntary  
payment does not apply based on the pleadings. See, Armer, supra., (to the extent that voluntary payment doctrine  
exists in Washington, factual issues relating to proof of the claim would defeat a motion to dismiss on the basis of  
voluntary payment).

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PLAINTIFFS' RESPONSE TO  
CITIES' MOTION FOR JUDGMENT  
ON THE PLEADINGS - 23  
[Cause No. 09-cv-01232 JCC]

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