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 AND OPPOSITION TO DEFENDANT REDFLEX TRAFFIC SOLULTIONS, INC.'S CR 12(b)(6) MOTION TO DISMISS

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

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

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

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

The Plaintiffs further allege that the Legislature restricted the cities' power to issue "red light camera" tickets by prohibiting certain contractual arrangements with the Defendant camera companies that would encourage the companies to issue more tickets so that more revenue would be generated for the cities and the revenue generated would always exceed the 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

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

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

The erroneous underlying premise of the Defendants' *res judicata* argument is that the

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

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

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

II. PERTINENT FACTS

The operative Complaint at the time the Defendants filed their motions was the

Plaintiffs' First Amended Complaint ("FAC"). The Plaintiffs have since file a motion for leave to file a Second Amended Complaint ("SAC"), which adds additional plaintiffs, who have not yet had a hearing on their tickets or paid a fine. The SAC also drops the malicious prosecution claim and clarifies that the denial of due process claim is not based solely on the statutory presumption that the vehicle's owner was the driver who violated the law. The claim is also based on the cities' violation of the express limitations imposed on their power by the Legislature. These include the issuance of a Notice of Infraction ("NOI") that was treated as a parking ticket, not moving violations, fines set at the amount of a parking ticket, approval of the form of NOI by the AOC and contracts that did not surrender control to the camera companies to issue infractions and/or provisions that gave incentives to increase revenues.

A. The Traffic Camera Legislation and Legislative History

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

B. The Cities Implemented Excessive Fines

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

C. The Law Prohibited "Stop-Loss" and Other Contract Provisions

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

Other contracts contain a clause that the camera companies will be paid on a "per ticket" basis if enough fines are collected. Nearly all of the contracts provide that the companies will be paid in part on a portion of the fine or penalty imposed or the revenue generated by the equipment. This violates the Legislature's intent as codified in RCW 46.63.170(1)(h). FAC at ¶ 3.18-20.[3]

D. <u>The Law Required Approval by the AOC of the Form of NOI</u>

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

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[2] <u>See</u>, 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.

[3] Plaintiffs' arguments with regard to the illegal contract provisions are set out in the Response to ATS' motion.

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

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

III. LEGAL ARGUMENT

Plaintiffs allege two claims for damages against the camera companies: (1) abuse of process (FAC at ¶ 7.2) and (2) violation of the Washington CPA (FAC at ¶ 9.2-9.5). [4]

A. *Res Judicata* Does Not Bar Plaintiffs' Claims in this Class Action Lawsuit

The sole function, purpose and jurisdiction of the Municipal Court in the action before it involving the Plaintiffs was to determine whether or not a violation the owner of the vehicle ran a red light or sped through a school zone, and not whether the camera companies who issued the infractions for the cities or collected the fines engaged in the tort of abuse of process or violated the Plaintiffs' statutory rights under the CPA.

Indeed, the NOI that the camera companies sent to vehicle owners expressly limited the matters which the owner could contest in the Municipal Court to only whether he or she has violated the law, whether his or her conduct warranted mitigation, and in the case of some, but not all of the notices, whether he or she was the driver of the vehicle when it went through the red light or sped through the school zone. Nothing in the NOI suggests to the vehicle's

[4] In addition, Plaintiffs seek a Declaratory Judgment under the Declaratory Judgment Act that certain of the notices were not approved as required, that certain contract provisions were unlawful and that the fines collected were excessive. Plaintiffs seek an injunction to prevent Defendants from continuing their illegal, unfair and/or deceptive practices. FAC at ¶ 8.2. Plaintiffs have voluntarily dropped their malicious prosecution claim. In their Response in Opposition to the ATS motion, Plaintiffs set out their substantive arguments against dismissal of their abusive of process and CPA claims, and incorporate by reference herein those arguments.

1 owner that he or she had a right to contest the maximum fine set by the city as violating state
2 law. Indeed, if such right existed in the municipal court proceeding, then the NOI would be
3 misleading as a matter of law and the company's failure to disclose such material information
4 would have been a clear violation of the CPA. [5]

5 **1. The Municipal Court Lacked Jurisdiction Over Plaintiffs' Claims**

6 Defendant Redflex argues that plaintiffs could have litigated all of their current claims
7 as defenses to whether they ran the red light or sped through the school zone in the municipal
8 court case and hence, their claims are barred by the doctrine of *res judicata*. On the other
9 hand, Defendant ATS, showing slightly more candor than Redflex, concedes that Plaintiffs
10 could not have asserted in the municipal court their tort claim for abuse of process or their
11 statutory claim for violation of the CPA. Nevertheless, ATS argues that plaintiffs could have
12 resolved their equitable claim for unjust enrichment and their Declaratory Judgment Act claim
13 in municipal court and, because they opted not to do so, *res judicata* bars their claims.

14 Defendants bear the burden of proving that *res judicata* applies and must initially show
15 that there was a "final judgment on the merits" of the claims in the prior proceeding. *Hisle v.*
16 *Todd Pacific Shipyards Corp.,* 151 Wash.2d 853, 865, 93 P.3d 108 (2004).[6] One Washington
17 appellate court defined "on the merits" to mean (emphasis added):

18 In order that a judgment or decree should be on the merits, it is not necessary that the
19 litigation should be determined on the merits, in the moral or abstract sense of these
words. It is sufficient that the status of the action was such that the parties **might have
20 had their suit thus disposed of**, if they had properly presented and managed their
respective cases.

21 *Pederson v. Potter*, 103 Wash.App. 62, 70, 11 P.3d 833, (2000) (cites omitted).

22 Measured against this standard, Defendants' defense of *res judicata* fails because the

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[5] See, *Panag v. Farmers Ins. Co. of Wash.,* 166 Wn.2d 27, 204 P.3d 885 (2009) (failure to disclose in collection notice that consumer could contest the debt stated as "owed" was a deceptive CPA practice as a matter of law, even if the notice contained truthful information that tried to convey that the debt could be contested.)

[6] In determining whether a state court judgment is to be given preclusive effect for purposes of *res judicata*, a federal court sitting in diversity applies the law of the state in which the judgment was entered, here Washington. *Constantini v. Trans World Airlines*, 681 F.2d 1199 (9th Cir), cert denied 459 US 1087 (1982)

present suit could not have been "disposed of" in the municipal court proceeding. The Municipal Court had no subject matter jurisdiction to hear any tort claim for abuse of process, any statutory claim for violation of the CPA, any equitable claim for unjust enrichment, any declaratory relief claim under the Declaratory Judgment Act, or any equitable or statutory claim for injunctive relief. The vesting of judicial power is set forth in the Washington State Constitution, Article 4, Section 6, which states, in pertinent part:

> Superior courts and district courts have concurrent jurisdiction in equity. The superior court shall have original jurisdiction in all cases at law which involve ...the legality of any tax...or municipal fine...The superior court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court...[7]

Under RCW 2.08.010, which incorporates the above provisions, the Superior Court has original jurisdiction to hear and decide the claims filed by Plaintiffs in this action.[8] It has jurisdiction to hear CPA claims, equitable claims for unjust enrichment and declaratory relief under the Uniform Declaratory Judgments Act.[9] It has original jurisdiction to decide plaintiffs' claims regarding the legality of municipal fines levied by defendants.[10]

In contract, the Legislature expressly limited the jurisdiction of municipal courts in cities of under 400,000 people to "exclusive original jurisdiction over traffic infractions

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[7] As may be obvious, the Superior Court and District Court are county courts, not municipal courts.

[8] This action was originally filed in King County Superior Court in June 2009 and was removed to this Court. Defendants' alleged basis of this Court's jurisdiction is "diversity" jurisdiction under the Class Action Fairness Act.

[9] *Strenge v. Clarke*, 89 Wash.2d 23, 569 P.2d 60 (1977) (CPA claims); *Ledgerwood v. Landsdowne*, 120 Wash.App. 414, 85 P.3d 950 (2004) (equitable claims).Unjust enrichment is an equitable claim. *Dragt v. Dragt/Detray, LLC*, 139 Wash. App. 560, 161 P.3d 473 (2007). The Uniform Declaratory Judgment Act, RCW 7.24.010 states: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. .." Municipal courts are not "courts of record." Wash. Const., Art. 4, § 11; *Application of Eng,* 113 Wash.2d 178, 776 P.2d 1136, recon. denied (1989).

[10] *Qwest v. Bellevue*, 161 Wash.2d 353, 166 P.3d 667 (2007) (Superior court did not err in refusing to deny city's motion to dismiss Qwest's action challenging city's utility occupation tax on customer's access charge for failure to exhaust administrative remedies, because Qwest was invoking Superior Court's original jurisdiction under Uniform Declaratory Judgment Act and State Constitution. RCW 2.08.101 vested Superior Court with original jurisdiction over all cases involving the legality of any tax...or municipal fine.").

arising under city ordinances…" RCW 35.20.020 (emphasis added). The Legislature limited the jurisdiction of municipal courts in cities over 400,000 people to only:

> The … jurisdiction to try violations of all city ordinances...to hear and determine all causes, civil or criminal, **arising under** such ordinances, and **to pronounce judgment in accordance therewith**...PROVIDED, That an appeal from the court's determination or order in a traffic infraction proceeding may be taken only in accordance with RCW 46.63.090(5)...". RCW 35.20.030 (emphasis supplied) [11]

The Washington Supreme Court has interpreted the phrase, "arising under" in a narrow manner, and has held that it is the Superior Court that has jurisdiction to hear legal and equitable claims for systemic violation of state law by a municipality, such as the claims alleged herein. *Orwick,* supra. In *Orwick*, plaintiffs brought a class action seeking declaratory and injunctive relief and money damages based on claims that the procedures followed by the Seattle Municipal Court to adjudicate traffic citations violated RCW 46.63, and that motorists were wrongfully issued speeding citations based on inaccurate radar equipment. The Superior Court dismissed the claims for lack of subject matter jurisdiction and failure to state a claim for relief. The Washington Supreme Court reversed the dismissal of plaintiffs' damages claim and affirmed dismissal of the remaining claims as moot. In doing so, however, the Court held that the Superior Court in fact had original jurisdiction to hear the plaintiff's legal and equitable claims had they not been rendered moot, stating at 103 Wn. 2d 251:

> "We hold that the superior courts have original jurisdiction over claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court and from alleged repetitious violations of constitutional rights by a municipality in the enforcement of municipal ordinances."

The *Orwick* Court explained that the relevant consideration for deciding the jurisdictional issue was the "nature of the cause of action and the relief sought." Where as here, the plaintiffs allege that the municipality systematically violates state law when

[11] RCW 46.63.090, entitled "Hearings-Contesting determination that infraction committed-Appeal," section (5) provides: "An appeal from the court's determination or order shall be to the superior court. The decision of the superior court is subject only to discretionary review pursuant to Rule 2.3 of the Rules of Appellate Procedure."

enforcing its ordinance, the plaintiff's claim does not "arise under the ordinance" but arises under the state law and Constitution. The Court stated, 103 Wn. 2d at 252, emphasis added:

> …Petitioners allege system-wide violations of the statutory requirements in RCW 46.63 and state and federal constitutional violations. Petitioners' claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. **These claims do not "arise under" a municipal ordinance and, therefore, are not within the exclusive jurisdiction of the Seattle Municipal Court.** Thus, the superior court has jurisdiction to hear petitioners' claim and jurisdiction to grant equitable relief, if appropriate…

Plaintiffs' claims herein do not "arise under" a municipal ordinance. They arise under state statutes and the state Constitution. They assert claims for declaratory and injunctive relief and money damages based on systemic violations of state statutory requirements, as well as claims in equity. Under *Orwick*, the Superior Court, where this action was originally filed by Plaintiffs, had jurisdiction to decide the claims and the claims could not be dismissed on the grounds that they failed to assert a claim for relief or that the Municipal Court had exclusive jurisdiction to resolve the claims. [12]

2. Limitations on Municipal Court Jurisdiction Would Immune Cities

The Washington Infraction Rules for Courts of Limited Jurisdiction (IRLJ) reflect the limits imposed on municipal court jurisdiction by the Washington Constitution, state law and judicial interpretation. Under IRLJ 2.4 entitled "Response to Notice," the only issue that a traffic camera defendant is permitted to contest is the determination "that an infraction occurred," IRLJ 2.4 b(2). The only judgment that the municipal court is empowered to enter is a judgment that a "defendant has committed the infraction." IRLJ 2.4 b(1).

RCW 46.63.090(5) grants an appeal from the municipal court's determination that an infraction has been committed to the Superior Court. Thus, under IRLJ 2.4, even if the traffic camera plaintiffs could have litigated their claims in municipal court (which they could not), the only determination they could have appealed was the decision that an infraction was

[12] A federal court sitting in diversity is bound by the pronouncements of the highest court of the state on issues of state law. It may use the decisions of intermediary appellate courts as guidance, but is not bound by them. Chemstar, Inc. v. Liberty Mut. Ins. Co., 41 F.3d 429 (9th Cir. 1994)

committed. They would have had no right to appeal an adverse decision on their tort, CPA, Declaratory Judgment Act and/or unjust enrichment claims. Where, as here, there is no meaningful right to appeal the judgment of a court of limited jurisdiction, preclusive effect must be denied.[13] Under Washington law, *res judicata* requires a "final judgment on the merits" in a prior lawsuit. A final judgment on the merits cannot issue unless the parties might have had their existing claims disposed of in the previous proceeding.[14] Because the municipal court did not have jurisdiction to determine plaintiffs' current claims, the municipal court proceeding could not have "disposed of" plaintiff's claims and *res judicata* does not apply.[15]

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[13] See, *State Farm v. Avery*, 114 Wash. App. 299, 307, 57 P.3d 300 (2002). (Where auto insurer had no right to appeal small claims court judgment that it was liable for a medical bill, the small claims court judgment did not collaterally estop the insurer from re-litigating its liability to pay personal injury protection benefits).

[14] *Pederson,* supra., 103 Wn..App. at 62, See, *Pension Trust Fund v. Triple A Machine Shop*, Inc., 942 F.2d 1457, 1460 (9th Cir. 1991) applying California law to hold that, "...for *res judicata* to apply to claims not raised in previous proceedings, the court rendering the prior judgment must have had jurisdiction to hear such claims." See, also *Dolby v. Fisher,* 1 Wn.2d 181, 189, 95 P.2d 369 (1939).(cite omitted)(Issues decided in prior action that are not material to Plaintiff's claims in subsequent suit have no *res judicata* effect.) The municipal court's determination that the traffic camera plaintiffs committed an infraction is not material to their claims in this class action lawsuit.

[15] In a footnote, ATS and Redflex cite *Doe v. Fife*, 74 Wash.App. 444, 874 P.2d 182 (1994) and ATS cites a Pennsylvania case, *O'Neill v. City of Philadelphia*, 711 A.2d 544 (1998) to the effect that *res judicata* applies where the Plaintiff fails to exhaust his administrative remedies. The cases are easily distinguishable and are, in any event, trumped by the Washington Supreme Court's decision in *Qwest,* supra., 161 Wn.2d at 371. This probably explains why they are relegated to footnote status in Defendants' motion. *Doe* was a class action case to recover court costs assessed against those charged with DUI, which were not authorized by statute. In a criminal case under the rules that apply to courts of limited jurisdictions in criminal cases, the Court of Appeals held that CrRLJ 7.8 was the sole mechanism for a party to move to vacate a void judgment or order. But traffic infractions, like those in this case, which are "noncriminal violations of law" under IRLJ1.1 (a) are governed by a different set of court rules than those involved in the *Doe* case. Those rules incorporate the relief from judgment provisions of CRLJ 60(b) and, by implication, the relief from judgment procedures of all of CRLJ 60. See IRLJ 67(a). CRLJ 60(c) provides that CRLJ 60 does not limit the power of a court to entertain an independent action to relieve a party from a judgment. Also, unlike our case, the judgments for costs in *Doe* had already been voided by a prior decision of the Court of Appeals, thus they could have easily been recovered in the underlying proceeding without any determination by the underlying court. The court noted in this regard that the trial court denied plaintiffs' claims for injunctive relief as unnecessary due to its prior decision invalidating the costs imposed on them. Even so, as the Washington Supreme Court in *Qwest* held, supra., the Washington Constitution and RCW 2.08.101 give the Superior Court original jurisdiction over all cases involving the legality of a municipal fine and "where a court has original jurisdiction over a dispute, the administrative exhaustion requirement does not apply." And, under the Washington Supreme Court's decision in *Orwick*, the Plaintiffs herein have a right to have their "claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court and from alleged repetitious violations of constitutional rights by a municipality in the enforcement of a municipal ordinance" decided in superior court.

3. **No Identity of Parties Exists for *Res Judicata* Purposes**

In addition to a "final judgment," Defendants have the burden of showing that the municipal court action involved the same: "(1) persons and parties; (2) causes of action; (3) subject matter; and (4) the quality of persons for or against whom the claim is made." *Kuhlman v. Thomas et al*, 78 Wn.App. 115, 120, 897 P.2d 365 (1995) (citations omitted).

Defendants admit there was no identity of parties because they were not and could not have been parties to the Municipal Court action. They claim instead an exception to the rule that permits consideration of whether they were "in privity" with the city in the Municipal Court action. But Washington courts strictly construe this exception <u>against</u> finding privity. *Loveridge v. Fred Meyer*, 125 Wash.2d 759, 764, 887 P.2d 898 (1995)(emphasis added):

> Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and **the rule is construed strictly to mean parties claiming under the same title.** It denotes mutual or successive relationship to the same right or property.
>
> Privity is established in cases where a person is in actual control of the litigation, or substantially participates in it…

The camera companies argue that they were in privity with the cities in the Municipal Court action because they had a contract to issue the NOI and collect the fine, but they cite no legal authority that under Washington's strictly construed rule this amounts to "privity" sufficient to dismiss the Plaintiffs' common law, CPA, equitable, declaratory or injunctive relief claims in a subsequent Superior Court action. None of their cited cases so holds and all are distinguishable on their facts.[16] The companies did not "control" the prior litigation and

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[16] In *Bordeaux v. Ingersoll Rand*, 71 Wash.2d 392, 429 P.2d 207 (1967) an industrial insurance examiner's decision to reject a workers comp claim was <u>not</u> *res judicata* in a subsequent products liability action brought by the same worker. In *Feature Realty v. Kirkpatrick & Lockhart et al*, 161Wash.2d 214, 164 P.3d 500 (2007) a plaintiff who dismissed an earlier legal malpractice suit against a law firm was barred by *res judicata* from asserting a second suit against a partner in the same firm on the same claim under CR 41. The camera companies' role *vis a vis* the city in a municipal court action is <u>not</u> the same as a partner in a law firm and the firm in two superior court actions for legal malpractice. In *Rains v. State*, 100 Wash.2d 660, 674 P.2d 165 (1983) the court merely held that in two lawsuits against the PDC, the PDC was functionally the same party as the State on the same claim asserted in both actions,

they are not suppose to have any interest in whether the vehicle owner is convicted or exonerated, mitigates his violation, or pays a fine in the Municipal Court proceeding.

4. The Causes of Action and Claims Are Not the Same

In determining whether causes of action are identical for purposes of *res judicata*, the Washington Supreme Court considers: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. [17]

First, as a general, the two causes of action are not the same between the Municipal Court action and the present class action because, as the Washington Supreme Court has stated, when the nature of the claims differs, "...they do not deal with the same subject matter." *Hayes v. City of Seattle,* 131 Wn.2d 706, 712-713 (1997). (Nature of claim to overturn Seattle City Council's decision to condition approval of application for master use permit on a reduction in size of proposed building was different from later claim for monetary relief to compensate for damages suffered due to the City Council's actions. No *res judicata* because no identity of subject matter or causes of action).

Second, the above considerations do not support Defendants' *res judicata* argument. Clearly, the camera companies' rights or interests established in the prior action would not be destroyed or impaired because they had no rights or interests established in the municipal court action. Similarly, if the Court were to decide that the fines were excessive, the cities'

although they were "nominally different." Here, the camera companies and the cities not functionally the same. The camera companies are for profit entities, the cities public entities charged with prosecuting violations of law.

[17] See, *Norco Construction, Inc. v. King County*, 106 Wash.2d 290, 721 P.2d 511 (1986). (No identity of cause of action between federal court claim for damages resulting from County's failure to take action on a preliminary plat application and later state court action for damages resulting from County's supersession of enforcement of writ to compel County to act on preliminary plat application. Dismissal of federal action on statute of limitations grounds was not *res judicata* in state court action. Defendant failed to prove each of the above elements).

interest in the determination that an infraction had occurred would not be destroyed. It would only be impaired if the Court were to find that the NOI was wrongly issued without proper approval or under a contract containing a prohibited "stop-loss" or other clause.

Clearly, the evidence presented in this case will be quite different from that in the municipal court where the only issue to be decided was whether a particular infraction was committed, and only evidence relevant to that issue was admissible. The rights and the nature of the claims which the plaintiffs assert in the instant case to declaratory, injunctive and equitable relief based on their illegal fine, illegal contracts and other claims are totally distinct from their municipal court rights related to alleged commission of a traffic infraction. Finally, the two "causes of action" involve widely disparate transactional nuclei of facts. The only factual inquiry in municipal court was whether plaintiffs committed a traffic infraction. That inquiry is irrelevant in this case. The relevant facts are whether the Defendants violated the law, were unjustly enriched, or the companies engaged in abuse of process or CPA violations.

5. Defendants' Cases are Distinguishable or Contrary to Washington Law

Defendants cite *Holder v. City of Vancouver*, 2008 WL 918725 (WD Wash. 2008) as authority for their position that *res judicata* bars the plaintiffs' claims. The *Holder* case involved a complex procedural history throughout which Mr. Holder, a *pro se* plaintiff, challenged in several forums a citation he received from the City of Vancouver in 2005 for parking violations on his own property. He lost his appeal of the parking citation in Superior Court and the Court of Appeals, and then filed suit in federal court seeking to have Vancouver's parking ordinance declared unconstitutionally vague. The Court held that Mr. Holder's claim was not viable in federal court because, under the Rooker-Feldman doctrine, lower United States Federal Courts generally do not have subject-matter jurisdiction to directly review state court decisions.[18] The Court went on to opine that, even if the Rooker-

[18] Redflex cites *Dajani v. Governor & Gen. Assembly of the State of Md.*, 2001 WL 85181 2-3 (D.Md. 2001) for the notion that the Rooker-Feldman doctrine bars re-litigation of municipal court determinations in federal court, but *Dajani* does not apply because there the case was filed in federal court, whereas this action was filed in state court.

Feldman doctrine did not bar Mr. Holder's claims, those claims were barred by the statute of limitations and *res judicata,* the latter because Holder could have raised his constitutional challenges to Vancouver's parking ordinance in the Washington Court of Appeals. The *Holder* decision is inapplicable in this case where the vehicle owners could not have asserted their current claims in municipal court which lacked jurisdiction to hear them, nor could they have asserted them on appeal when all they were entitled to appeal was the determination that the traffic camera infraction was committed. See RCW 46.63.090.[19]

Defendants argue that an out of state case, *Kovach v. District of Columbia*, 805 A.2d 957 (D.D.C. 2002) supports their argument that *res judicata* bars Plaintiffs' claims. In *Kovach*, the plaintiff motorist filed suit on behalf of a class seeking return of fines paid by drivers photographed by a street camera later pulled because the police decided the camera was confusing to motorists. The District of Columbia did not require those who had not yet paid their fine to pay, but it would not issue refunds. Plaintiff claimed the decision to forgive only unpaid fines was discriminatory under the D.C. Code, and unconstitutional. The *Kovach* court held that *res judicata* did not bar the plaintiff's claims because they were distinct from those heard previously. In this respect, *Kovach* supports the Plaintiffs' position that the judgments entered in the municipal court do not bar their claims. The *Kovach* Court did hold, however, that collateral estoppel precluded Kovach's claims because his payment of the fine estopped him from asserting that he was confused by the light's placement.

The *Dajani* Court held that under the Rooker-Feldman doctrine, federal district courts lack jurisdiction over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court action was unconstitutional. But, unlike Mr. Dajani, Plaintiffs in this action have not sought to challenge any state court decision in federal court; we are in federal court because the defendants removed the case to federal court and waived the argument they make now. Accordingly, the *Dajani* decision is inapposite.

[19] The defendants' reliance on *Costello v. Alameda County Transit Parking Enforcement Ctr.,* 2008 WL 5412842 (N.D. Cal. 2008) is equally misplaced. Costello involved another *pro se* plaintiff who, unlike the plaintiffs in the instant case, filed a federal court case challenging the constitutionality of a California statute governing administrative review of a parking violation after having previously lost a constitutional challenge to the same statute in state court. *Res judicata* and collateral estoppel applied because there was a final judgment on the merits of the same issue in the first case, and the parties and claims were identical.

But none of the Defendants, including ATS, Redflex or the cities, argue that *collateral estoppel* bars the Plaintiffs' claims. Undoubtedly this is because under Washington Supreme Court precedent, it is clear that judgments entered in a Washington municipal court for a traffic infraction do not have preclusive effect in subsequent litigation. *Hadley v. Maxwell*, 114 Wash.2d 306, 311, 27 P.3d 600 (2001).

In *Hadley v. Maxwell*, the plaintiff brought a personal injury action against a second motorist after the second motorist paid a fine for a related traffic violation. The *Hadley* Court held that the second motorist was not collaterally estopped from denying that she committed the infraction, and, at 114 Wash.2d 311, set out a four-part test for application of the doctrine of collateral estoppel: "(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied." (cites omitted). The *Hadley* Court stated at 312-313, emphasis added, that in deciding whether an injustice will be done, courts should ask:

> Does the party against whom the estoppel is asserted have interests at stake that would call for a full litigational effort?...Most jurisdictions have refused to admit traffic misdemeanors in subsequent civil cases, let alone allow them to be the basis for collateral estoppel...collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. *To that end, we hold it is not generally appropriate when there is nothing more at stake than a nominal fine. There must be sufficient motivation for a full and vigorous litigation of the issue."*

A similar decision was rendered in *Sevin v. Parish of Jefferson, Redflex Corporation et al*, 632 F.Supp.2d 586 (E.D. LA. 2008), a class action alleging that notices of violation received for running red lights after being caught by red light cameras violated the federal and state constitutions and statutes. Defendant Redflex was responsible for administering "civil" tickets on behalf of the Parish of Jefferson. The Parish moved to dismiss and, in the alternative for summary judgment. The *Sevin* Court, finding the *Kovach* decision inapplicable, held that plaintiff Sevin was not collaterally estopped from pursuing his claims

because his failure to contest the notice did not constitute or lead to a valid and final judgment as used in the Louisiana statute. In referencing the *Kovach* decision, the *Sevin* Court said, in part, at 632 F. Supp. 593: "…the local rule in the District of Columbia has little bearing on the proper interpretation of [Louisiana statute] because the Louisiana Supreme Court has spoken authoritatively on the matter."[20]

Defendants' arguments to dismiss Plaintiffs' claims on *res judicata* grounds are not support by Washington law and Defendants cannot meet their burden of proof regarding the elements of res judicata, including that there was a final municipal court judgment on the merits of the claims asserted herein. As discussed in *Orwick v. City of Seattle*, 103 Wash.2d at 252, plaintiffs' current claims do not "arise under" a municipal ordinance and the municipal court did not have jurisdiction to decide those claims. The Washington Supreme Court has determined that municipal court traffic infraction judgments should not be admitted in subsequent civil cases, nor should they serve as the basis for issue preclusion, because there is insufficient motivation in the municipal court for "full and vigorous litigation." *Hadley vs. Maxwell*, 114 Wash.2d at 313. Finally, ATS and Redflex have not proven that they were in privity with the Defendant cities, nor has any Defendant proven that there is identity of cause of action and subject matter between the municipal court proceedings and this lawsuit.

B. Plaintiffs' Complaint Sets Out a Claim for Declaratory Relief

Defendants make cursory arguments that Plaintiff cannot establish a right to

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[20] Redflex did not cite the *Sevin* case even though it involved Redflex. It cited instead *McCarthy v. City of Cleveland*, 2009 WL 2424296 (ND Ohio, 2009), a class action case against the City of Cleveland for a class of lessees of vehicles who received camera tickets and paid the fines. Plaintiffs' claims were for taking of property without just compensation in violation of the state and federal constitutions. The camera citations said that failure to pay the fine or answer within 20 days was an admission of liability. Plaintiffs had the option of electing to deny the infractions, but did not do so because they believed that the cost of challenging the citations would exceed the fine. On the city's motion to dismiss, the court held that the plaintiffs were afforded due process and voluntarily paid the fines, and granted the motion to dismiss. *McCarthy* is distinguishable from the case at bar for several reasons, including that the *McCarthy* plaintiffs raised only due process claims, but, the outcome in *McCarthy* is also contrary to the holding in *Hadley v. Maxwell, 114 Wash.2d 306,* that Washington municipal court judgments involving traffic infraction fines should not be afforded preclusive effect.

declaratory relief, but the arguments boil down to whether or not there are improper clauses in the contracts between the camera companies and the cities; whether the AOC needed to approve the notices of infraction and whether the fines assessed by the camera companies and the cities were excessive. See, Redflex Mot. at 11, § B; ATS motion at 17, § D. [21]

In their Response in opposition to the ATS motion, Plaintiffs set forth their arguments showing why the Redflex and ATS contracts contain impermissible clauses. Plaintiffs incorporate by reference those arguments in opposition to all motions as if fully set forth in each Response in opposition to each motion.

In their Response in opposition to the City of Renton's motion (dkt#64), Plaintiffs set forth their arguments showing that AOC approval was required for the form of NOI. Plaintiffs incorporate by reference those arguments in opposition to all motions as if fully set forth in each Response in opposition to each motion.

In their Response in opposition to the Defendants cities' joint motion for judgment (dkt# 56), Plaintiffs set forth their arguments that the cities' fines were excessive and were set higher than the Legislature intended. Plaintiffs incorporate by reference those arguments in opposition to all motions as if fully set forth in each Response in opposition to each motion.[22]

C. Plaintiffs Are Not Barred From Bringing Declaratory Relief Claim

Referring to RCW 7.24.110, Defendant ATS argues that under RCW 7.24.110,

[21] Redflex cites one case, ATS none, in support of its argument that Plaintiffs have no claim for declaratory relief , *Lecht v. City of Seattle,* 32 Wn.App. 831 (1982). But that case has nothing to do with the facts set forth herein and does not support its argument. Redflex makes the "throw away" argument, not made by ATS, that Plaintiffs cannot obtain injunctive relief because they cannot show they are likely to run red lights at an intersection with a traffic camera. Defendant is wrong, Washington courts recognize that declaratory and injunctive relief are available where as here, the controversy involves matters of continuing and substantial public interest, and the court's determination would provide future guidance to public officers. *Osborn v. Grant County,* 130 Wn.2d 615, 926 P.2d 911 (1996).

[22] Redflex argues that any claim that rests on the assertion that the fines were excessive should be dismissed because the municipal court has jurisdiction over such a claim, citing *Orwick,* supra. and *Post v. City of Tacoma.* As discussed above, *Orwick* holds the opposite that systemic claims alleging violations of state law or the Constitution do not "arise under" the city's ordinance and therefore, the Superior Court, not the municipal court has original jurisdiction over such a claim. *Post,* a land use case under a totally different statute and system, does not hold the municipal courts have exclusive jurisdictions over claims concerning traffic fines, and was *reversed* by the Washington Supreme Court in any event. *Post v. City of Tacoma,* 2009 Wash. LEXIS 970 (Oct. 15, 2009).

Plaintiffs cannot proceed with their challenge to the constitutionality of the traffic camera scheme because they did not served the Attorney General. Mot. at 17. But the state on its face does not require that the Attorney General be served in an action that seeks merely to force a municipality to adhere to a state statute restricting its authority to set excessive fines.

Defendant's argument presumably refers to the charge by Plaintiffs that RCW 46.63.075(1) is unconstitutional because it presumes that the owner of the vehicle was the driver who ran the red light or sped through a school zone without any proof support the accusation. No other challenges to the constitutionality of a statute or ordinance are to be found in the First Amended Complaint. To the extent the attorney general is to be served with a copy of the "proceeding", the First Amended Complaint and Petition for Removal were served on November 6, 2009. Given the current posture of this case, the attorney general may choose to be heard if it so desires. Furthermore, Plaintiffs' claims do not invoke the requirement that service be had on the Attorney general because Plaintiffs do not allege that the statute is unconstitutional as written. Plaintiffs allege that the presumption created by the statute when coupled with the cities failure to adhere to the procedural requirements set forth in the statute such as the limitation on the fine imposed and the approval of the NOI by the AOC, can lead to a deprivation of constitutional rights.

D. Plaintiffs Have Standing to Seek Injunctive Relief

Defendants argue that Plaintiffs lack standing to seek an injunction, because all of them have already paid their citations and cannot claim to be in imminent peril of committing another infraction for which they may be issued a citation. Redflex Mot. at 18-19; ATS Mot. at 18. As Defendants know, however, that at least one plaintiff, Belinda Riba, had not paid any fine at the time the original complaint was filed, and clearly, therefore, have standing to seek an injunction. Moreover, Plaintiffs have filed with the court a motion to amend their complaint to add several additional class representatives who likewise have not yet had a final judgment entered against them in connection with citations issued against them.

The Supreme Court has issued many opinions with respect to standing for injunctive relief, generally denying standing if the Plaintiffs were not likely to have a real and immediate threat of harm. Many of the decisions have involved vigorous dissents beginning with *City of Los Angeles v. Lyons*, City, 461 US 95, 94 S. Ct. 669 (1983) a 5-4 decision in which a plaintiff who had been illegally choked by police officers was not permitted to seek an injunction because he could not establish the real and immediate threat he would be stopped again and illegally choked. By the time the suit was filed, the challenged practice had been discontinued. In *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S. Ct. 1661 (1991) Plaintiffs who were in custody challenged County's policy of providing probable cause determinations for persons arrested without a warrant. Distinguishing *Lyons*, the court found that the objectionable practice had not ceased before the Plaintiffs had filed their complaint.

In *Department of Commerce v. United States House of Representatives,* 525 U.S. 316, 119 S. Ct. 765 (1998), the Court found that state residents had standing to challenge the decision of the Department of Commerce to use statistical sampling in the upcoming census. In *Friends of the Earth, Incorporated v. Laidlaw Environmental Services*, 528 U.S. 167, 120 S. Ct. 693 (2000) the Court found that environmental groups had standing because they intended to use an affected area and their recreational and aesthetic enjoyment of the area would be lessened by the challenged activity. In *Independent Living Center of Southern California Inc. v. Shewry,* 543 F. 3d 1050 (9th Cir. 2008) a nonprofit group pharmacies, health care providers, senior citizen groups and state Medicaid beneficiaries brought an action to enjoin a state officials from implementing legislation that would reduce payments to medical service providers by 10%. The 9th Circuit ruled that the various Plaintiffs had standing to bring suit.

Finally in *Bell v. American Traffic Solutions, Inc*., 2009 WL 1740586 (N. D. Tex.) motorists who had received and paid traffic citations were found to have standing to bring an action against American Traffic Solutions because they had suffered an injury in fact, which injury could be redressed by a favorable decision. The decision is entirely consistent with

Washington law. See, *Osborn v. Grant County,* 130 Wn.2d 615, 926 P.2d 911 (1996) (Declaratory and injunctive relief are available where the controversy involves matters of continuing and substantial public interest, and the court's determination would provide future guidance to public officers.) [23]

The municipal Defendants in our case have issued thousands of traffic citations using cameras and assessing fines in excess of what is permitted by the legislature. This conduct will continue without injunctive relief. The Plaintiffs have suffered a real injury which could be redressed by a favorable decision in this case.

Finally, Plaintiffs are entitled to obtain injunctive relief under the Consumer Protection Act to enjoin the Defendant camera companies' unfair and deceptive practices. RCW 19.86 *et seq.* None of the Defendants present any argument for why Plaintiffs lack standing to assert a claim for injunctive relief under the CPA. Defendants' contention that Plaintiffs lack standing because they would not be a victim of Defendants' illegal conduct in the future is clearly inconsistent with Washington authority under the CPA. See, e.g., *Panag,* supra. Indeed, in virtually every CPA case involving a continuing unfair or deceptive practice by the Defendant, injunctive relief would be entered enjoining the Defendant from engaging in such a practice to protect the general public not the Plaintiff. In such a case, it would be entirely unlikely that the Plaintiff would be harmed by the same practice in the future, because the Plaintiff is aware as a result of the lawsuit that the Defendant is engaging in such an unfair and deceptive practice.

E. Plaintiffs' Complaint States a Claim for Unjust Enrichment

In their Response in opposition to the Defendants cities' joint motion for judgment

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[23] The only Washington case cited by Defendants in support of their argument is *Orwick,* supra., which Defendant Redflex misleadingly quotes to imply that the court's holding would apply to a case where the plaintiff had not yet recovered or been reimbursed for an illegal fine.. Redflex Mot. at 18. In fact, *Orwick* holds the opposite. There, the plaintiff had already established his right to recover and hence there was no need for declaratory and injunctive relief. Accordingly, the Court dismissed the claims as moot. Here, the Plaintiffs have not yet established their right to recover, but will once they have been given the opportunity to establish that Defendants' practices violate the limited statutory powered conveyed by the Legislature by imposing fines in excess of a parking ticket fine; issuing unapproved notices of infraction and entering into illegal contracts that promote the issuances of infractions.

(dkt# 56), Plaintiffs set forth their arguments for why the Defendant cities were unjustly enriched by engaging in the disputed practices, including the assessing of excessive fines. Plaintiffs incorporate by reference those arguments in opposition to all motions as if fully set forth in each Response in opposition to each motion.

F. Plaintiffs Have Set Forth a Claim for Violation of the CPA

In their Response in opposition to the ATS motion (dkt# 45), Plaintiffs set forth their arguments showing why Redflex and ATS had engaged in unfair and/or deceptive conduct in violation of the CPA. Plaintiffs also set forth their arguments showing that they could establish that Defendants' acts caused them injury and damages. Plaintiffs incorporate by reference those arguments in opposition to all motions as if fully set forth in each Response in opposition to each motion.

IV. CONCLUSION

For the above stated reasons and those set forth in Plaintiffs' Responses in opposition to Defendant ATS' motion, the Joint Motion of the Defendant Cities and the Motion of the City of Renton, Defendants' motions to dismiss and for judgment on the pleadings should be denied.

DATED this 9th day of November, 2009.

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CERTIFICATE OF SERVICE

I, Leslie A. Listy, hereby certify that on November 9th, 2009, I electronically filed the

foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

s/Leslie A. Listy___________
Leslie A. Listy, legal assistant