No. 83632-3-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

SAUK-SUIATTLE INDIAN TRIBE

Appellant,

v.

CITY OF SEATTLE,

Respondent.

REPLY BRIEF OF APPELLANT

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I. Summary.

"*The people need to know the truth*." - Billy Frank, Jr.

Seattle City Light's federal license to operate a hydroelectric project in the Skagit Valley affords it no regulatory mandate beyond that of a municipal electrical utility authorized to generate electricity for Seattle. *See*, Brief of Respondent at II(A), at 4. Nevertheless, for decades running, Seattle, doing business as Seattle City Light, has conducted itself in the Skagit River Basin in a manner that can only be described as colonial.

For at least 40 years, Seattle City Light's environmental activities in the Skagit Valley associated with its Skagit Hydroelectric Project have revolved around the avoidance of fish passage. CP 209.

Since its last FERC license was issued in 1995, through a dizzying array of political, legal, financial and other avenues, Seattle City Light ("SCL"), as the proffered substitute for fish passage, has pushed, funded and promoted a Skagit salmon recovery plan focused on converting Skagit Valley farmland into salmon habitat.[1]

[1] One such example can be found in the First Amended Complaint at ¶ 2.15 (CP215). This has largely involved SCL opportunistically buying up smaller, disconnected parcels of Skagit Valley land and removing them from local tax rolls – defunding schools, roads, and much else in the process.

Skagit anadromous species have nevertheless declined precipitously since SCL's 1995 FERC license was issued, with three listings under the U.S. Endangered Species Act. CP 299 ("[T]here have been steep anadromous declines over the period of Seattle's license, with three species listed as threatened under the U.S. Endangered Species Act.")[2]

The only winner in this situation has been the City of Seattle and its subdivision Seattle City Light, which has gotten away with contributing approximately 37 times less funding than the average Pacific Northwest hydropower operator to salmon recovery. CP 231.

Rather than honestly admitting error and changing course, SCL's environmental team has instead chosen to prop up their misbegotten strategy with a campaign of deliberate misrepresentation about the condition of the Skagit, its fisheries resource, and SCL's own environmental performance, blatantly "greenwashing" reality to the detriment of the Tribe and every other Skagit citizen. As the Tribe wrote in the proceedings below:

> By disseminating false and deceptive information, defendant [SCL] has provoked and inflamed racial tension in the Skagit

[2] Meanwhile, at private electrical utility Puget Sound Energy's nearby hydroelectric project on the Skagit-tributary Baker River, fish passage, installed just over a decade ago, has dramatically increased Treaty-harvestable salmon runs. CP 231.

> Valley resulting in the reassignment of blame for the decline of anadromous species to tribal fishermen, undermining their ability to peacefully enjoy the fishing right secured pursuant to the Treaty of Point Elliot. Defendant has further harmed the Tribe by undermining public support for anadromous species restoration, publicly asserting success even when failure and decline were evident, diminishing public faith in our desperate efforts to actually achieve salmon recovery.

Plaintiff's Response In Opposition to Seattle's Motion to Dismiss, 4:5-11 (CP 297).

Reflecting a species of cognitive dissonance, Seattle's political leadership seems unwilling to squarely confront that this is the reality in the Skagit, having long been "informed" otherwise by their own electrical utility.

This captures the very essence of the problem with "greenwashing": the public and their political leaders are unable to legislate responsibly and take corrective actions when all they have is deliberate misinformation on which to operate. Sound and conscientious public policy requires truth, and that is the core reason for this legal action.

II. The Trial Court Erred In Dismissing The Tribe's Nuisance Cause of Action.

The trial court's order under appeal in this matter clearly states the two bases for the trial court's dismissal of the Tribe's nuisance cause of action, namely:

- "There is no allegation that the City's statements amount to advertising to sell a product or increase consumption of a product, as otherwise required by RCW 9.04.010" – thereby by precluding a nuisance *per se* claim. CP 459 (lines 17-18)

- "There is no allegation of how the City's speech is the proximate cause of harassment" – thereby precluding the Tribe's claim that SCL's conduct unreasonably interferes with the Tribe's right to quiet enjoyment of the land, waters and fisheries the Tribe reserved under the Treaty. CP 459 (lines 18-19).

The trial court's order was prepared by SCL's counsel, and generally appears to be a faithful reproduction of the trial court's oral ruling, CP 451:10 – CP 453:18.

As discussed in detail below, these two findings above are the principal bases of the Tribe's assignment of error, because each of these findings is a ruling on the *facts* by the trial court, wholly inappropriate as the basis for a CR 12 dismissal.[3] For this reason alone, the trial court's ruling must be reversed.

a. Contrary To The Trial Court's Ruling, the Tribe's First Amended Complaint Alleges At Length That SCL Was Misrepresenting Its Environmental Performance In Order To Advertise And Improve The Commercial Performance Of a Product.

[3] Judge Adrienne McCoy was a career King County deputy criminal prosecutor prior to her appointment to the King County bench on Oct 1, 2021, a week after this case was filed. https://www.governor.wa.gov/news-media/inslee-appoints-adrienne-mccoy-king-county-superior-court (last visited May 29, 2022).

In its order, the trial court concluded that SCL's conduct doesn't constitute nuisance *per se* because, the order states, the Tribe included "no allegation that the City's statements amount to advertising to sell a product or increase consumption of a product." CP 459. To the contrary, the Tribe pled exactly this, to an extent that seems difficult for any reader to miss:

> Since its 2003 LIHI Low Impact certification, Defendant Seattle has publicly communicated and advertised an extensive level of false and misleading environmental claims regarding its Skagit Project, fish passage, and the LIHI Low Impact certification, information that Defendant knew or should have reasonably known was deceptive and could create an inaccurate understanding on the part of the public as to matters relevant herein. First Amended Complaint ¶ 2.28 (CP 224).
>
> Defendant Seattle adopted as its brand and public slogan the bald assertion that Defendant Seattle is, allegedly, the "Nation's Greenest Utility," prominently displaying logos and claims to that effect on countless websites, materials, and presentations intended for marketing purposes and public consumption. First Amended Complaint ¶ 2.30 (CP225).
>
> Seattle has relentlessly misrepresented to the public that its operations on the Skagit have improved the condition of Skagit anadromous species and the Skagit ecosystem, despite downward trends and Endangered Species Act listings. First Amended Complaint ¶ 2.23 (CP227).
>
> Speaking on camera about Defendant Seattle's statements about salmon numbers on the Skagit below their Skagit Project, thirty-year Seattle City Light ratepayer Lori Winemuller said as follows: "That feels incredibly deceptive to me and irresponsible because [ratepayers] need to know what the impact is," Winnemuller said. "We're not

> getting the full picture here." First Amended Complaint ¶ 2.33 (CP228).
>
> Our Tribe's harm has been shared by the vast number of public electrical power customers and environmental certification recipients that have, in ways far too numerous to practicably assess or calculate, paid for LIHI Low Impact certified power derived from a hydroelectric project that clearly fails to meet LIHI Low Impact standards, values and ethics, their normal commercial defenses against "environmental snake oil" dulled by the overwhelming weight of Defendant Seattle's popularly-understood but entirely self-generated reputation for ESG stewardship in the Skagit ecosystem. First Amended Complaint ¶ 2.38 (CP229).
>
> The harm Plaintiff has experienced has been monetized by the Defendant Seattle and wrongfully transferred into the pockets of each and every Seattle City Light electrical power customer, each and every one of whom pays electrical rates far below the national average, a privilege that rests in significant measure on the immense amounts of "green" money that the Skagit Project generates for Defendant Seattle's power utility – based on a LIHI certification, brand and reputation for environmental responsibility that is wholly unjustified. First Amended Complaint ¶ 2.40 (CP229).

Obviously, the center of the Tribe's First Amended Complaint is the "allegation that the City's statements amount to advertising to sell a product or increase consumption of a product." CP459. It is unclear how the trial court concluded otherwise, given unrebutted evidence that SCL was erecting billboards along interstate highways, taking out advertisements, and spreading false information across the digital landscape - but, at minimum, this is a question of *fact*.

Here, the trial court ruled that the extensive and unrebutted allegations (as well as evidence) regarding SCL's unlawful product advertising were insufficient to show a connection to a commercial product (here, electricity), which is not only untrue but plainly inconsistent with the standards on a CR 12(b) motion to dismiss. To restate the applicable standards on a motion to dismiss:

> Dismissal is warranted only if the court concludes, beyond a reasonable doubt, the plaintiff cannot prove "any set of facts which would justify recovery." *Id.* (citing *Hoffer v. State*, 110 Wash.2d 415, 420, 755 P.2d 781 (1988)). The court presumes all facts alleged in the plaintiff's complaint are true and may consider hypothetical facts supporting the plaintiff's claims. *Id.* A motion to dismiss is granted "'sparingly and with care'" and, as a practical matter, "'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'"

Kinney v. Cook, 159 Wn.2d 837, 843 (2007). The trial court's order rejecting the Tribe's nuisance *per se* claim constitutes clear reversible error.

b. A Nuisance *Per Se* Arises When The Plaintiff States A Claim Involving An Unlawful Activity, As Here.

SCL further argues that its conduct is not a nuisance *per se* despite plain violation of RCW 9.04.010, because (i) SCL has never been criminally charged with false advertising; and (ii) generating electricity through the use of a hydroelectric dam and talking about it publicly is not inherently unlawful. The Tribe

does not dispute either of these propositions, but they are not controlling here. Here, the Tribe alleges that SCL is pursuing an activity that is always unlawful, because it is prohibited by statute, which constitutes a nuisance *per se*:

> A nuisance *per se* is an activity that is not permissible under any circumstances, such as an activity forbidden by statute or ordinance. 17 Stoebuck & Weaver, § 10.3, at 656; see also *Tiegs*, 135 Wash.2d at 13, 954 P.2d 877.

Kitsap County v. Kitsap Rifle & Revolver Club, 184 Wn. App. 252, 277 (2014).

Cases like *State ex rel Bradford v. Stubblefield* are instructive in understanding the distinction between an activity that is lawful and poses a nuisance, and an activity that is always unlawful. 36 Wn.2d 664 (1950). In *Stubblefield*, the Washington Supreme Court pointed out that a fat rendering plant could not be deemed a nuisance *per se* since the law allows fat rendering plants to exist where properly permitted and operated, holding that the fat rendering plant's more bothersome aspects could be abated by the installation of certain improvements. *Id*. In other words, fat rendering plants are not – unlike false and deceptive advertising – inherently unlawful.

Thus, while engaging in a lawful business is not a nuisance *per se*, "[e]ngaging in any business or profession in defiance of a law regulating or prohibiting the same, however, is a nuisance *per se*." *Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 138 (1986).

It is important to draw a distinction here. In the matter before this Court, the Tribe is *not* contending that SCL's hydroelectric project itself is a nuisance. Rather, the Tribe alleges that SCL is violating the false advertising statute, which constitutes a nuisance.

Violation of RCW 9.04.010 constitutes a nuisance *per se* because it is *always* a nuisance to falsely and deceptively misrepresent one's environmental performance in order to sell a product, *i.e.*, it is a form of false advertising prohibited by law. Contrary to SCL's assertion, the party claiming nuisance *per se* need not demonstrate a prior criminal conviction of the statute. Rather, the allegation of violation of the statute is a predicate act, insofar as the violation of the statute demonstrates that the conduct is always prohibited. This is reflected by Washington pattern jury instructions regarding nuisance *per se* actions:

> A statute provides as follows:
>
> (*Insert a brief description of the requirements of the statute*.)
>
> If you find that (*name of defendant)* violated this statute, then you must find that (*name of defendant*) committed a nuisance and that (*name of plaintiff*) has satisfied its burden of proving the first and second propositions found in Instruction (*fill in number of the instruction that is based on WPI 380.05*).

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 380.04 (7th ed., 2022)(Nuisance *Per Se*).

The Tribe's First Amended Complaint alleges that Seattle has engaged in a significant level of false and deceptive advertising, which RCW 9.04.010 makes unlawful, constituting a nuisance *per se*.

The fact that the City of Seattle has failed to prosecute its own power utility is not a bar to the Tribe's nuisance *per se* claim. See *Tiegs v. Watts*, 135 Wn.2d 1, 14 (1998)(fact that a regulating government entity has tolerated a nuisance is not a defense to civil nuisance claim).

c. The Trial Court Erred In Concluding The Tribe Failed To Show That Animus Directed At Its Members Was Proximately Caused By SCL. Not Only Is This A Misreading of the Law, It Is A Question Of Fact Inappropriate For Resolution On A Motion To Dismiss, And, Furthermore, Is Not The Only Fact Alleged In Support Of The Tribe's Nuisance Claim.

Even where an activity isn't a nuisance *per se*, it is still an actionable nuisance if conducted in a manner that unreasonably interferes with others' quiet enjoyment of their property. *Hardin v. Olympic Portland Cement Co*., 89 Wash. 320, 325 (1916).

In its First Amended Complaint, as one example of the unreasonable interference that SCL is creating, the Tribe alleged that SCL's false environmental claims have conveniently shifted blame for species decline from SCL to tribal fishermen, giving

rise to public ire against the Tribe and its members, thereby undermining their ability to quietly enjoy the fishing rights they reserved under the Treaty.

Lost in this self-serving discourse is the reality that the City's powerful electrical utility has actively camouflaged their contribution to the decline of endangered species while resorting to the classic colonial tactic of blame-shifting and falsely accusing tribal members of overfishing. First Amended Complaint ¶ 2.41 (CP 229-30).

SCL contested that the Tribe is being harmed in its motion to dismiss, and, in rebuttal, the Tribe submitted declarations from tribal representatives as well as local Skagit non-tribal residents that fully support the allegation that SCL is causing fear and anxiety among tribal members. *See*, Declarations of Grant Kirby (CP 404), Nino Maltos II (CP 326), Don Moore (CP 335), Matt Steinman (CP 332) and Spencer Roozen (CP 329). SCL submitted no rebutting evidence.

(i) The Trial Court's Failure To Consider The Tribe's Declaration Testimony As Admissible Evidence Was Improper.

Applicable civil rules require that evidence submitted in defense of a motion to dismiss be treated and considered as evidence submitted on a motion for summary judgment:

> If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be

> treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

CR 56(c). Instead, the trial court deemed the affidavits submitted by the Tribe to be merely "illustrative" (CP 451 lines 12-13). This constitutes reversible error.

ii. *Proximate Causation Of Plaintiff's Harm Is a Question For The Jury*.

After failing to consider the Tribe's admissible evidence, the trial court found that the Tribe failed to prove that harm alleged was proximately caused by the City's conduct, dismissing the Tribe's entire nuisance claim on that basis. Trial Court's Order, CP 459 (lines 18-19).

To rule against a party that furnished admissible evidence in favor of a moving party that submitted none would constitute reversible error in the context of a motion for summary judgment, let alone a motion to dismiss in which the trial court is obligated to accept the plaintiff's *allegations* as true and established. The question as to whether the results caused by a defendant's conduct support a nuisance action is plainly a question for the trier of fact. *Tiegs*, 135 Wn.2d at 14 ("The question whether a business created a nuisance and caused damage to crops on adjacent property is one for the jury.")

iii. *The Tribe's First Amended Complaint Makes Clear That Public Ire Directed At Tribal Members Is Only One Component Of The Harm*

To The Tribe And Its Members, Which The Trial Court Ignored.

The trial court's order also operates on the misguided belief that public ire directed at tribal members was the *only* harm alleged by the First Amended Complaint, which is simply not the case. CP 459, lines 19-24. While tribal members' fear and anxiety arising from the public animus that SCL has caused is certainly very real (see declaration testimony cited *supra*), the main thrust of the Tribe's complaint is that SCL's deceptive conduct has deeply damaged the public's understanding of the salmon crisis we face and has undermined public support in general, driving misguided public policy decisions, hampering our ability to preserve and protect the Skagit fisheries resource that sustains the tribe's cultural heritage, health and vital sustenance. As alleged in the First Amended Complaint:

> [T]he misleading and deceptive trade practices by which Defendant Seattle has bolstered its own brand and reputation have come squarely at the expense of the reputation of our people, our waters, and our lands. First Amended Complaint ¶ 237 (CP229).
>
> While Skagit salmon numbers have plummeted, Defendant Seattle has told stories of increasing salmon numbers while contributing the least to environmental performance and claiming the most, undermining public faith in legitimate environmental initiatives through the Skagit Valley and the region. First Amended Complaint ¶ 2.39 (CP229).
>
> Plainly stated, Defendant Seattle is "greenwashing" Skagit-derived electricity to the detriment of indigenous rights, the Skagit fisheries resource, the

> Skagit ecosystem, Defendant Seattle's ratepayers and wholesale customers, countless recipients of various forms of environmental certification, and the American public in general. First Amended Complaint ¶ 2.52 (CP 233).

The trial court did not consider any of this when entering an order of dismissal, constituting clear reversible error.

d. The Trial Court Misapplied The Law. Even A Reasonable *Fear* Of Harm Supports A Nuisance Claim. The Appropriate Test In A Nuisance Case Is Whether The Activity Is Unreasonable When Its Social Utility Is Balanced Against The Harm Produced.

While the Tribe has already documented actual harm through admissible evidence in addition to the allegations in the complaint, Washington courts have furthermore made clear that even a "reasonable fear of harm" supports a nuisance action:

> [C]ontrary to the Club's argument, nuisance can be based on a reasonable fear of harm. "*Where a defendant's conduct causes a reasonable fear of using property, this constitutes an injury taking the form of an interference with property*." *Lakey*, 176 Wash.2d at 923, 296 P.3d 860. "[T]his fear need not be scientifically founded, so long as it is not unreasonable." *Lakey*, 176 Wash.2d at 923, 296 P.3d 860.

Kitsap Rifle & Revolver Club, 184 Wn. App. at 284 (quoting *Lakey v. Puget Sound Energy*, 176 Wn.2d 909 (2013)(bolding added)).

This is so because the test as to whether an activity is a nuisance is not one of proximate causation in the first place (unlike a damages action), but rather asks whether the activity in question is unreasonable when the utility of the activity is

balanced against the harm it is creating. *Kitsap Rifle & Revolver Club*, 184 Wn. App. at 285 ("[W]hether an activity causes actual or threatened harm or a reasonable fear is not the dispositive issue. The crucial question for nuisance liability is whether the challenged activities are reasonable when weighing the harm to the aggrieved party against the social utility of the activity.") This is particularly relevant here, where the Tribe seeks no damages or any other retroactive relief.

SCL attempts to minimize and diminish its inexcusable track record in the Skagit by comparing its conduct to the kind of "mere puffery" one might associate with an overenthusiastic used car salesman, or the "minor annoyance" of a child's sidewalk chalk art. SCL Response Brief at 34, 42.

While SCL's extensive, deliberate and coordinated public campaign of misinformation involving interstate billboards, paid advertising and roadside "interpretive" signage erected at points along the Skagit River is no "mere puffery" or a "minor annoyance" in the first place, the relevant test is not simply about the instrumentality by which the nuisance is produced, but whether, as here, it reflects an activity that unreasonably interferes with another's lawfully-grounded right to quiet enjoyment of their home, property, land, and livelihood. *See*, e.g., *MJD Properties LLC v. Haley*, 189 Wn. App. 963, 970 (2015)(reversing trial court's dismissal of nuisance claim on

summary judgment; genuine issue of material fact existed as to whether neighbor's driveway light constituted a nuisance).

There is quite literally nothing more important or serious for the Tribe than the matters at issue in this litigation, which go to the Tribe's history, culture, economy, quality of life, food security, and health, all of which was reserved by the Treaty in consideration for the peaceful relinquishment of hundreds of thousands of acres of land across the Skagit ecosystem. From the Tribe's perspective, the rights that SCL is undermining with its conduct are considerably more important than, say, the annoying driveway light over which this Court reversed dismissal of a nuisance action in the *MJD Properties* decision, *supra*. As noted by the United States Supreme Court in 1905:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and *which were not much less necessary to the existence of the Indians than the atmosphere they breathed.*

United States v. Winans, 198 U.S. 371, 381 (1905) (emphasis added).

The flippant and dismissive analogies used by Seattle are instructive mostly as to the City's mindset, surprising conduct from a municipality that named itself after the Treaty of Point

Elliott's first signatory and routinely speaks publicly of its deep respect for indigenous rights and the health of our region's anadromous fish species.

As set forth in the factual summary above, Seattle City Light (SCL) seized control of salmon recovery in the Skagit in an effort to avoid its reasonable environmental obligations. Then, when reality intruded in the form of plummeting fish numbers, SCL's environmental team embarked on an intentional program of false and deceptive public information to cover its own tracks – *i.e.*, the subject of this litigation. SCL's conduct has harmed the rights of our Tribe and its members; our ability to restore harvestable levels of salmon and other anadromous species; and the Skagit ecosystem itself. The Tribe asks that the judicial system intervene only by directing SCL to desist from its unreasonable conduct. The extensive resources that SCL is deploying to resist our request, without bothering to deny its conduct, speaks volumes.

e. <u>The Tribe Has Property Interests In the Skagit Ecosystem, Which The Trial Court Found. While SCL Apparently Disagrees, This Is A Question Of Fact Inappropriate For Resolution On A Motion To Dismiss, And Was Not Properly Appealed.</u>

As SCL's response brief points out, the Tribe was recently involved in a dispute in federal district court with the Upper Skagit Indian Tribe over our two tribes' respective rights to

harvest anadromous species in areas surrounding the mouth of the Cascade River, with Upper Skagit arguing for a smaller confluence harvest zone, and Sauk-Suiattle arguing for a larger one. As SCL notes, the federal district court ruled in Upper Skagit's favor, which is currently on appeal before the Ninth Circuit Court of Appeals. SCL Response Brief at 46. On this basis alone, SCL pronounces that the Tribe lacks any property interest whatsoever in the Skagit River and its ecosystem. SCL Response Brief at 43-48.

In its oral ruling, the trial court explicitly recognized that the Tribe has a property interest at stake, at least for the purposes of SCL's motion to dismiss. Trial Court's Oral Ruling, CP 451 at lines 18-25 ("For purposes of this analysis, the Court does find that the Tribe has property rights that are being interfered with.")

As an initial matter, SCL failed to appeal the trial court's finding, and SCL is barred from now raising it. RAP 5.3 (a) (3); RAP 10.3 (a) (4) (appeal must state a separate concise statement of each error a party contends was made by the trial court).

More importantly, SCL is flat wrong in asserting that the Tribe has no property interest at issue. As the Declaration of Grant Kirby reflects, the Tribe has Treaty-protected rights to fish in the Cascade and Sauk Rivers, which are major tributaries to the Skagit located high in the Skagit Basin. CP 404. Anadromous species in the Cascade and Sauk depend heavily on

the condition of the Skagit River. *Id*. Furthermore, because of the Tribe's right to fish in the confluence zone of the Cascade and Sauk, the Tribe's harvest to a certain degree relies on Skagit anadromous species that use the Skagit mainstem. *Id.*

Taking snippets of this complex matter out of context, SCL attempts to leverage an ongoing intertribal dispute over Treaty fishing areas into a false proposition that the Tribe lacks any rights or property interest whatsoever in the Skagit River. Therefore, SCL claims, no nuisance cause of action is appropriate.

SCL's bold-but-uninformed statements contradict the trial court's ruling but weren't appealed, and, more importantly, are simply inaccurate. At best, SCL's assertion constitutes an issue of material fact that would have been inappropriate to resolve against the Tribe on summary judgment, let alone on a motion to dismiss.

f. <u>As The Trial Court Found, The Tribe's Complaint Is Not A Collateral Attack On SCL's 1995 FERC License.</u>

While the Tribe's First Amended Complaint discusses some of the details of SCL's FERC license, it is simply background information necessary to appropriately understand the egregious extent to which SCL has publicly misrepresented the facts. Nevertheless, SCL uses this to claim that the Tribe is, allegedly, engaging in a collateral attack on SCL's 1995 FERC

license. As the basis for this specious argument, SCL asserts that the Tribe's acceptance of the 1990 settlement agreement underpinning SCL's 1995 FERC license precludes the Tribe from seeking redress for SCL's false and deceptive advertising and other matters alleged in the complaint. SCL Response Brief at 60.

As an initial matter, the Superior Court specifically concluded that the Tribe was *not* seeking relief related to the FERC proceeding.

> [T]he complaint doesn't lead the Court to believe it's claiming anything about any kind of relief or asking for any relief as to the FERC proceeding. So, um, I don't think I have to decide that, because that's not part of the complaint.

Trial Court's Oral Ruling, CP 449, lines 12-15. SCL failed to appeal this conclusion, and is barred from now raising it.

Unable to persevere in the face of SCL's exorbitant political, legal and economic power, the Tribe had little other option but to accept the settlement that SCL handed out in 1990, which did not include fish passage. Echoing a disreputable history of trade beads and abuse of superior bargaining position resulting in fundamentally unfair transactions, SCL argues that a one-sided deal it engineered at a time when the Tribe was in an oppressively disadvantaged position and far less empowered to

assert its interests should now preclude the Tribe from protecting its sovereign rights against SCL's ongoing conduct. SCL's argument on this topic—made at pp. 5-6 of its response brief—is misleading at best.

As the trial court correctly held, the issues raised by the Tribe in this action stand independent of SCL's FERC license. To cite one example, Seattle's Low Impact Hydropower Institute (LIHI) "green power" certification – a valuable mark in commerce wholly independent of SCL's FERC license – was obtained by SCL through deceit, artifice and misrepresentation. *See,* First Amended Complaint ¶ 2.43 (CP 230-31). A request that SCL be ordered to stop using the LIHI mark until it is recertified through an honest, credible and transparent process is one of the Tribe's main requests for relief in this matter, relief that is *not* dependent on SCL's FERC license.

As such, this is not about a collateral challenge to SCL's FERC license. Rather, the Tribe brought this action asking that SCL be required to stop misrepresenting its environmental track record – so that political, social, regulatory and other systems and institutions can appropriately constrain SCL's appalling conduct in the Skagit.

III. As To The Tribe's CPA Claim, Seattle City Light Is Not Operating As A Municipal Entity In The Skagit, And Should Not Be Allowed To

Avail Itself Of The Law's Protection For Municipal Entities.

SCL attempts to hide behind the Washington Supreme Court's decision in *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty* for the proposition that any activity associated with a municipal government is flatly exempt from the Washington Consumer Protection Act's prohibition on false and deceptive advertising. 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

Municipal entities are subject to democratic processes, which provides a significant backstop to predatory and other practices prohibited by the CPA. But this backstop is not present in the present situation, where SCL is effectively operating as a colonial power far from its own jurisdiction, in a distant, rural valley whose citizens have neither right nor meaningful ability to engage in Seattle's decisions and elections.

Yet, paradoxically, the only way to change the unacceptable *status quo* that Seattle's power utility has created in the Skagit is to appeal to Seattle's political leadership, who, as a result of SCL's long-standing public misinformation campaign, possess a wildly inaccurate understanding of the situation.

As SCL would have it, SCL has the right to lie with impunity, and the Tribe has no right under the laws of the State of Washington to seek redress. The *Washington Natural Gas* decision does not expressly extend a municipal CPA exemption

to business units of municipal entities operating far outside their own jurisdiction. To avoid manifest injustice, this Court should decline to create one.

IV. Conclusion.

The trial court's order is based on factual findings regarding the Tribe's nuisance claims inappropriate on a motion to dismiss, and furthermore misapplies the law. The trial court's dismissal of the Tribe's nuisance claim must be reversed. The Court should also reverse the trial court's dismissal of the Tribe's Consumer Protection Act claim.

RESPECTFULLY SUBMITTED this 3rd day of June 2022.

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CERTIFICATE OF SERVICE

I certify that the foregoing Opening Brief of Appellant was filed with the Clerk on the above date using the Court's electronic filing system with a copy served upon all counsel of record.

S/Jack W. Fiander

CERTIFICATE OF COMPLIANCE

I certify per RAP 18.7 that the foregoing Opening Brief of Appellant comprised 5,132 words, excluding excluded portions.

S/Jack W. Fiander

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June 03, 2022 - 11:47 AM

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