The Honorable Marshall L. Ferguson
Hearing Date and Time: July 11, 2025
Without Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. THE KROGER CO., ET AL., Defendants.	NO. 24-2-00977-9 SEA STATE'S PETITION FOR ATTORNEYS' FEES AND EXPENSES

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I. RELIEF REQUESTED

This Court awarded the State "its costs, including attorneys' fees, under RCW 19.86.080(1)." Dkt. 946, p.118, ¶424. And it ordered Defendants, The Kroger Co., Albertsons Companies, Inc., Albertson's Companies Specialty Care, LLC, Albertson's LLC, Albertson's Stores Sub LLC, and Kettle Merger Sub, Inc. to pay the State's "reasonable costs and attorneys' fees, as provided by law." Dkt. 946, p.121. Now this Court must determine the reasonable and proper amount under RCW 19.86.080. The State respectfully requests $32,446,758.78:

Fees and Expenses Requested	Amount Requested
AGO Attorneys' Fees (through December 31, 2024, excluding fees related to the State's Cost Bill and Fee Petition)	$11,002,347.20 (inclusive of a 2.0 lodestar multiplier)
AGO Professional Staff Fees (through December 31, 2024, excluding fees related to the State's Cost Bill and Fee Petition)	$1,191,746.16 (inclusive of a 2.0 lodestar multiplier)
AGO Attorneys' Fees Related to Cost Bill and Fee Petition (through December 31, 2024)	$124,197.30
AGO Professional Staff Fees Related to Cost Bill and Fee Petition (through December 31, 2024)	$2,812.40
MTO Attorneys' Fees (through December 31, 2024)	$9,058,297.50
MTO Professional Staff Fees (through December 31, 2024)	$814,607.00
Testifying Experts' Fees	$6,236,622.69
Trial Technology Team (Prolumina)	$161,950.50
Electronic Discovery Platform (Everlaw)	$3,851,401.46
State's Statutory Costs, per its Cost Bill	$2,776.57
TOTAL:	$32,446,758.78 (including 2.0 lodestar multiplier for AGO time unrelated to the Cost Bill and Fee Petition)

These costs, fees and expenses are reasonable under the circumstances of this consequential, heavily litigated, and fast-paced merger challenge—which was tried only nine months after the State filed its Complaint. As the State's supporting declarations attest, the case's complexity, the volume of discovery, and the need to protect Defendants' and third parties' competitively sensitive information required significant resources. Moreover,

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Defendants' approach to litigating this case was to contest every material issue, requiring the State to devote significant resources to proving its case. The State's requested hourly rates are consistent with rates prevailing in this community. The State is confident that these rates are at or below those that Defendants paid their counsel. The State does not request fees for duplicative, unproductive, and clerical time, and time related to issues the State chose not to advance. The State does not request reimbursement for a wide swath of its actual expenses, including consulting expert time and travel expenses paid to its outside counsel and experts. The remaining costs, fees and expenses the State requests were appropriate and necessary, and the State respectfully requests that the Court order Defendants to pay them, jointly and severally, and order that 12% per annum interest applies to the Court's award.

II. STATEMENT OF FACTS

This Court ruled for the State by concluding that Defendants' proposed merger violates RCW 19.86.060 (¶423), permanently enjoining it (¶425), and awarding the State reasonable costs and attorneys' fees under RCW 19.86.080(1) (¶424). Dkt. 946, p.118. The Court entered judgment on February 26, 2025, and directed the State to file this Petition to establish the amount of the award. Dkt. 950. The State timely filed its CR 54(d)(1) Cost Bill for statutory costs under RCW 4.84.010, Dkt. 951, and now files its CR 54(d)(2) Petition for Attorneys' Fees and Expenses and supporting declarations and documentation pursuant to the Court's briefing schedule. Dkt. 950. Before filing this Petition, the State conferred with Defendants to attempt to reach agreement on the proper amount of the State's fees and costs, but the parties have not yet reached an agreement.

The Declaration of Jonathan Mark in Support of the State's Petition for Attorneys' Fees and Expenses demonstrates that the requested $22,194,007.56 in attorney fees and $10,249,974.65 in expenses reflect necessary work conducted by appropriate personnel. Mark Decl. ¶¶ 27–56, 68–96. Before submitting this request, Assistant Attorneys General ("AAGs") at the Attorney General's Office ("AGO") reviewed all hours billed by AGO timekeepers and

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by Special Assistant Attorneys General ("SAAGs") from Munger, Tolles & Olson, LLP ("MTO") to ensure that it is not requesting fees for duplicative, unproductive, and clerical time, and time related to issues the State chose not to advance, even though all such time was spent supporting this litigation. Mark Decl. ¶¶22–25, Ex. A (Individual); ¶30–31, Ex. B (AGO Staff); ¶¶52–53, Ex. C (MTO Staff). Likewise, MTO reviewed its invoices prior to submission to the State to ensure that its time entries were for work that was reasonably necessary for this litigation. Olasa Decl. ¶¶6, 8. The State does not request reimbursement for certain other MTO expenses, such as food, lodging, and transportation expenses. Mark Decl. ¶53.

A. The Merger Challenge

The investigation and litigation of Defendants' proposed merger ("Proposed Transaction") was swift and complex. Throughout its investigation and litigation, the State obtained over 96 million pages of documents, representing over 50 terabytes of document productions, plus an additional 7 terabytes of structured data including publicly available data, such as Nielsen's TDlinx, and proprietary data from Defendants and third parties, such as sales data, margins data, and loyalty card data. Mark Decl. ¶8.

In November 2022, the State began investigating the Proposed Transaction. In doing so, it issued Civil Investigative Demands ("CIDs"), conducted interviews, and reviewed troves of data. Mark Decl. ¶¶5–9. It interviewed grocery retailers, academics, suppliers, manufacturers, farmers, union representatives, pharmacies, and industry associations to determine the Proposed Transaction's potential impacts. Mark Decl. ¶9.

The State hired MTO as SAAGs to assist the AGO because MTO has tried merger cases in the past, including on behalf of State Attorneys General, and it would augment the State's resources to litigate a case of this magnitude. Mark Decl. ¶50. The AGO's Antitrust Division has only fifteen attorneys (including management), nine non-attorney professional legal staff, and one economist. Mark Decl. ¶13. It was infeasible for the State to staff all AAGs

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and other staff to this case because some were assigned to other ongoing cases and were unavailable to work on this matter. Mark Decl. ¶14.

In January 2024, the State filed suit. Dkt. 1. Thereafter, the State served interrogatories, requests for production and requests for admission, issued subpoenas, and took and defended fact and expert depositions. Mark Decl. ¶7. The State participated in over 70 fact depositions and 9 expert depositions in a matter of weeks, sometimes having to call on colleagues from other AGO divisions to help. Mark Decl. ¶7. The State met-and-conferred with Defendants and third parties for hours to limit the Court's involvement in pre-trial disputes, including narrowing discovery requests, CR 30(b)(6) topics, subpoenas, and, when practicable, accommodating Defendants' requests to coordinate certain discovery matters with parallel actions pending in other courts. Mark Decl. ¶7. The State's ability to collaboratively work through issues with Defendants and third parties saved this Court from being burdened with discovery disputes. Mark Decl. ¶7. This investment in labor during the expedited discovery process was made possible because the State divided discovery tasks between AAGs and SAAGs. Mark Decl. ¶7.

B. Expert and Professional Services

The State retained both consulting experts and testifying experts. Mark Decl. ¶8, ¶¶68–71. The State retained several consulting experts to help it analyze the case, determine which arguments to pursue, and identify any potential weaknesses. Mark Decl. ¶69. The State is ***not*** requesting fees for consulting experts ***nor*** for attorney and non-attorney time spent working with consulting experts. Mark Decl. ¶69, ¶80. The State ***is*** requesting fees for testifying experts and for attorney and non-attorney time spent working with them. The State's testifying experts are Dr. Nitin Dua (an antitrust economist); Richard Collison (a grocery information technology systems expert); Joseph Welsh (a grocery industry expert); and Dr. Kusum Ailawadi (a marketing professor). Mark Decl. ¶¶70–77. Defendants deposed these experts, and the State worked with each expert in advance of their testimony. Mark Decl. ¶¶70–77. The State also retained Dr. David Balan, an antitrust economist who consulted on efficiencies, wrote a report,

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was deposed, and was prepared to testify. Mark Decl. ¶¶78–79. The State is requesting fees for Dr. Balan, who would have testified for the State if Defendants had carried their burden of proof on efficiencies. Mark Decl. ¶71. The State is *not* requesting travel expenses for its experts, although it has paid its experts for travel expenses. Mark Decl. ¶71.

The State also respectfully seeks to recover $161,950.50 for expenses paid to its trial technology team, Prolumina, Mark Decl. ¶¶81–91, Exs. J–L, and $3,851,401.46 for its electronic discovery platform, Everlaw. Mark Decl. ¶¶92–96, Ex. M. These expenses were reasonable and necessary for the successful outcome in this case.

C. The State's Motions Practice and Trial Presentation

The State requests fees for motions it brought and defended against. Mark Decl. ¶¶57–64. The State has declined to request fees for some of the motions that it researched and drafted but ultimately chose not to bring. Mark Decl. ¶57. The State is requesting fees for some contingencies that it had to prepare for during the litigation, such as the possibility of needing to bring a motion for a preliminary injunction. Mark Decl. ¶57.

The State prevailed on Defendants' motion to dismiss, Dkt. 157, and requests fees for defending against it. Mark Decl. ¶58. It involved creative constitutional arguments, novel Consumer Protection Act ("CPA") interpretation questions, and remedies arguments that reverberated throughout the litigation. Mark Decl. ¶58. Responding to it involved extensive legal research, thoughtful writing, and multiple moot courts. Mark Decl. ¶58.

The State brought and defended against several motions in limine and is requesting fees for them. Mark Decl. ¶¶59–64. The State overcame Defendants' motions to preclude deposition designations, 9/10/24 Tr. 104:9–17, and to exclude Dr. Dua's testimony. *id.* at 154:8–55:2. The State requests fees for defending against these motions. Mark Decl. ¶64.

The State's motions in limine helped this Court frame issues and efficiently adjudicate the case. Mark Decl. ¶59. This Court granted the State's motion regarding Defendants' non-binding promise to lower prices. 9/10/24 Tr. 52:13–15. Although this Court reserved ruling on

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the State's motion to exclude material covered by Defendants' privilege assertions, *id.* at 34:15–35:13, the motion built a solid framework of understanding upon which the parties and the Court relied during the trial. Mark Decl. ¶61. While this Court denied the State's motion to exclude evidence that Defendants failed to produce, such as the Target Corporation deposition, it left the door open for the State to re-raise the issues. 9/10/24 Tr. 73:21–74:12. The State also prevailed when Defendants conceded they would only propose a modified divestiture package if, after trial, the Court found only "a handful of places where there are competitive concerns," *Id.* at 65:13–15, and that Defendants would only offer a modified divestiture package to the State "outside of court." *Id*. at 65:21–25. Finally, although this Court denied the State's motion to exclude Mr. Galante's testimony, it recognized the arguments as "great points [for] cross examination"; thereby, the State educated the Court on the nature of and potential issues with Mr. Galante's testimony, focusing the witness at trial. 9/10/24 Tr. 129:5–30:17; Mark Decl. ¶63. Indeed, the Court's findings and conclusions scantily cite his testimony. Dkt. 946. One of the rare times he is cited it is to indicate that "[e]ven Defendants' diligence expert had not seen the advice from Bain warning of the likelihood of a 20%+ rebannering sales detriments." Dkt. 946, p.72, ¶247. Although the State did not prevail on the motion pre-trial, the State's motion successfully persuaded the Court on the issue overall. Mark Decl. ¶63.

The trial lasted just over three weeks. The State examined dozens of witnesses, submitted deposition designations, and offered voluminous exhibits, many of which needed careful redactions to protect competitively sensitive information. Mark Decl. ¶12. This Court commented on the number of witnesses, depositions, exhibits, and the over 3,600-page record. 12/10/24 Tr. 4089:10–15. To try a case of this import and magnitude requires legal professionals with a variety of skill sets, and the State seeks recovery for their time performing legal work that enabled the State to prevail in this case. Mark Decl. ¶12.

Finally, the State requests fees for the preparation of the State's Cost Bill and Fee Petition through December 31, 2024, in the amount of $128,794.70. Mark Decl. ¶65. The State

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anticipates additional fees related to this Petition that post-date December 31, 2024, and will request additional post-trial and Petition-related fees in its Reply. Mark Decl. ¶67. The State has obtained preliminary timekeeping reports for January and February 2025. Mark Decl. ¶67. The State has not yet reviewed each timekeeping entry to determine whether it is chargeable. Mark Decl. ¶67. The total number of hours that the AGO spent on this matter during January 2025 is 313.2 hours, divided among 13 timekeepers, for a current total of $126,473.60 before reviewing for chargeability. Mark Decl. ¶67. The total number of hours that the AGO spent on this matter during February 2025 is 332.10 hours, divided among 12 timekeepers, for a current total of $130,427.10 before reviewing for chargeability. Mark Decl. ¶67.

D. The State's Reasonable Fees and Expenses

The State requests fees at reasonable rates. The State's requested rates are well within the rates prevailing in the community for similar services by timekeepers of reasonably comparable skill, experience, and reputation, and are reasonable in the legal community for work of similar complexity. Mark Decl. ¶29. The Mark Declaration contains a table detailing each AGO and MTO timekeeper's name, position, rate, and their total hours billed, total hours requested, total hours related to the Fee Petition, total amount requested (excluding hours related to the Fee Petition and the State's requested multiplier), total hours requested related to the Fee Petition, and total amount requested (including hours related to the Fee Petition and the application of the State's requested multiplier on non-Fee Petition hours) through December 31, 2024. Mark Decl. ¶27. The State's Declarations in Support of the State's Petition for Attorneys' Fees and Expenses detail the experience supportive of each timekeeper's rates and attach contemporaneous timekeeping entries for each timekeeper from November 1, 2022 through December 31, 2024: Jonathan Mark; Amy Hanson ("Hanson Decl."); Paula Pera ("Pera Decl."); Tyler Arnold ("Arnold Decl.") and ("Arnold Supp. Decl."); Valerie Balch ("Balch Decl."); Ashley Locke ("Locke Decl."); Helen Lubetkin ("Lubetkin Decl."); Jessica So ("So Decl."); Miriam Stiefel ("Stiefel Decl."); and Kuruvilla Olasa ("Olasa Decl.").

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Each timekeeper's work was necessary, and each timekeeper contributed their unique skills to the case, enabling the State to prevail at trial. Mark Decl. ¶27. The qualifications and billing entries of non-attorney AGO timekeepers, AGO timekeepers outside of the Antitrust Division, and AGO timekeepers who are no longer employed by the AGO are detailed in the Mark Declaration. Mark Decl. ¶¶31–42, Ex. B. The qualifications of MTO timekeepers are detailed in the Olasa Declaration. Olasa Decl. ¶¶11–35. The MTO billing entries have been reviewed by AAGs, and the State is not seeking recovery of some of the fees that it has already paid to MTO. Mark Decl. ¶¶50–56, Ex. C.

III. ISSUE STATEMENT

Issue: This Court has awarded the State "its reasonable costs and attorneys' fees, as provided by law" and "any such other relief as the Court may deem just and proper." Dkt. 946, p.121. Are the State's requested costs and attorneys' fees and expenses reasonable, just, and proper for this Court to award?

Short Answer: Yes, this Court should award the State its requested costs and attorneys' fees and expenses because they are reasonable and were necessary to the State's successful enforcement of RCW 19.86.060.

IV. EVIDENCE RELIED UPON

The State relies upon the authorities cited herein; the pleadings and papers on file in this action; and the Mark, Hanson, Pera, Arnold, Balch, Locke, Lubetkin, So, Stiefel and Olasa Declarations and the exhibits attached thereto.

V. AUTHORITY

"Awarding the State its fees and costs after a CPA action will encourage an active role in the enforcement of the CPA, places the substantial costs of these proceedings on the violators of the act, and will not drain the State's public funds." *State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 38–39, 436 P.3d 857 (2019) (cleaned up) (quoting *State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 314–15, 553 P.2d 423 (1976) (*Ralph Williams' II*)). "[T]he purpose of the fee award is to encourage active enforcement of the Consumer Protection Act and . . . an award of fees will be overturned only for a manifest abuse

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of discretion." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (citing *Ralph Williams' II*, 87 Wn.2d at 314–15). Under RCW 19.86.080(1), prevailing parties "*may, in the discretion of the court*, recover the costs of said action including a reasonable attorney's fee." RCW 19.86.080(1) (emphasis added). This Court has already exercised its discretion and awarded the State costs and fees, Dkt. 946, p.118, ¶424, and now must determine the components and amount of the award.

A. This Court Has Broad Discretion to Award the State Fees it Deems Reasonable

Trial judges have "broad discretion in determining the reasonableness of an award" and will not be reversed absent a showing they "manifestly abused [their] discretion." *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001) (citations omitted). Trial courts may award attorneys' fees "when authorized 'by contract, statute, or a recognized ground in equity.'" *Berryman v. Metcalf*, 177 Wn. App. 644, 656, 312 P.3d 745 (2013) (quoting *Cosmo. Eng'g Grp., Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 297, 149 P.3d 666 (2006)). This Court should exercise its discretion and award the State the fees and expenses that it necessarily incurred in bringing this case. *See* Mark Decl. ¶15.

In interpreting RCW 19.86.080, appellate courts consistently decline to limit the traditional equity powers of the courts because RCW 19.86.920 instructs courts to "liberally construe[] [the CPA] that its beneficial purposes may be served." *See State v. Ralph Williams' Nw. Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 277–78, 510 P.2d 233 (1973) (*Ralph Williams' I*) ("Although a restrictive interpretation of RCW 19.86.080 could be used to limit this authority, we are statutorily required to provide a liberal construction of the act's provision (RCW 19.86.920), and decline to limit the traditional equity powers of the court."); *StarKist Co. v. State*, 25 Wn. App. 2d 83, 94, 522 P.3d 594 (2023) (acknowledging that RCW 19.86.080 is a broad grant of authority, declining to limit the traditional equity powers of the court, and noting RCW 19.86.920's liberal construction directive). *See also Nat'l Sur. Corp. v. Cadet Mfg. Co.*, 132 F. App'x 711, 712–13 (9th Cir. 2005) (unpublished) (noting "the Washington

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CPA defines costs to include fees" and remanding for a fee award under RCW 19.86.090 when a CR 68 offer of judgment included "costs").[1]

Courts that exercise their discretion and award the State fees and costs consistent with the statutorily articulated policy of encouraging active CPA enforcement are upheld on appeal. *See, e.g.*, *Living Essentials*, 8 Wn. App. 2d at 39. In *Living Essentials*, the Court of Appeals affirmed the trial court's decision to award the State attorneys' fees and costs based on the trial court's finding that the "lengthy and complex nature of the litigation" supported the award because it "will help to encourage the attorney general's active role in CPA enforcement actions." *Id.* This Court should exercise its discretion, base its decision on the statutorily articulated policy of encouraging CPA enforcement, restore the State to its status quo ante, and award the State its requested fees and expenses.

B. The State's Requested Fees Are Reasonable

The State's requested fees are reasonable, considering the stakes of the case, the complexity of the subject matter, the scope of the record, the accelerated schedule between filing and trial, and the resources Defendants expended in their attempt to defend the Proposed Transaction. To determine a reasonable fee in a CPA case, "the court starts with the 'lodestar' calculation," which includes "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *State v. Mandatory Poster Agency*, 199 Wn. App. 506, 528, 398 P.3d 1271 (2017) (*Mandatory Poster*) (citations and quotations omitted). The lodestar calculation is, in principle, "grounded specifically in the market value of the property in question—the lawyer's services." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993) (citations and quotations omitted). Here, the State's request is for only the hours it reasonably spent and only at rates reasonable in the community for commensurate legal work.

[1] This unpublished decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1; *Crosswhite v. Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017). This authority applies to each unpublished opinion the State cites.

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The State's request is reasonable in relation to the stakes of the case. *See id.* at 150 ("While the amount in dispute does not create an absolute limit on fees, that figure's relationship to the fees requested or awarded is a vital consideration when assessing their reasonableness."). Here, Defendants valued the Proposed Transaction at around $24.6 billion. Hanson Decl. ¶18, Ex. R, p. 408, 521 (Verified Am. Compl., *Albertsons Cos., Inc. v. the Kroger Co.*, No. 2024-1276-LWW (Del. Ch. Feb. 9, 2024)). Defendants valued the divestiture package's total maximum purchase price at $2.525 billion. Hanson Decl. ¶18, Ex. R, p.449. News outlets reported that, as of Summer 2024, Defendants spent over $800 million in an attempt to consummate the Proposed Transaction. Hanson Decl. ¶14, Ex. F, p.85 (Leah Nylen & Jaewon Kang, *Kroger and Albertsons Spend More Than $800 Million on Merger Fees*, Bloomberg (Aug. 13, 2024)), Ex. G, p.87–89 (Timothy Inklebarger, *Kroger, Albertsons have spent $864 M, so far, on acquisition effort*, Supermarket News (July 31, 2024)), Ex. H, p.95–100 (Dan Monk, *Kroger and Albertsons spent $864M so far on merger-related costs*, WCPO (July 29, 2024)). Since then, three trials have taken place. In its Amended Complaint against Kroger following Defendants' loss in this Court, Albertsons claims it and its shareholders alone "spent hundreds of millions of dollars in preparing for the Merger." Hanson Decl. ¶18, Ex. R, p.362. Albertsons also alleges the "$600 million termination fee" was "less than 2.5% of the total merger consideration." Hanson Decl. ¶18, Ex. R, p.370. The State's requested fees are modest in comparison to the amount in dispute. *See Scott Fetzer Co.*, 122 Wn.2d at 150.

The State's requested rates and hours are reasonable. Mark Decl. ¶¶27–42, 50–67.

1. The State's rates are reasonable

The requested AGO and MTO hourly rates are reasonable given the level of skill required, time limitations, high stakes, and prevailing rates in the legal community. To determine whether rates are reasonable, Washington courts consider an attorney's established billing rate because "that rate will likely be a reasonable rate." *Bowers*, 100 Wn.2d at 597. Courts may also "consider the level of skill required . . . , time limitations . . . , the amount of

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the potential recovery, the attorney's reputation, and the undesirability of the case," *id.*, and "the hourly rate of opposing counsel." *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995) (*Absher*) (citation omitted). The factors contained in RPC 1.5(a) also inform the reasonableness of a fee.[2]

a. AGO Rates

The AGO uses a modified version of the *Laffey* Matrix to set its hourly billable rate for its attorneys, paralegals, and investigators. Mark Decl. ¶28. The *Laffey* Matrix is a schedule of fees that courts use to set reasonable attorney rates. *See Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984). The AGO used the *Laffey* Matrix and the U.S. Bureau of Labor Statistics information to create an AGO version of the *Laffey* Matrix because the *Laffey* Matrix is based on salary data from the District of Columbia. Mark Decl. ¶28. The AGO version has separate rates for different regions in the state including Seattle, Tacoma/Bellevue, Spokane, Olympia/Tumwater, Vancouver, and an "other" region used for any city not mentioned above. Mark Decl. ¶28. Relevant to this case, the rates for Seattle-based attorneys are reduced from the *Laffey* Matrix by 5% to account for the lower cost of living in Seattle compared to Washington, D.C. Mark Decl. ¶28.

Courts across the country have awarded government attorneys fees based on the *Laffey* Matrix. In *Judicial Watch, Inc. v. U.S. Department of Justice*, the district court explained, "For public-interest or government lawyers who do not have customary billing rates, courts in [the D.C.] circuit have frequently employed the '*Laffey* Matrix,' a schedule of fees based on years

[2] Those factors are: "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; (8) whether the fee is fixed or contingent; and (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices."

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of attorney experience." 774 F. Supp. 2d 225, 232 (D.D.C. 2011). *See also Elec. Priv. Info. Ctr. v. DHS*, 197 F. Supp. 3d 290, 295 (D.D.C. 2016) (noting that the *Laffey* Matrix is over 30 years old and using an updated version as a starting point); *People for the Ethical Treatment of Animals v. NIH*, 130 F. Supp. 3d 156, 166 (D.D.C. 2015) ("PETA calculated its fee application using *Laffey* rates."); *Elec. Priv. Info. Ctr. v. DHS*, 999 F. Supp. 2d 61, 70–72 (D.D.C. 2013) (chiding the *Laffey* Matrix drafters for not listing the rate for an attorney with less than one year of experience, but computing an appropriate rate). In the decades since the *Laffey* Matrix was first developed, the U.S. District Court for the District of Columbia has acknowledged, "[t]o account for inflation, competing updated Laffey Matrices have been developed" and "a fee applicant may supplement the proffered fee matrix with additional evidence" such as "surveys . . . ; affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases; and evidence of recent fees awarded by the courts or through settlement to attorneys with comparable qualifications handling similar cases." *Alavi v. Bennett*, No. 15-2146 (RBW), slip op. at 12–13 (D.D.C. Dec. 10, 2024) (citations, quotations, and alternations omitted).

Courts sometimes make an upward departure from the *Laffey* Matrix. Recently, the Western District of Washington declined to follow the *Laffey* Matrix, and instead set fees based on counsels' declarations regarding the prevailing rates in Western Washington, awarding plaintiffs rates between $450 and $850 per hour. *Koonwaiyou v. Blinken*, 724 F. Supp. 3d 1222, 1236 (W.D. Wash. 2024). In *FTC v. Shkreli*, the court awarded AAGs for California, Illinois, Ohio, and Pennsylvania fees at rates ranging from $426 to $731 per hour in an antitrust case in which the states won injunctive relief. Hanson Decl. ¶12, Ex. B, p.62 (Pl. States Suppl. Summ. of Att'ys' Fees and Decls. at 5, *FTC v. Shkreli*, No. 1:20-cv-00706-DLC (S.D.N.Y. May 2, 2022), ECF No. 911), Ex. C, p.64 (J. for Att'ys' Fees at 1, *FTC v. Shkreli*, No. 1:20-cv-00706-DLC (S.D.N.Y. June 13, 2022), ECF No. 919). As long ago as 1984, courts have awarded antitrust attorneys employed by state attorneys general offices attorneys' fees "at

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rates consistent with fees charged by similarly skilled attorneys in private practice." *Arizona v. Maricopa Cnty. Med. Soc'y*, 578 F. Supp. 1262, 1271 (D. Ariz. 1984) (awarding to "members of the Attorney General's Antitrust Staff [who] capably handled th[e] case" fees equivalent to those charged by attorneys in private practice).

Federal and state courts in Washington have awarded the AGO similar rates to those requested here in past state enforcement cases. For example, in *State v. CLA Estate Services, Inc.*, the court awarded AGO paralegals $158 per hour, AGO investigators $222 per hour, and AAGs between $396 and $582 per hour, and in doing so explicitly approved of using the *Laffey* Matrix. Hanson Decl. ¶16, Ex. L, p.173–77 (Findings of Fact and Conclusions of Law Regarding Pl.'s Mot. for Fees and Costs, *State v. CLA Estate Servs., Inc.*, No. 18-2-06309-4 (Wash. Super. Ct. Mar. 9, 2021)). Similarly, in *Washington v. The Geo Group, Inc.*, the court awarded an AGO paralegal $136 per hour, an AGO investigator $191 per hour, and AAGs between $320 and $417 per hour. Hanson Decl. ¶16, Ex. M, p.188 (*Washington v. The Geo Grp., Inc.*, No. 3:17-cv-05806-RJB, 2021 WL 5907799, at *4 (W.D. Wash. Dec. 14, 2021) (unpublished)). Most recently, in February 2024, in *Washington v. Providence Health & Services Washington*, the court approved of the *Laffey* Matrix and awarded an AGO paralegal $158 per hour and AAGs between $466 to $543 per hour. Hanson Decl. ¶16, Ex. S, p.549–551 (Findings of Fact and Conclusions of Law on State's Mot. for Fees at 5–6, *Washington v. Providence Health & Servs. Wash., et al.*, No. 22-2-01754-6 (Wash. Super. Ct. Feb. 9, 2024)).

The State's request of $158 per hour for paralegals and law clerks, $222 per hour for investigators, and $323 to $543 per hour for AAGs is consistent with these examples. Therefore, this Court should award the State its requested rates because they are reasonable.

b. MTO Rates

Courts analyzing and setting attorneys' fees in merger cases look to the national market for antitrust attorneys due to the doubly specialized nature of the practice—counsel must be proficient in both the complex field of antitrust law and trial advocacy. *See Saint Alphonsus*

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Med. Ctr.- Nampa, Inc. v. St. Luke's Health Sys., Ltd., No. 1:12-CV-00560-BLW, 2016 WL 1232656, at *4–5 (D. Idaho Mar. 28, 2016) (unpublished) (*St. Luke's*), *judgment corrected*, No. 1:12-CV-00560-BLW, 2016 WL 7017401 (D. Idaho Nov. 29, 2016) (unpublished).[3] In *St. Luke's*, the court assessed attorneys' fees in a successful merger challenge brought by both state and federal enforcers and by private plaintiffs. *Id.* at *1–2. In analyzing the reasonableness of private plaintiffs' requested fees, the *St. Luke's* Court remarked that "both sides hired highly-compensated specialty attorneys whose rates are set in a national market." *Id.* at *4. It even awarded travel costs for out-of-state counsel because the case "presented complicated issues in the health care antitrust field, and it was reasonable to hire counsel that specialized in this area." *Id.* at *4–5. Here, the State does not seek travel costs even though the case required MTO to travel to Washington throughout the litigation. Mark Decl. ¶53.

MTO's rates are reasonable because they are consistent with the prevailing rates charged by nationally recognized litigation counsel. When the AGO chose to hire MTO, it determined that MTO's rates were consistent with the prevailing rates charged by nationally recognized litigation counsel. Mark Decl. ¶50. MTO's rates in this matter are also significantly discounted. Olasa Decl. ¶11.

In Washington, a trial court abuses its discretion by limiting attorneys' fees "to the amount customarily charged" in the county in which the trial was held if it "fail[s] to provide a written basis for the limitation sufficient for [appellate] court[s] to accomplish proper review." *Crest Inc. v. Costco Wholesale Corp.*, 128 Wn. App. 760, 764–65, 115 P.3d 349 (2005). This is because "[a]lthough local fees are one factor in determining the reasonableness of the fee, there are other factors which should also be considered and addressed by the trial court." *Id.* at 764.

[3] *See supra* note 1.

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MTO's rates are also reasonable because other practitioners in Washington bill at similar rates.[4] In assessing MTO's rates, the Court can consider the rates charged by Defense counsel. *Absher*, 79 Wn. App. at 847; *see also Am. Immigr. Council v. DHS.*, 82 F. Supp. 3d 396, 410 (D.D.C. 2015) (declining to decide which version of the *Laffey* Matrix to use, and instead using "Dorsey's rates as a yardstick by which to gauge suitable rates for the in-house AIC attorneys"). To the extent Defendants contest the reasonableness of MTO's rates, the State invites them to provide the Court with a schedule of their rates.

Other cases demonstrate that the rates charged by Defense counsels' firms are comparable to or exceed MTO's rates. Hanson Decl. ¶13, Ex. D, p.67–68 (Summ. of Final Appl. of Arnold Porter Kaye Scholer LLP, as Special Counsel to Debtors and Debtors in Possession, for Allowance of Compensation and Reimbursement of Expenses Incurred at 2–3, *In re Ironnet, Inc.*, No. 23-11710-BLS (Bankr. D. Del. Mar. 6, 2024)), Ex. E, p.79–81 (Twenty-First Monthly Fee Statement of Weil, Gotshal & Manges LLP for Compensation for Servs. Rendered and Reimbursement of Expenses Incurred as Att'ys for the Debtors at 2–3, *In re SAS AB*, No. 22-10925 (Bankr. S.D.N.Y. May 29, 2024)). For example, in a bankruptcy proceeding, Arnold Porter Kaye Scholer LLP attorneys billed at rates between $639 (2023 admission year) and $1,467 (1988 admission year) per hour during 2024. Hanson Decl. ¶13, Ex. D, p. 67–68. These rates are higher than MTO attorneys' requested rates, which range from $475 per hour for eDiscovery Attorneys to $1,190 per hour for Partners. Mark Decl. ¶27, Ex. C. In a different bankruptcy proceeding from 2024, Weil, Gotshal & Manges LLP attorneys

[4] *See, e.g.*, *Koonwaiyou*, 724 F. Supp. 3d at 1233, 1236 (declining to follow the *Laffey* Matrix and instead finding as reasonable market rates $850 per hour for counsel with 24 years of experience and $450 per hour for counsel with 6 years of experience). Multiple unpublished cases in the Western District have also awarded fees at similar hourly rates, although none were complex antitrust matters. *See, e.g.*, *Knudsen v. Hightower Holdings, LLC*, No. C24-0395-KKE, slip op. at 3 (W.D. Wash. July 16, 2024) (finding attorney hourly rates reasonable based on years of experience: $850 (32 years); $800 (20 years); $755 (16 years); $685 (9 years); and $625 (6 years)); *Promedev, LLC v. Wilson*, No. C22-1063JLR, slip op. at 6 (W.D. Wash. June 18, 2024) (approving $850 per hour for partners and $180 per hour for paralegals because they are "consistent with the rates charged in [the Western] District by attorneys of similar skill, experience, and reputation"); *Wagafe v. Trump*, No. C17-94 RAJ, slip op. at 6 (W.D. Wash. Feb. 27, 2019) (finding $895 per hour reasonable). *See supra* note 1.

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billed at rates between $850.00 (2024 admission year) and $2,350.00 (1991 admission year) per hour. Hanson Decl. ¶13, Ex. E, p. 79–81. Like Arnold & Porter's rates, Weil's rates are higher than the rates MTO charged and the State requests. Mark Decl. ¶27, Ex. C.

2. The State's hours are reasonable

"'By and large, the court should defer to the winning lawyer's professional judgment as to how much time he was required to spend on the case; after all, he won, and might not have, had he been more of a slacker.'" *Cmty. Assoc. for Restoration of Env't Inc. v. DeCoster*, 704 F. Supp. 3d 1110, 1119 (E.D. Wash. 2023) (quoting *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)). In *Moreno*, the Ninth Circuit explained that "lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees" because "[t]he payoff is too uncertain." 534 F.3d at 1112. Here, the State paid its SAAGs an hourly rate, running the risk of not recovering MTO's fees or compensation for the AGO's time, so the Court should defer to the State when analyzing whether the hours it spent—with no guarantee of the ability to recover for them—were necessary to win the case. *See id.*

The State is entitled to fees it incurred prior to filing its Complaint. The State's pre-suit investigation—issuing CIDs, conducting interviews, and interacting with the merging parties—enabled it to understand the Proposed Transaction and its competitive effects. Mark Decl. ¶5. Enforcers can sometimes resolve competition concerns through agreed divestitures or "conduct remedies" without the need to file a contested lawsuit. Mark Decl. ¶5. Here, the State's pre-suit investigation streamlined the litigation because the parties had already identified and formed positions on the key issues before the State filed suit. Mark Decl. ¶¶5–6. The State's fees incurred prior to January 1, 2024, represent about 11% of the total amount of fees of AGO and MTO attorneys and staff combined (approximately 16% of AGO fees and 6% of MTO fees), and about 25% of the State's eDiscovery expenses. Mark Decl. ¶6.

The State exercised billing judgment pursuant to *Scott Fetzer Co.*, 122 Wn.2d at 156, and reduced its total hours for which it seeks a fee award by hundreds of hours. Mark Decl.

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¶27. The State properly documented the type of work performed and the timekeepers who performed it and preemptively disclaimed "hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers*, 100 Wn.2d at 597. The State disclaimed duplicative, unproductive, and clerical time, and time related to issues the State chose not to advance and that were not necessary to prepare for as a contingency. Mark Decl. ¶¶22, 25, 30–31, 37, 53, Exs. A–C; Hanson Decl. ¶¶7–10, Ex. A; Pera Decl. ¶¶13–16, Ex. A; Arnold Decl. ¶¶7–10, Ex. A; Balch Decl. ¶¶13–16, Ex. A; Locke Decl. ¶¶11–14, Ex. A; Lubetkin Decl. ¶¶10–13, Ex. A; So Decl. ¶¶6–9, Ex. A; Stiefel Decl. ¶¶8–11, Ex. A; Olasa Decl. ¶¶8–9.

Having multiple attorneys prepare for and participate in trial is reasonable and is not a duplication of effort when those attorneys each meaningfully contribute to the case. *See Democratic Party of Wash. State v. Reed*, 388 F.3d 1281, 1286–87 (9th Cir. 2004). In *Democratic Party of Washington State*, the Ninth Circuit explained that multiple attorneys' presence at trial may be duplicative if they are "merely [there to] watch so that they can learn and use their knowledge in subsequent cases." *Id.* at 1287. But their presence may not be duplicative if "they are there because their assistance is or may be needed by the lawyer arguing the case, as when the judge asks 'where is that in the record,' and one lawyer must frantically flip through pages and find the reference to hand to the lawyer arguing." *Id.* The Court also explained that, with respect to observing court, "a lawyer who has worked on the case and will be working on it subsequently may need to observe argument to judge how to proceed later." *Id.* Here, all the requested time is time that AGO and MTO timekeepers needed to expend to effectively litigate the case. Mark Decl. ¶27.

The State's documentation is sufficiently detailed. It need not contain "minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (i.e., senior partner, associate, etc.)." *Bowers*, 100 Wn.2d at 597. The State submits declarations supportive of the requested fee award, which detail timekeeper qualifications and contemporaneous billing records through

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December 31, 2024, which are unedited except to rephrase for clarity and readability and to redact attorney-client and work product privileged information. Mark Decl. ¶¶16–25, Ex. A (Individual), ¶¶27–42, Ex. B (AGO Staff), ¶¶50–56, Ex. C (MTO Staff); Hanson Decl. ¶1–10, Ex. A; Pera Decl. ¶¶1–16, Ex. A; Arnold Decl. ¶1–10, Ex. A; Arnold Supp. Decl. ¶4, Ex. A; Balch Decl. ¶¶1–16, Ex. A; Locke Decl. ¶¶1–14, Ex. A; Lubetkin Decl. ¶¶1–13, Ex. A; So Decl. ¶¶1–9, Ex. A; Stiefel Decl. ¶1–11, Ex. A; Olasa Decl. ¶¶6, 9, 14–35 (MTO Attorneys and Staff).

The State would not have had to spend the hours it spent to litigate this case had Defendants not taken such an aggressive approach to the litigation. For example, Defendants did not just attack the State's market definition, as is common in a merger challenge. They went so far as to dispute the bedrock principle of antitrust law: that a relevant market must be defined to assess a merger's competitive effects. Tr. 10/7/24 3227:20–3228:7; *see U.S. v. Marine Bancorporation, Inc.*, 418 U.S. 602, 618, 94 S. Ct. 2856, 41 L. Ed. 2d 978 (1974) ("Determination of the relevant product and geographic markets is 'a necessary predicate' to deciding whether a merger contravenes the Clayton Act."). The State had to spend significant time and resources responding to Defendants' meritless economic arguments, which included the use of the unreliable EGK model. The State had to rebut store-level EGK diversion ratios that Defendants—in the Court's words—"tucked away and [did] not br[ing] to the State's attention in the report." Tr. 10/7/24 3181:13–17. The Court ultimately found that Dr. Mark Israel's modified EGK model was "simply not helpful." Dkt. 946, p.32 ¶¶ 114.

When the State prevailed on its motion in limine regarding Defendants' non-binding promise to lower prices, the Court allowed Defendants to argue that "there is an economic, financial, or business incentive for them to make price lowering investments tied to the merger," 9/10/24 Tr. 52:13–19. Defendants made their price investment promise a central piece of their defense but presented no credible evidence that the promised price investment was the result of incentives created by merger efficiencies, or that Kroger would have an

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incentive to pass through its efficiencies to consumers. Dkt. 946, p.93–96, ¶¶320–27. Despite prevailing in its motion in limine, the State had to spend significant time and resources preparing to rebut this evidence Kroger promised the Court but never delivered. Defendants' broader arguments about the purported efficiencies that the merger would bring were similarly unsubstantiated. Defendants' own expert, Mr. Rajiv Gokhale, failed to verify that a portion of their claimed efficiencies were achievable over a four-year period. Dkt. 946, p.90, ¶307. As this Court found, the efficiencies were "not extraordinary" and Defendants "each routinely achieve comparable efficiencies as independent companies." Dkt. 946, p.90, ¶308. Still, the State had to retain Dr. Balan, produce his expert report, defend his deposition, and fly him to Seattle for testimony. Mark Decl. ¶¶78–79, Ex. I. Dr. Balan did not testify because Defendants, despite heavily pushing their efficiencies arguments throughout the litigation, produced "no evidence in the record regarding which of [Defendants' purported] cost savings and revenue increases, if any, would occur in the State of Washington." Dkt. 946, p.90, ¶309.

And Defendants could not live with this Court's pretrial ruling allowing the use of deposition designations. 9/10/24 Tr. 104:9–17. Toward the end of trial, after the parties had heavily negotiated and already narrowed down their deposition designations, Defendants balked at the State's request to submit a couple hundred pages of deposition designations and exhibits, which included both affirmative designations and counter-designations. 10/7/24 Tr. 3384:20–3385:9. The State filed briefing on the issue before the Court's ruling the following day. 10/8/24 Tr. 3431:7–8; Dkt. 769; Dkt. 770. Ultimately, the Court ruled for the State. 10/8/24 Tr. 3431:6–21. But Defendants' intransigence required the State to expend more resources than it should have had to when the Court had already ruled on the issue.

Not only did Defendants advance problematic arguments, they also advanced ad hominem attacks during closing arguments: they insinuated that this meritorious suit was a political stunt because the Attorney General was running for governor, 10/23/24 Tr. 4029:2–4; described AAGs as being "relegated to the back benches," 10/23/24 Tr. 4028:13–15; and

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called MTO attorneys "hired gun lawyers from California." 10/23/24 Tr. 3954:17– 19. The State details these actions so that the Court understands why the State needed to spend the time it spent on even simpler tasks such as negotiating the protective order, coordinating the case schedule, and rescheduling depositions. Defendants ensured no part of this litigation was easy.

The State had to bring this suit to protect consumers and competition. Although Defendants faced other legal challenges, this Court's permanent injunction was independently and insurmountably fatal to their merger plans. In its Verified Amended Complaint against Kroger, Albertsons alleged as much:

> The Washington Court's permanent injunction, ***by itself***, was an insurmountable barrier to closing the Merger. Appealing the ruling to the Washington Court of Appeals was off the table because that process would likely take too long for Kroger and C&S to maintain the necessary financing arrangements to complete the Merger, even if any appeal were successful.

Hanson Decl. ¶18, Ex. R, p.163 (emphasis added). Albertsons also alleged:

> Had the Oregon Court's preliminary injunction been the only injunction against the Merger, it might have been possible for Kroger and C&S to extend their financing until shortly after the January 2025 inauguration of President Donald Trump, which would potentially bring new FTC leadership and an opportunity to negotiate a settlement of the FTC's litigation that would allow the Merger to close. That hypothetical was academic, however, because ***the Washington Court's injunction was independently fatal*** and unaffected by the federal change of administration.

Hanson Decl. ¶18, Ex. R, p.164 (emphasis added). The time the State spent on this case was essential to blocking the Proposed Transaction.

3. The State is entitled to non-attorney timekeeper fees

The State requests $1,191,746.16 in non-attorney timekeepers' fees for AGO staff and $814,607.00 in non-attorney timekeepers' fees for MTO staff, all unrelated to the Cost Bill and Fee Petition. Mark Decl. ¶¶27–29, 31, 35–42, 50–53, 55–56, Exs. B, C; Olasa Decl. ¶6. Courts award such fees when (1) the services were "legal in nature"; (2) the services were "supervised by an attorney"; (3) the qualifications are "specified in the request for fees in sufficient detail to demonstrate that the [personnel] is qualified by virtue of education, training, or work

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experience to perform substantive legal work"; (4) "the nature of the services performed [are] specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical"; (5) the amount of time expended is reasonable; and (6) the amount charged reflects "reasonable community standards for charges by that category of personnel." *Absher*, 79 Wn. App. at 845. A law student's work is awardable so long as the *Absher* test is met. *See TJ Landco, LLC v. Harley C. Douglas, Inc.*, 186 Wn. App. 249, 260–62, 346 P.3d 777 (2015).

Elements one and four go hand-in-hand: the work must be legal—not clerical—and there must be sufficient information to make this determination. *See Absher*, 79 Wn. App. at 845. Here, the State submits detailed billing records for each timekeeper and declarations that establish that the work performed by non-attorney timekeepers was legal in nature, not clerical. Mark Decl. ¶¶27, 31, 35–42, 52, Exs. B, C; Olasa Decl. ¶¶6, 9. None of the fees the State requests are for clerical tasks. Mark Decl. ¶¶35, 37, Exs. B, C; Olasa Decl. ¶9.

Regarding element two, attorneys directed and supervised all non-attorney work. Mark Decl. ¶35, 37, Exs. B, C; Olasa Decl. ¶5. Regarding element three, the State's supporting declarations detail each non-attorney timekeeper's qualifications. Mark Decl. ¶¶36–42, 55; Olasa Decl. ¶¶27–35. Regarding element five, the State reviewed non-attorney timekeeper hours that were billed and disclaimed any hours unnecessarily expended. Mark Decl. ¶¶15, 27, 31, 35, 52–53, 56, Exs. B, C; Olasa Decl. ¶¶8–9.

Regarding element six, the non-attorney rates are reasonable and reflect community standards. Mark Decl. ¶¶27–29, 50–51; Olasa Decl. ¶¶ 11–13, 27–35. Courts have previously awarded the AGO $158 per hour for paralegals and $222 per hour for investigators. Hanson Decl. ¶16, Ex. L, p.173–76. MTO significantly discounted the rates it charged the State for non-attorney timekeepers. Olasa Decl. ¶11. And MTO's paralegal rate of $375 per hour is not substantially more than the rates awarded by courts in Washington. *See Allstate Indem. Co. v.*

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Lindquist, No. C20-1508JLR, 2021 WL 4226155, at *3 (W.D. Wash. Sept. 16, 2021) (unpublished) (awarding fees at $300 per hour for "legal assistants").[5]

C. The Court Should Apply a Lodestar Multiplier for AGO Time Because of the High Quality of Work Performed and the Risk the State Took to Bring the Case

This Court should award the State a 2.0 lodestar multiplier for all AGO timekeepers' fees except those related to the State's Cost Bill and Fee Petition. Lodestar multipliers may be awarded based upon "two broad categories: the contingent nature of success, and the quality of work performed." *Bowers*, 100 Wn.2d at 598. This Court should award the AGO a multiplier for both reasons. Mark Decl. ¶¶43–49. The State does ***not*** request a multiplier for MTO timekeepers' fees because MTO's rates (although discounted) largely factor in the quality of the work performed and because MTO was not paid on a contingency basis. Mark Decl. ¶48.

If a trial court declines to apply a requested lodestar multiplier, it must explain its reasoning to facilitate the appellate court's review for abuse of discretion. *Peiffer v. Pro-Cut Concrete Cutting and Breaking Inc.*, 6 Wn. App. 2d 803, 835, 431 P.3d 1018 (2018). A trial court errs and abuses its discretion if it denies a multiplier request based on irrelevant factors. *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wn.2d 537, 543–44, 151 P.3d 976 (2007). Here, this Court should exercise discretion and award the State a multiplier based on the quality of the work performed and the risk the State took in bringing the case.

1. A lodestar multiplier is justified by the high quality of the work performed

This Court should apply a lodestar multiplier because of the novelty, complexity, and high quality of the work performed in this case. Although in most lawsuits the quality of the work performed will be included in the reasonable hourly rate, that is not the case in every lawsuit. *Bowers*, 100 Wn.2d at 599. Antitrust actions are among the most complex cases to prosecute. *See In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000) ("An antitrust class action is arguably the most complex action to prosecute."); *In re*

[5] *See supra* note 1.

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Linerboard Antitrust Litig., No. CIV.A. 98-5055, 2004 WL 1221350, at *10 (E.D. Pa. June 2, 2004) (unpublished) (same), *amended*, No. CIV.A.98-5055, 2004 WL 1240775 (E.D. Pa. June 4, 2004); *In re Shopping Carts Antitrust Litig.*, No. 451-CLB, M-21-29, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) (unpublished) ("antitrust price fixing actions are generally complex, expensive and lengthy").[6]

Novelty, complexity, and high-quality representation can justify an upward lodestar adjustment. *Bloor v. Fritz*, 143 Wn. App. 718, 750–51, 180 P.3d 805 (2008) (affirming a 1.2 multiplier); *Banuelos v. TSA Wash., Inc.*, 134 Wn. App. 607, 617, 141 P.3d 652 (2006) (affirming a 1.5 multiplier). In *Bloor*, Division II affirmed the trial court's award of a 1.2 multiplier in a CPA case because "the complexity of case, the fact that it presented novel issues, the contingent nature of success, the high quality of representation, and the loss of other work made an enhancement appropriate." 143 Wn. App. at 750. The trial court specifically found that the quality of all parties' representation was high, and Division II determined "[t]he trial court considered appropriate factors . . . and did not abuse its discretion in deciding to apply a 1.2 multiplier." *Id.* at 752. In *Banuelos*, another CPA case, Division III affirmed the trial court's award of "a 1.5 multiplier on the pre-summary judgment award of attorney fees based on the risk of litigation, the contingent nature of the success, the quality of the work, and the lack of legal authority" because those reasons provided "a tenable basis" for the award. *Banuelos*, 134 Wn. App. at 617. Indeed, even when a case "did not present complex or novel issues," Division I affirmed a trial court's award of a 1.3 lodestar multiplier because "the reasonable hourly rate did not reflect the quality of the work performed." *Baker v. Fireman's Fund Ins. Co.*, 5 Wn. App. 2d 604, 621, 428 P.3d 155 (2018).

Here, like in *Bloor* and *Banuelos*, the complexity, novelty, and high quality of the representation support a lodestar multiplier. *See Bloor*, 143 Wn. App. at 750–52; *Banuelos*, 134 Wn. App. at 617. As to complexity, this Court described the case as "monumental" in

[6] *See supra* note 1.

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terms of "complexity" and "importance." 12/10/24 Tr. 4087:1–4. This Court also acknowledged the number of witnesses, depositions, exhibits, and the over 3,600-page record the parties presented in just over three weeks. *Id.* at 4089:10–15. While complex, the State presented an extremely efficient case—examining dozens of witnesses, submitting deposition designations, and offering exhibits (some of which needed extensive redactions to protect competitively sensitive content) in just over three weeks. The State accomplished this massive feat relying largely upon the "high-risk litigation strategy of proving the case through cross-examination and the testimony of adverse witnesses," which may also justify the award of a lodestar multiplier. *See Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 356–57, 279 P.3d 972 (2012) (citations and quotations omitted).

As to novelty, neither the State nor a private plaintiff has ever fully litigated a challenge to a nationwide merger—from filing, to trial, to final judgment—solely under RCW 19.86.060. Mark Decl. ¶4. Indeed, Defendants repeatedly described this case as "unprecedented." 4/26/24 Tr. 15:7, 19:25, and 29:13; 10/23/24 Tr. 3953:11, 3964:5–6.

As to the quality of the representation, this Court described the courtroom collegiality as "incredible and inspiring" and recognized "everyone's been working really hard around the clock, on weekends to make this case happen." 10/8/24 Tr. 3627:7–20. This Court described the lawyering as "superb," 12/10/24 Tr. 4086:24–87:1, and commented on the AGO's "utmost dedication, hard work, professionalism, and at times sheer brilliance." *Id.* at 4087:7–13. A court does not err in granting a lodestar multiplier for the high quality of work performed when it was "significantly better than could be expected from attorneys who command[] the hourly rates used to calculate the lodestar." *Bowers*, 100 Wn.2d at 601. Thus, a 2.0 lodestar multiplier for the AGO's fees is justified by the complexity, novelty, and high quality of representation.

2. A lodestar multiplier is justified by the contingent nature of success

The Court should apply a contingency multiplier because of the risks the State took in bringing this litigation. The State's AAGs and professional staff forewent other work while

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working on this case and the Antitrust Division risked not recovering reimbursement for any of the time it spent investigating and litigating this case. Mark Decl. ¶¶14, 45, 49. Washington courts have discretion to adjust the lodestar by a multiplier when an attorney's ability to recover fees is contingent on the outcome of the case. *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010) (noting that lodestar multipliers are discretionary).

Courts will affirm the award of a lodestar multiplier based upon findings that the case "significantly impacted the ability of the lead lawyers to work on other matters and constituted a significant risk to [the] law firm if it did not recover fees." *Broyles v. Thurston County*, 147 Wn. App. 409, 452–53, 195 P.3d 985 (2008) (affirming a 1.5 multiplier). Here, the AGO took on significant risk that it would not recover its own fees and expenses and those it paid—no matter the outcome—to MTO and its experts. Mark Decl. ¶¶14, 45, 49. Risk-based lodestar multipliers are awarded in CPA cases. *See Miller v. Kenny*, 180 Wn. App. 772, 826–27, 325 P.3d 278 (2014) (affirming a 1.5 multiplier); *Mayer v. Sto Indus., Inc.*, 123 Wn. App. 443, 461, 98 P.3d 116 (2004) (affirming a 1.57 multiplier), *aff'd in part, rev'd in part on other grounds*, *Mayer v. Sto-Indus., Inc.* 156 Wn.2d 677, 132 P.3d 115 (2006); *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 342–45, 54 P.3d 665 (2002) (affirming a 1.5 multiplier up to the date of default judgment). Here, the State's ability to recover its fees and expenses was contingent on its success, so the Court should award the State a risk-based lodestar multiplier.

While the State needs no incentive to bring meritorious cases, both private and public antitrust cases are expensive to bring, difficult to litigate, and often have unpredictable outcomes. These features weigh in favor of granting a contingency multiplier. As early as the 1980s, courts have recognized that, in Washington, private antitrust attorneys may not take cases without the possibility of receiving a lodestar multiplier if they prevail. *See Hasbrouck v. Texaco, Inc.*, 879 F.2d 632, 637 (9th Cir. 1989) (upholding a lodestar multiplier after hearing testimony that "an enhanced recovery in contingent fee antitrust litigation" was appropriate).

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Because the State seeks prospective injunctive relief in a merger challenge, the State necessarily incurs sunk costs, none of which it will recover if it does not prevail. Under RCW 19.86.080(1), if the State were to have lost, the State would not only be on the hook for its own sunk costs, but it might owe Defendants a portion of their fees and costs. *See State v. Black*, 100 Wn.2d 793, 804–07, 676 P.2d 963 (1984) (awarding attorneys' fees and costs under RCW 19.86.080). Thus, the Court should recognize the AGO's risks in bringing merger challenges when determining whether to apply a risk-based lodestar multiplier.

Unlike in other kinds of CPA enforcement cases, a lawsuit to block an anticompetitive merger does not involve claims for monetary relief. Rather, enforcers are seeking prospective, injunctive relief to block the transaction (and therefore any resultant harms) before they occur. Similarly, and again in contrast to other CPA matters, civil penalties are not available for violations of RCW 19.86.060. *See* RCW 19.86.140 (civil penalties do not include reference to RCW 19.86.060). Moreover, there is always a possibility that the merging parties elect to abandon the transaction before the case concludes. Thus, in terms of recovering costs and fees, merger enforcement under RCW 19.86.060 is fundamentally different from other CPA actions.

In addition to the typical lodestar analysis and adjustments, when CPA litigation "'produces protection for everyone who might in the future be injured by a specific violation, then it follows that the reasonableness of the attorney's fee should be governed by substantially more than the import of the case to the plaintiff alone.'" *Ewing v. Glogowski*, 198 Wn. App. 515, 524–25, 394 P.3d 418 (2017) (quoting *Berryman*, 177 Wn. App. at 674) (affirming a 1.5 multiplier). Here, a lodestar multiplier is appropriate because the State obtained permanent injunctive relief that protects consumers across Washington (and beyond) who would have otherwise been harmed by the Proposed Transaction to the tune of hundreds of millions of dollars per year in Washington alone. *See Ewing*, 198 Wn. App. at 524–25. Like in *Ewing*, here the State assumed "the significant risk that [it] would never be compensated for [its] work" and "the remedial nature of the CPA" weighs in favor of granting a multiplier. *Id.* at 525.

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This Court should award the State a risk-based lodestar multiplier because the State took on substantial risk in investigating and litigating this merger challenge, and because the State obtained injunctive relief that benefited consumers in Washington and beyond.

3. Courts consistently award lodestar multipliers in antitrust cases

Risk-based loadstar multipliers may be awarded to plaintiffs in federal antitrust litigation to account for the risk they took in "advanc[ing] millions of dollars in out-of-pocket expenses, including expert fees, in order to prosecute [an antitrust] action" *even if* those expenses are also separately awarded to them as a part of their attorney fees. *See In re High-Tech Emp. Antitrust Litig.*, No. 11–CV–02509–LHK, 2015 WL 5158730, at *10, *16 (N.D. Cal. Sept. 2, 2015) (unpublished).[7] In *In re High-Tech Employee Antitrust Litigation*, the Court awarded class counsel a 2.2 multiplier, remarking on the risk they took when they reviewed over 3.2 million pages of discovery productions, served 28 third-party subpoenas, reviewed 8,809 pages of third-party productions, "retained four experts to assist in analyzing over 15 gigabytes" of data, and "worked with the experts to produce multiple expert reports." 2015 WL 5158730 at *10. The Court then also awarded class counsel expenses—as part of the attorneys' fees—including "expert witness fees," expenses associated with a document vendor to host the over 3.2 million pages of documents produced, and "case-related travel for Plaintiffs, witnesses, experts, and counsel." *Id.* at *16.

Here, too, this Court should award a multiplier based on the risk associated with the State incurring similar out-of-pocket expenses and should separately award these expenses as part of the State's reasonable attorneys' fees. *See id.* The State served 48 third-party subpoenas for documents and/or testimony, and reviewed over 96 million pages of discovery productions, including over 4 million pages from third-parties. Mark Decl. ¶8. It retained testifying and consulting experts to assist in analyzing these massive document productions, plus an additional 7 terabytes of structured data, and worked with its experts to produce six expert

[7] *See supra* note 1.

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reports. Mark Decl. ¶8. In addition, the State took on substantial risk when it spent over $10,000,000 in fees and over $200,000 in costs to pay MTO for work performed through December 31, 2024, $6,255,430.05 to pay its testifying experts, $168,026.77 for Prolumina's trial technology expertise, and $3,851,401.46 to house the massive electronic discovery on Everlaw. Mark Decl. ¶49. The Court should consider the financial risks the State took when awarding it a lodestar multiplier.

For decades, state attorneys general obtained risk-based multipliers in antitrust litigation even when they receive fee awards commensurate with their private practice counterparts. *See, e.g.*, *Maricopa Cnty. Med. Soc'y*, 578 F. Supp. at 1271, 1278–79. In *Maricopa County Medical Society*, the court noted that "[t]he Attorney General was at risk for a much longer period of time than Special Counsel" and that "[t]he State was responsible for advancing all the costs and expenses incident to the case." *Id.* at 1278. It awarded the Arizona Attorney General's Office and its Special Counsel a 1.4 lodestar multiplier based, in part, on risk. *Id.* at 1279. It did so *even though* it already awarded the Arizona Attorney General's Office "rates equivalent to those charged by attorneys in private practice." *Id.* at 1271.

In antitrust class actions, many federal courts have approved of fee awards reflecting similar loadstar multipliers to the 2.0 that the State requests here, as calculated through a lodestar cross-check to analyze the reasonableness of class counsels' percentage fee award. For example, in *In re Ranbaxy Generic Drug Application Antitrust Litigation*, the U.S. District Court for the District of Massachusetts noted that there the typical lodestar multipliers range was "between one and 2.7," that most fell "between one and four," and that "between 2009 and 2013, the mean multiplier in common fund cases in the First Circuit was 2.4 and the mean multiplier in national antitrust cases was 1.61." 630 F. Supp. 3d 241, 246, (D. Mass. 2022) (citations omitted). Thus, awarding a lodestar multiplier is consistent with federal antitrust fee awards. *See id.*; *see also In re Flonase Antitrust Litig.*, 951 F. Supp. 2d 739, 751 (E.D. Pa. 2013) (approving 2.99 multiplier); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 82 (D. Mass.

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2005) (approving 2.02 multiplier); *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 524 (E.D.N.Y. 2003) (approving 3.5 multiplier); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998) (collecting cases and approving 3.97 multiplier); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 356–57 (N.D. Ga. 1993) (finding the "minimal enhancement of the lodestar" multiplier of 1.83 "appropriate," "justified," and "reasonable").

D. Expenses Are Allowable as Part of Attorneys' Fees When They Are Necessary to Establish the Plaintiff's Claim

Washington courts recognize that good public policy supports awarding the State attorneys' fees: doing so encourages CPA enforcement, places the costs of enforcement on violators, and does not drain the State's funds. *See Living Essentials*, 8 Wn. App. 2d at 38–39. Fees may be awarded "when authorized by contract, statute, or a recognized ground in equity." *Berryman*, 177 Wn. App. at 656 (internal citations and quotations omitted). Courts award prevailing parties litigation expenses as part of a reasonable attorneys' fee when equity so requires. Here, equity so requires.

The Court may exercise discretion in determining what to include in the State's reasonable attorneys' fees. RCW 19.86.080(1); *see also Ralph Williams' II*, 87 Wn.2d at 313–15 (affirming the trial court's discretionary award of fees and costs under RCW 19.86.080 and recognizing that RCW 4.84.090 does not limit awardable costs under RCW 19.86.080); *cf. Mandatory Poster*, 199 Wn. App. at 532 (declining to award costs beyond the statutory costs contained in RCW 4.84.010). Even setting aside the broad grant of discretion in RCW 19.86.080, this Court has the equitable power to craft appropriate relief when no adequate remedy exists at law. *M.G. by Priscilla G. v. Yakima Sch. Dist. No. 7*, 2 Wn.3d 786, 799, 544 P.3d 460 (2024). Indeed, "[w]here a statute provides a right of recovery, it is incumbent upon the court to devise a remedy." *Id.* at 799 (citations omitted).

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1. This Court should award the State its necessary litigation expenses

In a modern merger challenge, it is nearly impossible to obtain a decision on the merits without incurring certain expenses: those for testifying experts, trial technology support, and an electronic discovery and document review platform. The State is entitled to these expenses as part of its reasonable attorneys' fees. Courts recognize that "there is a difference between an entitlement to collect 'reasonable attorney fees' and an entitlement to collect those statutory 'costs' enumerated in RCW 4.84.010." *Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 142, 26 P.3d 910 (2001) (*Panorama*).

Federal courts regularly award prevailing plaintiffs their expert fees, trial technology support expenses, and electronic discovery and document review system expenses. *See, e.g.*, *McDonough v. Toys R Us, Inc.*, 80 F. Supp. 3d 626, 658 (E.D. Pa. 2015) (awarding professional expert and consulting services and document review on-line website expenses because they were "necessary for the competent handling of th[e] case"); *In re Flonase Antitrust Litig.*, 291 F.R.D. 93, 106 (E.D. Pa. 2013) (awarding expenses including "fees paid to experts, investigators, accountants, etc."); *In re Flonase Antitrust Litig.*, 951 F. Supp. 2d at 751 (awarding "fees paid [to] experts" including "economic experts, all of whom were integral to the Plaintiffs' prosecution of the case"); *Bradburn Parent Tchr. Store, Inc. v. 3M (Minnesota Mining & Mfg. Co.)*, 513 F. Supp. 2d 322, 336 (E.D. Pa. 2007) (awarding "expert fees" and "document storage" expenses); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 385 (D.D.C. 2002) (awarding expenses "for consulting and retaining experts, reviewing hundreds of thousands of documents, creating and maintaining a comprehensive computer database, and the like").[8]

[8] *See also Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-cv-00236-WHO, 2020 WL 7626410, at *8–9 (N.D. Cal. Dec. 22, 2020) (unpublished) (awarding expenses for "e-discovery, trial technical support, hotel rooms, and expert witnesses"), *aff'd*, No. 21-15124, 2024 WL 4471745 (9th Cir. Oct. 11, 2024); *In re Lidoderm Antitrust Litig.*, No. 2521, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (unpublished) (awarding expenses for computerized research, document hosting services, experts, and case-related travel); *In re Credit Default Swaps Antitrust Litig.*, No. 13md2476 (DLC), 2016 WL 2731524, at *7, *18 (S.D.N.Y. Apr. 26, 2016)

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Competition enforcers recognize that expert fees can be so prohibitive that only well-funded federal agencies can sue to block mergers. For example, former Federal Trade Commission Chair Lina Khan explained that "litigating a single merger trial can cost millions of dollars in fees to outside experts and economic consultancies—costs that often only federal enforcers can muster." Hanson Decl. ¶15, Ex. I, p.109 (*Statement of Chair Lina M. Khan, Joined by Commissioner Rebecca Kelly Slaughter & Commissioner Alvaro M. Bedoya, In the Matter of Tapestry, Inc. & Capri Holdings Limited, Commission File No. D09429* at 2, FTC (Dec. 5, 2024)). The Department of Justice's former Assistant Attorney General for the Antitrust Division Jonathan Kanter noted that the DOJ might "accrue expert fees of up to 30 million dollars – just for a single case." Hanson Decl. ¶15, Ex. J, p.127 (*Assistant Attorney General Jonathan Kanter Delivers Farewell Address*, DOJ (Dec. 17, 2024)). Nineteen states signed a comment regarding the 2023 Proposed Merger Guidelines, expressing concern that although "the use of empirical economic analysis can provide rigor, overreliance on this analysis comes at a real cost" because of the expenses "required to produce these results." Hanson Decl. ¶15, Ex. K, p.168 (Public Comments of Att'ys General of 19 States and Territories in Resp. to the July 29, 2023 Request for Comments on the Draft Merger Guidelines at 32, (Sept. 18, 2023)).

This Court should award the State its necessary expenses as part of its attorneys' fees.

a. Testifying expert expenses

The State requests $6,236,622.69 for its testifying experts. The State requests $5,385,106.95 in fees for Dr. Dua; $52,990.00 in fees for Mr. Collison; $121,352.50 in fees for

(unpublished) (awarding over $10 million in expenses, most of which "were incurred in connection with retention of experts" because there was no objection to them, "[t]he expert work was essential to the litigation," and "[i]t is important to encourage top-tier litigators to pursue challenging antitrust cases"); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (GEB), 2009 WL 411856, at *9 (D.N.J. Feb. 17, 2009) (unpublished) (awarding "fees for experts [and] costs associated with creating and maintaining electronic document databases"); *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007 FSH, 2005 WL 2230314, at *32 (D.N.J. Sept. 13, 2005) (unpublished) (awarding "substantial fees for experts" and "substantial costs associated with creating and maintaining an electronic document database"). *See supra* note 1.

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Mr. Welsh; $368,219.24 in fees for Dr. Ailawadi; and $308,954.00 in fees for Dr. Balan. Mark Decl. ¶¶70–79, Exs. D–I. The Court should award the State its testifying expert fees as part of its attorneys' fees because the State reasonably incurred these expenses and the State may not have prevailed had it not incurred them. Courts can award the payment of expert fees in certain CPA contexts. *See Ralph Williams' II*, 87 Wn.2d at 304–05, 313–14 (affirming award of an accountant's expert fees to the State under RCW 19.86.080 as part of a terms award in a CPA enforcement action).

This Court can exercise its discretion and equitable powers to award the State expert expenses as part of the State's attorneys' fees. *See Ethridge*, 105 Wn. App. at 460 (trial judges have "broad discretion in determining the reasonableness of an award" and will not be reversed absent a showing they "manifestly abused [their] discretion") (citations omitted). While courts have declined to award expert expenses *as costs* in private CPA actions under RCW 19.86.090[9] and when the State brings unfair methods of competition cases under RCW 19.86.080,[10] these cases are inapposite. Here, the State seeks expert expenses as part of its reasonable attorneys' fees and expenses, *not as costs*, except as discussed *infra* in Part V.D.2.

(1) The State's experts were essential to establishing its case

Litigating a merger challenge often requires expert testimony to assist the fact-finder in understanding the evidence or determining a fact in issue. *See* ER 702; *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962) ("it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition"); *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 273, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966) (relying on an exhibit prepared by "the Government's expert witnesses" detailing consolidation in the grocery

[9] *See, e.g.*, *Mayer*, 156 Wn.2d at 693–94; *Miller*, 180 Wn. App. at 827; *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). *See also Collard v. Reagan*, 112 Wn. App. 1019, 2002 WL 1357052, at *8 (Wash. Ct. App. 2002) (unpublished) ("Absent our Supreme Court explicitly overruling *Nordstrom*, we cannot award non-statutory costs on a CPA claim."). *See supra* note 1.

[10] *See, e.g.*, *Mandatory Poster*, 199 Wn. App. at 532.

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industry). This case is no exception. The State's experts were central to (1) supporting the State's market definition, allegations of anticompetitive harm, and arguments that C&S was an inadequate divestiture buyer; (2) preparing for and strategizing on the depositions of Defendants' experts; and (3) responding to Defendants' assertions. *See* Mark Decl. ¶¶71–79.

Plaintiffs may be entitled to expert witness fees as part of a reasonable attorneys' fee when the expert witnesses are necessary to establish the claim. *See, e.g.*, *Panorama*, 144 Wn.2d at 142. In *Panorama*, the Court explained that "there is a difference between an entitlement to collect 'reasonable attorney fees' and an entitlement to collect those statutory 'costs' enumerated in RCW 4.84.010." *Id.* It explicitly recognized that "[t]he phrase 'reasonable attorney fees' in and of itself supports an award not limited by 'costs' as described in RCW 4.84.010." *Id.* (citations omitted). The *Panorama* Court concluded that "[t]he Court of Appeals also erred when it disallowed expert witness fees and other expenses necessary to establish [the plaintiff's claim] as part of a reasonable attorney fee." *Id*. at 145.

The *Panorama* Court noted that "reasonable attorney fees and expenses might also be awarded pursuant to some recognized ground in equity." *Id.* at 143 (citations and quotations omitted). It explained that allowing expert fees to a prevailing plaintiff who is "forced to bring a lawsuit to obtain the benefit of his bargain with an insurer" is an equitable solution that resolves the inequity of the insured having to bear those litigation expenses. *Id.* at 144. Here, like in *Panorama,* an inequity will result if the State is forced to bear its expert fees after prevailing on the merits of its case.

The *Panorama* Court reasoned that, to make plaintiffs whole, "reasonable attorney fees must, by necessity, *contemplate expenses other than merely the hours billed by an attorney*" because "[f]ailure to reimburse expenses would often eat up whatever benefits the litigation might produce and additionally impose a backbreaking burden upon the small, but justified, litigants." *Id*. at 144 (emphasis added) (cleaned up). Here, too, expert fees are properly awarded to the State which—absent an award of expert expenses from the Court—must

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otherwise bear the cost of executing the State's constitutional mandate to prevent monopolies from forming in our state. *See id.*; Const. art. XII, § 22; Mark Decl. ¶49. Just as the *Panorama* Court sought to make plaintiffs whole, this Court should make the State whole. *See Panorama*, 144 Wn.2d at 144. As the successful litigant, the State should not have to shoulder such a "backbreaking burden." *See Panorama*, 144 Wn.2d at 144.

As *Panorama* explained, statutes providing for "reasonable attorney's fees and costs" (or the substantial equivalent) allow for expenses beyond statutory costs under RCW 4.84.010. *Id.* at 142–43 (quoting *Louisiana–Pac. Corp. v. Asarco Inc.*, 131 Wn.2d 587, 604, 934 P.2d 685 (1997) ("The court is authorized to additionally award other reasonably necessary expenses of litigation based upon such equitable factors as the court determines are appropriate.")); *see also Blair v. Wash. State Univ.*, 108 Wn.2d 558, 572–74, 740 P.2d 1379 (1987) (looking beyond RCW 4.84.010 to determine "what is reasonable and necessary in the preparation and trial of the case" and awarding expert fees). Indeed, "the term 'litigation expenses' normally encompasses expert witness fees." *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002).

Here, the State is entitled to expert expenses because the CPA allows it to recover its actual litigation expenses: prevailing parties may "recover the costs of said action *including* a reasonable attorney's fee." RCW 19.86.080 (emphasis added). Courts have already extended *Panorama*'s grant of expert expenses to prevailing plaintiffs in CPA actions. *See e.g.*, *IDS Prop. and Cas. Ins. Co. v. Fellows*, No. C15-2031 TSZ, 2017 WL 4122565, at *6–7 (W.D. Wash. Sept. 15, 2017) (unpublished) (noting that "actual litigation costs are recoverable" and awarding "witness fees . . . as litigation costs"); *Crane v. CTX Mortg. Co., LLC*, No. C06-448Z, 2008 WL 11506707, at *8 (W.D. Wash. Feb. 20, 2008) (unpublished) (explaining that the CPA "defines costs to include attorneys' fees" and awarding plaintiffs a portion of their expert witness fees as part of their attorney fees under RCW 19.86.090).[11]

[11] *See supra* note 1.

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Although some cases have limited the recovery of costs in CPA actions, those cases addressed the much narrower issue of whether expert witness expenses could be awarded as costs under RCW 4.84.010. None reversed an award of expert expenses as *part of the reasonable attorneys' fee* as upheld in *Panorama*.[12] None decided how the "difference between an entitlement to collect 'reasonable attorney fees' and an entitlement to collect those statutory 'costs' enumerated in RCW 4.84.010" impacted the ability to recover expert expenses as part of a prevailing plaintiff's reasonable attorneys' fees. *See Panorama*, 144 Wn.2d at 142. These cases failed to do so even though our Supreme Court held in *Ralph Williams' II* that there was "no abuse of discretion" in a trial court's award of an accountant's fees under RCW 19.86.080 as part of a terms award in a State-brought CPA enforcement action. *Ralph Williams' II*, 87 Wn.2d at 304–05, 313–14. The *Ralph Williams' II* Court went on to explain that "RCW 19.86.920 supports our approval of the costs and attorney fee award" because it "directs [the Court] to give the [CPA] a liberal construction" and because "[s]uch awards will encourage an active role in the enforcement of the [CPA]" and will "place[] the substantial cost of these proceedings on violators of the act, and it does not drain [the State's] public funds." *Id.* at 314–15 (internal citations omitted).

This Court can award the State its expert expenses under the plain language of RCW 19.86.080 and *Panorama* because they were necessary to the State's ability to prevail in this case. But even if this Court could not, it should award them by exercising its equitable powers. When a court has equitable power to award costs and fees, "the court [is] not limited to awarding costs under RCW 4.84.010." *Hamblin v. Castillo Garcia*, 23 Wn. App. 2d 814, 845, 517 P.3d 1080 (2022). The *Hamblin* Court affirmed an award of expert witness fees "[b]ecause the court elected to award fees on equitable grounds[,]" not as statutory costs. *Id.*

[12] *See Mayer*, 156 Wn.2d at 693–94 (analyzing expert expenses as costs); *Mandatory Poster*, 199 Wn. App. at 532 (same); *Miller*, 180 Wn. App. at 827 (same); *Nordstrom*, 107 Wn.2d at 743 ("We believe [expenses such as phone and copy expenses are] not recoverable as 'costs' and can only be recovered to the extent [they] would be included in a reasonable attorney fee."); *Collard*, 2002 WL 1357052 at *8 ("Absent our Supreme Court explicitly overruling *Nordstrom*, we cannot award non-statutory costs on a CPA claim."). *See supra* note 1.

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This Court, like the court in *Hamblin*, should exercise its equitable powers to award expert expenses as part of the State's reasonable attorneys' fees. *See id.*; *also Ralph Williams' I*, 82 Wn.2d at 277–78 (declining "to limit the traditional equity powers of the court"); *StarKist*, 25 Wn. App. 2d at 94–95 (recognizing that "RCW 19.86.080 is a grant of 'broad, discretionary authority' to courts to order restitution" and permitting joint and several liability for the "equitable relief under RCW 19.86.080" because "all distinctions between actions at law and actions in equity have been abolished") (internal citations omitted).

(2) The Court based crucial findings and conclusions on the State's experts' work

Dr. Nitin Dua

The State's use of an economics expert was helpful to the Court in deciding this case. This Court concluded that *both* the practical indicia evidence under the *Brown Shoe* factors *and* testimony from economic experts established the relevant product market. Dkt. 946, p.99–100, ¶343, ¶346. It concluded that Dr. Dua's studies support a supermarket product market because "a higher diversion ratio indicates closer competition" between supermarkets, Dkt. 946, p.101, ¶351; that "Dr. Dua's analysis is robust and confirms the soundness of his overall conclusion that the merger would produce highly concentrated markets—even *if* other format stores were included," Dkt. 946, p.103, ¶361; and that "Dr. Dua's analysis is more plausible than Dr. Israel's in light of the fact evidence clearly indicating that supermarkets are the relevant product market and that competition is local." Dkt. 946, p.108, ¶378.

The Court used Dr. Dua's explanations about how to understand substitution to dismiss Defendants' contentions that other retail formats were in the product market. Dkt. 946, p.11–13, ¶¶38–44; p.20 ¶¶73–75; p.24, ¶89. The Court relied on Dr. Dua's analysis to determine the relevant geographic markets, Dkt. 946, pp.26–29, ¶¶95–96, 98–105, and recounted Dr. Dua's testimony in finding that the Proposed Transaction would produce highly concentrated supermarket city area markets. Dkt. 946, pp.37–40, ¶¶133–46. The Court also relied on Dr. Dua's conclusions that the merger would be presumptively anticompetitive in 48 city areas

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under the 2023 guidelines if C&S retained 70% of sales "*and if* the market were expanded to include Costco, natural organic, and limited assortment stores." Dkt. 946, p.39, ¶141.

The Court relied on Dr. Dua's testimony about the upward pricing pressure that the merger would cause to find that the Proposed Transaction would create an incentive for Kroger to raise prices. Dkt. 946, pp.51–54, ¶¶184–92, ¶195; p.93, ¶319. The Court also relied on his testimony to find that coordinated effects are the likely result of the Proposed Transaction. Dkt. 946, pp.56–57, ¶¶201–02. Dr. Dua helped the Court understand that "[p]rice is not the only dimension on which [Defendants] compete," Dkt. 946, p.47, ¶174, and that "Dr. Israel's contention that Walmart's presence as a lower-priced retailer will prevent consumer harm unjustifiably ignores all facets of competition other than price." Dkt. 946, p.54, ¶195.

In addition, Dr. Dua helped the Court understand—and reject—Dr. Israel's opinions, Dkt. 946, p.29–37, ¶¶106–32, and Mr. Gokhale's efficiencies arguments. Dkt. 946, p.93, ¶319. Indeed, the Court relied upon Dr. Dua's testimony to find that "Kroger will not have an economic incentive to pass-through its efficiencies that are not marginal cost reductions (i.e., fixed cost savings and revenue increases)." Dkt. 946, p.94, ¶320.

Mr. Richard Collison

Mr. Collison's testimony helped the Court understand the information technology ("IT") risks presented by the divestiture to C&S. The Court found, based exclusively on Mr. Collison's testimony, that "IT errors can cause problems with basic functions like ringing up correct prices or reordering inventory." Dkt. 946, p.83, ¶286. The Court relied on Mr. Collison's testimony to find that "[t]he pace at which C&S must convert stores [to a new tech stack] is substantially faster than prior store conversions in the industry" and that "[u]ntil a store is converted, C&S cannot directly control the operations of a store's IT system." Dkt. 946, pp.83–84, ¶¶289–90. The Court relied on only Mr. Collison's testimony to find that, "[i]f C&S rushes its store conversions, that creates a risk of errors in the IT systems, which can

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cause customers to experience problems when checking out, issues with restocking inventory, and other problems that lead to sales losses." Dkt. 946, p.84, ¶292.

Mr. Joseph Welsh

The Court relied on Mr. Welsh's testimony to find, "Rebannering is complicated and risks a significant sales loss from disruption and alienating customers." Dkt. 946, p.69, ¶241. It found Mr. Welsh's testimony agreed with Bain's assessment that sales detriments "from rebannering generally can range from 5-10% to over 20%," and that Bain advised C&S of these possible sales detriments. Dkt. 946, p.70, ¶244. It found that Mr. Welsh "testified that this estimate/advice from Bain was consistent with his decades of experience in the grocery retail industry" and his experience rebannering stores, and that he testified that C&S was "rebannering 'in the wrong direction'" which "increases the likely sales losses." Dkt. 946, p.70–71, ¶245. "The Court found Mr. Welsh's testimony credible on this point." Dkt. 946, p.70–71, ¶245. It also found, based in part on Mr. Welsh's testimony, that "transition banners are likely to increase, rather than reduce, rebannering related risks." Dkt. 946, p.71, ¶246.

Dr. Kusum Ailawadi

Dr. Ailawadi helped the Court find that "[b]eing a successful grocery retailer requires a different set of skills than being a successful grocery wholesaler" and that C&S does not have those skills. Dkt. 946, pp.59–60, ¶¶210–13. Dr. Ailawadi helped the Court understand the Transition Services Agreement's ("TSA") provisions for Defendants to provide essential functions—such as data, pricing, and promotion support—to C&S for up to 12 months after the divestiture. Dkt. 946, p.65, ¶227. The Court relied exclusively on Dr. Ailawadi's testimony to find that "[p]ricing, promotions, and data analytics are 'crucial' to a successful grocery retail operation," Dkt. 946, p.79, ¶274, that Kroger and Albertsons developed their loyalty program capabilities over decades, Dkt. 946, p.80, ¶275, and that "C&S is unlikely to be able to" build up its data analytics, pricing, and promotions capabilities in the 12 months allotted. Dkt. 946, p.80, ¶276. The Court specifically found, "As Professor Ailawadi explained, other major

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retailers like CVS and Target took anywhere between 1.5 to 2 years just to *test* their loyalty programs before launching them across all retail locations." Dkt. 946, p.81, ¶280.

The Court relied on Dr. Ailawadi's testimony to find, "The Haggen and the QFC banners require more investments in their brand and brand equity than banners like Safeway and Fred Meyer, because Haggen and QFC are weaker and less well-known banners than Safeway and Fred Meyer." Dkt. 946, p.69, ¶243. It also relied on Dr. Ailawadi's testimony to find that "C&S will need to develop and implement a retail strategy *before it rebanners*, which is a reversal of the normal strategy where brand identity informs retail strategy" and "[t]hat this 'strange' result will 'negatively affect C&S's ability to compete with the merged Kroger stores.'" Dkt. 946, p.72, ¶250 (internal citation omitted).

Dr. Ailawadi helped the Court understand private label brands and their benefits. Dkt. 946, p.73–74, ¶¶254–56. Quoting Dr. Ailawadi, the Court found that "the markups that C&S will need to pay in years three and four of the TSA are likely to 'substantially eat into any margin advantage that [C&S] would have.'" Dkt. 946, p.78, ¶269.The Court relied extensively on Dr. Ailawadi's testimony comparing Kroger and Albertsons' private label products, describing the variety and importance of their organic offerings, and discussing the sales they typically generate. Dkt. 946, p.74–76, ¶¶257–60. The Court also relied on Dr. Ailawadi's testimony to find that, to build its own private label brand, C&S "will require adding more than 10,000 SKUs, improving quality and packaging, and adding entire private label product lines, such as for organic products." Dkt. 946, p.78, ¶270. In finding that "C&S is highly unlikely to be able to replace Albertsons' and Kroger's current private label offerings within four years," the Court again relied only on her testimony. Dkt. 946, p.78, ¶270.

Dr. Ailawadi also helped the Court understand vendor funding. Dkt. 946, p.82, ¶285. The Court relied exclusively on Dr. Ailawadi's testimony to find that "C&S's ability to offer competitive promotions will also be jeopardized by its inability to negotiate vendor funding on favorable terms" due to its inexperience; that Defendants' "combined size and experience will

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make vendors even less likely to allocate funds to C&S"; and that "C&S's weak private label portfolio will also hamstring its negotiations for vendor funds." Dkt. 946, p.82, ¶285.

Dr. David Balan

The State did not call Dr. Balan to testify, but he was in the courtroom and prepared to testify had his testimony been needed to rebut that of Defendants' efficiencies expert, Mr. Gokhale. Mark Decl. ¶¶71, 78–79, Ex. I. Dr. Balan conducted an analysis, prepared a report, and was deposed during discovery. Mark Decl. ¶78. Defendants' failures to prove their efficiencies arguments obviated the State's need to call Dr. Balan as a rebuttal witness. Mark Decl. ¶¶71, 78–79. The State's work with Dr. Balan enabled it to ask the correct questions of Defendants' experts during depositions and on cross-examination at trial to obtain these crucial concessions. Mark Decl. ¶79. The State made a strategic decision not to call him at trial due to the concessions it obtained during Mr. Gokhale's testimony, most of which were obtained through questioning based upon the analysis performed by Dr. Balan. Mark Decl. ¶79.

For example, the Court found "[a] large portion of Defendants' claimed efficiencies are speculative." Dkt. 946, p.91, ¶312. It found that Defendants' projected "sourcing cost savings," "Own More Transportation cost savings," and "Alternative Profits revenue increases" are not fully incremental. Dkt. 946, pp.92–93, ¶¶316–18. The Court found Defendants have not shown "a genuine gap in price." Dkt. 946, p.92, ¶313. The Court also found, "There is no economic analysis in the record quantifying how much, if at all, Kroger's alternative profits business would lower the profit-maximizing price from Albertsons' current levels." Dkt. 946, p.94, ¶322. This Court concluded, "Defendants have not met their burden of production to show that their efficiencies estimates were calculated by a 'reliable methodology' and are not 'speculative'" *and* "that their estimates represent *only* efficiencies that the firms could not achieve independently." Dkt. 946, p.117, ¶¶420–21. Because Defendants failed to carry their burden, the State chose not to call Dr. Balan, after incurring extensive costs in retaining him, defending his deposition and report, and preparing him to testify. Mark Decl. ¶¶71, 78–79.

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This Court should award the State reimbursement of its testifying expert expenses, including those of Dr. Balan, to make the State whole and to restore it to the position it was in prior to investigating and successfully challenging the Proposed Transaction. These expenses were reasonably necessary to permanently prevent the substantial lessening of supermarket competition in communities across Washington (and beyond).

b. Trial technology team expenses

The State requests $161,950.50 for expenses incurred in retaining its trial technology company, Prolumina. Mark Decl. ¶¶88–91, Ex. L. Prolumina staff utilized specialized trial presentation software to publish exhibits during trial in a manner that aided both the Court and the parties understanding of the evidence, by for example, using enlargement and highlighting features to—at the direction of counsel—direct witnesses to key portions of exhibits. Mark Decl. ¶82. Prolumina staff also worked with Defendants' trial technology staff to minimize disruptions during presentations of evidence at trial. Mark Decl. ¶82. When necessary, Prolumina published sealed exhibits only to the bench, the witness, and the attorneys, ensuring that competitively sensitive information contained in sealed exhibits remained confidential during trial. Mark Decl. ¶82. Prolumina utilized specialized software and network cabling that interfaced with the Court's video display equipment. Mark Decl. ¶82. The State would not have been able to present its case as efficiently and persuasively without Prolumina's services. Mark Decl. ¶91. This case was uniquely positioned for Prolumina's assistance because of the massive number of sealed exhibits used during trial. Mark Decl. ¶91.

Because the State needed Prolumina's technological expertise to preserve competitively sensitive information during the trial, this Court should award the State its Prolumina expenses. Courts allow recovery of fees for trial technology and support professionals because they are "the equivalent of additional attorneys or legal para-professionals." *BD v. DeBuono*, 177 F. Supp. 2d 201, 204 (S.D.N.Y. 2001) (prevailing plaintiff entitled to recover fees for trial consultants). Division I recently remanded for the trial court to apply the *Absher* test to

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determine whether a trial technician's services were recoverable. *See Hockett v. Seattle Police Dep't*, 31 Wn. App. 2d 210, 224, 548 P.3d 271 (2024) (unpublished in part) (citing *Absher*, 79 Wn. App. at 844–45).[13] Two local federal cases have allowed recovery of Prolumina expenses for similar trial technology support services. *See, e.g.*, *Hernandez v. City of Vancouver*, No. C04-5539 RBL, 2013 WL 593794, at *4 (W.D. Wash. Feb. 15, 2013) (unpublished), *rev'd in part on other grounds, vacated in part*, 657 F. App'x 685 (9th Cir. 2016); *Kreidler v. Pixler*, No. C06-0697RSL, 2011 WL 39054, at *6 (W.D. Wash. Jan. 3, 2011) (unpublished) ("there was a substantial amount of testimony via videotape in this case, and the Prolumina consultant assisted the parties and the Court by presenting that testimony in an efficient manner").[14]

Prolumina's work meets the *Absher* test because it was legal in nature and supervised by an attorney. *Absher*, 79 Wn. App. at 845 (elements one and two); Mark Decl. ¶¶83–84. The Mark Declaration specifies Prolumina's qualifications "in sufficient detail to demonstrate that [they are] qualified by virtue of education, training, or work experience to perform substantive legal work." *Id.* (element three); Mark Decl. ¶¶85–87, 90, Exs. J, K. The Mark Declaration also specifies the nature of Prolumina's services in sufficient detail to allow this Court to determine that their work was legal rather than clerical. *Id.* (element four); Mark Decl. ¶¶88–91, Ex. L. In fact, Prolumina's trial technology services were the equivalent of having additional legal para-professionals in the courtroom. *See BD*, 177 F. Supp. 2d at 204. Prolumina expended a reasonable amount of time. *Absher*, 79 Wn. App. at 845 (element five); Mark Decl. ¶89. And the amount Prolumina charged reflects "reasonable community standards for charges by that category of personnel." *Id.* (element six); Mark Decl. ¶90.

c. Electronic discovery expenses

The State requests $3,851,401.46 for its Everlaw, electronic discovery platform, expenses between November 1, 2022, through December 31, 2024. Mark Decl. ¶¶92–96. The State

[13] *See supra* note 1.
[14] *See supra* note 1.

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hosted the Everlaw platform, paid for it, and allowed other states to use it during a joint multistate investigation.[15] Mark Decl. ¶96. Washington paid for the cost of Everlaw up front, and other state Attorneys General reimbursed it. Mark Decl. ¶96. Washington is aware that other state Attorneys General may be requesting the amounts they paid to Washington through fee requests to be filed in parallel litigations. Mark Decl. ¶96. If Washington recovers its Everlaw expenses from this Court, it will reimburse members of the multistate investigation the amounts they paid for Everlaw. Mark Decl. ¶96. The State will not "double-dip," and will immediately alert this Court if any member of the multistate investigation is awarded recovery of Everlaw expenses in parallel litigation so that this Court may discount the State's award accordingly. Mark Decl. ¶96. The State will also immediately alert members of the multistate investigation if this Court awards its Everlaw expenses so that member states may be reimbursed for any amounts already paid to the State. Mark Decl. ¶96.

When electronic litigation tools are necessary to a plaintiff's ability to prevail in a suit, they may be awarded under the court's equitable powers. *Panorama*, 144 Wn.2d at 142–45 (awarding Westlaw charges as part of a reasonable attorneys' fee); *see also Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, No. 16-cv-00236-WHO, 2020 WL 7626410, at *8–9 (N.D. Cal. Dec. 22, 2020) (unpublished) (awarding expenses for "e-discovery, trial technical support, hotel rooms, and expert witnesses"), *aff'd*, No. 21-15124, 2024 WL 4471745 (9th Cir. Oct. 11, 2024); *In re Lidoderm Antitrust Litig.*, No. 2521, 2018 WL 4620695, at *4 (N.D. Cal. Sept. 20, 2018) (unpublished) (awarding expenses for computerized research and document hosting services); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184 (GEB), 2009 WL 411856, at *9 (D.N.J. Feb. 17, 2009) (unpublished) (awarding "costs associated with creating and maintaining electronic document databases"); *In re Remeron End-Payor Antitrust Litig.*, No. 02-2007 FSH, 2005 WL 2230314, at *32 (D.N.J.

[15] Washington co-led with Colorado a multistate investigation involving fifteen states. Mark Decl. ¶96. Washington left the multistate investigation when it filed its complaint. Mark Decl. ¶96.

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Sept. 13, 2005) (unpublished) (awarding "substantial costs associated with creating and maintaining an electronic document database").[16]

It would not have been possible for the State's limited personnel to search for (much less find) the relevant evidence on the expedited trial schedule in the over 96 million pages of documents it obtained, the vast majority of which were produced by Defendants. Mark Decl. ¶8. Here, the State's Everlaw expenses are recoverable as part of the State's reasonable attorneys' fees. *See Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987) ("We believe [expenses such as phone and copy expenses are] not recoverable as 'costs' and can only be recovered to the extent [they] would be included in a reasonable attorney fee."). Because Everlaw expenses were necessary to the State's success in this case, this Court should award those expenses as part of the State's reasonable attorneys' fees.

2. If the State's Expenses Are Not Part of its Fees, the Court Should Award them as Actual Costs

Even if this Court declines to award the State expenses as part of its attorneys' fees, it should award them as part of the State's *actual* costs because (1) the plain language of RCW 19.86.080(1) supports awarding expenses as part of actual costs; (2) there is a distinction between awarding fees and costs in public enforcement under RCW 19.86.080 (especially merger challenges) and private claims under RCW 19.86.090; and (3) this Court has equitable powers to craft appropriate relief under RCW 19.86.080.

First, RCW 19.86.080(1) provides that "the prevailing party may, in the discretion of the court, recover the *costs of said action* including a reasonable attorney's fee." (emphasis added). The plain language does not limit recovery to statutory costs. Instead, it allows the recovery of "costs of said action," which are actual costs. *See* RCW 19.86.080(1); *StarKist*, 25 Wn. App. 2d at 91–92 (applying a plain language analysis to RCW 19.86.080); *Nat'l Sur. Corp.*, 132 F. App'x at 712–13 (unpublished) (noting that "the Washington CPA defines costs

[16] *See supra* note 1.

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to include fees" and remanding for a fee award under RCW 19.86.090 when a CR 68 offer of judgment included "costs").[17]

Second, although *Mandatory Poster* arguably precludes the award of costs beyond those in RCW 4.84.010 in CPA actions asserting *violations of RCW 19.86.020*, this Court should consider whether the *Mandatory Poster* Court correctly read RCW 19.86.080(1), and whether that restrictive reading applies to all CPA violations—even those with no possibility of surplus monetary recovery, such as the RCW 19.86.060 violation that the State prevailed on here. Neither *Mandatory Poster* nor its predecessors or progeny preclude awarding the State its *actual* costs because none were *merger challenges* brought by the State in its enforcement capacity under RCW 19.86.080. *See, e.g.*, *Mayer*, 156 Wn.2d at 693–94; *Nordstrom*, 107 Wn.2d at 743; *Miller*, 180 Wn. App. at 827; *Mandatory Poster*, 199 Wn. App. at 532.[18]

In *Mandatory Poster*, the parties barely briefed the issue of whether a prevailing party may recover costs beyond those in RCW 4.84.010. Hanson Decl. ¶17, Ex. N, p.201, 247–48 (Br. of Appellants (Aug. 10, 2016)), Ex. O, p.300–01, 303 (Opening Br. of Resp't/Cross-Appellant State of Washington (Sept. 9, 2016)), Ex. P, p.331–32 (Reply Br. of Appellants (Oct. 19, 2016)), Ex. Q p.342 (Sur-Reply of Resp't/Cross-Appellant State of Washington (Nov. 17, 2016)). The *Mandatory Poster* Court erred by not analyzing the differences between private CPA claims brought under RCW 19.86.090 and the State's enforcement under RCW 19.86.080. There, the State brought an enforcement action against Mandatory Poster, but in stating that "[c]osts in a CPA action are limited to those set out in RCW 4.84.010," the court cites only one private CPA case, *Mayer*, where fees and costs were awarded under RCW 19.86.090, not under RCW 19.86.080. 199 Wn. App. at 532 n.84 (citing *Mayer*, 156 Wn.2d at 693–94). *Mayer*, in turn, cites only *Nordstrom*, a private action under RCW 19.86.090, stating that awarding costs beyond statutory costs would give a plaintiff "an

[17] *See supra* note 1.
[18] *See also Collard*, 2002 WL 1357052 at *8 (unpublished). *See supra* note 1.

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unwarranted recovery." 156 Wn.2d at 694 (quoting *Nordstrom*, 107 Wn.2d at 743). But *Nordstrom* cites no authority in stating that extending costs beyond statutory costs would result in "an unwarranted recovery." 107 Wn.2d at 743. Restitution, treble damages, and penalties are unavailable in this successful challenge to an unconsummated merger under RCW 19.86.060, so here there is no risk of an unwarranted recovery. *See* RCW 19.86.080(2)–(3) (restitution), .090 (treble damages), .140 (penalties).

None of the bases for the *Mandatory Poster* decision even considered whether private CPA claims under RCW 19.86.090 and State enforcement under RCW 19.86.080 are different in terms of what costs are recoverable. But they are. When the CPA was enacted only the AGO could enforce it, but that changed in 1971 when the Legislature created a private right of action. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 73, 170 P.3d 10 (2007). The public and private statutory provisions have different origins and different language, so public and private plaintiffs need not be treated the same.

As the Ninth Circuit observed, there is an "important" difference between statutory provisions that make fees and costs discretionary and those that make them mandatory. *Costco Wholesale Corp. v. Hoen*, 538 F.3d 1128, 1136 (9th Cir. 2008). Fees and costs are discretionary under RCW 19.86.080, but mandatory under RCW 19.86.090. *Black*, 100 Wn.2d at 805 ("It is clear that in making the award of attorney's fees discretionary in Attorney General suits while mandatory for prevailing plaintiffs in private actions, RCW 19.86.090, the Legislature intended that the courts develop standards to guide the exercise of their discretion."). The *Costco* Court explained that when fee shifting is mandatory, "equity cannot influence the determination of whether fees and costs should be awarded to substantially prevailing plaintiffs." 538 F.3d at 1136. Thus, the cases on which *Mandatory Poster* was based had no ability to consider what fees, costs, and expenses should be awarded under a court's equitable powers because they were operating under a mandatory fee-shifting statute. *See id.*

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Third, this Court may award the State expert fees under its equitable powers to craft an appropriate remedy. In *Ralph Williams' I*, our Supreme Court "decline[d] to limit the traditional equity powers of the court" under RCW 19.86.080 and acknowledged that the "equitable powers of remedy must be broad and flexible." *Ralph Williams' I*, 82 Wn.2d at 277–78. Recently, in *StarKist*, Division I reaffirmed the broad equitable powers of trial courts to order relief to the State under RCW 19.86.080. *See StarKist*, 25 Wn. App. 2d at 94–95.

Mandatory Poster and the cases upon which it was based do not analyze the trial court's equitable powers under the CPA to restore the State to its status quo ante. This Court's equitable power to award costs and fees is "not limited to awarding costs under RCW 4.84.010." *Hamblin*, 23 Wn. App. 2d at 845. In fact, the Legislature directed courts to "liberally construe[]" the CPA to ensure "that its beneficial purposes may be served." RCW 19.86.920; *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009).

If this Court declines to award the State its expenses as part of its attorneys' fees, it should award them as part of the State's actual costs. *Mandatory Poster* and its progeny were wrongly decided because they (1) failed to read the plain language of RCW 19.86.080(1) correctly by limiting costs to statutory costs instead of actual costs; (2) failed to recognize the distinctions between private claims under RCW 19.86.090 and State enforcement under RCW 19.86.080; and (3) failed to recognize that RCW 19.86.080 grants a trial court equitable authority to restore the State to its status quo ante. Or, this Court could simply rule that the line of cases does not apply because none are RCW 19.86.060 State-brought merger challenges under RCW 19.86.080 for which no other monetary relief is available.

E. The State is Entitled to the Expense Incurred in Bringing this Fee Petition

The State incurred $128,794.70 in attorneys' fees in preparing this Fee Petition through December 31, 2024, Mark Decl. ¶27, which is recoverable here. *See Fisher Props., Inc. v. Arden–Mayfair, Inc.*, 115 Wn.2d 364, 378, 798 P.2d 799 (1990). Detailed timekeeping entries supporting this aspect of the State's Fee Petition are attached to the declarations filed herewith.

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Mark Decl. ¶25 and Ex. A (Individual), ¶31 and Ex. B (AGO Staff), ¶51 and Ex. C (MTO Staff); Hanson Decl. ¶10, Ex. A; Pera Decl. ¶16, Ex. A; Arnold Decl. ¶10, Ex. A; Arnold Supp. Decl. ¶4, Ex. A; Balch Decl. ¶16, Ex. A; Locke Decl. ¶14, Ex. A; Lubetkin Decl. ¶13, Ex. A; So Decl. ¶9, Ex. A; Stiefel Decl. ¶11, Ex. A; Olasa Decl. ¶6. The State will submit additional documentation accompanying its Reply to support additional fees incurred after December 31, 2024. Mark Decl. ¶67.

F. Defendants are Jointly and Severally Liable and the Judgment Bears Interest

Defendants jointly litigated the merger, and this Court should hold them jointly and severally liable for the State's costs, fees, and expenses. *See* RCW 19.86.080; *StarKist*, 25 Wn. App. 2d at 88 (courts can award restitution under RCW 19.86.080(2)–(3) jointly and severally); *Ewing*, 198 Wn. App. at 523 (while courts must attempt to "segregate time spent litigating claims against codefendants," "segregation of attorney fees is not required if the trial court determines that the claims are so related that no reasonable segregation can be made"); *see also* RCW 4.84.070 (when defendants are not "united in interest" the court may apportion costs). Here, the State made one claim: that the Proposed Transaction violated RCW 19.86.060. Defendants are both parties to the Proposed Transaction and jointly defended their proposed union. Defendants operated under a joint defense agreement, had one attorney examine witnesses, submitted joint briefings, and shared time for opening and closing arguments. At all junctures of the case Defendants presented a united front.

"It is the trial court's responsibility to enter an award of interest that complies with the applicable statute." *Sintra, Inc. v. City of Seattle*, 96 Wn. App. 757, 761, 980 P.2d 796, 798 (1999). RCW 4.56.110 governs post-judgment interest rates. The default rule is that civil judgments "shall bear interest from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof." RCW 4.56.110(6). The maximum allowable interest rate for February 2025 is 12% per annum. *State Maximum Interest Rate*, State Treasurer, https://lawfilesext.leg.wa.gov/Law/CRO/WSRhtm/rates.htm. This Court entered

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judgment on February 26, 2025. Dkt. 950. The sole claim was a CPA claim—which "is a statutory remedy outside the scope of common law torts." *See Woo v. Fireman's Fund Ins. Co.*, 150 Wn. App. 158, 172, 174–75, 208 P.3d 557 (2009). As such, this Court's Judgment should bear 12% interest per annum under RCW 4.56.110(6).

VI. CONCLUSION

The State respectfully requests that the Court order Defendants to pay the State $32,446,758.78, which represents the State's statutory costs submitted in its Cost Bill and the State's reasonable attorneys' fees and expenses requested herein. The State requests that the Court find Defendants jointly and severally liable to the State. The State reserves the right to supplement its request with any future fees incurred in replying to any opposition to this Fee Petition and preparing declarations and exhibits to support that reply.

DATED this 14th day of March 2025.

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**The signing attorney certifies that this Petition is no more than the 50 pages permitted by this Court in its February 26, 2025 Judgment.*

DECLARATION OF SERVICE

I declare that I caused the foregoing document to be electronically served through the Court's Electronic Filing System on all counsel of record in this action.

DATED this 14th day of March 2025 in Seattle, Washington.

s/ Paula Pera C.
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