The Honorable Timothy Bradshaw
Trial Date: May 3, 2016

**STATE OF WASHINGTON**
**KING COUNTY SUPERIOR COURT**

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| JASMINE KAISER, an individual,<br><br>Plaintiff,<br><br>v.<br><br>CSL PLASMA INC., a corporation,<br><br>Defendant. | NO. 15-2-10233-8<br><br>AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF WASHINGTON |



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## I. INTRODUCTION

Jasmine Kaiser is a transgender woman who alleges that she attempted to donate plasma at CSL Plasma Inc.'s donation center in Kent, Washington, but was turned away based on her gender identity. Ms. Kaiser is challenging CSL Plasma's admitted policy of rejecting plasma donations from transgender donors. Ms. Kaiser alleges that CSL Plasma's policy is discriminatory and violates the Washington Law Against Discrimination ("WLAD") and the Consumer Protection Act ("CPA").

CSL Plasma seeks to dismiss Ms. Kaiser's claims, arguing, inter alia, that: (1) the WLAD's protections do not extend to a plasma donation center because it is not a place of public accommodation; (2) the federal Food and Drug Administration's ("FDA") guidelines regarding plasma donations require a no-transgender donor policy and preempt the WLAD's protections; (3) the FDA permits a no-transgender donor policy, thus exempting CSL Plasma from the CPA; and (4) the FDA has primary jurisdiction over Ms. Kaiser's claims. *See* Defendant's Motions to Dismiss, Doc. No. 17 ("Def. Mot. to Dismiss") at 10-22. The Attorney General offers this brief to assist the Court in addressing the scope of the WLAD and the CPA and determining whether a conflict exists between the FDA guidelines and state law.

## II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General is the legal adviser to the State of Washington. *See* RCW 43.10.030. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest. *See Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195, 200 (1978).

Ms. Kaiser's complaint alleges violations of the WLAD and the CPA. Complaint, Doc. No. 1 ("Compl.") at ¶¶ 15-19. The Attorney General enforces both statutes. *See* RCW 19.86.080 (authorizing CPA enforcement actions by the Attorney General);



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RCW 49.60.030(3) (defining public accommodations discrimination under the WLAD as a *per se* violation of the CPA). The Office of the Attorney General has a strong interest in ensuring the correct interpretation of the statutes it enforces on behalf of the state.

The Attorney General also has an interest in protecting the public interest, including the public's right to be free from unlawful discrimination. *See City of Seattle v. McKenna*, 172 Wn.2d 551, 562, 259 P.3d 1087, 1091-12 (2011) (Attorney General's "general powers and duties" include "discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern") (internal quotation marks omitted); RCW 49.60.010 (Legislative finding that discrimination "threatens not only the rights and proper privileges of [state] inhabitants but menaces the institutions and foundation of a democratic state"). This case considers whether Defendant CSL Plasma's policy of refusing to accept plasma donations from transgender donors is discriminatory under the WLAD and the CPA. This case presents issues of significant public interest, including the scope of the laws protecting Washington citizens from discrimination.

## III. ISSUES ADDRESSED BY AMICUS

**A.** Whether a donation center that solicits plasma donations from the public is a public accommodation under the WLAD;

**B.** Whether the WLAD's prohibition against discriminating based on gender identity is preempted by the FDA guidelines;

**C.** Whether a policy of rejecting donations from transgender donors is "permitted by" the FDA and therefore exempt under RCW 19.86.170 of the CPA; and

**D.** Whether the FDA has primary jurisdiction over Ms. Kaiser's claims.

## IV. LEGAL ARGUMENT

In its motion to dismiss, CSL Plasma argues that the WLAD's protections do not cover plasma donation centers and conflict with FDA guidelines, and that Ms. Kaiser's claims



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should be referred to the FDA under the doctrine of primary jurisdiction. CSL Plasma's arguments are not supported by law or policy. A place of public accommodation under the WLAD "includes, but is not limited to" any place that is "kept for gain." RCW 49.60.040(2). As a for-profit business that invites plasma donations from the general public, CSL Plasma's donation centers fall squarely within the WLAD's ambit. Further, the WLAD's protections are not preempted by the FDA guidelines. While the FDA requires the deferral of male donors who have had sex with men since 1977 ("MSM deferral policy"), *see* Def. Mot. to Dismiss at 5 (citing FDA recommendations regarding HIV risk), the FDA nowhere requires plasma donation centers to implement a blanket prohibition against all transgender donors, as CSL Plasma has done here, nor can CSL Plasma claim the FDA specifically permits such a policy. Finally, because the FDA has no competency or expertise regarding state anti-discrimination laws, there is no reason to dismiss Ms. Kaiser's claims under the doctrine of primary jurisdiction. In short, under the facts of this case, CSL Plasma is subject to the WLAD and is not exempt under the CPA.

## A. Plasma donation centers are "public accommodations" under the WLAD

The WLAD's anti-discrimination provisions extend to CSL Plasma's donation center. Under the WLAD, a public accommodation is "any place" "kept for gain." RCW 49.60.040(2). Given its plain text and its mandate requiring liberal construction, *see* RCW 49.60.020, the Court should hold that CSL Plasma's donation center is a public accommodation under state law. CSL Plasma's remaining arguments about its "service" or the "private" nature of its business are unavailing.

### 1. WLAD's definition of "public accommodation" is broad and inclusive

The WLAD is a broad remedial statute, the purpose of which is to prevent and eradicate discrimination on the basis of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation (including gender identity), or the



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presence of any sensory, mental or physical disability. RCW 49.60.030(1); *see also Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 42, 50 (1996). The WLAD protects Washingtonians from discrimination in employment, housing, commerce, credit transactions, insurance transactions, and in places of public accommodation. RCW 49.60.030(1)(a)-(g). By its own terms, the WLAD mandates liberal construction. RCW 49.60.020 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof"); *see also Shoreline Cmty. Coll. Dist. No. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 406, 842 P.2d 938, 945 (1992) (noting that a statutory mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage of the law).

This Court's analysis of whether plasma donation centers are public accommodations should start with the text of the "public accommodations" definition. *See State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030, 1035 (2001). Under the WLAD, a place of public accommodation "*includes, but is not limited to*":

> "[A]ny place, licensed or unlicensed, kept for gain, hire, or reward, or where charges are made for admission, service, occupancy, or use of any property or facilities, whether conducted for the entertainment, housing, or lodging of transient guests, or for the benefit, use, or accommodation of those seeking health, recreation, or rest, or for the burial or other disposition of human remains, or for the sale of goods, merchandise, services, or personal property, or for the rendering of personal services, or . . . where public amusement, entertainment, sports, or recreation of any kind is offered with or without charge, or where medical service or care is made available, or where the public gathers, congregates, or assembles for amusement, recreation, or public purposes . . ."

RCW 49.60.040(2) (emphasis added).

"This definition is broad and inclusive." *In re Johnson*, 71 Wn.2d 245, 252, 427 P.2d 968, 973 (1967). *Cf. Elane Photography, LLC v. Willcock*, 284 P.3d 428, (N.Mex. Ct. App. 2012), *aff'd* 309 P.3d 53 (N.M. 2013) (noting several states have adopted broad definitions of public accommodations and citing Washington as an example). By its very terms, the WLAD does "not list every possible example [of a public accommodation] to which it applies." *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F.Supp. 2d 1151, 1159 (W.D.



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Wash. 2011). Indeed, since it first enacted the public accommodations provisions, "[t]he Legislature has progressively broadened the scope of the WLAD . . . both with regard to the types of covered facilities and with regard to the protected groups." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 247, 59 P.2d 655, 667 (2002) (hereinafter "*Tenino Aerie*"); *see also Powell v. Utz*, 87 F. Supp. 811, 816 (E.D. Wash. 1949) (noting that the legislature amended the definition of public accommodation to add "resort" and "assemblage" to the places covered by the WLAD); *Browning v. Slenderella Sys. of Seattle*, 54 Wn.2d 440, 445, 341 P.2d 859, 863 (1959) (noting that the public accommodations amendments sought to remove limitations created by the Washington Supreme Court when it earlier held a soda foundation in a drug store and a baseball park to not be public accommodations), *disapproved of on other grounds by Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 482-83, 805 P.2d 800, 803-04 (1991).

**2. CSL Plasma's plasma donation center falls within the WLAD's definition of a "public accommodation"**

Ms. Kaiser alleges that CSL Plasma is a "for-profit business," that allows donors to provide plasma "in exchange for compensation" at the center it "operates and advertises" in Kent, Washington. Compl. ¶¶ 7-8. According to promotional materials cited by CSL Plasma, its facility is open to the public "Monday through Sunday" without the need for an appointment. Declaration of Bruce Douglas in Support of Def. Mot. to Dismiss, Doc. No. 18 ("Douglas Decl.") ¶ 3, Exhibit B at 1, 3. Considered in the light most favorable to Ms. Kaiser, *see McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 102-03, 233 P.3d 861, 863-64 (2010), these allegations satisfy the definition of a "public accommodation" and the Court should deny CSL Plasma's motion to dismiss.

No single set of factors guides courts seeking to identify a public accommodation. *See Apilado*, 792 F.Supp.2d at 1158 (identifying factors to consider only after "stripp[ing] away" definitional language that would be "extraneous" in the context of an athletic

association). Nevertheless, "Washington law on what constitutes a public accommodation is extensive." *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 638 n.24, 911 P.2d 1319, 1329 (1996). Even assuming *arguendo* that CSL Plasma does not provide donors with a medical service, *see* Def. Motion to Dismiss at 13-14, medical service is but one category of establishments identified in the non-exclusive list of public accommodations covered under the WLAD. *See* RCW 49.60.040(2). For example, even though they are not explicitly listed, courts have interpreted the WLAD to include restaurants, *Powell*, 87 F.Supp. at 816, parks and public resorts, *Davis v. Tacoma Ry. & Power Co.*, 35 Wash. 203, 207, 77 P. 209, 211 (1904), theaters, *Anderson v. Pantages Theatre Co.*, 114 Wash. 24, 27-28, 194 P. 813, 814 (1921), and barbershops, *In re Johnson*, 71 Wn.2d at 252. Further, the WLAD's coverage is not limited to assuring equal access to the provision of purely tangible goods and services. *See, e.g., Slenderella Sys. of Seattle*, 54 Wn.2d at 445. (weight loss clinic); *Apilado*, 792 F.Supp.2d at 1158-60 (softball league); *Tenino Aerie*, 148 Wn.2d at 255 (membership policies of fraternal organizations). In *Slenderella Systems of Seattle*, for example, the plaintiff challenged a weight loss clinic's failure to provide her with a courtesy demonstration of its treatments because she was black. 54 Wn.2d at 445. Although the service sought by the plaintiff was free, the Washington Supreme Court did not have "any issue" with determining the weight loss clinic to be a place of public accommodation and affirmed the lower court's finding of discrimination. *Id.*

Here, based on Ms. Kaiser's allegations and CSL Plasma's moving papers, a plasma donation center is a place of public accommodation under the WLAD. As a for-profit business open to the public, CSL Plasma is a place of "accommodation" or "assemblage" that is "kept for gain, hire, or reward."[1] RCW 49.60.040(2); *see also Davis*, 35 Wash. at 207

[1] Indeed, a blood donation center may also fall within the WLAD to the extent donors receive personal satisfaction from donating blood. *See Roberts v. U.S. Jaycees*, 468 U.S 609, 626, 104 S. Ct. 3244, 82 L. Ed.2d 462 (1984) (noting a fraternal organization may be subject to a state's definition of public accommodation because "[l]eadership skills" and "business

(recognizing the right to go to any place "where the public generally are invited"). While CSL Plasma argues that a plasma donation center is "utterly unlike" some of the accommodations identified under the WLAD, *see* Def. Mot. to Dismiss at 13, the WLAD's statutory definition itself identifies a diversity of places as public accommodations, all of which are "utterly unlike" one another. *See* RCW 49.60.040(2) (identifying places that provide housing, medical care, transportation, education, sports, and burial services as public accommodations). Plasma donation centers are not exempt from the WLAD's coverage simply because they differ from some of the other covered places of accommodation or because the WLAD does not explicitly identify them in its definition. *See Powell*, 87 F.Supp. at 814-16 (concluding that "restaurants" fall within the WLAD's coverage even though the word "restaurants" was omitted from the WLAD's definition).

**3. The federal Americans with Disabilities Act is not controlling**

CSL Plasma cites two unpublished district court cases in an effort to narrow the WLAD's definition of "public accommodations" in the blood plasma context. *See* Def. Mot. to Dismiss at 13. These cases apply the federal Americans with Disabilities Act ("ADA") and are inapposite.

Although state courts sometimes look to cases construing federal anti-discrimination laws for guidance, the WLAD is a separate statute that pre-dates the ADA. *See Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 850, 292 P.3d 779, 788 (2013) (noting that the

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contacts" could be considered "goods" and "advantages" as covered by state law). As CSL Plasma suggests here, the donated blood here is "used in the manufacture of high-grade pharmaceutical products, including critical therapies for individuals suffering from . . . a variety of . . . life-threatening conditions." Def. Mot. to Dismiss at 15. As such, a blood donation center may be a place where individuals "render [] personal services," or a place where "the public gathers . . . for public purposes," i.e., in the name of life-saving medical research. *See* RCW 49.60.040(2); *see also* Douglas Decl. ¶ 2, Exhibit A at 2 (stating that "[w]hen you donate, you give a valuable gift to those who require plasma-derived therapies to live healthier lives" and that "[p]lasma-derived biotherapies save and improve the quality of life for people with rare and serious diseases worldwide.").

WLAD's liberal construction mandate makes its scope broader than federal law). Even where subsections of the WLAD may have federal analogues, "there is no provision in the federal law which sets forth the equivalent of the broad language of RCW 49.60.030(1)." *Marquis*, 130 Wn.2d at 110-111. As such, state courts are "free to adopt those theories and rationale which best further the purposes and mandates of our state statute." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 361-62, 753 P.2d 517, 520 (1988); *see Allison v. Hous. Auth. of City of Seattle*, 118 Wn.2d 79, 91, 821 P.2d 34, 40 (1991) (noting that federal law is "only persuasive authority" and adopting a standard that "correspond[ed] with the language and policies contained in [the WLAD]").

Indeed, state courts routinely depart from federal anti-discrimination statute precedent where the WLAD's coverage extends beyond its federal counterparts. *See, e.g., Brown v. Scott Paper Worldwide*, 143 Wn.2d 349, 361, 20 P.3d 921, 928 (2001) (finding individual supervisors liable under the WLAD, unlike Title VII); *Martini v. Boeing Co.*, 137 Wn.2d 357, 375-76, 971 P.2d 45, 54-55 (1999) (finding that the WLAD provides for damages unlike Title VII); *Marquis*, 130 Wn.2d at 110-12 (finding independent contractors are able to bring a discrimination claim under the WLAD, unlike Title VII). Such independence is required where the language of the WLAD significantly differs from its federal counterparts. *See Scott Paper*, 143 Wn.2d at 358 (finding Title VII's definition of "employer" to be significantly different from the WLAD definition). *Cf. Powell*, 87 F.Supp. at 816 (rejecting case law based on other state statutes because those state statutes lacked the WLAD's broad, general wording and legislative history).

Here, the public accommodations provision of the WLAD is significantly different from the ADA. The WLAD contains its own definition of a "place of public accommodation," RCW 49.60.040(2), which is wholly broader than the definition under the ADA, *see* 42 U.S.C. § 12181(7) (limiting "public accommodations" to only twelve specifically identified categories of places). CSL Plasma's citation to *Maley v. Octapharma*

*Inc.*, No. 12-13892, 2013 WL 3814248, at *2 (E.D. Mich. July 22, 2013) and *Levorsen v. Octapharma Plasma, Inc.*, No. 2:14-cv-325, 2014 WL 6751172, at *4 (D. Utah Dec. 1, 2014) therefore, is misplaced. Both *Maley* and *Levorsen* considered whether plasma centers fell within the statutory definition of a public accommodation under the ADA, not the WLAD. *Id.* Here, in a case alleging discrimination based on gender identity under state law, there is no reason to apply the federal definition of public accommodation that relates only to disability discrimination.

**4. CSL Plasma's remaining arguments about its "service" and the "private" nature of its business fail**

CSL Plasma offers three alternative arguments for why its donation center is not a public accommodation: (1) the opportunity to donate plasma is a service, not a place; (2) CSL Plasma does not render a service, at all, and (3) a plasma donation center is a private business. None of these arguments is persuasive.

First, CSL Plasma argues that the WLAD only protects "physical access to CSL," and not "the opportunity to donate plasma, which is a service." Def. Motion to Dismiss at 11-12 (citing *Fell*, 128 Wn.2d at 638 (rejecting "entitlement[s] to [disability] services" given that plaintiff "define[d] a place of accommodation as . . . wherever public transportation is provided"), and *Kral v. King Cty.*, No. C10-1360-MAT, 2012 WL 726901, at *16 (W.D. Wash. Mar. 6, 2012) (rejecting disability service requested by plaintiff for use in his home)). CSL Plasma's argument is misplaced. The WLAD is not limited to regulating the physical accessibility of places of public accommodation—it also prohibits discrimination regarding the accessibility of goods and services provided within those places of accommodation. *Washington State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 186, 293 P.3d 413, 420 (2013). In *Regal Cinemas*, a group advocating on behalf of individuals with hearing loss challenged Regal Cinema's failure to provide captioning in the screening of its movies. *Id.* at 182-83. In holding failure to provide a "comparable service" to individuals



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with hearing loss violated the WLAD, the court dismissed the defendants' idea that the "service" movie theaters "provide is selling tickets to movies, rather than screening them for their customers." *Id.* at 195-96. The Court here should likewise dismiss CSL Plasma's argument. Regardless of her physical access to the plasma donation center, Ms. Kaiser was denied the full scope of access granted to non-transgender donors, i.e., the opportunity to donate plasma. Just like a theater that sells tickets to the general public but prevents some patrons from actually viewing the movie, CSL Plasma is subject to the WLAD.

Second, CSL Plasma's alternative argument, i.e., that CSL Plasma is not rendering a service at all because it is the individual providing a service to CSL Plasma, also fails. *See* Def. Mot. to Dismiss at 12 n.7. CSL Plasma's argument copies the reasoning in *Levorsen v. Octapharma Plasma, Inc.*, 2014 WL 6751172, at *4, which considered the definition of public accommodations under the ADA, not the WLAD. In *Levorsen*, the district court looked to the "service establishments" explicitly identified in the ADA to analyze whether a plasma donation center fell within the ADA's catch-all provision for "other service establishments." *Id.* Since a plasma donation center offers the public money in exchange for a service (plasma donation) instead of offering services or goods in exchange for money, the district court held that it did not fall within the ADA's coverage. *Id.* However, under the WLAD, to be a place of public accommodation, CSL Plasma is not required to render a service at all. The WLAD merely requires CSL Plasma be a "place" "kept for gain," and generally open to the public. RCW 49.60.040(2); *see also Powell*, 87 F. Supp. at 814 (noting "public" means "open to the use of the public in general for any purpose").[2]

[2] To the extent the Court analyzes whether CSL Plasma's business involves provisions of a "service," the Court should reject altogether *Levorsen*'s conception of a "service" as limited to establishments that provide a service to the general public, and not one where the public sells its services to the establishment. In defining a place of public accommodation, the legislature simply stated it includes a place used for the "sale of . . . services." RCW 49.60.040(2). If the legislature had intended to limit the operation of the law to places where the establishment sold its services, it could easily have so provided in plain words. *See*



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Finally, CSL Plasma's argument that its plasma donation centers are exempt as a private business is equally unsupportable. CSL Plasma bears the burden of showing it is exempt under the statute as "distinctly private." *See Apilado*, 792 F. Supp. 2d at 1159. The Washington Supreme Court has set forth factors to consider when determining whether a place of accommodation is public or exempt under the statute as "distinctly private": (1) size, (2) purpose, (3) policies, (4) selectivity, (5) public services offered, (6) practices, and (7) other characteristics particular to the case. *Tenino Aerie*, 148 Wn.2d at 251 (*citing Roberts v. U.S. Jaycees*, 468 U.S. 609, 620, 104 S. Ct. 2013, 80 L. Ed 2d 622 (1984)). In analyzing these factors, "emphasis should be placed on whether the organization is a business or a commercial enterprise and whether its membership policies are so unselective and unrestricted that the organization can fairly be said to offer its services to the public." *Id.* Here, CSL Plasma has not carried its burden to show that its plasma donation centers are "distinctly private." CSL Plasma is a commercial enterprise that collects plasma for use in the manufacture of high-grade pharmaceutical products. *See* Def. Mot. to Dismiss at 2. Even though plasma donors are eventually screened for donor eligibility, such screening cannot preclude the WLAD's coverage. If the WLAD were "construed to exclude any business establishment where . . . in the absence of statutory restrictions the proprietor has the right to govern the terms of his dealings with the patrons," "then no privately owned and operated place of business would be included, and the civil rights statute would be a farce and a sham." *Powell*, 87 F. Supp. at 815.

Further, contrary to CSL Plasma's suggestion, its business model is wholly different from the private business at issue in *Elmi v. SSA Marine, Inc.*, No. C13-1703-JCC, 2015 WL 2374210, at *9 (W.D. Wash. May 18, 2015). In *Elmi*, the defendant did not offer *any* services to the public and leased a terminal whose access was limited to longshore workers,

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*Powell*, 87 F.Supp. at 815 (declining to limit the WLAD's reach to only government-owned and operated establishments where limiting language not present in the statute).

short-haul truckers, and other port workers. *Id.* In contrast, CSL Plasma is neither small nor selective. Its own website invites the general public to its place of business to donate plasma with or without appointment. Douglas Decl. ¶ 3, Exhibit B at 1, 3. Indeed, the activity central to its business, the collection of plasma, *requires* the participation of the general public. CSL Plasma falls squarely within the WLAD's definition of a public accommodation.

**B. The FDA's guidelines do not conflict with CSL Plasma's obligations under the WLAD**

Because it is a place of accommodation, CSL Plasma cannot avoid compliance with the WLAD. Nor do FDA guidelines allow CSL Plasma to avoid compliance with the WLAD. In its motion, CSL Plasma concedes that federal law regarding blood plasma collection is not so pervasive so as to wholly displace state laws or regulations. Def. Mot. to Dismiss at 19. CSL Plasma nevertheless argues the WLAD is preempted because it is impossible to comply with both state and federal law, and the WLAD stands as an obstacle to the achievement of Congress's objectives. This is simply not so.

Assuming *arguendo* that federal guidelines (as opposed to laws or regulations) are capable of preempting state law,[3] no conflict exists between the WLAD and the FDA guidelines. *See Scott v. CSL Plasma, Inc.*, No. 13-cv-2616, slip op. at 7-8 (D. Minn. Apr. 11, 2014) (rejecting CSL Plasma's same claim that the FDA guidelines conflict with Minnesota law). The WLAD prohibits a plasma donation center from discriminating based on a donor's gender identity. Nowhere in the FDA regulations or guidelines is CSL Plasma required to implement a policy of rejecting plasma donations based on gender identity. *See* 21 C.F.R.

[3] Although CSL Plasma relies on an FDA guideline and minutes of two meetings with a non-profit, where unidentified FDA staff indicated donations from transgender woman should be deferred, Douglas Decl. ¶¶ 17-18, Exhibit P and Q, CSL Plasma cites no case law suggesting that federal guidelines or meeting minutes are capable of preempting state law. *Cf. Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (noting federal *regulations* have no less preemptive effect than federal statutes).



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§§ 640.60-640.76 (setting forth general plasma collection procedures only); *Hillsborough Cty. v. Automated Med. Labs. Inc.*, 471 U.S. 707, 105 S. Ct. 2371, 85 L. Ed 2d 714 (1985) (discussing the FDA's own statement that it did not intend its regulations to be exclusive). Indeed, according to CSL Plasma's own request for judicial notice, FDA guidelines most recently indicated that, when considering donor eligibility, assessments should be based not on gender identity, but "on risk behavior." Douglas Decl. ¶ 7, Exhibit F, at 5. Regardless of whether FDA staff indicated that some transgender donors could fall under FDA guidelines that defer donations from "men who have had sex with another man even one time since 1977," *see* Douglas Decl. ¶ 7, Exhibit F at 6, there is no reason for CSL Plasma to assume that all transgender donors, male or female, have had sex with men and prevent them from donating. To the contrary, like the plaintiff in *Scott v. CSL Plasma, Inc.*, Ms. Kaiser specifically alleges that, "at no point, either before or after her transition process, has [she] engaged in sexual contact with a male." Compl. ¶ 3. Under these facts, no conflict exists between the WLAD and the FDA guidelines and no preemption results.

Further, the WLAD does not stand as an "obstacle" to federal objectives in ensuring the integrity and safety of the plasma collected. The WLAD does not require, as CSL Plasma suggests, that it "accept donations of transgender donors without any regard to the FDA's regulatory scheme." *Cf.* Def. Mot. to Dismiss at 20. The WLAD simply prohibits CSL Plasma from implementing a blanket policy of rejecting donations from all transgender donors. Indeed, CSL Plasma's across-the-board policy disregards the FDA's own recommendation that donor eligibility be assessed based "on behavior and not stereotypes." *See* Douglas Decl. ¶ 7, Exhibit F, at 5. Simply put, rejecting prospective donors based on gender identity alone is not only discriminatory, but unnecessary to secure the safety of our nation's blood supply.



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In sum, CSL Plasma is fully capable of complying with both the WLAD and the FDA guidelines by considering a donor's risk exposure, as opposed to their gender identity. Under the facts of this case, the FDA guidelines do not preempt the WLAD.

**C. The FDA guidelines do not exempt CSL Plasma from complying with the CPA**

Contrary to its argument, CSL Plasma's policy is not exempt from the Consumer Protection Act. *See* Def. Mot. to Dismiss at 16.

The CPA does not apply to "actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States." RCW 19.86.170. This CPA exemption is narrowly construed. *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 111, 22 P.3d 818, 822 (2001). It only applies if a particular practice alleged to be unfair or deceptive is specifically permitted by another state or federal regulatory body. *Vogt v. Seattle-First Nat'l Bank, N.A.*, 117 Wn.2d 541, 551-52, 817 P.2d 1364, 1370 (1991). "Mere nonaction by a regulatory board or commission . . . to actions taken by members of a business, occupation or profession does not amount to specific permission." *In re Real Estate Brokerage Antitrust Litig.*, 95 Wn.2d 297, 301, 622 P.2d 1185, 1187 (1980).

Here, CSL Plasma argues the CPA exemption applies because the FDA regulates plasma donation centers and permits plasma donation centers to assess a donor's eligibility. Def. Mot. to Dismiss at 16-17. But Ms. Kaiser is not challenging CSL Plasma's general ability to assess a donor's eligibility. *See In re Real Estate*, 95 Wn.2d at 301 (concluding an action or transaction is not exempt from the CPA and antitrust laws merely because other aspects of its business are regulated generally). Ms. Kaiser is challenging CSL Plasma's specific policy of refusing plasma donations from transgender donors as discriminatory, unfair, and deceptive. *See* Compl. ¶¶ 15, 19; RCW 49.60.030(3) (declaring WLAD violations to be an "unfair practice" and a per se violation of the CPA). Unless the FDA "takes overt

and affirmative actions" to specifically permit plasma donation centers to reject all transgender donors, "then such actions and transactions do not qualify as exemptions from the CPA." *See Singleton v. Naegeli Reporting Corp.*, 142 Wn. App. 598, 607-08, 175 P.3d 594, 600 (2008); *see also Vogt*, 117 Wn.2d at 552. The FDA has taken no such action, and the CPA exemption does not apply.

CSL Plasma's citations to the contrary are unavailing. In *Johnson v. Cash Store*, 116 Wn. App. 833, 847, 68 P.3d 1099, 1107 (2003), the plaintiff challenged the interest rates charged on her payday loan; however, a state statute specifically permitted the high interest rates charged. *Id.* Likewise, in *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 421, 865 P.2d 536, 540 (1994), a federal agency was already charged with determining whether banking practices were unfair or deceptive, leaving no room for a conflicting determination under state law. Here, as CSL Plasma concedes, the FDA's regulation of plasma collection is not so pervasive so as to displace our state laws. Further, the FDA does not purport to regulate or permit blanket discrimination based on gender identity. Because the FDA has not authorized CSL Plasma's across-the-board policy of rejecting transgender donors, the CPA's protections still apply.

**D. The FDA does not have primary jurisdiction over Ms. Kaiser's claims**

CSL Plasma argues the FDA has primary jurisdiction over Ms. Kaiser's complaint. This is not so. "Primary jurisdiction" is a prudential doctrine under which courts may determine that the initial decision-making responsibility should be performed by a relevant agency rather than the courts. *Vogt*, 117 Wn.2d at 554. However, the doctrine is not designed to "secure expert advice" from agencies "every time a court is presented with an issue conceivably within the agency's ambit." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 1990). When considering primary jurisdiction, Washington courts consider three factors: (1) whether the administrative agency has the authority to resolve issues that

would be referred to it by the court, (2) whether the agency has special competence over all or some part of the controversy which renders the agency better able than the court to resolve the issues; and (3) whether the claim involves issues that fall within the scope of a pervasive regulatory scheme so that a danger exists that judicial action would conflict with the regulatory scheme. *In re Real Estate*, 95 Wn.2d at 302. All three factors must be satisfied before a court can refer an issue to an administrative agency. *Id.* at 303.

Here, the first factor is dispositive. Ms. Kaiser challenges CSL Plasma's policy of rejecting plasma donations from transgender donors under the WLAD and the CPA. Regardless of FDA's regulatory power over the nation's blood supply, FDA is not the relevant agency to resolve Ms. Kaiser's discrimination claim or her claim of an unfair practice in trade or commerce. As a federal agency, the FDA has neither the authority nor the competence to resolve state-law discrimination claims. *Cf. Gordon v. Church & Dwight Co.*, No. C09-5585 PJH, 2010 WL 1341184, at *1-2 (N.D. Cal. Apr. 2, 2010) (finding the FDA had primary jurisdiction after observing the FDA had the power to impose the kinds of labels and warnings plaintiff sought to impose). To the extent the FDA manages a pervasive regulatory scheme and has special expertise in securing the nation's blood supply, it has directed that donor eligibility be based on the donor's "risk behavior history," not blanket assumptions related to gender identity. Douglas Decl. ¶ 7, Exhibit F at 5 (recommending that "trained blood establishment personnel" "talk with each prospective donor about risk factors for HIV infection" and that "[t]he focus [of the talk] should be on behavior and not on stereotypes"). Ms. Kaiser's claim challenges a policy that the FDA has not authorized and that is alleged to discriminate under state law. The FDA does not have primary jurisdiction over such claims.

## V. CONCLUSION

For these reasons, the Attorney General respectfully urges the Court to hold (1) CSL Plasma's donation center is a place of public accommodation under state law, (2) the WLAD

is not preempted by FDA guidelines; (3) the FDA guidelines do not exempt CSL Plasma from CPA's protections; and (4) Ms. Kaiser's claims should not be referred to the FDA.

RESPECTUFLLY SUBMITTED this 27 day of October 2015.

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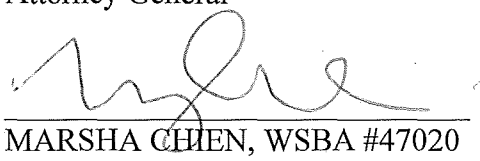

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