

The Honorable Ricardo S. Martinez

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

TVI Inc. dba SAVERS and VALUE  
VILLAGE,

Plaintiff,

v.

ROBERT W. FERGUSON, in his official  
capacity as Attorney General of the State of  
Washington,

Defendant.

NO. 2:17-cv-01845-RSM

DEFENDANT’S MOTION TO DISMISS  
UNDER FRCP 12(b)(1) AND (b)(6))

NOTED FOR: JANUARY 12, 2018

**I. RELIEF REQUESTED**

Plaintiff TVI, Inc. dba Savers and Value Village (TVI) preemptively filed this Section 1983 suit against Washington State Attorney General Robert W. Ferguson (Attorney General) in the midst of settlement negotiations with the State of Washington related to TVI’s alleged violations of the Consumer Protection Act (CPA), RCW 19.86 and Charitable Solicitations Act (CSA), RCW 19.09. TVI claims that the Attorney General’s threatened lawsuit (which has since been filed) and pre-suit settlement demands violated TVI’s First Amendment rights to free speech.

The Attorney General moves that all of the claims against him be dismissed with prejudice based on *Younger* abstention and principles of equity, comity, and federalism.

1 See Fed. R. Civ. P. 12(b)(1) and (6). The Attorney General requests that the Court take judicial  
2 notice of the State of Washington’s Complaint against TVI filed in King County Superior Court  
3 alleging violations of the CPA and CSA that seeks civil penalties, restitution, and injunctive relief  
4 (State Court Suit). The State Court Suit alleges that TVI violated the consumer protection laws by  
5 deceiving charitable donors as well as shoppers at its retail stores. Until recently, TVI paid its charity  
6 partners nothing for furniture and household items despite deceptively representing to donors that  
7 it did so. TVI now pays its charity partners several cents per piece of furniture or household item  
8 that is donated. Additionally, TVI has and continues to deceptively represent to consumers shopping  
9 at its chain of retail stores that it in-store purchases benefit charities. The First Amendment does  
10 not bar deception claims against commercial fundraisers hired by charitable organization based  
11 on allegations that fundraisers made false or misleading representations. *Illinois ex rel. Madigan*  
12 *v. Telemarketing Assoc., Inc.*, 538 U.S. 600, 624 (2003). Deceptive commercial speech is not  
13 protected by the First Amendment. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*  
14 *of Ohio*, 471 U.S. 626, 638, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (“The States and the Federal  
15 Government are free to prevent the dissemination of commercial speech that is false, deceptive, or  
16 misleading.”).

## 19 II. STATEMENT OF FACTS

### 20 A. TVI’s Allegations

21 The Attorney General has been conducting a consumer protection investigation of TVI  
22 for several years. Dkt. 1, ¶3. In the course of that investigation, the Attorney General submitted  
23 pre-suit settlement demands to TVI that included proposed injunctive terms requiring TVI to  
24 disclose to charitable donors as well as to shoppers at its thrift stores the amount that TVI pays  
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1 to charities for the items that were donated. *Id.*, ¶26. TVI did not agree. *Id.* The Attorney General  
2 also demanded that TVI pay a monetary amount to the State to resolve the consumer protection  
3 claims. *Id.*, ¶¶27-8.

4 While settlement negotiations were ongoing and an offer from TVI to the State was  
5 outstanding, TVI filed this suit. TVI asserts that the State’s threatened claims violated “the First  
6 Amendment, as they are founded on the premise that the State may allege and recover for  
7 deceptive practices if TVI does not disclose to all donors the particulars of its contractual  
8 compensation arrangements with charity partners.” *Id.*, ¶36. TVI seeks declaratory and  
9 injunctive relief against the Attorney General pursuant to 42 U.S.C. § 1983 and the Declaratory  
10 Judgment Act. *Id.*, ¶1.

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13 **B. The State Court Suit**

14 The State alleges that TVI violated the CPA by deceiving donors that donations of  
15 furniture and household goods to TVI would benefit TVI’s charity partners. *See* Declaration of  
16 Jeffrey Rupert in Support of Defendant’s Motion to Dismiss (Rupert Decl.), Exhibit A, State  
17 Court Suit, ¶¶1.2, 5.8. – 5.12, 5.44 – 5.52, 6.1 – 6.12. In reality, charities received nothing from  
18 TVI for any furniture or household items that consumers donated to TVI on the charities’ behalf  
19 until recently. Rupert Decl. Ex. A, ¶¶1.2, 5.7. TVI now pays the charity several cents per piece  
20 of furniture or household item that is donated to TVI on the charities’ behalf. *Id.*, ¶¶1.6, 5.13.  
21 TVI also deceives consumers by representing in its chain of retail stores that in-store purchases  
22 benefitted a charity. *Id.*, ¶¶1.6, 5.27 – 5.32. The compensation that a charity received from TVI  
23 had no relationship whatsoever with what is purchased in TVI’s retail stores. *Id.*, ¶¶1.6, 5.27.  
24 TVI also failed to include certain disclosures mandated by the CSA on some of its  
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1 advertisements, and each violation of the CSA is a per se violation of the CPA. *Id.*, ¶¶5.53, 7.1  
 2 – 7.8. In its Complaint, the State seeks civil penalties, restitution, and injunctive relief. *Id.*, ¶¶8.1-  
 3 8.7.

4 The First Amendment does not bar deception claims against commercial fundraisers  
 5 hired by charitable organization based on allegations that fundraisers made false or misleading  
 6 representations. *Illinois ex rel. Madigan*, 538 U.S. at 624 (2003). “The First Amendment’s  
 7 concern for commercial speech is based on the informational function of advertising . . . there  
 8 can be no constitutional objection to the suppression of commercial messages that do not  
 9 accurately inform the public about lawful activity.” *Central Hudson Gas & Elec. Corp. v. Public*  
 10 *Serv. Comm’n of New York*, 447 U.S. 557, 563, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). As a  
 11 result, it is permissible to “ban forms of communication more likely to deceive the public than  
 12 to inform it.” *Id.*; see *Zauderer*, 471 U.S. at 638 (“The States and the Federal Government are  
 13 free to prevent the dissemination of commercial speech that is false, deceptive, or misleading.”).

### 14 III. AUTHORITY

15 The Attorney General moves that all of the claims against him be dismissed with  
 16 prejudice based on *Younger* abstention.

#### 17 A. Request That the Court Take Judicial Notice of the State Court Suit

18 Courts may take judicial notice of a fact that “is not subject to reasonable dispute because  
 19 it can be accurately and readily determined from sources whose accuracy cannot reasonably be  
 20 questioned.” Fed.R.Evid. 201. A court may take judicial notice of undisputed matters of public  
 21 record, including documents “on file in federal or state courts.” *Harris v. County of Orange*, 682  
 22 F.3d 1126, 1131 (9th Cir.2012).  
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1 The Attorney General requests that the Court take judicial notice of the State Court Suit,  
2 which is attached as Ex. A to the Rupert Decl.

3 **B. Legal Standards for Motion to Dismiss**

4 This Court should dismiss the Complaint if the Court lacks jurisdiction over the subject  
5 matter of the dispute, or if Plaintiff fails to state a claim upon which relief can be granted. Fed. R.  
6 Civ. P. 12(b)(1), (6). In considering either basis for dismissal, the Court must accept as true all  
7 material factual allegations in the complaint. *Keniston v. Roberts*, 717 F.2d 1295, 1300 (9th Cir.  
8 1983). In deciding whether a complaint states a claim, the Court must additionally draw all  
9 reasonable inferences in favor of the plaintiff. *Id.* at 1300. The Court is not, however, required to  
10 accept as true Plaintiff's legal or conclusory allegations. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
11 (2009). Additionally, when the question to be considered is one involving the jurisdiction of a  
12 federal court, the plaintiff must affirmatively establish jurisdiction, and that showing is not made  
13 by drawing inferences from the pleadings. *Norton v. Larney*, 266 U.S. 511, 515 (1925); *Shipping*  
14 *Financial Services Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998).

17 **C. This Court Should Abstain From Exercising Jurisdiction Under *Younger v. Harris***

18 TVI's Complaint should be dismissed under the *Younger* abstention doctrine. *See*  
19 *Younger v. Harris*, 401 U.S. 37, 43-46 (1971). The *Younger* abstention doctrine holds that  
20 principles of equity, comity, and federalism limit the exercise of federal jurisdiction over matters  
21 being litigated in an ongoing state proceeding. *Id.* The *Younger* abstention doctrine is limited to  
22 three categories of cases: (1) parallel, pending state criminal proceedings, (2) quasi-criminal  
23 enforcement actions, and (3) state civil proceedings that implicate a State's interest in enforcing  
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1 the orders and judgments of its courts. *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588  
2 (2013).

3 The Ninth Circuit has held that, in civil cases, “*Younger* abstention is appropriate only  
4 when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or  
5 involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an  
6 important state interest, and (4) allow litigants to raise federal challenges.” *ReadyLink*  
7 *Healthcare, Inc. v. State Comp. Ins. Fund*, 754 F.3d 754, 759 (9th Cir. 2014). If these four  
8 threshold elements are met, courts “then consider whether the federal action would have the  
9 practical effect of enjoining the state proceedings and whether an exception to *Younger* applies.”  
10 *Id.* If the threshold elements are met, and no exception applies, the Court should dismiss actions  
11 involving injunctive or declaratory relief. *Gilbertson v. Albright*, 381 F.3d 965, 968–69 (9th Cir.  
12 2004) (*en banc*).

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15 **1. The State proceeding is ongoing**

16 For a State proceeding to be “ongoing” for purposes of *Younger* abstention, the State  
17 proceeding does not need to be filed before the federal case. Rather, abstention under *Younger*  
18 may be required if the state proceeding has been initiated “before any proceedings of substance  
19 on the merits have taken place in the federal court.” *Hawaii Housing Auth. v. Midkiff*, 467 U.S.  
20 229, 238, 104 S.Ct. 2321, 2328, 81 L.Ed.2d 186 (1984). *See also Hoyer v. City of Oakland*, 653  
21 F.3d 835, 844 (9th Cir. 2011)(“[t]he commencement of state proceedings only ceases to require  
22 federal abstention after the federal court proceedings have moved beyond an ‘embryonic  
23 stage.’”).  
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1 Here, the State filed the State Court Suit less than ten days after TVI filed this federal  
2 case. No proceedings of substance on the merits of this case or the State Court Suit have taken  
3 place. The State Court Suit alleges that TVI violated the CPA and CSA and seeks civil penalties,  
4 restitution, and injunctive relief. In this case, TVI seeks injunctive and declaratory relief that it  
5 did not violate the CPA and CSA. The State Court Suit encompasses all of the issues raised in  
6 TVI's federal case.  
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8 **2. The State Court Suit is a quasi-criminal enforcement action**

9 The State's consumer protection action against TVI is a quasi-criminal enforcement  
10 action for purposes of *Younger* abstention. In a quasi-criminal enforcement action, the Supreme  
11 Court and Ninth Circuit have held that "a state actor is routinely a party to the state proceeding  
12 and often initiates the action," the proceedings "are characteristically initiated to sanction the  
13 federal plaintiff . . . for some wrongful act," and "[i]nvestigations are commonly involved, often  
14 culminating in the filing of a formal complaint or charges." *ReadyLink Healthcare, Inc. v. State*  
15 *Comp. Ins. Fund*, 754 F.3d at 759, quoting *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 592  
16 (2013).  
17

18 The State Court Suit has the three hallmarks of a quasi-criminal enforcement action  
19 identified in *ReadyLink* and *Sprint*: (1) the State initiated the state court suit, (2) the State Court  
20 Suit seeks to sanction TVI for its wrongful deceptive acts, and (3) the State Court Suit was filed  
21 after a lengthy investigation. The State Court Suit asserts consumer protection claims against  
22 TVI for TVI's deceptive acts. The State initiated the State Court Suit after conducting a lengthy  
23 investigation that involved numerous Civil Investigative Demands pursuant to RCW 19.86.110.  
24 The State alleges that TVI committed thousands of violations of RCW 19.86.080 and that the  
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1 trial court should impose injunctive relief, restitution, and a civil penalty on TVI for each  
2 violation. *See, e.g., State v. Mandatory Poster Agency, Inc.*, 199 Wn.App. 506, 398 P.3d 1271,  
3 1280-2 (2017).

4 That the State Court Suit is a quasi-criminal enforcement action is buttressed by Ninth  
5 Circuit precedent. Similar to TVI, the plaintiff in *Williams v. State of Wash.*, 554 F.2d 369, 370  
6 (9th Cir. 1977) was the subject of consumer protection claims by the Washington Attorney  
7 General and filed a federal 42 U.S.C. §1983 suit seeking injunctive and declaratory relief. The  
8 State moved to dismiss based on *Younger* abstention, which the district court granted. *Id.* The  
9 Ninth Circuit held that Washington consumer protection claims by the Attorney General were a  
10 quasi-criminal action and that *Younger* abstention was appropriate:  
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12 The suit Williams seeks to enjoin here is like the quasi-criminal nuisance action in  
13 *Huffman*, in which “the State’s interest \* \* \* is likely to be every bit as great as it  
14 would be were this a criminal proceeding.” *Huffman v. Pursue, Ltd.*, 420 U.S. at  
15 604, 95 S.Ct. at 1208. The state is acting to protect its consumers from unfair and  
16 deceptive trade practices by prosecuting and penalizing those who violate the  
17 Consumer Protection Act. Calling the prosecution “civil” does not mean that  
18 important state policies can be frustrated by federal court interference that would  
19 not be countenanced in criminal cases.

20 *Id.*

21 A similar result was reached more recently in *In re Standard and Poor’s Rating Agency*  
22 *Litig.*, 23 F.Supp.3d 378 (S.D.N.Y.2014). In that case, similar to TVI, S&P preemptively filed  
23 declaratory judgment actions in federal court seeking a declaration that consumer protection  
24 claims by the States of South Carolina and Tennessee were unconstitutional. *Id.* at 408. The  
25 States then filed their consumer protection claims in state court, which S&P removed.  
26

1 The district court remanded the state court claims,<sup>1</sup> and then addressed the *Younger* and *Sprint*  
 2 factors in regard to the federal claims. *Id.* The district court found that the state consumer  
 3 protection claims each bore the three hallmarks of a quasi-criminal enforcement action identified  
 4 by the Supreme Court:

5       Each (1) was “initiate[d]” by “a state actor” (namely, the state attorney general in  
 6 his or her official capacity) to (2) “sanction the federal plaintiff ... for some  
 7 wrongful act” (namely, S & P for its allegedly false and misleading  
 8 representations)); and (3) “involved” a lengthy “investigation [ ] ... culminating in  
 the filing of a formal complaint or charges.”

9 *Id.* at 409, quoting *Sprint*, 134 S.Ct. at 592. The district court abstained from hearing the federal  
 10 claims brought by S&P against the South Carolina and Tennessee Attorney Generals based on  
 11 *Younger* abstention. *Id.* at 410-1. *See also MPHJ Technology Investments, LLC v. Sorrell*, 108  
 12 F.Supp.3d 231, 237-8 (D. Vermont 2015) (abstaining from hearing claims that overlapped with  
 13 consumer protection claim brought by Vermont Attorney General based on *Younger* abstention).  
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15       In sum, the State Court Suit is a quasi-criminal enforcement action. Consumer protection  
 16 claims are similar to the anti-nuisance proceeding in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 598  
 17 (1975), the bar disciplinary proceeding in *Middlesex Cnty. Ethics Comm. v. Garden State Bar*  
 18 *Ass’n*, 457 U.S. 423, 433-4 (1982), and the civil welfare fraud claim in *Trainor v. Hernandez*,  
 19 431 U.S. 434, 444, 97 S.Ct. 1911, 52 L.Ed.2d 486 (1977) which were held to be quasi-criminal  
 20 proceedings to which *Younger* abstention applies. *See Sprint Commc'ns, Inc.*, 134 S. Ct. at 592.  
 21 *See generally Rynearson v. Ferguson*, 2017 WL 4517790 (W.D. Wash., Oct. 10, 2017) (*Younger*  
 22 abstention appropriate for challenges to Washington’s civil cyberstalking statute).  
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26 \_\_\_\_\_  
<sup>1</sup> The State of Washington also filed a consumer protection claim against S&P in state court, which S&P removed. The district court remanded the State of Washington’s consumer protection claim. *Id.* at 400.

### 3. Consumer protection claims are an important state interest

The State’s consumer protection claims against TVI seek injunctions to prevent deceptive conduct as well as civil penalties and restitution. Consumer protection laws and enforcement of those laws are an important state interest. The Legislature and courts have stated that the purpose of the CPA is “to protect the public and foster fair and honest competition” and it “shall be liberally construed that its beneficial purposes may be served.” RCW 19.86.920; *Thornell v. Seattle Service Bureau, Inc.* 184 Wn.2d 793, 801, 363 P.3d 587 (2015) (the CPA is to be liberally construed “to effectuate its purpose: to protect the public against unfair or deceptive acts.”).

Courts have repeatedly held that state actions to enforce consumer protection statutes and laws against deceptive business practices are sufficiently important for *Younger* purposes. *See, e.g., Williams v. State of Washington*, 554 F.2d 369, 370 (9th Cir.1977); *Cedar Rapids Cellular Tel., L.P. v. Miller*, 280 F.3d 874, 880 (8th Cir.2002); *MPHJ Technology Investments, LLC v. Sorrell*, 108 F.Supp.3d 231, 237-8 (2015); *In re Standard and Poor’s Rating Agency Litig.*, 23 F.Supp.3d 378, 408-410 (S.D.N.Y.2014); *Merck Sharp & Dohme Corp. v. Conway*, 909 F.Supp.2d 781, 785 (E.D.Ky.2012); *Goleta Nat. Bank v. Lingerfelt*, 211 F.Supp.2d 711, 716 (E.D.N.C.2002); *State Farm Mut. Auto. Ins. Co. v. Metcalf*, 902 F.Supp. 1216, 1218 (D.Haw.1995). Additionally, in other contexts, the Supreme Court itself has recognized that States have an important interest in protecting the public from deceptive business practices. *See, e.g., Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (citing the “general interest in protecting consumers and regulating commercial transactions” in stating that “[t]he state interests implicated in this case are particularly strong”);

1 *Zauderer*, 471 U.S. at 651 (recognizing “the state’s interest in preventing deception of  
2 consumers.”).

3 **4. TVI may raise its federal challenges in the State Court Suit**

4 “Art. VI of the United States Constitution declares that ‘the Judges in every State shall  
5 be bound’ by the Federal Constitution, laws, and treaties.” *Huffman*, 420 U.S. at 611. State courts  
6 are presumed to be an adequate venue in which to assert federal challenges “in the absence of  
7 unambiguous authority to the contrary.” *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15, 107 S.Ct.  
8 1519, 95 L.Ed.2d 1 (1987). TVI cannot overcome the presumption that state court judges would  
9 consider and apply federal law simply by expressing a belief that the state courts would not find  
10 in their favor. *Huffman*, 420 U.S. at 610.

11  
12 TVI seeks injunctive and declaratory relief based on its assertion that the First  
13 Amendment shields it from the State’s CPA and CSA claims. TVI may raise these issues as  
14 defenses in the State Court Suit. *See, e.g., Illinois ex rel. Madigan v. Telemarketing Assoc., Inc.*,  
15 538 U.S. 600, 624 (2003) (First Amendment raised as a defense to consumer protection claims).  
16 The Attorney General does not have self-executing power to impose civil penalties, restitution,  
17 or injunctions on a party for consumer protection violations, but may obtain those remedies if  
18 successful in litigation.  
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21 **5. The federal action would have the practical effect of enjoining the State  
22 Court Suit**

23 The State Court Suit encompasses all of the issues raised in TVI’s federal case, which  
24 seeks injunctive and declaratory relief that it did not violate the CPA and CSA. If the Court were  
25 to grant the injunction sought by TVI, it would halt the State Court Suit. This would, by  
26

1 definition, “unduly interfere” with the state proceeding. *See Younger*, 401 U.S. at 44, 91 S.Ct.  
2 746.

3 **6. No exceptions to *Younger* abstention apply**

4 If the *Younger* factors are met, a court must examine whether the state proceeding is  
5 characterized by bias, bad faith, harassment, or some other extraordinary circumstances that  
6 would make abstention inappropriate. *Kenneally v. Lungren*, 967 F.2d 329, 332 (9th Cir. 1992).  
7 “Bias exists where a court [or tribunal] has prejudged, or reasonably appears to have prejudged,  
8 an issue.” *Id.* at 333. The party raising bias must overcome a presumption of honesty and  
9 integrity in those serving as adjudicators. *Id.* Bad faith typically means that “a prosecution has  
10 been brought without a reasonable expectation of obtaining a valid conviction.” *Baffert v. Cal.*  
11 *Horse Racing Bd.*, 332 F.3d 613, 621 (9th Cir. 2003);  
12

13 TVI has not pled any facts supporting an exception to *Younger* abstention.  
14

15 **IV. CONCLUSION**

16 All of the *ReadyLink* elements are present and TVI’s federal action would have the effect  
17 of enjoining the State Court Suit. Notions of comity require the federal government to let states be  
18 “free to perform their separate functions in their separate ways.” *Younger*, 401 U.S. at 44. For the  
19 foregoing reasons, the Attorney General requests that this Court enter an order dismissing all claims  
20 asserted against him with prejudice.  
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1 DATED this 20th day of December, 2017.

2  
3 ROBERT W. FERGUSON  
4 Attorney General

5 */s/ Jeffrey G. Rupert*  
6 JEFFREY G. RUPERT, WSBA #45037  
7 CELESTE T. STOKES, WSBA #12180  
8 Assistant Attorney General  
9 Attorneys for Defendant State of Washington  
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**DECLARATION OF SERVICE**

I hereby certify that on December 20, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 20th day of December, 2017, at Seattle, Washington.

/s/ Jeffrey G. Rupert  
JEFFREY G. RUPERT  
Assistant Attorney General