No. 90848-6

SUPREME COURT
OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS LLC,
Plaintiff-Petitioner,

v.

THE CITY OF BOTHELL, WASHINGTON,
Defendant-Respondent,

CITIES 1 through 100+,
Defendants.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

In its unpublished opinion, the Court of Appeals correctly required petitioner New Cingular Wireless PCS LLC ("New Cingular") to live with the legal consequences of its tactical decisions. This case emanates from New Cingular's practice of voluntarily paying utility taxes on income that it now claims was not taxable and passing the cost onto its customers. When customers brought class-action lawsuits against New Cingular, it settled them without paying a dime. Instead, it agreed to seek tax refunds, which would be assigned to the settlement class. This agreement placed all the risk of non-recovery onto the customers, and all the burden of compensating the customers for New Cingular's alleged overcharging onto the cities that received New Cingular's tax payments in good faith.

Pursuant to this arrangement, New Cingular, a sophisticated corporate litigant, at all times represented by able legal counsel, submitted an administrative tax-refund claim to respondent City of Bothell ("the City"). After the City treasurer denied the claim, New Cingular abandoned the administrative process and filed suit in superior court. The Court of Appeals followed well-developed principles of Washington law in holding that New Cingular could not evade the statute of limitations that necessarily applies as a result of that strategic choice.

New Cingular fails to offer any argument that would justify Supreme Court review of the Court of Appeals' unpublished decision. New Cingular complains that, because the decision is unpublished, it has no precedential value for New Cingular's other lawsuits. But New Cingular fails to explain how a decision's *lack* of precedential value renders it a matter of substantial public interest under RAP 13.4(b)(4), especially where New Cingular *did not move to have it published.*

New Cingular also disingenuously claims that it raises two issues of first impression, while ignoring controlling Washington law. This Court has established certain minimum standards that govern the equitable tolling doctrine in Washington. New Cingular has not even attempted to argue that it can meet those requirements. In fact, it fails to even mention this Court's standards, while urging the Court to follow case law from other jurisdictions that would be incompatible with them.

Moreover, the Court of Appeals resolved this case based on a fact-specific analysis under which New Cingular's proposed extensions of law are not even implicated. New Cingular's desire for a published decision, adopting doctrines that conflict with Washington law and do not arise from the facts, does not create an issue of substantial public interest. As such, New Cingular's petition for review should be denied.

B. STATEMENT OF THE CASE

New Cingular is a telephone business, subject to utility taxes under the Bothell Municipal Code ("BMC"), Chapter 5.08. *See* CP 192 *et seq.* The BMC requires the taxpayer to calculate the amount of utility tax due each month, while excluding from this computation any income derived from transactions that are not legally taxable under state or federal law. *See* BMC 5.08.040, .090. New Cingular assesses a surcharge to its customers to recover the cost of this tax. CP 12.

With the advent of the "smart phone," New Cingular began selling internet access in addition to telephone services. CP 13. New Cingular now argues that income derived from the provision of internet access is exempt from taxation under state and federal law, including RCW 35.21.717 and the Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151. CP 13. However, New Cingular claims that, for many years, it included such income in its computation of its utility tax liability, not only to the City but also to other taxing jurisdictions across the nation.[1] CP 12-13.

New Cingular continued this practice until 2010, when customers around the country filed class-action lawsuits against New Cingular's

[1] In considering New Cingular's claim that it paid these taxes "inadvertently" (Petition for Review ("Petition") at 3), the Court should take notice that New Cingular and its affiliates comprise a sophisticated, multi-billion-dollar telecommunications giant, with a legion of tax lawyers at its disposal. The notion that it *accidentally* paid taxes that were not due, throughout the country for years, does not hold up to scrutiny.

affiliate, AT&T Mobility LLC ("AT&T"). CP 184. These cases were centralized in the U.S. District Court for the Northern District of Illinois. CP 14. AT&T then settled these cases without paying any compensation to its customers. *Id.* Rather, under the settlement agreement, AT&T would pursue refund claims from the various taxing jurisdictions and assign any recovery to the settlement class. *Id.*

Although New Cingular now represents that it "collected and remitted"[2] the tax on internet access "inadvertently," it expressly reserved the right to continue charging its customers for such taxes if the settlement was not approved by the court. CP 85. It also represented that if the case were litigated further, it would assert the defense "that neither ITFA nor state law forbids the challenged taxes." CP 93.

Pursuant to the settlement agreement, AT&T submitted an administrative refund request to the City, on New Cingular's behalf, in November 2010. CP 280. It is undisputed that this refund request suffered from multiple flaws, including the following:

- In June 2012, New Cingular admitted that it had (1) included taxes paid on charges for services that were not

[2] Petition at 3. New Cingular is mistaken when it says that it "collected" this tax from its customers. Because New Cingular has no taxing authority, it could not "collect" taxes. Although the utility tax is segregated and identified as a charge to its customers, and the amount received is used solely to defray the utility tax New Cingular must pay, the utility tax charge simply increases the price the consumer pays for cellular services. *Sprint Spectrum v. City of Seattle*, 131 Wn. App. 339, 347, 127 P.3d 755 (2006).

data services and (2) failed to account for amounts written off as "bad debts." These errors overstated the claim by roughly $17,000. CP 280, 293-94.

- The claim requested a refund of taxes paid "through September 30, 2010." CP 280. But New Cingular has represented, throughout this lawsuit, that it ceased paying such taxes in August 2010. CP 177-78, 243.

- The refund request sought taxes paid over a five-year period, from November 2005 through September 2010. CP 280. But the BMC limits administrative refund claims to a two-year period. BMC 5.08.110.

The City denied New Cingular's request by letter dated April 16, 2012. CP 266. The BMC provided a detailed administrative process by which New Cingular could appeal that decision. CP 207.[3] New Cingular could request a conference with the City treasurer. BMC 5.08.210. If unsatisfied, it could appeal to the City Council. BMC 5.08.220. It then had a further appeal right in the form of a trial de novo in superior court. BMC 5.08.230.

New Cingular chose not to follow the City's appeal process. Instead, it filed an original action in superior court on April 25, 2012. CP 106-24. New Cingular argued in early motions practice that the statute of

[3] New Cingular misleadingly asserts that the BMC obligated the City to "'promptly' refund overpaid taxes upon request." Petition at 6. The cited provision states only that the City will "promptly *consider* the petition, and may grant or deny it." BMC 5.08.210 (emphasis added).

limitations was equitably tolled as of November 2010, the date of its administrative refund request. *See* CP 55.

The City propounded discovery requests to New Cingular, designed to explore the equitable tolling claim. CP 186-87. The City sought the evidentiary basis for New Cingular's contention that the City had engaged in "bad faith, deception, or false assurances." *Id.* New Cingular responded only with generalized allegations about the conduct of multiple defendants. CP 186. New Cingular did not identify *any* specific conduct by the City, *any* persons with knowledge, or *any* documents that reflected or related to New Cingular's allegations. CP 186-87.

Based on this lack of evidence, the City moved for a partial summary judgment. CP 49. The City demonstrated that equitable tolling did not apply because New Cingular could not make the predicate showing required under Washington law. CP 58-64. The City thus asked the trial court to apply the three-year statute of limitations and rule that New Cingular could claim a refund only of taxes paid after April 25, 2009, i.e. during the three-year period immediately preceding the filing of New Cingular's complaint in superior court. CP 67.

The trial court denied the City's motion and granted a partial summary judgment on this issue, *sua sponte*, in New Cingular's favor. CP

326-27. The trial court did not find that New Cingular had met Washington's standard for equitable tolling; instead it relied on New Cingular's citation to non-Washington authority. *See* RP 49-50. The trial court recognized that its ruling extended Washington law:

> So even though *this is an extension, I believe, of the equitable tolling rule in Washington*, I think it's appropriate under the circumstances.

RP 45 (emphasis added). Likewise, in its written order, the trial court acknowledged "*that its decision is an extension of the current Washington case law on equitable tolling.*" CP 327 (emphasis added).

The trial court later certified the order for discretionary review under RAP 2.3(b)(4). CP 350-51. The Court of Appeals granted review and reversed in an unpublished opinion.[4] New Cingular did not move to publish the Court of Appeals' decision.

C. ARGUMENT WHY REVIEW SHOULD BE DENIED

The only ground for review asserted by New Cingular is its contention that this case "involves an issue of substantial public interest that should be determined" by this Court, under RAP 13.4(b)(4). New Cingular makes scant reference to this standard, instead skipping to the

[4] The Court of Appeals' unpublished opinion is attached to the Petition as Appendix A.

merits and essentially arguing that the Court should accept review because New Cingular disagrees with the Court of Appeals. In its introduction, however, New Cingular suggests that review should be accepted because New Cingular has similar litigation pending against 35 other cities, and: (1) the Court of Appeals' decision in this case was unpublished and therefore of no precedential value in the other cases; and (2) the Court of Appeals did not address certain arguments that New Cingular denominates "issues of first impression."[5] These contentions are disingenuous, at best, given New Cingular's failure to move for publication and its failure to even acknowledge this Court's longstanding precedent on equitable tolling, which squarely controls New Cingular's claims.

1. Washington's equitable tolling doctrine is complete and controlling, and New Cingular's desire to change it is not a matter of substantial public interest.

New Cingular argues that this Court should review New Cingular's proposed "issues of first impression," but fails to mention that this Court already has a well-established equitable tolling doctrine. New Cingular is not being candid when it asks the Court to adopt doctrines from other states, while ignoring that those doctrines conflict with this Court's precedent. New Cingular does not even attempt to argue that it can meet

[5] Petition at 1.

this Court's strict requirements for equitable tolling. Instead, it pretends those standards do not exist.

This Court long ago established a framework that governs when equitable tolling can apply to a judicial action. *See In re Bonds*, 165 Wn.2d 135, 141, 196 P.3d 672 (2008). Under this well-settled doctrine, the plaintiff must first show two predicates: (1) "bad faith, deception, or false assurances by the defendant"; and (2) "the exercise of diligence by the plaintiff." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (citing *Finkelstein v. Security Properties, Inc.*, 76 Wn. App. 733, 739-40, 888 P.2d 161 (1995)). Once these predicates are shown, the plaintiff must then show that justice requires equitable tolling. *Bonds*, 165 Wn.2d at 141 (holding that equitable tolling is permitted only "when justice requires and when the predicates for equitable tolling are met").

This doctrine "should be used *sparingly* and does not extend broadly to allow claims to be raised except under *narrow circumstances*." *Bonds*, 165 Wn.2d at 141 (emphasis added). The rule is strict because the "statute of limitations is 'a legislative declaration of public policy which the courts can do no less than respect.'" *Cost Management Services, Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) (quoting *J.M. Arthur & Co. v. Burke*, 83 Wash. 690, 693, 145 P. 974 (1915)). A

rule allowing greater discretion "would be a dangerous path to follow," "could only be in disregard of the universal maxim that ignorance of the law excuses no one," and "would substitute for a positive rule established by the legislature a variable rule of decision based upon individual ideas of justice conceived . . . by the courts." *Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947).

New Cingular has not even attempted to argue in its Petition that the necessary predicates can be shown here.[6] Indeed, New Cingular has inexcusably failed to even mention the predicates anywhere in its Petition. Again, these predicates are *mandatory*. *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 810-11, 818 P.2d 1362 (1991) ("In the absence of bad faith on the part of the defendant and reasonable diligence on the part of the plaintiff, equity cannot be invoked.").

This Court has thus squarely addressed the question of whether a plaintiff can invoke equitable tolling without the predicate showing. The answer, plainly and unequivocally for decades, is that it cannot. New Cingular's proposed doctrines are not "issues of first impression" in this state, as New Cingular claims.

[6] As explained in the briefing below, New Cingular cannot satisfy this Court's predicates because the City's conduct was entirely appropriate and certainly did not amount to deception, bad faith, or false assurances.

Nor are they compatible with Washington law. For its first proposed extension, New Cingular relies on a California case,[7] *McDonald v. Antelope Valley Community College District*, 45 Cal.4th 88, 100, 84 Cal.Rptr.3d 734, 194 P.3d 1026 (2008). *McDonald* held that an employee's filing of a voluntary action with the California Department of Fair Employment and Housing could toll the statute of limitations for a lawsuit under the California Fair Employment and Housing Act. New Cingular asks the Court to adopt this rule as good policy.

McDonald is inapposite because California does not require deception, bad faith, or false assurances as a predicate to equitable tolling. *See Structural Steel Fabricators, Inc. v. City of Orange*, 40 Cal.App.4th 459, 464-65, 46 Cal.Rptr.2d 867 (1995) ("Equitable tolling has three elements: 'timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff.'") (quoting *Addison v. State of California*, 21 Cal.3d 313, 319, 146 Cal.Rptr. 224, 578 P.2d 941 (1978)). Such a rule would also contravene this Court's recent pronouncement that a taxpayer "cannot choose first to pursue recovery

[7] Petition at 14. Notwithstanding New Cingular's claim that courts "around the country" recognize its proposed rule, New Cingular cites only to cases from California, Alaska, Montana, and Wyoming. (Petition at 14). Only the California case actually applied the rule. The other three made vague references to it, but did not apply it. *See American Marine Corp. v. Sholin*, 295 P.3d 924 (Alaska 2013); *Weidow v. Uninsured Employers' Fund*, 259 Mont. 77, 246 P.3d 704 (2010); *Enron Oil & Gas Co. v. Freudenthal*, 861 P.2d 1090 (Wyo. 1993).

through the courts, and then attempt to bypass the statute of limitations that necessarily applies as a result of that choice by seeking relief through the administrative process." *Cost Management*, 310 P.3d at 813.

New Cingular's second argument relies on a Ninth Circuit case, which allowed equitable tolling based on court-created confusion. *See Capital Tracing v. United States*, 63 F.3d 859 (9th Cir. 1995). As with California, the federal courts do not require deception, bad faith, or false assurances as a predicate to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2562, 177 L.Ed.2d 130 (2010) (to invoke equitable tolling, the petitioner must prove "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing") (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S.Ct. 1807, 161 L.Ed.2d 669 (2005)).

Under this Court's longstanding jurisprudence, in Washington—unlike in California and federal law—deception, bad faith, or false assurances by the defendant is a *required* predicate to equitable tolling. *See In re Haghighi*, 178 Wn.2d 435, 449, 309 P.3d 459 (2013) ("we apply the civil standard and require the predicates of bad faith, deception, or false assurances"). Remarkably, New Cingular asks this Court to adopt two doctrines that would allow equitable tolling without this essential

predicate, while failing to even mention that this is a requirement in Washington law. New Cingular has not demonstrated any substantial public interest in discarding that rule.

2. The fact-specific nature of this case precludes consideration of the doctrines proffered by New Cingular.

The Court should decline to review this case for the additional reason that New Cingular's proposed extensions of Washington law are not even implicated under the facts of this case. The Court of Appeals based its decision on a fact-specific analysis, focused on New Cingular's failure to pursue available remedies that would have allowed it to preserve its administrative filing date. This analysis would preclude application of New Cingular's proposed doctrines, even if the Court were to adopt them.

a. *The Court of Appeals decided this case on a fact-specific basis.*

In rejecting New Cingular's claim, the Court of Appeals focused on the City's administrative appeal process and New Cingular's failure to pursue it. The court reproduced three sections of the BMC in their entirety.[8] It dedicated an additional paragraph to describing the BMC's administrative appeal process, which gives the taxpayer the opportunity to file "an action in superior court 'for a trial de novo on the matter at

[8] *See* Petition, App. A at 6-7.

issue.'"[9] The court then observed that New Cingular's only explanation for abandoning this process was "a claim that the process was 'hostile' and 'demonstratively slow and futile.'"[10] Citing the BMC, the court rejected this argument:

> But the City's denial of New Cingular's application at the first stage of the administrative process did not mean that New Cingular could not have obtained the relief sought by completing this process, which included the opportunity for a trial de novo.

Petition, App. A at 12. The court concluded that this failure to continue the administrative process precluded equitable tolling. *Id.* at 12-13.

b. *New Cingular's policy arguments were not implicated under the facts of this case.*

Relying on *McDonald*, New Cingular claims that when a person has multiple legal remedies, the pursuit of one should equitably toll the statute of limitations for the others. While such a rule would unquestionably be an extension of Washington law, New Cingular argues that it would be good policy. According to New Cingular, a claimant should be able to preserve its right to judicial action, while pursuing an informal remedy, without having to file a parallel action in court.[11]

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[9] *Id.* at 7 (quoting BMC 5.08.230).
[10] *Id.* at 12.
[11] Petition at 14-15.

As the Court of Appeals noted, however, the BMC gave New Cingular the opportunity for a trial de novo in superior court.[12] Thus, all New Cingular had to do was continue its initial course of action, an administrative claim with the City, and it eventually would have arrived in court with a November 2010 filing date. New Cingular *created* the statute of limitations problem through its own tactical decision to abandon this process in favor of a direct judicial action with an April 2012 filing date.

This Court recently held that it would be inappropriate to consider an extension of Washington law on equitable tolling where a claimant forwent other means to preserve its claim. *See Haghighi*, 178 Wn.2d at 448. In *Haghighi*, the Court rejected a defendant's request to equitably toll the deadline for amending his timely personal restraint petition ("PRP"). The Court explained that in the PRP context defendants have other means to preserve their remedies. *Id.* It would thus be "both unwise and unnecessary to expand the [equitable tolling] doctrine beyond the traditional standard." *Id.*

Likewise, here, New Cingular had another means to preserve its remedy, simply by continuing with the City's administrative process. The Court of Appeals correctly declined to consider New Cingular's proposed

[12] Petition, App. A at 12 (citing BMC 5.08.230).

extension of Washington law under these circumstances. Such an extension would have been "both unwise and unnecessary." *Id.*

c. *New Cingular's "court-created confusion" argument does not arise under these circumstances.*

New Cingular's second argument relies on the *Capital Tracing* case. There, conflicting Ninth Circuit authority recognized two paths for a wrongful levy action. *Capital Tracing*, 63 F.3d at 862. Under one the plaintiff's action was timely, and under the other it was untimely. *Id.* at 862-63. Equitable tolling was appropriate where the clarifying opinion forced the plaintiff to choose the path for which its action was already untimely. *Id.* at 863.

New Cingular attempts to analogize that confusion to potential confusion regarding the administrative exhaustion requirement, which this Court resolved in *Cost Management*, 178 Wn.2d at 645-46. According to New Cingular, it believed it was free to file suit at any time with or without exhausting administrative remedies, based on its reading of *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 166 P.3d 667 (2007). *Cost Management* subsequently clarified that New Cingular's reading of *Qwest* was incorrect and that exhaustion was required in this type of case. *See*

Cost Management, 178 Wn.2d at 646.[13] New Cingular claims that it was confused and that this confusion justifies equitable tolling under the Ninth Circuit's theory in *Capital Tracing*.

This argument is a red herring. The potential confusion mentioned in *Cost Management* related to whether exhaustion was required. Nothing in *Qwest* or its progeny remotely suggested that an administrative tax-refund claim could toll the statute of limitations for judicial action. *Qwest* did not even mention the term "statute of limitations." Thus, even if New Cingular reasonably believed that it was entitled to file suit without exhausting administrative remedies, there was no support in the cited "potentially confusing" cases for the notion that the statute of limitations would somehow not apply to such action.

3. New Cingular's purported desire for a published decision does not amount to a showing of substantial public interest.

New Cingular also argues that this Court should accept review because guidance is needed in its other lawsuits, and the Court of Appeals' decision, being unpublished, would not control the statute of limitations

[13] New Cingular misrepresents this Court's holding in *Cost Management* when it claims the Court stated that "*Qwest* was a confusing decision, because it blurred procedural and jurisdictional requirements." Petition at 19 (citing *Cost Management*, 178 Wn.2d at 645-48). This Court did not say that *Qwest* was confusing, but rather that the *Court of Appeals'* discussion of original jurisdiction was potentially confusing. *Cost Management*, 178 Wn.2d at 645-46. The Court of Appeals here explained that *Qwest* is not applicable at all because New Cingular does not challenge the City's authority to impose utility taxes. Petition, App. A at 10.

issue in those cases.[14] New Cingular fails to explain how the fact that an opinion is *not* controlling makes review appropriate. To the contrary, in construing RAP 13.4(b)(4), this Court considers the far-reaching effects that a controlling Court of Appeals decision would have. *See, e.g., State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005).

In *Watson*, for example, this Court accepted review of a published Court of Appeals' decision, which held that a memorandum submitted by a prosecuting attorney to all Pierce County Superior Court judges, regarding drug offender sentencing alternative ("DOSA") sentences was an improper *ex parte* communication. In characterizing this as "a prime example of an issue of substantial public interest," this Court stressed that it had "the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue." *Id.* Thus, a prime example of a case justifying review under RAP 13.4(b)(4) is one that will affect many other cases. Here, in contrast, New Cingular's contention is that the effect on other cases is too *limited.*

Indeed, the fact-specific nature of the Court of Appeals' holding would limit its effect even if it were published. Again, the Court of

[14] In its appendix, New Cingular submitted several documents, identified as Appendixes D through L, which are not part of the record on review. New Cingular did not seek this Court's permission to submit these materials, and thus violated RAP 13.4(c)(9), 13.4(e), and 10.3(a)(8).

Appeals rejected equitable tolling here after a detailed discussion of Bothell's administrative process. New Cingular fails to show that the same facts are present in its other cases.

Finally, New Cingular's argument rings especially hollow where *New Cingular did not move to publish the Court of Appeals' opinion.* The decision was issued on August 25, 2014. The deadlines for motions to publish and motions for reconsideration expired on September 15, 2014. *See* RAP 12.3(3), 12.4(b). New Cingular sought neither form of relief before bringing its Petition to this Court. In other words, New Cingular's real concern is not the lack of guidance for its other lawsuits, but rather the lack of a decision favorable to New Cingular.

D. CONCLUSION

The City offered New Cingular a detailed administrative process that included a trial de novo in superior court. New Cingular initiated this process, then abandoned it in favor of direct judicial action, and then asked the courts to exercise their equitable powers so that New Cingular would not have to face the statute of limitations that necessarily applied to that tactical decision. The Court of Appeals correctly determined that equitable tolling does not apply under these circumstances.

New Cingular fails to show any substantial public interest that would justify review of the Court of Appeals' unpublished decision. This Court already has a well-developed equitable tolling doctrine, which New Cingular utterly ignores in its Petition. New Cingular's proposed extensions of that doctrine conflict with this Court's existing precedent and, in any event, would not arise under the facts of this case.

This Court should therefore deny review.

RESPECTFULLY SUBMITTED this 23rd day of October, 2014.

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DECLARATION OF SERVICE

Marcelle Whipple hereby makes the following declaration pursuant to RAP 18.5, CR 5(b)(B), and RCW 9A.72.085:

1. I am now and was at all times material hereto over the age of 18 years. I am not a party to the above-entitled action and am competent to be a witness herein.

2. I certify that I served via e-mail a copy of the Answer to Petition for Review on plaintiff's attorneys at Michael R. Scott, mrs@hcmp.com, Andrew Murphy, agm@hcmp.com, and Holly D. Golden, hdg@hcmp.com, on the 23rd day of October, 2014.

3. I certify that I served via U.S. Mail a copy of the Answer to Petition for Review on plaintiffs' attorneys at:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

10/23/2014 Seattle, WA — Marcelle Whipple

Date and Place — Marcelle Whipple

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New Cingular Wireless PCS LLC v. The City of Bothell

Case No. 90848-6

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