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OF THE STATE OF WASHINGTON

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MARTIN SCHNALL, a New Jersey resident; NATHAN RIENSCHE, a Washington resident; and KELLY LEMONS, a California resident; individually and on behalf of all the members of the class of persons similarly situated,

Appellants,

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

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I. INTRODUCTION

This appeal concerns the availability of class actions under the Washington Consumer Protection Act. Plaintiffs sued defendant AT&T Wireless Services, Inc. ("AWS") for breach of contract and violations of Washington's Consumer Protection Act ("CPA") for charging a "universal connectivity charge" ("UCC") without disclosing it in the advertised monthly rate and misleading customers into thinking it was a tax, rather than an extra charge created by AWS. The Plaintiffs' claim reflects a common practice of wireless phone service providers, who advertise the cost of their calling plans at set prices per month, but then, post-sale, add undisclosed charges beyond the advertised rate to the consumer's monthly bill. (*See* CP 83) The charges are added by the provider in order to recoup from consumers, a few dollars a month, overhead expenses that the provider does not want to roll into the advertised price of service because of the intense price competition for consumers between providers. Because these added fees and surcharges are not disclosed in the advertised calling plan rate, the true cost of service cannot be determined by the consumer, and comparisons in the true cost of service cannot be made.

AWS's practices affect several million consumers but result in small individual damages that make private individual suits by consumers impracticable. Nonetheless, the trial court refused to certify a class of any nature, concluding that the CPA requires proof

of actual individual consumer reliance, i.e., that every single individual consumer class member would have to prove that, if AWS had disclosed the UCC, he or she would not have purchased AWS's services. This decision is contrary to law, logic, and public policy. If the trial court's decision is upheld, there will be no effective enforcement of the CPA against violators who use unfair and deceptive means to cheat thousands of consumers out of small sums of money, one consumer at a time, even though the legislature enabled private consumer suits for just this purpose.

The court also denied certification of Plaintiffs' breach of contract claim, that AWS's contract for service with each and every class member did not state that AWS charged a "UCC" in addition to the advertised calling plan rate. AWS changed the wording of its standard consumer contracts in 2003, after the relevant class period, stating for the first time that a "UCC" would be added to the monthly rate for service. While the interpretation of a contract is an issue of law, the trial court denied certification of the breach of contract claim on the grounds that, hypothetically, "context" evidence could be introduced concerning the consumer's possible knowledge of the UCC, apparently to show whether the parties "intended" the contract to include the UCC. This kind of inquiry is completely inappropriate in the context of a standardized, adhesion contract which the consumer generally does not even read. Moreover, no evidence of any nature was actually presented to the

trial court that any consumer within the proposed class had any knowledge of the meaning of the term "UCC" or that such a charge would be added to the cost of service. The trial court's conclusion, that the mere possibility of hypothetical "context" evidence precludes class certification, would effectively eviscerate the use of the class action device in consumer breach of contract cases, where as here, the defendant uses a form, adhesion contract, that it drafts, and imposes on consumers without negotiation over the terms, on "a-take-it-or-leave-it" basis.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that each class member would be required to individually prove causation to establish a Consumer Protection Act claim, contrary to the prevailing rule that individualized proof of causation is not necessary in consumer protection cases.

2. The CPA should not be construed to require proof of reliance, because such a rule would eviscerate the consumer class action and undermine the very purpose of the private cause of action under the CPA, which is to encourage private enforcement of the broad public protections enacted in the CPA.

3. The trial court should have at least certified a class on the liability elements of Plaintiffs' CPA claims, which were admittedly common to the entire class of millions of consumers.

4. The trial court erred in denying class certification of Plaintiffs' contract claims based on AWS's unsupported assertion that it may introduce individualized "context" evidence to interpret the terms of its contracts, where they were adhesion contracts, drafted by AWS, and were neither negotiated nor read by consumers, and Plaintiffs merely seek to enforce the contracts as written by AWS.

5. The trial court erred in concluding class certification was precluded by a choice of law provision in AWS's standard form contract, where the provision does not require application of a particular state's laws to the exclusion of any other and where there was no basis to conclude that any state's law was materially different from Washington's.

III. STATEMENT OF THE CASE

A. Plaintiffs' Consumer Protection and Contract Claims

Plaintiffs' claims concern AWS's practice of billing its customers an extra charge, which it calls the "universal connectivity charge" ("UCC"), above and beyond the advertised, agreed upon monthly calling plan rate. (*See* CP 185-96) The UCC was created by AWS to recover additional money from its customers; it is not a tax or government-mandated charge, but rather is imposed by AWS

as a means of recovering one of its costs of doing business.[1] AWS determines the amount of the UCC to charge customers, and in doing so it builds in a "cushion" for itself against "the risk of short collecting." (CP 658, 157) AWS has collected hundreds of millions of dollars from its customers through the UCC. (*See* CP 155, 107)

1. AWS Advertised A Monthly Rate That Did Not Disclose the Additional Charge.

AWS sells its services based on an advertised monthly rate, such as $29.99, which it highlights in large print in its advertising and marketing materials. (*See, e.g.*, CP 79) It does not state that it will add additional charges to recover costs it has to pay as a condition of doing business. AWS began charging its customers the UCC, in addition to the advertised monthly rate, in February 1998. (CP 111) In January and February of 1998, AWS sent its existing customers a notice with their bills which described what the UCC was and what it would cost. (CP 111) AWS "felt it was important that we send this kind of notice to our customers." (CP 660) However, AWS did not provide this information to any prospective customers so that they would know in advance of their

[1] AWS imposed the UCC on its customers to reimburse itself, in advance, for the payments the Federal Communications Commission ("FCC") required AWS to make to the Universal Service Fund, which was created to subsidize cellular service to low-income and rural areas. (CP 155) The UCC is not a tax on the consumer, but is simply AWS's cost of doing business that it chooses to pass on to its customers. (CP 155) The FCC allows but does not require cellular providers to recover their contributions to the Fund from their customers.

purchase that the service would not actually cost $29.99 but instead would cost one or two or five dollars more than that. (*See, e.g.,* CP 85) Nor did AWS supply this information to existing customers after February 1998. (CP 661) Customers who began service in March 1998 or thereafter did not receive any explanation of the UCC, which AWS added to their bill each month. The trial court described the plaintiffs' principal CPA claim as follows:

> THE COURT: Well, I guess what I see is the essence of their claim based on the Consumer Protection Act is the argument that it's an unfair and deceptive practice for AT&T Wireless to market their services to a customer saying here's your payment plan. I realize I've got a whole menu of different plans. But just to make it very simple, you know you're going to pay a flat $30 a month or whatever and say, okay, here you're going to get this kind of service for $30 a month and then afterwards charge them $30 a month plus the Universal Connectivity Charge, saying all we're doing is passing on to you another fee.
>
> You know, because in essence you've lured the customer in saying this is all you're going to have to pay, but then you tack something on and justify it on the basis that well, the federal government is charging this. So we've got to charge you that. Isn't there a requirement to be up front to the customer and say it's $30 plus these other charges that, you know, we have to—that we either know the amount now or we have to calculate it in the future?

(CP 55-56).

2. AWS Did Not Change Its Standard Consumer Contracts to Include the Additional Charge.

AWS uses a pre-printed standard form contract with each of its new customers which it calls "Terms and Conditions of Service"

("T&Cs"). (*See, e.g.,* CP 229, 233-38) The T&Cs are printed in a either a "Service Agreement" or a "Welcome Guide." (CP 283). AWS contends that it provides the T&Cs to customers by placing it in the box containing their new phone, i.e., after they have signed up for service. (CP 358, 361)[2] The terms of these agreements are not negotiable. (CP 577) AWS says customers generally do not even read them, because they are "full of mouse type and trivia type." (CP 68, 70)

When AWS began charging the UCC in February 1998, it did not disclose or explain the UCC in its consumer contract, the T&Cs, (*see* CP 445-46), and for five years, until early 2003, it did not change its standard consumer contracts to provide for the new charge. *See* CP 62. This lawsuit was filed in early 2002, and at a hearing in November 2002, the court observed the following about the plaintiffs' principal breach of contract claim:

> [MR. McGINN(defendant's counsel)]: ... I have here as my second argument here is the Universal Connectivity Charge provided by the contract. And I think the language in the contract is very clear that it obligates Mr. Schnall to pay all charges including, but not limited to the taxes and surcharges as a result of the use of the service.
>
> THE COURT: I'm troubled by that, Mr. McGinn, because it strikes me as a question in fact. I mean, don't we – you know, as to whether this charge

[2] All three named Plaintiffs testified that they did not recall ever receiving the "Terms and Conditions of Service." (*See, e.g.* CP 368, 378)

> actually comes within that language or not. I mean it doesn't come out and say Universal Connectivity Charge anywhere.
>
> MR. McGINN: Right.

(CP 55). Two months later, five years after AWS began charging customers the UCC in addition to the agreed upon monthly rate, AWS finally changed its standard consumer contracts to disclose that the UCC would be added to customers' regular monthly rate. (CP 62) The plaintiffs here seek to represent all of those customers of AWS who, like them, signed up for service between March 1998 and February 2003 and who were charged and paid a UCC that was not in their contract for service. (*See* CP 34)

3. The UCC Appeared on Customers' Bills As if It Was A Tax.

AWS listed the UCC on customer bills under the heading "Taxes, Surcharges, and Regulatory Fees," suggesting it was a tax or government mandated charge and rather than a charge AWS created to recoup part of its overhead from consumers. (*See, e.g.,* CP 88) When customers saw the UCC on their bill and called AWS to complain or inquire about it, AWS employees routinely told customers that the UCC "is a government mandated charge and not an AWS initiative." (CP 540)

4. AWS Raised the Rate Without Advanced Notice.

AWS periodically changed the amount it charged customers for the UCC. Its standard form contract required AWS to notify

customers in advance of changes in the cost of service. (*e.g.,* CP 230, 235, 545) Contrary to this provision, AWS frequently raised the amount it charged customers for the UCC without giving customers advance notice of the increases in the cost of their service. (CP 658-59)

B. Class Certification Decisions in the Trial Court.

On Plaintiffs' initial motion for class certification, the trial court found that the Washington CPA applied to the claims of all putative class members nationwide. (CP 420-21) The court nonetheless denied certification of the CPA claims, holding that individualized issues would predominate because each class member would have to establish causation by proving individual reliance. (CP 421-22) The trial court believed the only way for a consumer to prove causation was to establish the hypothetical proposition that, had AWS in fact disclosed that the true cost of service was not the advertised monthly rate but rather the advertised rate plus the UCC, the consumer would have contracted for service with a different provider. (CP 422) This rule of law, the trial court held, would have to be applied on an individual basis and this single causation issue negated the availability of the class action device for addressing all the other common issues of liability raised by application of the Washington CPA to the consumers' claims. (CP 422)

The court also denied class certification on Plaintiffs' contract claims. The court construed a choice of law provision in AWS's standard form contract to require that all claims be decided under the law of the state "associated with" the customer's phone number, and concluded that applying the contract laws of multiple states would make a class action unmanageable. (CP 418) The court suggested that states' laws might differ with regard to whether "context" evidence is admissible to establish the terms of the contract, whether AWS's "voluntary payment" defense defeated the claims, and whether absent class members could be compelled to arbitrate their claims individually.[3] (CP 418-19)

The court also found that under Washington's "context rule" of contract interpretation, AWS could introduce evidence that an individual customer became aware of the UCC by some means other than the contract itself—such as from AWS's website, from some promotional flyers and brochures which mentioned the UCC, or through conversations with AWS representatives after they received their bills—in order to prove the meaning of the contractual language. (CP 418-19) Despite the fact that this contract was a standardized form contract drafted by AWS, the

[3] The trial court had rejected a motion to compel the named plaintiffs to arbitrate their claims, finding AWS's arbitration clause was unconscionable under Washington law. (CP 423-25)

court concluded that these theoretical differences between consumers' experience "leads to predominance of individual rather than class issues to be decided by the court." (CP 419)

The Plaintiffs took further discovery and learned that AWS did not actually have any such "context" evidence that any consumers had any specific understanding of the UCC. (*See* CP 553-54) Accordingly, Plaintiffs moved for reconsideration of the trial court's denial of a nationwide class, and, alternatively, moved to certify classes for the states represented by the five individual plaintiffs—Washington, Florida, California, New York, and New Jersey.[4] (CP 563) Over AWS's timeliness objection, the trial court considered the Plaintiffs' motion, and denied it without explanation. (CP 593) Plaintiffs sought discretionary review in this Court, which was denied.

Plaintiffs then moved the trial court for certification of a liability-only class for their CPA claims, pursuant to this Court's opinion in *Sitton v. State Farm Mutual Automobile Ins. Co.*, 116 Wn. App. 245, 256, 63 P.3d 198 (2003), which held that the need for individualized proof of reliance and damages should not preclude class certification of common issues concerning liability. (CP 602)

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[4] Subsequently, one named plaintiff from Florida and one of the two named plaintiffs from California dismissed their claims and removed themselves from the lawsuit, leaving the three Appellants, who received service in four states. (CP 595-98)

The trial court denied the Plaintiffs' *Sitton* motion, without explanation. (CP 739) Plaintiffs then settled their individual claims, obtained final judgment, and brought this appeal as of right, seeking review of all the trial court's orders denying class certification. (CP 741-42) *See Schwendeman v. USAA Cas. Ins. Co.*, 116 Wn. App. 9, 17, 65 P.3d 1 (2003) (plaintiff who settles his individual claim may still appeal the denial of class certification).

IV. ARGUMENT

A. Washington Law Favors Granting Class Certification.

Any application of CR 23 starts with the liberal policy in favor of certifying class actions whenever possible to accomplish the objectives of the rule.

> Washington Courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits and frees the defendant from harassment of identical future litigation. <u>We resolve close cases in favor of allowing or maintaining the class.</u>

Sitton, 116 Wn. App. at 250 (emphasis added, internal quotations and alterations omitted). This is especially true in the case of consumer protection cases, in which the class action device is particularly important to accomplishing the legislature's remedial purposes. *See Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 937, 106 P.3d 841, *review granted*, 155 Wn.2d 1024, 126 P.3d 820 (2005). "[T]he interests of justice require that in a doubtful case ... any

error, if there is to be one, should be committed in favor of allowing the class action." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 319, 54 P.3d 665 (2002) (*quoting Esplin v. Hirschi*, 402 F.3d 94, 101 (10th Cir. 1968)).

B. Standard of Review.

This Court reviews the trial court's class certification decisions for an abuse of discretion. *Sitton*, 116 Wn. App. at 250. A trial court has "necessarily" abused its discretion where its ruling is based on an erroneous view of the law. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). The trial court here ignored the mandate to apply CR 23 liberally in favor of granting class certification, resolving all doubts <u>against</u> certification. The trial court's bases for denying certification—that causation would have to be proven by each class member individually, and that AWS would be allowed to introduce evidence on consumers' contractual intent which could vary for class members from different states—were contrary to law and not supported by any evidence. The trial court abused its discretion and its denial of class certification should be reversed.

C. Plaintiffs Satisfy All of the Requirements of CR 23.

Under CR 23, plaintiffs seeking class certification must show that their allegations, if true, meet the four requirements of CR 23(a)—commonality, typicality, numerosity, and adequacy of

representation—and at least one of the requirements of CR 23(b). *Behr*, 113 Wn. App. at 319-20. Plaintiffs claims meet all the requirements of CR 23(a) and the requirements of CR 23(b)(3).

1. Numerosity, Commonality, Typicality, and Adequacy of Representation.

AWS did not deny that Plaintiffs met the test for numerosity. (CP 417) The test is whether "the proposed class is so numerous that joinder of all members is impracticable." CR 23(a)(1); *Miller v. Farmer Bros. Co.*, 115 Wn. App. 815, 821, 64 P.3d 49 (2003). The proposed nationwide class amounts to millions of consumers, and any select statewide classes would include many thousands.

Plaintiffs also satisfied the CR 23(a)(2) test for commonality. Commonality is established if there is at least one issue that is common to all members of the class. *Behr*, 113 Wn. App. at 320. "[T]here is a low threshold to satisfy this test." *Id.* Plaintiffs claims in this case present numerous issues which are common to all members of the class, including (a) whether it was unfair or deceptive for AWS to fail to fully disclose to prospective customers its practice of adding the UCC to customers' bills, (b) whether AWS's T&Cs allowed it to charge the UCC, (c) whether the T&Cs required AWS to provide advance notice to customers each time it raised the amount it billed them for the UCC, and (d) whether AWS's placement of the UCC on consumer bills was unfair or

deceptive under the CPA. (*See also* CP 39-40) These common issues easily satisfy the commonality test of CR 23(a)(2).

The Plaintiffs also easily satisfy the typicality test of CR 23(a)(3). "[A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct which gives rise to the claims of the other class members, and if his or her claims are based on the same legal theory." *Behr*, 113 Wn. App. at 320. Each of the Plaintiffs' claims here arise from a single course of conduct by AWS which it carried out over and over with each putative class member, and each claim is based on the same two legal theories for all class members. Typicality is easily met.

Plaintiffs also meet the adequacy requirement of CR 23(a)(4). *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974); *Marquardt v. Fein*, 25 Wn. App. 651, 656-57, 612 P.2d 378 (1980). AWS did not dispute adequacy of representation and the trial court so found. (CP 417)

2. Common Issues Predominate and Class Action is Superior to Individual Adjudications.

Certification of Plaintiffs' claims as a class action is also appropriate under CR 23(b)(3), because common issues predominate over individual issues, and a class action is superior to other available methods of adjudicating the controversy.[5]

[5] Rule 23(b)(3) is intended to be a less stringent requirement than Rule 23(b)(1) or (b)(2). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615, 117 S. Ct.

"Predominance" requires a "'pragmatic inquiry into whether there is a common nucleus of operative facts to each class member's claim." *Sitton*, 116 Wn. App. at 255 (quoting *Behr*, 113 Wn. App. at 323) (internal quotations omitted). The "central question" is "whether adjudication of the common issues in the particular suit has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." *Id.* at 254 (*quoting* 1 Newberg & Conte, *Newberg on Class Actions* § 4.25, at 4-86 (3d ed. 1992)). This case challenges AWS's marketing and billing practices that are exactly the same for millions of consumers nationwide. It makes no sense to prosecute these claims as individual actions, and a class action is the most effective, efficient, and consistent means of resolving these claims for all parties and the courts.

The second prong of CR 23(b)(3), "superiority," requires courts to consider the purposes of Rule 23, including conserving time, effort, and expense; providing a forum for small claimants, and deterring illegal activities. *Sitton*, 116 Wn. App. at 257. Where, as here, individual claims of class members are small, "a class action will usually be deemed superior to other forms of litigation."

2231, 138 L. Ed. 2d 689 (1997) ("Framed for situations in which class-action treatment is not as clearly called for as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit may nevertheless be convenient and desirable.") (internal quotations omitted).

Miller, 115 Wn. App. at 828; *see also Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161, 30 Cal. Rptr. 3d 76 (Cal. 2005) ("because ... damages in consumer cases are often small and because '[a] company which wrongfully exacts a dollar from each of millions of its customers will reap a handsome profit, the class action is often the only effective way to halt and redress such exploitation.'") (A89-90) A case like this which challenges a relatively small charge assessed on millions of consumers simply could not be litigated without the class action device. Class certification is the only practical method of resolving plaintiffs' claims and therefore the superior method.

D. The Trial Court Erred in Denying Class Certification of Plaintiffs' CPA Claims.

The trial court denied class certification of Plaintiffs' CPA claims because it felt that the causation element of the claims would require individual proof from every member of the class.[6] The court felt that the only way a consumer could prove causation would be to show that he "relied" upon the challenged practice—i.e., that if AWS had disclosed the UCC, he would not have purchased its services. (CP 422) This position is untenable for multiple legal, practical, and policy reasons.

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[6] The trial court concluded that the Washington CPA should be applied to all of the consumer protection act claims made by the proposed nationwide plaintiff class because all of the conduct complained of took place in or emanated from AT&T's headquarters in Redmond, Washington. (CP 421)

First, the trial court's view is contrary to this Court's analysis in *Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 920, 6. P.3d 63 (2000), *reversed on other grounds*, 145 Wn.2d 178 (2001), which held that individual reliance was not required in a class action under the CPA. ***Second***, it is inconsistent with the legislature's mandate that decisions under the CPA should follow decisions of the federal courts under similar consumer protection laws, which hold that reliance is not required. ***Third***, it would mean virtually the end of consumer class actions in Washington State, which conflicts with the legislature's intent in enlisting consumers to enforce the CPA on behalf of the public at large. ***Fourth***, it is simply illogical to require a consumer to prove "reliance" on something he did not know in the first place, and would serve no purpose in the fact-finding process. ***Fifth***, even if the trial court were correct in its belief that causation must be proven individually, that is not a legally sufficient reason to deny class certification, as this Court explained in *Sitton*. For each of these reasons, the trial court's orders should be reversed and the claims should be certified as a class action.

1. The Trial Court's Decision Is Contrary To This Court's Analysis in *Pickett*: Reliance is Not Required Under the Consumer Protection Act.

As this Court held in *Pickett*, it is not necessary for class members to prove individual reliance in order to prove a claim under Washington's CPA. In *Pickett*, the plaintiffs brought CPA and

contract claims against the defendant cruise line for its collection of port taxes in excess of those provided in its form contracts. 101 Wn. App. at 905. The trial court denied class certification based on its belief that individual reliance was necessary on the CPA claim, which defeated the predominance requirement of CR 23(b)(3). *Id.* at 907. The parties then reached a class settlement, which was approved by the trial court. *Id.* at 907-08. An objector to the settlement appealed to this Court.

In considering the trial court's denial of class certification, this Court surveyed cases from numerous jurisdictions holding that individualized evidence of causation was not necessary in consumer cases and would conflict with the purposes of state consumer protection acts. *Id.* at 918-20.[7] This Court agreed and held that individual reliance was not required to make out a claim under Washington's CPA. *Pickett*, 101 Wn. App. at 920. The Court rejected the notion that in order to find causation, it must determine "whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes." *Id.* Instead, it is

[7] Courts in many other states have likewise held that individual proof of reliance cannot be required in statutory consumer protection actions, particularly in the class action context. *See Group Health Plan v. Phillip Morris, Inc.*, 621 N.W.2d 2, 15 (Minn. 2001); *Stutman v. Chemical Bank*, 731 N.E.2d 24, 30 (New York 2000); *Varacallo v. Massachusetts Mut. Life Ins. Co.*, 752 A.2d 807, 813-14 (New Jersey 2000); *Dix v. American Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987); *Hinchliffe v. Am. Motors Corp.*, 440 A.2d 810, 815-16 (Conn. 1981); *Fletcher v. Security Pacific National Bank*, 591 P.2d 51, 57 (Cal. 1979).

enough to find that the defendant used deceptive practices to sell tickets to plaintiffs, and the plaintiffs purchased the tickets. "Purchase of a cruise ticket is the single event that occasioned each plaintiff's injury. Causation inheres in the fact that the plaintiffs purchased cruise tickets." *Id.*

On review, the Supreme Court found this Court had erred in examining the trial court's class certification decision and instead should have focused on the reasonableness of the settlement. *Pickett*, 145 Wn.2d at 188-191. The Supreme Court did not disagree with this Court's holding that individual proof of reliance is not required, but only said it should not have overturned the settlement in that case: "Under the posture of this case, we believe it is enough to say that [reliance] is a debatable question without a clear answer under Washington law <u>at the time of the parties' settlement</u> ...." 145 Wn.2d at 197 (emphasis added). Thus, while the outcome of this Court's decision in *Pickett* was reversed on review, the analysis was not, and there is no reason it should not obtain in this case. *See Peace Lutheran Church and Academy v. Village of Sussex*, 246 Wis.2d 502, 631 N.W.2d 229, 235 n.5 (2001) (intermediate appellate court's holding persuasive authority when state supreme court had reversed on an unrelated ground; "holdings not specifically reversed on appeal retain precedential value."). Under the *Pickett* analysis, the trial court's denial of class certification should be reversed.

2. The *Pickett* Analysis of Causation is Consistent With Prior Precedent on the Elements of a Consumer Protection Act Claim.

Washington cases prior to *Pickett* support the conclusion that individual proof of reliance is not required under the CPA. The Supreme Court first required proof of "causation" in *Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).[8] The Court did not say what must be shown to establish causation, and no case but *Pickett* has addressed the question since.[9] Prior to *Hangman Ridge*, while "causation" was not expressly required, the courts had required that plaintiffs prove the defendant "induced" the plaintiff to act by unfair or deceptive acts or practices. *Id.* at 789-90 (quoting *Anhold v. Daniels*, 94 Wn.2d 40, 46, 614 P.2d 184 (1980)). *Hangman Ridge* essentially replaced the "inducement" requirement with "causation." *See Hangman Ridge*, 105 Wn.2d at 792-93.

In the pre-*Hangman* cases, the Supreme Court construed "inducement" in the same way this Court construed "causation" in

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[8] The Court established five essential elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *Hangman Ridge*, 105 Wn.2d at 780.

[9] Many cases state that the burden of establishing an "injury" and causation under the CPA is not high: "Injury and causation are established if the plaintiff loses money because of unlawful conduct." *Pickett*, 101 Wn. App. at 916, (citing *Edmonds v. John L. Scott Real Estate*, 87 Wn. App. 834, 847, 942 P.2d 1072 (1997); *Mason v. Mortgage America Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)); *see also Sorrell v. Eagle HealthCare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002) (denial of rightful possession of one's funds for a period of two weeks is "injury" under the CPA.)

Pickett. The Court did not require plaintiffs to show actual "reliance" in order to show "inducement"; causation could be shown by evidence that the defendants' acts or practices were the type that "serve to induce potential purchasers," and the plaintiff was a purchaser. *Eastlake Construction Co. v. Hess,* 102 Wn.2d 30, 51, 686 P.2d 465 (1984): "As [defendant's] conduct serves to induce potential purchasers, and as [defendant] appears to have engaged in such conduct, we find that Hess has made the requisite showing of inducement." This is consistent with this Court's holding in *Pickett* that, if the defendant has engaged in a deceptive practice in order to sell its product or service, "causation inheres in the fact that the plaintiff purchased" that product or service. 106 Wn. App. at 920.

In *Hess*, the Supreme Court observed that if heightened proof of causation such as actual reliance were required, many unfair or deceptive trade practices would go unpunished, and the objectives of the CPA would be defeated.

> A contrary conclusion would exclude from the operation of the Act conduct which clearly should be subject to the express legislative purpose of protecting the public from unfair, deceptive and fraudulent acts or practices. In particular, the Act is designed to protect the public from those who would repeatedly indulge in unfair or deceptive practices, as [plaintiff] claims [defendant] has done. **Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices.**

Hess, 102 Wn.2d at 52 (emphasis added). This is even more true in a case like this one, which involves a widespread practice which costs millions of consumers a small amount of money. Because there is no dispute that the price of service is not only material but critical to the consumer's initial selection of service, and AWS misrepresented the price of service by omitting the UCC, once the consumer is placed in a position where he or she has to pay a small added fee beyond the advertised price, causation should be established as a matter of law. The consumer has now been placed in a position where he or she must pay or go through the inconvenience and added expense of changing carriers.[10] Requiring proof of individual consumer reliance in order to establish a claim under the CPA would conflict with the fundamental objective of the Act, "to protect the public and foster fair and honest competition." RCW 19.86.920.

It is also well-established that a plaintiff need not prove actual deception in order to establish a violation of the CPA, but only that the act or practice had the "*capacity* to deceive." *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992) (emphasis in original). "The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury

[10] AWS requires customers to commit to a one to two year wireless service contract, and if they tried to cancel their service after they discover the UCC, they would be charged $150-175 cancellation fee. (CP 532)

occurs." *Hangman Ridge*, 105 Wn.2d at 785. Thus, a practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed, before signing the contract or completing the transaction. *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 116, 22 P.3d 818 (2001). Reliance cannot be a mandatory element in a CPA action consistent with this precedent. A consumer cannot have relied upon misconduct if he was not actually deceived by it, or if he became fully informed before the transaction was complete. To require a consumer to prove that he relied upon a deceptive act would require him to prove exactly what the law clearly does not require—actual deception and continued ignorance—and would render these well-established rules superfluous.

The trial court relied upon *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982), in requiring proof of actual reliance to establish causation. *Nuttall* was decided before *Hangman Ridge* and is inconsistent with subsequent caselaw. In that case, the defendant, a real estate broker who sold a parcel of real property to the plaintiff, misrepresented the property's boundaries to plaintiff. The court in *Nuttall* acknowledged the rule that consumer reliance was not necessary to establish an actionable misrepresentation, "so long as it has the capacity or tendency to deceive," but concluded that rule only applied in actions brought by the Attorney General, not private suits by consumers. *Id.* at 110. It held that

private actions by consumers were different, and concluded a consumer would have to prove actual reliance to prevail. *Id.* at 111.

This approach was rejected two years later in *Hess, supra*, which held that proof of actual inducement was not required. 102 Wn.2d at 50-52. Two years after that, *Hangman Ridge* made it clear that the "capacity to deceive" standard applied to private actions as well as Attorney General actions under the CPA. 105 Wn.2d at 785. As *Nuttall* itself acknowledged, the "capacity to deceive" test is not consistent with a reliance requirement. 31 Wn. App. at 110. In light of intervening precedent, *Nuttall* is not good law on causation. *See, e.g., Pickett*, 145 Wn.2d at 196 (noting that *Nuttall* is a "pre-*Hangman* Court of Appeals decision").[11]

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[11] *Nuttall* is also distinguishable because it involved affirmative factual misrepresentations, rather than a failure to disclose information. In the context of securities fraud, the courts have distinguished non-disclosure cases from misrepresentation cases. "Since there is no affirmative representation in a nondisclosure case, a plaintiff who was required to prove reliance would have to show that he believed the opposite of the omitted fact, and this would be practically impossible to prove." *Morris v. International Yogurt Co.*, 107 Wn.2d 314, 328, 729 P.2d 33 (1986), (*citing Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972)). Courts have consistently held that where the allegations involve non-disclosures, "[a]ll that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." *Affiliated Ute Citizens*, 406 U.S. at 152-53; *but see Binder v. Gillespie*, 172 F.3d 649, 653 (9th Cir. 1999); *id.* at 658-59 (Rhinehart, J., dissenting) (explaining why this logic applies in misrepresentation case as well and some courts would apply a presumption of reliance in both types of cases). Plaintiffs in this case can not be expected to prove after the fact that they would have acted differently when they had no knowledge of the information at the time they made their choice. *See Pickett*, 101 Wn.App. at 917-18 (noting defendant's argument would mean a CPA claim in such circumstances would be impossible).

3. The Trial Court's Holding is Contrary to Federal Law Which the Legislature Directed the Courts to Follow in Interpreting the CPA.

The trial court's decision is also contrary to applicable federal law. Washington courts follow federal court decisions interpreting the Federal Trade Commission Act ("FTCA") and other similar federal laws when interpreting the CPA.[12] It is well-established under the FTCA that proof of individual consumer reliance is not necessary to establish causation in a consumer protection case. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). "A presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that customers purchased the defendant's product." *Id.* at 605-06.[13]

This federal precedent supports reversal of the trial court's denial of class certification. The reasons for the federal rule that

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[12] RCW 19.86.920 ("It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal court and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters . . . . To this end the act shall be liberally construed that its beneficial purposes be served."); *Blewett v. Abbott Laboratories*, 86 Wn. App. 782, 787-88, 938 P.2d 842 (1997) (statutory directive means any departure from federal law "must be for a reason rooted in our own statutes or case law and not in [ ] general policy arguments" courts would normally consider in case of first impression).

[13] Some federal courts have held that the defendant has the burden at that point of proving a particular consumer did not in fact rely. *See id.*; *see also F.T.C. v. Freecom Communications, Inc.*, 401 F.3d 1192, 1205-06 (10th Cir. 2005) (no rebuttal mentioned); *McGregor v. Chierico*, 206 F.3d 1378, 1388 (11th Cir. 2000) (rebuttal would be allowed). Even if that is the case, it "does not preclude predominance of common questions" for class certification purposes. *Blackie v. Barrack*, 524 F.2d 891, 906-07 n. 22 (9th Cir. 1975).

individual proof of actual reliance is not required are consistent with the underlying purposes of the Washington statute: to enable effective enforcement of consumer protection laws. *Compare Figgie Int'l*, 924 F.2d at 605 (quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1293 (D. Minn. 1985) ("Requiring proof of subjective reliance by each individual consumer would thwart effective prosecutions of large consumer redress actions and frustrate the goals of the [FTCA]") *with Pickett*, 101 Wn. App. at 920 (same).

This case addresses acts and practices by AWS which impact millions of telecommunications customers. As a matter of law, it is "material" to the average telecommunications consumer whether extra charges will be added to the total advertised price of service. *See Robinson*, 106 Wn. App. at 116 (failure to disclose an extra "concession fee" added to price of rental car would be material fact, and therefore deceptive, as a matter of law). AWS's failure to disclose the total price of service and the nature of the extra charges it added to the price was common to all class members, and all members purchased AWS's service. Under comparable federal laws, this establishes causation for all class members, and is a common issue across the class. *See Figgie Int'l*, 994 F.2d at 605-06; *Blackie*, 524 F.2d at 905-06. Because the Washington CPA must follow comparable federal authority, and the policies behind the CPA are consistent with the federal rule against

requiring proof of individual consumer reliance, the trial court erred in holding that proof of individual reliance is required.

4. The Trial Court's Decision Would Eliminate Consumer Class Actions in Washington, Contrary to the Legislative Purpose in Enlisting Private Enforcement of the CPA and the Liberal Application of CR 23.

The trial court's decision that individual proof of reliance is required to establish causation under the CPA and the need for such proof precludes class certification would mean private CPA actions in general and class actions in particular would be virtually eliminated, contrary to legislative intent with respect to both the CPA and CR 23. The private right of action under the CPA was established for the very purpose of enlisting consumers to help enforce the protections in the Act. *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976). The CPA does not provide a means of resolving purely private disputes, as Washington courts have always required a private consumer bringing a CPA action to show a "public interest impact." *Id.* at 334; *Hangman Ridge*, 105 Wn. App. at 787-89. Thus, the class action is a vital part of CPA enforcement:

> [T]he CPA does not exist merely for the purpose of benefiting an individual plaintiff. Rather, the statute's purpose is to offer broad protection to the citizens of Washington from unfair or deceptive acts or practices. RCW 19.86.920. Requiring [plaintiffs] to litigate their CPA claim in Virginia without the benefit of a class action procedure as is allowed in Washington therefore undermines the very purpose of the CPA,

> which is to offer broad protection to the citizens of Washington.

Dix v. ICT Group, Inc., 125 Wn. App. 929, 937 (citations omitted), *review granted*, 155 Wn.2d 1024, 126 P.3d 820 (2005).[14]

Without class actions, there will be literally no recourse for even the most callous and blatant deceptive trade practices, if they involve small individual damage claims which cannot easily be enforced on an individual basis. Many courts have observed that barring consumer class actions would essentially exculpate parties who engage in dishonest trade practices from any liability for wrongdoing.[15] As the Seventh Circuit Court of Appeals explained, the result of eliminating consumer class claims is the elimination of all consumer claims: "The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). If consumers cannot challenge

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[14] *See also Varacallo v. Massachusetts Mut. Life Ins. Co.*, 752 A.2d 807, 815 (New Jersey 2000) ("The principle is that class actions should be liberally allowed where consumers are attempting to redress a common grievance under circumstances that would make individual actions uneconomical to pursue."); *Dix v. American Bankers Life Assurance Co.*, 415 N.W.2d 206, 209 (Mich. 1987) ("This remedial provision of the Consumer Protection Act should be construed liberally to broaden the consumers' remedy, especially in situations involving consumer frauds affecting a large number of persons.").

[15] *See, e.g., Kristian v. Comcast Corp.*, --F.3d--, 2006 WL 1028758 (1st Cir. 2006); *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 161, 113 P.3d 1100 (Cal. 2005); *Ting v. AT&T*, 319 F.3d 1126, 1130 (9th Cir. 2003); *Luna v. Househould Fin. Corp. III*, 236 F. Supp. 2d 1166, 1179 (W.D. Wash. 2002).

such small but widespread fraud on a collective basis, then it will simply go unchallenged. The trial court's decision in this case would encourage rather than discourage companies like AWS to misrepresent the true cost of its service to consumers by setting out a monthly price of service in large, bold print, in its advertising, which does not reflect the complete sum of charges that will be added in advertising the consumer's monthly bill.

The class action procedure itself was designed in part for consumer protection cases just such as this, where the individual damages at issue are too small to support individual litigation.[16] The trial court's decision in this case would eviscerate the consumer class action in Washington, which in turn would leave most Washington consumers with no recourse for unfair and deceptive practices, contrary to the public policy embodied in the CPA. In order to fulfill the legislature's intent, plaintiffs who bring otherwise cognizable claims of widespread, unfair or deceptive trade practices that are too small to prosecute effectively must be

[16] *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n. 9 (1980) ("A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery.")

allowed to use the class action device, and to prove causation without having to prove individual reliance.

5. Regardless of How Causation is to be Proved, the Trial Court Erred in Refusing to Certify a Class on the Liability Elements of Plaintiffs' CPA Claims.

Even if individual proof of reliance were required in this case, the trial court erred in refusing to certify a class for liability issues, based solely on its finding that causation and damages would have to be proven individually. In *Sitton v. State Farm*, 116 Wn. App. at 256, this Court held that, where there are substantial common questions regarding the defendant's liability, class certification is appropriate even though causation and damages may have to be proven individually. *See also Behr*, 113 Wn. App. at 323.

In *Sitton*, the plaintiffs were insureds of State Farm who were denied personal injury protection (PIP) coverage for injuries they suffered in automobile accidents. 116 Wn. App. at 249. They claimed State Farm used its "medical utilization review" process to deny or limit coverage, in breach of its contracts and fiduciary duties and in violation of the CPA. *Id.* This Court affirmed certification of a CR 23(b)(3) class, despite the existence of individual issues pertaining to both causation and damages. State Farm made the same arguments as AWS does here:

> State Farm contends the claims of each class member will necessarily require litigation regarding the facts of each accident, the medical condition of each insured, the specific action taken by each review panel, individual causation, and individual damages.

> In essence, State Farm contends that the presence of individual issues regarding causation, reliance, or damages precludes certification.

Id. at 254. The Court expressly rejected these arguments. *Id.* at 255-56. The Court explained that individual issues of causation and reliance should not preclude class certification "because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." *Sitton*, 116 Wn. App. at 255 n. 22 (*quoting* 1 Newberg & Conte, *Newberg on Class Actions* § 4.26, at 4-104 (3d ed. 1992)); *see also Carnegie*, 376 F.3d at 661 (common liability issues under RICO should be resolved for class, regardless of individual causation and damages issues).

Here, the Plaintiffs' claims are based on AWS's nationwide marketing, disclosure, and billing practices which did not vary at all between millions of potential class members, and which can and should be certified for resolution on a class basis. At trial in this case, the jury will have to answer five questions in order to decide each of plaintiffs' claims:

1. Whether defendant engaged in an unfair or deceptive act or practice;
2. Whether the act or practice occurred in the conduct of defendant's trade or commerce;
3. Whether the act or practice affected the public interest;
4. Whether the plaintiffs were injured in either their business or their property; and

5. Whether defendant's act or practice caused the plaintiffs' injury.

Wash. Pattern Jury Instr. 310.01; *see also Hangman Ridge*, 105 Wn.2d at 787-93. The first four of the five elements will present exactly the same questions for every member of the proposed nationwide class.[17] The remaining issue of whether the plaintiffs' injury was caused by defendant's unlawful practices (and the amount of damages suffered) is the only issue that, in the trial court's view, presents individualized issues, yet on that basis alone it concluded that individual issues would "predominate" over classwide issues. This is contrary to *Sitton*.

"Predominance" under CR 23(b)(3) is a "pragmatic inquiry" rather than a rigid test, and "the central question" is whether adjudication of the common issues "has important and desirable advantages of judicial economy compared to all other issues, or when viewed by themselves." 116 Wn. App. at 254.[18] This Court

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[17] All plaintiffs were "injured" by having to pay the UCC. "Injury" under the CPA is not the same as "damages." *Sorrell v. Eagle HealthCare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002), "[U]nder the CPA, injury is distinguished from damages. No monetary damages need be proven so long as there is some injury to property or business." The amount of each class member's "damages" can be easily calculated from AWS records of customer payments.

[18] *Sitton* held that, because the courts have authority under CR 23(c)(4) to certify a class action for the purposes of certain issues and not others, a class limited to the common issues concerning liability "necessarily" affords predominance as to those issues. *Id.* at 255 (*quoting* 1 Newberg & Conte, *Newberg on Class Actions* § 4.23, at 4-79). Under CR 23(c)(4), a Rule 23(b)(3) class may be certified as to some issues and not others "without strictly satisfying the predominance test which was designed to apply to the totality of issues in a lawsuit." *Id.* at 256 (*quoting* Newberg, *supra*, §§ 4.23, .25, at 4-79, 4-81 to 4-82); *see also Carnegie*, 376 F.3d at 661 (citing federal cases relying on Rule 23(c)(4)).

has addressed and rejected precisely the concerns that led the trial court to deny certification here:

> The presence of individual issues may pose management problems for the judge, but as the chief commentator has observed, courts have a variety of procedural options to reduce the burden of resolving individual damage issues, including bifurcated trials, use of subclasses or masters, pilot or test cases with selected class members, or even class decertification after liability is determined.

Sitton, 116 Wn. App. at 254-55 (*citing* 1 Newberg & Conte, *Newberg on Class Actions* § 4.26, at 4-91 through 4-97, (3d ed. 1992)); *see also Carnegie*, 376 F.3d at 661. Even if causation were to be an individualized issue in this case, common issues concerning AWS's nationwide standard practices predominate and class certification should have been granted.

"Superiority" under CR 23(b)(3) "focuses upon a comparison of alternatives." *Sitton*, 116 Wn. App. at 256. Here, the trial court did not indicate that it compared alternatives at all. In circumstances such as this case, where the traditional alternatives such as joinder, intervention, or consolidation are not available because the class numbers in the millions, "CR 23 is to be construed liberally in favor of permitting certification." *Id.* "[F]orcing numerous plaintiffs to litigate the alleged pattern or practice of bad faith in repeated individual trials runs counter to the very purpose of a class action." *Id.* at 256-57; *Carnegie*, 376 F.3d at 661. Class treatment of the common liability issues in this case is superior to

individual adjudication by the three plaintiffs alone, and the trial court's decision must be reversed.

E. The Trial Court Erred in Refusing to Certify a Class to Pursue Plaintiffs' Breach of Contract Claims.

Plaintiffs claim that AWS breached its contract with consumers by (1) charging the UCC, to recover its costs of doing business, and (2) not informing customers each time it raised the UCC. The overriding common issue on these claims is whether or not AWS had a contractual right to engage in this conduct. The contract is the same for all class members because AWS uses standardized Terms and Conditions of Service ("T&Cs") with all class members, which are not negotiated or even shown to consumers until after they sign up for service, and the question for the jury is whether the contract permits AWS to charge the UCC and/or to raise the charge without notice.

The trial court denied class certification of these claims based on two concerns: (1) that under Washington law, AWS may introduce individualized evidence of the circumstances of every customer's contracting experience in order to interpret the meaning of AWS's standard T&Cs; and (2) that AWS's "governing laws" provision in its T&Cs would require application of every state's laws. The trial court found three specific issues that could differ from one state's laws to the next: (a) what evidence would be adimssible to interpret the contract, (b) the merits of AWS's "voluntary payment"

defense, and (c) the enforceability of AWS's binding arbitration clause. Each of these "roadblocks" to class treatment is entirely speculative and legally erroneous, and the court's decision is plainly contrary to the presumption in favor of class certification.

1. Contract Interpretation Will not Differ Across the Class.

The trial court recognized that the central question posed by plaintiffs' breach-of-contract claims was whether AWS's T&Cs permitted it to charge the UCC. (CP 418)[19] The trial court observed that, while the language in the T&Cs varied over time, they all contained basically the same terms concerning the charges that customers would have to pay, *id.*, and it is undisputed that none of the T&Cs used within the class period even mentioned, much less explained, the UCC. (CP 62) So the ultimate question on this claim is whether the language AWS used in its T&Cs permitted it to charge the UCC. *See Smillow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32, 39 (1st Cir. 2003) ("The common question of law is whether those terms precluded defendant from charging for incoming calls."). This is a common question, with a common answer, for every member of the class.

[19] The trial court did not mention or address the plaintiffs' other contract claim based on AWS's admitted failure to provide advance notice of increases in the UCC, which similarly calls solely for interpretation of the words in the contract. (*See* CP 570-71)

The trial court's central concern in denying certification was that the meaning of the contract terms may vary from one customer to the next, depending on the "context" in which each customer contracted for service. This concern is mistaken for two independent reasons: (1) "context" evidence is not relevant to interpret a standardized, mass adhesion contract, and (2) AWS has no individualized "context" evidence to support its interpretation of the contract.

a. "Context" is Irrelevant to Interpreting a Standardized Adhesion Contract.

The only permissible use of "context" evidence is to determine what the parties intended when they entered their contract. *See, e.g., Estate of Cato*, 88 Wn. App. 522, 528-29, 944 P.2d 1052 (1997). Such evidence is irrelevant in this case because the contract was not negotiated by the parties. "[A standardized agreement] is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the terms of the writing." Restatement (Second) of Contracts, Section 211(2).[20]

> A party who makes regular use of a standardized form of agreement does not ordinarily expect his

[20] This section of the Restatement is found in the same chapter, under the same topic, as the sections (212 and 214) that set forth the "context rule" adopted in *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990), upon which the trial court relied. *See infra*.

> customers to understand or even read the standard terms. One of the purposes of standardization is to eliminate bargaining over details in individual transactions . . .. [C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it.

Restatement (Second) on Contracts, § 211, comment *b, e.* Claims arising from interpretation of a form contract present the "classic case" for treatment as a class action. *Kleiner v. First Nat. Bank of Atlanta*, 97 F.R.D. 683, 692 (N.D.Ga. 1983) (citing numerous cases).

Here, it is undisputed that AWS's customers do not even <u>receive</u> the T&Cs until after they start their service (CP 358, 361), they generally do not <u>read</u> the T&Cs when they do receive them (CP 68, 70), and they have no right to negotiate any change in the terms anyway. (CP 577) *Nothing the customer knew or did had any bearing on the terms of the contract.* Thus, the individual consumer's intent is literally irrelevant to what the terms mean because the consumer cannot affect the terms, regardless of what he or she knows or thinks about them. The "context" of each individual consumer transaction is totally irrelevant to determine the meaning of the contract in this case.

The trial court treated the "contract" in this case as if it were a negotiated agreement between two equals rather than a standardized, mass adhesion contract foisted on millions of

consumers without any regard for what they think or want. All consumers should be treated alike with respect to the unilateral terms of AWS's T&Cs. Consumers typically do not understand or even read this standardized agreement and can have no "intent" with respect to the terms of that agreement. The trial court erred in holding that any evidence would be admissible to alter the terms of AWS's form contracts for individual consumers.

b. AWS Offered No Individualized "Context" Evidence to Support its Interpretation of the Contract.

Even if "context" evidence were admissible to show the parties' intent in this case, AWS does not have any actual evidence of context that it could offer at trial to support its interpretation. The trial court concluded that there were two types of such evidence: (1) the customer's experience with AWS's website information about the UCC, and (2) the customer's post-contract experience with AWS concerning the UCC. (CP 419)

First, the court accepted that AWS may offer evidence of consumers' experience with the company's website, even though AWS offered no evidence that any customer has ever actually viewed the company's website concerning the UCC. AWS has no such evidence and does not intend to offer any such evidence, whether this case is tried as an individual case or as a class action.

(*See* CP 493-97)[21] It is not appropriate to deny class certification based on possible individualized issues which are a matter only of conjecture. *Smillow*, 323 F.3d at 40. To do so is directly contrary to the well-established rule that all doubts about class certification be resolved in favor of certifying a class. *Behr*, 113 Wn. App. at 319.

Second, the court accepted that AWS may offer evidence of consumers' post-contract conduct concerning the UCC. This is illogical and legally wrong. Any information provided to consumers about the UCC after the consumer contracted for AWS service would say nothing about the consumer's intent at the time of contracting. *See Nelson v. Nat'l Fund Raising Consultants*, 120 Wn.2d at 391 (disclosure of an added fee after contract formation is not meaningful) (citing generally Restatement (Second) of Contracts, ch. 3 (1981)). At that time, the consumer has no recourse anyway because if he cancels he is fined far more than any line item charge would likely ever amount to. (CP 532)

Regardless, the only such evidence cited was that Plaintiff Schnall had called to complain about the UCC, while the other plaintiffs had not.[22] The court stated that "the amount of

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[21] As plaintiffs pointed out, plaintiff Nathan Reinsche tried to look up information about the UCC on AWS's website and found nothing. (CP 514-15)

[22] Nearly a year after he signed up for service, Mr. Schnall received a billing notice concerning the UCC for the first time, which did not explain what the

knowledge" each individual class member had about the UCC as a result of having called to complain would create "significant differences" in the meaning of their contract terms. (CP 419) This makes no sense. If anything, the fact that a customer called to ask about the UCC shows he did not understand that he would be charged the UCC when he contracted for service.

Further, everyone who did call about the UCC (including Mr. Schnall) was improperly informed and further misled about what it was. In Mr. Schnall's case, for example, he recalls being told that the AWS was required by the government to charge him the UCC, which of course is false. (CP 518-19)[23] In fact, the evidence of record shows that customers who actually called AWS to inquire about the UCC were consistently told that the charge was a tax or government mandated charge, and "not an AWS initiative." (CP 540) Thus, when customers did take the step to call AWS in order to get information about this deceptively-presented charge, they were not told the truth, but instead were further deceived. The trial court erred in denying class certification based on AWS's unsupported conjecture that individual "context" evidence could be

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charge was, but stated that it was being reduced to "$0.00." That is what caused him to call AWS to ask what this charge was in the first place. (*See* CP 521)

[23] *See also* CP 521 (AWS record of call, 1/25/99)). Beyond Mr. Schnall, AWS admits it is impossible to tell which, if any, customers actually called and protested payment of the UCC. (CP 122)

offered to prove its interpretation of the contract.

c. Collateral Advertising Cannot Vary the Contract Terms.

AWS also contended, and the trial court accepted, that a variety of its marketing materials were "incorporated" into the "Terms and Conditions of Service," and that this other material differed from consumer to consumer, raising individual issues as to what the "contract" was. The trial court concluded that "liability issues would be substantially different for those class members who relied upon an agreement, advertising, or promotional materials which explicitly mention the universal connectivity charge than the issues presented by those class members who did not see such material." (CP 418) [24]

This, too, is in error. First of all, as a matter of law, the T&Cs do not effectively incorporate other documents. An incorporation by reference must be "clear and unequivocal.... It must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." *Seventh Day Adventists v. Ferrelgas, Inc.*, 102 Wn. App. 488, 494-95, 7 P.3d 861 (2000) (quoting 11 Williston,

[24] AWS concedes it did not make any reference to the UCC in any of these "collateral" documents until 2002, more than four years after it began charging the UCC, making them irrelevant to most class members. (CP 578) It is undisputed that none of this collateral ever disclosed anything about the UCC which even remotely explains what the charge is, i.e., they simply mention in passing, "universal connectivity charge" along with taxes, surcharges, and assessments which may be billed. (*See, e.g.,* CP 509)

The Law of Contracts 234) (emphasis added, alterations omitted)). AWS's alleged incorporation by reference reads as follows:

> **RATES**. Your Service rates and other charges and conditions for each Number or Phone are described in your Calling Plan brochure and Welcome Guide, if applicable, and your PocketNet™ Service Plan if applicable, each of which is a part of this Agreement....

(CP 445 (emphasis added)) This does not specify what terms are incorporated, or even what documents are incorporated. "Contract language is to be interpreted most strongly against the party who drafted the contract. *Universal/Land Const. Co. v. City of Spokane*, 49 Wn.App. 634, 638, 745 P.2d 53 (1987). AWS asks the court to bend over backwards in its favor, to read this provision as giving it *carte blanche* to designate any document it wants as part of the "contract" with each consumer. This is patently absurd; the reference to other documents is neither "clear" nor "unequivocal." In addition, it confusingly appears only under the "Service Rates" section and not in the separate section on "Charges" where AWS's contends the UCC was actually disclosed. If AWS intended that additional contractual terms about the UCC charge would be found in some unspecified, amorphous marketing documents, it cannot possibly have intended the customer to actually understand that from the language in the T&Cs. Accordingly, AWS can prove no mutual "knowledge of and assent to" incorporation of additional

terms, and collateral documents have no bearing on the plaintiffs' contract claims.

Even if some unnamed "collateral" documents could be incorporated into the T&Cs, and AWS could identify which customers' "collateral" disclosed the UCC, the court could easily certify a subclass in order to enable AWS to argue that this "collateral" disclosure (which its Vice President of Marketing says customers don't read anyway, CP 68) was sufficient to permit it to charge these customers the UCC.[25] *See generally Sitton*, 116 Wn. App. at 256-57 (presence of individual issues can be solved with procedural devices such as subclasses, unless they are "insurmountable.").

2. "Choice of Law" Is No Obstacle to Class Adjudication.

AWS argued, and the trial court agreed, that its contracts contain a choice of law provision which requires application of the law of the state "associated with" the customer's phone number. However, the provision actually calls for application of <u>all</u> "applicable" laws:

> This agreement is subject to applicable federal and state laws, and tariffs, and the laws of the state associated with the Number, without regard to such state's conflict of law rules.

[25] This argument, of course, implicitly accepts the Plaintiffs' argument that where the contract did <u>not</u> disclose the UCC by name, AWS could not charge it. Given this, it seems likely that AWS would not ultimately make this argument anyway.

(CP 446 ¶ E) This provision does not exclude in any way the application of Washington law, which clearly applies to AWS, a Washington corporation. The courts should not enforce a contractual choice of law that does not exist, and the plaintiffs' claims may be decided under Washington law because Washington has a great interest in the conduct of domestic corporations, and the greatest contacts with the subject matter of this action. (CP 441 (citing cases))

Even if foreign laws were applicable, this would not actually pose any practical impediment to class certification. Foreign laws concerning contract interpretation do not differ from Washington law in any way material to this case. As described above, there is no individualized context evidence which is admissible in this case because the contract at issue was not negotiated by the parties. It cannot possibly matter what individual consumers knew or did because such actions would not indicate an understanding or intent with respect to contract language over which they had no control in any event. Moreover, AWS cannot identify any context evidence it could offer.[26]

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[26] Even if individual context evidence were admissible in this case, there is no state that would treat such evidence differently than Washington. Washington's "context rule," adopted by the Supreme Court in *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990), simply follows the Restatement (Second) of Contracts §§ 212 & 214. The *Berg* Court referenced several other states which followed the rule, including California, Arizona, Maryland, and Massachusetts, and none that did not. *Id.* at 667. AWS affirmatively conceded that the Restatement would govern this case. (CP 301, 303 (citing Restatement and *Berg*

At the very least, the trial court should have certified classes of consumers in the states in which the named plaintiffs received service (Washington, New York/New Jersey, and California).[27] As a practical matter, trial of these class claims would be exactly the same as trial of the individual claims. Under the trial court's approach, it would have to instruct the jury on the law of all of these states, or determine that there is no significant difference and instruct the jury on one law of contracts. In either case, the jury would be instructed the same whether this is a class action or an individual action. Accordingly, there is no choice of law issue in this case and if there is, it does not present an actual, practical impediment to class certification.

The trial court also concluded that AWS's affirmative defenses would implicate differences in state laws, specifically its "voluntary payment" defense and contractual arbitration clauses. (CP 419-20) However, where common issues otherwise predominate, "courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses." *Smillow*, 323 F.3d at 39. Plaintiffs' claims

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for the "cardinal rules" of contract interpretation, which are applicable "in many states.") Thus, there is no conflict of law on how to interpret the contract in this case, and choice of law presents no impediment to class certification.

[27] Martin Schnall lives in New Jersey but received a New York telephone number. AWS contends that New York law applies to his contract. Nathan Riensche purchased and received service in Washington, and Kelly Lemons purchased in Washington and received service in Washington and California.

concern a common course of conduct and common contractual provision; no affirmative defense diminishes the predominance of common issues.

Concerning the voluntary payment doctrine, the trial court understood the defense to be materially different from state to state, but the only example in the court's opinion or in the defendant's brief was an alleged distinction between New York and Illinois law. There is no such distinction; both states, like Washington, apply the doctrine only where the plaintiff had full knowledge of the pertinent facts.[28] This defense will be the same for the entire class. *See, e.g., Smillow*, 323 F.3d at 39 (phone company's waiver argument based on evidence that user guide and invoice disclosed charge presented common issues). AWS has offered no evidence whatsoever that any customer knew what the UCC was when they paid it, or that the contract did not provide for the UCC when it was charged to them. All of the available evidence suggests that anytime a customer tried to find out what

[28] *West Suburban Hosp. Med. Ctr. v. Hynes*, 527 N.E.2d 1086, 1092 (Ill. 1988) ("The doctrine is simply that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the sole ground that the claim was illegal."); *Loconti v. City of Utica,* 306 N.Y.S.2d 772, 774 (N.Y. 1969) ("it must appear that the money was paid with knowledge of the facts which showed no liability to pay, and even with knowledge that it ought not to be paid."); *Central Life Assurance Soc. v. Implemans*, 13 Wn.2d 632, 647 (1942) ("Any act on the part of the purchaser treating the contract as in force, when done voluntarily and with a knowledge of the facts creating a right to rescind, amounts to a waiver of the right to rescind because of the existence of such facts.").

the UCC was by calling AWS, he was given false information that the charge was a "tax" and not an AWS-initiated charge. The voluntary payment defense has no merit and does not present individual issues.

As for AWS's arbitration argument, it already moved to compel the named plaintiffs to arbitrate their claims and the trial court found the arbitration clauses unconscionable under Washington law.[29] (CP 423-25) AWS is a Washington corporation, and there is no reason it should be able to enforce unconscionable provisions of its standardized form contracts against anyone, regardless of what other states' laws may permit. To hold otherwise would permit AWS to export an illegal contract, contrary to Washington's public policy, rendering the application of foreign law inappropriate. *Whitaker v. Spiegel, Inc.*, 95 Wn.2d 661, 667, 637 P.2d 235 (1981) (contract terms are "subject to limitation and invalidation if they contravene public policy").

Further, as a practical matter, whether or not absent class members are subject to enforceable arbitration clauses (which is not shown and appears dubious) makes no difference to class certification. Arbitration agreements are enforceable against named parties. A defendant may not be permitted to bootstrap its

[29] The motion was directed only to plaintiffs Riensche and Lemons; plaintiff Schnall's alleged contract does not contain an arbitration clause. (CP 443-46)

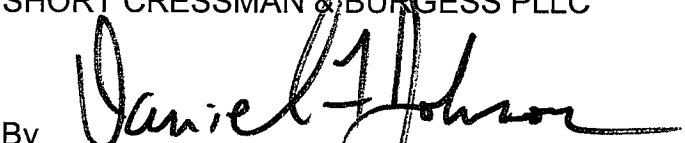
way out of a class action by showing that some unnamed members of the class could theoretically be required to bring their own claims (if they chose to bring individual claims) in arbitration. It would defy common sense to require a multitude of private arbitrations to resolve a dispute that can and will be resolved in court anyway.[30]

V. CONCLUSION

For all of the foregoing reasons, the Plaintiffs request that the trial court's denial of class certification be reversed.

RESPECTFULLY SUBMITTED this 17th day of May, 2006.

SHORT CRESSMAN & BURGESS PLLC

By 

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[30] *See In re Baldwin-United Corp. Litigation*, 122 F.R.D. 424, 429 (S.D.N.Y. 1986): "The fairness and completeness of class litigation, in contrast to the scattered and fairly random solution suggested by individual arbitration, persuades this Court that fraud claims such as these are often best resolved by class action. Not only are interests of consistency, efficiency and completeness served, but there is also the assurance that most if not all potential claimants will be apprised of their rights and of the named plaintiffs' comparatively inexpensive efforts to vindicate them. This Court finds it hard to believe that any class action defendant so situated would prefer separate arbitration of each of thousands of potential claims that might otherwise be decided by class action at far less transactional cost. At least under the circumstances of this case, arbitration cannot be regarded as a serious alternative to the class action, which is so ideally suited to securities fraud claims."

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

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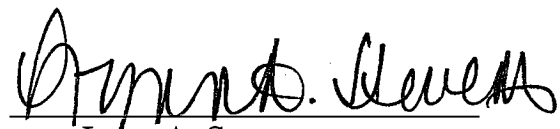
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 19th day of May, 2006.



Lynn A. Stevens

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