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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARTIN SCHNALL, a New Jersey resident; NATHAN RIENSCHKE,
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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**APPELLANTS' REPLY BRIEF AND
RESPONSE TO CROSS-APPEAL**

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I. INTRODUCTION

Defendant-Appellee AT&T Wireless Services, Inc. ("AWS") tacitly concedes that the main issues in this case are common issues, such as: what is the "Universal Connectivity Charge" (UCC), why does AWS impose this charge on its customers, did AWS disclose the nature or amount of this charge to the public in its marketing and advertising, did AWS's contract for service permit this charge, was the nature of the charge apparent from AWS's bills, and was AWS permitted to raise the amount of the charge without notice? AWS attempts to offer the Court answers to these questions, which proves the point: these are the main issues in the case, and they are common issues, not individual issues.

This Court must decide whether the Washington Consumer Protection Act (CPA) requires a consumer to prove "reliance" on a defendant's misrepresentation or nondisclosure in order to prove a causal link between a deceptive practice and the consumer's injury. If not, there is concededly no basis for the trial court's denial of class certification in this case. If so, then the Court must reaffirm the rule it announced in *Sitton v. State Farm Mut. Auto Ins.*, 116 Wn. App. 245, 63 P.3d 198 (2003), that individualized inquiries on causation should not prevent class certification, or the consumer class action will likely disappear in Washington, a result that is contrary to the purposes of both the CPA and CR 23.

The Court must also decide whether a standardized adhesion contract which is imposed on millions of consumers, with the express knowledge that most will not even read it, should be construed according to the "context" of each of the millions of transactions on a case-by-case basis or, instead, should be interpreted according to the Restatement's rule for such agreements, based on "the reasonable expectations of the average member of the public who accepts it." Restatement (Second) of Contracts § 211, cmt. e (1981). Plaintiffs' breach of contract claims call for interpretation of a single sentence in AWS's standard consumer contract, which it drafted to govern its relationship with millions of consumers. Its contention that the meaning of this sentence should vary from customer to customer depending on his or her state of mind or course of conduct should be rejected. This central, common question, whether AWS's contract permitted it to charge the UCC, predominates and a class should be certified for its adjudication.

II. REPLY TO STATEMENT OF THE CASE

In its Statement of the Case, AWS claims its consumer contracts or "Subscriber Agreements" "always" provided that customers would be charged the UCC, and claims it took "reasonable steps" to inform consumers about the UCC. These and other sweeping factual assertions concerning what "all" its contracts said and what information it gave to "each" customer

amply demonstrate that common questions will predominate in this case. AWS's assertions by their very nature will be resolved the same for the entire class. Whether the assertions are accurate or not (and most are not) is not material to the determination of class certification because on a motion for class certification, the court does not resolve the merits of the claims or defenses. Rather, the court focuses on the questions in the case, rather than the answers, to determine whether "common" questions predominate over questions affecting "only individual members" of the class. CR 23(b)(3). AWS's factual contentions demonstrate that common questions of fact predominate over questions affecting only individual members and that Plaintiffs' claims should be certified for classwide adjudication.

For example, AWS contends it provided information about the UCC to all of its customers, and "the vast majority" of them understood what the UCC was, while Plaintiffs contend AWS did not provide any information about the UCC to class members, and no one knew what it was.¹ AWS says the language in all of its

¹ Compare Brief of Resp. at 3, with Clerk's Papers ("CP") 66 (AWS's Vice President of Marketing did not know what UCC was); CP 201 (AWS store manager did not know what UCC was); CP 514-15 (Plaintiff unable to get information about UCC at AWS store); CP 493-94 (interrogatory response showing AWS has no evidence any class member actually knew about the UCC before entering contract); CP 540 (AWS survey showing new customers called AWS to ask what UCC was, and AWS representatives told them it was a tax "and not an AWS initiative").

consumer contracts covered the UCC, while Plaintiffs say that the same language did not cover the UCC.² AWS argues that all customers received notice of the UCC through their monthly bills, which clearly distinguished the UCC from mandatory "taxes," while Plaintiffs contend that the bills did not adequately identify the UCC and suggested that it was a tax, not a discretionary charge created by AWS.³ AWS says its sales representatives were trained to explain the UCC to new customers, and Plaintiffs say the sales representatives didn't even know what the UCC was.⁴ AWS contends its customer care representatives had "extensive training" to enable them to accurately explain the UCC to customers, while Plaintiffs contend AWS's own survey shows that customer care

² Compare Brief of Resp. at 7, with CP 62 (January 2003 subscriber agreement was first to contain specific reference to UCC). Further illustrating the classwide nature of this issue, AWS sought summary judgment on the breach of contract claim, arguing that the contract language was unambiguous and on its face it covered the UCC. The trial court denied the motion, pointing out that the language of the contract did not "come out and say Universal Connectivity Charge anywhere." CP 55. (Two months later, AWS added "universal connectivity charge" to the contract, CP 62, which would have been unnecessary if the contract already unambiguously required customers to pay any charges that were set forth on the customer's bill.)

³ Compare Brief of Resp. at 9 with CP 540 (AWS survey showing new customers seeing the UCC for the first time on their bill "want to know what it is," and AWS representatives routinely told them it was a tax "and not an AWS initiative").

⁴ Compare Brief of Resp. at 11 with CP 201 (AWS store manager did not know what UCC was); CP 66 (AWS's Vice President of Marketing did not know what UCC was); CP 514-15 (Plaintiff unable to get information about UCC at AWS store); CP 493-94 (interrogatory response showing AWS has no evidence any class member actually knew about the UCC before entering contract).

representatives routinely told customers the UCC was a tax "and not an AWS initiative."⁵

Of course, it does not matter at this point who wins these disputes, because on a motion for class certification, the court is only to determine whether common issues predominate in those disputes, and is not to "attempt to resolve material factual disputes or make any inquiry into the merits of the claim." *Miller v. Farmer Bros. Co.*, 115 Wn.App. 815, 820, 64 P.3d 49 (2003) . What matters at this point is that the Plaintiffs' claims present common issues, which can and should be resolved through a class action, not by individual adjudications for each plaintiff/consumer. AWS's own statement of the case and specific factual assertions demonstrates that common issues will predominate in the resolution of Plaintiffs' claims, and class certification is appropriate.

III. ARGUMENT

A. **The Trial Court Should Have Certified Plaintiffs' CPA Claims.**

The trial court erred in denying class certification on plaintiffs' CPA claims for two reasons: (1) the CPA does not require every class member to prove causation by direct proof that he or she "relied" on AWS's failure to disclose the UCC; and (2) even if the CPA did require individualized evidence of causation, a class

⁵ Compare Brief of Resp. at 12 with CP 540.

should have been certified pursuant to *Sitton* to determine the common classwide issues presented by plaintiffs' claims.

1. Prior to *Hangman Ridge*, the CPA Did Not Require Proof of Reliance: *Nuttall* and *Eastlake*

As both sides acknowledge, the requirement of proving "causation" in a private CPA action was established in *Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.*, 105 Wn. 2d 778, 719 P.2d 531 (1986). AWS, like the trial court, relies solely on a pre-*Hangman Ridge* case—*Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982)—to argue that reliance is required to prove causation under the CPA. Yet AWS ignores the contrary holding in *Eastlake Construction Co. v. Hess*, 102 Wn. 2d 30, 51, 686 P.2d 465 (1984), asserting that "causation was not an issue" in that case. Brief of Resp. at 31. In fact, neither *Nuttall* nor *Eastlake* addressed reliance in the context of "causation" because *Hangman Ridge* had not yet been decided. Instead, both opinions concerned the then-prevailing test for establishing "public interest impact," which required proof that the defendant "induced" the plaintiff to purchase the defendant's product. *Eastlake*, 102 Wn. 2d at 50 (citing *Anhold v. Daniels*, 94 Wn. 2d 40, 46, 614 P.2d 184 (1980)); *Nuttall*, 31 Wn. App. at 111 (citing the same test from *Anhold*).

In *Nuttall*, the Court of Appeals held that, in order to show "inducement," a plaintiff would have to prove he relied upon the defendant's misrepresentation. 31 Wn. App. at 111. Two years

later, the Supreme Court in *Eastlake* held the opposite: that a private plaintiff could prove inducement simply by showing that the defendant engaged in an unfair or deceptive practice that "serves to induce potential purchasers." 102 Wn. 2d at 51. The Court explained that to require more would effectively leave many deceptive practices outside the coverage of the CPA. In order to ensure liberal coverage, the *Eastlake* Court held, "Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices." *Id.* at 52.

If, as AWS contends, *Eastlake* is not about causation, then neither is *Nuttall*, and there is no legal authority for AWS's position or the trial court's decision. But if they are about causation, then *Eastlake* clearly prevails, and direct proof of reliance is not required.

2. After *Hangman Ridge*, the CPA Did Not Require Proof of Reliance: *Pickett*

AWS asserts that cases after *Hangman Ridge* required proof of individual reliance. None of the cases AWS cites support this proposition. At most, they say only that a plaintiff could prove causation through reliance, not that a plaintiff must prove causation in this manner.⁶ The only case after *Hangman Ridge* in which a

⁶ See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn. 2d 299, 314, 858 P.2d 1054 (1993); *Schmidt v. Cornerstone Investments, Inc.*,

Washington appellate court has expressly decided whether proof of reliance is required is *Pickett v. Holland America Line Westours, Inc.*, 101 Wn. App. 901, 6 P.3d 63 (2000), *reversed on other grounds*, 145 Wn. 2d 178, 35 P.3d 351 (2001).⁷ Like this case, *Pickett* involved claims that defendant failed to disclose extra charges it intended to bill plaintiffs for its services, in that case "port taxes" added to the price of a cruise ticket. This Court decided, consistent with *Eastlake*, that it is not necessary for each individual plaintiff to prove he or she would not have purchased the defendants' services had they known about the extra charges. 101 Wn. App. at 920. Rather, the fact that the defendant used deceptive practices to sell its services means that each plaintiff's purchase of those services "caused" each plaintiff's injury. *Id.* "Causation inheres in the fact that the plaintiffs purchased cruise tickets." *Id.*

AWS contends that this analysis of causation in *Pickett* was effectively overruled by the Washington Supreme Court. Yet AWS

115 Wn. 2d 148, 167, 795 P.2d 1143 (1990); *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn. 2d 396, 759 P.2d 418 (1988); *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 113, 22 P.3d 818 (2001).

⁷ However, in *Nelson v. National Fund Raising Consultants*, 120 Wn.2d 382, 842 P.2d 473 (1992), the Court at least implicitly reached the same conclusion as this Court in *Pickett*. The plaintiffs there learned about the defendant's undisclosed charges after entering into the contract, but the Court rejected the defendant's argument that the plaintiffs had to prove actual deception, i.e., lack of knowledge, in order to establish a violation of the CPA. *Id.* at 392.

admits that the Supreme Court expressly declined to decide the causation issue, based on its view that the question was not properly presented.⁸ The Supreme Court's only statement on the subject was to say that, at the time of the settlement in that case, i.e., before this Court's decision in the case, causation had been a "debatable question" under the CPA. 145 Wn.2d at 197. This is far from an express or even an implied disapproval of this Court's subsequent analysis of the causation question.⁹ This Court's analysis of CPA causation in *Pickett* was correct, and the trial court's decision in this case should be reversed.

3. Analogous Federal Laws Do Not Require Direct or Individualized Proof of Reliance.

AWS acknowledges that the legislature directed Washington courts to follow the decisions of the federal courts and the Federal Trade Commission when interpreting the CPA, but claims that the Federal Trade Commission Act cases discussed in Plaintiffs' opening brief are not the proper cases to examine regarding causation. AWS says the Court should instead look to cases on causation under the federal Racketeering Influenced and Corrupt

⁸ AWS says that a higher court may "impliedly" overrule a lower court's decision, but its only authority for that proposition, *Spencer v. County of Brown*, 573 N.W.2d 222, 226 (Wisc. App. 1997), says the opposite. ("Ordinarily, holdings not specifically reversed on appeal retain precedential value.")

⁹ Indeed, this Court has indicated the Supreme Court's decision in *Pickett* is "of no help" on the question whether individualized causation evidence precludes class certification. *Sitton*, 116 Wn. App. at 254 n. 18.

Organizations Act (RICO), 18 U.S.C. §§ 1961-68. However, RICO is not analogous to the CPA; it is primarily a criminal statute designed to reach criminal enterprises.¹⁰ No Washington court has ever relied upon RICO in connection with the CPA.

Rather, Washington courts look to the federal anti-trust laws the CPA was modeled after, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act. *Tradewell Stores, Inc., v. T. B. & M., Inc.*, 7 Wn. App. 424, 431, 500 P.2d 1290 (1972).¹¹ As indicated in Plaintiffs' opening brief, the most analogous of these laws on the question of causation is the Federal Trade Commission Act (FTCA), because it is the federal statute which, like the CPA, authorizes recovery of damages by consumers for unfair or deceptive trade practices. See 15 U.S.C. § 57(b). Contrary to AWS's contention, the FTCA, like the CPA, does require a "causal link" between the defendant's deceptive practice and the consumer's injury. 15 U.S.C. § 57(b) (FTC may recover damages to redress consumer injuries "resulting from" deceptive acts or practices). This provision is no less a requirement of "causation" than the CPA's language authorizing damages to consumers who are injured "by" a deceptive act or practice. RCW

¹⁰ See *Systems Mgmt. Inc. v. Loiselle*, 303 F.3d 100, 101 n. 1 (1st Cir. 2002).

¹¹ See also *Short v. Demopolis*, 103 Wn.2d 52, 59-60, 691 P.2d 163 (1984); *Blewett v. Abbott Labs.*, 86 Wn. App. 782, 787, 938 P.2d 842 (1997); *Ballo v. James S. Black Co.*, 39 Wn. App. 21, 26, 692 P.2d 182 (1984).

19.86.090. And it is this provision of the FTCA that courts say does not require individualized proof of reliance. *F.T.C. v Figgie Int'l, Inc.*, 994 F.2d 595, 605 (9th Cir. 1993). This is the most analogous federal statute on this question, and the legislature expressly directed the courts to follow it.

The same result would obtain under the Sherman Anti-Trust Act and the Clayton Act, i.e., establishing causation does not require direct proof of individual reliance. For example, in *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 812 (9th Cir. 1977), a Sherman Act case, the court rejected imposition of "the nearly impossible burden of proving what each [plaintiff] would have done" in the absence of the defendants' acts, and held instead that, absent evidence to the contrary, causation could be assumed from the defendant's acts and the reasonable plaintiff's response. *Id.* The same is true under the Clayton Act: causation is subject to a "relaxed standard" and is satisfied upon proof that the plaintiff's injury is "of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *In re: Data General Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1118 (N. D. Cal. 1980) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S. Ct. 690, 50 L.Ed.2d 701 (1977)).¹²

¹² Even RICO would not require individual proof of reliance in this case. See *Systems Mgmt.*, 303 F.3d at 104 (civil RICO claim does not require proof of reliance to establish causation). As the Ninth Circuit explained in the principal

Analogous federal authority confirms that the trial court erred in concluding that individual proof of actual reliance is necessary to prove causation under the CPA, and its denial of class certification should be reversed.

4. Under the *Affiliated Ute* Rule, Plaintiffs Cannot Be Required to Prove They "Relied" on Defendant's Failure to Disclose Material Information About the Price of the Service.

There is a well-established body of authority, cited in Plaintiffs' opening brief, that claims based on omissions rather than affirmative misrepresentations are not susceptible to individualized, direct proof of reliance. Those cases hold that where the allegations involve primarily "failure to disclose" facts rather than affirmative misrepresentations of fact, "positive proof of reliance is not a prerequisite to recovery." *Affiliated Ute*, 406 U.S. at 153

All that is necessary is that the facts withheld be material in the sense that a reasonable [consumer] might have considered them important in the making of this decision.

case relied upon by AWS, *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), reliance is not necessarily the only way to prove causation under RICO. *Id.* at 666. The court held that reliance would be necessary in that case because the "unique nature of gambling transactions" differ from the typical economic transaction—in which a consumer purchases a commodity for a particular price—because gamblers have a variety of non-economic motives for their use of a slot machine. *See id.* at 665. That is not the case in the purchase of wireless phone service. *Poulos* also acknowledged that in cases like this one which involve primarily a failure to disclose information rather than affirmative misrepresentations, a classwide "presumption of reliance" may be appropriate under RICO. *Id.* at 666-67 (quoting *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 153-54, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972); *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999)). *See infra* subsection 4.

Id. at 153-54.¹³ As many courts have observed, requiring proof of reliance on an omission makes little sense. "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). Requiring proof of reliance in a nondisclosure case, as the trial court did here, would require the plaintiffs to prove a "speculative negative." *Blackie v. Barrack*, 524 F.2d 891, 907 (9th Cir. 1975).

Thus, regardless of the exact nature or source of the causation inquiry, requiring proof of individual reliance is inappropriate in cases which, like this one, are based primarily on nondisclosures. The Plaintiffs' claims are based upon AWS's failure to disclose the "Universal Connectivity Charge" to prospective customers or in their standard form contracts. See Appellants' Opening Brief at 6, 7-8 (citing CP 55-56, describing claims as failure to disclose extra charge).¹⁴ It would make little sense to require each individual plaintiff to prove, through

¹³ Notably, this formulation closely resembles both this Court's approach to CPA causation in *Pickett* and the Supreme Court's analysis of "inducement" in *Eastlake*. See *supra* subsections 1 and 2.

¹⁴ AWS asserts that this case involves affirmative misrepresentations rather than omissions, but fails to explain or justify this assertion, and it is simply contrary to the record.

necessarily speculative evidence, what they would have done had AWS disclosed its intent to add a UCC charge to each monthly bill.

AWS claims that the *Affiliated Ute* rule only applies in cases that involve "pure omissions." Brief of Resp. at 38, citing *Poulos*, 379 F.3d at 666-67. This is false; all of the cases cited by both sides, including specifically *Poulos*, say the *Affiliated Ute* rule applies to cases that "primarily" involve a failure to disclose. *Id.* at 666, 667 (quoting *Binder*, 184 F.3d at 1064); see also *Affiliated Ute*, 406 U.S. at 153-54, *quoted in Morris*, 107 Wn.2d at 328. It is beyond dispute that this case involves primarily a failure to disclose, and the *Affiliated Ute* rule precludes a requirement of individual proof of reliance for each class member.

AWS also contends that even if individual proof of reliance is unnecessary under the *Affiliated Ute* rule, this "does nothing" to minimize individual issues because the rule only creates a "presumption" of reliance, which the defendant can then rebut, on an individual, consumer-by-consumer basis. Brief of Resp. at 38. To the contrary, the *Affiliated Ute* rule clearly reduces the individual issues in a case by permitting the plaintiffs to prove causation with common proof that the facts defendant failed to disclose would have been material to the "reasonable consumer."¹⁵ And while

¹⁵ *Morris*, 107 Wn.2d at 330; see also *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976) ("An omitted fact is material

Affiliated Ute itself does not mention a "rebuttable presumption," even if rebuttal evidence were permitted, it would necessarily implicate far fewer, if any, "individual" issues.¹⁶ As indicated, AWS does not have a single piece of evidence that a single class member knew what the UCC was before they signed up, and there is abundant evidence that most did not. See *supra*, Section II & footnotes 1-4. Even if AWS did have some evidence that some consumers knew the UCC would be added to their bill before they purchased the service, this could not possibly justify denying class certification.

The right of rebuttal . . . does not preclude the predominance of common questions. Causation as to each class member is commonly proved more likely than not by materiality. That showing will undoubtedly be conclusive as to most of the class. **The fact that a defendant may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones;** plaintiffs satisfy their burden by showing materiality to all.

Blackie, 524 F.2d at 907 n. 22 (emphasis added).¹⁷ Even if the

if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

¹⁶ See *Blackie*, 524 F.2d at 906 n. 22.

¹⁷ See also *Basic, Inc. v. Levinson*, 485 U.S. 224, 245, 250, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988) (affirming class certification on presumption of reliance theory); *Vasquez v. Superior Court*, 484 P.2d 964, 972-73 (Cal. 1971) (same); *Cope v. Metropolitan Life Ins. Co.*, 696 N.E.2d 1001, 1008 (Ohio 1998) ("cases involving common omissions across the entire class are generally certified as class actions" based on presumption of reliance).

CPA permitted AWS to disprove causation on an individual basis, it was error to deny class certification based on predominance of individual issues.

5. Reliance Is Not Required With Respect to "Unfair" Acts or Practices.

The CPA prohibits both "deceptive" and "unfair" trade practices. RCW 19.86.020. AWS apparently concedes that "unfair" practices do not require proof of "reliance." Brief of Resp. at 28 ("Where the alleged violation is grounded in deception, the causal link requires that a plaintiff who seeks damages show that she was deceived."). AWS contends Plaintiffs cannot make viable "unfair practices" claims because such claims are "preempted" by federal law. *Id.* at 28 n. 17. AWS cites *In re Truth-in-Billing Format, Second Report & Order*, 20 F.C.C.R. 6448, at ¶¶ 30-32 (2005), in which the Federal Communications Commission (FCC) held that any state action that would "require or prohibit" the charging of a line item, such as the UCC, is preempted by the Federal Communications Act (FCA). Putting aside the fact that this order is not, by its own terms, retroactive to the class period alleged in this case, it has been reversed as beyond the FCC's authority and contrary to the FCA. *Nat'l Ass'n of State Utility Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006).

It is true that Plaintiffs do not contend AWS's decision to charge consumers the UCC was unfair. However, Plaintiffs clearly

allege that AWS's practice of charging the UCC without providing for it in its contracts was an "unfair" practice under the CPA, as well as its practice of raising the amount of the UCC without notice, contrary to its contract. These claims, AWS must concede, do not require a showing of deception, and therefore do not require reliance to prove causation. The trial court erred by applying a reliance requirement on Plaintiffs' unfair practices claims under the CPA. AWS's unfair practices were its billing of customers for an additional charge for service beyond the advertised calling plan rate, i.e., a UCC, that was not specified in the consumer's contract, and by increasing the amount of the monthly UCC without notice, where the contract required advance notice of any change in the material terms of the contract. Reliance could not be required to prove causation because AWS's billing practices were unfair under the terms of the consumer's contract.

6. *Sitton* Requires Reversal Regardless of How Causation Will Be Proven.

Even if causation did present significant individualized issues, the trial court should have certified Plaintiffs' CPA claims for purposes of common issues concerning liability. This Court held three years ago in *Sitton* that, pursuant to the legislative purposes and caselaw underlying CR 23, it would be inappropriate to decline to certify a class where there are common issues of fact concerning the defendant's conduct, simply because there may be individual

issues regarding "causation, reliance, or damages." 116 Wn. App. at 254-57; see also *Carnegie v. Household Int'l Inc.*, 376 F.3d 656, 661 (7th Cir. 2004); *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3rd Cir. 1985).

Causation in the form of reliance is the only issue that the trial court found to raise "individual" questions under the CPA in this case. CP 421-22.¹⁸ AWS has never disputed that the other elements of its liability under the CPA raise only common questions. See CP 611, 692.¹⁹ Those concededly classwide issues include: (1) whether the defendants engaged in the practices complained of; (2) whether the defendants' practices were unfair or deceptive; and (3) whether the practices affect the public interest. As illustrated in the parties' statements of the case, these common issues are significant to the outcome of the Plaintiffs' claims.

¹⁸ AWS's attempt to confuse the issues of "damages," "causation," and "injury" is unavailing. Causation is the only substantive issue upon which the trial court found individual issues, and that is the only potential such issue, because if Plaintiffs prove causation, then their injury—having paid the UCC—will be established, and the amount of their damages will be easily calculated from defendants' billing records.

¹⁹ AWS attempts to add to the list of "individual" questions by reference to its "voluntary payment" defense. Brief of Resp. at 47. As the trial court observed, voluntary payment is a contract defense. CP 419-20; *Central Life Assurance Soc. v. Implemans*, 13 Wn.2d 632, 647 (1942). No case has ever held it applied to a CPA claim. See *Nelson*, 120 Wn.2d at 391, 392 (defendant cannot rely on his disclosure of extra costs after contract was formed to insulate himself from CPA). The CPA is to be construed liberally in favor of consumers, and its few statutory exceptions are to be "narrowly confined." *Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 552, 817 P.2d 1364 (1991). "Voluntary payment" does not apply.

Accordingly, *Sitton* is controlling and the claims should have been certified for class adjudication on these common issues.

AWS attempts to avoid *Sitton* by arguing that it is "inconsistent" with other cases, principally *Schwendeman v. USAA Casualty Ins. Co.*, 116 Wn. App. 9, 65 P.3d 1 (2003). Clearly this Court did not consider the two cases to be inconsistent, as they were decided within a month of one another, unanimously, by panels with two of three judges in common.

AWS's attempt to distinguish this case from *Sitton* is equally mistaken. AWS asserts that the claims in *Sitton* did not involve "deception" and therefore did not implicate individual issues about the plaintiffs' state of mind.²⁰ This assertion, even if true, misses the point; the *Sitton* Court accepted that causation, specifically reliance may be an individual issue, yet held that this did not defeat the propriety of class certification for the purpose of resolving other, common issues. *Sitton*, 116 Wn. App. at 255 & n. 22 (causation and reliance "go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability"). There, just as here, there were significant common issues underlying the defendant's liability, and the predominance and superiority requirements of CR 23 are met, regardless whether

²⁰ As indicated *supra* in subsection 5, some of the Plaintiffs' claims in this case are not based on "deception."

causation is an individual issue.

B. AWS's Cross-Appeal Should Be Denied Because the Trial Court Correctly Applied the "Most Significant Relationship" Test and Determined the Washington CPA Applied.

The trial court held that the Washington CPA is properly applied to the claims of all members of the nationwide class. CP 420, 421. AWS "cross-appeals" this ruling based on a choice of law provision in its contract. That provision does not, by its own terms, apply to statutory or pre-contract claims such as Plaintiffs' CPA claims: "**This agreement** is subject to applicable federal laws, federal or state tariffs, if any, and the laws of the state associated with the [consumer's] phone number." See CP 3508 (emphasis added). The trial court specifically concluded this language does not cover Plaintiffs' CPA claims:

The choice of law provision contained in the contracts is inapplicable to the consumer protection claims both because the claims arise from statute rather than the contract and because temporally, many of the consumer claims arise before the parties have entered into a contract.

CP 420 (emphasis in original). AWS fails to offer any reason why this conclusion is incorrect, and it must therefore be accepted.

Even if the contractual choice of law did cover Plaintiffs' claims, AWS admits it is only one factor in the choice of law analysis. Brief of Resp. at 39. The trial court carefully performed that analysis and correctly found that Washington law applies to all

Plaintiffs' claims. Its conclusion was based upon (1) the well-established principle that the law of the state with the "most significant relationship" to the issues in the case applies, and (2) an undisputed factual record that all of the practices at issue in this case, including all of the marketing materials, service agreements, bills, and billing and disclosure decisions, emanated from AWS's headquarters in Redmond, Washington. CP 420, 421.

AWS relies heavily on *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981), which it calls "a very similar case" to this one. Brief of Resp. at 41. *Kammerer* could hardly be more different; the plaintiffs were California residents who claimed the defendant, a Washington corporation, had fraudulently induced them to enter a licensing agreement permitting defendant to manufacture oil drilling equipment covered by plaintiffs' patents. *Id.* at 418. The agreement was negotiated in California, the defendants' fraudulent statements were made in California, and the damage was sustained in California. *Id.* at 423. The Court applied the "most significant relationship" test and found that California had sufficient contacts to the case to permit a Washington court to award punitive damages under the law of California. *Id.*

This case, by contrast, did not involve any negotiations. The contract and all of the allegedly deceptive and unfair practices were created and disseminated from the State of Washington. The State of Washington has an undeniable interest in prohibiting unfair and

deceptive trade practices by corporations based in Washington. As the trial court observed, the CPA was intended to be construed and applied broadly, and not limited to the State's borders. CP 420 (quoting RCW 19.86.920). AWS offers no competing interest by any other state, nor any truly significant contact between the Plaintiffs' claims and another state. The mere fact that the plaintiffs lived in and purchased the phone service in another state is unimportant where the claims do not concern the phone service or the plaintiff's residence but rather the defendant's marketing and billing practices, all of which occurred here.

AWS appears to concede that the "general principle" for choice of law analysis, set forth in the Restatement (Second) of Conflict of Law § 145, supports the trial court's conclusion that Washington has the most significant relationship to Plaintiffs' claims. See CP 421. AWS argues, instead, that § 148 states a different rule for "fraud and misrepresentation" cases, and that this rule rather than the general rule applies here. Section 148 does not state a different rule, it merely elaborates the general rule that the law of the State with the most significant contacts is the proper law to apply. See *Kammerer v. Western Gear Corp.*, 27 Wn. App. 512, 520, 618 P.2d 1330 (1980) (turning to § 145 after quoting § 148).²¹

²¹ In *Kammerer*, the Supreme Court did not even mention the Restatement but simply analyzed the relationships each state had to the conflict. 96 Wn.2d at 422-423.

Section 148 specifically applies where the defendant's misrepresentations "are made" in the same state in which the plaintiff relies and suffers damage as a result. That is not the case here, as AWS's acts and omissions were all undertaken in Washington. CP 420, 421. Section 148 is not helpful here because it concerns common law fraud claims, where the plaintiff's reliance and damage are significant elements of the claim. A statutory consumer class action focuses on the unfair or deceptive practices of the defendant, which affect large groups of consumers but may cause an insignificant amount of damage in each instance. As set forth above, Plaintiffs' "reliance" is not an issue, and even if it were, it would be proven through evidence about the materiality of defendants' practices, not anything peculiar to the individual plaintiff.

C. The Trial Court Should Have Certified Plaintiffs' Breach of Contract Claims.

1. Contract Interpretation Will Involve A Single Sentence in a Single Contract with A Single Result for All Class Members.

The parties agree that Plaintiffs' principal breach of contract claim requires interpretation of a single provision in AWS's standardized consumer contract (the "Terms & Conditions of Service" or the "Subscriber Agreement"). The parties agree that this provision did not materially change during the class period.

Brief of Resp. at 7.²² The issue presented is whether that language permits AWS to charge the UCC. The language reads as follows:

You are responsible for paying all charges to your account, including but not limited to . . . any taxes, surcharges, fees, assessments, or recoveries imposed on you or us as a result of use of the Service.

Brief of Resp. at 7 (citing CP 763). AWS contends the UCC "clearly is included" in this language because it belongs in one or more of the categories listed ("tax, surcharge, charge and/or fee"). *Id.* at 7-8. Plaintiffs contend this language clearly does not cover the UCC because the UCC is not, in fact, "imposed on you [the consumer] or us [AWS] as a result of use of the service." See CP 74 (AWS admission that the UCC was not dependent on consumer's use of service). This dispute clearly presents a "common question" that will determine the contractual rights of all class members, and should have been certified for class adjudication.

Despite its position that the contract "clearly" authorized it to charge the UCC, AWS asserts that "extrinsic evidence" will be necessary to interpret the disputed contract provision. AWS relies

²² AWS does not argue on appeal that other, unidentified "rate plan materials" or other advertising or promotional documents were "incorporated by reference" in the consumer contract, and therefore abandons that argument. See Brief of Resp. at 16-28; see also *Smillow v. Southwestern Bell Mobile Systems, Inc.*, 323 F.3d 32 (1st Cir. 2003) (certifying class on breach of standard, form consumer contracts, despite a variety of rate plans and usage patterns). The AWS contract also contained an integration clause that specifically superseded any inconsistent or additional terms. See CP 402.

on *Berg v. Hudesman*, 115 Wn.2d 657, 667-68, 801 P.2d 222 (1990), for the proposition that extrinsic evidence, particularly the post-contract conduct of particular class-members, will be relevant and admissible to show the meaning of the language at issue. Brief of Resp. at 22-24. In other words, despite its "clear" coverage, the meaning of the language AWS foisted on millions of consumers could vary from one consumer to the next based on the "context" of each customer's purchase of wireless services.

AWS studiously ignores the fact that the contracts at issue here were not discussed with, negotiated by, or even read by the plaintiff class members. As AWS's corporate representative on marketing practices flatly admitted, "most customers tell us they don't read material of that kind very often" because it is "full of small mouse type and trivia type." CP 70; see *also* CP 577, 361. The named plaintiffs testified they did not even recall seeing AWS's Subscriber Agreement. CP 368, 373-74, 377-78. Therefore, the question whether the contract's language permitted AWS to charge plaintiffs the UCC cannot possibly turn on what the plaintiffs intended by that language, because they had no knowledge it even existed.

The Restatement (Second) of Contracts, which Washington courts routinely consult, provides express rules for interpreting such contracts:

"Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing."

Restatement (Second) of Contracts § 211(2) (1981). As the comments to § 211 explain, this rule is tailor-made for this case because AWS "makes regular use of a standardized form of agreement [and] does not ordinarily expect [its] customers to understand or even read the standard terms." *Id.*, cmt. b. Accordingly, "courts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." *Id.*, cmt. e. Thus, the interpretation of AWS's contract language regarding the UCC will be decided based upon the "average" consumer's "reasonable expectations," not on the supposed "intent" of any specific plaintiff class member. Contract interpretation is thus a common question, not an individual one, and the trial court's conclusion to the contrary was erroneous.

Surprisingly, AWS does not even address § 211. It offhandedly asserts that Washington's "context rule" has been applied to "standardized agreements," but cites two cases that do not say that, and which involved contracts that were discussed, negotiated and signed by the parties.²³ These cases are outside

²³ *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 338, 352, 103 P.2d 773 (2004) (arbitration agreement explained to and signed by employee); *Western Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wn. App. 488, 491, 496-

the scope of § 211 and have no bearing on its application. Washington courts have routinely adopted contract interpretation rules from the Restatement, and this Court has specifically cited § 211 with approval. *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 829, 970 P.2d 803 (1999). Many other states have adopted § 211, and it should be applied in this case.²⁴

AWS's chief example of so-called "extrinsic evidence" demonstrates its irrelevance to the interpretation of this contract. AWS says that "evidence of subsequent performance" by consumers is "particularly compelling" on the question of what the disputed language was "intended" to mean at the time the consumer contracted with AWS. Brief of Resp. at 23. As AWS admits, *Berg* only holds that subsequent conduct "may" be relevant to discerning the parties' intent. Brief of Resp. at 22 (quoting 115 Wn.2d at 668). It is absurd on its face that a consumer who never saw, read, or negotiated a sentence printed in "mouse type" in the back of a phone pamphlet would by his subsequent conduct somehow demonstrate the intended meaning of that sentence. See *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*,

98, 7 P.3d 861 (2000) (design and construction contracts discussed and negotiated between multiple parties).

²⁴ See *West Virginia ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 274 (W. Va. 2002); *Allen v. Prudential Property & Cas. Ins. Co.*, 839 P.2d 798, 808 (Utah 1992); *Lauvetz v. Alaska Sales & Serv.*, 828 P.2d 162, 165 (Alaska 1992); *Kinoshita v. Canadian Pac. Airlines, Ltd.*, 724 P.2d 110, 117 (Haw. 1986); *Darner Motor Sales, Inc.*, 682 P.2d 388, 398-99 (Ariz. 1984).

682 P.2d 388, 399 (Ariz. 1984):

To apply the old rule and interpret such contracts according to the imagined intent of the parties is to perpetuate a fiction which can do no more than bring the law into ridicule.

Berg does not trump ER 401's basic relevance requirement, and context is simply not relevant to this contract.²⁵

The only evidence of "subsequent conduct" offered by AWS for purposes of contract interpretation is that plaintiffs paid the UCC without protest after seeing it on their bills. This is true of all class members, and therefore presents a common question of fact and law for the entire class. See *Smillow*, 323 F.3d at 39 (waiver defense based on customer's receipt of monthly invoices presents common question of fact and law). Indeed, AWS admits that four out of the five named plaintiffs behaved exactly the same as one another, i.e., they "paid [the UCC] without questioning" it. *Id.*²⁶

AWS says the fifth plaintiff, Martin Schnall, "may be the

²⁵ Indeed, the evidence is that AWS's common practice for all consumers is that the contract is provided in the box with the phone, received after the consumer has purchased the service. CP 358, 361. AWS presented no evidence that, despite this, any consumer saw, much less read, the contract before purchasing the service. On the facts of this case, there simply is no individualized "extrinsic" evidence of contractual intent, and it was error for the trial court to deny certification on assertions that such extrinsic evidence might exist where the record shows it does not.

²⁶ Of course, plaintiffs contend that the reason they paid the UCC is because they did not know what it was, and thought it was a tax, and that a reasonable consumer would not have refused to pay it even if they had understood what it was because that would have required switching carriers after the fact, giving up their phone number, and paying a \$150-175 early termination fee. See CP 532.

exception that proves the rule." Although he also paid the UCC on his bill "without protest" for many months, he did call AWS just before he canceled his service to ask about the UCC, though the parties dispute "whether he was satisfied when he learned what it entailed." *Id.*²⁷ But regardless of what Mr. Schnall was told about the UCC or whether he was "satisfied" with what he was told, it cannot possibly be relevant to the contract's meaning. "Disclosure of a contract's terms, to be meaningful, must occur before contract formation, not after the parties have become contractually bound." *Nelson*, 120 Wn.2d at 391. One cannot use subsequent conduct to determine what a consumer "intended" a contract's language to mean at the time entered into it if he never saw, read, or negotiated that language.

AWS misleadingly argues that the Plaintiffs have relied on extrinsic evidence to prove the contract's meaning. AWS cites a statement of Plaintiffs' counsel (made in an oral argument on a summary judgment motion that is not part of this appeal) concerning not the terms of the contract but which corporate entity was a party to the contract. RP (4/25/03) at 5. In contrast to the issue presented here, i.e., the meaning of the substantive terms of

²⁷ AWS has no evidence that it properly informed Mr. Schnall what the UCC was (see CP 521), and its own survey of customer service representatives states that customers like Mr. Schnall who called to inquire about the UCC were routinely misinformed that it was, in fact, a tax, "and not an AWS initiative." CP 540.

the agreement, that motion concerned whether the corporate defendant "AT&T Wireless Services, Inc.," was a party to its own consumer contracts, despite its effort to substitute some other, unnamed regional affiliate. As the trial court observed on that issue, "I suspect if you went out and surveyed AT&T Wireless customers across the country, somewhere in excess of 90 percent of them would think they actually had a contract with AT&T, not whoever the local subsidiary is." RP (11/22/02) at 9-10. The fact that a consumer's understanding about who he or she is contracting with may be relevant to that issue does not mean the consumer's understanding of substantive terms he did not read is relevant to their meaning.²⁸

2. The "Choice of Law" Provision Does Not Raise Individual Issues.

As indicated in Plaintiffs' opening brief, the "choice of law" provision in AWS's Subscriber Agreement is vague at best.²⁹ It does not specify any state's law by name and does not exclude

²⁸ AWS also says that Plaintiffs rely on extrinsic evidence by citing AWS's survey of customer call centers for the proposition that AWS representatives routinely misinform inquiring customers what the UCC is. Brief of Resp. at 26 (referencing CP 540. This evidence is relevant to Plaintiffs' CPA claims and to rebut AWS's defenses. It has never been offered for the purpose of interpreting the meaning of the contract's terms.

²⁹ AWS suggests that Mr. Schnall's agreement is not representative of other class members' because it does not specify a specific state's laws. Brief of Resp. at 17. However, this is true of most if not all of AWS's contracts. See, e.g., CP 402. It is the agreement AWS relies upon, which specifies a particular state's laws, which is the anomaly. See CP 3508, 3522.

application of Washington law. As set forth in Section B above, Washington has the most significant relationship with and greatest interest in the subject matter of this dispute, and the law of Washington should apply to all class members' claims.

Regardless, there are no material differences in the law of contracts affecting this case. AWS, like the trial court, identifies three issues upon which alleged differences in states' laws would create substantial individual issues sufficient to predominate over common issues: (1) the admissibility of extrinsic evidence; (2) the applicability of the "voluntary payment" defense, and (3) the enforceability of AWS's mandatory arbitration clause. These issues do not present substantial individual questions.³⁰

a. The applicable law on extrinsic evidence does not vary from state to state.

As noted, extrinsic evidence of, for example, subsequent conduct, is totally irrelevant to the meaning of a standardized agreement that is not even intended to be read by consumers. There is a Restatement rule directly on point which calls for an objective "average person" standard of interpretation, which many states have expressly adopted.³¹ Both parties in this case asked

³⁰ AWS suggests there are potentially 50 states' laws at issue, but this is incorrect; it operated in approximately 20 or 25 states during the class period. See CP 107-08 (showing local and regional affiliates on whose account AWS made USF payments).

³¹ See *supra* footnote 24.

the trial court to interpret the contract as a matter of law, based on the language of the agreement, not on the "context" of any specific consumer's interaction with AWS. See Brief of Resp. at 24.

Even so, there is no material difference in the laws of different states concerning the admissibility of extrinsic evidence. While AWS argues that New York law allows extrinsic evidence in narrower circumstances than Washington law, it admits those circumstances are present here, so the difference is immaterial. See Brief of Resp. at 22, 24-25. The question whether extrinsic evidence will be admitted in this case depends not on what state's law applies but on the relevance of such evidence in the context of this kind of a case, and it will be resolved the same for the whole class.

b. The "voluntary payment doctrine" does not differ from state to state.

AWS also asserts that its affirmative defense of "voluntary payment" differs materially from state to state.³² Again, there is no material distinction. The cases AWS cites states the doctrine in literally almost identical terms:

- *Smith v. Prime Cable of Chicago*, 658 N.E.2d 1325, 1329-30 (Ill. App. 1995): "money voluntarily paid under a claim of right to the payment, and with knowledge of the

³² As discussed below, the doctrine has no application in the context of this case in any event.

facts by the person making the payment, cannot be recovered by the payor solely because the claim was illegal."

- *Hassen v. Mediaone of Greater Fla., Inc.*, 751 So.2d 1289, 1290 (Fla. App. 2000): "It does not matter that the payment may have been made upon a mistaken belief as to the enforceability of the demand, or liability under the law, as long as payment is made with knowledge of the factual circumstances."³³
- *Gimbel Bros. v. Brooks Shopping Ctrs.*, 499 N.Y.S.2d 435, 438-39 (N.Y. App. 1986): "The traditional rule is that a voluntary payment made with full knowledge of the facts cannot be recovered because it was made

³³ A more complete statement of the law is stated in cases cited in *Hassen*:

It has been held that money voluntarily paid upon claim of right, with full knowledge of all the facts, cannot be recovered back merely because the party, at the time of payment, was ignorant, or mistook the law, as to his liability. The illegality of the demand paid constitutes of itself no ground for relief, but there must be, in addition, some compulsion or coercion attending its assertion which controls the conduct of the party making the payment. To constitute such compulsion or coercion as will render payment involuntary, there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money.

Hall v. Humana Hospital Daytona Beach, 686 So.2d 653, 657 n. 7 (Fla. App. 1996) (quoting *Jefferson County v. Hawkins*, 2 So. 362, 365 (Fla.1887)).

pursuant to a mistake of law."³⁴

- *Speckert v. Bunker Hill Ariz. Mining Co.*, 6 Wn.2d 39, 52, 106 P.2d 602 (1940): "It is a universally recognized rule 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 ground that the claim was illegal, or that there was no liability to pay in the first instance."

This "universal" rule, to the extent it can even be applied in the context of this case, does not present any conflict of law that gives rise to individual questions.

c. AWS's arbitration clause is unconscionable under Washington law, and cannot be revived for absent class members.

AWS also contends its arbitration provision creates individual issues that preclude class certification. AWS has already moved to compel the named plaintiffs to arbitrate their claims and the trial court declared AWS's arbitration provision unconscionable under Washington law, primarily because it precludes class actions. CP 424.³⁵ AWS's alternative proposition, for which it cites no

³⁴ This case suggests New York has modified the rule to some degree to permit some mistakes of law within the traditional exception for ignorance of the facts. *Id.* This difference would not be material here because Plaintiffs allege ignorance of the facts, not the law.

³⁵ Other courts have reached the same result. *See, e.g., Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

authority, that a class cannot be certified, and absent class members cannot enjoy the benefits of the named plaintiffs' efforts, because the same arbitration provisions that are unenforceable against the named Plaintiffs could be enforceable against the absent class members—if they were to sue AWS—is absurd and contrary to the very purposes of arbitration and of class actions. See Opening Brief at 48-49.

To the extent that AWS's unconscionable arbitration clause is enforceable under some other state's laws, then to apply that state's laws to AWS's contract would violate the public policy of this state. This, as AWS recognizes, offers an independent basis to apply Washington law to the Plaintiffs' claims. Brief of Resp. at 17 ("The trial court found correctly that Washington courts will enforce a choice-of-law provision in a contract as long as application of the chosen law does not violate any fundamental policy of the forum state.").³⁶ AWS, a Washington corporation, has inserted an unconscionable arbitration provision in its contracts, and cannot be allowed to use it as a basis to avoid scrutiny of its practices in Washington courts.

³⁶ Washington courts will not enforce a forum selection clause if it is deemed unfair and unreasonable. *Exum v. Vantage Press, Inc.*, 17 Wn. App. 477, 478-799, 563 P.2d 1314 (1977). The Court of Appeals has refused to enforce a forum selection clause where it would deprive consumers of the right to bring a class action under the CPA. *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).

d. The trial court should have at least certified statewide classes on the contract claims.

Even if there were material differences in the applicable state contract laws which created significant individual issues, there was no reason not to certify subclasses of plaintiffs from each of the named Plaintiffs' home states. AWS contends Plaintiffs failed to suggest this alternative to the trial court. Brief of Resp. at 49. This is mistaken: Plaintiffs specifically requested this alternative and the trial court rejected it without comment. CP 563, 593. As the Plaintiffs pointed out to the trial court, if each customer's breach of contract claim must be decided under the law of his or her home state, then the law of each of the named individual Plaintiffs will have to be applied at trial, whether the claims are certified as a class or not. Thus, certification of state subclasses would not make the trial any less manageable, nor introduce any additional individual issues. There is literally no practical basis not to certify statewide subclasses on the Plaintiffs' breach of contract claims.

3. AWS's Affirmative Defenses Raise No Individual Evidentiary Issues.

Finally, AWS suggests that its two "affirmative defenses," voluntary payment and "the arbitration issue," raise substantial individual issues even under Washington law, therefore justifying the trial court's conclusion that individual issues would

predominate.³⁷

The court in *Smillow v. Southwestern Bell* addressed a similar argument in a very similar case. Plaintiffs brought breach of contract and consumer fraud claims against Southwestern Bell, doing business as Cellular One, for its practice of charging for incoming calls, which plaintiffs contended was not permitted by Cellular One's standard form contract. 323 F.3d at 35. Customer invoices showed that customers were being charged for incoming calls, and Cellular One argued, just as AWS argues, that plaintiffs' voluntary payment of those charges constituted a waiver of claims. *Id.* The Court noted that both the factual and legal bases for this defense presented common, not individual, issues. "All class members received a user guide and monthly invoices showing that defendant charged the class members for the incoming calls." *Id.* at 39. The same is true here: all class members received the same

³⁷ As a threshold matter, the voluntary payment doctrine does not properly apply to this case. It is well established that the defense does not apply unless (a) the plaintiff had "full knowledge of all the facts" at the time he made payment and (b) his payment was not coerced. See *Speckert*, 6 Wn.2d at 52; see also *supra*, subsection 2.b. None of the named plaintiffs knew what the UCC was when they paid it, and there is no evidence that any other class member did either. See *supra* footnotes 1-4. Plaintiffs expressly allege AWS's presentation of the UCC made it look like a tax rather than a discretionary charge imposed by AWS. See CP 193 ¶ 5.14; CP 325-26. Even if there were evidence that Plaintiffs later learned what the UCC was, subsequent payments cannot be considered "voluntary" because to have canceled service in order to avoid paying the UCC would have required switching carriers, changing phone numbers, and paying an early termination fee. See *Nelson*, 120 Wn.2d at 391 ("Disclosure of a contract's terms, to be meaningful, must occur before the contract formation, not after the parties have become contractually bound.").

information about the UCC from AWS's invoices, and whether subsequent payment of the UCC constitutes a "voluntary payment" is a common question classwide.

The *Smillow* court also pointed out that even "in the unlikely event" that individual determinations prove necessary, it would not necessarily sufficiently outweigh the common issues. *Id.*

Instead, where common issues otherwise predominated, courts have usually certified Rule 23(b)(3) classes even though individual issues were present in one or more affirmative defenses. After all, Rule 23(b)(3) requires merely that common issues predominate, not that all issues be common to the class.

Id. (citing cases, citations omitted); accord *Sitton*, 116 Wn. App. at 254-56 (courts should certify class actions for significant common questions, even if individual questions exist). *Smillow* also aptly noted, "There is even less reason to decertify a class where the possible existence of individual [] issues is a matter of conjecture." 323 F.3d at 39 (citing *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 298-99 (1st Cir. 2000) ("We are unwilling to fault a district court for not permitting arguments woven entirely out of gossamer strands of speculation and surmise to tip the decisional scales in a class certification ruling.")). Again, the defendants have no specific evidence to support an individualized defense of voluntary payment, and instead rely on common facts such as receipt of

AWS invoices. See Brief of Resp. at 9, 23, 44.³⁸ It has failed to offer more than conjecture to support a finding that individual issues would predominate.

AWS also suggests that the trial court's finding that the named Plaintiffs' arbitration clauses were unconscionable may not apply to all class members, even under Washington law. It cites unpublished decisions from trial courts for the proposition that "more recent versions" of its arbitration clause have been sustained. Brief of Resp. at 45. As noted, it cannot matter whether absent class members would be compelled to arbitrate because they did not bring claims against AWS and would instead rely on the named Plaintiffs to serve as representatives.³⁹

In addition, putting aside the rule against citing unpublished decisions, the decisions AWS cites are dated well after the class period (March 1998 to February 2003) on the Plaintiffs' breach of contract claim, and would not be applicable in any event.

³⁸ Again, any suggestion that Mr. Schnall's inquiry about the UCC just before he canceled service somehow supports a "voluntary payment" defense is nonsense; AWS admits Mr. Schnall called about the UCC to find out what it was, and it is not disputed that he did not pay any UCC charges thereafter, so this evidence is irrelevant. See Brief of Resp. at 23, 44.

³⁹ See *supra* subsection 2.c. No one would really prefer hundreds, thousands, or potentially even millions of individual arbitrations to a single class action on the very same issues, and the law should not support such a result. See *e.g.*, *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) ("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.").

IV. CONCLUSION

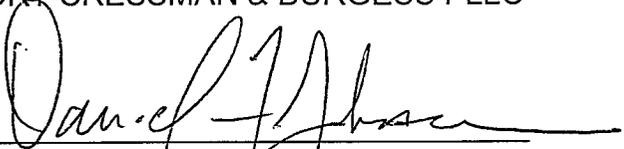
Civil Rule 23, particularly CR 23(b)(3), was designed to enable people with small individual claims to use the courts to vindicate those claims by combining resources to justify the expense of litigation. *Anchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Washington courts have repeatedly held that courts should make every effort to facilitate class adjudication of issues that affect many consumers. *Sitton*, 116 Wn. App. at 256-57; *Smith v. Behr*, 113 Wn. App. 306, 318-19, 54 P.3d 665 (2002). There are indisputably significant common issues in this case which affect millions of class members in exactly the same way. The Plaintiffs offered the trial court at least four different alternatives for certifying these issues, all of which it denied.⁴⁰ The bases for its denial are insufficient as a matter of law because reliance is not required under the CPA and would be insufficient by itself to deny certification, and the supposed individual issues in interpreting AWS's service contract are both nonexistent and irrelevant.

This Court should reverse the decisions of the trial court and order that Plaintiffs' claims be certified for class adjudication.

⁴⁰ As set forth in Plaintiffs' Opening Brief pp. 9-12, they filed three different motions, asking the court to certify nationwide classes on their CPA and contract claims, statewide classes on their breach of contract claims, and/or a nationwide class on the common liability issues under the CPA.

RESPECTFULLY SUBMITTED this 27th day of September,
2006.

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By 

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CERTIFICATE OF SERVICE

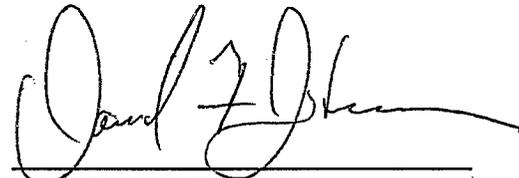
The undersigned certifies that on this day he caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Michael E. Kipling
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- via U.S. Mail
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- via E-Mail
- via facsimile

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 SEP 28 AM 10:54

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 27th day of September, 2006.



Daniel F. Johnson