

90848-6

No. 70810-4-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

**NEW CINGULAR WIRELESS PCS LLC,
Plaintiff-Petitioner,**

vs.

**THE CITY OF BOTHELL, WASHINGTON,
Defendant-Respondent,
CITIES 1 through 100+,
Defendants.**

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SEATTLE WA
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PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner New Cingular Wireless has cases pending against 36 Washington cities, and each case has the same complicated statute of limitations issues presented here. In these cases, New Cingular seeks tax refunds for the direct benefit of its customers, pursuant to a class action settlement approved by a federal court in a nationwide multidistrict litigation proceeding.

New Cingular's cases against 19 cities are pending in 11 Superior Courts, which are within the jurisdiction of each Court of Appeals division, and in addition, there is a federal multi-district litigation action in the Western District of Washington involving claims against 17 cities.¹ Nearly all of those cases are stayed pending ultimate resolution of the statute of limitations issues raised in this appeal, which are also raised in all the other cases. The Court of Appeals decision lacks precedential value as an unpublished case, and more importantly, it does not address the issues of first impression raised by New Cingular. Accepting this petition is appropriate under RAP 13.4(b)(4), because New Cingular's petition raises issues of substantial public interest that the Supreme Court should resolve.

¹ These cases were filed by New Cingular in Superior Courts, and the cities removed the cases to federal courts in the Eastern and Western Districts of Washington.

II. IDENTITY OF PETITIONER

Petitioner, New Cingular Wireless PCS LLC, a Delaware limited liability company, asks the Supreme Court to accept review of the Court of Appeals decision designated in Part III of this petition.

III. DECISION BELOW

New Cingular seeks review of the Court of Appeals' opinion filed on August 25, 2014, which reversed a summary judgment order in New Cingular's favor and held the statute of limitations was not equitably tolled upon submitting a tax refund claim to the City. Appendix ("App.") A.

IV. ISSUES PRESENTED FOR REVIEW

(1) Application of the doctrine of equitable tolling in a tax refund case remains an issue of first impression in Washington. New Cingular argues that filing its tax refund claim with the City of Bothell equitably tolled the statute of limitations in November 2010, because the filing satisfied the predicates of the statute of limitations, equitable tolling would eliminate any incentive on the part of the City to stonewall, and equitable tolling would constitute prudent public policy. Is an issue of substantial public interest presented where the same issue exists in cases pending against 36 Washington cities?

(2) Whether court-caused confusion should equitably toll a statute of limitations is another issue of first impression in Washington. After

Bothell waited 17 months to summarily deny New Cingular's claim, New Cingular filed suit directly in court as then permitted under the concurrent original jurisdiction doctrine. More than one year after New Cingular filed suit, and nearly three years after New Cingular filed its refund claims, the Washington Supreme Court clarified the doctrine to generally require exhaustion of administrative remedies. Is an issue of substantial public interest presented where the Court has not resolved whether court-caused confusion should equitably toll the statute of limitations?

V. STATEMENT OF THE CASE

A. **New Cingular collected Bothell's utility tax from its customers and remitted the tax to Bothell.**

The City of Bothell, like many taxing jurisdictions, imposes a utility tax on New Cingular as a telephone business. CP 41.² As permitted by law, New Cingular passes the taxes through to its customers by collecting a monthly utility fee and remitting it to the appropriate taxing jurisdiction. CP 247. During the period at issue, New Cingular inadvertently collected and remitted a tax not only on telephone services, but also on Internet access. CP 273–74. Because State and federal laws prohibit taxation of Internet access, this inadvertent error resulted in

² Cited excerpts of the Clerk's Papers are included in App. B.

overpayment of utility taxes to the taxing jurisdictions. *See* 47 U.S.C. § 151 (1998), as amended; RCW 35.21.717.

B. AT&T Mobility discovered that it had collected taxes on Internet access after its customers filed class action lawsuits across the country.

In February 2010, customers in Washington and around the country sued AT&T Mobility and its affiliates, including New Cingular as its Washington affiliate (collectively, “ATTM”), to recover taxes on Internet access. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935 (N.D. Ill. 2011). The cases were consolidated, and the parties reached a settlement that was reviewed and approved by the court. *Id.* at 939. As part of the settlement, ATTM agreed to seek refunds from jurisdictions that received the taxes on Internet access, including Bothell, and return the refunded taxes to the Settlement Class. *Id.* at 940–41.

In response to the class action proceedings, ATTM conducted lengthy and thorough evaluations of its coding for Internet access services in early 2010. CP 243. ATTM sells Internet access services under different names and numerous formats that vary depending on the volume the customer desires and the type(s) of device(s) the customer will use. CP 242. ATTM hired an auditor to review and test the data analysis. CP 243. Through the lengthy internal evaluation and the following audit,

ATTM determined that, as new services had evolved to meet the needs of iPhone and other smart-phone customers, taxes on unbundled Internet access services had been inadvertently charged to and collected from ATTM's customers and remitted to taxing jurisdictions. CP 273-74. ATTM reprogrammed its systems in August 2010 so that taxes are not billed for unbundled Internet access services. *Id.*

C. New Cingular submitted detailed refund requests in accordance with the class action settlement and monitored those claims.

Having evaluated its coding and reprogrammed its systems, ATTM set to work filing refund claims with taxing jurisdictions pursuant to the class action settlement. CP 244. On about November 1, 2010, New Cingular filed its refund requests with Bothell and other Washington taxing jurisdictions on behalf of itself and the Washington-based members of the Settlement Class. CP 243-44, 247-64. Bothell's municipal code does not specify a particular form for tax refunds, so New Cingular provided the information the State requests for tax refund claims. *See* WAC 458-20-229. The refund claim also included detailed spreadsheets that showed the exact amount of the overpayments in two ways: individual customer-level information, and monthly totals of overpaid taxes remitted to Bothell. CP 244. Finally, the refund claim included a statement that summarized the legal and factual bases for the refund request. CP 249-56.

The refund claim was subsequently supplemented and reduced by letter dated June 15, 2012. CP 269-70. New Cingular adjusted the refund amount to account for “bad debts” that were billed to but not collected from customers, and to eliminate charges that ATTM’s continued review of its billing codes revealed should have been excluded from the refund claim. CP 269–70. The supplement reduced the total refund claim by less than three percent. ATTM sent similar letters to other taxing jurisdictions across the country. CP 245.

In January of 2012, New Cingular sent a follow-up letter to Bothell, requesting an update regarding the City’s progress with the refund claim. CP 290-91. As identified in the letter, New Cingular understood that processing the refund claim could take time and effort. *Id.* In fact, New Cingular had assisted other Washington cities in processing refund claims and had staff dedicated to provide assistance upon request. CP 244. But, even though Bothell had a self-imposed municipal code obligation to “promptly” refund overpaid taxes upon request, New Cingular did not receive any kind of response from Bothell until 17 months after submitting the refund claim. Bothell Municipal Code 5.08.210; CP 276.

D. In a joint letter, Bothell and eleven other cities summarily denied the refund claim.

Bothell's first response to New Cingular was a generic, summary denial of the refund claim. An attorney denied the claim by sending a letter dated April 16, 2012 (the "**Denial Letter**") to New Cingular on behalf of Bothell and 11 other cities, identified collectively in the letter as the "Consortium Cities." CP 266. The Denial Letter denied the refund claim on behalf of each of the 12 Consortium Cities in a mere one-and-one-half pages. CP 266-67. The Denial Letter did not identify any Bothell-specific, nor any Consortium City-specific, reason for denial. The Denial Letter did, however, assert that submitting the refund claims "did not toll the statute of limitations." CP 266.

One of the stated generic reasons for denial was insufficient information. *Id.* It is undisputed that Bothell received the detailed data that verified the refund claim, and no Bothell representative ever requested additional information, identified insufficiencies in the Refund Claim, or otherwise contacted New Cingular until the Denial Letter was sent. CP 276.

The Denial Letter did not outline the procedures for, much less identify the opportunity to, appeal any of the 12 denials. Of course, given the summary nature of the Denial Letter, there was nothing of substance to appeal.

E. New Cingular filed suit in Superior Court.

On April 25, 2012, less than 10 days after receipt of the Denial Letter, New Cingular filed its complaint seeking, among other things, a declaration of its rights to a refund and restitution of the unjustly retained taxes. CP 106-24. In addition to Bothell, New Cingular named as defendants other Washington cities that had not issued a refund. New Cingular brought the lawsuit as a single action in King County Superior Court because the cities asserted the same defenses (or had not even responded to the refund claim), the cases all involved the same underlying law and facts, and many of the cities were working together. CP 41-48.

At the time of filing, Washington law did not require New Cingular to exhaust administrative remedies before filing suit in Superior Court because of the concurrent original jurisdiction doctrine. The doctrine recognized that superior courts have original jurisdiction in cases involving the “legality of any tax, impost, assessment, toll or municipal fine.” Const. art. IV, § 6; RCW 2.08.010. Because the trial court shared original jurisdiction with Bothell over the tax refund claim, the trial court did not operate in an appellate capacity, and administrative exhaustion requirements did not apply. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007), *overruled in part by Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013)

(hereinafter “*CMS*”);³ *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000), *overruled in part by CMS*, 178 Wn.2d 635. Both parties and the trial court acknowledged the law allowed New Cingular to bypass the City’s administrative process and file suit directly in court. RP 10, 12, 17-18, 22, 37; CP 65, 234, 297.⁴

F. New Cingular filed other actions across the state.

On or about February 26, 2013, approximately 21 defendant-cities in the original action filed a Motion to Drop the Moving Misjoined Parties (the “**Misjoinder Motion**”), which New Cingular opposed. The court granted the Misjoinder Motion on March 14, 2013.⁵ App. D. The court also denied New Cingular’s subsequent Motion for Reconsideration, which argued that the parties should have been severed, not dismissed. App. E. In the interest of efficiency, New Cingular and nearly all defendant-cities signed a stipulation and order that preserved New Cingular’s appeal rights and allowed all defendant-cities to be treated as though they had joined in the Misjoinder Motion. *See, e.g.*, App. F. Most cities were dismissed under this stipulation. Bothell was not dismissed, however, because it was the first-named city located in King County.

³ The only portion of *Qwest* that *CMS* overturned was the portion that indicated the exhaustion requirement did not apply in cases where the Superior Court had original jurisdiction. The other portions of *Qwest* remain good law.

⁴ Cited excerpts of the Verbatim Report of Proceedings are included as App. C.

⁵ The order granting the Misjoinder Motion will not be ripe for appeal until final resolution of this case.

To protect its interests in the tax refund claims, New Cingular refiled individual lawsuits against many of the cities that had been dismissed. App. G. Seventeen cities removed their cases to federal court, which were then consolidated into one multidistrict litigation action before Judge John C. Coughenour in the Western District of Washington. App. H. All 36 Washington cities New Cingular is currently litigating against have raised a statute of limitations defense. App. I.

G. New Cingular prevailed on Bothell's Motion for Partial Summary Judgment, Bothell appealed, and most of the other cases were stayed pending resolution of this appeal.

On July 5, 2013, Bothell brought a motion for partial summary judgment regarding the statute of limitations. CP 46-67. New Cingular argued the statute of limitations should be equitably tolled from the date it filed its tax refund claim with Bothell. *See* CP 211-240. Judge Ramsdell agreed that the circumstances of this case justify invocation of the doctrine of equitable tolling, and ruled in New Cingular's favor. CP 326-27. Bothell filed a motion for discretionary review, and New Cingular agreed that interlocutory appeal of the equitable tolling issue should be allowed.

After the Court of Appeals granted discretionary review, most of the remaining cases were stayed pending ultimate resolution of this appeal. App. I. Except for four cities, each defendant-city entered into a stipulation

with New Cingular to stay their cases in recognition that it would conserve party and court resources for an appellate court to provide guidance on the same statute of limitations issues in each case. *See, e.g.*, App. J. Lakewood was one of the four cities that did not agree to a stay.⁶ It moved for partial summary judgment regarding the same statute of limitations defense raised by Bothell, and New Cingular responded with the same arguments offered here.⁷ App. K. The trial judge granted Lakewood's motion, but she recognized the equitable tolling issues were so vexing that she offered to certify her order for discretionary review. *See* App. L. That case is currently pending in Division II of the Court of Appeals. *New Cingular Wireless PCS, LLC v. City of Lakewood*, No. 46503-5-II.

H. The Supreme Court eliminated the concurrent original jurisdiction rule that allowed plaintiffs to file tax refund claims in Superior Court without exhausting administrative remedies.

While the parties prepared for appeal, the Washington Supreme Court decided *CMS*, 178 Wn.2d 635. In holding that the taxpayer in that case was not obligated to exhaust administrative remedies because the city never directly responded to the refund claim, the Court distinguished the procedural nature of exhaustion from jurisdictional requirements:

⁶The four cities that have not agreed to a stay are Lakewood, Lacey, Bellingham, and Yakima. A stay was entered over Lacey's objection, and stays are currently being discussed with Bellingham and Yakima.

⁷ Lakewood also moved to dismiss New Cingular's case based on an alleged failure to exhaust available administrative remedies. The trial court denied that motion.

The exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power of the court to hear a case.... A superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court.

Id. at 648. The Court acknowledged that its previous unanimous *Qwest* opinion suggested exhaustion was not required if a superior court had original jurisdiction, and interpreting that opinion was “potentially confusing.” *Id.* at 645. *CMS* did not address equitable tolling.

I. The Court of Appeals reversed the trial court without addressing New Cingular's arguments.

The Court of Appeals reversed the *Bothell* trial court's equitable tolling decision in an unpublished opinion. *New Cingular Wireless v. City of Bothell*, No. 70810-4-I (Aug. 25, 2014). The Court of Appeals held that *Qwest* did not excuse New Cingular's failure to exhaust administrative remedies, because the *Qwest* holding only applied to issues of statutory interpretation. Slip op. at 8–9. The Court of Appeals also found justice did not require equitably tolling the statute of limitations because New Cingular could have obtained a trial de novo had it exhausted Bothell's administrative process. *Id.* at 12. The opinion did not address the strong public policy reasons for applying equitable tolling in the circumstances present in this case and the related cases. Nor did the opinion consider New Cingular's arguments for why exhaustion of Bothell's administrative

remedies was not required, which were that the Bothell City Council lacked jurisdiction; the City had not issued a final, appealable order; and fairness and practicality outweighed any requirement for exhaustion.

VI. ARGUMENT

A. **The Supreme Court should accept review to determine whether the pursuit of an administrative remedy before filing suit can equitably toll the statute of limitations.**

Courts have broad equitable powers that allow them to “meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices.” *Holland v. Florida*, 130 S. Ct. 2549, 2563, 177 L. Ed. 2d 130 (2010). Washington courts exercise those broad powers to equitably toll statutes of limitation “when justice requires.” *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998). Other states recognize justice is served through equitably tolling the statute of limitations when a plaintiff seeks administrative relief before filing suit in court. Although *CMS* held pursuing the administrative process *after* seeking relief in court cannot toll the statute of limitations, *CMS* does not address whether the administrative process can preserve a timely claim *before* filing suit. The Supreme Court should accept review to clarify Washington law and resolve whether justice requires equitable tolling in these circumstances.

1. Courts across the country recognize pursuing administrative remedies should equitably toll the statute of limitations.

Although it is an issue of first impression in Washington, courts around the country recognize equitable tolling should apply when a plaintiff voluntarily pursues administrative proceedings prior to filing a lawsuit. *See Am. Marine Corp. v. Sholin*, 295 P.3d 924, 927 (Alaska 2013); *Weidow v. Uninsured Emp'rs Fund*, 359 Mont. 77, 83, 246 P.3d 704 (2010); *Enron Oil & Gas Co. v. Freudenthal*, 861 P.2d 1090, 1094 (Wyo. 1993).

For example, the California Supreme Court explained equitable tolling applies “when an injured person has several legal remedies, and reasonably and in good faith, pursues one.” *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 100 (2008) (internal citations omitted). Application of equitable tolling in such circumstances “serves the need for harmony and the avoidance of chaos in the administration of justice” because it allows the parties to pursue informal remedies without the need to seek redress in two different forums. *Id.* It does not compromise the defendant’s interests “in being promptly appraised of claims against them in order that they may gather and preserve evidence” because the defendant receives notice through the “filing of the first proceeding that gives rise to tolling.” *Id.*

The elements of equitable tolling in this instance are (1) timely notice to the defendant, (2) lack of prejudice to the defendant, and (3) good faith conduct on the part of the plaintiff. *Id.* at 102. The case at bar satisfies these three elements because Bothell received timely notice of the claim when New Cingular filed its tax refund application in November 2010, Bothell's defense is not prejudiced by equitable tolling, and New Cingular acted in good faith in pursuing its claim. The trial court found equitable tolling here constituted prudent public policy, but the Court of Appeals did not even consider the issue.

2. *CMS* does not address or control the equitable tolling issue in New Cingular's cases.

Instead, the Court of Appeals found that *CMS* controls the statute of limitations issue, but that was error because *CMS* never addressed or considered equitable tolling. Contrary to the Court of Appeals opinion, *CMS* is a narrow decision that stands for the proposition that the administrative process cannot *revive* claims after a court rules those claims are stale. Unlike the plaintiff in *CMS*, whose claims were stale the day it filed in court, New Cingular's claims were preserved as timely through the assertion of equitable tolling.

In *CMS*, the trial court ruled on a motion for partial summary judgment that the three year statute of limitations barred a portion of the

plaintiff's claim. 178 Wn.2d at 640. To recover the taxes paid during the time-barred period, the plaintiff then filed a second suit that sought a writ of mandamus to force the city to respond to its initial tax refund claim. *Id.* The Court disapproved of that tactic because the plaintiff had attempted to evade the trial court's ruling. *Id.* at 651.

The *CMS* Court objected to the sequence in which the taxpayer attempted to use the administrative process and the taxpayer's motive. The sequence was improper because the plaintiff "sought mandamus only *after* the trial court informed it that its recovery in superior court was constrained by the three year statute of limitations." *Id.* (emphasis added). "Under the circumstances of this case, we hold that CMS cannot choose *first* to pursue recovery through the courts, *and then* attempt to bypass the statute of limitations that necessarily applies as a result of that choice by seeking relief through the administrative process." *Id.* at 652 (emphasis added). The Court repeatedly limited its holding to "the circumstances of this case." *Id.* at 651–52. The *CMS* Court also objected to the plaintiff's improper motive for pursuing the administrative process because the plaintiff sought mandamus for the express purpose of reaching beyond the statute of limitations. *Id.* As Chief Justice Madsen phrased it during oral

argument, CMS tried to get what it wanted in the first place, but through the back door.⁸

CMS never directly addresses equitable tolling, and only briefly addresses pursuing administrative relief before filing suit in its discussion of *Ladzinski v. MEBA Pension Trust*, 951 F. Supp. 570 (D.Md.), *aff'd*, No. 97-1237, 1997 WL 452237 (4th Cir. Aug. 11, 1997) (unpublished). *See CMS*, 178 Wn.2d at 651–52. In *Ladzinski*, the plaintiff waited more than 20 years to challenge an administrative determination, and even though the applicable statute of limitations was three years, the responsible board still heard and denied the claim. 951 F. Supp. at 573–74. The district court found the claim was time-barred because the unsuccessful and untimely administrative decision could not revive the already-stale claim. *Id.* at 574. In other words, the administrative relief in *Ladzinski* was time-barred, so the subsequent appeal to the courts was as well.

Unlike the *CMS* and *Ladzinski* plaintiffs, New Cingular’s pursuit of administrative relief was timely. New Cingular only seeks the taxes that were within the statute of limitations when it submitted its refund claim to Bothell. New Cingular did not seek administrative relief to revive a stale claim years after the statute of limitations barred relief. Instead, before it

⁸ Wash. State Supreme Court oral argument, *Cost Mgmt. Servs., Inc. v. City of Lakewood*, No. 87964–8 (May 16, 2013), at 38 min., 50 sec., *audio recording* by TVW, Washington State’s Public Affairs Network, *available at* <http://www.tvw.org>.

filed suit in court, New Cingular pursued Bothell's administrative remedy in good faith with the proper motive of efficient, informal dispute resolution.

Taxation is "one of the most sensitive points of contact between citizens and their government." RCW 82.32A.005. Justice is not served where a city can delay responding to a tax refund claim, summarily deny it, and then assert the administrative process "did not toll the statute of limitations." CP 266. That would incentivize cities to delay responding to its citizens by placing unjustly retained taxes outside the statute of limitations with each day the city stonewalled. Without equitable tolling in these circumstances, Bothell and other cities will be rewarded for their unjustifiable delays in responding to their citizens and taxpayers.

The Court of Appeals inappropriately expanded *CMS* to preclude equitable tolling during the pursuit of an administrative remedy. This Court should accept review to clarify whether the timely pursuit of an administrative remedy *before* filing suit can equitably toll the statute of limitations.

B. The Supreme Court should accept review to determine whether court-caused confusion should equitably toll the statute of limitations.

Equitable tolling is available to plaintiffs that face a confusing procedural dilemma and select a viable, but ultimately incorrect, course of

action. *See Millay*, 135 Wn.2d at 207. Washington courts have not declared a test for when court-caused confusion justifies equitable tolling, but federal law is instructive. Under Ninth Circuit precedent, equitable tolling is appropriate when (1) there was confusing authority regarding procedural requirements, (2) the courts issued an intervening decision, (3) the intervening decision required a procedure for which the limitations period had expired when the decision was issued, and (4) the absence of prejudice to the defendant. *Capital Tracing, Inc. v. United States*, 63 F.3d 859, 860–63 (9th Cir. 1995).⁹

All four elements are present here. As the Supreme Court has already stated, *Qwest* was a confusing decision, because it blurred procedural and jurisdictional requirements. *CMS*, 178 Wn.2d at 645–48 (the “Discussion of Original Jurisdiction is Potentially Confusing.”). The trial court and both parties in this case shared the same confusion, and believed New Cingular was not required to exhaust administrative remedies before filing suit. The Supreme Court issued *CMS* years after New Cingular filed its refund claims, more than one year after this case was filed, and shortly before the Court of Appeals accepted review. *CMS* eliminated the procedure allowed by *Qwest* and *Chaney*, where New

⁹ The elements *Capital Tracing* explicitly identifies are the lack of clear precedent and the absence of prejudice to the defendant, but New Cingular also meets the most restrictive reading of the case, as described above.

Cingular could have completely avoided the administrative process. If New Cingular were to refile a refund claim and exhaust Bothell's administrative remedies as generally required by *CMS*, then the entire refund claim amount would fall outside the statute of limitations. Finally, Bothell was on notice the day New Cingular filed its refund claim, and fully capable of assembling and preserving all relevant evidence. Bothell has not and cannot assert that equitable tolling prejudices its defense in any way.

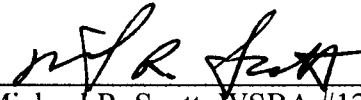
The Court of Appeals erred by not even considering whether court-caused confusion can equitably toll the statute of limitations, and the Court should accept review to determine whether it should adopt the Ninth Circuit's test.

VII. CONCLUSION

The Court of Appeals incorrectly held that the good faith pursuit of an administrative remedy before filing suit cannot equitably toll the statute of limitations. Moreover, the court did not address whether court-caused confusion should equitably toll the statute of limitations. Dozens of cities have agreed to a stay of New Cingular's cases against those cities in order to receive authoritative guidance from the appellate courts on these statute of limitations issues. The Supreme Court should accept review to resolve this case, and promote the resolution of many others just like this case.

RESPECTFULLY SUBMITTED this 27th day of September, 2014.

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APPENDIX

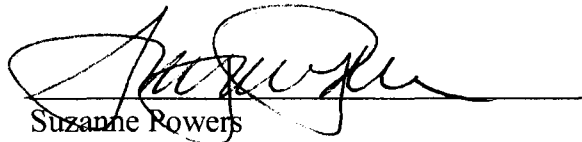
- Appendix A: *New Cingular Wireless PCS LLC v. The City of Bothell, Washington, Cities 1 through 100+*, No. 70810-4-I (Wash. Ct. App., Aug. 25, 2014)
- Appendix B: Clerk's Papers excerpts
- Appendix C: Verbatim Report of Proceedings excerpts. Summary Judgment Hearing, *New Cingular Wireless PCS LLC v. The City of Bothell, et al.*, No. 12-2-15031-1 SEA (Aug. 2, 2013)
- Appendix D: Order Granting Cities of Algona, et al., Motion to Drop the Moving Misjoined Parties, dated March 14, 2013
- Appendix E: Order Denying Plaintiff's Motion for Reconsideration or Clarification, dated April 15, 2013
- Appendix F: Stipulation and Order Regarding Defendant Cities' Motion to Drop the Moving Misjoined Parties, dated May 21, 2013
- Appendix G: New Cingular's Related Cases Against Washington Cities
- Appendix H: Transfer Order, dated December 19, 2013
- Appendix I: List of Orders to Stay and Statute of Limitations Defenses raised in New Cingular's Related Cases Against Washington Cities
- Appendix J: Stipulation and Order to Stay Litigation in *New Cingular Wireless PCS LLC v. City of Redmond, Washington*, dated May 5, 2014
- Appendix K: Plaintiff's Response to Motion to Dismiss in *New Cingular Wireless PCS LLC v. City of Lakewood*, Case No. 13-2-10900-5
- Appendix L: Order of Certification Pursuant to RAP 2.3(b)(4) in *New Cingular Wireless PCS LLC v. City of Lakewood*, Case No. 13-2-10900-5, dated June 27, 2014

CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via email to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 24th day of September, 2014, at Seattle, Washington.


Suzanne Powers

ND: 19994.002 4845-8274-8957v2

CLERK OF SUPERIOR COURT
COUNTY OF KING
STATE OF WASHINGTON
2014 SEP 24 PM 4:30

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

NEW CINGULAR WIRELESS PCS)	NO. 70810-4-I
LLC, a Delaware limited liability)	
company,)	DIVISION ONE
)	
Respondent,)	UNPUBLISHED OPINION
)	
v.)	
)	
THE CITY OF BOTHELL,)	
WASHINGTON,)	FILED: August 25, 2014
)	
Petitioner,)	
)	
CITIES 1 through 100+,)	
)	
Defendants.)	

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STATE OF WASHINGTON
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LEACH, J. — On discretionary review, we must decide if the trial court applied equitable tolling properly to New Cingular Wireless PCS LLC's claim for a tax refund from the city of Bothell (City).¹ The trial court concluded that New Cingular's filing of an administrative tax refund claim with the City tolled the statute of limitations for separate claims asserted in a lawsuit New Cingular filed

¹ New Cingular initially sued more than 100 cities in this action. On March 14, 2013, the trial court granted various defendants' motion for misjoinder and dismissed without prejudice all defendant cities except Bothell. Including each name in the caption of this opinion would take several pages. In the interest of publishing economy, we order the abbreviation of the caption to that set forth above for purposes of this opinion and any postopinion pleadings filed in an appellate court only.

NO. 70810-4-1 / 2

later in superior court. Because New Cingular failed to exhaust its administrative remedies before filing its superior court action, we reverse and remand.

FACTS

New Cingular provides telecommunications services and sells wireless data plans. The data plans allow customers to access the Internet on personal electronic devices. New Cingular paid to the City utility taxes on revenues from its provision of these Internet services. New Cingular billed for and collected from its customers these tax payments.

In 2010, New Cingular's customers in Washington sued AT&T in federal court, alleging that AT&T unlawfully charged them for utility taxes on Internet services.² The United States Judicial Panel on Multidistrict Litigation consolidated this action with 27 other lawsuits from around the country.³ AT&T settled these lawsuits, agreeing to seek refunds on the Internet taxes that it paid to the various taxing jurisdictions, including the City, and to return any refunded taxes to the class members.⁴

² Vickery v. AT&T Mobility LLC, No. 2:10-CV-0257 (W.D. Wash. 2010). New Cingular is an affiliate of AT&T.

³ In re AT&T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 939 (N.D. Ill. 2011).

⁴ AT&T, 789 F. Supp. 2d at 940-41.

In November 2010, New Cingular filed with the City a refund request for \$416,802.28 in alleged overpayment of utility taxes for the period November 1, 2005, through September 30, 2010. On January 13, 2012, New Cingular, by letter, asked the City about the status of its tax refund claim. On April 16, 2012, the City sent a letter to New Cingular denying its refund claim.

On June 15, 2012, New Cingular wrote a letter to the City stating, “[I]n the months since that process was undertaken, the company has identified certain tax amounts that should not be included in the amount sought in the Refund Claim.” Accordingly, New Cingular proposed reductions in the requested refund amounts.

Earlier, on April 25, 2012, New Cingular sued the City in King County Superior Court seeking “a declaration that Defendants have an obligation to refund the erroneously collected tax on Internet access.” It also sought recovery of its tax payments on theories of unjust enrichment and violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and the Washington State Constitution.⁵ On July 5, 2013, the City moved for partial summary judgment, seeking a decision that “the doctrine of equitable tolling does not apply to this action” and that the statute of limitations barred New Cingular’s claims for recovery of taxes paid before April 25, 2009, three years

⁵ New Cingular amended its complaint on August 21, 2012.

before New Cingular filed this lawsuit. In response, New Cingular argued, “[T]he refund application should toll the statute of limitations because Bothell acted in bad faith by failing to timely process the refund claim, despite its code provisions which require ‘prompt’ review, while New Cingular diligently pursued its claim.”

The trial court denied the City’s motion and, without any motion requesting this relief, granted partial summary judgment in favor of New Cingular. The court’s order states, “The doctrine of equitable tolling applies under the circumstances of this case, commencing upon the filing of the tax refund claim with the City of Bothell in November 2010. Denial of the refund claim was not necessary for accrual of the cause of action for unjust enrichment.” The court also stated, “The court acknowledges that its decision is an extension of the current Washington case law on equitable tolling.”

On August 22, 2013, the trial court certified under RAP 2.3(b)(4) “that the order denying summary judgment entered on August 2, 2013 involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.”

The City sought discretionary review, which this court granted.

STANDARD OF REVIEW

We review de novo a trial court's summary judgment decision.⁶ In this review, we construe all facts and reasonable inferences from those facts in the light most favorable to the losing party.⁷ The prevailing party bears the burden of showing that no material issue of fact exists.⁸ A fact is material if the outcome of the litigation depends upon it.⁹

ANALYSIS

Washington courts apply a three-year statute of limitations to tax refund claims.¹⁰ "The limitation period commences when a cause of action accrues and tolls when a complaint is filed or a summons is served."¹¹ An action for a tax refund accrues when the plaintiff pays the challenged taxes.¹²

The doctrine of equitable tolling "permits a court to allow an action to proceed when justice requires it, even though a statutory time period has

⁶ Young v. Savidge, 155 Wn. App. 806, 814, 230 P.3d 222 (2010) (citing Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006)).

⁷ Savidge, 155 Wn. App. at 814 (citing Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.2d 400 (1999)).

⁸ Savidge, 155 Wn. App. at 814 (citing Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989)).

⁹ Savidge, 155 Wn. App. at 814 (citing Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)).

¹⁰ RCW 4.16.080(3); Cost Mgmt. Servs., Inc. v. City of Lakewood, 178 Wn.2d 635, 651, 310 P.3d 804 (2013); Hart v. Clark County, 52 Wn. App. 113, 116, 758 P.2d 515 (1988).

¹¹ U.S. Oil & Refining Co. v. Dep't of Ecology, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981).

¹² Hart, 52 Wn. App. at 117.

elapsed.”¹³ Justice generally requires equitable tolling in cases involving a defendant’s bad faith, deception, or false assurances and the plaintiff’s exercise of diligence.¹⁴ The party asserting equitable tolling bears the burden of proof.¹⁵

Courts apply equitable tolling sparingly.¹⁶ “In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations.”¹⁷

Bothell Municipal Code (BMC) 5.08.110 states,

If, upon application by a taxpayer for a refund or for an audit of his records, or upon an examination of the returns or records of any taxpayer, it is determined by the treasurer that within the two years immediately preceding the receipt by the city of the application by the taxpayer for a refund or for an audit, or, in the absence of such an application, within the two years immediately preceding the commencement by the city treasurer of such examination, a tax has been paid in excess of that properly due, the excess amount paid within such period of two years shall be credited to the taxpayer’s account or shall be refunded to the taxpayer, at his option. No refund or credit shall be allowed with respect to any payments made to the city more than two years before the date of such application or examination.

BMC 5.08.210 states,

¹³ In re Pers. Restraint of Bonds, 165 Wn.2d 135, 141, 196 P.3d 672 (2008) (citing In re Pers. Restraint of Carlstad, 150 Wn.2d 583, 593, 80 P.3d 587 (2003)).

¹⁴ Millay v. Cam, 135 Wn.2d 193, 206, 955 P.2d 791 (1998).

¹⁵ City of Bellevue v. Benyaminov, 144 Wn. App. 755, 767, 183 P.3d 1127 (2008).

¹⁶ Graham Neigh. Ass’n v. F.G. Assoc., 162 Wn. App. 98, 119, 252 P.3d 898 (2011) (citing Nikum v. City of Bainbridge Island, 153 Wn. App. 366, 378, 223 P.3d 1172 (2009)).

¹⁷ Millay, 135 Wn.2d at 206.

Any person having paid any tax, original assessment, additional assessment, or corrected assessment of any tax may apply to the treasurer within the time limitation for refund provided in this chapter by petition in writing for a correction of the amount paid and a conference for examination and review of the tax liability, in which petition he shall set forth the reasons why the conference should be granted, and the amount in which the tax, interest, or penalty should be refunded. The treasurer shall promptly consider the petition, and may grant or deny it. If denied, the petitioner shall be notified by mail thereof forthwith. If a conference is granted, the treasurer shall notify the petitioner by mail of the time and place fixed therefor. After the hearing, the treasurer may make such determination as may appear to him just and lawful, and shall mail a copy of his determination to the petitioner.

BMC 5.08.240(A) states,

The city treasurer or his duly authorized agent may examine any books, papers, records, or other data bearing upon the amount of any tax payable or upon the correctness of any return, or for the purpose of making a return where none has been made, or in order to ascertain whether a return should be made. The city manager may require the attendance of any person at a time and place fixed in a notice served by any person in the same manner as a subpoena is served in a civil case.

The treasurer's decision is final unless the petitioner timely appeals to the city council.¹⁸ If the city council orders a public hearing on this appeal, it votes to affirm, modify, or reverse the treasurer's decision.¹⁹ The city council's decision is final unless the petitioner files an action in superior court "for a trial de novo on the matter at issue."²⁰

¹⁸ BMC 5.08.220.

¹⁹ BMC 5.08.220.

²⁰ BMC 5.08.230.

New Cingular claims that equitable tolling applies. It alleges that the City acted in bad faith with its “delay in processing the claim” and “by its failure to describe how the detailed claim that New Cingular submitted was supposedly insufficient, its failure to ask for more information, and its lack of contact with New Cingular in any way prior to Bothell’s summary, generic denial.” New Cingular also alleges that the City provided false assurances:

Bothell’s Municipal Code provided false assurances in two ways: first, by providing that Bothell would “promptly” process the claim, BMC 5.08.210, and, second, by representing any overpayment in taxes “shall be refunded” to the taxpayer. BMC 5.08.110. New Cingular relied on both representations when it pursued its administrative claim. Waiting 17 months to respond is not prompt, and Bothell has flouted its obligation to repay the funds it wrongfully possesses.

New Cingular asserts that it “diligently pursued its claim by seeking redress through the administrative process and then filing suit promptly after Bothell sent its summary denial.”

New Cingular claims that our Supreme Court’s decision in Qwest Corp. v. City of Bellevue²¹ supports its argument: “Because the trial court shared original jurisdiction with Bothell over the tax refund claim, the trial court did not operate in an appellate capacity, and administrative exhaustion requirements did not apply.” We disagree and distinguish Qwest.

²¹ 161 Wn.2d 353, 166 P.3d 667 (2007).

In Qwest, a telephone service provider challenged Bellevue's imposition of a utility occupation tax.²² Qwest filed a superior court action before Bellevue assessed its tax against Qwest.²³ After Bellevue issued its tax assessment, Qwest challenged it under the Bellevue Municipal Code with the city's hearing examiner.²⁴ Bellevue appealed the trial court's denial of its motion to dismiss the lawsuit on the grounds that Qwest had failed to exhaust its administrative remedies. Our Supreme Court affirmed the trial court, concluding that a party is not required to exhaust administrative remedies where the superior court has original jurisdiction and the party seeks to invoke the court's original, rather than appellate, jurisdiction.²⁵ The court also noted that "questions of statutory interpretation need not be referred to administrative agencies."²⁶ And it explained that the case involved "issues of broad public import which require prompt and ultimate determination."²⁷

Here, New Cingular first filed a refund application with the City and then abandoned the administrative process before filing a separate superior court action. This case does not involve an issue of statutory interpretation. New

²² Qwest, 161 Wn.2d at 356.

²³ Qwest, 161 Wn.2d at 357.

²⁴ Qwest, 161 Wn.2d at 357.

²⁵ Qwest, 161 Wn.2d at 371.

²⁶ Qwest, 161 Wn.2d at 371.

²⁷ Qwest, 161 Wn.2d at 371.

Cingular does not challenge the City's authority to impose a tax but argues that it "inadvertently" paid the taxes at issue. Qwest is not applicable here.

New Cingular fails to show that justice requires equitable tolling. In Cost Management Services, Inc. v. City of Lakewood,²⁸ decided after the trial court in this case denied the City's motion for summary judgment, our Supreme Court held, "A superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court." In Cost Management Services, a natural gas purchasing agent sought a refund from Lakewood of taxes allegedly paid in error.²⁹ Cost Management Services stopped paying the taxes and requested a refund.³⁰ After Lakewood failed to respond to its request, Cost Management Services filed a lawsuit in superior court.³¹ The superior court concluded that the three-year statute of limitations limited Cost Management Services' recovery to payments made within three years of the date when it filed its lawsuit.³² Cost Management Services then filed a separate superior court action seeking a writ of mandamus compelling Lakewood to respond to its original refund request filed with the

²⁸ 178 Wn.2d 635, 648, 310 P.3d 804 (2013).

²⁹ Cost Mgmt. Servs., 178 Wn.2d at 639.

³⁰ Cost Mgmt. Servs., 178 Wn.2d at 639.

³¹ Cost Mgmt. Servs., 178 Wn.2d at 639.

³² Cost Mgmt. Servs., 178 Wn.2d at 640.

City.³³ The court consolidated these actions, granted the writ, and entered a judgment in favor of Cost Management Services.³⁴

Our Supreme Court began its review by explaining, “This court has long applied ‘the general rule that when an adequate administrative remedy is provided, it must be exhausted before the courts will intervene.’”³⁵ The court recognized, “The primary question in exhaustion cases . . . is whether the relief sought can be obtained through an available administrative remedy; if so, the party seeking relief must first seek relief through the administrative process.”³⁶ The court held, “[E]ven if original jurisdiction in a case lies with the superior court, exhaustion of administrative remedies is still required.”³⁷

In Cost Management Services, the court also declined to base the running of the statute of limitations for Cost Management Services’ superior court claims upon the time that it filed its administrative action.³⁸ The court stated, “CMS seeks mandamus for the express purpose of reaching back beyond the legal

³³ Cost Mgmt. Servs., 178 Wn.2d at 640.

³⁴ Cost Mgmt. Servs., 178 Wn.2d at 640.

³⁵ Cost Mgmt. Servs., 178 Wn.2d at 641 (quoting Wright v. Woodard, 83 Wn.2d 378, 381, 518 P.2d 718 (1974)).

³⁶ Cost Mgmt. Servs., 178 Wn.2d at 642.

³⁷ Cost Mgmt. Servs., 178 Wn.2d at 646. The Supreme Court, however, held that Cost Management Services was not required to exhaust administrative remedies “because none were available.” 178 Wn.2d at 652. Cost Management Services filed a claim with the city for a refund, but the city did not respond. The court concluded that “the administrative process available to CMS could not have provided an adequate remedy.” 178 Wn.2d at 645.

³⁸ Cost Mgmt. Servs., 178 Wn.2d at 651.

statute of limitations.”³⁹ It determined, “In essence, CMS seeks to use the administrative process to revive a claim otherwise barred by the three year statute of limitations.”⁴⁰ Accordingly, the court concluded, “We do not think the statute of limitations can be overcome by such a use of the administrative process.”⁴¹

Similarly, here, New Cingular cannot use the administrative process, which it chose to abandon, to avoid the statute of limitations bar in its superior court action. New Cingular does not show an inability to obtain the requested relief through the administrative process. New Cingular provides a single explanation for abandoning the City’s administrative process—a claim that the process was “hostile” and “demonstratively slow and futile.” But the City’s denial of New Cingular’s application at the first stage of the administrative process did not mean that New Cingular could not have obtained the relief sought by completing this process, which included the opportunity for a trial de novo.⁴² Because New Cingular failed to exhaust administrative remedies, the trial court should not have applied equitable tolling to allow it to “revive a claim otherwise barred by the three year statute of limitations.”

³⁹ Cost Mgmt. Servs., 178 Wn.2d at 652.

⁴⁰ Cost Mgmt. Servs., 178 Wn.2d at 651.

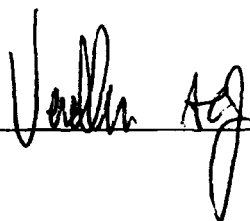
⁴¹ Cost Mgmt. Servs., 178 Wn.2d at 652.

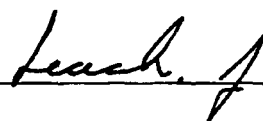
⁴² BMC 5.08.230.

CONCLUSION

Because New Cingular failed to exhaust its administrative remedies before filing its superior court action, equitable tolling does not apply to the claims it asserted in superior court. The statute of limitations bars recovery of all payments made more than three years before the filing of this lawsuit. We reverse and remand for proceedings consistent with this opinion.

WE CONCUR:







APPENDIX B

APPENDIX B: CLERK'S PAPERS EXCERPTS

- B-1 Excerpts from Defendant Cities of Bothell, Carnation, Gig Harbor, Issaquah, Kirkland, Mercer Island, Milton, Mount Vernon, Mountlake Terrace, Mukilteo, Redmond, Woodway, Normandy Park, Poulsbo, Wenatchee, Othello, Port Townsend, Moses Lake, Olympia, Woodinville, Ellensburg, and Clyde Hill's Answer to First Amended Complaint, dated January 3, 2013 (CP 41-48)
- B-2 Excerpts from Defendant City of Bothell's Motion for Partial Summary Judgment, dated July 5, 2013 (CP 65)
- B-3 Complaint, dated April 25, 2012 (CP 106-124)
- B-4 Excerpts from Plaintiff's Opposition to Defendant City of Bothell's Motion for Partial Summary Judgment, dated July 22, 2013 (CP 234)
- B-5 Declaration of Linda A. Fisher in Opposition to Defendant City of Bothell's Motion for Partial Summary Judgment, dated July 18, 2013 (CP 241-245)
- B-6 AT&T Mobility Claim for Refund of Tax on Internet Access Charges to the City of Bothell, Washington, dated November 3, 2010 (CP 247-264)
- B-7 Denial of Claim by the City of Bothell, Washington, dated April 16, 2012 (CP 266-267)
- B-8 Supplement to AT&T Mobility Claim for Refund of Tax on Internet Access Charges to the City of Bothell, Washington, dated July 15, 2012 (CP 269-271)
- B-9 Declaration of David Spradlin in Opposition to Defendant City of Bothell's Motion for Partial Summary Judgment, dated July 19, 2013 (CP 272-274)
- B-10 Declaration of Tami Schackman in Support of Defendant City of Bothell's Motion for Partial Summary Judgment, dated July 5, 2013 (CP 275-277)
- B-11 Letter from Michael R. Scott regarding the AT&T Mobility Claim for Refund of Tax on Internet Access Charges to the City of Bothell, Washington, dated July 13, 2012 (CP 290-291)

- B-12 Excerpts from Bothell's Reply to Motion for Partial Summary Judgment, dated July 29, 2013 (CP297)
- B-13 Order Denying Defendant City of Bothell's Motion for Partial Summary Judgment, entered August 2, 2013 (CP 326-328)

APPENDIX B-1

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

CITY OF BOTHELL a Washington
municipal corporation, et al.,

Defendants.

No. 12-2-15031-1 SEA

)
) DEFENDANT CITIES OF BOTHELL,
) CARNATION, GIG HARBOR,
) ISSAQUAH, KIRKLAND, MERCER
) ISLAND, MILTON, MOUNT VERNON,
) MOUNTLAKE TERRACE, MUKILTEO,
) REDMOND, WOODWAY, NORMANDY
) PARK, POULSBO, WENATCHEE,
) OTHELLO, PORT TOWNSEND, MOSES
) LAKE, OLYMPIA, WOODINVILLE,
) ELLENSBURG, AND CLYDE HILL'S
) ANSWER TO FIRST AMENDED
) COMPLAINT
)
)

COME NOW, the above-named defendant cities ("Answering Defendants") by and through their attorneys of record, Ogden Murphy Wallace, and in answer to Plaintiff's First Amended Complaint, hereafter referred to as "Complaint," answers as follows:

1. In answer to paragraph 1 of the Complaint, Answering Defendants admit that this is an action to recover taxes. Answering Defendants have insufficient information on which to base an answer as to whether the taxes in question were paid erroneously and therefore deny this allegation. Answering Defendants admit that they charge a municipal tax on telephone and other businesses, including Plaintiff. Answering Defendants deny that Plaintiff can "collect" a tax

1 from its customers and that Plaintiff's customers "were taxed" as alleged in the Complaint.
2 Answering Defendants have insufficient information on which to base an answer as to whether
3 Plaintiff paid taxes on internet access and as to whether such payment was due to a "coding
4 error" and therefore deny these allegations. The last sentence of paragraph 1 is a legal conclusion
5 to which no admission or denial is required.

6 2. In answer to paragraph 2 of the Complaint, Answering Defendants deny that the
7 taxes in question were "collected" from Plaintiff's customers. Answering Defendants have
8 insufficient information on which to base an answer as to the remaining allegations in this
9 paragraph and therefore deny the same.

10 3. In answer to paragraph 3 of the Complaint, Answering Defendants admit that
11 Plaintiff filed refund claims with them. Answering Defendants have insufficient information on
12 which to base an answer to the remaining allegations in this paragraph and therefore deny the
13 same.

14 4. In answer to paragraph 4 of the Complaint, Answering Defendants have
15 insufficient information on which to base an answer to the first sentence and therefore deny the
16 same. In answer to the second sentence, Answering Defendants allege that they have denied
17 Plaintiff's refund claims. Answering Defendants deny the remaining allegations in this
18 paragraph.

19 5. In answer to paragraph 5 of the Complaint, Answering Defendants deny that this
20 Court has jurisdiction pursuant to the Declaratory Judgment Act.

21 6. In answer to paragraph 6 of the Complaint, Answering Defendants deny that this
22 Court has jurisdiction under the Washington Constitution and/or under RCW 2.08.010 and
23 further deny that this case involves the legality of a tax.

24 7. In answer to paragraph 7 of the Complaint, Answering Defendants admit that
25 some defendant cities in this action are located in King County.
26

1 8. In answer to paragraph 8 of the Complaint, Answering Defendants deny that
2 Plaintiff's claims against all defendants arise from the same series of transactions and
3 occurrences. Answering Defendants admit that there are issues of fact and law that may be
4 common to Plaintiff's claims against all defendants.

5 9. In answer to paragraph 9 of the Complaint, Answering Defendants are without
6 sufficient information upon which to base an answer and therefore deny the same.

7 10. In answer to paragraph 10 of the Complaint, Answering Defendants admit that
8 Plaintiff has standing to seek administrative refunds of the taxes it pays but deny that Plaintiff
9 has standing in this action.

10 11 - 139. In answer to paragraphs 11 through 139, Answering Defendants admit that
11 all Answering Defendants are cities located in the State of Washington.

12 140. In answer to paragraph 140 of the Complaint, Answering Defendants admit that
13 Plaintiff and its affiliate are telephone businesses. Answering Defendants have insufficient
14 information on which to base an answer to the remaining allegations in this paragraph and
15 therefore deny the same.

16 141. In answer to paragraph 141 of the Complaint, Answering Defendants lack
17 sufficient information on which to base an answer and therefore deny the same.

18 142. In answer to paragraph 142 of the Complaint, Answering Defendants lack
19 sufficient information on which to base an answer to the allegations in this paragraph and
20 therefore deny the same.

21 143. In answer to paragraph 143 of the Complaint, Answering Defendants admit that
22 they impose a tax on Plaintiff. Answering Defendants deny that Plaintiff is permitted by law to
23 pass taxes through to its customers and/or to charge taxes to its customers. Answering
24 Defendants have insufficient information on which to base an answer to the remaining
25 allegations in this paragraph and therefore deny the same.

26

1 144. In answer to paragraph 144 of the Complaint, Answering Defendants have
2 insufficient information on which to base an answer to the allegations in this paragraph and
3 therefore deny the same.

4 145 - 147. In answer to paragraphs 145 through 147 of the Complaint, Answering
5 Defendants allege that the texts of the Internet Tax Freedom Act ("ITFA") and RCW 35.21.717
6 speak for themselves. Answering Defendants deny all legal conclusion contained in these
7 paragraphs.

8 148 - 153. In answer to paragraphs 148 through 153 of the Complaint, Answering
9 Defendants have insufficient information on which to base an answer to the allegations in these
10 paragraphs and therefore deny the same.

11 154. In answer to paragraph 154 of the Complaint, Answering Defendants admit that
12 Plaintiff submitted refund requests to them on or about the date stated. Answering Defendants
13 deny that all requests submitted to all defendants complied with all applicable statutes, codes, or
14 ordinances. Answering Defendants deny that the refund requests contained "a detailed statement
15 in support of the refund claim" and further deny that the refund requests provided an adequate
16 legal and factual basis. Answering Defendants admit that Exhibit A to the Complaint is a
17 "sample refund request," but have insufficient information on which to base an answer as to
18 whether this sample accurately represents the refund requests submitted to all defendants and
19 therefore deny this allegation.

20 155. In answer to paragraph 155 of the Complaint, Answering Defendants admit that
21 Plaintiff submitted DVDs at or near the time its refund requests were submitted. Answering
22 Defendants deny that these DVDs contained sufficient information to support Plaintiff's refund
23 requests.

24 156. In answer to paragraph 156 of the Complaint, Answering Defendants deny the
25 allegations in this paragraph.
26

1 157. In answer to paragraph 157 of the Complaint, Answering Defendants have
2 insufficient information on which to base an answer to the allegations in this paragraph and
3 therefore deny the same.

4 158. In answer to paragraph 158 of the Complaint, Answering Defendants admit that
5 they denied Plaintiff's refund request by letter. Answering Defendants deny that they have failed
6 to make a final determination and/or failed to respond to the refund request.

7 159. In answer to paragraph 159 of the Complaint, Answering Defendants have
8 insufficient information on which to base an answer to the allegations in this paragraph and
9 therefore deny the same. Answering Defendants deny that they have failed to respond to and/or
10 failed to make a final determination on Plaintiff's refund request.

11 160. In answer to paragraph 160 of the Complaint, Answering Defendants have
12 insufficient information on which to base an answer as to the defense on which the cities
13 generally relied in denying Plaintiff's refund request and therefore deny the same. Answering
14 Defendants deny that the three defenses listed are inapplicable.

15 161. In answer to paragraph 161 of the Complaint, Answering Defendants admit that
16 some cities have claimed that the tax in question was allowed due to grandfathering. Answering
17 Defendants deny all remaining allegations and legal conclusions.

18 162. In answer to paragraph 162 of the Complaint, Answering Defendants admit that
19 some cities have argued that the voluntary payment doctrine prohibits a refund. Answering
20 Defendants deny all remaining allegations and legal conclusions.

21 163. In answer to paragraph 163 of the Complaint, Answering Defendants admit that
22 some, if not all, cities denied the refund request due to Plaintiff's failure to provide sufficient
23 information. Answering Defendants lack sufficient information on which to base an answer as to
24 whether "most" municipal codes contain refund requirements. Answering Defendants deny all
25 remaining allegations in this paragraph.

26

1 164. In answer to paragraph 164 of the Complaint, Answering Defendants deny the
2 same.

3 165. In answer to paragraph 165 of the Complaint, Answering Defendants incorporate
4 their answers to the preceding paragraphs as if fully set forth herein.

5 166. In answer to paragraph 166 of the Complaint, Answering Defendants deny
6 Plaintiff's legal conclusions and allege that Plaintiff is the sole taxpayer in this matter.
7 Answering Defendants have insufficient information on which to base an answer to the
8 remaining allegations in this paragraph and therefore deny the same.

9 167. In answer to paragraph 167 of the Complaint, Answering Defendants allege that
10 the language of RCW 7.24.010 speaks for itself, deny Plaintiff's legal conclusions, and deny that
11 the Declaratory Judgment Act is applicable to this matter.

12 168. In answer to paragraph 168 of the Complaint, Answering Defendants deny the
13 same.

14 169. In answer to paragraph 169 of the Complaint, Answering Defendants incorporate
15 their answers to the preceding paragraphs as if fully set forth herein.

16 170. In answer to paragraph 170 of the Complaint, Answering Defendants deny that
17 they erroneously collected any taxes from Plaintiff, deny that Plaintiff can legally collect taxes
18 from its customers, and have insufficient information on which to base an answer as to whether
19 any actions taken by Plaintiff were erroneous.

20 171. In answer to paragraph 171 of the Complaint, Answering Defendants deny the
21 same.

22 172. In answer to paragraph 172 of the Complaint, Answering Defendants deny the
23 first two sentences and have insufficient information on which to base an answer to the
24 remaining allegations and therefore deny the same.

25 173. In answer to paragraph 173 of the Complaint, Answering Defendants deny the
26 same.

1 174. In answer to paragraph 174 of the Complaint, Answering Defendants incorporate
2 their answers to the preceding paragraphs as if fully set forth herein.

3 175. In answer to paragraph 175 of the Complaint, Answering Defendants allege that
4 the paragraph consists entirely of legal conclusions to which no answer is required. To the extent
5 an answer is required, Answering Defendants deny this paragraph.

6 176. In answer to paragraph 176 of the Complaint, Answering Defendants deny the
7 same.

8 177. In answer to paragraph 177 of the Complaint, Answering Defendants deny the
9 same.

10 178. In answer to paragraph 178 of the Complaint, Answering Defendants incorporate
11 their answers to the preceding paragraphs as if fully set forth herein.

12 179. In answer to paragraph 179 of the Complaint, Answering Defendants allege that
13 the paragraph consists entirely of legal conclusions to which no answer is required. To the extent
14 an answer is required, Answering Defendants deny this paragraph.

15 180. In answer to paragraph 180 of the Complaint, Answering Defendants deny the
16 same.

17 181. In answer to paragraph 181 of the Complaint, Answering Defendants deny the
18 same.

19 BY WAY OF AFFIRMATIVE DEFENSES, ANSWERING DEFENDANTS ALLEGE
20 AS FOLLOWS:

- 21 1. Plaintiff has failed to state a claim upon which relief may be granted.
- 22 2. Plaintiff has failed to comply with conditions precedent to filing this lawsuit.
- 23 3. Portions of Plaintiff's claims are barred under the applicable statute of limitations.
- 24 4. Plaintiff has failed to exhaust administrative remedies.
- 25 5. Plaintiff's claim is barred under the doctrine of laches.
- 26 6. Plaintiff lacks standing to assert unjust enrichment.

1 7. The Court lacks jurisdiction over Plaintiff's claims under the Declaratory
2 Judgment Act.

3 8. Plaintiff's claims are barred by the voluntary payment doctrine.

4 9. Plaintiff's equitable claims are barred by the doctrine of unclean hands.

5 10. Plaintiff's claims are barred by waiver and estoppel.

6 11. Answering Defendants reserve the right to amend this answer to add any further
7 affirmative defenses as may arise during discovery in this matter.

8 WHEREFORE, having fully answered Plaintiff's Complaint, Answering Defendants pray
9 for relief as follows:

10 1. That Plaintiff's Complaint be dismissed with prejudice and with costs assessed
11 against Plaintiff in favor of Answering Defendants.

12 2. For such other and further relief as to the Court may seem just in the
13 circumstances.

14 DATED this 3rd day of January, 2013.

15 OGDEN MURPHY WALLACE, P.L.L.C.

16 By



Wayne D. Tanaka, WSBA #6303

Elana R. Zana, WSBA #39736

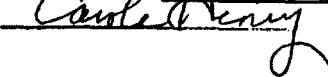
Aaron P. Riensche, WSBA #37202

17
18 **DECLARATION OF SERVICE**

19 I hereby declare that I sent a copy of the document on
20 which this declaration appears via fax/mail/messenger/email
21 service to ALL COUNSEL OF RECORD

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

Executed at Seattle, WA on JAN. 3/13

Signed by: 

Attorneys for Cities of Bothell, Carnation, Gig
Harbor, Issaquah, Kirkland, Mercer Island, Milton,
Mount Vernon, Mountlake Terrace, Mukilteo,
Redmond, Woodway, Normandy Park, Poulsbo,
Wenatchee, Othello, Port Townsend, Moses Lake,
Olympia, Woodinville, Ellensburg, and Clyde Hill

APPENDIX B-2

1 Cingular would still have a statutory right to file a writ of certiorari in the superior court, seeking
2 judicial review of the city's actions. See RCW 7.16.040; *Kerr-Belmark Const. Co. v. City*
3 *Council of City of Marysville*, 36 Wn. App. 370, 371-73, 674 P.2d 684 (1984).

4 Thus, equitable tolling is not necessary to achieve the policy goals posited by New
5 Cingular. Under existing statutes (and the BMC), a taxpayer can follow the administrative
6 process through to conclusion and still have its day in superior court. Plaintiff's tactical decision
7 to abandon this process, and file an original action in this Court, is not a ground for equitable
8 tolling.

9 Equity is "[f]airness; impartiality; evenhanded dealing ... The body of principles
10 constituting what is fair and right." *Delagrave v. Employment Sec. Dept. of State of Wash.*, 127
11 Wn. App. 596, 612, 111 P.3d 879 (2005) (quoting BLACK'S LAW DICTIONARY 560 (7th ed.
12 1999)) (alteration in original). It has been defined as "the correction of that wherein the law by
13 reason of its universality is deficient." *Storseth v. Folsom*, 45 Wash. 374, 378, 88 P. 632 (1907).
14 There is no deficiency in the law here. Local and state law gave New Cingular ample means to
15 pursue its refund claim administratively and still preserve its right to seek relief in court. And
16 fairness, impartiality and evenhanded dealing favor the City, which indisputably received New
17 Cingular's tax payments in good faith and now faces the substantial burden of repaying funds
18 because of New Cingular's practice of charging its customers for taxes that it now claims were
19 illegal.

20 The availability of administrative remedies exposes an additional flaw in Plaintiff's
21 claims of bad-faith delay. Because New Cingular had the right to take the administrative denial
22 to court, there was no tactical advantage to the City in delaying its decision. Moreover, Plaintiff
23 could have brought this original action at any time, without awaiting the City's ruling. See *Qwest*
24 *Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007) (noting that a plaintiff need
25 not exhaust administrative remedies before invoking the superior court's original jurisdiction).
26 There was no connection between the timing of the City's administrative decision and New

1 Washington courts apply the three-year statute of limitations, in RCW 4.16.080(3), to tax-
2 refund claims. See *Corwin Inv. Co. v. White*, 166 Wash. 195, 6 P.2d 607 (1932); *Pacific Coal &*
3 *Lumber Co. v. Pierce County*, 133 Wash. 278, 282, 233 P. 953 (1925); *Hart v. Clark County*, 52
4 Wn. App. 113, 117, 758 P.2d 515 (1988). This period applies to all of New Cingular's causes of
5 action for tax refunds, whether described as a declaration or otherwise.

6 New Cingular commenced this action on April 25, 2012. Therefore, the limitations
7 period reaches back only to April 25, 2009. New Cingular is time-barred from seeking a refund
8 of taxes paid before that date.

9 **VI. CONCLUSION**

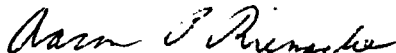
10 New Cingular cannot show any of the predicates for equitable tolling. There is not a
11 shred of evidence that the City engaged in deception, bad faith, or false assurances during the
12 time New Cingular's refund request was pending. Nor can New Cingular show that it pursued its
13 claim diligently during that time. Further, New Cingular's policy argument is nothing more than
14 a ruse. As such, the submission of its refund request to the City, as a matter of law, did not toll
15 the limitation period. The City asks the Court to dismiss any claim for refund of taxes paid
16 before April 25, 2009.

17 **VII. ORDER**

18 A proposed form of order is attached hereto.

19 DATED this 5th day of July, 2013.

20 OGDEN MURPHY WALLACE, P.L.L.C.

21 By 
22 Wayne D. Tanaka, WSBA #6303
23 Elana R. Zana, WSBA #39736
24 Aaron P. Riensche, WSBA #37202
25 Attorneys for Defendant City of Bothell
26

APPENDIX B-3

JACKIE'S 4.25
COPY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, WASHINGTON; 1
THE CITY OF CARNATION, WASHINGTON; 2
THE CITY OF CLYDE HILL, WASHINGTON;
THE CITY OF DUVAL, WASHINGTON;
THE CITY OF HUNTS POINT, WASHINGTON;
THE CITY OF ISSAQUAH, WASHINGTON; 3
THE CITY OF KIRKLAND, WASHINGTON; 4
THE CITY OF LAKE FOREST PARK,
WASHINGTON;
THE CITY OF MERCER ISLAND, 5
WASHINGTON;
THE CITY OF NORTH BEND, WASHINGTON;
THE CITY OF REDMOND, WASHINGTON; 6
THE CITY OF ABERDEEN, WASHINGTON;
THE CITY OF AIRWAY HEIGHTS,
WASHINGTON;
THE CITY OF ALGONA, WASHINGTON;
THE CITY OF ARLINGTON, WASHINGTON;
THE CITY OF AUBURN, WASHINGTON;
THE CITY OF BAINBRIDGE, WASHINGTON;
THE CITY OF BATTLE GROUND,
WASHINGTON;
THE CITY OF BENTON CITY, WASHINGTON;
THE CITY OF BLACK DIAMOND,

No. 12-2-15031-1 SEA

COMPLAINT

Complaint - 1

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 WASHINGTON;
2 THE CITY OF BREMERTON, WASHINGTON;
3 THE CITY OF BUCKLEY, WASHINGTON;
4 THE CITY OF BURLINGTON, WASHINGTON;
5 THE CITY OF CASHMERE, WASHINGTON;
6 THE CITY OF CENTRALIA, WASHINGTON;
7 THE CITY OF CHEHALIS, WASHINGTON;
8 THE CITY OF CHELAN, WASHINGTON;
9 THE CITY OF CHENEY, WASHINGTON;
10 THE CITY OF CHEWALAH, WASHINGTON;
11 THE CITY OF CLE ELUM, WASHINGTON;
12 THE CITY OF COLFAX, WASHINGTON;
13 THE CITY OF COLLEGE PLACE,
14 WASHINGTON;
15 THE CITY OF COULEE DAM, WASHINGTON;
16 THE CITY OF COUPEVILLE, WASHINGTON;
17 THE CITY OF COVINGTON, WASHINGTON;
18 THE CITY OF DAYTON, WASHINGTON;
19 THE CITY OF DEER PARK, WASHINGTON;
20 THE CITY OF DES MOINES, WASHINGTON;
21 THE CITY OF DUPONT, WASHINGTON;
22 THE CITY OF EAST WENATCHEE,
23 WASHINGTON;
24 THE CITY OF EDMONDS, WASHINGTON;
25 THE CITY OF ELMA, WASHINGTON;
26 THE CITY OF EPHRATA, WASHINGTON;
27 THE CITY OF EVERSON, WASHINGTON;
28 THE CITY OF FEDERAL WAY, WASHINGTON;
THE CITY OF FIFE, WASHINGTON;
THE CITY OF FIRCREST, WASHINGTON;
THE CITY OF GEORGE, WASHINGTON;
THE CITY OF GIG HARBOR, WASHINGTON; 7
THE CITY OF GOLD BAR, WASHINGTON;
THE CITY OF GOLDENDALE, WASHINGTON;
THE CITY OF GRAND COULEE,
WASHINGTON;
THE CITY OF GRANDVIEW, WASHINGTON;
THE CITY OF GRANITE FALLS,
WASHINGTON;
THE CITY OF HOQUIAM, WASHINGTON;
THE CITY OF KENNEWICK, WASHINGTON;
THE CITY OF KENT, WASHINGTON;
THE CITY OF KITTITAS, WASHINGTON;
THE CITY OF LA CONNER, WASHINGTON;
THE CITY OF LACEY, WASHINGTON;

Complaint - 2

HILLIS CLARK MARTIN & PETERSON P.S.
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Telephone: (206) 623-1745
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1 THE CITY OF LAKE STEVENS, WASHINGTON;
2 THE CITY OF LAKEWOOD, WASHINGTON;
3 THE CITY OF LONG BEACH, WASHINGTON;
4 THE CITY OF LONGVIEW, WASHINGTON;
5 THE CITY OF MAPLE VALLEY,
6 WASHINGTON;
7 THE CITY OF MARYSVILLE, WASHINGTON;
8 THE CITY OF MCCLEARY, WASHINGTON;
9 THE CITY OF MEDICAL LAKE, WASHINGTON;
10 THE CITY OF MILTON, WASHINGTON; 8
11 THE CITY OF MONTESANO, WASHINGTON;
12 THE CITY OF MOSES LAKE, WASHINGTON;
13 THE CITY OF MOUNT VERNON, 11
14 WASHINGTON;
15 THE CITY OF MOUNTLAKE TERRACE, 9
16 WASHINGTON;
17 THE CITY OF MOXEE, WASHINGTON;
18 THE CITY OF MUKILTEO, WASHINGTON; 10
19 THE CITY OF NAPAVINE, WASHINGTON;
20 THE CITY OF NEWPORT, WASHINGTON;
21 THE CITY OF NORMANDY PARK,
22 WASHINGTON;
23 THE CITY OF NORTH BONNEVILLE,
24 WASHINGTON;
25 THE CITY OF OAK HARBOR, WASHINGTON;
26 THE CITY OF OCEAN SHORES,
27 WASHINGTON;
28 THE CITY OF OKANOGAN, WASHINGTON;
THE CITY OF OLYMPIA, WASHINGTON;
THE CITY OF ORTING, WASHINGTON;
THE CITY OF OTHELLO, WASHINGTON;
THE CITY OF PACIFIC, WASHINGTON;
THE CITY OF PORT ORCHARD,
WASHINGTON;
THE CITY OF PORT TOWNSEND,
WASHINGTON;
THE CITY OF POULSBO, WASHINGTON;
THE CITY OF PROSSER, WASHINGTON;
THE CITY OF PULLMAN, WASHINGTON;
THE CITY OF PUYALLUP, WASHINGTON;
THE CITY OF QUINCY, WASHINGTON;
THE CITY OF RAINER, WASHINGTON;
THE CITY OF RENTON, WASHINGTON;
THE CITY OF RICHLAND, WASHINGTON;
THE CITY OF ROSLYN, WASHINGTON;

Complaint - 3

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1221 Second Avenue, Suite 500
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Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 THE CITY OF ROY, WASHINGTON;
2 THE CITY OF SELAH, WASHINGTON;
3 THE CITY OF SHORELINE, WASHINGTON;
4 THE CITY OF SPOKANE VALLEY,
5 WASHINGTON;
6 THE CITY OF STANWOOD, WASHINGTON;
7 THE CITY OF STEVENSON, WASHINGTON;
8 THE CITY OF SULTAN, WASHINGTON;
9 THE CITY OF SUMAS, WASHINGTON;
10 THE CITY OF SUMNER, WASHINGTON;
11 THE CITY OF SUNNYSIDE, WASHINGTON;
12 THE CITY OF TUKWILA, WASHINGTON;
13 THE CITY OF UNION GAP, WASHINGTON;
14 THE CITY OF UNIVERSITY PLACE,
15 WASHINGTON;
16 THE CITY OF VANCOUVER, WASHINGTON;
17 THE CITY OF WARDEN, WASHINGTON;
18 THE CITY OF WASHOUGAL, WASHINGTON;
19 THE CITY OF WENATCHEE, WASHINGTON;
20 THE CITY OF WESTPORT, WASHINGTON;
21 THE CITY OF WEST RICHLAND,
22 WASHINGTON;
23 THE CITY OF WILBUR, WASHINGTON;
24 THE CITY OF WOODLAND, WASHINGTON;
25 THE CITY OF WOODWAY, WASHINGTON; *8-12*
26 THE CITY OF YACOLT, WASHINGTON;
27 THE CITY OF YAKIMA, WASHINGTON; and
28 THE CITY OF YELM, WASHINGTON,

Defendants.

Plaintiff alleges the following:

I. OVERVIEW OF THE ACTION

1. This is an action to recover taxes erroneously paid to and collected by Washington cities. Washington cities, including the named Defendants, charge a municipal tax on telephone and other businesses, including Plaintiff New Cingular Wireless PCS LLC ("New Cingular"). As is required by law, New Cingular collected the tax from its Washington customers and remitted the tax to the Defendants. Due to a coding error, the customers were

Complaint - 4

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1 taxed not only on telephone services, but also on Internet access. State and federal laws
2 prohibit taxation of charges for Internet access.

3 2. Customers in Washington and around the country sued AT&T Mobility, LLC
4 ("AT&T Mobility") and its affiliates, including New Cingular, to recover the erroneously
5 collected tax on Internet access, which New Cingular had remitted to the various taxing
6 jurisdictions. The U.S. Judicial Panel on Multidistrict Litigation consolidated the class action
7 lawsuits into one proceeding before the United States District Court for the Northern District
8 of Illinois. The parties to the proceeding settled, and New Cingular agreed to seek refunds
9 from the cities and other jurisdictions that collected the tax.

10 3. Pursuant to the settlement agreement, New Cingular filed refund claims with
11 the cities to which it had remitted the tax. Pursuant to the settlement agreement approved by
12 the United States District Court for the Northern District of Illinois, all refunds New Cingular
13 receives are deposited into escrow accounts for the benefit of the taxpayers that originally
14 paid the tax.

15 4. New Cingular has received refunds from numerous Washington cities, and has
16 deposited them into the escrow accounts. Defendants, however, have either denied the refund
17 claim, failed to make a final determination of the refund claim, or failed to respond to the
18 refund claim altogether. Washington taxpayers are entitled to recover these funds, and the
19 cities have no right to keep the tax. Defendants' failure to refund the erroneously paid tax is
20 wrongful and is in violation of municipal, state, and federal law.

21 **II. JURISDICTION**

22 5. This Court has jurisdiction pursuant to Washington's Declaratory Judgment
23 Act, RCW ch. 7.24.

24 6. This Court has original jurisdiction under Article IV Section Six of the
25 Washington Constitution and RCW 2.08.010 because this case involves the legality and
26 applicability of a tax.
27
28

1 III. VENUE

2 7. Pursuant to RCW 4.12.025, venue is proper in this court because defendant
3 cities Auburn, Black Diamond, Bothell, Carnation, Clyde Hill, Covington, Des Moines,
4 Duvall, Federal Way, Hunts Point, Issaquah, Kent, Kirkland, Lake Forest Park, Maple Valley,
5 Mercer Island, Milton, Normandy Park, North Bend, Pacific, Redmond, Renton, and Tukwila
6 are located in this County.

7 8. Plaintiff's claims against Defendants all arise from the same series of
8 transactions and occurrences and involve common issues of fact and law.

9 IV. PARTIES AND STANDING

10 9. Plaintiff New Cingular is a Delaware limited liability company. New Cingular
11 maintains its principal place of business at 5565 Glenridge Connector, Glenridge Two,
12 Atlanta, Georgia 30342. It is registered to do business in Washington. Plaintiff does business
13 throughout Washington.

14 10. New Cingular has standing to seek refunds of the taxes it erroneously paid
15 because New Cingular in fact paid these taxes to the Defendants.

16 11. Defendant City of Bothell is a Washington city.

17 12. Defendant City of Carnation is a Washington city.

18 13. Defendant City of Clyde Hill is a Washington city.

19 14. Defendant City of Duvall is a Washington city.

20 15. Defendant City of Hunts Point is a Washington city.

21 16. Defendant City of Issaquah is a Washington city.

22 17. Defendant City of Kirkland is a Washington city.

23 18. Defendant City of Lake Forest Park is a Washington city.

24 19. Defendant City of Mercer Island is a Washington city.

25 20. Defendant City of North Bend is a Washington city.

26 21. Defendant City of Redmond is a Washington city.

27 22. Defendant City of Aberdeen is a Washington city.

28 23. Defendant City of Airway Heights is a Washington city.

*Does not really
cite a reason,
city venue
for the opposing
cities.*

- 1 24. Defendant City of Algona is a Washington city.
- 2 25. Defendant City of Arlington is a Washington city.
- 3 26. Defendant City of Auburn is a Washington city.
- 4 27. Defendant City of Bainbridge is a Washington city.
- 5 28. Defendant City of Battle Ground is a Washington city.
- 6 29. Defendant City of Benton City is a Washington city.
- 7 30. Defendant City of Black Diamond is a Washington city.
- 8 31. Defendant City of Bremerton is a Washington city.
- 9 32. Defendant City of Buckley is a Washington city.
- 10 33. Defendant City of Burlington is a Washington city.
- 11 34. Defendant City of Cashmere is a Washington city.
- 12 35. Defendant City of Centralia is a Washington city.
- 13 36. Defendant City of Chehalis is a Washington city.
- 14 37. Defendant City of Chelan is a Washington city.
- 15 38. Defendant City of Cheney is a Washington city.
- 16 39. Defendant City of Chewelah is a Washington city.
- 17 40. Defendant City of Cle Elum is a Washington city.
- 18 41. Defendant City of Colfax is a Washington city.
- 19 42. Defendant City of College Place is a Washington city.
- 20 43. Defendant City of Coulee Dam is a Washington city.
- 21 44. Defendant City of Coupeville is a Washington city.
- 22 45. Defendant City of Covington is a Washington city.
- 23 46. Defendant City of Dayton is a Washington city.
- 24 47. Defendant City of Deer Park is a Washington city.
- 25 48. Defendant City of Des Moines is a Washington city.
- 26 49. Defendant City of DuPont is a Washington city.
- 27 50. Defendant City of East Wenatchee is a Washington city.
- 28 51. Defendant City of Edmonds is a Washington city.

Complaint - 7

HILLIS CLARK MARTIN & PETERSON P.S.
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- 1 52. Defendant City of Elma is a Washington city.
- 2 53. Defendant City of Ephrata is a Washington city.
- 3 54. Defendant City of Everson is a Washington city.
- 4 55. Defendant City of Federal Way is a Washington city.
- 5 56. Defendant City of Fife is a Washington city.
- 6 57. Defendant City of Fircrest is a Washington city.
- 7 58. Defendant City of George is a Washington city.
- 8 59. Defendant City of Gig Harbor is a Washington city.
- 9 60. Defendant City of Gold Bar is a Washington city.
- 10 61. Defendant City of Goldendale is a Washington city.
- 11 62. Defendant City of Grand Coulee is a Washington city.
- 12 63. Defendant City of Grandview is a Washington city.
- 13 64. Defendant City of Granite Falls is a Washington city.
- 14 65. Defendant City of Hoquiam is a Washington city.
- 15 66. Defendant City of Kennewick is a Washington city.
- 16 67. Defendant City of Kent is a Washington city.
- 17 68. Defendant City of Kittitas is a Washington city.
- 18 69. Defendant City of La Conner is a Washington city.
- 19 70. Defendant City of Lacey is a Washington city.
- 20 71. Defendant City of Lake Stevens is a Washington city.
- 21 72. Defendant City of Lakewood is a Washington city.
- 22 73. Defendant City of Long Beach is a Washington city.
- 23 74. Defendant City of Longview is a Washington city.
- 24 75. Defendant City of Maple Valley is a Washington city.
- 25 76. Defendant City of Marysville is a Washington city.
- 26 77. Defendant City of McCleary is a Washington city.
- 27 78. Defendant City of Medical Lake is a Washington city.
- 28 79. Defendant City of Milton is a Washington city.

Complaint - 8

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Facsimile: (206) 623-7789

- 1 80. Defendant City of Montesano is a Washington city.
- 2 81. Defendant City of Moses Lake is a Washington city.
- 3 82. Defendant City of Mount Vernon is a Washington city.
- 4 83. Defendant City of Mountlake Terrace is a Washington city.
- 5 84. Defendant City of Moxee is a Washington city.
- 6 85. Defendant City of Mukilteo is a Washington city.
- 7 86. Defendant City of Napavine is a Washington city.
- 8 87. Defendant City of Newport is a Washington city.
- 9 88. Defendant City of Normandy Park is a Washington city.
- 10 89. Defendant City of North Bonneville is a Washington city.
- 11 90. Defendant City of Oak Harbor is a Washington city.
- 12 91. Defendant City of Ocean Shores is a Washington city.
- 13 92. Defendant City of Okanogan is a Washington city.
- 14 93. Defendant City of Olympia is a Washington city.
- 15 94. Defendant City of Orting is a Washington city.
- 16 95. Defendant City of Othello is a Washington city.
- 17 96. Defendant City of Pacific is a Washington city.
- 18 97. Defendant City of Port Orchard is a Washington city.
- 19 98. Defendant City of Port Townsend is a Washington city.
- 20 99. Defendant City of Poulsbo is a Washington city.
- 21 100. Defendant City of Prosser is a Washington city.
- 22 101. Defendant City of Pullman is a Washington city.
- 23 102. Defendant City of Puyallup is a Washington city.
- 24 103. Defendant City of Quincy is a Washington city.
- 25 104. Defendant City of Rainer is a Washington city.
- 26 105. Defendant City of Renton is a Washington city.
- 27 106. Defendant City of Richland is a Washington city.
- 28 107. Defendant City of Roslyn is a Washington city.

Complaint - 9

HILLIS CLARK MARTIN & PETERSON P.S.
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Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

- 1 108. Defendant City of Roy is a Washington city.
- 2 109. Defendant City of Selah is a Washington city.
- 3 110. Defendant City of Shoreline is a Washington city.
- 4 111. Defendant City of Spokane Valley is a Washington city.
- 5 112. Defendant City of Stanwood is a Washington city.
- 6 113. Defendant City of Stevenson is a Washington city.
- 7 114. Defendant City of Sultan is a Washington city.
- 8 115. Defendant City of Sumas is a Washington city.
- 9 116. Defendant City of Sumner is a Washington city.
- 10 117. Defendant City of Sunnyside is a Washington city.
- 11 118. Defendant City of Tukwila is a Washington city.
- 12 119. Defendant City of Union Gap is a Washington city.
- 13 120. Defendant City of University Place is a Washington city.
- 14 121. Defendant City of Vancouver is a Washington city.
- 15 122. Defendant City of Warden is a Washington city.
- 16 123. Defendant City of Washougal is a Washington city.
- 17 124. Defendant City of Wenatchee is a Washington city.
- 18 125. Defendant City of Westport is a Washington city.
- 19 126. Defendant City of West Richland is a Washington city.
- 20 127. Defendant City of Wilbur is a Washington city.
- 21 128. Defendant City of Woodland is a Washington city.
- 22 129. Defendant City of Woodway is a Washington city.
- 23 130. Defendant City of Yacolt is a Washington city.
- 24 131. Defendant City of Yakima is a Washington city.
- 25 132. Defendant City of Yelm is a Washington city.

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Complaint - 10

HILLIS CLARK MARTIN & PETERSON P.S.
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V. FACTS

A. NEW CINGULAR CUSTOMERS ACROSS WASHINGTON PAID TAX ON INTERNET ACCESS.

133. New Cingular, like its affiliate AT&T Mobility, is a telephone business that provides telecommunication services to customers.

134. In addition to telecommunication services, New Cingular sells wireless data plans providing Internet access to customers by contract through various payment plans. The purchase of a wireless data plan permits customers to obtain access to the Internet remotely, either on a computer or on a so-called smart phone, such as an iPhone, a Blackberry, or a similar device. New Cingular provides the following Internet services:

- **Smart-phone Data Features "Bolt-on"** – Web access and ability to send and receive Internet email.
- **Smart-phone Standalone Data Plans** – Web access and ability to send and receive Internet email.
- **iPhone Data Plans** – Web access and ability to send and receive Internet email.
- **Personal Blackberry Plans** – Web access and ability to send and receive Internet email, including access to Blackberry APN, which provides push email, and contacts/calendar synchronization through a RIM server.
- **Enterprise Smartphone Plans** (using RIM/Blackberry, Goodlink, or Microsoft application provider) – Same as Personal Blackberry plans, and also provides Enterprise customers' end users the ability to send and receive internal and Internet email to and from email addresses provided by the Enterprise customer.
- **Computer Access** – Where access is by computer only, New Cingular charges a monthly fee for the use of a datacard. The datacard permits its user to connect a computer to the Internet wirelessly through a radio device embedded in the computer or through a device that connects to the computer through a

1 PCMCIA card or a USB port. The datacard does not transmit voice or pictures
2 independently of the Internet.

3 135. New Cingular bills its customers monthly. Internet access services usually
4 appear on monthly bills as a separate line item. The refund claims only seek the refund of tax
5 attributable to separately stated charges for Internet access services, not on charges for
6 Internet access services that are bundled together with other services (such as
7 telecommunications).

8 136. Defendants impose tax on New Cingular as a telephone business. New
9 Cingular, as permitted by law, passes these taxes through to its customers on their monthly
10 bills. Prior to November 1, 2010, the municipal telephone business taxes charged to customers
11 included tax on Internet access for customers with wireless data plans for their smart phones
12 or computers.

13 137. New Cingular included this tax on Internet access due to a coding error. The
14 coding error led to collection of the tax on Internet access as part of New Cingular customers'
15 monthly bills. New Cingular did not keep the tax collected on Internet access. Instead, New
16 Cingular remitted this mistakenly collected tax to the Defendants.

17 **B. FEDERAL AND STATE LAW PROHIBITS COLLECTION OF TAXES ON**
18 **INTERNET ACCESS.**

19 138. The Internet Tax Freedom Act ("ITFA"), 47 U.S.C. § 151 (1998), as amended,
20 imposes a national moratorium on state and local government taxation on Internet access. "No
21 State or political subdivision thereof shall impose any of the following taxes during the period
22 beginning November 1, 2003, and ending November 1, 2014: ... (1) Taxes on Internet access."

23 139. Under ITFA, the phrase "Internet access" means: "a service that enables users
24 to connect to the Internet to access content, information, or other services offered over the
25 Internet; (B) includes the purchase, use or sale of telecommunications by a provider of a
26 service described in subparagraph (A) to the extent such telecommunications are purchased,
27 used or sold.-- (i) to provide such service; or (ii) to otherwise enable users to access content,
28 information or other services offered over the Internet[.]"

1. 140. Washington law has also expressly prohibited municipal taxation of Internet
2 service providers since May 1997, when a moratorium was implemented on taxing Internet
3 service providers above the rate applied to a general service classification. See Substitute
4 S.B. 5763, 55th Leg., Reg. Sess. (Wash. 1997). The temporary moratorium is now law under
5 RCW 35.21.717.

6 C. THE PARTIES SETTLED THE CLASS ACTION LAWSUIT AGAINST AT&T
7 MOBILITY AND ITS SUBSIDIARIES.

8 141. AT&T Mobility customers across the country discovered the erroneously
9 collected tax related to Internet access and brought class action lawsuits against AT&T
10 Mobility for a refund of the tax. Washington customers brought suit in *Vickery v. AT&T*
11 *Mobility LLC*, Case No. CV10-0257 (W.D. Wash.).

12 142. The U.S. Judicial Panel on Multidistrict Litigation centralized twenty-eight
13 similar actions against AT&T Mobility, including the Washington suit, in the Northern
14 District of Illinois before the Honorable Amy J. St. Eve, case No: 10-cv02278. The parties in
15 the consolidated action settled, and after full briefing and two days of hearings, the Court
16 approved the settlement.

17 143. Because AT&T Mobility, including New Cingular, did not retain the tax
18 collected on Internet access, the Settlement Class agreed to discharge AT&T Mobility from
19 all claims or obligations related to the tax, and provided that AT&T Mobility would seek
20 refunds of the taxes from the cities and states that had ultimately received and benefitted from
21 the tax.

22 144. In addition to filing claims for the refunds, AT&T Mobility, at its own
23 expense, notified all AT&T Mobility customers that paid a tax on Internet access of the class
24 action settlement agreement. AT&T Mobility established a website, created an automated
25 1-800 number, published notice in *USA Today*, contacted its current customers through a bill
26 message and a text message, and emailed former customers.

1 145. AT&T Mobility also filed, at its own expense, refund and credit applications in
2 taxing jurisdictions across the country. AT&T Mobility sought to refund taxpayers in
3 45 states and Puerto Rico.

4 146. As part of the settlement, Judge St. Eve certified a series of subclasses of
5 former and current AT&T Mobility customers, including a Washington Settlement Subclass.
6 Judge St. Eve authorized New Cingular and the Washington Settlement Subclass, through
7 Class Representative Matthew Vickery, to act as the Settlement Subclass Members'
8 representatives for seeking refunds of the taxes.

9 **D. NEW CINGULAR SUBMITTED TAX REFUND CLAIMS TO EACH DEFENDANT**
10 **CITY.**

11 147. On or about November 1, 2010, New Cingular filed a refund request with each
12 of the Defendants pursuant to the applicable claims statute, code, or ordinance. These refund
13 requests included: the total amount of tax for which a refund was claimed, a detailed
14 statement in support of the refund claim which summarized the legal and factual basis for the
15 refund request, and a power of attorney form. A copy of a sample refund request is attached as
16 Exhibit A.

17 148. The refund request also included a DVD containing encrypted information
18 supporting the claim in each city. The DVD listed the customers from whom New Cingular
19 collected the tax on Internet access and the total monthly amounts collected for tax on Internet
20 access.

21 149. The refund claims sought refunds for the maximum period permitted by the
22 applicable statute of limitations and were properly presented under the Defendants' codes and
23 ordinances.

24 150. Under the settlement agreement approved by the United States District Court's
25 Order, New Cingular assigned its right to any amount refunded to the Settlement Class. New
26 Cingular deposits any refunded money directly into an escrow account. When a city issues a
27 future tax credit to New Cingular in lieu of a refund, New Cingular remits the value of the
28 credit to the escrow account.

1 E. DEFENDANTS FAILED TO REFUND THE ERRONEOUSLY COLLECTED TAX.

2 151. Each Defendant has denied the refund claim by letter, failed to make a final
3 determination of the refund claim, or failed to respond to the refund claim altogether.

4 152. A majority of the defendant cities have failed to make a final determination on
5 the refund claim or entirely failed to respond to the refund claim. The refund claims were
6 submitted November 1, 2010. A follow up letter was sent to all unresponsive cities on
7 January 13, 2012. After more than sixteen months, a number of cities have not issued a final
8 determination, and many cities remain completely unresponsive.

9 153. The cities that denied the claim generally relied on three inapplicable defenses:
10 grandfathering, the voluntary payment doctrine, and insufficient evidence.

11 154. First, some cities have claimed that the tax on Internet access was allowed in
12 their jurisdiction because a city ordinance on taxation of Internet access was excepted or
13 grandfathered under ITFA. ITFA provides that a taxing jurisdiction may be grandfathered
14 only if it had a tax on Internet access that was generally imposed, actually enforced, and
15 authorized by statute before October 1, 1998. Because Washington's moratorium on the
16 collection of tax on Internet access started on May 9, 1997, tax on Internet access in
17 Washington was not authorized by statute prior to October 1, 1998. Since state law prohibited
18 the collection of tax on Internet access, no Defendant can claim grandfathering under ITFA.

19 155. Second, many cities have argued that the voluntary payment doctrine prohibits
20 a refund of the taxes. The voluntary payment doctrine generally holds that money paid
21 voluntarily and with full knowledge of all of the facts cannot be refunded to the payer. The
22 doctrine is subject to a number of exceptions. For example, protest of payment indicates
23 involuntariness. Protest is only one exception to the voluntary payment doctrine, and is not a
24 common law requirement, as some cities assert. A taxpayer's mistake of fact also renders the
25 doctrine inapplicable. Finally, if a statutory or constitutional provision expressly or impliedly
26 gives a taxpayer a right to refund, the voluntary payment doctrine does not apply. Here, the
27 due process clauses of the federal and state constitutions and municipal code provisions
28 authorizing refund render the voluntary payment doctrine defense inapplicable.

Complaint - 15

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1 156. Third, some cities denied the refund request because of allegedly insufficient
2 information. Most municipal codes do not provide specific refund requirements, so New
3 Cingular submitted the information required under WAC 458-20-229 for a state refund
4 request. To the extent that any municipal code did contain refund requirements, New Cingular
5 substantially complied with those requirements. AT&T Mobility certified the veracity of the
6 information in a declaration. Finally, New Cingular has been and remains willing to
7 supplement the information, and in fact has dedicated staff to answer technical questions and
8 provide additional information about the tax refunds to the cities.

9 157. Defendants' failure to refund the erroneously paid taxes is wrongful and is in
10 violation of municipal, state, and federal law. The Defendants have no right to the tax on
11 Internet access. The money should be refunded and returned to the individual taxpayers that
12 originally paid the erroneously collected tax.

13
14 **VI. FIRST CAUSE OF ACTION**
15 **DECLARATORY JUDGMENT**

16 158. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth
17 herein.

18 159. The Internet Tax Freedom Act and Washington's codified moratorium prohibit
19 the collection of tax on charges for Internet access. New Cingular customers paid a tax on the
20 amounts they were separately charged for Internet access, and the taxpayers are entitled to a
21 refund of this erroneously collected and remitted tax.

22 160. Washington's Declaratory Judgment Act, RCW 7.24.010, authorizes courts to
23 "declare rights, status and other legal relations." In particular, courts can declare the validity
24 and application of statutes and ordinances.

25 161. Plaintiff is entitled to a judicial determination of its right to a refund under
26 municipal, state, and federal law. Specifically, Plaintiff is entitled to a declaration that the
27 Defendants' affirmative defenses, including, but not limited to, grandfathering, the voluntary
28

1 payment doctrine, and insufficient information, are inapplicable and that the Defendants owe
2 the tax refund.

3
4 **VII. SECOND CAUSE OF ACTION**
5 **UNJUST ENRICHMENT**

6 162. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth
7 herein.

8 163. Defendants received a benefit from receipt of taxes erroneously collected from
9 New Cingular customers and remitted to the Defendants.

10 164. Under state and federal law, Defendants are not authorized to collect taxes on
11 Internet access. Defendants improperly collected and retained this tax.

12 165. Defendants' retention of the erroneously collected tax is unjust. The money
13 remitted to the cities belongs to the taxpayers in Washington. Under the terms of the
14 settlement agreement, New Cingular will return any collected refunds to the Washington
15 customers that originally paid the tax through the escrow accounts and distribution
16 mechanism provided under the settlement agreement approved by the District Court.

17 166. The measure of restitution that Defendants must make to New Cingular is the
18 amount unjustly received by Defendants.

19 **VIII. THIRD CAUSE OF ACTION**
20 **VIOLATION OF THE DUE PROCESS CLAUSES OF THE FOURTEENTH**
21 **AMENDMENT TO THE UNITED STATES CONSTITUTION**

22 167. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth
23 herein.

24 168. The Due Process clauses of the Fourteenth Amendment to the United States
25 Constitution require local governmental entities to provide a meaningful opportunity to secure
26 post-payment relief for taxes erroneously collected and to provide a clear and certain remedy
27 to the taxpayers. }
28

1 169. Because New Cingular provided Defendants with all the information
2 Defendants reasonably need to support and verify the refund claim, due process requires
3 Defendants to provide a remedy in the form of a tax refund to New Cingular.

4 170. Defendants' failure and refusal to provide the tax refunds claimed by New
5 Cingular violates New Cingular's right to due process under the United States Constitution.

6
7 **IX. FOURTH CAUSE OF ACTION**
8 **VIOLATION OF THE DUE PROCESS CLAUSE OF THE**
9 **WASHINGTON CONSTITUTION**

10 171. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth
11 herein.

12 172. The Due Process clause of Article I Section Three of the Washington
13 Constitution requires local governmental entities to provide a meaningful opportunity to
14 secure post-payment relief for taxes erroneously collected and to provide a clear and certain
15 remedy to the taxpayers.

16 173. Because New Cingular provided Defendants with all the information
17 Defendants reasonably need to support and verify the refund claim, due process requires
18 Defendants to provide a remedy in the form of a tax refund to New Cingular.

19 174. Defendants' failure and refusal to provide the tax refunds claimed by New
20 Cingular violates New Cingular's right to due process under the Washington Constitution.

21 //
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Complaint - 18

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X. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief against Defendants:

1. For a declaration that Defendants have an obligation to refund the erroneously collected tax on Internet access;
2. For an award of the costs of this suit; and
3. Such other and further relief as may be just and proper.

DATED this 25th day of April, 2012.

HILLIS CLARK MARTIN & PETERSON P.S.

By s/ Michael R. Scott

Michael R. Scott, WSBA #12822
 Sarah E. Moum, WSBA #42086
 Holly D. Golden, WSBA #44404
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 1221 Second Avenue, Suite 500
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 sem@hcmp.com; hdg@hcmp.com

Attorneys for Plaintiff

ND: 19994.002 4837-4238-7983v4

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 STATE OF WASHINGTON
 SEP 24 11 43 AM '12

APPENDIX B-4

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13 JUL 22 PM 2:36

THE HONORABLE JEFFREY M. THOMAS
KING COUNTY
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 12-2-15031-1 SEA

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, et al.,
Defendants.

No. 12-2-15031-1 SEA
(Consolidated with
Case No. 12-2-34511-2 SEA)

**PLAINTIFF'S OPPOSITION TO
DEFENDANT CITY OF BOTHELL'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BELLEVUE, et al.,
Defendants.

*Plaintiff's Opposition to Defendant City of Bothell's
Motion for Partial Summary Judgment*

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Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 the UDJA requires action in a “reasonable time,” and New Cingular’s claim was brought
2 within an eminently reasonable time. The court should deny Bothell’s motion for partial
3 summary judgment.

4 DATED this 22nd day of July, 2013.

5 HILLIS CLARK MARTIN & PETERSON P.S.

6 By s/ Michael R. Scott

7 Michael R. Scott, WSBA #12822
8 Sarah E. Moum, WSBA #42086
9 Holly D. Golden, WSBA #44404
10 Hillis Clark Martin & Peterson P.S.
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14 Email: mrs@hcmp.com; sem@hcmp.com;
15 hdg@hcmp.com

12 BARTIMUS, FRICKLETON, ROBERTSON & GORNY, P.C.

13 Admitted *pro hac vice*

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15 Mary D. Winter
16 715 Swifts Highway
17 Jefferson City, MO 65109
18 Tel: (573) 659-4454 Fax: (573) 659-4460
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20 marywinter@earthlink.net

18 BARTIMUS, FRICKLETON, ROBERTSON & GORNY, P.C.

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20 James P. Frickleton
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23 Tel: (913) 266-2300 Fax: (913) 266-2366
24 Email: jimf@bflawfirm.com

25 Attorneys for Plaintiff New Cingular Wireless PCS LLC
26 in Case No. 12-2-15031-1 SEA

23 ND: 19994.002 4849-8913-1796v2

24 *Plaintiff’s Opposition to Defendant City of Bothell’s*
25 *Motion for Partial Summary Judgment - 24*

26 HILLIS CLARK MARTIN & PETERSON P.S.
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APPENDIX B-5

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13 JUL 22 PM 2:36

THE HONORABLE JEFFREY M. RAMSELL
KING COUNTY
SUPERIOR COURT CLERK

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CASE NUMBER: 12-2-15031-1 SEA

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, et al.,
Defendants.

No. 12-2-15031-1 SEA
(Consolidated with
Case No. 12-2-34511-2 SEA)

**DECLARATION OF
LINDA A. FISHER IN OPPOSITION
TO DEFENDANT CITY OF
BOTHELL'S MOTION FOR
SUMMARY JUDGMENT**

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BELLEVUE, et al.,
Defendants.

Pursuant to RCW 9A.72.085, the undersigned hereby declares that:

1. I am Assistant Secretary and Director of Transaction Tax Operations for AT&T Mobility ("ATTM"), an affiliate of plaintiff, New Cingular Wireless PCS LLC ("New Cingular"). I have held this position since April 2008 and have been employed by an affiliate of AT&T Mobility LLC or its predecessors since February 1993.

Declaration of Linda A. Fisher - 1

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1 2. The statements made herein are based on my personal knowledge and the
2 records of AT&T Services Inc. ("ATTSP") and its affiliates, including New Cingular Wireless
3 PCS LLC ("ATTM"), a Delaware limited liability company having its principal place of
4 business at 1025 Lenox Park Blvd NE, Atlanta, GA 30319.

5 3. I submit this Declaration in opposition to Defendant City of Bothell's Motion
6 for Summary Judgment in the above-captioned matter.

7 4. My current job responsibilities include the accounting for and remittances of
8 transaction taxes for all business units and affiliates of AT&T Mobility LLC, including New
9 Cingular. I was also responsible for compiling aggregate and customer specific data used for
10 the refund claim filed with the City of Bothell (the "Refund Claim") pursuant to the Global
11 Class Action Settlement Agreement in In re: AT&T Mobility Wireless Data Services Sales
12 Tax Litigation, MDL No. 2147, Case No. 10-cv-02278 (N.D. Ill.) ("Class Action Litigation").
13 A true and correct copy of the Refund Claim is attached as Exhibit A.

14 5. ATTM provides both wireless voice telecommunications services and data
15 services providing Internet access, in addition to other services, to its consumers in the City of
16 Bothell and throughout the United States.

17 6. For telecommunications services, the customer generally pays for the voice
18 calling services either through a flat fee for a bucket of minutes plus coverage or on a per
19 minute cost basis. Separate and distinct from the telecommunications services, ATTM also
20 provides wireless data services to consumers which enable them to access the Internet using
21 mobile devices. Specifically, ATTM sells billing plans for data services providing Internet
22 access used on a smart-phone or other wireless devices, laptop connectivity data plans, and
23 also sells such services on an a la carte, pay-per-use basis (collectively, "Internet Access
24 Services").

25 7. ATTM Internet Access Services are sold under numerous different names and
26 in numerous different formats that vary depending on the volume of use the customer desires
27 and the types of device(s) that the customer will be using. Prices for Internet Access Services
28

Declaration of Linda A. Fisher - 2

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1 vary, similar to prices for voice-calling plans, with the customer either paying a flat monthly
2 charge or a varying charge based on actual usage (e.g., a pay-per-use basis).

3 8. Prior to August 2010, due to a historical anomaly, ATTM coded the charges
4 for Internet Access Services as taxable instead of nontaxable. In early 2010, in response to
5 the Class Action Litigation, ATTM conducted a lengthy and thorough evaluation of its coding
6 for Internet Access Services, and determined that during the period at issue in the Class
7 Action Litigation, ATTM had inadvertently charged and remitted to various taxing
8 jurisdictions nationwide (including the City of Bothell) sales and utility users taxes on Internet
9 Access Services. In August 2010, ATTM ceased imposing taxes on charges for Internet
10 Access Services.

11 9. The refund amount for the Refund Claim was calculated as part of ATTM's
12 obligations under the Global Class Action Settlement Agreement and derived from individual
13 billing records. ATTM first determined whether its customers were charged for Internet
14 Access Services by examining which Service Order Codes ("SOC") and Feature Codes were
15 used in various billing plans for stand-alone sales of Internet Access Services (e.g., as Internet
16 Access Service plans for a smart-phone or other wireless device, Internet Access Service
17 plans for a laptop connectivity card or as "ala carte" Internet Access Services usage). Once
18 the relevant SOC and Feature Codes were identified as Internet Access Services, customer
19 billing records were parsed to determine which customers had purchased services under those
20 SOC and Feature Codes. ATTM engaged PriceWaterhouseCoopers ("PWC") to review and
21 test the data analysis. During such testing, PWC identified additional combinations of SOC
22 and Feature Codes that constituted Internet Access Services on which taxes had been charged,
23 collected and remitted.

24 10. Once the universe of customers who had been sold Internet access services was
25 identified, the computer program identified the full amount of tax each customer was billed on
26 such Internet Access Services for the time period at issue.

27 11. In this manner, ATTM determined the amount reflected on the Refund Claim
28 for the Refund Period for the City of Bothell and every other taxing jurisdiction to which a

Declaration of Linda A. Fisher - 3

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1 refund claim was submitted. ATTM submitted detailed information and data to the City of
2 Bothell and every other jurisdiction in support of the refund claims. *See* Exhibit A. The
3 supporting data provided to Bothell and other taxing jurisdictions included:

- 4 a. A schedule listing the customers from whom ATTM collected tax on
5 Internet Access Services on bills issued from November 1, 2005
6 through September 7, 2010, which tax amounts were included in the
7 Refund Claim. The schedule provided the total amount of tax on
8 Internet Access Services charged to each customer (net of adjustments),
9 with customers identified at the billing account number level.
- 10 b. A listing of the total monthly amounts of tax billed on Internet Access
11 Services (net of adjustments) for the taxing jurisdiction from November
12 1, 2005 through September 7, 2010, which amounts were remitted by
13 ATTM to the taxing jurisdiction in accordance with the taxing
14 jurisdiction's periodic remittance requirements and which in total
15 equaled the aggregate by-customer listing of taxes billed on Internet
16 Access Services.

17 12. After receiving the refund claims, many jurisdictions around the country
18 responded by requesting additional information in order to evaluate and verify the claims. A
19 number of jurisdictions have engaged in full audits of ATTM's tax remittances during the
20 period at issue. Given the volume and complexity of the data, the process of taxing
21 jurisdictions' evaluation of the refund claims has been lengthy. Although a number of
22 jurisdictions across the country and in the State of Washington have resolved the refund
23 claims submitted to them, many others are still in the process of requesting information and
24 continuing to evaluate the claims. ATTM has responded, and continues to respond,
25 cooperatively to each jurisdiction's requests for information.

26 13. ATTM did not receive any response from the City of Bothell to the November
27 2010 Refund Claim until April 16, 2012. On about April 16, 2012, counsel for the City of
28 Bothell and 11 other cities (referred to as the "Consortium Cities"), sent a letter summarily
denying the Refund Claim. A true and correct copy of the letter is attached as Exhibit B. At
no time prior to the letter, nor after, has the City of Bothell requested any additional
information from ATTM relating to the Refund Claim.

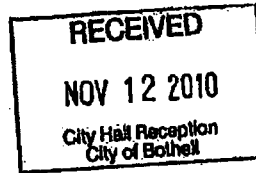
Declaration of Linda A. Fisher - 4

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APPENDIX B-6

McDermott Will & Emery

Boston Brussels Chicago Düsseldorf Houston London Los Angeles Miami Milan
Munich New York Orange County Rome San Diego Silicon Valley Washington, D.C.
Strategic alliance with MAYER China Law Offices (Shanghai)



Margaret C. Wilson
Attorney at Law
mwilson@mwe.com
+1 212 547 5743



November 3, 2010

To: **REFUND CLAIM PROCESSING UNIT**

Re: **AT&T Mobility Claim for Refund of Tax Attributable to Internet Access Services**

To Whom It May Concern:

The documentation included in this mailing constitutes a refund claim seeking a refund of tax that was previously remitted with respect to charges for various wireless services providing Internet access ("Data Services") to customers in your jurisdiction. The Data Services are described in detail in the enclosed statement in support of the refund claim.

This refund claim is filed by or on behalf of the specific AT&T Mobility affiliate that remitted the tax, as identified on the enclosed refund claim form, and is joined in by the customers from whom tax amounts were collected, to the extent and as explained in the enclosed statement in support.

Specifically, this refund claim package includes:

- (1) A refund claim form identifying the particular AT&T Mobility affiliate that is filing the claim and the total amount of tax on Data Services for which a refund is being claimed (that amount includes only taxes on relevant Data Services; previously remitted taxes related to charges for other goods or services are not included in the refund claim amount);
- (2) A statement in support of the refund claim, which provides background regarding both the Data Services and the basis for claiming a refund of previously remitted taxes on Data Services;
- (3) If applicable, a copy of a waiver agreement executed by the relevant AT&T Mobility affiliate at the request of your jurisdiction;
- (4) A DVD containing encrypted data in support of the refund claim for your jurisdiction, including:
 - a. A listing of the customers from whom AT&T collected tax on Data Services on bills issued from November 1, 2005 through September 7, 2010, which tax amounts are included in the refund claim amount. This schedule provides the total amount of tax on Data Services charged to each customer (net of adjustments), with customers identified at the billing account number level.
 - b. A listing of the total monthly amounts of tax billed on Data Services (net of adjustments) for your jurisdiction from November 1, 2005 through September 7, 2010, which amounts were remitted by AT&T in accordance with your jurisdiction's periodic remittance requirements and which in total equal the aggregate by-customer listing of tax billed on Data Services.
- (5) A power of attorney form appointing specified attorneys at McDermott Will & Emery LLP as the representatives of AT&T Mobility and its affiliates for purposes of this refund claim (PLEASE NOTE: THIS POWER OF ATTORNEY IS NOT INTENDED TO REPLACE OR SUPERCEDE OTHER POWERS OF ATTORNEY THAT MAY BE ON FILE WITH YOUR JURISDICTION FOR THE APPLICABLE COMPANY).

You will receive a separate mailing enclosing a decryption code and instructions for accessing the data files contained on the enclosed DVD. Questions related to the DVD and the data contained therein may be directed to Linda Fisher, AT&T, lf2212@att.com, (561) 775-4319.

Other questions related to the refund claim may be directed to Margaret Wilson, McDermott, Will & Emery LLP, mwilson@mwe.com, (212) 547-5743.

Sincerely,


Margaret C. Wilson

U.S. practice conducted through McDermott Will & Emery LLP.

340 Madison Avenue New York, New York 10173-1922 Telephone: +1 212 547 5400 Facsimile: +1 212 547 5444 www.mwe.com

Claim for Refund Of Washington, Bothell Utility Users Tax

This claim for refund of tax is submitted by the following company, an affiliate of ATT Mobility LLC:

Affiliate / Taxpayer's Name: New Cingular Wireless PCS LLC

Affiliate / Taxpayer's FEIN: 22-3330080

Business Address: 11760 U.S. Highway 1
West Tower, Suite 600
North Palm Beach, FL 33408

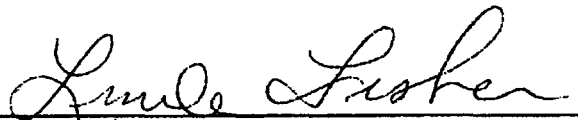
Description of Tax: Local Utility Users Surcharge

Time Period: November 1, 2005 through September 30, 2010

Refund Amount Requested: \$416,802.28

Reason: Tax was inappropriately collected from customers of the Taxpayer and remitted to your jurisdiction's tax administration during the above time period as explained in the attached statement. Supporting detailed billing and tax remittance schedules are also enclosed on the DVD.

The undersigned certifies that this Claim is made on behalf of the Taxpayer named. I declare, under penalties of perjury that this Claim (including the accompanying schedules and statement) has been examined by me and to the best of my knowledge and belief is true, correct and complete for the purpose stated.



Linda A. Fisher
Assistant Secretary and
Director of Tax

Date: 11-1-10

**STATEMENT IN SUPPORT OF CLAIM FOR
REFUND OF TAX ATTRIBUTABLE TO
AMOUNTS PAID FOR INTERNET ACCESS**

This refund claim is being filed by or on behalf of AT&T Mobility or one of the affiliates of AT&T Mobility that provides various wireless services to customers in your jurisdiction, including but not limited to "Data Services" (described in detail below) (hereinafter, the "Refund Claim").

A list of all AT&T Mobility affiliates that have sold Data Services is attached as Exhibit A. Tax was remitted to your jurisdiction by the specific AT&T Mobility affiliate that had a contractual relationship with customers in your jurisdiction, and that same AT&T Mobility affiliate is hereby seeking a refund of tax previously remitted with respect to amounts the affiliate charged those customers for Data Services. AT&T Mobility and the various AT&T Mobility affiliates each sold the same types of Data Services, and so the affiliated companies will be referred to collectively in this statement as "AT&T Mobility."

As discussed in detail below, this Refund Claim is made pursuant to a "Settlement Agreement" and to the extent permitted under the laws of your jurisdiction the "Settlement Class" (customers of AT&T Mobility) joins in the making of this Refund Claim, as contemplated under the Settlement Agreement. The Settlement Agreement obligates AT&T Mobility to transfer all refunded monies related to tax on Data Services, including any refund granted in response to this Refund Claim, to certain Escrow Accounts that are for the sole benefit of the Settlement Class -- and not for the benefit of AT&T Mobility. One hundred percent (100%) of the amount refunded will be for the benefit of customers of AT&T Mobility who remitted the tax payments to AT&T Mobility.

I. Overview

This Refund Claim relates solely to receipts from Data Services sold to customers who used various types of wireless devices. Data Services are distinct from and sold separately from the various types of voice telecommunications services that are also sold by AT&T Mobility to customers for use with such wireless devices. In contrast to typical voice services, Data Services permit the customer to transmit electronic data across the Internet -- thus enabling the customer to "surf" the Internet, send electronic mail, and make numerous other uses of the Internet. These Data Services are described more fully below.

Several months ago, various plaintiffs filed lawsuits against AT&T Mobility in numerous jurisdictions claiming that the AT&T Mobility Data Services the plaintiffs had purchased were the sale of "Internet access" as it is defined under the federal Internet Tax Freedom Act ("ITFA"), and thus could not be subjected to state or local taxation. The lawsuits were filed as putative class actions and alleged that AT&T Mobility had improperly collected tax on Data Services from the plaintiffs in violation of the ITFA.

As described below in "II – The Internet Tax Freedom Act," the ITFA is a federal law that prohibits the imposition of state and local taxes on Internet access. As described below in "III – AT&T Mobility Data Services," the Data Services sold by AT&T Mobility fall within the definition of protected "Internet access" under the ITFA. Finally, in "IV – The National Class Action Settlement," we describe the process by which all amounts refunded or credited pursuant to this Refund Claim will be submitted to a specially administered escrow fund for the benefit of (and to be distributed to) the class action plaintiffs.

This Refund Claim reflects tax remitted to your jurisdiction in connection with separately stated charges for Data Services because even to the extent, if any, that the laws of your jurisdiction sought to impose tax on charges for Internet access, the imposition of that tax was barred by the ITFA.

II. The Internet Tax Freedom Act

The ITFA provides that no state or political subdivision of a state may impose a tax on Internet access during the period beginning November 1, 2003, and ending November 1, 2014. The current language in the ITFA is the product of several different Congressional Acts, as follows:

- P.L. 105-277: effective Oct. 21, 1998 (the Internet Tax Freedom Act)
- P.L. 107-75: effective Nov. 28, 2001 (extended the ITFA to Nov. 1, 2003)
- P.L. 108-435: effective Nov. 1, 2003 (Internet Tax Nondiscrimination Act, amending ITFA)
- P.L. 110-108: effective Nov. 1, 2007 (further amendments to ITFA)

The language from the ITFA that is relevant to this Refund Claim is set forth below.

1. Definition of the "Internet"

The definition of "Internet" reads:

INTERNET.—The term "Internet" means collectively the myriad of computer and telecommunications facilities, including equipment and operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor or successor protocols to such protocol, to communicate information of all kinds by wire or radio.¹

Thus, to fall within this definition, the computer or telecommunications facilities at issue must be: (1) part of the "world-wide network of networks," (2) must be an "interconnected" part of that network, and (3) must employ the Transmission Control Protocol/Internet Protocol or a predecessor or successor protocol.

¹ ITFA Section 1105(4).

2. Definition of "Internet access"

The ITFA defines "Internet access" as follows:

(A) means a service that enables users to connect to the Internet to access content, information, or other services offered over the Internet;

(B) includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold—

(i) to provide such service; or

(ii) to otherwise enable users to access content, information or other services offered over the Internet;

(C) includes services that are incidental to the provision of the service described in subparagraph (A) when furnished to users as part of such service, such as a home page, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity;

(D) does not include voice, audio or video programming, or other products and services (except services described in subparagraph (A), (B), (C), or (E)) that utilize Internet protocol or any successor protocol and for which there is a charge, regardless of whether such charge is separately stated or aggregated with the charge for services described in subparagraph (A), (B), (C), or (E); and

(E) includes a homepage, electronic mail and instant messaging (including voice- and video-capable electronic mail and instant messaging), video clips, and personal electronic storage capacity, that are provided independently or not packaged with Internet access.²

Subpart "A" of the definition of "Internet access" emphasizes that a qualifying service will "enable" "users" to connect to the Internet, for various purposes. The term "enable," which is not defined in ITFA, is commonly defined as providing someone with "means or opportunity."³ As discussed below, the AT&T Mobility Data Services enable customers to connect to the Internet and, as such, are Internet access subject to the ITFA tax moratorium.

While subpart "B" provides that certain telecommunications are included within the scope of protected Internet access, those types of sales are not at issue and are not included in this Refund Claim. For example, the Refund Claim does not include sales of telecommunications to Internet service providers used to transport data being sent or received by the Internet service provider's customer.

² ITFA Section 1105(5).

³ Merriam-Webster's Online Dictionary.

Subpart "C" states that the provision of any services that are incidental to enabling an Internet connection will also be considered to be within the scope of protected "Internet access." This provision gives a list of examples of such permissible incidental services. The types of incidental services expressly listed are a home page, electronic mail, instant messaging, video clips and personal electronic storage capacity. Permissible electronic mail and instant messaging includes forms of those services that are voice-capable and video-capable. The provision of such incidental services as part of an Internet access service does not cause sales of Internet access service to fall outside the ITFA moratorium on state and local taxes. In fact, subpart "B" of the definition of Internet access explicitly provides that these products and services qualify as protected Internet access even when those services are "provided independently or not packaged with Internet access."

Subpart "D" of this definition expressly excludes voice, audio programming, video programming, and any "other products and services" not described in the other parts of the Internet access definition. Taxes related to charges for such services are not included in this Refund Claim.

III. AT&T Mobility Data Services

This Refund Claim seeks the refund or credit of taxes remitted by AT&T Mobility with regard to charges it made for Data Services because those Data Services constitute protected Internet access under the ITFA.

1. The Nature of AT&T Mobility Data Services

AT&T Mobility's Data Services are separate and distinct from the voice calling services that AT&T Mobility sells. Many AT&T Mobility customers purchase both voice calling services and Data Services for use on the same mobile device.

Each of the Data Services sold by AT&T Mobility provides access to the public Internet from various types of devices, including smart-phones, laptops, and other devices capable of housing a SIM card (subscriber identity module, or smart card) to enable the user to utilize his or her mobile network subscription. These Data Services enable a customer to connect to and browse the public Internet. Specifically, the AT&T Mobility Data Services are used to access a particular access point name ("APN") on the Internet and to identify and connect to a wireless application protocol ("WAP") server. From that point, the AT&T Mobility customer can browse the public Internet or access the appropriate server that will enable the customer, among many other things, to send or receive electronic mail.

For the purposes of accessing the Public Internet, the Data Service is essentially the same for each particular device (whether a smart-phone, air-card for a laptop, etc.). In each case, the Data Service provided by AT&T Mobility enables the customer to access the public Internet.

The Data Services are sold under numerous different names and in numerous different formats that vary depending on the type of use the customer desires and the type of device(s) that the

customer will be using. The pricing varies as well, with the customer either paying a flat monthly charge or a varying charge based on actual usage (e.g., a pay-per-use basis). These are pricing distinctions that do not reflect distinctions in the nature of the Data Service being sold – just the quantity.

2. AT&T Mobility Data Services Are Internet Access Under the ITFA

All of the AT&T Mobility Data Services give customers the ability to browse anywhere on the public Internet. As such, the Data Services are a “service that enables users to connect to the Internet to access content, information, or other services offered over the Internet” for purposes of the ITFA.⁴ Thus, except for jurisdictions specifically grandfathered under the ITFA to charge tax on Internet access, no state or local taxes may be imposed on charges for AT&T Mobility’s Data Services.

3. Taxes Not Included in this Refund Claim

The taxes sought in this Refund Claim relate solely to charges for Data Services, and do not include taxes collected and remitted with respect to charges for voice, text messaging (neither SMS (short message services) nor MMS (multimedia message services)) or other services or equipment sold by AT&T Mobility. This Refund Claim does not seek the refund of taxes collected on any charges for Data Services that were bundled with charges for other services that are otherwise sold separately by AT&T Mobility.

This Refund Claim also does not relate to telecommunications services sold to an Internet service provider in order to facilitate the provision of Internet access services to its customers. Instead, this Refund Claim relates solely to the Data Services sold by AT&T Mobility directly to residential or business consumers.

IV. The National Class Action Settlement

As mentioned above, AT&T Mobility has been the subject of numerous lawsuits over the past several months claiming that state and/or local taxes were incorrectly imposed on charges to customers for Data Services because those taxes are barred by the ITFA. Those cases were consolidated and transferred to the United States District Court for the Northern District of Illinois pursuant to transfer orders from the Judicial Panel on Multidistrict Litigation.

After reviewing both the precise terms of the ITFA and the nature of the Data Services, AT&T Mobility has agreed that the taxes relating to charges for Data Services that were previously collected and remitted to your jurisdiction were taxes on Internet access and are thus barred by the ITFA. As such, AT&T Mobility:

⁴ ITFA §1105(5)(A) (definition of Internet access, as in effect since November 1, 2007). This definition replaced an earlier ITFA definition of Internet access that had been effective November 1, 2003, which provided that “‘Internet access’ means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. The term ‘Internet access’ does not include telecommunications services, except to the extent such services are purchased, used, or sold by a provider of Internet access to provide Internet access.”

- has ceased collecting and remitting the taxes that are the subject of this Refund Claim on any charges for Data Services, and
- now seeks the recovery of previously remitted taxes attributable to Data Services, as set forth in this Refund Claim.

These matters are addressed in the Settlement Agreement entered into among AT&T Mobility and the class of all its past and present Data Services customers who do not choose to opt out of the settlement (the "Settlement Class"). What follows are the pertinent terms of that Settlement Agreement and notice of other matters relevant to this Refund Claim.

1. The Settlement Class Consents to and Joins in this Refund Claim

Pursuant to the Settlement Agreement, the Settlement Class has consented to, and has assigned to AT&T Mobility its rights related to, this Refund Claim, as follows:

The Settlement Class hereby consents to AT&T Mobility's filing of the claims for refund of Internet Taxes contemplated by this Settlement Agreement and to the payment of refunds or issuance of tax credits to AT&T Mobility in accordance with the terms of the Settlement Agreement. ... To the extent required by the law of any state or local jurisdiction at issue, the Settlement Class assigns AT&T Mobility all rights of the Settlement Class members to file the refund claims for Internet Taxes contemplated by this Settlement Agreement.

The Settlement Class has thus expressly joined in the making of this Refund Claim, as contemplated under the Settlement Agreement.

2. All Funds to be Paid to Escrow for Benefit of the Settlement Class

The Settlement Agreement obligates AT&T Mobility to transfer all refunded monies related to tax on Data Services, including any refund granted in response to this Refund Claim, to certain Escrow Accounts that are for the sole benefit of the Settlement Class – and not for the benefit of AT&T Mobility. To that end, AT&T Mobility is required to assign to the Settlement Class all of its rights, title and interest in all amounts obtained through Refund Claims.

With respect to those refund claims filed in the name of AT&T Mobility, to the extent that the Taxing Jurisdiction grants AT&T Mobility a refund, AT&T Mobility shall assign all of its rights, title and interest in such refund to the Settlement Class, subject to any claims or conditions that may be imposed on such refund by the Taxing Jurisdiction. In accordance with this assignment, AT&T Mobility shall seek to have the refunded monies paid directly to the Escrow Accounts by the Taxing Jurisdictions. All monies that are nonetheless received by AT&T Mobility relating to the refund claims filed with the Taxing Jurisdictions shall be transferred by AT&T Mobility to the Escrow Accounts

established at the Depository Bank within seven (7) business days of receipt. The monies transferred by AT&T Mobility to the Escrow Accounts for refunds from a Taxing Jurisdiction shall be segregated by the Escrow Agent pursuant to the Escrow Agreement into separate accounts, each designated as originating from the specific jurisdiction for which the monies in question were received and each for the benefit of those Settlement Class Members who remitted Internet Taxes to AT&T Mobility for payment to such Taxing Jurisdiction making the refund.

All sums deposited in the Escrow Accounts will be assigned to and solely for the benefit of the Settlement Class in accordance with the distribution procedures under the Settlement Agreement.

3. Request that Cash Refunds Be Paid Directly to Settlement Class Escrow Accounts

Under the terms of the Settlement Agreement, and in accordance with AT&T Mobility's assignment of its refund rights to the Settlement Class, AT&T Mobility requests that any payment of a cash refund in response to this Refund Claim be made directly to the Escrow Accounts established by the Settlement Agreement. Instructions for such direct payment will be provided upon request.

4. Settlement Class Acknowledges AT&T Mobility Satisfies Any Pre-Payment Requirement

The Settlement Class has acknowledged that its members have already received effective payment of the refund amounts sought in this Refund Claim by virtue of AT&T Mobility's assignment of refund rights to the Settlement Class and its obligation to transfer all refunds received to the Settlement Class, under the terms of the Settlement Agreement and under the supervision of the United States District Court for the Northern District of Illinois.

In light of AT&T Mobility's obligation to pay the refunded or credited Internet Taxes received by AT&T Mobility to the Escrow Accounts, the Settling Parties agree that AT&T Mobility has assigned and refunded to the Settlement Class all Internet Tax refunds to be sought pursuant to the Settlement Agreement.

The Settlement Class thus waives any requirement that AT&T Mobility pay cash refunds to the Settlement Class prior to obtaining a refund or credit from this taxing jurisdiction.

5. Interest

In addition to taxes AT&T Mobility also seeks the payment (or credit) of interest with respect to all amounts sought in the Refund Claim.

6. Credit, Instead of Cash, Refund

In lieu of a cash payment to satisfy this Refund Claim, AT&T Mobility is willing to accept an effective refund of all tax, interest, and any other amounts sought in this Refund Claim through the issuance of credits to be applied to satisfy future tax liabilities of AT&T Mobility ("Credits").

Pursuant to the terms of the Settlement Agreement, upon the receipt from or acknowledgement of such Credits from this taxing jurisdiction AT&T Mobility will make a payment of cash representing the agreed upon value of those Credits to the Escrow Accounts for the benefit of the Settlement Class Members.

* * *

AT&T Mobility and the Settlement Class have consented to the filing of this Refund Claim and to all requests made herein, join in the filing of this Refund Claim to the extent that is permitted, assign to the other party any of its rights necessary to the filing and perfection of this Refund Claim, to the extent possible have waived any requirement that AT&T Mobility pay refunds to the Settlement Class prior to obtaining a refund or credit from this Taxing Jurisdiction, and have waived any other rights that might be inconsistent with the refund claim or the manner in which it has been filed.

Power of Attorney and Declaration of Representative

1. Taxpayer Information

Taxpayer's Name: AT&T Mobility LLC and each Affiliate listed on Exhibit A (collectively referred to as "Taxpayer")	Taxpayer's Federal EIN: 74-2955068 (and as shown on Exhibit A)
Address: 11760 US Highway 1, West Tower – Suite 600	
City, State and ZIP Code: North Palm Beach, FL 33408	

2. The Taxpayer listed above hereby appoints the following representatives as its attorneys-in-fact:

Representative's Name Margaret C. Wilson	Phone Number (212) 547-5743
Mailing Address McDermott Will & Emery	Fax Number (212) 547-5444
Mailing Address 340 Madison Avenue	FEIN 36-1453176
City New York	State NY
ZIP Code 10173-1922	Email Address mwilson@mwe.com
Representative's Name Arthur R. Rosen	Phone Number (212) 547-5596
Mailing Address McDermott Will & Emery	Fax Number (212) 547-5444
Mailing Address 340 Madison Avenue	FEIN 36-1453176
City New York	State NY
ZIP Code 10173-1922	Email Address arosen@mwe.com
Representative's Name Lindsay M. LaCava	Phone Number (212) 547-5344
Mailing Address McDermott Will & Emery	Fax Number (212) 547-5444
Mailing Address 340 Madison Avenue	FEIN 36-1453176
City New York	State NY
ZIP Code 10173-1922	Email Address llacava@mwe.com

Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

2. The Taxpayer listed above hereby appoints the following representatives as its attorneys-in-fact (continued):

Representative's Name			Phone Number
Matthew C. Boch			(312) 984-5399
Mailing Address			Fax Number
McDermott Will & Emery			(312) 984-7700
Mailing Address			FEIN
227 West Monroe Street, Suite 4400			36-1453176
City	State	ZIP Code	Email Address
Chicago	IL	60606-5096	mboch@mwe.com

To represent the Taxpayer and its Affiliates listed on Exhibit A with the following tax matter(s):

3. Tax Matter(s)

Please see Exhibit B for the specific tax matter(s).

With full power to receive confidential information and to perform any and all acts that the Taxpayer can perform with respect to the above specified tax matter(s), except for signing tax returns. The representatives are each also authorized to receive refund checks and to delegate his or her authority to another.

4. Retention/revocation of prior Power(s) of Attorney

This power of attorney (POA) only applies to tax matters described above. This power of attorney is not intended to revoke any other existing powers of attorney previously executed and filed with this agency for the same tax matter(s) and year(s) or period(s) covered by this document.

5. Notices and certain other communications

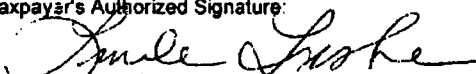
In those instances where statutory notices and certain other communications involving the tax matter(s) listed on page 2 are sent to a Representative, these documents will be sent to the first Representative named in Section 2.

Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

6. Taxpayer's signature

I certify that I am acting in the capacity of a officer or fiduciary on behalf of the taxpayer and each of the Affiliates listed on Exhibit A, and that I have the authority to execute this power of attorney on behalf of the Taxpayer and each of the Affiliates.


Taxpayer's Authorized Signature: 	Date: 10-14-10
Name (Type) of person signing this form: Linda A. Fisher	Work Phone Number: (561) 775-4319
Title: Assistant Secretary and Director of Tax	E-mail address: lf2212@att.com

7. Acknowledgement

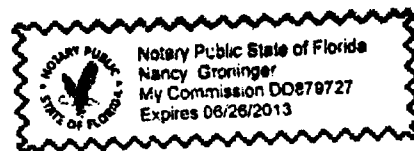
State of Florida
County of Palm Beach

SS:

Sworn to (or affirmed) and subscribed before me this 14 day of October, 2010, by Linda A. Fisher, who is personally known to me.

Signature of Notary Public: 	Date: 10/14/10
Name of Notary (Typed, Printed or Stamped): Nancy Groninger	

Notary public: Affix stamp (or other indication of your notary authority)

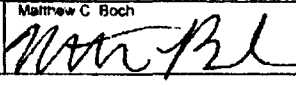


Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

8. Declaration of Representatives

I declare that I am not currently under suspension or disbarment from practice before any court or tribunal, that I am a member in good standing of the bar of the highest court of the state in which I have my primary office (listed above), and that I am authorized to represent the Taxpayer identified in Section 1 and the Affiliates listed on Exhibit A for the tax matters therein specified in Section 3.

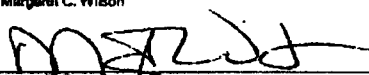

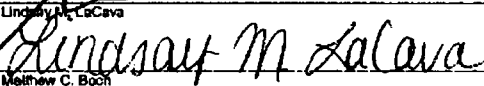
Designation	Jurisdiction	Signature	Date
Attorney	NJ, NY	Margaret C. Wilson	
Attorney	NY	Arthur R. Rosen	
Attorney	CT, NY	Lindsay M. LaCava	
Attorney	IL	Matthew C. Boch 	10/20/2010

Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

8. Declaration of Representatives

I declare that I am not currently under suspension or disbarment from practice before any court or tribunal, that I am a member in good standing of the bar of the highest court of the state in which I have my primary office (listed above), and that I am authorized to represent the Taxpayer identified in Section 1 and the Affiliates listed on Exhibit A for the tax matters therein specified in Section 3.

Designation	Jurisdiction	Signature	Date
Attorney	NJ, NY	<small>Margaret C. Wilson</small> 	10/15/10
Attorney	NY	<small>Arthur R. Rossi</small> 	10/16/10
Attorney	CT, NY	<small>Lindsay M. LaCava</small> 	10-14-10
Attorney	IL	<small>Matthew C. Booth</small>	

Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

EXHIBIT A

INCLUDED AFFILIATES OF AT&T MOBILITY LLC

Name of Affiliate:	FEIN:
Acadiana Cellular GP	58-1887375
AT&T Mobility II LLC	84-1659970
AT&T Mobility of Galveston LLC	75-3244338
AT&T Mobility Puerto Rico Inc	13-3120943
ATC Custom Services, Inc.	26-0497223
Bellingham Cellular Partnership	91-1410480
Bloomington Cellular Telephone Company	91-1433690
Bradenton Cellular Partnership	91-1414365
Bremerton Cellular Telephone Company	91-1430625
Cagal Cellular Communications Corporation	59-2794544
Cagal Cellular Communications Corporation	59-2794544
Cellular Retail LLC	25-1689318
Champaign CellTelCo	36-3665161
Chattanooga MSA LP	58-1616444
Cincinnati SMSA LP	36-3298472
Cingular Wireless Of Texas RSA #11 LP	22-3104693
Cingular Wireless Of Texas RSA #16 LP	22-3104704
Citrus Cellular Limited Partnership	93-1116059
Decatur RSA LP	58-1948295
Florida RSA No 2B	58-1901899
Georgia RSA #3 LP	58-1921807
Hood River Cellular Telephone Company Inc	91-1451869
Houma - Thibodaux Cellular Partnership	72-1326054
Lafayette MSA LP	74-2508690
Louisiana RSA No 7 Cellular GP	58-1887376
Louisiana RSA No 8 LP	58-1887374
Lubbock SMSA LP	75-2176282
Madison SMSA LP	36-3479364
McAllen-Edinburg Mission SMSA LP	75-2694914
Medford Cellular Telephone Company Inc	91-1429384
Melbourne Cellular Telephone Company	91-1430745
Milwaukee SMSA LP	36-3298475
Missouri RSA 11/12 LP	75-2694918
Missouri RSA 8 LP	75-2694916
Missouri RSA 9B1 LP	75-2694917
NE Georgia Limited Partnership	58-1918882
New Cingular Wireless PCS LLC	22-3330080
Ocala Cellular Telephone Company Inc	91-1429238
Oklahoma City SMSA LP	75-2694919
Oklahoma Independent RSA 7 Partnership	73-1398216
Oklahoma RSA 3 LP	75-2694920
Oklahoma RSA 9 LP	75-2694922

Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

EXHIBIT A (continued)

INCLUDED AFFILIATES OF AT&T MOBILITY LLC

Name of Affiliate:	FEIN:
Olympia Cellular Telephone Company Inc	91-1429232
Orlando SMSA LP	58-1596096
Pine Bluff Cellular Inc	71-0685006
Provo Cellular Telephone Company	91-1430747
Reno Cellular Telephone Company	86-0585485
Salem Cellular Telephone Company	91-1430749
Santa Barbara Cellular Systems Ltd	77-0166031
Sarasota Cellular Telephone Company	91-1430748
St Cloud Cellular Telephone Company Inc	91-1496911
Telecorp Communications LLC	52-2105807
Texas RSA 18 LP	75-2298601
Texas RSA 19 LP	75-2298602
Texas RSA 2 Limited Partnership	73-1398219
Texas RSA 20B1 LP	75-2338365
Texas RSA 6 LP	75-2298616
Texas RSA 7B1 LP	75-2298613
Texas RSA 9B1 LP	75-2298610
Topeka SMSA LP	75-2688729
Visalia Cellular Telephone Company	91-1430750
Wireless Maritime Services LLC	20-0781427

Power of Attorney and Declaration of Representative

Taxpayer's FEIN: 74-2955068

EXHIBIT B

Washington, Bothell Utility Users Tax

RCS #: 1198

Tax Type / Matter

Tax Years / Periods

Local Utility Users Surcharge

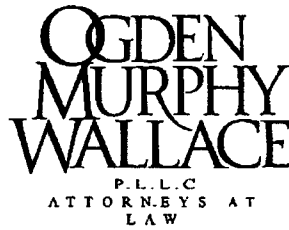
Jan. 1, 2005 - Sep. 30, 2010

APPENDIX B-7

RECEIVED

APR 17 2012

HILLIS, CLARK, MARTIN & PETERSON



Wayne D. Tanaka
wtanaka@omwlaw.com

April 16, 2012

Michael R. Scott
Hillis Clark Martin & Peterson P.S.
1221 Second Avenue, Suite 500
Seattle, WA 98101

RE: AT&T Mobility Claim for Refund of Tax

Dear Mr. Scott:

Our firm represents a consortium of cities in reviewing, analyzing and responding to AT&T Mobility's ("ATTM") claim for a refund of utility taxes remitted to these cities for wireless services providing Internet access. We have been given authority from the City Administration to respond to your refund request on their behalf. The consortium is comprised of the following cities: Bothell, Carnation, Gig Harbor, Issaquah, Kirkland, Mercer Island, Milton, Mount Vernon, Mountlake Terrace, Mukilteo, Redmond and Woodway (collectively the "Consortium Cities").

This letter is sent on behalf of the City Administration of each of the Consortium Cities. Each city has reviewed the materials submitted by ATTM on November 3, 2010, as well as the letter dated January 13, 2012. Each city has concluded that the information provided by ATTM does not substantiate a claim for a tax refund.

In addition to a lack of sufficient information to validate the claim, ATTM's claim is barred based on Washington law. ATTM has brought this refund claim on behalf of both ATTM and the Settlement Class Members. The Settlement Class Members do not have standing to request a refund from a city as they did not in fact pay any taxes directly to the cities.

ATTM requests a refund pursuant to the Internet Tax Freedom Act (ITFA). However, several of the Consortium Cities have taxed data services since well before October 1, 1998. Accordingly, the grandfather clause of the ITFA applies to these cities, and their ordinances are specifically exempt from the ITFA's moratorium on taxes.¹

ATTM's claim for a five year refund is also time barred by the statute of limitations. The letter received November 3, 2010 did not toll the statute of limitations. Furthermore, some of the Consortium Cities have specific non-claim provisions which provide a procedural time limitation to bring refund claims.

¹ Nothing herein should be deemed to waive any city's ability to pursue ATTM for failure to pay the proper amount of utility tax as authorized by law.

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Michael R. Scott
Page 2

In addition, payment made by ATTM to the Consortium Cities was voluntary. Under Washington law, a taxpayer is not entitled to a refund for taxes voluntarily paid without first protesting such payment. The voluntary payment/failure to protest doctrine was recently affirmed by the Washington State Supreme Court in *Cary v. Mason County*.² To the extent that any of the Consortium Cities are subject to the ITFA moratorium, ATTM's failure to protest the payment of such tax precludes ATTM from recovery of such taxes.

Accordingly, for these and other reasons, ATTM's and the Settlement Class Members' claims are hereby denied.

The transmittal of this letter should not be construed as an exhaustive recital of all defenses available to the Consortium Cities and accordingly, the Consortium Cities specifically reserve all rights and do not waive any other defense to ATTM's and the Settlement Class Members' refund claim which it may have. If you have any questions regarding this denial please address them to me at (206) 447-7000 or via e-mail at wtanaka@omwlaw.com.

Very truly yours,

Ogden Murphy Wallace, P.L.L.C.



Wayne Tanaka

cc: City Attorney
Elana R. Zana, Ogden Murphy Wallace

² --- P.3d ---, 2012 WL 503637 (February 16, 2012).

APPENDIX B-8



AT&T Mobility
11760 U.S. Highway 1, West Tower
Suite 600
North Palm Beach, FL 33408

June 15, 2012

City of Bothell
18305 101st Ave NE
Bothell, WA 98011-0000

ATTN: TAX REFUND CLAIM PROCESSING UNIT

**Re: SUPPLEMENT to AT&T Mobility Claim for Refund of Tax on Internet Access Charges
(Filed on or about November 9, 2010)
Refund Claim filed by: New Cingular Wireless PCS LLC (FEIN: 22-3330080)**

This letter supplements the refund claim previously submitted to your jurisdiction by AT&T Mobility affiliate New Cingular Wireless PCS LLC ("AT&T Mobility") seeking a refund of tax attributable to various wireless services providing Internet access, reflected on customer bills as a separately stated charge ("Data Services") for the period November 1, 2005 through September 30, 2010 (the "Refund Claim"). The Refund Claim was filed on or about November 9, 2010.

The Refund Claim that you received identified the amount of tax on Data Services for which a refund is sought, and the Refund Claim package included a DVD with two listings of supporting data breaking out the total tax amount being sought as: (1) a listing of the customers from whom AT&T Mobility collected tax on Data Services on bills issued during the Refund Claim period, and (2) a listing of the total monthly amounts of tax billed on Data Services for the Refund Claim period.

The process of identifying the specific Data Services that provided Internet access for which an unbundled charge was shown on AT&T Mobility customer bills was thorough and careful; however, in the months since that process was undertaken, the company has identified certain tax amounts that should not be included in the amount sought in the Refund Claim. AT&T Mobility has sought to make the Refund Claim verification process as transparent as possible for the taxing jurisdictions involved and, continuing with that forthright approach, AT&T Mobility now brings to your attention the following issues potentially resulting in a reduction of the tax amount being sought in the Refund claim filed with your jurisdiction.

1. Removal of Tax Associated with Certain Charges. AT&T Mobility advises that the total tax amount sought in the Refund Claim for the period November 1, 2005 through September 30, 2010 should be **reduced** by the amount \$11,144.70 to reflect the following two issues.
 - a. Certain charges for voice services sold on a pay-per-use basis to customers with a monthly data plan that constitutes a Data Service were inadvertently captured in the course of culling the AT&T Mobility computerized billing

records to generate the tax information used to prepare the Refund Claims. The related Data Service monthly plan charges were separately stated on customer bills and the tax associated with those charges was properly included in the Refund Claims. The tax associated with voice pay-per-use charges, also shown as separate line items on customer bills, should be removed from the amount sought in the Refund Claim (the "Voice Service Tax"). To the extent there was an amount of Voice Service Tax inadvertently included in the amount sought in the Refund Claim filed with your jurisdiction, that amount has been identified for the period November 2005 through September 2010 and is reflected in the amount listed above as a specific **reduction** in the total refund of tax being sought. For further details, please contact either the AT&T Mobility representative with whom you are working to verify the Refund Claim or Scott Adams (sa245q@att.com).

- b. The AT&T Mobility companies have, historically, used thousands of different combinations of billing codes to identify the various services, including Data Services, sold to customers (with varying pricing and terms). The process of determining which of those billing codes constituted Data Services was exhaustive and thorough. However, in the time since that process was conducted, certain billing codes that were included in generating the tax amounts for the Refund Claims have been identified as not constituting Data Service (the "Excluded Codes"). To the extent there was an amount of tax attributable to Excluded Codes that was inadvertently included in the amount sought in the Refund Claim filed with your jurisdiction, that amount has been identified for the period November 2005 through September 2010 and is reflected in the amount listed above as a specific **reduction** in the total refund of tax being sought. For further details, please contact either the AT&T Mobility representative with whom you are working to verify the Refund Claim or Scott Adams (sa245q@att.com).

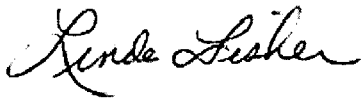
2. **Adjustments for Bad Debt Credits.** The Refund Claims were generated from actual AT&T Mobility billing system data, culled from billions of records maintained on nationwide platforms. Any billing adjustments related to Data Services that had been reflected on current bills were captured and reflected in the amounts sought in the Refund Claims. However, because credits for outstanding customer balances that are written off as "bad debt" are taken in periods subsequent to the billing period for which the tax was remitted, the culling process through which the Refund Claim data was generated did not capture credits taken against tax remittances for bad debts. The AT&T Mobility billing records systems do not tie bad debt amounts back to specific customer charges; as such, it is not possible to trace bad debt credits back to individual Data Service charges that were included in the Refund Claim. The AT&T Mobility companies do maintain records reflecting the percentage of charges written off as bad debt for each jurisdiction in each month. AT&T Mobility submits that a 1.5% Reduction (based on AT&T Mobility's national average bad debt credit percentage for 2009-2010) is an appropriate reduction in the amount of tax that should have been paid or credited by your jurisdiction.

City of Bothell
June 15, 2012
Page 3

The AT&T Mobility representative with whom you worked on the Refund Claim can make such information available to you for review and discuss with you any proposed resolution.

Please direct any questions you may have regarding the above to the AT&T Mobility representative with whom you are working to verify Refund Claim or to Scott Adams (sa245q@att.com).

Sincerely,

A handwritten signature in cursive script that reads "Linda Fisher".

Linda A. Fisher
Assistant Secretary and
Director of Tax

APPENDIX B-9

FILED

13 JUL 22 PM 2:36

KING COUNTY
THE HONORABLE JEFFREY M. RAMSDALL
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 12-2-15031-1 SEA

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, et al.,
Defendants.

No. 12-2-15031-1 SEA
(Consolidated with
Case No. 12-2-34511-2 SEA)

**DECLARATION OF
DAVID SPRADLIN IN OPPOSITION
TO DEFENDANT CITY OF
BOTHELL'S MOTION FOR
SUMMARY JUDGMENT**

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BELLEVUE, et al.,
Defendants.

Pursuant to RCW 9A.72.085, the undersigned hereby declares that:

1. I am a Lead Tax Accountant for AT&T Services, Inc. ("ATTSI"), an affiliate of AT&T Mobility ("ATTM") and plaintiff, New Cingular Wireless PCS LLC ("New Cingular"), working in the tax research and planning group. I have personal knowledge of the facts set forth in this declaration and am fully competent to testify in this matter.

Declaration of David Spradlin - 1

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 2. I have been with ATTSI and its predecessors, including Cingular Wireless
2 LLC ("Cingular"), for over 11 years. Over those years I have been involved with tax research
3 and planning for the company, and have had responsibility for coding new products or
4 services for tax purposes. We determine the taxability of products and services in jurisdictions
5 across the country. Those taxing decisions are ultimately programmed into our computer
6 system by others to implement, where appropriate, the billing and remittance of tax for each
7 product or service.

8 3. Cingular was historically not an Internet services provider; it was a cell phone
9 company. Many of the devices through which Cingular provided services in the early years of
10 my tenure with the company were "clam shell" style cellular phones. Some of those phones
11 permitted some limited data access – such as checking the weather. In contrast, landline
12 telephone companies and cable companies regularly provided broader Internet access services
13 in addition to their other services.

14 4. Over the course of 2004 through 2006, through a series of transactions, certain
15 predecessors to ATTM (including Cingular and AT&T Wireless) were acquired by SBC
16 Communications ("SBC"). In 2007, SBC rebranded the related products and services under
17 the AT&T mark.

18 5. In June 2007, Apple's iPhone was introduced in the United States market, with
19 ATTM as the exclusive provider of cellular services for the iPhone.

20 6. Unlike the traditional "clam shell" style cellular phone users, the iPhone users
21 (as well as the users of other so-called smart-phones that came onto the market around this
22 time) had the ability to access the Internet for a variety of purposes. A variety of wireless data
23 services plans were offered to ATTM's customers. Some initial plans bundled Internet access
24 services with text messaging, while other plans provided Internet access services for a charge
25 that was separately stated from other services.

26 7. In response to various lawsuits filed against ATTM relating to taxes on
27 Internet access services, ATTM conducted a review of those services and their taxation. Our
28 review determined that taxes had been inadvertently charged to and collected from ATTM's

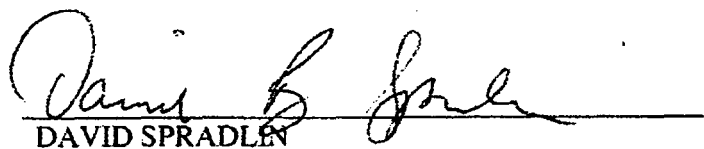
Declaration of David Spradlin - 2

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 customers, and remitted to applicable taxing jurisdictions, on unbundled Internet access
2 services as new services had evolved to meet the needs of iPhone and other smartphone
3 customers. In August 2010, ATTM's systems were reprogrammed so that taxes are not billed
4 for unbundled Internet access services.

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

7 DATED this 19 day of July, 2013 at Atlanta, Georgia.

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11 DAVID SPRADLEN

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APPENDIX B-10

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- a. AT&T Mobility LLC's Claim for Refund of Washington, Bothell Utility Users Tax, dated November 1, 2010 (the "Tax Refund Claim").
- b. A letter from Hillis Clark Martin & Peterson P.S. to the City, dated January 13, 2012 (the "Follow-Up Letter").
- c. AT&T Mobility LLC's supplement letter to the City, dated June 15, 2012 (the "Supplement Letter").

5. In my capacity as Finance Director/Treasurer, I reviewed the Tax Refund Claim, including the relevant data in the accompanying disk, and the relevant provisions of the Business Utilities Tax Code and the City Municipal Code. After consulting with the City Manager, staff, and legal counsel, I issued a final determination regarding the Tax Refund Claim.

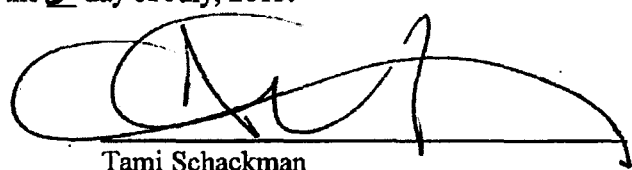
6. The letter denying the Tax Refund Claim, which was issued by our legal counsel in April 2012, was the first communication from the City to AT&T Mobility LLC, or to its affiliates or attorneys, regarding the Tax Refund Claim. Neither I nor any other City employee (that I am aware of) made any representations or directed any form of communications to AT&T Mobility LLC, or to its affiliates or attorneys, regarding the Tax Refund Claim before the denial letter was sent in April 2012.

7. After the City received the Tax Refund Claim, in November 2010, the City received no further communication from AT&T Mobility LLC, or from its affiliates or attorneys, until the City received the Follow-Up Letter in January 2012. I am not aware of any efforts by AT&T Mobility LLC to apply for a conference with me for examination and review of its tax liability. After the City denied the Tax Refund Claim, the City received no request for an appeal to the City Council.

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

Executed at Bothell, Washington on the 5 day of July, 2013.



Tami Schackman

APPENDIX B-11

January 13, 2012

City of Bothell
18305 101st Ave NE
Bothell, WA 98011-0000

Re: *AT&T Mobility Claim for Refund of Tax Attributable to Internet Access Services*
Inquiry re: Status of City's Review

To Whom It May Concern:

We write concerning the status of the City's review of the claim for refund of utility users tax filed with the City in November of 2011 by New Cingular Wireless PCS LLC, an affiliate of ATT Mobility LLC (together referred to hereafter as "*ATTM*"). The materials submitted included:

- A cover letter outlining the documentation sent by ATTM regarding the refund request;
- A Refund Claim Form, including the taxpayer information and total amount of tax for which a refund is sought;
- A Statement in Support of Claim for Refund, providing background information regarding the basis for the claim; and
- A DVD containing encryption data in support of the claim and a separate mailing enclosing a decryption code and instructions for accessing the information

(collectively, the "*Refund Claim*"). As you may recall and as explained in the Statement in Support of Claim for Refund, the Refund Claim seeks a refund of utility taxes previously remitted to the City with respect to charges for various wireless services providing Internet access to ATTM customers in your jurisdiction.

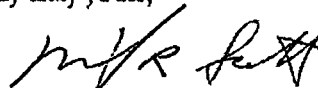
January 13, 2012
Page 2 of 2

We understand that reviewing and processing the Refund Claim takes time, and accordingly have been patient to permit adequate time for analysis. However, it has been over a year since ATIM submitted the Refund Claim. We have not yet received a response and are concerned that a response may not be forthcoming. If we do not hear from you regarding the Refund Claim, we will have no other option but to file a writ of mandate seeking (i) a judicial order directing the appropriate City official to process the Refund Claim and (ii) an award of statutory costs as permitted under RCW 7.16.260.

We would certainly prefer to resolve the Refund Claim without seeking judicial enforcement of the City's obligation to process the Refund Claim. Accordingly, please promptly respond to let us know the status of your review of the Refund Claim.

We look forward to hearing from you.

Very truly yours,



Michael R. Scott

MRS:smp
E-Mail: mrs@hcmp.com
Direct Dial: (206) 470-7616
Fax: (206) 623-7789

leucr MRS.docx

Hillis Clark Martin & Peterson P.S.

APPENDIX B-12

FILED

13 JUL 29 PM 12:25

KING COUNTY

SUPERIOR COURT CLERK
The Honorable Jeffrey Ramsdell
Filed
Hearing Date: August 2, 2013
CASE NUMBER: 12-2-15031-1 SEA
Hearing Time: 2:00 p.m.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

CITY OF BOTHELL a Washington
municipal corporation, et al.,

Defendants.

) No. 12-2-15031-1 SEA

) CITY OF BOTHELL'S REPLY IN
) SUPPORT OF ITS MOTION FOR
) PARTIAL SUMMARY JUDGMENT

CITY OF BOTHELL'S REPLY IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT

1
2 **A. The statute of limitations begins to run upon payment of the taxes.**

3 No matter how denominated, this lawsuit seeks a tax refund. As such it is governed by a three
4 year statute of limitations, RCW 4.16.080(3). A cause of action accrues when the plaintiff has the
5 right to seek relief. New Cingular had the right to seek relief immediately after it paid the taxes. New
6 Cingular appears to be claiming that it did not know it had overpaid taxes until sometime in 2010.¹ A
7 cause of action accrues when the plaintiff learns of or in the exercise of reasonable diligence should
8 have learned of the facts which give rise to the cause of action. However, this discovery rule is
9 limited. As noted by the court in *Metropolitan Services, Inc. v. Spokane*, 32 Wash.App. 714, 720, 649
10 P.2d 642 (1982): “In all cases in which [the discovery rule] has been applied, the plaintiff has lacked
11 the means or ability to ascertain a wrong has been committed” (emphasis added). This certainly is not
12 the case here. New Cingular was in sole possession of all facts necessary to determine that it had made
13 a “coding error” and overpaid taxes. It certainly had the ability to make this determination.
14
15

16 New Cingular argues that its cause of action did not accrue until the city rejected its refund
17 request.² Bothell does provide an administrative procedure for seeking a refund of taxes. (BMC 5.08)
18 However, in this state, the superior court has concurrent original jurisdiction along with the City to
19 order a refund of taxes. *Quest v Bellevue*, 161 Wn2d 353, 166 P.3d 667 (2007); *Cost Management*
20 *Services v. Lakewood*, 170 Wash.App. 260, 284 P.3d 785 (2012). Thus, New Cingular did not need to
21 file a refund request. It could have applied directly to this court for relief pursuant to the court’s
22 original jurisdiction. Even if New Cingular was somehow required to request a refund, it delayed
23
24

25 ¹ Bothell objects to the Spradlin declaration on the basis set forth in Wayne Tanaka’s supplemental declaration.

26 ² New Cingular did not always adhere to this view and its current position is inconsistent with what it has alleged in the past. See Exhibit 2 to Tanaka supplemental declaration.

1 New Cingular also cites to *Tenpenny v. United States*, 490 F.Supp.2d 852 (N.D. Ohio 2007).
2 New Cingular admits that equitable tolling applied in that case because the government created
3 confusion as to exhaustion requirements. New Cingular then argues – but presents no evidence – that
4 the City somehow created confusion here. The arguments of counsel are not evidence and New
5 Cingular has not presented any testimony from any New Cingular personnel saying that they were
6 confused in any way by any act or omission of the City.

7 Plaintiff also expends two pages discussing *McDonald v. Antelope Valley Community College*
8 *District*, 45 Cal.4th 88 (2008). To this it suffices to say that California law does not require bad faith,
9 deception or false assurances as a predicate to equitable tolling. See *Structural Steel Fabricators, Inc.*
10 *v. City of Orange*, 40 Cal.App.4th 459, 464-65 (1995) (quoting *Addison v. State*, 21 Cal.3d 313, 319
11 (1978)) (“Equitable tolling has three elements: ‘timely notice, and lack of prejudice to the defendant,
12 and reasonable and good faith conduct on the part of the plaintiff.’”)

13 New Cingular’s last argument is that its declaratory judgment action must be brought within a
14 reasonable time, per *Brutsche v. City of Kent*, 78 Wn. App. 370, 898 P.2d 319 (1995). But New
15 Cingular has not disputed that, since *Brutsche*, the courts have clarified that filing an action for
16 declaratory judgment, rather than one for direct relief, cannot avoid the statute of limitations. *Reid v.*
17 *Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004). Regardless of the label New Cingular applies
18 to its claim, what it seeks is a tax refund. The limitation period for such claims, as explained above, is
19 three years running from the date of payment.

20 DATED this 29th day of July, 2013.

21
22 OGDEN MURPHY WALLACE, P.L.L.C.

23 By /s/ Wayne D. Tanaka

24 Wayne D. Tanaka, WSBA #6303

25 Aaron P. Riensche, WSBA #37202

26 Elana R. Zana, WSBA #39736

Attorneys for Defendant City of Bothell

APPENDIX B-13

THE HONORABLE JEFFREY M. RAMSDELL

FILED
KING COUNTY, WASHINGTON

AUG 2 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, et al.,
Defendants.

No. 12-2-15031-1 SEA ✓
(Consolidated with
Case No. 12-2-34511-2 SEA)

~~PROPOSED~~ ORDER DENYING 9/12
DEFENDANT CITY OF BOTHELL'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BELLEVUE, et al.,
Defendants.

THIS MATTER having come before the Court on Defendant City of Bothell's Motion for Partial Summary Judgment ("Motion"); Defendant City of Bothell having appeared by and through its counsel, Ogden Murphy Wallace, P.L.L.C., Wayne D. Tanaka, Elana R. Zana and Aaron P. Riensche; and plaintiff, New Cingular Wireless PCS LLC, having appeared by and through its counsel, Hillis Clark Martin & Peterson P.S., Michael R. Scott, Sarah E. Moum and Holly D. Golden; and the Court having reviewed the record and having considered the

*Order Denying Defendant City of Bothell's Motion
for Partial Summary Judgment- 1*

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
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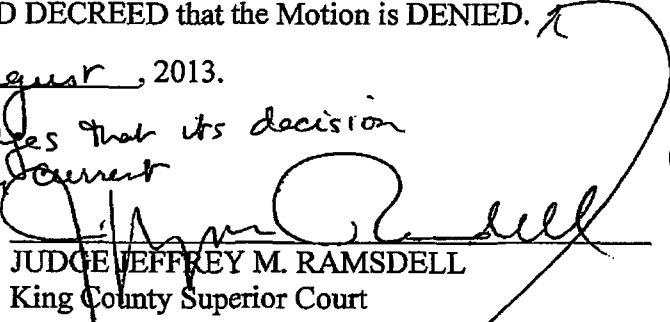
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1 evidence, and in particular the Motion; the Declaration of Tami Schackman in Support of the
2 Motion; the Declaration of Wayne Tanaka in Support of the Motion; Plaintiff's Opposition to
3 Defendant City of Bothell's Motion; the Declaration of Linda A. Fisher in Opposition to
4 Defendant City of Bothell's Motion; the Declaration of David Spradlin in Opposition to
5 Defendant City of Bothell's Motion; City of Bothell's Reply in Support of its Motion; and the
6 Supplemental Declaration of Wayne Tanaka; and the pleadings and records on file herein; and
7 the Court having considered the arguments of counsel and being fully advised in the premises;
8 now, therefore, it is hereby:

9 ORDERED, ADJUDGED AND DECREED that the Motion is DENIED. ↗

10 Dated this 2nd day of August, 2013.

11 * The court acknowledges that its decision
12 is an extension of the precedent
13 Washington case law
14 on equitable Tolling.

15 
16 JUDGE JEFFREY M. RAMSDELL
17 King County Superior Court

18 Presented by:

19 HILLIS CLARK MARTIN & PETERSON P.S.

20 By s/ Michael R. Scott

21 Michael R. Scott, WSBA #12822
22 Sarah E. Moun, WSBA #42086
23 Holly D. Golden, WSBA #44404
24 Hillis Clark Martin & Peterson P.S.
25 1221 Second Avenue, Suite 500
26 Seattle WA 98101-2925
27 Telephone: (206) 623-1745
28 Facsimile: (206) 623-7789
Email: mrs@hcmp.com; sem@hcmp.com;
hdg@hcmp.com

BARTIMUS, FRICKLETON, ROBERTSON & GORNY, P.C.
Admitted *pro hac vice*

Edward D. Robertson, Jr.
Mary D. Winter
715 Swifts Highway
Jefferson City, MO 65109
Telephone: (573) 659-4454
Facsimile: (573) 659-4460
Email: chiprob@earthlink.net;
marywinter@earthlink.net

Order Denying Defendant City of Bothell's Motion
for Partial Summary Judgment- 2

The doctrine of equitable
tolling applies under
the circumstances of
this case, commencing
upon the filing of the
tax refund claim with
the City of Bothell in
November, 2010. Denial
of the Refund claim was
not necessary to accrual
of the cause of action for
unjust enrichment. *

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
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Facsimile: (206) 623-7789

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BARTIMUS, FRICKLETON, ROBERTSON & GORNY, P.C.

Admitted *pro hac vice*

James P. Frickleton
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*Order Denying Defendant City of Bothell's Motion
for Partial Summary Judgment- 3*

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APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, WASHINGTON;
THE CITY OF CARNATION, WASHINGTON;
THE CITY OF CLYDE HILL, WASHINGTON;
THE CITY OF DUVALL, WASHINGTON;
THE CITY OF HUNTS POINT, WASHINGTON;
THE CITY OF ISSAQUAH, WASHINGTON;
THE CITY OF KIRKLAND, WASHINGTON;
THE CITY OF LAKE FOREST PARK,
WASHINGTON;
THE CITY OF MERCER ISLAND,
WASHINGTON;
THE CITY OF NORTH BEND, WASHINGTON;
THE CITY OF REDMOND, WASHINGTON;
THE CITY OF ABERDEEN, WASHINGTON;
THE CITY OF AIRWAY HEIGHTS,
WASHINGTON;
THE CITY OF ALGONA, WASHINGTON;
THE CITY OF ARLINGTON, WASHINGTON;
THE CITY OF AUBURN, WASHINGTON;
THE CITY OF BAINBRIDGE, WASHINGTON;
THE CITY OF BATTLE GROUND,
WASHINGTON;
THE CITY OF BENTON CITY, WASHINGTON;
THE CITY OF BLACK DIAMOND,
WASHINGTON;
THE CITY OF BREMERTON, WASHINGTON;
THE CITY OF BUCKLEY, WASHINGTON;
THE CITY OF BURLINGTON, WASHINGTON;
THE CITY OF CASHMERE, WASHINGTON;
THE CITY OF CENTRALIA, WASHINGTON;
THE CITY OF CHEHALIS, WASHINGTON;
THE CITY OF CHELAN, WASHINGTON;
THE CITY OF CHENEY, WASHINGTON;
THE CITY OF CHEWALAH, WASHINGTON;
THE CITY OF CLE ELUM, WASHINGTON;
THE CITY OF COLFAX, WASHINGTON;
THE CITY OF COLLEGE PLACE,
WASHINGTON;

No. 12-2-15031-1 SEA

SUMMARY JUDGMENT

HEARING

August 2, 2013

The Honorable

Jeffrey M. Ramsdell

Presiding

THE CITY OF COULEE DAM, WASHINGTON;
THE CITY OF COUPEVILLE, WASHINGTON;
THE CITY OF COVINGTON, WASHINGTON;
THE CITY OF DAYTON, WASHINGTON;
THE CITY OF DEER PARK, WASHINGTON;
THE CITY OF DES MOINES, WASHINGTON;
THE CITY OF DUPONT, WASHINGTON;
THE CITY OF EAST WENATCHEE,
WASHINGTON;
THE CITY OF EDMONDS, WASHINGTON;
THE CITY OF ELMA, WASHINGTON;
THE CITY OF EPHRATA, WASHINGTON;
THE CITY OF EVERSON, WASHINGTON;
THE CITY OF FEDERAL WAY, WASHINGTON;
THE CITY OF FIFE, WASHINGTON;
THE CITY OF FIRCREST, WASHINGTON;
THE CITY OF GEORGE, WASHINGTON;
THE CITY OF GIG HARBOR, WASHINGTON;
THE CITY OF GOLD BAR, WASHINGTON;
THE CITY OF GOLDENDALE, WASHINGTON;
THE CITY OF GRAND COULEE,
WASHINGTON;
THE CITY OF GRANDVIEW, WASHINGTON;
THE CITY OF GRANITE FALLS,
WASHINGTON;
THE CITY OF HOQUIAM, WASHINGTON;
THE CITY OF KENNEWICK, WASHINGTON;
THE CITY OF KENT, WASHINGTON;
THE CITY OF KITTITAS, WASHINGTON;
THE CITY OF LA CONNER, WASHINGTON;
THE CITY OF LACEY, WASHINGTON;
THE CITY OF LAKE STEVENS,
WASHINGTON;
THE CITY OF LAKEWOOD, WASHINGTON;
THE CITY OF LONG BEACH, WASHINGTON;
THE CITY OF LONGVIEW, WASHINGTON;
THE CITY OF MAPLE VALLEY,
WASHINGTON;
THE CITY OF MARYSVILLE, WASHINGTON;
THE CITY OF MCCLEARY, WASHINGTON;
THE CITY OF MEDICAL LAKE,
WASHINGTON;
THE CITY OF MILTON, WASHINGTON;
THE CITY OF MONTESANO, WASHINGTON;
THE CITY OF MOSES LAKE, WASHINGTON;
THE CITY OF MOUNT VERNON,
WASHINGTON;
THE CITY OF MOUNTLAKE TERRACE,
WASHINGTON;
THE CITY OF MOXEE, WASHINGTON;

THE CITY OF MUKILTEO, WASHINGTON;
THE CITY OF NAPAVINE, WASHINGTON;
THE CITY OF NEWPORT, WASHINGTON;
THE CITY OF NORMANDY PARK,
WASHINGTON;
THE CITY OF NORTH BONNEVILLE,
WASHINGTON;
THE CITY OF OAK HARBOR, WASHINGTON;
THE CITY OF OCEAN SHORES,
WASHINGTON;
THE CITY OF OKANOGAN, WASHINGTON;
THE CITY OF OLYMPIA, WASHINGTON;
THE CITY OF ORTING, WASHINGTON;
THE CITY OF OTHELLO, WASHINGTON;
THE CITY OF PACIFIC, WASHINGTON;
THE CITY OF PORT ORCHARD,
WASHINGTON;
THE CITY OF PORT TOWNSEND,
WASHINGTON;
THE CITY OF POULSBO, WASHINGTON;
THE CITY OF PROSSER, WASHINGTON;
THE CITY OF PULLMAN, WASHINGTON;
THE CITY OF PUYALLUP, WASHINGTON;
THE CITY OF QUINCY, WASHINGTON;
THE CITY OF RAINER, WASHINGTON;
THE CITY OF RENTON, WASHINGTON;
THE CITY OF RICHLAND, WASHINGTON;
THE CITY OF ROSLYN, WASHINGTON;
THE CITY OF ROY, WASHINGTON;
THE CITY OF SELAH, WASHINGTON;
THE CITY OF SHORELINE, WASHINGTON;
THE CITY OF SPOKANE VALLEY,
WASHINGTON;
THE CITY OF STANWOOD, WASHINGTON;
THE CITY OF STEVENSON, WASHINGTON;
THE CITY OF SULTAN, WASHINGTON;
THE CITY OF SUMAS, WASHINGTON;
THE CITY OF SUMNER, WASHINGTON;
THE CITY OF SUNNYSIDE, WASHINGTON;
THE CITY OF TUKWILA, WASHINGTON;
THE CITY OF UNION GAP, WASHINGTON;
THE CITY OF UNIVERSITY PLACE,
WASHINGTON;
THE CITY OF VANCOUVER, WASHINGTON;
THE CITY OF WARDEN, WASHINGTON;
THE CITY OF WASHOUGAL, WASHINGTON;
THE CITY OF WENATCHEE, WASHINGTON;
THE CITY OF WESTPORT, WASHINGTON;
THE CITY OF WEST RICHLAND,
WASHINGTON;

THE CITY OF WILBUR, WASHINGTON;
THE CITY OF WOODLAND, WASHINGTON;
THE CITY OF WOODWAY, WASHINGTON;
THE CITY OF YACOLT, WASHINGTON;
THE CITY OF YAKIMA, WASHINGTON;
THE CITY OF YELM, WASHINGTON;
THE CITY OF BELLINGHAM, WASHINGTON;
THE CITY OF BONNEY LAKE, WASHINGTON;
THE CITY OF BRIER, WASHINGTON;
THE CITY OF BURIEN, WASHINGTON;
THE CITY OF ELLENSBURG, WASHINGTON;
THE CITY OF ENUMCLAW, WASHINGTON;
THE CITY OF FERNDALE, WASHINGTON;
THE CITY OF LYNDEN, WASHINGTON;
THE CITY OF LYNNWOOD, WASHINGTON;
THE CITY OF MONROE, WASHINGTON;
THE CITY OF NOOKSACK, WASHINGTON;
THE CITY OF PASCO, WASHINGTON;
THE CITY OF RIDGEFIELD, WASHINGTON;
THE CITY OF SEATTLE, WASHINGTON;
THE CITY OF SEQUIM, WASHINGTON;
THE CITY OF SHELTON, WASHINGTON;
THE CITY OF SNOHOMISH, WASHINGTON;
THE CITY OF SNOQUALMIE, WASHINGTON;
THE CITY OF SPOKANE, WASHINGTON;
THE CITY OF TACOMA, WASHINGTON;
THE CITY OF WALLA WALLA, WASHINGTON;
THE CITY OF WOODINVILLE, WASHINGTON,
and
THE CITY OF ANACORTES, WASHINGTON;

Defendants.

TRANSCRIBED BY:

Reed Jackson Watkins

Court-Approved Transcription

206.624.3005

A P P E A R A N C E S

1

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11 On Behalf of Defendants:

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1 know if Bothell was going to give us our money back. And so,
2 therefore, we didn't know if we had -- whether they were
3 unlawfully retaining our funds because they didn't tell us until
4 a year and a half later that they were going to keep them. I
5 mean, you've read the briefs probably --

6 MR. TANAKA: Right.

7 THE COURT: -- more times than I have. So what do you make
8 of all that?

9 MR. TANAKA: Well, what I make of it is this, Your Honor.
10 First of all, I believe, the Court has to keep straight, as the
11 parties have alleged, that this is not an appeal of an
12 administrative decision to refund or not refund taxes.

13 THE COURT: True.

14 MR. TANAKA: And we, I think, all agree under current law the
15 Plaintiff has a right to either invoke the court's appellate
16 jurisdiction, or review jurisdiction, after the City makes its
17 administrative determination, and they've exhausted their
18 administrative remedies. Or the Plaintiffs may invoke the
19 court's original concurrent jurisdiction and ask for a refund.
20 And they don't have to go through one, or exhaust one or other.
21 That's the Bellevue case. That's the Lakewood case. I think
22 that's the law, currently.

23 So, the fact that they chose -- Plaintiffs chose to file a
24 refund request and begin the administrative process is
25 irrelevant because they've abandoned that administrative

1 THE COURT: Sure.

2 MR. TANAKA: And so they may -- a party may legitimately
3 choose to pursue the administrative remedy, because there may
4 not be as many defenses available for that, they may be able to
5 go back further, and they're not required to, you know, file a
6 lawsuit and engage in that expense.

7 THE COURT: Right.

8 MR. TANAKA: Well, they could after the City has denied it
9 then, yes, they have an administrative remedy to court, through
10 writ of review, or whatever, to have that looked at.

11 THE COURT: But this Court's review, then, would be limited
12 --

13 MR. TANAKA: To the record.

14 THE COURT: -- to the record.

15 MR. TANAKA: Yes, that's right.

16 THE COURT: And to the standards of appellate review and
17 administrative determinations.

18 MR. TANAKA: That's right. There's some disadvantages there;
19 there's pluses and minuses.

20 THE COURT: Mm-hmm.

21 MR. TANAKA: The point is is that the Plaintiff has a pure
22 choice.

23 THE COURT: Mm-hmm.

24 MR. TANAKA: And they chose to pursue -- start to pursue one,
25 abandon it, and start another. That's their choice, but they

1 THE COURT: So they'd have to make the choice of: do I put
2 all of my eggs in the administrative appeal basket or do I
3 abandon that, run the risk of only being able to collect half of
4 what I think I'm owed, but get that adjudicated in Superior
5 Court under a different standard than the administrative appeal?

6 MR. TANAKA: They have the right to preserve both the
7 administrative process, and potential subsequent appeal or the
8 court's original jurisdiction, they could have filed -- as you
9 pointed out at the start, they could have filed this lawsuit
10 back then --

11 THE COURT: Okay.

12 MR. TANAKA: -- and preserved it either through an agreement
13 or, if not, certainly coming to the court and saying, "We're
14 going through this administrative process, Your Honor; would you
15 please put a stay on all of this?"

16 THE COURT: And I was trying to think of how that pans out
17 with what we usually do when there's an administrative remedy.
18 It basically sidelines the case because you haven't exhausted
19 your administrative remedies.

20 MR. TANAKA: Right. That's in the typical case where the
21 administrative remedy is a precondition to bringing the lawsuit.
22 Here, it's not.

23 THE COURT: Okay.

24 MR. TANAKA: Due to this somewhat of a unique situation in
25 taxes, where the courts have been clear that they don't have to

1 go through the administrative process, they don't have to
2 exhaust anything, they can skip directly to courts -- the
3 court's original jurisdiction and try this as an unjust
4 enrichment, money hadn't received, however they want to style
5 it, and get potentially a trial, where they may not have in the
6 administrative process.

7 But, Your Honor, they may feel that they have the proof and
8 that the City is really not capable of disputing that through
9 the administrative process, they could try that out, see what
10 our defenses are or, you know, how we're going to respond to it
11 and then they may decide to just file a administrative appeal if
12 the City arbitrarily denies their permit -- or their refund,
13 which, of course, we cannot do.

14 So, they have a lot of options.

15 THE COURT: Sure.

16 MR. TANAKA: And I think, I don't think we need to feel sorry
17 about a plaintiff here for taxes in this state at this time.
18 They've got a number of options that they can pursue. We're
19 focused on the one that they did, which is the court's original
20 jurisdiction for a refund. They're entitled to do that. But
21 they're also, then, bound by the rules of civil actions,
22 statutes of limitations, and so forth.

23 THE COURT: So, let me ask you this, Counsel. One of the
24 things that comes through in the cases on equitable tolling --

25 MR. TANAKA: Yes.

1 because they did the process that the City probably put on their
2 website, and said, "We have a refund process" --

3 MR. TANAKA: Yes.

4 THE COURT: -- "Oh, great, I'll do that."

5 MR. TANAKA: Yes. Yeah. And then they would have given up--
6 again, they would have given up, potentially, the ability to
7 invoke the court's original jurisdiction. But they would have
8 had an ability to challenge the City's denial. That happens for
9 permits, and so on, all the time.

10 THE COURT: Administratively?

11 MR. TANAKA: Administratively.

12 THE COURT: Sure.

13 MR. TANAKA: They are not without a remedy. We're not trying
14 to -- we're just saying, "You had two, you chose one. You know,
15 you could have had two."

16 So, I think in this case, Your Honor, just paradoxically,
17 since there are so many options, I think it makes even less
18 sense, in this case, because they have a legal remedy. If
19 they'd have pursued the administrative process, and the City
20 would have denied it, then they could have taken it up to the
21 court and said, "There's no basis for the City denying this. We
22 submitted all of this evidence that showed we were entitled to
23 it. Here's the Internet Tax Freedom Act. Here's RCW so-and-so.
24 They can't do it. End of case."

25 They could have done that. But they chose not to.

1 THE COURT: Okay.

2 MR. TANAKA: The City cannot act arbitrarily. And so the
3 fact that they didn't is confusing, then, in light of these
4 assertions that they provided all the information, gave us
5 plenty of time, and then we denied it without even explaining
6 why. That sounds kind of arbitrary to me.

7 And so why didn't they, at that point, exhaust their
8 administrative remedies and then take it to court? I don't
9 know. It doesn't matter because they didn't have to. They
10 don't have to. And Your Honor's hypothetical about -- I'm
11 sorry.

12 THE COURT: No, go ahead, sir.

13 MR. TANAKA: Oh, okay. Your Honor's hypothetical about, what
14 happens if New Cingular filed the lawsuit and they were
15 hypothesizing that the City would say, "This is not ripe. We
16 haven't had a chance to make a decision." The Court should
17 throw that out because he is not required to ask us for a
18 decision under the dual track. He can go direct to court. So
19 our saying, "Oh this unjust enrichment isn't -- we haven't said
20 no or we haven't taken an unreasonable time to say no, and
21 therefore, your unjust enrichment action is premature or not
22 ripe or whatever." That's not correct.

23 Because, again, he doesn't have to go to us; doesn't have to.
24 And so whether we deny it or don't deny it has nothing to do
25 with his ability to say, "You had this money. You never had the

C E R T I F I C A T E

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STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this ____ day of _____, 2013.

NOTARY PUBLIC in and for
the State of Washington,
residing at Kirkland.
My commission expires 12-28-14.

APPENDIX D

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FILED
KING COUNTY, WASHINGTON

MAR 14 2013

SUPERIOR COURT CLERK
KIRSTIN GRANT
DEPUTY

Hon. Jeffrey Ramsdell

Counsel for
shall promptly mail a copy of this
order to all other counsel/parties

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC,
a Delaware limited liability company,

Plaintiff,

vs.

THE CITY OF BOTHELL,
WASHINGTON; et al.,

Defendants.

NO. 12-2-15031-1 SEA

ORDER GRANTING
DEFENDANT CITIES OF
ALGONA, AUBURN,
BELLINGHAM, CLE ELUM,
DUPONT, DUVALL, GOLD BAR,
KENNEWICK, KENT, LAKE
FOREST PARK, LONGVIEW,
NORTH BEND, ORTING,
PULLMAN, RENTON,
RICHLAND, SPOKANE, TUKWILA,
WASHOUGAL, AND
WEST RICHLAND AND
DEFENDANT TOWN OF HUNTS
POINT'S MOTION TO DROP
THE MOVING MISJOINED
PARTIES

(Clerk's Action Required)

THIS MATTER came before the Honorable Jeffrey Ramsdell on the motion of Defendant Cities of Algona, Auburn, Bellingham, Cle Elum, Dupont, Duvall, Gold Bar, Kennewick, Kent, Lake Forest Park, Longview, North Bend, Orting, Pullman, Renton, Richland, Spokane, Tukwila, Washougal, and West Richland and Defendant Town of Hunts Point to drop the moving misjoined parties pursuant to CR 20 and CR 21. The Court having considered the motion and written opposition, and having reviewed the records, files, and pleadings herein, and being otherwise fully advised;

ORIGINAL

ORDER GRANTING DEFENDANT CITIES' MOTION TO
DROP THE MISJOINED MOVING PARTIES - 1



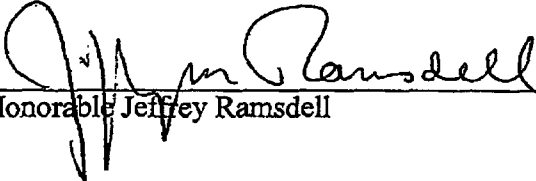
Kenyon Disend, PLLC
The Municipal Law Firm
11 Front Street South
Issaquah, WA 98027-3820
Tel: (425) 392-7090
Fax: (425) 392-7071

1 NOW THEREFORE, it is hereby

2 ORDERED, ADJUDGED, AND DECREED that the Motion of Defendant Cities
3 of Algona, Auburn, Bellingham, Cle Elum, Dupont, Duvall, Gold Bar, Kennewick, Kent,
4 Lake Forest Park, Longview, North Bend, Orting, Pullman, Renton, Richland, Spokane,
5 Tukwila, Washougal, and West Richland and Defendant Town of Hunts Point to Drop
6 the Moving Misjoined Parties is GRANTED.

7 ~~IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Moving~~
8 ~~Parties of Algona, Auburn, Bellingham, Cle Elum, Dupont, Duvall, Gold Bar,~~
9 ~~Kennewick, Kent, Lake Forest Park, Longview, North Bend, Orting, Pullman, Renton,~~
10 ~~Richland, Spokane, Tukwila, Washougal, and West Richland and Defendant Town of~~
11 ~~Hunts Point are DISMISSED, without prejudice.~~

12 DONE IN OPEN COURT this 14th day of March, 2013.

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15 Honorable Jeffrey Ramsdell
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APPENDIX E

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Hon. Jeffrey Ramsdell

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC,
a Delaware limited liability company,

Plaintiff,

vs.

THE CITY OF BOTHELL,
WASHINGTON; et al.,

Defendants.

NO. 12-2-15031-1 SEA

ORDER DENYING PLAINTIFF'S
MOTION FOR
RECONSIDERATION OR
CLARIFICATION

THIS MATTER came before the Honorable Jeffrey Ramsdell on Plaintiff New Cingular Wireless PCS LLC's Motion for Reconsideration or Clarification. The Court having considered the motion, written opposition and reply, and having reviewed the records, files, and pleadings herein, and being otherwise fully advised; NOW THEREFORE, it is hereby

ORDERED, ADJUDGED, AND DECREED that Plaintiff New Cingular Wireless PCS LLC's Motion for Reconsideration or Clarification is DENIED. *

** To the extent Plaintiff has requested Clarification of this Court's order, dated March 14, 2013, the Court notes that the Motion presented for decision was a "Motion to Drop the Moving Misjoined Parties." The Response requested that the Court deny the Motion to "Drop" or to grant deference in the alternative. This Court granted Defendants' Motion "To Drop." It is this Court's understanding that "dropping" the Defendants was the functional equivalent of dismissal without prejudice. Neither ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OR CLARIFICATION - 1 has*



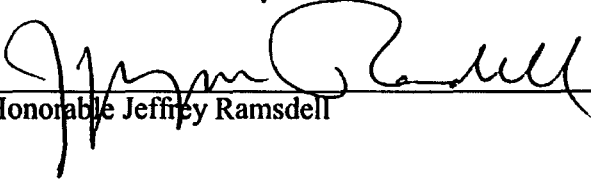
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Fax: (425) 392-7071

provided authority to the contrary

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DONE IN OPEN COURT this 15th day of April, 2013.


Honorable Jeffrey Ramsdell

Presented by:

KENYON DISEND, PLLC

By s/ Chris D. Bacha

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Attorneys for Defendant Cities of
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Kennewick, Kent, Lake Forest Park,
Longview, North Bend, Orting,
Pullman, Renton, Richland, Spokane,
Tukwila, Washougal, and West
Richland, and Defendant Town of
Hunts Point

Appendix F

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THE HONORABLE JEFFREY M. RAMSDELL

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF BOTHELL, et al.,
Defendants.

No. 12-2-15031-1 SEA

**STIPULATION AND ORDER
REGARDING DEFENDANT CITIES'
MOTION TO DROP THE MOVING
MISJOINED PARTIES**

I. STIPULATION

IT IS HEREBY STIPULATED between Plaintiff, New Cingular Wireless PCS LLC, and the Defendant Cities of Anacortes, Arlington, Bainbridge Island, Black Diamond, Bremerton, Buckley, Burien, Burlington, Carnation, Clyde Hill, Colfax, College Place, Dayton, Des Moines, East Wenatchee, Edmonds, Ellensburg, Ephrata, Federal Way, Fircrest, Gig Harbor, Issaquah, Kennewick, Kirkland, Lacey, Lakewood, Lynden, Lynnwood, Marysville, Medical Lake, Mercer Island, Milton, Moses Lake, Mount Vernon, Mountlake Terrace, Mukilteo, Napavine, Normandy Park, Oak Harbor, Okanogan, Olympia, Othello, Pacific, Port Townsend, Poulsbo, Prosser, Puyallup, Quincy, Redmond, Seattle, Shoreline, Spokane Valley, Sultan, Sumas, Sumner, University Place, Vancouver, Wenatchee, Wilbur, Woodinville, Woodland, Woodway and Yakima, (the "Stipulating Defendant Cities"), as follows:

*Stipulation and Order Regarding Defendant Cities'
Motion to Drop the Moving Misjoined Parties - 1*

HILLIS CLARK MARTIN & PETERSON P.S.
1221 Second Avenue, Suite 500
Seattle, Washington 98101-2925
Telephone: (206) 623-1745
Facsimile: (206) 623-7789

1 1. On about February 26, 2013, Defendant Cities of Algona, Auburn, Bellingham,
2 Cle Elum, Dupont, Duvall, Gold Bar, Kennewick, Kent, Lake Forest Park, Longview,
3 North Bend, Orting, Pullman, Renton, Richland, Spokane, Tukwila, Washougal, and
4 West Richland and the Town of Hunts Point (the "Moving Defendant Cities") filed their
5 Motion to Drop the Moving Misjoined Parties (the "Misjoinder Motion").

6 2. On March 14, 2013, the Court entered an order granting the Misjoinder Motion
7 (the "Misjoinder Order").

8 3. On about March 25, 2013, Plaintiff filed its Motion for Reconsideration or
9 Clarification of the Misjoinder Order.

10 4. On April 15, 2013, the Court entered its Order Denying Plaintiff's Motion for
11 Reconsideration or Clarification.

12 5. The Stipulating Defendant Cities have asserted that they are in the same
13 position as the Moving Defendant Cities.

14 6. In the interest of efficiencies for the parties and the Court, the Court may
15 consider the Stipulating Defendant Cities as having joined in the Misjoinder Motion in lieu of
16 the necessity of filing a new motion to drop the cities as misjoined parties, and the Court
17 likewise may consider Plaintiff's filings in opposition to the Misjoinder Motion in lieu of the
18 necessity of filing any new opposition papers.

19 7. The Stipulating Cities may present a proposed order to the Court based on this
20 Stipulation and Order. The proposed order shall be substantially the same as the Misjoinder
21 Order. The Court may consider the proposed order as if noted for consideration the day it is
22 presented.

23 8. Plaintiff expressly reserves its right to appeal all orders dropping defendants
24 who assert misjoinder, including but not limited to the Misjoinder Order, the Order Denying
25 Plaintiff's Motion for Reconsideration or Clarification, and any other order dropping a party
26 or parties as misjoined based on this stipulation.

27 //

28 //

*Stipulation and Order Regarding Defendant Cities'
Motion to Drop the Moving Misjoined Parties - 2*

HILLIS CLARK MARTIN & PETERSON P.S.
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1 DATED this 17th day of May, 2013.

2 HILLIS CLARK MARTIN & PETERSON P.S.

3 By s/ Michael R. Scott

4 Michael R. Scott, WSBA #12822

5 Sarah E. Moum, WSBA #42086

6 Holly D. Golden, WSBA #44404

7 Hillis Clark Martin & Peterson P.S.

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22 CERTIFICATE OF SERVICE

23 The undersigned certifies that on this day she caused a copy
24 of this document to be served via email to the last known
address of all counsel of record.

25 I certify under penalty of perjury under the laws of the state
26 of Washington and the United States that the foregoing is true
and correct.

27 DATED this 17th day of May, 2013, at Seattle, Washington.

28 s/ Suzanne Powers

*Stipulation and Order Regarding Defendant Cities'
Motion to Drop the Moving Misjoined Parties - 3*

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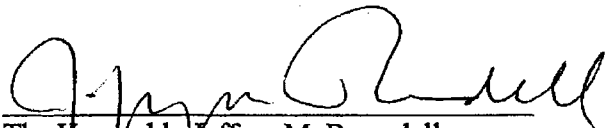
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II. ORDER

IT IS SO ORDERED.

DATED this 21st day of May, 2013.


The Honorable Jeffrey M. Ramsdell
King County Superior Court Judge

ND: 19994.002 4832-5740-3411v2

APPENDIX G

NEW CINGULAR'S RELATED CASES AGAINST WASHINGTON CITIES

PENDING IN STATE COURT

1. *New Cingular Wireless PCS LLC v. City of Bainbridge Island, Washington,*
Case No. 13-2-01515-5.
2. *New Cingular Wireless PCS LLC v. the City of Bellevue, Washington and the
City of Everett, Washington,* Case No. 12-2-34511-2-SEA
3. *New Cingular Wireless PCS LLC v. City of Bellingham, Washington,*
Case No. 13-2-01599-1
4. *New Cingular Wireless PCS LLC v. City of Bremerton, Washington,*
Case No. 13-2-01516-3
5. *New Cingular Wireless PCS LLC v. City of Issaquah, Washington,*
Case No. 13-2-25628-2 SEA
6. *New Cingular Wireless PCS LLC v. City of Lacey, Washington,*
Case No. 13-2-01453-7
7. *New Cingular Wireless PCS LLC v. City of Lakewood, Washington,*
Case Nos. 13-2-10900-5, 465035-II
8. *New Cingular Wireless PCS LLC v. City of Mercer Island, Washington,*
Case No. 13-2-25625-8 SEA
9. *New Cingular Wireless PCS LLC v. City of Moses Lake, Washington,*
Case No. 13-2-00900-1
10. *New Cingular Wireless PCS LLC v. City of Mount Vernon, Washington,*
Case No. 13-2-01192-4
11. *New Cingular Wireless PCS LLC v. City of Mukilteo, Washington,*
Case No. 13-2-06080-7
12. *New Cingular Wireless PCS LLC v. City of Olympia, Washington,*
Case No. 13-2-01454-5
13. *New Cingular Wireless PCS LLC v. City of Puyallup, Washington,*
Case No. 13-2-10901-3
14. *New Cingular Wireless PCS LLC v. City of Redmond, Washington,*
Case No. 13-2-25624-0 SEA

15. *New Cingular Wireless PCS LLC v. City of Vancouver, Washington*,
Case No. 13-2-02499-7
16. *New Cingular Wireless PCS LLC v. City of Woodinville, Washington*,
Case No. 13-2-25629-1 SEA
17. *New Cingular Wireless PCS LLC v. City of Yakima, Washington*,
Case No. 13-2-02245-1

PENDING IN FEDERAL COURT

1. *New Cingular Wireless PCS LLC v. City of Auburn, Washington*,
Case Nos. 13-2-23472-6 KNT, 2:13-cv-01309 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
2. *New Cingular Wireless PCS LLC v. City of Clyde Hill, Washington*,
Case Nos. 13-2-27778-6 SEA, 2:13-cv-01534 (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
3. *New Cingular Wireless PCS LLC v. City of Edmonds, Washington*,
Case Nos. 13-2-06078-5, 2:13-cv-01464 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
4. *New Cingular Wireless PCS LLC v. City of Federal Way, Washington*,
Case Nos. 13-2-25626-6 KNT, 2:13-cv-01398 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
5. *New Cingular Wireless PCS LLC v. City of Kennewick, Washington*,
Case Nos. 13-2-01581-9, 2:13-cv-05079-RHW (E.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.), 2:13-md-02485-JCC (W.D. Wash.)
6. *New Cingular Wireless PCS LLC v. City of Kent, Washington*,
Case Nos. 13-2-23471-8 KNT, 2:13-cv-01290 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
7. *New Cingular Wireless PCS LLC v. City of Kirkland, Washington*,
Case Nos. 13-2-25627-4 SEA, 2:13-cv-01436-RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
8. *New Cingular Wireless PCS LLC v. City of Longview, Washington*,
Case Nos. 13-2-00794-1 SEA, 3:13-cv-05611-RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)

9. *New Cingular Wireless PCS LLC v. City of Mountlake Terrace, Washington*,
Case Nos. 13-2-06079-3, 2:13-cv-01423 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
10. *New Cingular Wireless PCS LLC v. City of Pullman, Washington*,
Case Nos. 13-2-00141-0, 2:13-cv-05079-RHW (E.D. Wash.),
2:13-cv-02315-JCC (W.D. Wash.), 2:13-md-02485-JCC (W.D. Wash.)
11. *New Cingular Wireless PCS LLC v. City of Renton, Washington*,
Case Nos. 13-2-23470-0 KNT, 2:13-cv-01283-RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
12. *New Cingular Wireless PCS LLC v. City of Richland, Washington*,
Case Nos. 13-2-01582-7, 2:13-cv-05085-RHW (E.D. Wash.),
2:13-cv-02320-JCC (W.D. Wash.); 2:13-md-02485-JCC (W.D. Wash.)
13. *New Cingular Wireless PCS LLC v. City of Spokane, Washington*,
Case Nos. 13-2-02500-5, 2:13-cv-00275-TOR (E.D. Wash.),
2:13-cv-02316-JCC (W.D. Wash.), 2:13-md-02485-JCC (W.D. Wash.)
14. *New Cingular Wireless PCS LLC v. City of Spokane Valley, Washington*,
Case Nos. 13-2-02772-5, 2:13-cv-00307-JLQ (E.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
15. *New Cingular Wireless PCS LLC v. City of Tukwila, Washington*,
Case Nos. 13-2-23469-6 KNT, 2:13-cv-01287 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
16. *New Cingular Wireless PCS LLC v. City of University Place, Washington*,
Case Nos. 13-2-10903-0, 3:13-cv-05694 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)
17. *New Cingular Wireless PCS LLC v. City of West Richland, Washington*,
Case Nos. 13-2-01583-5, 2:13-cv-05082-RHW (E.D. Wash.),
2:13-cv-02319-JCC (W.D. Wash.); 2:13-md-02485-JCC (W.D. Wash.)

APPENDIX H

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: NEW CINGULAR WIRELESS, PCS, LLC
DATA SERVICES SALES TAX REFUND
LITIGATION**

MDL No. 2485

TRANSFER ORDER

Before the Panel:* Common plaintiff New Cingular Wireless PCS LLC (Cingular) has moved, pursuant to 28 U.S.C. § 1407, for coordinated or consolidated pretrial proceedings of this litigation in the Western District of Washington. Defendants in three Western District of Washington actions do not oppose the motion. The remaining defendants agree that centralization in the Western District of Washington is appropriate for purposes of determining liability, but they oppose centralization for purposes of determining damages.

This litigation currently consists of seventeen actions listed on Schedule A and pending in two districts, eleven actions in the Western District of Washington and six actions in the Eastern District of Washington.

On the basis of the papers filed and hearing session held, we find that these actions involve common questions of fact, and that centralization under Section 1407 in the Western District of Washington will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation. These actions share factual questions relating to allegations that Cingular is owed refunds from the defendant cities for the overpayment of taxes on internet access data services that Cingular claims was the result of a coding error. Centralization will eliminate duplicative discovery; prevent inconsistent pretrial rulings; and conserve the resources of the parties, their counsel, and the judiciary.

Several defendants request centralization for purposes of determining liability only, and not for purposes of determining damages. The extent to which pretrial proceedings are coordinated or consolidated in the transferee court, however, is best addressed by the transferee judge. *See In re: Mut. Funds Inv. Litig.*, 310 F. Supp. 2d 1359, 1361 (J.P.M.L. 2004). *See also In re: Sundstrand Data Control, Inc. Patent Litig.*, 443 F. Supp. 1019, 1021 (J.P.M.L. 1978) (“[T]he Panel has neither the power nor the inclination to dictate in any way the manner in which the coordinated or consolidated pretrial proceedings are to be conducted by the transferee judge.”).

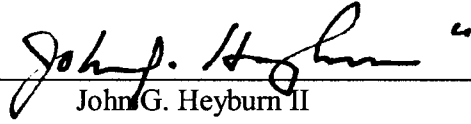
* Judge Marjorie O. Rendell did not participate in the disposition of this matter.

-2-

The Western District of Washington is the most appropriate transferee forum. All parties support centralization in that district and the majority of the actions are pending there, all before Judge John C. Coughenour.

IT IS THEREFORE ORDERED that pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A are transferred to the Western District of Washington and, with the consent of that court, assigned to the Honorable John C. Coughenour for coordinated or consolidated pretrial proceedings in that district.

PANEL ON MULTIDISTRICT LITIGATION



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Chairman

Paul J. Barbadoro
Lewis A. Kaplan
Ellen Segal Huvelle

Charles R. Breyer
Sarah S. Vance

**IN RE: NEW CINGULAR WIRELESS, PCS, LLC
DATA SERVICES SALES TAX REFUND
LITIGATION**

MDL No. 2485

SCHEDULE A

Eastern District of Washington

New Cingular Wireless PCS LLC v. City of Pullman, Washington, C.A. No. 2:13-00267
New Cingular Wireless PCS LLC v. City of Spokane, Washington, C.A. No. 2:13-00275
New Cingular Wireless PCS LLC v. City of Spokane Valley, Washington,
C.A. No. 2:13-00307
New Cingular Wireless PCS LLC v. City of Kennewick, Washington,
C.A. No. 2:13-05079
New Cingular Wireless PCS LLC v. City of West Richland, Washington,
C.A. No. 2:13-05082
New Cingular Wireless PCS LLC v. City of Richland, Washington, C.A. No. 2:13-05085

Western District of Washington

New Cingular Wireless PCS LLC v. City of Renton, Washington, C.A. No. 2:13-01283
New Cingular Wireless PCS LLC v. City of Tukwila, Washington, C.A. No. 2:13-01287
New Cingular Wireless PCS LLC v. City of Kent, Washington, C.A. No. 2:13-01290
New Cingular Wireless PCS LLC v. City of Auburn, Washington, C.A. No. 2:13-01309
New Cingular Wireless PCS LLC v. The City of Federal Way, Washington,
C.A. No. 2:13-01398
New Cingular Wireless PCS LLC v. City of Mountlake Terrace, Washington,
C.A. No. 2:13-01423
New Cingular Wireless PCS LLC v. City of Kirkland, Washington, C.A. No. 2:13-01436
New Cingular Wireless PCS LLC v. The City of Edmonds, Washington,
C.A. No. 2:13-01464
New Cingular Wireless PCS LLC v. City of Clyde Hill, Washington,
C.A. No. 2:13-01534
New Cingular Wireless PCS LLC v. City of Longview, Washington,
C.A. No. 3:13-05611
New Cingular Wireless PCS LLC v. City of University Place, Washington,
C.A. No. 3:13-05694

APPENDIX I

NEW CINGULAR'S RELATED CASES AGAINST WASHINGTON CITIES

Statute of Limitations Defenses Raised and Orders to Stay

PENDING IN STATE COURT

1. *New Cingular Wireless PCS LLC v. City of Bainbridge Island, Washington*, Case No. 13-2-01515-5 (Answer (Dkt. # 6), Order to Stay (Dkt. # 8)).
2. *New Cingular Wireless PCS LLC v. the City of Bellevue, Washington and the City of Everett, Washington*, Case No. 12-2-34511-2-SEA (Bellevue Answer (Dkt. # 28), Everett Answer (Dkt. # 29), Order to Stay (Dkt. # 57)).
3. *New Cingular Wireless PCS LLC v. City of Bellingham, Washington*, Case No. 13-2-01599-1 (Answer (Dkt. #6)).
4. *New Cingular Wireless PCS LLC v. City of Bremerton, Washington*, Case No. 13-2-01516-3 (Answer (Dkt. # 5), Order to Stay (Dkt. # 7)).
5. *New Cingular Wireless PCS LLC v. City of Issaquah, Washington*, Case No. 13-2-25628-2 SEA (Answer (Dkt. # 9), Order to Stay (Dkt. #12)).
6. *New Cingular Wireless PCS LLC v. City of Lacey, Washington*, Case No. 13-2-01453-7 (Answer (Dkt. # 10), Order to Stay (Dkt. # 38)).
7. *New Cingular Wireless PCS LLC v. City of Lakewood, Washington*, Case Nos. 13-2-10900-5, 465035-II (Answer (Dkt. # 10)).
8. *New Cingular Wireless PCS LLC v. City of Mercer Island, Washington*, Case No. 13-2-25625-8 SEA (Answer (Dkt. # 8), Order to Stay (Dkt. #12)).
9. *New Cingular Wireless PCS LLC v. City of Moses Lake, Washington*, Case No. 13-2-00900-1 (Answer (Dkt. # 4), Order to Stay (Dkt. #10)).
10. *New Cingular Wireless PCS LLC v. City of Mount Vernon, Washington*, Case No. 13-2-01192-4 (Answer (Dkt. # 5), Order to Stay (Dkt. # 6)).
11. *New Cingular Wireless PCS LLC v. City of Mukilteo, Washington*, Case No. 13-2-06080-7 (Answer (Dkt. # 5), Order to Stay (Dkt. # 7)).
12. *New Cingular Wireless PCS LLC v. City of Olympia, Washington*, Case No. 13-2-01454-5 (Answer (Dkt. # 9), Order to Stay (Dkt. # 18)).
13. *New Cingular Wireless PCS LLC v. City of Puyallup, Washington*, Case No. 13-2-10901-3 (Answer (Dkt. # 9), Order to Stay (Dkt. # 20)).

14. *New Cingular Wireless PCS LLC v. City of Redmond, Washington*,
Case No. 13-2-25624-0 SEA (Answer (Dkt. # 8), Order to Stay (Dkt. # 10)).
15. *New Cingular Wireless PCS LLC v. City of Vancouver, Washington*,
Case No. 13-2-02499-7 (Answer (Dkt. # 6), Stipulation and Proposed Order to Stay filed on Sept. 15, 2014.)
16. *New Cingular Wireless PCS LLC v. City of Woodinville, Washington*,
Case No. 13-2-25629-1 SEA (Answer (Dkt. # 9), Order to Stay (Dkt. # 12)).
17. *New Cingular Wireless PCS LLC v. City of Yakima, Washington*,
Case No. 13-2-02245-1 (Answer (Dkt. # 5)).

PENDING IN FEDERAL COURT

The Order to Stay for the following cases is Dkt. # 8 in the MDL proceeding, Case No. 2:13-md-02485-JCC (W.D. Wash.). The citation for the cities' statute of limitations defense is identified in their most recently filed Answer.

1. *New Cingular Wireless PCS LLC v. City of Auburn, Washington*,
Case Nos. 13-2-23472-6 KNT, 2:13-cv-01309 RAJ (W.D. Wash.)
(Answer (Dkt. # 19)), 2:13-md-02485-JCC (W.D. Wash.)
2. *New Cingular Wireless PCS LLC v. City of Clyde Hill, Washington*,
Case Nos. 13-2-27778-6 SEA (Answer (Dkt. # 8)),
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3. *New Cingular Wireless PCS LLC v. City of Edmonds, Washington*,
Case Nos. 13-2-06078-5, 2:13-cv-01464 RAJ (W.D. Wash.),
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The City of Edmonds has not filed an Answer in its currently pending cases, but did raise a statute of limitations defense when it was joined in this case. Case No. 12-2-15031-1 (Dkt. # 584).

4. *New Cingular Wireless PCS LLC v. City of Federal Way, Washington*,
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5. *New Cingular Wireless PCS LLC v. City of Kennewick, Washington*,
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2:13-cv-02318-JCC (W.D. Wash.) (Answer (Dkt. # 16)),
2:13-md-02485-JCC (W.D. Wash.)

6. *New Cingular Wireless PCS LLC v. City of Kent, Washington*,
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7. *New Cingular Wireless PCS LLC v. City of Kirkland, Washington*,
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8. *New Cingular Wireless PCS LLC v. City of Longview, Washington*,
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9. *New Cingular Wireless PCS LLC v. City of Mountlake Terrace, Washington*,
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(Answer (Dkt. # 19)), 2:13-md-02485-JCC (W.D. Wash.)
10. *New Cingular Wireless PCS LLC v. City of Pullman, Washington*,
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11. *New Cingular Wireless PCS LLC v. City of Renton, Washington*,
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12. *New Cingular Wireless PCS LLC v. City of Richland, Washington*,
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2:13-cv-02320-JCC (W.D. Wash.) (Answer (Dkt. # 15)),
2:13-md-02485-JCC (W.D. Wash.)
13. *New Cingular Wireless PCS LLC v. City of Spokane, Washington*,
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2:13-cv-02316-JCC (W.D. Wash.) (Answer (Dkt. # 15)),
2:13-md-02485-JCC (W.D. Wash.)
14. *New Cingular Wireless PCS LLC v. City of Spokane Valley, Washington*,
Case Nos. 13-2-02772-5, 2:13-cv-00307-JLQ (E.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)

The City of Spokane Valley has not filed an Answer in its currently pending cases, but did raise a statute of limitations defense when it was joined in this case. Case No. 12-2-15031-1 (Dkt. # 578)

15. *New Cingular Wireless PCS LLC v. City of Tukwila, Washington*,
Case Nos. 13-2-23469-6 KNT, 2:13-cv-01287 RAJ (W.D. Wash.),
(Answer (Dkt. # 18)), 2:13-md-02485-JCC (W.D. Wash.)
16. *New Cingular Wireless PCS LLC v. City of University Place, Washington*,
Case Nos. 13-2-10903-0, 3:13-cv-05694 RAJ (W.D. Wash.),
2:13-md-02485-JCC (W.D. Wash.)

The City of University Place has not filed an Answer in its currently pending cases, but did raise a statute of limitations defense when it was joined in this case.

Case No.12-2-15031-1 (Dkt. # 242)

17. *New Cingular Wireless PCS LLC v. City of West Richland, Washington*,
Case Nos. 13-2-01583-5, 2:13-cv-05082-RHW (E.D. Wash.),
2:13-cv-02319-JCC (W.D. Wash.) (Answer (Dkt. # 14)),
2:13-md-02485-JCC (W.D. Wash.)

APPENDIX J

THE HONORABLE CATHERINE D. SHAFFER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF REDMOND, WASHINGTON;

Defendant.

No. 13-2-25624-0 SEA

**STIPULATION AND ~~PROPOSED~~
ORDER TO STAY LITIGATION**

[CLERK'S ACTION REQUIRED]

Stipulation and Order to Stay Litigation - 1

ORIGINAL

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I. STIPULATION

The parties, by and through their respective counsel, stipulate that:

1. The appeal in *New Cingular Wireless PCS LLC v. The City of Bothell, et al.*, Case Nos. 12-2-15031-1 SEA, 70810-4-I (the "**Bothell appeal**"), is relevant to the claims and defenses in this case.
2. Resolution of the *Bothell* appeal may control or guide issues of law that apply to Plaintiff's case against Defendant.
3. A stay of all discovery, discovery deadlines, motions and the trial date in this case pending resolution of the *Bothell* appeal would prudently conserve the resources of the parties and the court.
4. Pending final and non-appealable resolution of the *Bothell* appeal, all discovery, discovery deadlines, motions and the trial date in this case should be stayed pursuant to this Stipulation and Order. Upon notification by the parties that the *Bothell* appeal is resolved, the Court will set a new case schedule, if required.
5. The duration of the stay shall be excluded from any prejudgment interest calculation.
6. The parties reserve the right to bring any and all relevant motions in the future, after the stay is lifted.
7. The parties do not waive any motions or defenses as a result of entering into this Stipulation.

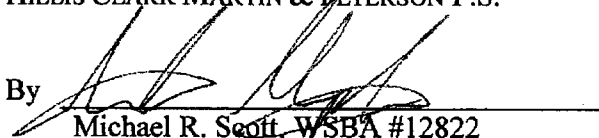
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IT IS SO STIPULATED.

Respectfully submitted this 30th day of April, 2014.

HILLIS CLARK MARTIN & PETERSON P.S.

By

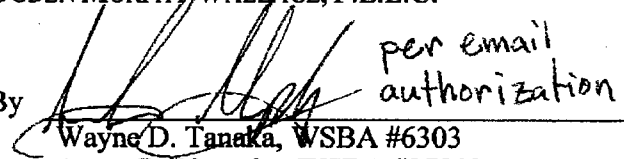


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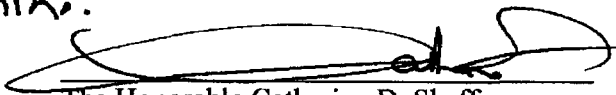
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II. ORDER

IT IS SO ORDERED.

The parties are to update the Court in 6 months.

Date: May 5, 2014



The Honorable Catherine D. Shaffer
King County Superior Court Judge

ND: 19994.002 4819-5058-8186v1

APPENDIX K

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF LAKEWOOD, WASHINGTON;

Defendant.

No. 13-2-10900-5

**PLAINTIFF'S RESPONSE TO
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Plaintiff's Response to Motion to Dismiss - iii

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1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 Federal and state laws prohibit taxation of Internet access. New Cingular Wireless
3 inadvertently collected and remitted utility tax payments on Internet access, which resulted in
4 overpaying the taxes owed to Lakewood and other taxing jurisdictions. New Cingular
5 customers initiated several class actions across the country to recover those overpayments.
6 Those class action lawsuits were consolidated into a single proceeding, and then settled.
7 Pursuant to the court-approved settlement, New Cingular filed tax refund claims with many
8 taxing jurisdictions, including Lakewood, to recover the overpayments on behalf of its
9 customers. Although New Cingular offered resources to aid in processing the claim and
10 requested updates from Lakewood, the city ignored New Cingular's claim for 18 months.
11 When New Cingular filed suit in superior court to enforce its rights, Lakewood waited one
12 month and then finally responded to New Cingular's claim with a perfunctory denial.
13 Lakewood now seeks to dismiss this action because New Cingular did not abandon its
14 pending court case and pursue Lakewood's administrative appeal process.

15 The Court should deny Lakewood's motion, because its failure to fairly process the
16 refund claim wrongfully deprived New Cingular of meaningful access to the city's
17 administrative procedures. Lakewood should not be allowed to ignore New Cingular's claim
18 for well over a year, and then, after New Cingular sought to enforce its rights, force New
19 Cingular out of court and back into the city's flawed administrative process. New Cingular
20 did all that it was required to do by pursuing an administrative remedy, and then filing suit
21 when Lakewood did not respond. The exhaustion doctrine does not bar New Cingular's case.

22 The Court should also find that New Cingular's filing of the claim equitably tolled the
23 statute of limitations because the filing satisfied all the statute of limitations predicates and

1 Lakewood's defense is not prejudiced in any way. However, with respect to the statute of
2 limitations issue, New Cingular requests the Court enter a stay of proceedings in this case
3 pending final and non-appealable resolution of the appeal in *New Cingular Wireless PCS LLC*
4 *v. The City of Bothell, et al.*, Case Nos. 12-2-15031-1 SEA, 70810-4-I, (the "**Bothell**
5 **appeal**"). The *Bothell* appeal involves the same underlying law and facts, and the same statute
6 of limitations defense. Final resolution of the *Bothell* appeal would either inform or bind this
7 Court's decision. A stay here would efficiently conserve judicial and party resources by
8 avoiding unnecessary and duplicative litigation.

9 II. STATEMENT OF ISSUES

10 1. Should Lakewood be able to assert New Cingular's failure to exhaust as an
11 affirmative defense when Lakewood failed to respond to New Cingular's claim for 18 months
12 and waited to issue a denial until one month after New Cingular filed suit in superior court?

13 2. Should the Court find New Cingular's filing of the tax refund claim with
14 Lakewood equitably tolled the statute of limitations where the filing promptly and fairly
15 appraised Lakewood of the claim and satisfied the purposes of the statute of limitations?

16 3. In the interest of judicial economy and preserving court and party resources,
17 should this case be stayed pending resolution of the *Bothell* appeal?

18 III. EVIDENCE RELIED UPON

19 New Cingular relies on the Declarations of David Spradlin, Linda A. Fisher, and
20 Michael R. Scott in opposition to the Motion to Dismiss, with attached exhibits, including
21 excerpts from the deposition transcript of Choi Halladay, and on the papers and pleadings
22 filed in this action and the *Bothell* action.

1 **IV. STATEMENT OF FACTS**

2 **A. NEW CINGULAR COLLECTED LAKEWOOD’S UTILITY TAX FROM ITS**
3 **CUSTOMERS AND REMITTED THE TAX TO LAKEWOOD.**

4 Lakewood, like many taxing jurisdictions, imposes a utility tax on telephone
5 businesses, including New Cingular. Lakewood Municipal Code (“LMC”) 3.52.050(C). New
6 Cingular passes that utility tax through to its Lakewood customers by collecting a monthly
7 utility fee and remitting it to Lakewood. During the period at issue, New Cingular
8 inadvertently collected and remitted a tax not only on telephone services, but also on Internet
9 access. Spradlin Dec. ¶ 7. While the law permits utilities to pass through valid utility taxes to
10 their customers,¹ state and federal laws prohibit taxation of Internet access. 47 U.S.C. § 151
11 (1998), as amended; RCW 35.21.717.

12 **B. THE ADVENT OF “SMART PHONES” CAUSED NEW CINGULAR TO EVOLVE INTO**
13 **A CELLULAR TELEPHONE BUSINESS THAT OFFERED INTERNET ACCESS**
14 **SERVICES.**

15 AT&T Mobility (“ATTM”) and its affiliates, including New Cingular, began as
16 cellular telephone companies that did not offer Internet access services. Spradlin Dec. ¶ 3.
17 Before the iPhone, New Cingular mainly provided services through basic cellular phones. *Id.*
18 The introduction of the iPhone in June 2007 significantly increased sales of wireless Internet
19 access services. *Id.* ¶¶ 6–7. The iPhone and other so-called “smart phones” enhanced and
20 simplified customers’ ability to access the Internet. *Id.* ¶ 6.

21 The tax payments at issue relate to ATTM’s complex billing systems. ATTM sells
22 Internet access data services plans for smart phones, other wireless devices, laptop
23 connectivity data plans, and also sells such services on a pay-per-use basis (collectively,

¹ Washington law permits a utility to “pass on the tax it owes” to its customers. *Sprint Spectrum L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 346–47, 127 P.3d 755 (2006).

1 “Internet Access Services”). Fisher Dec. ¶ 6. Internet Access Services are sold under
2 different names and formats, and with corresponding different billing codes, that vary
3 depending on the plan the customer desires and the device(s) the customer will use. *Id.* ¶ 7.

4 C. NEW CINGULAR DISCOVERED THAT IT COLLECTED TAXES ON INTERNET
5 ACCESS SERVICES AFTER ITS CUSTOMERS FILED CLASS ACTION LAWSUITS
6 ACROSS THE COUNTRY.

6 In February 2010, customers in Washington and around the country sued ATTM and
7 its affiliates, including New Cingular, to recover taxes collected and remitted on Internet
8 access, including utility taxes remitted to Lakewood. *See In re AT & T Mobility Wireless Data*
9 *Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 939 (N.D. Ill. 2011) (the “Federal
10 Proceedings”). The United States Judicial Panel on Multidistrict Litigation consolidated the
11 class action lawsuits into one proceeding. *Id.*

12 In response to the Federal Proceedings, ATTM conducted lengthy and thorough
13 evaluations of its billing codes in early 2010. Fisher Dec. ¶ 8. Through this process, ATTM
14 determined that, as new services had evolved to meet the needs of smart-phone customers,
15 taxes had inadvertently been collected on unbundled Internet Access Services and remitted to
16 taxing jurisdictions, including Lakewood. Spradlin Dec. ¶ 7. In August 2010, ATTM’s
17 systems were reprogrammed to correct the billing code errors. *Id.*

18 The parties to the Federal Proceedings eventually reached a settlement, which was
19 reviewed and approved by the court. *AT & T*, 789 F. Supp. 2d at 939. As part of the
20 settlement, ATTM agreed to seek refunds from the taxing jurisdictions that received the taxes
21 on Internet access, and return the refunded taxes to the class members (the “Settlement
22 Class”). *Id.* at 940–41. ATTM agreed to pay the significant costs involved in seeking the
23 refunds and notifying the class. *Id.* at 941. New Cingular assigned its rights in any refunded

1 amounts to the Settlement Class. *Id.* at 943. When Washington taxing jurisdictions issue a tax
2 refund or credit, New Cingular deposits the money directly into escrow accounts for the
3 benefit of the Washington plaintiffs in the Settlement Class (the “Washington Class”), which
4 includes New Cingular customers in Lakewood. *See Id.* at 940.

5 **D. NEW CINGULAR SUBMITTED A DETAILED REFUND REQUEST TO LAKEWOOD**
6 **IN ACCORDANCE WITH THE COURT-APPROVED CLASS ACTION SETTLEMENT.**

7 Having evaluated and reprogrammed its systems to prevent billing for taxes on
8 unbundled Internet Access Services, ATTM set to work filing refund claims on behalf of the
9 Settlement Class. Fisher Dec. ¶ 11. New Cingular contacted Lakewood on June 17, 2010 to
10 determine the city’s required refund application format and procedure. Scott Dec. Ex. A.
11 Assistant City Attorney Mike McKenzie responded in a July 12, 2010 email, and stated “A
12 request for a utility tax refund must follow the procedure stated in LMC 3.52.150.” *Id.* That
13 provision does not specify a required form or procedure for filing refund claims, but it does
14 obligate the city to refund any excess taxes paid in error:

15 Any money paid to the City through error, or otherwise not in payment of the
16 tax imposed by this Chapter, or in excess of such tax, shall, upon the request of
17 the taxpayer, be credited against any tax due or to become due from such
18 taxpayer hereunder, or, upon the taxpayer ceasing to do business in the City, be
19 refunded to the taxpayer.

20 LMC 3.52.150.

21 Although the city failed to offer guidance on how to request a tax refund or what
22 information to submit, New Cingular filed a refund claim with Lakewood and other taxing
23 jurisdictions on or about November 1, 2010. Fisher Dec. Ex. A. Without guidance from
Lakewood, and in an effort to submit a thoroughly supported claim, New Cingular provided
the information that the Washington Administrative Code requires for tax refunds. *See id.*;

1 WAC 458-20-229. New Cingular's refund claim included the taxpayer's name and tax
2 identification number, the amount of the claim, the tax type and taxable period, the basis for
3 the claim, and the signature of the taxpayer's representative. Fisher Dec. Ex. A. The refund
4 claim also included a detailed statement that summarized the legal and factual bases for the
5 overpayment and refund request. *Id.* In addition to these items, the refund claim included
6 spreadsheets with billing data that verified the requested refund amount. *Id.* ¶ 11. These
7 spreadsheets were sent to Lakewood as encrypted files on a DVD, with the password
8 following in a separate letter. Halladay Dep. 47:23-24; 48:21-22

9 **E. LAKEWOOD'S GENERAL PRACTICE FOR PROCESSING REFUND CLAIMS**
10 **INVOLVES REQUESTING NECESSARY INFORMATION FROM THE TAXPAYER.**

11 Lakewood has a "general practice" for processing utility tax refund requests. Halladay
12 Dep. 42:14-16. The finance department receives the application, the Assistant City Manager
13 of Administration then gathers information to analyze and evaluate the claim, and then the
14 Assistant City Manager consults with the city legal department to decide whether to grant the
15 refund. *Id.* 42:17-19; 43:14-21. During the time at issue, the Assistant City Manager was
16 Choi Halladay, who was also the city official designated to construe, interpret, administer and
17 enforce the tax code. *Id.* 22:16-20.

18 Lakewood followed its general practice with the only other utility tax refund request it
19 has received, which was filed by Cost Management Services. *Id.* 33:1-17. There, the finance
20 department received the claim, and Halladay analyzed the submitted data. *Id.* 35:14-24.
21 Halladay then contacted Cost Management's attorney to request additional clarifying
22 information. *Id.* 36:7-11. Halladay received and analyzed 50 to 60 pages of information
23 before sending a letter intended to deny the claim. *Id.* 36:12-25. The entire process, from

1 filing the claim to sending the letter, took six months. *Cost Mgmt. Servs., Inc. v. City of*
2 *Lakewood*, 178 Wn.2d 635, 638, 310 P.3d 804 (2013) (hereinafter “*CMS*”)

3 **F. LAKEWOOD “DIDN’T DO A HECK OF A LOT” TO PROCESS NEW CINGULAR’S**
4 **REFUND CLAIM.**

5 Lakewood did not follow the same general practice with New Cingular’s claim.
6 Instead, Lakewood’s legal department received the refund claim on November 12, 2010, and
7 also received the data DVD and password within the following two weeks. Fisher Dec. Ex. A;
8 Halladay Dep. 47:23-24; 48:21-22. Halladay did not begin analyzing the data until February
9 2011, when he and McKenzie reviewed the data together for one hour. *Id.* 67:14-19. The two
10 found the data confusing, so McKenzie was charged with contacting New Cingular to obtain
11 clarifying information. *Id.* 50:17-20. But he never did. In fact, the only communication
12 Lakewood ever had with New Cingular was McKenzie’s July 2010 email. Scott Dec. Ex. B
(response to Interrogatory 8).

13 The city “didn’t do a heck of a lot more” to process the application for more than a
14 year. Halladay Dep. 50:23. During the summer of 2011, Halladay had two or three sessions
15 where he looked at the data for thirty minutes to one hour. *Id.* 51:10-17. He never attempted
16 to contact New Cingular like he did Cost Management. *Id.* 62:16-18. Halladay also did not
17 ask McKenzie about whether he had contacted New Cingular nor encourage him to do so.
18 *Id.* 53:6-12.

19 New Cingular sent a follow-up letter to Lakewood in January of 2012, requesting a
20 status update regarding the refund claim. Scott Dec. Ex. C. As identified in the letter, New
21 Cingular understood that processing the refund claim could take time and effort. *Id.* In fact,
22 New Cingular had assisted other Washington cities in processing refund claims and had staff
23

1 dedicated to answer technical questions and provide additional information upon request—the
2 same people who would have assisted McKenzie or Halladay had they contacted New
3 Cingular. Fisher Dec. ¶ 12. However, as of January 2012, New Cingular had not received any
4 kind of response from Lakewood. *Id.* ¶ 13.

5 **G. LAKEWOOD FAILED TO RESPOND TO THE REFUND CLAIM, SO NEW CINGULAR
6 FILED SUIT IN COURT.**

7 Due to the lack of responsiveness from Lakewood and other cities, New Cingular filed
8 its initial complaint on April 25, 2012. New Cingular brought suit against multiple Washington
9 cities, including Lakewood, as a single action in King County. Scott Dec. ¶ 4. New Cingular
10 sought, among other things, a declaration of its rights to a refund and restitution of the unjustly
11 retained taxes.

12 At the time of filing, Washington law did not require New Cingular to exhaust
13 administrative remedies before filing suit in court because of the concurrent original jurisdiction
14 doctrine. The doctrine recognized that superior courts have original jurisdiction in cases
15 involving the “legality of any tax.” Const. art. IV, § 6. Because the trial court shared original
16 jurisdiction with Lakewood over the tax refund claim, the trial court did not operate in an
17 appellate capacity, and administrative exhaustion requirements did not apply. *Qwest Corp. v.*
18 *City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007), *disagreed with by CMS*,
19 178 Wn.2d 635. In other words, at the time New Cingular filed its refund claim, the law allowed
20 New Cingular to bypass the city’s administrative process and file suit directly in court.

21 **H. LAKEWOOD WAITED UNTIL ONE MONTH AFTER NEW CINGULAR FILED SUIT
22 TO DENY THE REFUND CLAIM.**

23 New Cingular’s lawsuit finally spurred Lakewood into action. The lawsuit made
Halladay realize that the city “needed to do something rather than continue to wait.” Halladay

1 Dep. 87:18-19. So Halladay finally asked McKenzie if he had obtained clarifying information
2 from New Cingular—nearly 18 months after receiving the claim and 14 months after realizing
3 the city should ask for help. *Id.* 53:6-12. Of course, because he never even tried contacting
4 New Cingular, McKenzie had nothing to offer. *Id.* 62:13-15. Halladay then began processing
5 the claim by analyzing the municipal tax code. *Id.* 56:2-16. Halladay decided in May 2012 to
6 deny New Cingular’s claim on the purported basis that Internet access taxes were due under
7 the code. *Id.* 68:9-69:7. The Legal Department then prepared a Notice and Order denying the
8 claim, which Halladay signed on May 25, 2012—exactly one month after New Cingular filed
9 suit. Fisher Dec. Ex. B. Halladay admitted that New Cingular’s lawsuit motivated the city to
10 deny its claim. Halladay Dep. 88:5-7.

11 New Cingular supplemented and reduced the refund claims filed with Lakewood and
12 other taxing jurisdictions nationwide by letter dated June 15, 2012. Fisher Dec. ¶ 14, Ex. C.
13 The letter identified certain minor adjustments to the refund amount, identified through New
14 Cingular’s interactions with taxing jurisdictions, which reduced the total refund claim by less
15 than five percent. *Id.*

16 **I. THE *BOTHELL* COURT EQUITABLY TOLLED THE STATUTE OF LIMITATIONS.**

17 The *Bothell* trial court decided that the defendant-cities in the original action should not
18 be joined in one action, and signed an order dismissing Lakewood on June 12, 2013. Scott
19 Dec. ¶ 4. Bothell was not dismissed from the action because it was the first-named city located
20 in King County. *Id.* New Cingular then brought this action against Lakewood on July 10, 2013.

21 New Cingular continued pursuing its claims against Lakewood, Bothell, and other
22 Washington municipalities in separate actions across the state. Bothell filed a Motion for Partial
23 Summary Judgment on July 5, 2013. *Id.* ¶ 5. Like Lakewood, Bothell argued that the statute of

1 limitations was not tolled until New Cingular filed its complaint, and that much of the refund
2 claim was time barred. *Id.* As in this case, New Cingular responded that the statute of
3 limitations should be equitably tolled upon filing the refund claim with the city in
4 November 2010. *Id.* ¶ 5. The court agreed with New Cingular that the doctrine of equitable
5 tolling applied to these circumstances, and denied Lakewood’s motion in an order dated
6 August 2, 2013. *Id.* Ex. D. The court then certified the issue for discretionary interlocutory
7 review, and Division I of the Court of Appeals accepted review. *Id.* ¶ 6. The parties completed
8 their briefing in March 2014, and are awaiting an oral argument date. *Id.*

9 **J. THE SUPREME COURT CLARIFIED THE RULE THAT ALLOWED PLAINTIFFS TO**
10 **PURSUE TAX REFUND CLAIMS IN SUPERIOR COURT WITHOUT EXHAUSTING**
11 **ADMINISTRATIVE REMEDIES.**

12 While the parties continued litigating, and more than one year after New Cingular filed
13 suit in the original action, the Washington Supreme Court decided *CMS*, 178 Wn.2d 635.
14 In holding that Cost Management was not obligated to exhaust administrative remedies because
15 Lakewood, and Halladay in particular, never directly responded to the refund claim, the Court
16 distinguished the procedural nature of exhaustion from jurisdictional requirements:

17 The exhaustion doctrine has no bearing on the jurisdiction of the court in terms
18 of the constitutional power of the court to hear a case.... A superior court’s
19 original jurisdiction over a claim does not relieve it of its responsibility to
20 consider whether exhaustion should apply to the particular claim before the
21 court.

22 *Id.* at 648 (emphasis added). The Court acknowledged the *Qwest* decision suggested
23 exhaustion was not required for utility tax refund claims, which was “potentially confusing.”

Id. at 645. *CMS* did not address equitable tolling.

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V. AUTHORITY

Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832–33, 100 P.3d 791 (2004). The party moving for summary judgment has the burden of proving by uncontroverted facts that no genuine issue exists. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977). All material evidence and all reasonable inferences are construed most favorably to the nonmoving party. *Id.*

Unlike Lakewood, New Cingular did all that it was required to: it pursued an administrative remedy with the city and then filed suit when Lakewood would not respond. The Supreme Court has already approved of that exact course of action when dealing with Lakewood’s utility tax refund process. *CMS*, 178 Wn.2d at 644. Lakewood ignored New Cingular’s refund claim for more than a year and waited until New Cingular was already in court to issue its denial. That wrongful deprivation of access to Lakewood’s administrative process means the exhaustion doctrine does not bar New Cingular’s case.

Lakewood also asks the Court to find that most of New Cingular’s claims fall outside the statute of limitations. As in the *Bothell* case, the doctrine of equitable tolling should be invoked to toll the statute of limitations as of the date of New Cingular’s tax refund application. Rather than resolving the statute of limitations issue, however, the Court should stay this case pending the outcome of the *Bothell* appeal to avoid a duplicative, parallel, nearly identical proceeding.

A. LAKEWOOD’S FAILURE TO RESPOND TO THE REFUND CLAIM UNTIL AFTER NEW CINGULAR FILED SUIT OBVIATES THE EXHAUSTION REQUIREMENT.

Contrary to Lakewood’s assertion, exhaustion is not always required simply because administrative procedures exist. *Smoke v. City of Seattle*, 132 Wn.2d 214, 224–25, 937 P.2d

1 186 (1997) (identifying several exceptions to exhaustion); *see also* RCW 34.05.534(2)
2 (same). Although Washington law has a strong bias toward requiring exhaustion, courts
3 excuse the failure to exhaust when the defendant does not properly respond to the plaintiff's
4 claim or the defendant wrongfully deprives the plaintiff of meaningful access to the
5 administrative process. Both exceptions apply to New Cingular, so Lakewood's motion
6 should be denied.

7 **1. New Cingular exhausted its available administrative remedies by**
8 **filing a claim with Lakewood and waiting 18 months for the city to**
9 **respond before filing suit.**

9 The Supreme Court has already recognized that Lakewood's inadequate processing of
10 utility tax refunds obviates the exhaustion requirement. *CMS*, 178 Wn.2d at 645. In *CMS*,
11 Cost Management filed a tax refund claim with Lakewood and, after Halladay processed the
12 claim in six months, Lakewood responded by issuing a demand to pay taxes, which it asserted
13 also formally denied Cost Management's claim. *Id.* at 638. Cost Management filed suit in
14 court, and, as here, Lakewood moved to dismiss based on the failure to exhaust. *Id.* at 639.
15 The trial court denied Lakewood's motion, and the Supreme Court later agreed that
16 exhaustion was not required. *Id.* at 639, 645.

17 The same result should occur here for the same reasons. The Court found that
18 "Lakewood's inaction in response to [Cost Management's] refund request ended [Cost
19 Management's] obligation to continue pursuing a remedy in that forum." *Id.* at 642. Here,
20 New Cingular waited 18 months for Lakewood to act on its refund request, but Lakewood
21 responded with inaction. Lakewood argues that its eventual response required New Cingular
22 to pursue an administrative appeal, but the city's argument ignores the timing of the situation.
23 Lakewood attempted to revive New Cingular's obligation to pursue an administrative appeal

1 by issuing its denial *after* New Cingular filed suit. Lakewood’s denial was untimely—its
2 inaction in response to New Cingular’s refund request ended New Cingular’s obligation to
3 pursue an administrative remedy, and New Cingular rightfully commenced its action in court.

4 This was not a case where the city was diligently processing the application and New
5 Cingular interrupted that process by prematurely filing in court. Instead, this is a situation where
6 the city waited until *after* New Cingular filed suit to even begin meaningfully processing the
7 claim. The city should not be allowed to ignore a refund claim for more than a year, wait until
8 the taxpayer files suit, and then issue a response that attempts to force the taxpayer out of court
9 and back into the administrative system. That kind of gamesmanship provides unsettling
10 incentives to cities that would obstruct taxpayers from obtaining their just relief.

11 The *CMS* Court found Cost Management “did everything it was required to do to
12 exhaust its administrative remedies” by filing a claim and waiting for Lakewood to respond.
13 *Id.* at 644. New Cingular did the same. Fisher Dec. Ex. A. This key fact distinguishes New
14 Cingular from the plaintiff in *IGI Res., Inc. v. City of Pasco*, 30524-4-III, 2014 WL 1600377
15 (Wash. Ct. App. Apr. 22, 2014). There, the plaintiff filed suit without making “any
16 administrative refund attempt with the City.” *Id.* at *2. In contrast, New Cingular sought
17 “relief through the administrative process,” but Lakewood would not entertain that request.
18 *CMS* at 641. Like Cost Management, New Cingular “did everything it was required to do”
19 and Lakewood did not. As in *CMS*, the exhaustion doctrine does not bar New Cingular’s case.

20 **2. Lakewood wrongfully denied New Cingular of meaningful access to**
21 **the city’s administrative process by waiting to deny the refund**
22 **claim until after New Cingular filed suit.**

22 The failure to exhaust is excused “when a claimant has been wrongfully denied
23 meaningful access” to administrative procedures. *Washington Teamsters Welfare Trust Fund*

1 v. *DePiano*, 26 Wn. App 52, 57, 612 P.2d 805 (1980). For example, in *Washington*
2 *Teamsters*, the Industrial Employee Benefits Trust (“**Industrial Trust**”) sued Mario DePiano
3 to recover funds it asserted were improperly paid to him. *Id.* at 53. After voluntarily
4 dismissing its case, Industrial Trust was joined as a third-party plaintiff three years later in a
5 separate case against DePiano by another welfare trust. *Id.* at 54. After DePiano filed a
6 counterclaim against Industrial Trust, the court granted the trust’s motion to remand for
7 administrative review because DePiano did not exhaust administrative remedies. *Id.* at 54–55.
8 Division II of the Court of Appeals reversed the trial court because DePiano’s failure to
9 exhaust was excused. “Exhaustion is excused not only when resort to such procedures would
10 be futile, but also when a claimant has been wrongfully denied meaningful access to those
11 procedures...” *Id.* at 57 (citing *Taylor v. Bakery & Confectionary Union & Indus. Int’l*
12 *Welfare Fund*, 455 F.Supp. 816 (E.D.N.C. 1978) (recognizing wrongful denial of access to
13 administrative procedures can excuse exhaustion)). The court found a wrongful denial of
14 access because Industrial Trust sued DePiano after denying his claim. *Id.* at 58.

15 Lakewood similarly wrongfully denied New Cingular of meaningful access to its
16 administrative procedures. New Cingular filed a claim with Lakewood, but the city
17 disregarded it for over a year. The city’s general practice for processing refund claims
18 involved obtaining clarifying information from the taxpayer, but Lakewood never even tried
19 to contact New Cingular. The city was aware New Cingular had resources dedicated to assist
20 cities process the refund claim. Halladay Dep. 65:2-8; 66:21-25. But the city did not use them.
21 New Cingular tried to access the city’s administrative process by urging Lakewood in
22 January 2012 to respond to the claim. But, again, the city did nothing. Lakewood did not take
23 any action on the claim until New Cingular filed suit.

1 The Court should not reward Lakewood for its irresponsible and dilatory action. The
2 city essentially ignored New Cingular's claim, and only responded when confronted with a
3 lawsuit. The city then finally provided what it had withheld for over a year: a response
4 denying the claim. That is far from offering meaningful access, and Lakewood's willful
5 withholding of administrative relief obviates the exhaustion requirement.²

6 **B. FILING THE REFUND CLAIM WITH LAKEWOOD EQUITABLY TOLLED THE**
7 **STATUTE OF LIMITATIONS, BUT THE COURT SHOULD ENTER A STAY PENDING**
8 **FINAL RESOLUTION OF THE *BOTHELL* APPEAL RATHER THAN DECIDE THIS**
9 **ISSUE.**

10 The statute of limitations was equitably tolled on the date of New Cingular's tax refund
11 application. The Court could reach this conclusion by exercising its broad equitable powers, or
12 by conducting a formal equitable tolling analysis. New Cingular satisfies each element of
13 equitable tolling under Washington law, so it is entitled to that relief as a matter of law. The
14 Court could also find that the narrow circumstances of this case or the court-caused confusion
15 from the *Qwest* decision independently justify equitable tolling. But instead of reaching a
16 decision, the Court should conserve judicial and party resources and enter a stay while the
17 *Bothell* appeal resolves these same issues.

18 **1. The Court has broad discretion to craft equitable remedies.**

19 Equitable powers of remedy must be broad and flexible. *State v. Ralph Williams' NW*
20 *Chrysler*, 82 Wn.2d 265, 278-79, 10 P.2d 233 (1973). The Court has considerable inherent
21 discretion when applying equitable remedies. *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d

22 ² Lakewood may argue that New Cingular should have pursued an appeal of its belated administrative denial
23 after Lakewood was dismissed from the original *Bothell* action in King County and before pursuing this action. But that argument also fails because New Cingular could not access Lakewood's administrative process. New Cingular only had ten days to appeal Lakewood's notice and order, Fisher Dec. Ex. B, and that deadline passed on June 5, 2012—almost one year before Lakewood was dismissed from the original action. At that time, there was no available administrative remedy, and filing suit was New Cingular's only means of relief.

1 36 (1982). “In deciding whether to grant an equitable remedy, courts often ‘balance the
2 equities’ between the parties, taking into consideration the relief sought by the plaintiff and
3 the hardship imposed on the defendant.” *Douchette v. Bethel School Dist. No. 403*,
4 117 Wn.2d 805, 812, 818 P.2d 1362 (1991). This flexible standard allows courts to “meet new
5 situations that demand equitable intervention, and to accord all the relief necessary to correct
6 particular injustices.” *Holland v. Florida*, 130 S.Ct. 2549, 2563, 177 L.Ed.2d 130 (2010).
7 Here, Lakewood has not demonstrated any unique hardship. But New Cingular and the
8 Washington Class would not receive relief if the Court declines to exercise its broad equitable
9 powers and toll the statute of limitations on the date New Cingular filed its refund claim.

10 The Washington Supreme Court has invoked an equitable analysis to allow a claim
11 that would have otherwise been barred by the statute of limitations because the plaintiff
12 pursued an administrative remedy in reliance on representations made by the city. *Valley View*
13 *Indus. Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987). There, a property
14 developer filed building permit applications with the city to develop an industrial park on land
15 the city was in the process of rezoning. *Id.* at 625–28. The city informed the plaintiff that the
16 permit applications were deemed abandoned, but the city later assured the plaintiff that it
17 could proceed under the permits. *Id.* at 629. After the city rezoned the property to agricultural
18 use, the plaintiff filed an application to change the zoning back to light industrial use. *Id.* The
19 city council denied the rezone request, and the plaintiff did not appeal that decision within
20 30 days as required by the city code. *Id.* at 629, 631. The plaintiff filed suit after subsequent
21 negotiations with the city failed. *Id.* at 629.

22 The Court rejected the city’s argument that the statute of limitations barred relief from
23 the zoning change because the plaintiff had a good faith belief that it had a vested right to

1 develop the industrial park based on the city's representations. *Id.* The plaintiff pursued
2 administrative relief in reliance on those representations, and terminated its attempts to work
3 with the city after the city issued its final denial. *Id.* at 632. Without conducting an express
4 equitable tolling analysis, but nonetheless relying on its equitable powers, the Court found the
5 plaintiff did not lose its right to obtain relief "simply because it took more than 30 days to
6 seek some accommodation from the City." *Id.*

7 As in *Valley View*, this case demonstrates why courts' equitable powers must be
8 flexible to allow relief for diligent parties. New Cingular had a good faith belief based on
9 Lakewood's representations in its own municipal code that it had a right to a refund of
10 overpaid taxes. *See* LMC 3.52.150 (obligating the city to issue refunds of overpaid taxes).
11 New Cingular filed an administrative refund claim based on that representation. New Cingular
12 filed suit because Lakewood manifested that it would not process the refund claim. *Valley*
13 *View* demonstrates how courts should exercise their broad equitable discretion to relax statute
14 of limitation requirements. Like *Valley View*, this case presents a new situation where the
15 plaintiff is entitled to equitable relief.

16 **2. The Court should equitably toll the statute of limitations as of the**
17 **date of New Cingular's tax refund application.**

18 The Supreme Court "allows equitable tolling when justice requires." *Millay v. Cam*,
19 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (omitting internal citations). Case law establishes
20 that among the predicates for equitable tolling in Washington are bad faith, deception, or false
21 assurances by the defendant and the exercise of diligence by the plaintiff. *Id.* Equitable tolling
22 is appropriate when consistent with both the purpose of the statute providing the cause of
23 action and the purpose of the statute of limitations. *Id.*

1 Each of these elements are present here, and New Cingular is entitled to equitable
2 tolling as a matter of law. Justice requires equitable tolling here, because, without it, New
3 Cingular and the Washington Class will not obtain the relief to which they are entitled.
4 Lakewood was put on full notice of the possibility for litigation when New Cingular filed its
5 refund claim, and has not lost the ability to defend itself in any way. The Court should apply
6 its broad and flexible equitable powers to toll the statute of limitations, or Lakewood will be
7 rewarded for its bad faith, and New Cingular will be penalized for filing an administrative
8 refund application instead of immediately filing suit.

9 **a. Lakewood acted in bad faith by failing to reasonably process**
10 **New Cingular's tax refund application.**

11 The facts before the Court provide multiple examples of Lakewood's bad faith in
12 processing the tax refund claim. Lakewood's bad faith is manifested not only by its 18 month
13 delay in processing the claim, but also by issuing its denial *after* New Cingular filed suit,
14 issuing the denial *because* New Cingular filed suit, failing to process the claim in accordance
15 with the city's general practices, and failing to contact New Cingular in any way prior to
16 Lakewood's denial. Furthermore, Lakewood acknowledged that taxes mistakenly paid due to
17 a software error would qualify for a refund. Halladay Dep. 89:3-7. That is precisely what
18 happened to New Cingular, yet Lakewood still refuses to issue a refund.

19 Lakewood's stonewalling directly affected New Cingular's alleged delay in filing suit.
20 At the time New Cingular filed its refund claim, the concurrent original jurisdiction permitted
21 New Cingular to avoid the administrative process and file suit directly in court. *Qwest*,
22 161 Wn.2d at 371, *disagreed with by CMS*, 178 Wn.2d 635. New Cingular sought to avail
23 itself of the prompt, less costly administrative remedies Lakewood offered, and only filed suit

1 after it became apparent Lakewood would not consider the refund claim in good faith. Public
2 policy encourages taxpayers to file claims with cities to avoid litigation. That public policy
3 would be thwarted if the statute of limitations continues to run, and the claim is
4 correspondingly diminished while it remains pending with a city.

5 ***b. Lakewood provided false assurances.***

6 Lakewood provided two false assurances. Lakewood's Municipal Code represented
7 that any overpayment in taxes "shall" be refunded, LMC 3.52.150, and McKenzie's June
8 2010 email provided the false assurance that complying with the code was the only
9 requirement for obtaining a refund. Scott Dec. Ex. A. New Cingular relied on both
10 representations when it pursued its administrative claim.

11 ***c. New Cingular diligently pursued and monitored its refund
12 claim.***

13 New Cingular has diligently asserted its right to a tax refund since it became aware of
14 the overpayment. After New Cingular discovered the tax overpayments, it comprehensively
15 reviewed its complicated coding system, changed that system, hired an auditor to verify that
16 work, filed tax refund claims across the country, allowed the taxing jurisdictions time to
17 process the claims, made staff available to assist with the refund claims, and sought a status
18 update from cities that had not yet responded. Fisher Dec. ¶¶ 8-12. After Lakewood ignored
19 New Cingular's claim for 18 months, New Cingular filed a declaratory judgment action,
20 which is a course of action the Supreme Court has recognized as diligent. *Millay*, 135 Wn.2d
21 at 207.
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d. Equitable tolling here effectuates the policies of Lakewood's tax refund code provision.

Overpaid taxes constitute a debt owed to the taxpayer, and the taxing jurisdiction has no equitable right to the taxes paid in excess of the amount properly due. *Bryam v. Thurston Cnty.*, 141 Wn. 28, 38–40, 251 P. 103 (1926), *modified*, 141 Wn. 28, 252 P. 943 (1927). Lakewood's municipal code reflects this policy. *See* LMC 3.52.150. It represents to its taxpayers that Lakewood will only retain taxes it is properly owed. Equitable tolling furthers this policy, because it allows New Cingular and the Washington Class to regain possession of the taxes that Lakewood has no equitable right to retain.

e. Equitable tolling here effectuates the purposes underlying the statute of limitations.

Statutes of limitations serve to protect defendants from stale claims and to promote justice by “preventing surprises through the revival of stale claims that have been allowed to slumber while evidence has been lost, memories have faded, and witnesses have disappeared.” *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965).

Equitable tolling in this case effectuates each of those purposes. Lakewood has had full notice of New Cingular's claims since the filing of the refund claim in November 2010. It does not and cannot claim that evidence has been lost, memories have faded, or witnesses have disappeared since the claim was filed. Lakewood was fully able to gather and preserve evidence as soon as New Cingular filed its refund claim. Lakewood cannot allege it is prejudiced by the application of equitable tolling.

1 **3. The narrow circumstances of this case justify equitable tolling.**

2 The statute of limitations issue before the court is narrow: whether the voluntary
3 pursuit of administrative proceedings prior to filing a lawsuit can equitably toll the statute of
4 limitations in the court action. Courts around the country recognize that equitable tolling
5 constitutes prudent public policy in that context. *See Am. Marine Corp. v. Sholin*, 295 P.3d
6 924, 927 (Alaska 2013); *Weidow v. Uninsured Emp'rs Fund*, 359 Mont. 77, 83, 246 P.3d 704
7 (2010); *Enron Oil & Gas Co. v. Freudenthal*, 861 P.2d 1090, 1094 (Wyo. 1993).

8 For example, in *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 97,
9 194 P.3d 1026 (2008), Sylvia Brown filed an administrative discrimination complaint against
10 her employer when she could have filed a lawsuit instead. While internal appeal proceedings
11 were pending, Brown filed a lawsuit against her employer after the statute of limitations for
12 her claim had run. *Id.* at 98. The Court of Appeal found Brown's administrative claim
13 equitably tolled the statute of limitations, and the California Supreme Court agreed. *Id.* at 99.

14 The Court explained equitable tolling applies "when an injured person has several
15 legal remedies, and reasonably and in good faith, pursues one." *Id.* at 100 (internal citations
16 omitted). Application of equitable tolling in such circumstances "serves the need for harmony
17 and the avoidance of chaos in the administration of justice" because it allows the parties to
18 pursue informal remedies without the need to seek redress in two different forums. *Id.* It does
19 not compromise the defendants' interests "in being promptly apprised of claims against them
20 in order that they may gather and preserve evidence" because the defendant receives notice
21 through the "filing of the first proceeding that gives rise to tolling." *Id.*

22 The elements of equitable tolling in this instance are (1) timely notice to the defendant,
23 (2) lack of prejudice to the defendant, and (3) good faith conduct on the part of the plaintiff.

1 *Id.* at 102. This case satisfies these three elements, in addition to the predicates required under
2 Washington law, because Lakewood received timely notice of the claim when New Cingular
3 filed its refund claim, Lakewood's defense is not prejudiced by equitable tolling, and New
4 Cingular acted in good faith in pursuing its claim. "Failing to afford plaintiffs equitable tolling
5 in these circumstances would both create procedural traps for the unwary and encourage
6 duplicative filings, with attendant burdens on plaintiffs, defendants, and the court system." *Id.*

7 This Court should adopt the sound reasoning of *McDonald* to conclude that New
8 Cingular's tax refund claim tolled the statute of limitations. Applying equitable tolling in these
9 circumstances aligns incentives, because cities have no incentive to delay processing claims,
10 and taxpayers have no incentive to immediately initiate litigation. Furthermore, equitable
11 tolling here promotes harmony and efficiency in the administration of justice, because it allows
12 the parties to pursue informal remedies without the need to seek redress in two different
13 forums at the same time. *Id.* at 100.

14 **4. Equitable tolling is appropriate when courts cause confusion.**

15 Equitable tolling is available to plaintiffs that face a confusing procedural quandary
16 and select a viable, but ultimately incorrect, course of action. *Millay*, 135 Wn.2d at 207 (filing
17 a declaratory judgment action could equitably toll statute of limitations). Courts recognize that
18 court actions that cause confusion justify equitably tolling the statute of limitations. *Baldwin*
19 *Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723 (1984).

20 Washington courts have not declared a test for when court-caused confusion justifies
21 equitable tolling, but federal law is instructive. *See Douchette*, 117 Wn.2d at 811. The Ninth
22 Circuit found a plaintiff was entitled to equitable tolling when (1) there was confusing
23 authority regarding procedural requirements, (2) the courts issued an intervening decision,

1 (3) the intervening decision required a procedure for which the limitations period had expired
2 when the decision was issued, and (4) the absence of prejudice to the defendant. *Capital*
3 *Tracing, Inc. v. United States*, 63 F.3d 859, 860–63 (9th Cir. 1995)

4 All four elements are present here. As the Supreme Court has already stated, the rule
5 in *Qwest* was confusing, as it blurred procedural and jurisdictional requirements. *CMS*,
6 178 Wn.2d at 645–48. *CMS* was decided after New Cingular filed suit and before trial. If the
7 Court requires New Cingular to file a new administrative claim before the Court will exercise
8 jurisdiction, then the entire refund claim would fall outside the statute of limitations. Finally,
9 Lakewood has not and cannot assert equitable tolling prejudices its defense in any way.

10 **5. The Court should exercise its authority to stay this action pending**
11 **resolution of the *Bothell* appeal.**

12 “[T]he power to stay proceedings is incidental to the power inherent in every court to
13 control the disposition of the causes on its docket with economy of time and effort for itself,
14 for counsel, and for litigants.” *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 350,
15 16 P.3d 45 (2001) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S. Ct. 163,
16 81 L. Ed. 153 (1936)). That inherent power includes “the power to stay the trial of an action
17 pending an appeal from a judgment in another action.” *Lloyd v. Superior Court for Walla*
18 *Walla County*, 42 Wn.2d 908, 909, 259 P.2d 369 (1953). The Court should stay this action
19 because (a) the *Bothell* appeal will provide either persuasive or binding precedent regarding
20 the statute of limitations issue raised here, and (b) a stay will not prejudice Lakewood.
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a. The Bothell appeal will resolve the statute of limitations issue raised by Lakewood, so the parties and the Court should not waste resources on unnecessary litigation.

Courts across jurisdictions stay proceedings when the legal issues involved may be resolved or guided by decisions in similar actions already pending elsewhere. *E.g., IGI Res.*, 2014 WL 1600377 at *1 (the Court stayed an action because its resolution would be guided by an appeal decision pending in a similar action); *Nw. Forest Res. Council v. Robertson*, 71 F. Supp. 1039, 1040 (D. Or. 1989) (staying Oregon action where resolution of similar previously filed Washington actions could “obviate the need to proceed in [the stayed] case”).

Because final resolution of the *Bothell* appeal may guide or bind this Court, a stay should be entered here. When the Court of Appeals decides the *Bothell* appeal, this Court will have new persuasive precedent to guide its ruling. If the Court of Appeals’ decision is appealed and the Supreme Court accepts review, the Court’s decision would be binding precedent. In the meantime, this Court and the parties should not waste valuable resources litigating legal issues that will be decided soon.

b. Lakewood will not be prejudiced by a temporary stay.

Lakewood will not be prejudiced by a stay. New Cingular is willing to waive prejudgment interest for the duration of the stay, so there is no financial prejudice to Lakewood. The delay in resolving this case also will not prejudice the city. The *Bothell* appeal is fully briefed, and the case should be argued and decided in the next few months. *See Landis*, 299 U.S. at 256–57 (approving length of stay exceeding one year). This case will ultimately be resolved more efficiently if it is stayed now. Final resolution of the *Bothell* appeal will at least guide the decision of this case, and a stay would prevent a parallel, simultaneous, nearly identical proceeding.

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VI. CONCLUSION

Lakewood lost this same motion in *CMS*, but is trying again. The Court should remind Lakewood that it has an obligation to respond to its taxpayers, and that it cannot arbitrarily limit when a taxpayer can access its administrative process. New Cingular attempted to obtain an administrative remedy from Lakewood, but the city did not acknowledge the refund claim until New Cingular was forced to file suit. This Court should follow the *CMS* Court and find that Lakewood's failure to timely respond to the tax refund claim obviates the exhaustion requirement.

This Court should also look to the *Bothell* appeal when addressing the statute of limitations issue. This case and the *Bothell* appeal involve the same underlying law, virtually the same underlying facts, and the same statute of limitations defense. Equitable tolling applies in both cases, but neither the parties nor the Court should waste valuable resources litigating issues already addressed in *Bothell*, and soon to be addressed by the Court of Appeals. To benefit all parties, the Court should stay this action pending final resolution of the *Bothell* appeal.

DATED this 9th day of June, 2014.

HILLIS CLARK MARTIN & PETERSON P.S.

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ND: 19994.002 4826-3788-2907v3

Thank you. Your working copy packet has been accepted.

Case: 13-2-10900-5

NEW CINGULAR WIRELESS PCS LLC VS. CITY OF LAKEWOOD

Proceeding: DEPT 16 - JUDGE MARTIN 06-20-2014 9:00 AM

Submitted: 06-09-2014 2:48 PM (Submissions made outside of normal business hours will be filed at 8:30AM the next business day.)

Working Copy Submission ID: 101953

Total Pages: 169

Your Bank confirmation number: 199166859

Working Copy Submission Fee: \$10.00

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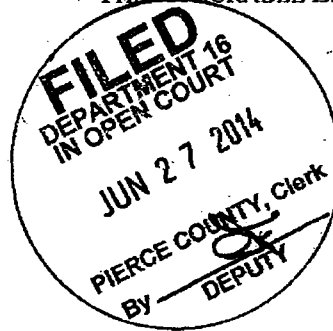
42668072 - Workingcopy coversheet and uploaded docs
42667996 - Certificate of Service
42667995 - Declaration of David Spradlin in Oppos Def Motion
42667994 - Declaration of Michael R. Scott in Oppos Def Motio
42667993 - Declaration of Linda A. Fisher in Oppos Def Motion
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APPENDIX L



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

NEW CINGULAR WIRELESS PCS LLC, a
Delaware limited liability company,

Plaintiff,

v.

THE CITY OF LAKEWOOD, WASHINGTON;

Defendant.

No. 13-2-10900-5

**ORDER OF CERTIFICATION
PURSUANT TO RAP 2.3(b)(4)**

THIS MATTER, having come on regularly before the undersigned judge of the above Court, the Court now makes the following findings and enters the following order:

The Court FINDS that the Order Granting in Part Defendant City of Lakewood's Motion for Summary Judgment ("the Order"), entered on June 20, 2014, involves controlling questions of law as to which there is substantial ground for a difference of opinion and that immediate review of the Order may materially advance the ultimate termination of this litigation. There is no just reason to delay review of the Order.

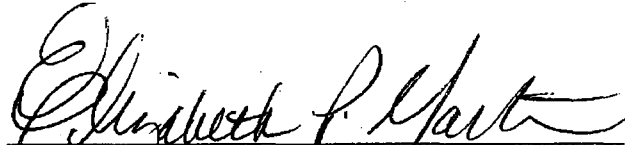
Order of Certification Pursuant to RAP 2.3(b)(4)- 1

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ORIGINAL

1 The Court ORDERS that, pursuant to RAP 2.3(b)(4), the Order is certified for
2 discretionary review.

3
4 Dated this 27th day of June, 2014.

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7 
8 JUDGE ELIZABETH MARTIN
Pierce County Superior Court

9 Presented by:

10 HILLIS CLARK MARTIN & PETERSON P.S.

11 By 

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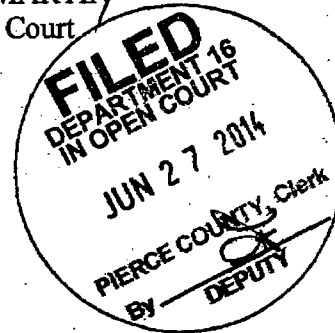
24 Approved as to form:

25 KEATING, BUCKLIN & MCCORMACK, INC., P.S.

26 By 

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authorization
6/25/14



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