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APR 3 2006
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 77985-6

HERBERT NELSON,
on his behalf and on behalf of all others similarly situated,
Respondent-Appellee,

v.

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a
APPLEWAY SUBARU/VOLKSWAGEN/AUDI, APPLEWAY
ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE
GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY
GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI,
APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY
TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO
SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and TSP
DISTRIBUTORS; and AUTONATION, INC., a Delaware corporation,
Petitioners-Appellants.

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BY C. J. HERRITT
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PETITIONERS' ANSWER TO AMICUS CURIAE MEMORANDA

Stephen M. Rummage, WSBA No. 11168
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101
(206) 622-3150 (phone)
(206) 628-7699 (fax)

Daniel F. Katz
Luba Shur
Williams & Connolly LLP
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000 (phone)
(202) 434-5029 (fax)

Attorneys for Petitioners-Appellants

Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
PETITIONERS' ANSWER.....1

TABLE OF AUTHORITIES

DOCKETED CASES

James A. Brown v. Charter Communications, LLC, Chelan County Superior Court, Case No. 05-2-01218-2 (11/14/2005).....1

Marcia Johnson & Theron Johnson v. Camp Automotive, Inc. & Lithia Motors, Inc., Spokane County Superior Court, Case No. 05-2-05059-9 (10/19/2005).....1

Jeremy Kingsbury v. Rural Cellular, Chelan County Superior Court, No. 05-2-01217-4 (11/14/2005).....2

Melissa Morse v. Cingular Wireless, Chelan County Superior Court, No 06-2-00021-2 (1/9/2006).....2

Nancy Brown v. Sprint Nextel Corp., Chelan County Superior Court, No 06-2-00015-8 (1/6/2006)2

Stephen C. Johnson & Keith Hastreiter v. Town & Country Chrysler Jeep, Inc., King County Superior Court, No. 06-2-06851-3 (2/23/2006)2

STATE STATUTES AND RULES

Uniform Declaratory Judgments Act, RCW 7.24.010 *et seq*.....2

RCW 82.04.5002, 3

CR 233

RAP 13.4.....3

PETITIONERS' ANSWER

Petitioners AutoNation, Inc. (“AutoNation”), and the Appleway automobile dealerships and other businesses indirectly owned by AutoNation, file this answer to the amicus curiae memoranda to alert the Court to additional copy-cat class action lawsuits beyond those noted in the amicus curiae memoranda.

As explained in the memoranda, two of the amici before this Court already have been sued in actions premised on the theory adopted by Division III. Charter Communication LLC (“Charter”), whose predecessors and affiliates provide cable television service in several states, filed an amicus memorandum advising the Court that a copy-cat putative class action has been filed against it in Chelan County. *See James A. Brown v. Charter Communications, LLC*, Chelan County Superior Court, Case No. 05-2-01218-2 (11/14/2005). In addition, Camp Automotive, Inc., a corporation that sells motor vehicles in Washington, and Lithia Motors, Inc., its parent company (collectively, “Lithia”), filed an amicus memorandum advising the Court that a copy-cat putative class action has been filed against them in Spokane County. *See Marcia Johnson & Theron Johnson v. Camp Automotive, Inc. & Lithia Motors, Inc.*, Spokane County Superior Court, Case No. 05-2-05059-9 (10/19/2005). Based on the need for this Court to resolve issues that may be dispositive in those cases, Charter and Lithia have urged review.

The Charter and Lithia memoranda, however, omit at least four other copycat actions. Another putative class action has recently been

filed in King County against a Washington automobile dealer, Town & Country Chrysler Jeep (“Town & Country”).¹ See *Stephen C. Johnson & Keith Hastreiter v. Town & Country Chrysler Jeep, Inc.*, King County Superior Court, No. 06-2-06851-3 (2/23/2006) (attached as Exhibit 1). Further, the same lawyers who filed the action against Charter have filed putative class action lawsuits in Chelan County against Rural Cellular, Sprint Nextel Corporation, and Cingular Wireless. See *Jeremy Kingsbury v. Rural Cellular*, Chelan County Superior Court, No. 05-2-01217-4 (11/14/2005) (attached as Exhibit 2); *Nancy Brown v. Sprint Nextel Corp.*, Chelan County Superior Court, No 06-2-00015-8 (1/6/2006) (attached as Exhibit 3); *Melissa Morse v. Cingular Wireless*, Chelan County Superior Court, No 06-2-00021-2 (1/9/2006) (attached as Exhibit 4).²

Like the actions against Charter and Lithia, these copycat lawsuits seek monetary damages arising from a business’s itemized disclosure of the B&O tax pass-through recognized by RCW 82.04.500. Each lawsuit alleges violations of RCW 82.04.500 via the Uniform Declaratory Judgments Act, RCW 7.24.010 *et seq.* And each lawsuit requests class

¹ AutoNation indirectly owns Town & Country.

² The plaintiff voluntarily dismissed *Brown* shortly after Sprint Nextel removed it to federal court under the Class Action Fairness Act of 2005. Because the dismissal was without prejudice, it would not preclude a subsequent re-filing. See Notice of Voluntary Dismissal (3/6/2006) (attached as Exhibit 5). Similarly, the plaintiff voluntarily dismissed *Morse* without prejudice after Cingular (a) filed a notice of removal alleging that federal law preempted any state regulation purporting to prohibit itemization of B&O tax on its monthly bills, and (b) moved to compel arbitration. See Notice of Removal (2/9/2006) (attached as Exhibit 6); Notice of Voluntary Dismissal (3/6/2006) (attached as Exhibit 7).

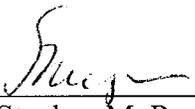
certification under CR 23(b)(2), even though each suit seeks primarily a monetary recovery. Accordingly, all six of these lawsuits – and there may be others of which petitioners are unaware – raise the same policy and statutory issues as this case. Further, the allegations in these cases suggest that many Washington businesses have itemized the B&O pass-through in accordance with the plain language of RCW 82.04.500 and the Department of Revenue’s reading of the statute.

In light of the recurring issues raised by the decision below (as evidenced by these follow-on lawsuits), and for the reasons discussed in the Petition for Review, petitioners therefore request that the Court grant review under RAP 13.4(b).

RESPECTFULLY SUBMITTED on March 31, 2006.

Of counsel:
Daniel F. Katz
Luba Shur
Williams & Connolly LLP

Davis Wright Tremaine LLP
Attorneys for Petitioners

By 

Stephen M. Rummage
WSBA # 11168

EXHIBIT 1

ROBERTS W. MERTEL

NO. 06-2-06851-3 CFA

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STEPHEN C. JOHNSON and KEITH HASTREITER, individually and on behalf of the class of all persons similarly situated,

Plaintiffs,

v.

TOWN & COUNTRY CHRYSLER JEEP, INC.,

Defendant.

CLASS ACTION

NO.

06-2-06851-3 CFA

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER EQUITABLE RELIEF

I. Parties

1. Plaintiff Keith Hastreiter is a resident of King County, Washington and has been at all relevant times. He purchased a vehicle from defendant at it facility in King County, Washington, on or about April 9, 2004 and has purchased parts and service from defendant from that time until the present. He is well qualified to represent the interests of the class described below and has satisfied any and all prerequisites for the bringing of this action.

2. Plaintiff Stephen C. Johnson is a resident of Snohomish County, Washington, and has been at all relevant times. He purchased a vehicle from defendant at its facility in King County, Washington, on or about April 17, 2004

COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER EQUITABLE RELIEF - 1



1001 Fourth Avenue, Suite 4200
P.O. Box 21846 Seattle, WA 98111-0646
206.429.1144

1 and has purchased parts and service from defendant from that time until the
2 present. He is well qualified to represent the interests of the class described below
3 and has satisfied any and all prerequisites for the bringing of this action.

4 3. Defendant Town & Country Chrysler Jeep, Inc. is a Washington
5 corporation. Its main office, dealership and service and billing departments are
6 located in King County, Washington.
7

8 4. All matters alleged in this complaint occurred in King County,
9 Washington.

10 II. Background Facts

11 5. Plaintiff Keith Hastreiter purchased a Jeep Grand Cherokee from
12 defendant on or about April 9, 2004. Plaintiff Keith Hastreiter and defendant
13 agreed upon a price for the vehicle. Plaintiff was then provided with paperwork for
14 the sale which added various items of "tax and license" charges, including "B&O
15 Tax Overhead" to the agreed upon price. Plaintiff paid the additional tax and
16 license fees, including the "B&O Tax Overhead" in addition to the agreed upon
17 price.
18

19 6. Plaintiff Stephen C. Johnson purchased a Chrysler Town & Country
20 van from defendant on or about April 17, 2004. Plaintiff Stephen C. Johnson and
21 defendant agreed upon a price for the vehicle. Plaintiff was then provided with
22 paperwork for the sale which added various items of "tax and license" charges,
23 including "B&O Tax Overhead" to the agreed upon price. Plaintiff paid the
24
25

1 additional tax and license fees, including the "B&O Tax Overhead" in addition to
2 the agreed upon price.

3 7. Plaintiffs have subsequently had their vehicles serviced by defendant.
4 The charges for that service, including parts and labor, have included a line item
5 charge for "B&O Tax Overhead."
6

7 III. Violations of Law

8 8. The charge for "B&O Tax Overhead" was and is unlawful and in
9 violation of RCW 82.04.500.

10 9. The charge of "B&O Tax Overhead" constitutes an unfair and
11 deceptive act and practice in violation of the Washington Consumer Protection Act,
12 RCW 19.86, and, in particular, RCW 19.86.020. The charge of this "B&O Tax
13 Overhead" after agreeing upon a price, or as an add-on cost to a sale or service
14 charge, constitutes an (1) unfair or deceptive act or practice with the capacity to
15 deceive a substantial portion of the public; (2) occurring in trade or commerce; (3)
16 with public interest impact; (4) which caused economic injury to plaintiff.
17 Defendant's actions as alleged above were committed in the course of defendant's
18 business, were part of a pattern or generalized course of conduct, repeated acts
19 were committed prior to the acts involving plaintiffs, and there is a real and
20 substantial potential for repetition of defendant's conduct. Defendant's conduct has
21 occurred in the context of consumer transactions with the general public, and with
22 the class members in particular, and defendant has, or should have, superior
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1 knowledge regarding the unlawful nature of defendant's actions than do members
2 of the public.

3 IV. Class Action Allegations

4 10. This action is brought on behalf of the class of all persons who are or
5 were at any time since February 23, 2002 customers of Town & Country Chrysler
6 Jeep, Inc. and who have been charged and paid for "B&O Tax Overhead" as a line
7 item charge in purchasing goods or services, including new and/or used vehicles,
8 and vehicle repair and/or maintenance. The class excludes the Judge assigned to
9 preside over this matter and all employees, officers and/or directors of defendant.
10 All class members have been affected adversely by the unlawful actions described
11 above.
12

13
14 11. The class is so numerous that joinder of all members is impracticable.

15 12. There are numerous questions of fact or law that are common to the
16 class, including the following:

17 a. whether, and the extent to which, the "B&O Tax Overhead"
18 charge constitutes an unlawful charge under Washington law;

19 b. whether the defendant is obligated to refund to all class
20 members all or any portion of the "B&O Tax Overhead" paid by the class members,
21 plus sales tax paid on those amounts;

22 c. whether the class members are entitled to declaratory and
23 injunctive relief (i) declaring the "B&O Tax Overhead" charge invalid and unlawful
24
25

1 and (ii) prohibiting the defendant from imposing or collecting this charge from its
2 existing and/or future customers; and

3 d. whether plaintiff is entitled to an award of attorney fees and
4 expenses incurred in this action.

5 13. The claims of plaintiffs as class representatives are typical of the class
6 members generally, because defendant's unlawful conduct described above has
7 affected plaintiff in the same manner as the class members generally.

8 14. Plaintiffs as class representatives will fairly and adequately represent
9 the interests of the class, because:

10 a. Plaintiffs' interests in prosecuting his claims against defendant
11 are identical (except as to amount) to the interests of the class members; and

12 b. Plaintiffs are well qualified by background, experience and
13 knowledge to prosecute these claims, and have retained experienced and
14 competent counsel who are well familiar with the applicable substantive law and
15 with class actions.

16 15. Class certification is appropriate under CR 23(b)(1), because the
17 prosecution of separate actions by individual customers of defendant would create a
18 risk of (a) inconsistent or varying adjudications with respect to individual members of
19 the class which could establish incompatible standards of conduct for the defendant,
20 and (b) adjudications with respect to individual customers would as a practical matter
21 be dispositive of the interests of the other customers not parties to the adjudications
22 or substantially impair or impede their ability to protect their interest.

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COMPLAINT FOR DECLARATORY, INJUNCTIVE
AND OTHER EQUITABLE RELIEF - 5



1001 Fourth Avenue, Suite 4200
P.O. Box 21846/Seattle, WA 98111-3846
(206) 292-1144

1 16. Class certification is appropriate under CR 23(b)(2), because defendant
2 has acted or refused to act on grounds generally applicable to all of its customers,
3 thereby making appropriate final injunctive relief or corresponding declaratory relief
4 with respect to the class of customers as a whole.

5 17. Class certification is appropriate under CR 23(b)(3), because (a) the
6 questions of law or fact common to all members of the class predominate over any
7 questions affecting only individual class members, and (b) a class action is superior to
8 other available methods for the fair and efficient adjudication of the controversy
9 between the parties.

10
11 V. Relief to which Plaintiff and Class Members Are Entitled

12 18. There is an actual, present and existing dispute between the parties
13 concerning (a) whether the collection of the "B&O Tax Overhead" is lawful under
14 Washington law, (b) the legality of defendant's acts and practices described above,
15 (c) the right of plaintiffs and other class members to injunctive relief prohibiting
16 defendant from further unlawful acts and practices as described above, and (d) the
17 defendant's obligation to make refunds to the class members of amounts collected
18 by defendant as "B&O Tax Overhead." Accordingly, plaintiffs and other class
19 members are entitled to declaratory relief on these matters.

20
21
22 19. As to future services and sales, plaintiffs and other class members
23 have no adequate remedy at law and are entitled to injunctive relief as to the
24 matters described above.

1 20. By their unlawful acts described above, defendant has been unjustly
2 enriched.

3 21. The defendant is obligated to pay to plaintiffs and other class
4 members, the full amount of all such charges unlawfully imposed on them,
5 together with interest (or other compensation for loss of use of funds) and any
6 earnings thereon. Furthermore, the defendant should be required to disgorge all
7 amounts by which defendant has been unjustly enriched, including any interest or
8 earnings thereon.
9

10 22. Plaintiffs and all class members are entitled to an award of treble
11 damages under RCW 19.86.090 up to ten thousand dollars per claimant and to an
12 award of attorney fees and expenses pursuant to RCW 19.86.090 and the common
13 fund doctrine.
14

15 WHEREFORE, plaintiffs pray for judgment against defendant as follows:

16 1. Declaring, under RCW 7.24.020, that the "B&O Tax Overhead" as
17 charged by defendant to plaintiffs and class members is illegal and in violation of
18 Washington law;

19 2. Prohibiting the defendant from charging the "B&O Tax Overhead" on
20 new or used car sales, or for goods and services provided to or for class members as
21 described above, or otherwise;

22 3. Requiring the defendant to refund to plaintiffs and all class members
23 the "B&O Tax Overhead" charged in any sale or service charge as described above,
24 together with interest and any earnings thereon:
25

COMPLAINT FOR DECLARATORY, INJUNCTIVE
AND OTHER EQUITABLE RELIEF - 7



1001 Fourth Avenue, Suite 4200
P.O. Box 21846 Seattle, WA 98111-3846
(206) 292-1144

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4. Awarding plaintiffs and the class members reasonable attorney fees, expenses and costs incurred in this action; and

5. Awarding plaintiffs and the class members such other and further relief as may be just, equitable and proper.

Dated this 23rd day of February, 2006.

HELSELL FETTERMAN LLP

By *AJK*
Andrew J. Kinstler, WSBA #12703
Attorneys for Plaintiffs



EXHIBIT 2

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FILED
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 COUNTY CLERK

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 COUNTY OF CHELAN

3 JEREMY KINGSBURY, a single person,)
 4 individually and on behalf of others)
 5 similarly situated,)

6 Plaintiffs,)

7 vs.)

8 RURAL CELLULAR CORPORATION, a)
 9 Minnesota corporation, d/b/a UNICEL,)
 10 and f/d/b/a CELLULAR ONE,)

11 Defendant.)

NO. **05-2 01217 4**
COMPLAINT FOR CLASS ACTION

FILED
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STATE OF WASHINGTON

11 Plaintiff Jeremy Kingsbury, individually and on behalf of others similarly
 12 situated, by and through his attorneys of record, Jeffers, Danielson, Sohn &
 13 Aylward, P.S., by James M. Danielson and Brian C. Huber, brings this Complaint
 14 for Class Action against Defendant Rural Cellular Corporation, a Minnesota
 15 corporation, alleging as follows:
 16

COMPLAINT FOR CLASS ACTION
Page 1
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Jeffers, Danielson, Sohn & Aylward, P.S.
 Attorneys at Law
 2800 Chester-Kilmer Road / P.O. Box 168
 Wenatchee, WA 98807-1688
 (509) 662-3485 / (509) 662-3627 FAX

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1 **I. PARTIES**

2 1.1 **Representative Plaintiff.** Jeremy Kingsbury is a single person and a
3 resident of Chelan County, Washington. Kingsbury has agreed to act as class
4 representative in this matter.

5 1.2 **Defendant.** Rural Cellular Corporation ("RCC") is a Minnesota
6 corporation doing business in Chelan County, Washington. RCC is currently
7 doing business as "Unicel" but formerly was doing business as "Cellular One."

8 1.3 **Putative Class Members.** The members of the relevant class
9 include all persons:

10 (a) Who have purchased or received services provided by RCC,

11 and

12 (b) Who, within the applicable statute of limitations, were
13 charged Washington State business and occupation (B&O) tax as an itemized
14 charge on their monthly bill.

15 **II. JURISDICTION AND VENUE**

16 2.1 The acts complained of in this lawsuit occurred in whole or in part in
17 Chelan County, Washington.

18 2.2 Jurisdiction and venue are proper pursuant to RCW 4.12.020,
19 4.12.025, and other applicable law.

20 **III. PROPRIETY OF CLASS ACTION PROSECUTION**

21 3.1 **Impracticality of Joining All Members of the Class as Parties Due to**

COMPLAINT FOR CLASS ACTION

Page 2
228130

Jeffrey Davidson, Sean S. Agnew, P.S.
Attorneys at Law
2600 Chester Klum Road / P.O. Box 1688
Wenatchee, WA 98807-1688
(509) 842-2442 / (509) 842-2482 FAX

1 Size of Class - CR 23(a)(1). The exact number of persons and/or entities
 2 similarly situated to the Representative Plaintiff is now unknown. However, RCC
 3 is one of the largest providers of cellular telephone service in the state of
 4 Washington, and it is estimated that the number of such persons is in the
 5 hundreds of thousands. The exact number of such persons may be identified
 6 from RCC's records of customers in Washington State, and such persons may
 7 be identified with particularity through appropriate judicial discovery procedures,
 8 such that it would be possible to give such persons actual notice of these
 9 proceedings, if required.

10 3.2 Existence of Questions of Law or Fact Common to the Class - CR
 11 23(a)(2). There exist questions of law and fact common the Representative
 12 Plaintiff's claim and the claims of the putative class members, such as those set
 13 forth for Representative Plaintiff Jeremy Kingsbury individually in paragraphs 4.1
 14 through 9.5.

15 3.3 Claims of the Representative Party are Typical of Claims of the
 16 Class - CR 23(a)(3). The claims of the Representative Plaintiff are similar to all
 17 others in that the Plaintiffs are or have been customers of RCC, and have been
 18 and are continuing to be, charged Washington State B&O tax as an itemized
 19 charge on their monthly bills from RCC.

20 3.4 The Representative Party Fairly and Adequately Protects the
 21 Interest of the Class - CR 23(a)(4). The Representative Plaintiff comes before

1 this Court in the same capacity as any other litigant seeking redress for
 2 grievances and to seek class relief for all of those persons exposed to the same
 3 harm for which he is aggrieved. The adequacy of the Representative Plaintiff's
 4 ability to fairly and adequately protect the interest of the class does not depend
 5 upon his financial status but rather upon:

6 (a) The capacity of chosen counsel to adequately prosecute the
 7 case on his behalf and on the behalf of the putative class. Plaintiffs' counsel are
 8 experienced trial attorneys who have engaged in extensive trial practice and
 9 have considerable experience in all aspects of class action litigation from several
 10 other class action cases. Plaintiffs' counsel has the necessary skills, expertise,
 11 and competency to adequately represent the Plaintiffs' interest in those of the
 12 class.

13 (b) The fact that the Representative Plaintiff does not have any
 14 interests which are antagonistic to those of the class;

15 (c) The fact that the Representative Plaintiff is ready and willing
 16 to bring this class action in a representative capacity on behalf of the putative
 17 class.

18 3.5 This Class Action is Maintainable Under CR 23(b). In addition to
 19 satisfying CR 23(a), the Plaintiffs' claims satisfy the conditions of CR 23(b)(1), (2)
 20 and (3).

21 (a) CR 23(b)(1)(A) and (B). The prosecution of separate actions

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1 by individual members of the class would create a risk of inconsistent or varying
2 adjudications which would establish incompatible standards of conduct for the
3 Defendant and would also create the risk of adjudication with respect to
4 individual members of the class which would, as a practical matter, be dispositive
5 of the interests of other persons not party to the adjudication.

6 (b) CR 23(b)(2). The defendant has acted on grounds generally
7 applicable to all putative class members, making final injunctive relief appropriate
8 with respect to the class as a whole.

9 (c) CR 23(b)(3). Alternatively, the resolution of the numerous
10 legal and factual questions pertaining to the putative class members
11 predominates over any questions affecting only individual members such that the
12 prosecution of a class action is superior to other available methods for the fair
13 and efficient adjudication of this controversy. In this regard, there should be little,
14 if any, interest in individual members of the class controlling the prosecution of a
15 separate action for this relief since the relief sought is to apprise the entire class
16 membership of their rights to damages or reductions in charges. This action is a
17 superior method in preventing future economic and pecuniary loss to thousands
18 of Washington citizens and members of the public at large in purchasing cellular
19 telephone service. This action is uniquely directed to preserve the integrity and
20 safety of Washington citizens, the sanctity of business ventures, and to ensure
21 that all Washington citizens are protected in the future by providing that

COMPLAINT FOR CLASS ACTION

Page 5
12/1/05

Jeffrey, Binkley, Ryan & Ayward, P.S.
Attorneys at Law
2600 Chester-Kennel Road / P.O. Box 1688
Washouak, WA 98077-1688
(360) 642-3000 / (360) 642-2002 FAX

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1 businesses operating in Washington State may not pass along B&O tax to
2 consumer customers as an itemized charge. The class will benefit by redress
3 from the ongoing action which, if left to hundreds of thousands of individual
4 actions, would greatly congest the forums of the Superior Courts of the state of
5 Washington. Any difficulties which may be encountered in this action will be
6 slight compared to the impracticality of having hundreds of thousands of
7 individuals bringing individual actions and thereby unnecessarily burdening the
8 courts throughout the state of Washington. The class litigation is a fair, efficient
9 and expeditious vehicle for providing redress to both unnamed and named
10 plaintiffs and to as yet unidentified class members. This action is superior to any
11 other available method for the fair and efficient adjudication of the controversy.

12 IV. FACTS

13 4.1 Plaintiff Jeremy Kingsbury purchased cellular telephone service
14 from RCC.

15 4.2 Kingsbury continues to be a customer of RCC.

16 4.3 Kingsbury's monthly bill from RCC has included an itemized charge
17 for Washington State B&O tax.

18 4.4 It is unlawful for a business operating in Washington to pass along
19 Washington State B&O tax to customers by including such as an itemized charge
20 on a bill or invoice.

21

COMPLAINT FOR CLASS ACTION

Page 6

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Jaffers, Swanson, Sosa & Aylward, P.S.
Attorneys at Law
2600 Chester Street, 4th Floor / P.O. Box 1470
Wenatchee, WA 98807-1468
(509) 642-2685 / (509) 642-2622 FAX

1 **V. FIRST CAUSE OF ACTION: DECLARATORY RELIEF**

2 5.1 Kingsbury has a statutory legal right under RCW 82.04.500 that is
3 capable of judicial protection.

4 5.2 Pursuant to Washington's Uniform Declaratory Judgments Act
5 (RCW 7.24), Kingsbury seeks a declaratory judgment that RCC has violated
6 RCW 82.04.500 by the manner in which it collects the B&O tax from its
7 customers.

8 5.3 Kingsbury also seeks further relief in this declaratory action
9 pursuant to RCW 7.24.080, as set forth below.

10 **VI. SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF**

11 6.1 Kingsbury requests that the Court issue an injunction permanently
12 enjoining RCC from assessing, collecting, passing through or itemizing the B&O
13 taxes from customers in Washington.

14 **VII. THIRD CAUSE OF ACTION: RESTITUTION**

15 7.1 Kingsbury requests that the Court enter judgment against RCC so
16 that Kingsbury and the other class members may receive restitution. Restitution
17 should be awarded to the extent RCC has been unjustly enriched by assessing,
18 collecting, passing through or itemizing the B&O taxes from its customers in
19 Washington.

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1 **VIII. FOURTH CAUSE OF ACTION: BREACH OF CONTRACT**

2 8.2 RCC's unlawful assessment, collection, passing through or
3 itemization of the B&O taxes to its Washington customers as herein alleged
4 constitutes breach of contract. Kingsbury therefore seeks judgment in favor of
5 Kingsbury and the other class members for any damages caused by RCC's
6 breach of contract.

7 **IX. FIFTH CAUSE OF ACTION: VIOLATION OF THE WASHINGTON**
8 **CONSUMER PROTECTION ACT, RCW 19.86, et. seq.**

9 9.1 RCC engaged in unfair or deceptive acts by passing along the
10 Washington State B&O tax by including such as an itemized charge on
11 customers' monthly bills.

12 9.2 RCC violated RCW 82.04.500.

13 9.3 RCC's above-described actions occurred in the conduct of its trade
14 or commerce.

15 9.4 RCC's above-described actions affect the public interest.

16 9.5 RCC's actions caused injury to Plaintiffs in an amount to be
17 determined at trial.

18 **IX. PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff Jeremy Kingsbury, individually and on behalf of
20 others similarly situated, prays that the court grant the following relief:

21 1. For declaratory judgment that RCC has violated RCW 82.04.500 by

COMPLAINT FOR CLASS ACTION

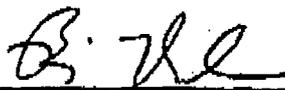
Page 8
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Jeffrey S. Brantley, Susan S. Aylward, P.S.
Attorneys at Law
2600 Chester Square Road / P.O. Box 1688
Wenatchee, WA 98807-1688
(509) 662-3425 / (509) 662-3422 FAX

- 1 the manner in which it collects the B&O tax from its customers.
- 2 2. For a permanent injunction against RCC enjoining RCC from
- 3 engaging in the above-described unlawful and/or unfair or deceptive business
- 4 acts.
- 5 3. For an award of restitution to the extent RCC has been unjustly
- 6 enriched.
- 7 4. For an award of damages based on RCC's breach of contract.
- 8 5. For an award of treble and other damages for violation of the
- 9 Washington Consumer Protection Act, RCW 19.86, et. seq.
- 10 6. For an award of reasonable attorney's fees and costs based on
- 11 RCW 19.86, et. seq., or other legal or equitable bases.
- 12 7. For such and other further relief as the court deems just and
- 13 proper.

14 DATED this 14 day of November, 2005.

15 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

16
17 By 

18 JAMES M. DANIELSON, WSBA #01629
19 BRIAN C. HUBER, WSBA #23659
20 Attorneys for Plaintiff
21

EXHIBIT 3

FILED

JAN 06 2006

SIRI A. WOODS
CHELAN COUNTY CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF CHELAN

NANCY BROWN, a single person,
individually and on behalf of others
similarly situated,

Plaintiffs,

vs.

SPRINT NEXTEL CORPORATION, a
Kansas corporation,

Defendant.

NO. **06-2 00015 8**
COMPLAINT FOR CLASS ACTION

Plaintiff NANCY BROWN, individually and on behalf of others similarly
situated, by and through her attorneys of record, Jeffers, Danielson, Sonn &
Aylward, P.S., by James M. Danielson and Brian C. Huber, brings this Complaint
for Class Action against Defendant SPRINT NEXTEL CORPORATION, a Kansas
corporation, alleging as follows:

1 **I. PARTIES**

2 1.1 **Representative Plaintiff.** Nancy Brown is a single person and a
3 resident of Chelan County, Washington. Brown has agreed to act as class
4 representative in this matter.

5 1.2 **Defendant.** Sprint Nextel Corporation ("Sprint") is a Kansas
6 corporation doing business in Chelan County, Washington, and was formally
7 known as Sprint Corporation.

8 1.3 **Putative Class Members.** The members of the relevant class
9 include all persons:

10 (a) Who have purchased or received services provided by
11 Sprint, and

12 (b) Who, within the applicable statute of limitations, were
13 charged Washington State business and occupation (B&O) tax as an itemized
14 charge on their monthly bill.

15 **II. JURISDICTION AND VENUE**

16 2.1 The acts complained of in this lawsuit occurred in whole or in part in
17 Chelan County, Washington.

18 2.2 Jurisdiction and venue are proper pursuant to RCW 4.12.020,
19 4.12.025, and other applicable law.

20 **III. PROPRIETY OF CLASS ACTION PROSECUTION**

21 3.1 **Impracticality of Joining All Members of the Class as Parties Due to**

1 Size of Class - CR 23(a)(1). The exact number of persons and/or entities
2 similarly situated to the Representative Plaintiff is now unknown. However,
3 Sprint is one of the largest providers of cellular telephone service in the state of
4 Washington, and it is estimated that the number of such persons is in the
5 hundreds of thousands. The exact number of such persons may be identified
6 from Sprint's records of customers in Washington State, and such persons may
7 be identified with particularity through appropriate judicial discovery procedures,
8 such that it would be possible to give such persons actual notice of these
9 proceedings, if required.

10 3.2 Existence of Questions of Law or Fact Common to the Class - CR
11 23(a)(2). There exist questions of law and fact common the Representative
12 Plaintiff's claim and the claims of the putative class members, such as those set
13 forth for Representative Plaintiff Nancy Brown individually in paragraphs 4.1
14 through 9.5.

15 3.3 Claims of the Representative Party are Typical of Claims of the
16 Class - CR 23(a)(3). The claims of the Representative Plaintiff are similar to all
17 others in that the Plaintiffs are or have been customers of Sprint, and have been
18 and are continuing to be, charged Washington State B&O tax as an itemized
19 charge on their monthly bills from Sprint.

20 3.4 The Representative Party Fairly and Adequately Protects the
21 Interest of the Class - CR 23(a)(4). The Representative Plaintiff comes before

1 this Court in the same capacity as any other litigant seeking redress for
2 grievances and to seek class relief for all of those persons exposed to the same
3 harm for which he is aggrieved. The adequacy of the Representative Plaintiff's
4 ability to fairly and adequately protect the interest of the class does not depend
5 upon her financial status but rather upon:

6 (a) The capacity of chosen counsel to adequately prosecute the
7 case on her behalf and on the behalf of the putative class. Plaintiffs' counsel are
8 experienced trial attorneys who have engaged in extensive trial practice and
9 have considerable experience in all aspects of class action litigation from several
10 other class action cases. Plaintiffs' counsel has the necessary skills, expertise,
11 and competency to adequately represent the Plaintiffs' interest in those of the
12 class.

13 (b) The fact that the Representative Plaintiff does not have any
14 interests which are antagonistic to those of the class;

15 (c) The fact that the Representative Plaintiff is ready and willing
16 to bring this class action in a representative capacity on behalf of the putative
17 class.

18 3.5 This Class Action is Maintainable Under CR 23(b). In addition to
19 satisfying CR 23(a), the Plaintiffs' claims satisfy the conditions of CR 23(b)(1), (2)
20 and (3).

21 (a) CR 23(b)(1)(A) and (B). The prosecution of separate actions

1 by individual members of the class would create a risk of inconsistent or varying
2 adjudications which would establish incompatible standards of conduct for the
3 Defendant and would also create the risk of adjudication with respect to
4 individual members of the class which would, as a practical matter, be dispositive
5 of the interests of other persons not party to the adjudication.

6 (b) CR 23(b)(2). The defendant has acted on grounds generally
7 applicable to all putative class members, making final injunctive relief appropriate
8 with respect to the class as a whole.

9 (c) CR 23(b)(3). Alternatively, the resolution of the numerous
10 legal and factual questions pertaining to the putative class members
11 predominates over any questions affecting only individual members such that the
12 prosecution of a class action is superior to other available methods for the fair
13 and efficient adjudication of this controversy. In this regard, there should be little,
14 if any, interest in individual members of the class controlling the prosecution of a
15 separate action for this relief since the relief sought is to apprise the entire class
16 membership of their rights to damages or reductions in charges. This action is a
17 superior method in preventing future economic and pecuniary loss to thousands
18 of Washington citizens and members of the public at large in purchasing cellular
19 telephone service. This action is uniquely directed to preserve the integrity and
20 safety of Washington citizens, the sanctity of business ventures, and to ensure
21 that all Washington citizens are protected in the future by providing that

1 businesses operating in Washington State may not pass along B&O tax to
2 consumer customers as an itemized charge. The class will benefit by redress
3 from the ongoing action which, if left to hundreds of thousands of individual
4 actions, would greatly congest the forums of the Superior Courts of the state of
5 Washington. Any difficulties which may be encountered in this action will be
6 slight compared to the impracticality of having hundreds of thousands of
7 individuals bringing individual actions and thereby unnecessarily burdening the
8 courts throughout the state of Washington. The class litigation is a fair, efficient
9 and expeditious vehicle for providing redress to both unnamed and named
10 plaintiffs and to as yet unidentified class members. This action is superior to any
11 other available method for the fair and efficient adjudication of the controversy.

12 **IV. FACTS**

13 4.1 Plaintiff Nancy Brown purchased cellular telephone service from
14 Sprint.

15 4.2 Brown continues to be a customer of Sprint.

16 4.3 Brown's monthly bill from Sprint has included an itemized charge
17 for Washington State B&O tax.

18 4.4 It is unlawful for a business operating in Washington to pass along
19 Washington State B&O tax to customers by including such as an itemized charge
20 on a bill or invoice.
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V. FIRST CAUSE OF ACTION: DECLARATORY RELIEF

5.1 Brown has a statutory legal right under RCW 82.04.500 that is capable of judicial protection.

5.2 Pursuant to Washington's Uniform Declaratory Judgments Act (RCW 7.24), Brown seeks a declaratory judgment that Sprint has violated RCW 82.04.500 by the manner in which it collects the B&O tax from its customers.

5.3 Brown also seeks further relief in this declaratory action pursuant to RCW 7.24.080, as set forth below.

VI. SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF

6.1 Brown requests that the Court issue an injunction permanently enjoining Sprint from assessing, collecting, passing through or itemizing the B&O taxes from customers in Washington.

VII. THIRD CAUSE OF ACTION: RESTITUTION

7.1 Brown requests that the Court enter judgment against Sprint so that Brown and the other class members may receive restitution. Restitution should be awarded to the extent Sprint has been unjustly enriched by assessing, collecting, passing through or itemizing the B&O taxes from its customers in Washington.

1 **VIII. FOURTH CAUSE OF ACTION: BREACH OF CONTRACT**

2 8.2 Sprint's unlawful assessment, collection, passing through or
3 itemization of the B&O taxes to its Washington customers as herein alleged
4 constitutes breach of contract. Brown therefore seeks judgment in favor of
5 Brown and the other class members for any damages caused by Sprint's breach
6 of contract.

7 **IX. FIFTH CAUSE OF ACTION: VIOLATION OF THE WASHINGTON**
8 **CONSUMER PROTECTION ACT, RCW 19.86, et. seq.**

9 9.1 Sprint engaged in unfair or deceptive acts by passing along the
10 Washington State B&O tax by including such as an itemized charge on
11 customers' monthly bills.

12 9.2 Sprint violated RCW 82.04.500.

13 9.3 Sprint's above-described actions occurred in the conduct of its
14 trade or commerce.

15 9.4 Sprint's above-described actions affect the public interest.

16 9.5 Sprint's actions caused injury to Plaintiffs in an amount to be
17 determined at trial.

18 **IX. PRAYER FOR RELIEF**

19 WHEREFORE, Plaintiff Nancy Brown, individually and on behalf of others
20 similarly situated, prays that the court grant the following relief:

21 1. For declaratory judgment that Sprint has violated RCW 82.04.500

EXHIBIT 4

FILED

JAN 09 2006

**SIRI A. WOODS
CHELAN COUNTY CLERK**

| | | |
|---|---|------------------------------|
| 1 | IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON | |
| 2 | COUNTY OF CHELAN | |
| 3 | MELISSA MORSE, a single person, individually and on behalf of others |) NO. 06-2 00021-2 |
| 4 | similarly situated, |) COMPLAINT FOR CLASS ACTION |
| 5 | Plaintiffs, |) |
| 6 | vs. |) |
| 7 | CINGULAR WIRELESS, LLC, a Delaware limited liability company, |) |
| 8 | Defendant. |) |

9
10 Plaintiff Melissa Morse, individually and on behalf of others similarly
11 situated, by and through her attorneys of record, Jeffers, Danielson, Sonn &
12 Aylward, P.S., by James M. Danielson and Brian C. Huber, brings this Complaint
13 for Class Action against Defendant Cingular Wireless, LLC, a Delaware limited
14 liability company, alleging as follows:
15
16

COMPLAINT FOR CLASS ACTION
Page 1
536182

Jeffers, Danielson, Sonn & Aylward, P.S.
Attorneys at Law
2600 Chester Kimm Road / P.O. Box 1688
Wenatchee, WA 98807-1688
(509) 662-2685 / (509) 662-2452 FAX

I. PARTIES

1.1 Representative Plaintiff. Melissa Morse is a single person and a resident of Chelan County, Washington. Morse has agreed to act as class representative in this matter.

1.2 Defendant. Cingular Wireless, LLC ("Cingular") is a Delaware limited liability company doing business in Chelan County, Washington.

1.3 Putative Class Members. The members of the relevant class include all persons:

(a) Who have purchased or received services provided by Cingular, and

(b) Who, within the applicable statute of limitations, were charged Washington State business and occupation (B&O) tax as an itemized charge on their monthly bill.

II. JURISDICTION AND VENUE

2.1 The acts complained of in this lawsuit occurred in whole or in part in Chelan County, Washington.

2.2 Jurisdiction and venue are proper pursuant to RCW 4.12.020, 4.12.025, and other applicable law.

III. PROPRIETY OF CLASS ACTION PROSECUTION

3.1 Impracticality of Joining All Members of the Class as Parties Due to Size of Class - CR 23(a)(1). The exact number of persons and/or entities

1 similarly situated to the Representative Plaintiff is now unknown. However,
2 Cingular is one of the largest providers of cellular telephone service in the state
3 of Washington, and it is estimated that the number of such persons is in the
4 hundreds of thousands. The exact number of such persons may be identified
5 from Cingular's records of customers in Washington State, and such persons
6 may be identified with particularity through appropriate judicial discovery
7 procedures, such that it would be possible to give such persons actual notice of
8 these proceedings, if required.

9 3.2 Existence of Questions of Law or Fact Common to the Class - CR
10 23(a)(2). There exist questions of law and fact common the Representative
11 Plaintiff's claim and the claims of the putative class members, such as those set
12 forth for Representative Plaintiff Melissa Morse individually in paragraphs 4.1
13 through 9.5.

14 3.3 Claims of the Representative Party are Typical of Claims of the
15 Class - CR 23(a)(3). The claims of the Representative Plaintiff are similar to all
16 others in that the Plaintiffs are or have been customers of Cingular, and have
17 been and are continuing to be, charged Washington State B&O tax as an
18 itemized charge on their monthly bills from Cingular.

19 3.4 The Representative Party Fairly and Adequately Protects the
20 Interest of the Class - CR 23(a)(4). The Representative Plaintiff comes before
21 this Court in the same capacity as any other litigant seeking redress for

1 | grievances and to seek class relief for all of those persons exposed to the same
2 | harm for which he is aggrieved. The adequacy of the Representative Plaintiff's
3 | ability to fairly and adequately protect the interest of the class does not depend
4 | upon his financial status but rather upon:

5 | (a) The capacity of chosen counsel to adequately prosecute the
6 | case on his behalf and on the behalf of the putative class. Plaintiffs' counsel are
7 | experienced trial attorneys who have engaged in extensive trial practice and
8 | have considerable experience in all aspects of class action litigation from several
9 | other class action cases. Plaintiffs' counsel has the necessary skills, expertise,
10 | and competency to adequately represent the Plaintiffs' interest in those of the
11 | class.

12 | (b) The fact that the Representative Plaintiff does not have any
13 | interests which are antagonistic to those of the class;

14 | (c) The fact that the Representative Plaintiff is ready and willing
15 | to bring this class action in a representative capacity on behalf of the putative
16 | class.

17 | 3.5 This Class Action is Maintainable Under CR 23(b). In addition to
18 | satisfying CR 23(a), the Plaintiffs' claims satisfy the conditions of CR 23(b)(1), (2)
19 | and (3).

20 | (a) CR 23(b)(1)(A) and (B). The prosecution of separate actions
21 | by individual members of the class would create a risk of inconsistent or varying

1 adjudications which would establish incompatible standards of conduct for the
2 Defendant and would also create the risk of adjudication with respect to
3 individual members of the class which would, as a practical matter, be dispositive
4 of the interests of other persons not party to the adjudication.

5 (b) CR 23(b)(2). The defendant has acted on grounds generally
6 applicable to all putative class members, making final injunctive relief appropriate
7 with respect to the class as a whole.

8 (c) CR 23(b)(3). Alternatively, the resolution of the numerous
9 legal and factual questions pertaining to the putative class members
10 predominates over any questions affecting only individual members such that the
11 prosecution of a class action is superior to other available methods for the fair
12 and efficient adjudication of this controversy. In this regard, there should be little,
13 if any, interest in individual members of the class controlling the prosecution of a
14 separate action for this relief since the relief sought is to apprise the entire class
15 membership of their rights to damages or reductions in charges. This action is a
16 superior method in preventing future economic and pecuniary loss to thousands
17 of Washington citizens and members of the public at large in purchasing cellular
18 telephone service. This action is uniquely directed to preserve the integrity and
19 safety of Washington citizens, the sanctity of business ventures, and to ensure
20 that all Washington citizens are protected in the future by providing that
21 businesses operating in Washington State may not pass along B&O tax to

1 consumer customers as an itemized charge. The class will benefit by redress
2 from the ongoing action which, if left to hundreds of thousands of individual
3 actions, would greatly congest the forums of the Superior Courts of the state of
4 Washington. Any difficulties which may be encountered in this action will be
5 slight compared to the impracticality of having hundreds of thousands of
6 individuals bringing individual actions and thereby unnecessarily burdening the
7 courts throughout the state of Washington. The class litigation is a fair, efficient
8 and expeditious vehicle for providing redress to both unnamed and named
9 plaintiffs and to as yet unidentified class members. This action is superior to any
10 other available method for the fair and efficient adjudication of the controversy.

11 IV. FACTS

12 4.1 Plaintiff Melissa Morse purchased cellular telephone service from
13 Cingular.

14 4.2 Morse continues to be a customer of Cingular.

15 4.3 Morse's monthly bill from Cingular has included an itemized charge
16 for Washington State B&O tax.

17 4.4 It is unlawful for a business operating in Washington to pass along
18 Washington State B&O tax to customers by including such as an itemized charge
19 on a bill or invoice.
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V. FIRST CAUSE OF ACTION: DECLARATORY RELIEF

5.1 Morse has a statutory legal right under RCW 82.04.500 that is capable of judicial protection.

5.2 Pursuant to Washington's Uniform Declaratory Judgments Act (RCW 7.24), Morse seeks a declaratory judgment that Cingular has violated RCW 82.04.500 by the manner in which it collects the B&O tax from its customers.

5.3 Morse also seeks further relief in this declaratory action pursuant to RCW 7.24.080, as set forth below.

VI. SECOND CAUSE OF ACTION: INJUNCTIVE RELIEF

6.1 Morse requests that the Court issue an injunction permanently enjoining Cingular from assessing, collecting, passing through or itemizing the B&O taxes from customers in Washington.

VII. THIRD CAUSE OF ACTION: RESTITUTION

7.1 Morse requests that the Court enter judgment against Cingular so that Morse and the other class members may receive restitution. Restitution should be awarded to the extent Cingular has been unjustly enriched by assessing, collecting, passing through or itemizing the B&O taxes from its customers in Washington.

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VIII. FOURTH CAUSE OF ACTION: BREACH OF CONTRACT

8.2 Cingular's unlawful assessment, collection, passing through or itemization of the B&O taxes to its Washington customers as herein alleged constitutes breach of contract. Morse therefore seeks judgment in favor of Morse and the other class members for any damages caused by Cingular's breach of contract.

IX. FIFTH CAUSE OF ACTION: VIOLATION OF THE WASHINGTON CONSUMER PROTECTION ACT, RCW 19.86, et. seq.

9.1 Cingular engaged in unfair or deceptive acts by passing along the Washington State B&O tax by including such as an itemized charge on customers' monthly bills.

9.2 Cingular violated RCW 82.04.500.

9.3 Cingular's above-described actions occurred in the conduct of its trade or commerce.

9.4 Cingular's above-described actions affect the public interest.

9.5 Cingular's actions caused injury to Plaintiffs in an amount to be determined at trial.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Melissa Morse, individually and on behalf of others similarly situated, prays that the court grant the following relief:

- 1. For declaratory judgment that Cingular has violated RCW

1 82.04.500 by the manner in which it collects the B&O tax from its customers.

2 2. For a permanent injunction against Cingular enjoining Cingular from
3 engaging in the above-described unlawful and/or unfair or deceptive business
4 acts.

5 3. For an award of restitution to the extent Cingular has been unjustly
6 enriched.

7 4. For an award of damages based on Cingular's breach of contract.

8 5. For an award of treble and other damages for violation of the
9 Washington Consumer Protection Act, RCW 19.86, et. seq.

10 6. For an award of reasonable attorney's fees and costs based on
11 RCW 19.86, et. seq., or other legal or equitable bases.

12 7. For an award of prejudgment interest on the amounts wrongfully
13 collected by the defendant.

14 8. For such and other further relief as the court deems just and
15 proper.

16 DATED this 9 day of January 2006.

17 JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

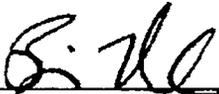
18
19 By 
20 JAMES M. DANIELSON, WSBA #01629
21 BRIAN C. HUBER, WSBA #23659
Attorneys for Plaintiff Melissa Morse

EXHIBIT 5

1 Brian C. Huber
2 Jeffers, Danielson, Sonn & Aylward, P.S.
3 P.O. Box 1688
4 Wenatchee, WA 98807-1688
5 (509) 662-3685 / (509) 662-2452 FAX

THE HONORABLE ALAN A. MCDONALD

6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON

8 NANCY BROWN, a single person, and) NO. 06-00055-AAM
9 on behalf of others similarly situated,)

10 Plaintiff,

) NOTICE OF VOLUNTARY
) DISMISSAL

11 vs.

12)
13 SPRINT NEXTEL CORPORATION, a)
14 Kansas corporation,)

15 Defendant.
16)

17
18 Plaintiff hereby gives notice that this action is hereby dismissed without
19 prejudice. This dismissal is appropriate pursuant to FRCP 41(a), as the
20 Defendant has not yet answered, asserted a counterclaim or filed a motion for
21 summary judgment.
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DATED this 6th day of March, 2006.

s/BRIAN C. HUBER
WSBA No. 23659
Attorney for Plaintiff
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: 509-662-3685
Fax: 509-662-2452
Email: brianh@jdsalaw.com

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

David M. Brenner – dbrenner@riddellwilliams.com

Gavin W. Skok – gskok@riddellwilliams.com

I hereby certify that I have mailed by United States Postal Service the foregoing document to the following non-CM/ECF participants:

R Bruce Allensworth
Kirkpatrick & Lockhart LLP - MA
75 State Street
Boston, MA 02109

Brian M Forbes
Kirkpatrick and Lockhart Nicholson Graham PLLP
75 State Street
Boston, MA 02109

Andrew C Glass
Kirkpatrick and Lockhart Nicholson Graham PLLP
75 State Street
Boston, MA 02109

Ryan M Tosi
Kirkpatrick and Lockhart Nicholson Graham PLLP
75 State Street
Boston, MA 02109

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s/BRIAN C. HUBER
WSBA No. 23659
Attorney for Plaintiff
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: 509-662-3685
Fax: 509-662-2452
Email: brianh@jdsalaw.com

EXHIBIT 6

1 STOKES LAWRENCE, P.S.
800 Fifth Avenue, Suite 4000
2 Seattle, Washington 98104-3179
(206) 626-6000
3
4

5 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

6 MELISSA MORSE, individually and on
behalf of others similarly situated,

7 Plaintiff,

8 v.

9 CINGULAR WIRELESS LLC, a
Delaware limited liability company,

10 Defendant.
11

Case No.: **CV-06-050-RHW**

NOTICE OF REMOVAL

12 Cingular Wireless LLC ("Cingular") files this Notice of Removal ("Notice")
13 under 28 U.S.C. § 1441(a).

14 **I. TIMELINESS**

15 Melissa Morse ("Morse" or "Plaintiff") served Cingular with a complaint and
16 summons on January 11, 2006, which she had filed in Chelan County Superior Court
17 two days earlier. Copies of the complaint and summons are attached as **Exhibit A,**
18 **pages 15-27.** This Notice is timely under 28 U.S.C. § 1446(b) because it is filed within
19 thirty days of service on Cingular. *See Murphy Bros., Inc. v. Michetti Pipe Stringing,*
20 *Inc., 526 U.S. 344, 354 (1999).*
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1 **II. PROCESS, PLEADINGS AND ORDERS**

2 Other than the Summons and Complaint and initial discovery requests (Exhibit B.
3 pages 28-57), no other process, pleading or order has been served, nor have further
4 proceedings taken place.

5 **III. JURISDICTION**

6 The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
7 Plaintiff's principal claim, although couched as one under state law, is completely
8 preempted by the Federal Communications Act. It is therefore inherently federal in
9 nature and removable under 28 U.S.C. § 1441. *See, e.g., Bastien v. AT&T Wireless*
10 *Servs., Inc.*, 205 F.3d 983, 986-87 (7th Cir. 2000) (state law claim completely
11 preempted by Federal Communications Act); *Gilmore v. Southwestern Bell Mobile Sys.,*
12 *Inc.*, 156 F. Supp. 2d 916, 923-24 (N.D. Ill. 2001) (state law claim completely
13 preempted by Federal Communications Act); *see also Aetna Health Inc. v. Davila*,
14 542 U.S. 200, 221(2004) (state law statutory claim completely preempted by ERISA);
15 *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (state law claim for usury
16 completely preempted by National Bank Act); *Metropolitan Life Ins. Co. v. Taylor*,
17 481 U.S. 58, 63-64 (1987) (state law claim completely preempted by ERISA); *Avco*
18 *Corp. v. Aero Lodge No. 735*, 390 U.S. 557 (1968) (state law claim completely
19 preempted by the Labor Management Relations Act).

20 **A. Plaintiff Asserts That Cingular's Line-Item Charge Violates State Law.**

21 Washington state imposes a business and occupation tax ("B&O Tax") on
22 Cingular. Cingular passes the cost of the B&O Tax on to its Washington subscribers as
23 part of its rate for wireless services; the cost is set forth as a separate line item on each
24

1 bill. Plaintiff asserts that this line-item charge violates RCW 82.04.500. Complaint
2 ¶¶ 5.2 and 7.1. Federal law, however, prohibits states from regulating the rates charged
3 by wireless carriers and creates an exclusive cause of action in federal court (or before
4 the FCC) for rate-related claims. Thus, under the Supreme Court's complete
5 preemption doctrine, Plaintiff's state law claim arises under federal law and is
6 removable.

7 **B. The Complete Preemption Doctrine Is an Exception to the Well Plead
8 Complaint Rule.**

9 "As a general rule, absent diversity jurisdiction, a case will not be removable if
10 the complaint does not affirmatively allege a federal claim," even where federal law
11 may provide an absolute defense to the state-law claim asserted. *Beneficial Nat'l Bank*
12 *v. Anderson*, 539 U.S. 1, 6 (2003); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470,
13 475 (1998). This is known as the well-pleaded complaint rule.

14 The complete preemption doctrine is an exception to the well-pleaded complaint
15 rule, *id.* at 475-76, and applies if "a federal statute wholly displaces [a] state law cause
16 of action." *Beneficial*, 539 U.S. at 8. Complete preemption occurs when federal law
17 defensively preempts the state law claim and simultaneously provides an exclusive
18 federal remedy. *See, e.g., Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64
19 (1987); *Abraham v. Norcal Waste Systems, Inc.*, 265 F.3d 811, 819 (9th Cir. 2001).
20 When these two conditions are met, Congress' intent that the federal cause be exclusive
21 is clear and the claim arises under federal law for removal purposes. *Beneficial*, 539
22 U.S. at 9 n.5.

23 In *Beneficial*, for instance, the Court held that the National Bank Act completely
24 preempted state law usury claims against national banks, even though the usury claims

1 “did not refer to any federal law.” *Id.* at 4. Noting the strong federal interest in
2 uniformity advanced by the particular provisions of the National Bank Act, 12 U.S.C.
3 §§ 85 and 86, the Court concluded that the provisions “supersede both the substantive
4 and the remedial provisions of state usury laws and create a federal remedy . . . that is
5 exclusive, even when a state complainant, as here, relies entirely on state law.” *Id.* at
6 11.

7 **C. The Federal Communications Act Completely Preempts Plaintiff’s Principal**
8 **Claim.**

9 When it comes to the regulation of wireless carriers’ rates, the Federal
10 Communications Act (the “FCA” or the “Act”), 47 U.S.C. § 151, *et seq.*, has the same
11 preemptive effect as the National Bank Act. Congress has both expressly forbidden
12 states from regulating wireless rates and created an exclusive federal remedy for
13 consumers wishing to challenge unjust or unreasonable charges on their bills.

14 Therefore, as in *Beneficial*, state law claims challenging rates are completely preempted.

15 **1. Congress Has Forbidden States From Regulating Wireless Carriers’**
16 **Rates.**

17 Because “[n]o state lines divide the radio waves,” the federal government long
18 ago concluded that “national regulation is not only appropriate but essential to the
19 efficient use of radio facilities.” *Federal Radio Comm’n. v. Nelson Bros. Bond &*
20 *Mortgage Co.*, 289 U.S. 266, 279 (1933). Consistent with this policy, and in response
21 to the advent of cellular telephones, Congress in 1993 amended the Federal
22 Communications Act to “dramatically revise the regulation of the wireless
23 telecommunications industry” with respect to rates. *Connecticut Dep’t. of Pub. Util.*
24 *Control v. FCC*, 78 F.3d 842, 845 (2d Cir. 1996). Congress intended the 1993

1 Amendments “to establish a national regulatory policy for CMRS [Commercial Mobile
2 Radio Service], not a policy that is balkanized state-by-state.” *In re Petition of the*
3 *People of the State of Cal.*, 10 F.C.C.R. 7486, 7499 (¶ 24), 1995 WL 314451 (May 19,
4 1995) (footnote omitted). The legislative history of the 1993 Amendments underscores
5 Congress’ intent:

6 [B]ecause commercial mobile services require a Federal
7 license and the Federal Government is attempting to promote
8 competition for such services, and because providers of such
9 services do not exercise market power vis-à-vis telephone
10 exchange service carriers and State regulation can be a barrier
11 to the development of competition in this market, *uniform*
12 *national policy is necessary and in the public interest.*

13 *Id.* at 7499 n.70 (quoting *Conference Report*, at 80-81) (emphasis added).

14 To ensure uniformity, Congress expressly forbade states from regulating the rates
15 charged by wireless carriers:

16 [N]o state or local government shall have any authority to
17 regulate the entry of or the rates charged by any commercial
18 mobile service . . . except that this paragraph shall not prohibit
19 a State from regulating the other terms and conditions of
20 commercial mobile services.

21 47 U.S.C. § 332(c)(3)(A). The language Congress used in § 332(c)(3)(A) could not be
22 more clear; over the last decade, the FCC and numerous courts have confirmed the
23 preemptive effect of § 332(c)(3)(A). *See, e.g., Metrophones Telecomms., Inc. v. Global*
24 *Crossing Telecomms., Inc.*, 423 F.3d 1056, 1077 (9th Cir. 2005) (noting that
§ 332(c)(3)(A) “has been held to preempt any claim that would require a court to set a
reasonable rate or to assess the reasonableness of rates charged.”).¹

¹ *See also Ball v. GTE Mobilnet of Cal.*, 96 Cal. Rptr. 2d 801, 806 (Cal. App. 2000)
(state law injunctive claims challenging carriers’ practice of charging for non-
communication time preempted); *In The Matter Of Southwestern Bell Mobile Systems*,

1 **2. State-Specific Line-Item Charges Fall Within the Definition of Rates.**

2 Rate regulation comes in many shapes and sizes. It covers not only issues such as
3 the absolute price a wireless carrier may charge but also questions like “for what goods
4 and services may a wireless carrier charge customers?” and “how must a wireless carrier
5 break out its rates?” All of these components make up the carrier’s rate structure, and
6 they are the exclusive province of federal law.

7 **(a) The FCC has expressly decided that state laws like
8 RCW 82.04.500 are preempted by § 332.**

9 If there were any doubt on this point, it was put to rest last year when the FCC
10 explicitly held that state laws prohibiting wireless carriers from using line item charges
11 to pass-through state taxes constituted rate regulation under § 332(c)(3)(A). *Second*
12 *Report and Order in the Matter of Truth-in-Billing and Billing Format*, 20 F.C.C.R.
13 6448, 6449 (¶ 1), 6462 (¶¶ 30-31), 2005 WL 645905 (2005). As the FCC observed,
14 § 332(c)(3)(A) broadly prohibits state regulation of the “rates charged by” wireless
15 service providers, including not only “rate levels,” but also rate “structures” and rate
16 “elements,” including “line items.” *Id.* at 6462-63 (¶ 30).

17 The FCC unambiguously explained its reasoning: “State regulations that prohibit
18 a [wireless] carrier from recovering certain costs through a separate line item, thereby
19 *Inc.*, FCC 99-356, 14 F.C.C.R. 19898 ¶¶ 18-20, 23, 1999 WL 1062835 (Nov. 24, 1999)
20 (states may not prohibit wireless carriers from charging for incoming calls or from
21 charging for airtime in whole minute increments); *In re Comcast Cellular Telecomms.*
22 *Litig.*, 949 F. Supp. 1193, 1201 (E.D. Pa. 1996) (state law claims asserting that charging
23 for non-communication time and “rounding up” airtime preempted).
24

1 permitting cost recovery only through an undifferentiated charge for service, clearly and
2 directly affect the manner in which the [wireless] carrier structures its rates” and
3 therefore constitute rate regulation preempted by Section 332. *Second Truth-in-Billing*
4 *Order*, 20 F.C.C.R. at 6463 (¶ 31).

5 The FCC identified certain state laws and regulations, including a Vermont
6 regulation prohibiting the use of line items to recover the cost of gross revenues taxes,
7 as preempted rate regulations. *Id.* at 6464 n.87. And the FCC went further, noting that:
8 “The statutory preemption we recognize in this item is not limited to these particular
9 state rules, but would apply to other rules, now and in the future, that constitute ‘rate
10 regulation’ in the manner described above.” *Id.* The *Second Truth-in-Billing Order*
11 leaves no question that RCW 82.04.500 is preempted by § 332(c)(3)(A) to the extent it
12 prohibits wireless carriers from passing through the cost of the B&O Tax.²

13
14
15 ² The FCC’s Order is the subject of petitions for review pending in the U.S. Court of
16 Appeals for the Eleventh Circuit. *See National Ass’n of State Utility Consumer*
17 *Advocates v. FCC*, Nos. 05-11682-DD and 05-12601-DD (11th Cir.). The filing of the
18 petitions for review did not suspend the operation of the Order, 28 U.S.C. § 2349(b),
19 and no stay has been sought in or issued by either the FCC or the Eleventh Circuit. By
20 its terms, the FCC Order extends to all state laws that constitute “rate regulation” in the
21 manner of the laws considered by the Commission—i.e., laws prohibiting CMRS
22 providers from recovering gross receipts taxes and other expenses through separate line
23 item charges.

1 **(b) The FCC's decision is entitled to *Chevron* deference.**

2 The FCC's conclusions in the *Second Truth-in-Billing Order* are entitled to
3 deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,
4 467 U.S. 837 (1984). Congress delegated to the FCC the authority to "execute and
5 enforce" the Communications Act, 47 U.S.C. § 151, and to "prescribe such rules and
6 regulations as may be necessary in the public interest to carry out the provisions" of the
7 Act, *id.* § 201(b); *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 377-378 (1999).
8 These provisions give the FCC the authority to promulgate binding legal rules, and the
9 FCC issued the *Second Truth-in-Billing Order* in the exercise of that authority.
10 *Chevron* deference must therefore be accorded to the declaratory ruling set forth in that
11 order. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, — U.S. —,
12 125 S. Ct. 2688, 2699 (2005) (giving *Chevron* deference to the FCC's interpretation of
13 the Communications Act in a declaratory ruling because the FCC is authorized to
14 promulgate binding legal rules and it "issued the order under review in the exercise of
15 that authority").

16 Where an agency has acted within the scope of its authority, *Chevron* provides for
17 a two step analysis to determine the validity of the agency's action. First, a court must
18 determine whether the statute makes Congress' intent clear; if so, a court must "give
19 effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-
20 43. If not, and the statute is ambiguous as to the precise question at issue, a court must
21 "defer at step two to the agency's interpretation so long as the construction is 'a
22 reasonable policy choice for the agency to make.'" *Brand X*, 125 S. Ct. at 2702
23 (quoting *Chevron*, 467 U.S. at 845).

1 The statutory prohibition of state regulation of “rates charged” for CMRS clearly
2 expresses Congress’s intent to proscribe state laws such as RCW 82.04.500. But even
3 to the extent the statute is ambiguous on this point, *Chevron* requires deference to the
4 FCC’s interpretation of Section 332(c)(3)(A) as encompassing such laws because such
5 an interpretation is plainly a reasonable policy choice in view of Congress’s intention
6 that CMRS rates be comprehensively and exclusively regulated at the federal level.
7 Recognizing that the term “rates charged” in Section 332(c)(3)(A) includes line item
8 charges precludes such adverse effects, preserves the uniform, market-based regulatory
9 framework mandated by Congress, and thus was eminently reasonable in light of these
10 overarching federal CMRS policy goals.

11 **3. The FCA Creates an Exclusive Federal Cause of Action for Claims**
12 **Challenging Wireless Carriers’ Rates.**

13 The FCA prohibits carriers from charging unjust or unreasonable rates, 47 U.S.C.
14 §§ 201(b) and 202(a), “codify[ing] the bedrock consumer protection obligations of a
15 common carrier.” *In re Personal Communications Industry Association’s Broadband*
16 *Personal Communications Servs. Alliance’s Petition for Forbearance for Broadband*
17 *Personal Communications Servs.*, 13 F.C.C.R. 16857, ¶ 15, 1998 WL 374954 (1998).
18 Among other things, § 201(b) “requires that all charges, practices, classifications, and
19 regulations for and in conjunction with interstate communications service be just and
20 reasonable.” *Second Truth-in-Billing Order* at 6460 (¶ 25). This applies to line item
21 charges on wireless carriers’ bills. *Id.* at 6460-6441¶¶ 25-29. And under § 207, claims
22 for violations of § 201(b) must be brought in the federal district court or before the FCC.
23 47 U.S.C. § 207; *see AT&T Corp. v. Coeur D’Alene Tribe*, 295 F.3d 899, 905 (9th Cir.
24 2002) (“By its express language, § 207 establishes concurrent jurisdiction in the FCC

1 and federal district courts only, leaving no room for adjudication in any other forum --
2 be it state, tribal or otherwise.”). “Congress has decreed that suits related to rates and
3 service of [wireless] telephone companies be handled in federal court.” *Bastien v.*
4 *AT&T Wireless Servs., Inc.*, 205 F.3d 983, 984 (7th Cir. 2000). Therefore the second
5 requirement for complete preemption (i.e., that federal law provide an exclusive federal
6 remedy) is also met in this case. Under *Beneficial*, Plaintiff’s challenge to Cingular’s
7 line item charge necessarily arises under federal law.

8 **D. Plaintiff’s Claims Are Also Removable Under the Substantial Federal**
9 **Question Doctrine.**

10 Even if the complete preemption doctrine did not apply, this action would still be
11 removable under the substantial federal question doctrine because adjudication of
12 Plaintiff’s claims requires the resolution of substantial disputed questions of federal law.
13 *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13-14 (1983);
14 *Gully v. First Nat’l Bank*, 299 U.S. 109 (1936); *Smith v. Kansas City Title & Trust Co.*,
15 255 U.S. 180 (1921); *Lippitt v. Raymond James Fin. Servs., Inc.*, 240 F.3d 1033 (9th
16 Cir. 2003).

17 In this case, whether federal law authorizes Cingular to pass along the cost of the
18 B&O tax as a line item surcharge is dispositive of Plaintiff’s claims. Plaintiff’s
19 Complaint therefore raises substantial, disputed questions of federal law.

20 Moreover, to permit state courts to entertain challenges to the propriety of
21 wireless carriers’ rate structures would inevitably lead to the promulgation of fifty
22 different and possibly conflicting standards regarding whether, when, and how wireless
23 carriers can bill their customers for the costs incurred from state taxes. Yet the federal
24 statutory framework is intended to create a “a *national* regulatory policy for CMRS, not

1 a policy that is balkanized state-by-state.” *In re Petition of New York State Public*
2 *Service Commission to Extend Rate Regulation*, 10 F.C.C.R. 8187, ¶ 24, 1995 WL
3 319051 (1995) (emphasis added). Again, in the FCC’s words:

4 Efforts by individual states to regulate CMRS carriers’ rates
5 through line item requirements thus would be inconsistent
6 with the federal policy of a uniform, national and deregulatory
7 framework for CMRS. Moreover, there is the significant
8 possibility that state regulation would lead to a patchwork of
9 inconsistent rules requiring or precluding different types of
10 line items, which would undermine the benefits derived from
11 allowing CMRS carriers the flexibility to design national or
12 regional rate plans.”

13 *Second Truth-in-Billing Order* 6467 (¶ 35). This implicates another substantial question
14 of federal law. “Where the resolution of a federal issue in a state-law cause of action
15 could, because of different approaches and inconsistency, undermine the stability and
16 efficiency of a federal statutory regime, the need for uniformity becomes a substantial
17 federal interest, justifying the exercise of jurisdiction by federal courts.” *Ormet Corp. v.*
18 *Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996); *see Boomer v. AT&T Corp.*, 309
19 F.3d 404, 418 (7th Cir. 2002) (“[A] state law challenge to the validity of the terms and
20 conditions of a telephone service agreement would result in the application of fifty
21 bodies of law, and this would inevitably lead to customers in different states receiving
22 different terms and conditions.”).

23 **E. The Court Has Supplemental Jurisdiction Over Any Pendent State Law**
24 **Claims.**

In addition to the completely preempted claim under RCW 82.04.500, Morse has
also included a breach of contract claim and a state consumer protection act claim. It is
unclear what the basis for the claims are from the complaint, but regardless, neither
claim is an impediment to federal jurisdiction. If one claim is removable, the Court may

1 exercise supplemental jurisdiction over any remaining claims under 28 U.S.C. § 1367.
2 28 U.S.C. § 1441(c) (when one claim removable, entire case may be removed at district
3 court's discretion); *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 n.3 (2003).

4 **IV. VENUE**

5 Venue is proper in this district pursuant to 28 U.S.C. § 1446(a) because the
6 United States District Court for the Eastern District of Washington encompasses Chelan
7 County, the county in which Morse filed her state court action.

8 **V. NOTICE**

9 Promptly after filing this Notice, Cingular will give written notice of this pleading
10 to Plaintiff and will file a copy of this Notice with the Superior Court of Chelan County.

11 DATED this 9th day of February, 2006.

12 STOKES LAWRENCE, P.S.

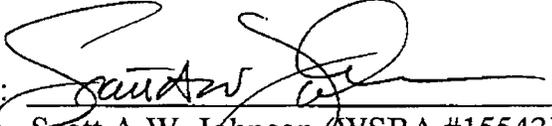
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14 By: 
15 Scott A.W. Johnson (WSBA #15543)
16 Kelly Twiss Noonan (WSBA #19096)
17 Attorneys for Cingular Wireless LLC
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EXHIBIT 7

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Brian C. Huber
Jeffers, Danielson, Sonn & Aylward, P.S.
P.O. Box 1688
Wenatchee, WA 98807-1688
(509) 662-3685 / (509) 662-2452 FAX

THE HONORABLE ROBERT H. WHALEY

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

| | |
|--|------------------------------------|
| MELISSA MORSE, a single person, individually and on behalf of others similarly situated, |) NO. 06-00050-RHW |
| |) |
| Plaintiff, |) NOTICE OF VOLUNTARY DISMISSAL |
| |) |
| vs. |) |
| |) |
| CINGULAR WIRELESS, LLC, a Delaware limited liability company, |) |
| |) |
| Defendant. |) |
| |) |

Plaintiff hereby gives notice that this action is hereby dismissed without prejudice. This dismissal is appropriate pursuant to FRCP 41(a), as the Defendant has not yet answered or filed a Motion for Summary Judgment.

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DATED this 3rd day of March, 2006.

s/BRIAN C. HUBER
WSBA No. 23659
Attorney for Plaintiff
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: 509-662-3685
Fax: 509-662-2452
Email: brianh@jdsalaw.com

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

scott.johnson@stokeslaw.com

kelly.noonan@stokeslaw.com

s/BRIAN C. HUBER
WSBA No. 23659
Attorney for Plaintiff
JEFFERS, DANIELSON, SONN & AYLWARD, P.S.
2600 Chester Kimm Road
P.O. Box 1688
Wenatchee, WA 98807-1688
Telephone: 509-662-3685
Fax: 509-662-2452
Email: brianh@jdsalaw.com