1		The Honorable Timothy A. Bradshaw			
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6	IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR THE COUNTY OF KING				
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8	STATE OF WASHINGTON,				
9	Plaintiff,	No. 16-2-18224-1 SEA			
10	<b>v.</b>	FINDINGS OF FACT AND CONCLUSIONS OF LAW			
11	COMCAST CABLE COMMUNICATIONS				
12	MANAGEMENT, LLC; COMCAST CABLE COMMUNICATIONS, LLC; and				
13	COMCAST OF COLORADO/FLORIDA/MICHIGAN/ NEW				
14.	MEXICO/PENNSYLVANIA/ WASHINGTON, LLC,				
15					
16	Defendants.				
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18	THIS MATTER, by law a trial to the bench, was litigated before the undersigned, Dept 01				
19	of the King County Superior Court, Seattle WA. The Plaintiff, the State of Washington ("State"),				
20	appeared by and through Assistant Attorneys General, Daniel T. Davies, Seann C. Colgan,				
21	Matthew Geyman, M. Elizabeth Howe, and Peter J. Helmberger. The Defendants, Comcast Cable				
22	Communications Management, LLC, Comcast Cable Communications, LLC, and Comcast of				
23	Colorado/Florida/Michigan/New Mexico/Pennsylvania/Washington, LLC ("Defendants" or				
24.	"Comcast") appeared by and through David Gringer, Matthew T. Martins, Howard M. Shapiro,				
25	Alejandro N. Mayorkas, and Ariel Warner of the law firm Wilmer, Cutler, Pickering, Hale and				
26	Dorr LLP, and Mark N. Bartlett and Ross Siler of the law firm Davis Wright Tremaine LLP. The				
27	Court heard testimony from the following individuals:				

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1	1. Rebecca Hartsock (Dec. 3-4, 2018), testimony recorded in pages 133-267 of the Verbatin			
2	Report of Proceedings ("VRP");			
3	2. Susan Rusch (Dec. 4, 2018), VRP pp. 267-287;			
4	3. Aloria Mercer (Dec. 4, 2018), VRP pp. 287-310;			
5	4. Stacey Peters (Dec. 4, 2018), VRP pp. 310-330;			
6	5. Anita Job (Dec. 4, 2018), VRP pp. 330-348;			
7	6. Alexander Polson (Dec. 4, 2018), VRP pp. 348-366;			
8	7. Tyler Burton (Dec. 5, 2018), VRP pp. 380-426;			
9	8. Patrick McCarthy (Dec. 5, 2018), VRP pp. 426-440;			
10	9. Jaeson Albritton (Dec. 5, 2018), VRP pp. 449-491;			
11	10. Elise Robertson (Dec. 5, 2018), VRP pp. 492-522;			
12	11. Sandra Hatcher (Dec. 6, 2018), VRP pp. 526-543;			
13	12. Patrice Lewis (Dec. 6, 2018), VRP pp. 559-609;			
14	13. Jeffrey Sumbillo (Dec. 10, 2018), VRP pp. 613-775;			
15	14. Sarah Butler (Dec. 11-12, 2018), VRP pp. 782-896, 899-974, 978-1081, 1085-1147;			
16	15. Doug Brodin (Dec. 13, 2018), VRP pp. 1157-1207;			
17	16. Pamela Smith (Dec. 13, 2018), VRP pp. 1215-1254;			
18	17. Eric Padilla (Dec. 17, 2018), VRP pp. 1265-1334;			
19	18. Karen Hills (Dec. 18, 2018), VRP pp. 1341-1366;			
20	19. Anthony Pratkanis, Ph.D. (Dec. 19, 2018), VRP pp. 1374-1488, 1491-1531;			
21	20. Tabetha Decker (Jan. 7, 2019), VRP pp. 1544-1596;			
22	21. Tom Karinshak (Jan. 7-8, 2019), VRP pp. 1640-1716, 1720-1830, 1833-1863;			
23	22. Martha Soehren, Ph.D. (Jan. 8-9, 2019), VRP pp. 1864-1928, 1932-2021;			
24	23. Anne Marie Miriello (Jan. 9, 2019), VRP pp. 2022-2047;			
25	24. Ryan Kelly (Jan. 9, 2019), VRP pp. 2048-2055, 2058-2076;			
26	25. Charles Abrams (Jan. 9-10, 2019), VRP pp. 2076-2159, 2164-2283, 2286-2297;			
27	26. Ravi Dhar, Ph.D. (Jan. 10, 2019) & Jan. 14, 2019), VRP pp. 2297-2386, 2390-2433;			
28				

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1	27. John Hauser, Ph.D. (Jan. 14, 2019), VRP pp. 2433-2513, 2516-2597;				
2	28. Billy John Daisey (Jan. 15, 2019), VRP pp. 2601-2730;				
3	29. Bruce Deal (Jan. 15-17, 2019 & Jan. 29, 2019), VRP pp. 2374-2811, 2814-2939, 2942-				
4	3033, 3040-3163, 3166-3182, 3330-3381;				
5	30. Lorraine Barrick (Jan. 17, 2019 & Jan. 29, 2019), VRP pp. 3183-3267, 3288-3330.				
6	The Court additionally reviewed portions of transcripts and video portions of the depositions of:				
7	1. Christopher Weeks (Tr. of Deposition dtd. May 18, 2018), video played Dec. 5, 2018;				
8	2. James Heyward (Tr. of Deposition dtd. May 10, 2018), video played Dec. 6, 2018;				
9	3. Chris Martin Johnson (Tr. of Deposition dtd. Dec. 6, 2017), video played Dec. 6, 2018;				
10	4. Jerard Darr (Tr. of Deposition dtd. Dec. 7, 2017), video played Dec. 12-13, 2018;				
11	5. Kevin Preugschat (Tr. of Deposition dtd. Apr. 26, 2018), video played Dec. 13, 2018 &				
12 13	Dec. 17, 2018;				
15	6. Jeffrey Becker, Jr. (Tr. of Deposition dtd. Dec. 4, 2017), video played Dec. 17, 2018;				
14	7. Pamela Clare (Tr. of Deposition dtd. Dec. 6, 2017), video played Dec. 17-18, 2018;				
15	8. Ryan Jaycox (Tr. of Deposition dtd. Dec. 14, 2017), video played Dec. 18, 2018;				
10	9. Ian Linthicum (Tr. of Deposition dtd. Dec. 12, 2017), video played Dec. 18, 2018;				
18	10. Brandon Dickey (Comcast corporate representative) (Tr. of Deposition dtd. May 1, 2018),				
19	video played Dec. 18, 2018;				
20	11. Christopher Starr (Comcast corporate representative) (Tr. of Deposition dtd. May 2, 2018),				
21	read into record Dec. 19, 2018, VRP pp. 1532-1537;				
22	12. Billy John Daisey (Comcast corporate representative) (Tr. of Deposition dtd. Apr. 24,				
23	2018), video played Dec. 19, 2018;				
24	13. Megan Johnson (Tr. of Deposition dtd. Apr. 26, 2018), video played Jan. 7, 2019;				
25	14. William Fritcher (Teleperformance USA corporate representative) (Tr. of Deposition dtd.				
26	Apr. 27, 2018), video played Jan. 15, 2019;				
27	The Court admitted approximately 1,621 exhibits.				
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Based upon the files and records herein and the evidence and testimony presented at trial, the Court makes the following Findings of Facts and Conclusions of Law. To the extent any Finding of Fact may be more properly characterized as a Conclusion of Law, or vice versa, it shall be re-characterized as such.

Parties<br/>1. The Plaintiff State of Washington commenced this action against Defendants<br/>seeking injunctive and declaratory relief, restitution, civil penalties, and its attorneys' fees and<br/>costs under the Consumer Protection Act ("CPA"), RCW ch. 19.86, pursuant to the enforcement<br/>authority of the Attorney General of the State of Washington under RCW 19.86.080 and RCW<br/>19.86.140.

2. Defendant Comcast Cable Communications, LLC is a subsidiary of Comcast Corporation that operates in Washington. It is a Delaware limited liability company with its principal place of business located in Philadelphia, Pennsylvania. Admitted in Answer of Defendants, ¶ 3.1, Dkt. # 201.

3. Defendant Comcast Cable Communications Management, LLC is a subsidiary of
Comcast Cable Communications, LLC that operates in Washington. It is a Delaware limited
liability company with its principal place of business located in Philadelphia, Pennsylvania.
Admitted in Answer of Defendants, ¶ 3.2, Dkt. # 201.

4. Defendant Comcast of Colorado/Florida/Michigan/New Mexico/Pennsylvania/ Washington, LLC is a subsidiary of Comcast Cable Communications, LLC that operates in Washington. It is a Colorado limited liability company with its principal place of business located in Philadelphia, Pennsylvania. Admitted in Answer of Defendants, ¶ 3.3, Dkt. # 201.

Defendants will be referred to collectively herein as "Defendants" or "Comcast."

#### FINDINGS OF FACT

Background

A.

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#### Comcast's Operations in Washington

 Defendants ("Comcast") provide cable, telephone, and internet services to approximately 1.6 million residential customers in Washington. Trial Tr. at 2753:5-18 (Jan. 15, 2019) (Deal).

2. Comcast distributes a "Welcome Kit," which is an envelope containing various pieces of information, to all new customers after they purchase Comcast services. Trial Tr. at 2023:9-22, 2024:17-20, 2025:11-19 (Jan. 9, 2019) (Miriello); Trial Tr. at 2617:3-23 (Jan. 15, 2019) (Daisey).

3. The "Welcome Kit" includes, among other things, a copy of the Residential Services Agreement ("RSA"), which addresses the terms of Comcast customers' service. Trial Tr. at 2617:12-16, 2618:13-2619:2 (Jan. 15, 2019) (Daisey); DX-2700.

4. Comcast receives over 20,000 telephone calls from its Washington customers daily, in various points of need. Trial Tr. at 1652:18-1653:2 (Jan. 7, 2019) (Karinshak).

5. Since approximately late 2012, calls from customers across Comcast's West Division (which includes Washington) have been routed to "centers of excellence," which are call centers with representatives trained to handle specific types of calls. Trial Tr. at 1646:19-1648:6 (Jan. 7, 2019) (Karinshak). The centers of excellence include repair (representatives trained to troubleshoot and attempt to resolve service issues), billing (representatives trained to answer questions about customer bills), retention (representatives trained to talk to customers thinking of cancelling their Comcast services who attempt to preserve the customer relationship), and sales (representatives trained to offer Comcast products and services to customers). Trial Tr. at 1647:11-1648:6, 1649:6-19 (Jan. 7, 2019) (Karinshak).

6. At any given time, there are four to five thousand Comcast employees working in the centers of excellence that handle calls from Washington customers. Trial Tr. at 1658:10-

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#### What Happens When Something Goes Wrong with Comcast Service В.

7. If Washington customers have issues with their Comcast service, Comcast attempts to resolve their issues over the telephone. Telephone troubleshooting with customer service representatives resolves customers' service issues approximately 70% of the time. Trial Tr. at 2073:18-22 (Jan. 9, 2019) (Kelly); Trial Tr. at 2753:19-2754:8 (Jan. 15, 2019) (Deal).

8. If telephone troubleshooting does not resolve the customer's issue, Comcast technicians make service visits to customers' residences ("service visit"). Comcast charges customers for some of those service visits, depending on the nature of the issue. Trial Tr. at 2759:10-2760:7 (Jan. 15, 2019) (Deal); Trial Tr. at 2624:23-2626:1 (Jan. 15, 2019) (Daisey).

9. At certain times,<sup>1</sup> Comcast included its Customer Guarantee ("Comcast Guarantee") in a User Guide that was contained in the "Welcome Kits" distributed to all new customers. Trial Tr. at 2023:9-22 (Jan. 9, 2019) (Miriello); Trial Tr. at 2218:24-2219:5 (Jan. 10, 2019) (Abrams); DX-2712 at 3; PX-988 at 13. The Comcast Guarantee stated, among other provisions, that Comcast "won't charge you for a service visit that results from a Comcast equipment or network problem." PX-988 at 13.

10. Consistent with the Comcast Guarantee, from January 2011 until June 30, 2016, Comcast provided its Washington customers with approximately 1.3 million free service visits. Trial Tr. at 2759:10-2760:7 (Jan. 15, 2019) (Deal). Comcast spent more than \$70 million performing these free service visits. Trial Tr. at 2759:10-2760:7 (Jan. 15, 2019) (Deal).

<sup>1</sup> The State offered evidence that the Guarantee was distributed in a version of the User Guide from 2011 and versions of the User Guide from 2014; it did not establish whether the Guarantee was included in the User Guide in other years. See Trial Tr. at 2218:24-2219:5 (Jan. 10, 2019) (Abrams); Trial Tr. at 2044:8-2045:23 (Jan. 9, 2019) (Miriello).

11. When service visits required work not covered by the Comcast Guarantee, Comcast charged customers a fee of between \$30 and \$70. Trial Tr. at 1273:11-23 (Dec. 17, 2018) (Padilla); Trial Tr. at 2694:20-2695:1 (Jan. 15, 2019) (Daisey); DX-2651 at 1; DX-2642 at 2. Chargeable work typically involved service issues requiring the repair and replacement of wiring and cabling inside the customer's home ("inside wiring"), the diagnosis of issues with the customer's equipment (e.g., televisions, printers), and service visits where customer education was necessary to resolve the customer's underlying issue. Trial Tr. at 2624:23-2625:5 (Jan. 15, 2019) (Daisey); DX-2498 at 7; DX-2494 at 9-10.

12. Comcast technicians use "fix codes" to reflect the work performed on a service visit that was necessary to resolve the customer's issue; technicians may enter up to six fix codes per service visit. Trial Tr. at 2629:3-13, 2630:16-2632:9, 2636:8-12, 2689:9-24 (Jan. 15, 2019) (Daisey); DX-2022 at 2. Certain fix codes, when applied, may result in a charge to the customer. Trial Tr. at 2626:25-2627:20 (Jan. 15, 2019) (Daisey). Comcast technicians could, however, use the U51 waiver code, which when placed on a customer account, ensured that the customer would not be charged for the service visit, regardless of the other fix codes entered. Trial Tr. at 2641:14-2642:10 (Jan. 15, 2019) (Daisey); Trial Tr. at 2898:5-2899:12 (Jan. 16, 2019) (Deal); Linthicum Tr. at 33:11-22 (played at trial on Dec. 18, 2018); DX-2035 at 1. Comcast encouraged technicians to use the waiver code to avoid circumstances where customers would be unfairly charged for service visits. Trial Tr. at 2642:11-2643:1 (Jan. 15, 2019) (Daisey). Comcast did not place limitations or restrictions on technicians' use of the U51 code. Trial Tr. at 2642:21-23 (Jan. 15, 2019) (Daisey). Between January 2011 and June 2016, technicians applied the U51 waiver code 67,966 times. Trial Tr. at 2897:8-2898:21(Jan. 16, 2019) (Deal).

13. Between December 2006 and June 30, 2016, Comcast offered customers the option of purchasing the Service Protection Plan ("SPP") for a monthly fee of \$.99 to \$5.99. A subscription to the SPP allowed the customer to avoid charges for otherwise chargeable service visits that were not covered by the Comcast Guarantee. Ex 835; DX-2713; PX-835 at 6; PX-869 at 3; DX-2989; Trial Tr. at 1934:2-1935:15 (Soehren); Trial Tr. at 2751:20-22 (Jan. 15, 2019) (Deal); Trial Tr. at 3292:25-3293:5 (Jan. 29, 2019) (Barrick).

14. Comcast charged customers who subscribed to the SPP a monthly, recurring charge.

15. Monthly SPP revenue from WA customers varied between \$1.21 and \$1.48 million, between January 2013 and July 2015. Ex. 818.

16. Comcast stopped selling the SPP to new subscribers in 2018. Trial Tr. at 1651:7-10 (Jan. 7, 2019) (Karinshak).

C.

## Comcast Policies Ostensibly Require Pre-Sale Affirmative Informed Consent

17. Comcast's call quality program, known as the S4 Guidelines or S4X, requires, among other things, representatives to summarize at the end of a call any changes made to a customer's account, including the addition of any products or services like the SPP, as well as the price of the products or services and the roll-off date of any promotional pricing. Trial Tr. at 1738:1-1740:11 (Jan. 8, 2019) (Karinshak); Trial Tr. at 1270:15-23 (Dec. 17, 2018) (Padilla); Becker Tr. at 69:8-70:3 (played at trial on Dec. 17, 2018); Darr Tr. at 107:7-108:5 (played at trial on Dec. 13, 2018); C. Johnson Tr. at 67:14-68:11 (played at trial on Dec. 6, 2018); Preugschat Tr. at 73:15-74:12 (played at trial on Dec. 12, 2018); DX-2708 at 18; DX-2709 at 14; DX-2490 at 7.

18. Comcast also expected employees to obtain affirmative consent from a customer before processing an order for a service or equipment or making any changes to the customer's account. Comcast 30(b)(6) Tr. (Dickey) at 11:21-12:01, 27:3-27:8 (played at trial on Dec. 18, 2018); Trial Tr. at 1749:22-1751:3 (Jan. 8, 2019) (Karinshak); Trial Tr. at 1891:25-1892:11 (Jan. 8, 2019) (Soehren); Trial Tr. at 2014:2-5 (Jan. 9, 2019) (Soehren); Trial Tr. at 2175:2-8 (Jan. 10, 2019) (Abrams). Comcast's policy re affirmative consent is communicated to all employees who sell Comcast products and services. Comcast 30(b)(6) Tr. (Dickey) at 27:3-12 (played at trial on Dec. 18, 2018).

19. Comcast also expected its employees to disclose prices, including any monthly recurring charge or promotional period, to customers on a sales call. Comcast 30(b)(6) Tr. (Dickey) at 112:2-17 (played at trial on Dec. 18, 2018); Trial Tr. at 171:6-15 (Jan. 8, 2019) (Karinshak); DX-2708 at 14, 16, 18, 22. In addition, the bills that Comcast provides its customers on a monthly basis indicate the charges that pertain to each service in which a customer is enrolled, including am embedded line item for the SPP. DX-2254 at 2; DX-2277 at 3; Comcast 30(b)(6) Tr. (Dickey) at 39:14-22 (played at trial on Dec. 18, 2018).

20. Comcast's Sales Integrity and Protection Guidelines tells representatives to "[a]lways secure a customer's consent and approval before adding or removing any products on a customer's account." Trial Tr. at 1753:5-14 (Jan. 8, 2019) (Karinshak); DX-2111 at 1. These Guidelines also inform representatives to "[c]learly explain promotional offers, the expiration date of the promotion, the full value of the product customers are receiving at a discount and what their monthly bill will be at the end of the promotion." DX-2111 at 2. All West Division call center employees were required to sign the Guidelines. Trial Tr. at 1753:18-24 (Jan. 8, 2019) (Karinshak); DX-2111 at 2. Trial Tr. at 1315:19-1320:16 (Dec. 17, 2018) (Padilla); C. Johnson Tr. at 29:18-33:16 (played at trial on Dec. 6, 2018); Becker Tr. at 33:20-37:3 (played at trial on Dec. 17, 2018); Darr Tr. at 97:3-99:3 (played at trial on Dec. 12, 2018); Clare Tr. at 29:1-18, 31:12-33:2 (played at trial on Dec. 18, 2018).

21. Employees who fail to comply with Comcast's affirmative consent policies are subject to discipline, up to and including termination. Trial Tr. at 1750:8-17, 1753:18-24 (Jan. 8, 2019) (Karinshak); Comcast 30(b)(6) Tr. (Dickey) at 12:8-19, 28:1-9 (played at trial on Dec. 18, 2018); DX-2111 at 2.

22. Call center representatives have calls randomly monitored by their direct supervisors and by independent monitors for compliance with Comcast's policies. Trial Tr. at 1696:2-9, 1697:4-21; 1698:16-1701:8 (Jan. 7, 2019) (Karinshak); Trial Tr. at 1739:21-1740:5, 1841:15-21 (Jan. 8, 2019) (Karinshak); Comcast 30(b)(6) Tr. (Dickey) at 35:17-36:14 (played at trial on Dec. 18, 2018); DX-2163 at 1, 4.

23. Independent monitors also evaluate call center employee compliance with the S4 Guidelines. Trial Tr. at 1697:4-8, 1698:16-1701:2 (Jan. 7, 2019) (Karinshak); Trial Tr. at 1841:15-21 (Jan. 8, 2019) (Karinshak); DX-2163 at 1, 4. Failure to disclose information about a product or service, including the price, roll-off date of a promotion, or that a product or service was added to a customer's account, is a violation of both the S4 Guidelines and Comcast's sales integrity policy. Trial Tr. at 1740:6-1741:5 (Jan. 8, 2019) (Karinshak); Trial Tr. at 1923:10-1925:20 (Jan. 8, 2019) (Soehren); DX-2708 at 22; DX-2709 at 18-19; DX-2111 at 1, 2; PX-1113 at 1, 2.

# D. Comcast Trains Employees on Consent Policies, Service Call Charges, and the SPP

24. When hired, all customer-facing employees complete a four- to eight-week training program. Trial Tr. at 1889:17-1890:13 (Jan. 8, 2019) (Soehren); Trial Tr. at 2610:14-2611:5 (Jan. 15, 2019) (Daisey). This program is run by Comcast's training department, which is known as Comcast University. Trial Tr. at 1868:1-9 (Jan. 8, 2019) (Soehren). Each year, Comcast spends more than \$74 million on training through Comcast University. Trial Tr. at 1871:24-1872:5 (Jan. 8, 2019) (Soehren).

25. Employees are routinely trained on Comcast's sales integrity and affirmative consent policies. Trial Tr. at 1664:8-18 (Jan. 7, 2019) (Karinshak); Trial Tr. at 2175:2-8 (Jan. 10, 2019) (Abrams); Trial Tr. at 1892:6-11 (Jan. 8, 2019) (Soehren); Comcast 30(b)(6) (Dickey) Tr. at 35:17-36:6 (played at trial on Dec. 18, 2018).

26. Employees are also trained on Comcast's expectations for their performance and the quality of their interactions with customers on telephone calls. Trial Tr. at 1900:2-18, 1906:9-1909:7 (Jan. 8, 2019) (Soehren); DX-2514 at 1.

27. Since 2006, new hire training has covered Comcast's policies for charging for service visits and the scope of the SPP's coverage. Trial Tr. at 1896:16-1897:20 (Jan. 8, 2019) (Soehren); Trial Tr. at 1933:17-1936:25, 1937:1-1941:14, 1943:22-1946:17, 1947:11-1953:15 (Jan. 9, 2019) (Soehren); PX-869 at 3; DX-2497 at 100-03.

28. Comcast trained its call center employees to inform customers of the possibility of a service visit charge before scheduling a service visit, and it trained its technicians to alert a customer to the possibility of a service visit charge before performing work that could generate a service visit charge. Trial Tr. at 2617:17-23 (Jan. 15, 2019) (Daisey); Clare Tr. at 24:23-25:1, 44:16-45:2 (played at trial on Dec. 18, 2018); DX-2494 at 7-8, 10-11.

29. Comcast employees continue to receive training throughout their time at the company. Trial Tr. at 1667:4-1668:2 (Jan. 7, 2019) (Karinshak); Trial Tr. at 1888:9-23 (Jan. 8, 2019) (Soehren); Trial Tr. at 1975:26-1976:10 (Jan. 9, 2019) (Soehren). This ongoing training takes various forms, such as weekly coaching sessions with supervisors, regular team huddles, and refresher training on specific products and policies, including the SPP and affirmative consent policy. Trial Tr. at 1667:4-1668:2 (Jan. 7, 2019) (Karinshak); Trial Tr. at 1888:4-23 (Jan. 8, 2019) (Soehren); Trial Tr. at 1976:22-1977:4 (Jan. 9, 2019) (Soehren); Trial Tr. at 2611:6-2612:10 (Jan. 15, 2019) (Daisey); Trial Tr. at 617:15-17, 668:17-18 (Dec. 10, 2018) (Sumbillo); C. Johnson Tr. at 17:17-25, 23:21-24:5 (played at trial on Dec. 6, 2018); M. Johnson Tr. at 12:1-19 (played at trial on Jan. 7, 2019); Becker Tr. at 23:19-24:16 (played at trial on Dec. 17, 2018); DX-2038.

#### Comcast Evaluates and Compensates its Call Center Employees Based on E. **Call Quality and Customer Satisfaction**

30. Over 90% of total compensation for Comcast call center representatives is based on their hourly wage. Trial Tr. at 1670:22-1671:2 (Jan. 7, 2019) (Karinshak); Trial Tr. at 1743:5-25 1744:6 (Jan. 8, 2019) (Karinshak). The remaining ten percent is variable based on incentives or commission bonuses tied to employee performance. Trial Tr. at 1671:2-9 (Jan. 7, 2019) (Karinshak); Trial Tr. at 1744:1-6 (Jan. 8, 2019) (Karinshak).

31. Metrics focused on call quality and customer satisfaction comprise over 90% of a Comcast employee's performance evaluation. Trial Tr. at 1724:3-1728:14 (Jan. 8, 2019) (Karinshak); DX-2113 at 4-5; Trial Tr. at 1671:10-1673:12 (Jan. 7, 2019) (Karinshak); DX-2511 at 9. These metrics include "quality," the first call resolution rate (FCR), voice of the

customer (VOC), and ITG compliance. DX-2512 at 7. FCR measures the percentage of customers who have to call back regarding the same issue as an initial call within seven days. Trial Tr. at 1671:19-1672:7 (Jan. 7, 2019) (Karinshak). VOC measures customer satisfaction based on a random survey of customers at the conclusion of a telephone call with a Comcast representative. Trial Tr. at 1672:7-25 (Jan. 7, 2019) (Karinshak). ITG compliance assesses compliance with available troubleshooting reference guides. Trial Tr. at 1706:20-1708:4 (Jan. 7, 2019) (Karinshak).

32. A small portion of a customer-facing employee's performance score is based on sales. To determine this score, Comcast measures transaction sales rate ("TSR,"), which is based only on the sales of Comcast's core products. Trial Tr. at 1673:4-12 (Jan. 7, 2019) (Karinshak). Sales of the SPP are not included in TSR. Trial Tr. at 1673:13-20 (Jan. 7, 2019) (Karinshak).

33. Comcast provided a commission for the sale of the SPP; it was the lowest commission available for any of Comcast's products. Trial Tr. at 1746:25-1747:17 (Jan. 8, 2019) (Karinshak); DX-2646 at 3.

34. Comcast conducts regular audits of employee sales and commissions. Trial Tr. at 1756:2-14 (Jan. 8, 2019) (Karinshak); DX-2111 at 2. For example, Comcast identifies representatives who have higher commission payments than the statistical norm and investigates their interactions with customers to confirm compliance with Comcast's policies. Trial Tr. at 1680:1-5 (Jan. 7, 2019) (Karinshak); Comcast 30(b)(6) Tr. (Dickey) at 35:17-36:14 (played at trial on Dec. 18, 2018); DX-2111 at 2.

## F. Comcast Utilizes Independent Contractor Representatives Who Are Trained and Follow Affirmative Consent Policies

35. Comcast uses independent contractors to handle calls from customers to help manage customer call volume and to ensure that a representative is available to assist customers at any hour on every day of the year. Trial Tr. at 1659:2-1660:21 (Jan. 7, 2019)

(Karinshak). The employees of these independent contractors represent Comcast but are not Comcast employees. Trial Tr. at 1660:22-24 (Jan. 7, 2019) (Karinshak).

36. However, employees of the independent contractors are expected to comply with Comcast's policy of obtaining affirmative consent and to accurately describe the products and services they sell to customers, including the price of those services. Trial Tr. at 1756:15-18 (Jan. 8, 2019) (Karinshak); TPUSA 30(b)(6) Tr. (Fritcher) at 35:9-36:15, 39:18-25, 48:6-19 (played at trial on Jan. 15, 2019). Independent contractor employees are also told to comply with Comcast's S4 Guidelines. TPUSA 30(b)(6) Tr. (Fritcher) at 51:18-52:11, 53:2-6 (played at trial on Jan. 15, 2019).

37. Independent contractor employees receive training from content created by Comcast University. Trial Tr. at 1974:9-11 (Jan. 9, 2019) (Soehren); Weeks Tr. at 26:7-12 (played at trial on Dec. 5, 2018); TPUSA 30(b)(6) Tr. (Fritcher) at 16:7-14 (played at trial on Jan. 15, 2019). Comcast trains the trainers employed by its independent contractors to deliver the training content to the independent contractor's employees. Trial Tr. at 1974:23-1975:17 (Jan. 9, 2019) (Soehren); Weeks Tr. at 28:22-30:4 (played at trial on Dec. 5, 2018); TPUSA 30(b)(6) Tr. (Fritcher) at 16:15-17:09 (played at trial on Jan. 15, 2019).

38. Comcast does not pay commissions to independent contractor employees. Trial Tr. at 1756:19-22 (Jan. 8, 2019) (Karinshak).

#### G. **Comcast's New Process for Obtaining Customer Consent**

39. In June 2017, Comcast implemented a new process to enhance its ability to obtain affirmative consent from customers who purchase Comcast products and services. Comcast 30(b)(6) Tr. (Dickey) at 16:9-15, 19:11-15 (played at trial on Dec. 18, 2018). The new process leverages technology to ensure that customers review and affirmatively approve their order through one of several methods before the order can be entered, including text message, email, telephone keypad, or in-person by signing an e-tablet. Comcast 30(b)(6) Tr. (Dickey) at 16:15-17:11 (played at trial on Dec. 18, 2018). Once the order is completed, an order confirmation is sent immediately afterwards to the email address on file and is also

available in the customer's "My Account" online profile. Comcast 30(b)(6) Tr. (Dickey) at 17:12-15 (played at trial on Dec. 18, 2018).

#### II. The State's Comcast Guarantee Claims

40. The State contends that a single sentence of the Comcast Guarantee is unfair and/or deceptive. Trial Tr. at 79-82 (Dec. 3, 2018) (State Opening Statement). The challenged sentence (or "at-issue statement") provides that "[W]e [Comcast] won't charge you for a service visit that results from a Comcast equipment or network problem." PX-988 at 13.

#### **Multi-Purpose Service Visits**

41. During the relevant period, Comcast charged customers for service visits where it performed work not covered by the Guarantee that was necessary to resolve the customer's service issue if, during the same visit, the technician also addressed a Comcast equipment or network issue (hereinafter "multi-purpose service visits"). Trial Tr. at 2634:17-23 (Jan. 15, 2019) (Daisey).<sup>2</sup>

42. Multi-purpose service visits occurred infrequently. Comcast's expert witness
Bruce Deal testified that these visits resulted in a charge to the customer in 0.9 percent of all service visits from 2011 to June 30, 2016, resulting in total charges of \$782,999 to
Washington customers. Trial Tr. at 2899:13-2901:2 (Jan. 16, 2019) (Deal); DX-2997. The
State offered rebuttal expert testimony from Lorraine Barrick contending that multi-purpose
service visits resulted in a charge to customers 24,804 times, which is 1.3 percent of the 1.9
million service visits during that time period, resulting in total charges of \$1,170,466 to
Washington customers. Trial Tr. at 3225:7-3228:2 (Jan. 17, 2019) (Barrick); PX-1282.
Neither party offered evidence concerning how many, if any, multi-purpose service visits

<sup>2</sup> These are service visits where the first of six fix codes entered was a nonchargeable code, and a chargeable fix code was entered in positions 2-6. In January 2018, Comcast changed its policy and now charges for service calls only where the first fix code entered is chargeable. Comcast 30(b)(6) Tr. (Daisey) at 118:21-119:11 (played at trial Dec. 19, 2018).

Findings of Fact and Conclusions of Law

43. Ms. Barrick arrived at her higher number either by double-counting certain service visits, Trial Tr. at 3338:18-3340:13 (Jan. 29, 2019) (Deal), or by counting service visits with fix codes entered that she classified as "unknown." Trial Tr. 3312:2-3313:2 (Jan. 29, 2019) (Barrick). Thus, from January 2011 to June 30, 2016, Comcast charged Washington consumers \$782,999 for 16,393 multi-purpose service visits. Trial Tr. at 2897:1-4, 2899:13-2901:2 (Jan. 16, 2019) (Deal); DX-2997. From December 25, 2013<sup>3</sup> until June 30, 2016, Comcast charged Washington consumers \$605,466 for 11,879 multi-purpose service visits. *See* DX 2035; DX 2108; DX 2570; DX 2571; DX 2681; DX 2722.

44. The State asserts that charging consumers for multi-purpose service visits was improper because it violated Comcast's "national policy." Trial Tr. at 80-81 (Dec. 3, 2018) (State Opening Statement). But multiple witnesses credibly testified that there was no such national policy, only guidance. Trial Tr. at 2638:1-21 (Jan. 15, 2019) (Daisey); Trial Tr. at 2177:11-20 (Jan. 10, 2019) (Abrams). Normal-course business documents confirmed that two of Comcast's three Divisions at times charged customers for multi-purpose service visits. DX-2104 at 1; PX-942 at 1; *see also* Trial Tr. at 2638:11-21 (Jan. 15, 2019) (Daisey).

45. Charging for multi-purpose service visits was consistent with the Guarantee. Comcast trained technicians only to enter fix codes that reflect work necessary to resolve the customer's issue. Trial Tr. at 2629:3-13, 2630:16-2632:9, 2689:9-24 (Jan. 15, 2019) (Daisey); DX-2022 at 2; M. Johnson Tr. at 57:24-58:1, 58:4-8, 58:13-17, 97:5-22 (played at trial on Jan. 7, 2019); Linthicum Tr. at 128:1-25 (played at trial on Dec. 18, 2018). Thus, as multiple witnesses testified, in a circumstance where both chargeable and non-chargeable fix codes were entered on the same service visit, resolving the customer's Comcast equipment or network issue was not, by itself, sufficient to restore the customer's service. Instead,

<sup>3</sup> The Court accepted the parties' stipulation that the State will not seek civil penalties for any CPA violation occurring before December 25, 2013. State's Opp. to Comcast's CR 41(b)(3) Mot. at 14; Comcast's Reply ISO CR 41(b)(3) Mot. at 9; Trial Tr. at 3386:11-14 (Jan. 29, 2019) (Court's Ruling on CR 41(b)(3) Motion).

chargeable work needed to be performed to restore the customer's service. Trial Tr. at 2633:7-2636:7, 2729:6-2730:12 (Jan. 15, 2019) (Daisey).

46. Normal-course of business analyses also showed that Washington's policy of charging customers across all six fix codes did not increase customer complaints and was not a driver of credits for service visit charges. Trial Tr. at 2640:2-2641:13 (Jan. 15, 2019) (Daisey); DX-2983.

47. The State failed to present evidence that customers understood from the Comcast Guarantee that they would not be charged for multi-purpose service visits. At trial, the State called 13 Comcast customers as witnesses. None of those customers testified that they understood from the Comcast Guarantee that they would not be charged for multi-purpose service visits. Trial Tr. at 267-287 (Dec. 4, 2018) (Rusch); Trial Tr. at 287-310 (Dec. 4, 2018) (Mercer); Trial Tr. at 310-330 (Dec. 4, 2018) (Peters); Trial Tr. at 330-347 (Dec. 4, 2018) (Job); Trial Tr. at 348-366 (Dec. 4, 2018) (Polson); Trial Tr. at 381-426 (Dec. 5, 2018) (Burton); Trial Tr. at 450-491 (Dec. 5, 2018) (Albritton); Trial Tr. at 492-522 (Dec. 5, 2018) (Robertson); Trial Tr. at 559-609 (Dec. 6, 2018) (Lewis); Trial Tr. at 1157-1207 (Dec. 13, 2018) (Brodin); Trial Tr. at 1215-1254 (Dec. 13, 2018) (Smith); Trial Tr. at 1341-1366 (Dec. 18, 2018) (Hills); Trial Tr. at 1544-1596 (Jan. 7, 2019) (Decker).

48. The State called two expert witnesses, but neither provided testimony concerning consumer understanding of the Comcast Guarantee. Trial Tr. at 782-1147 (Dec. 11-12, 2018) (Butler); Trial Tr. at 1375-1531 (Dec. 19, 2018) (Pratkanis). The State's expert, Sarah Butler, performed a survey that did not purport to test customer comprehension of the Comcast Guarantee. Trial Tr. at 961:15-962:12 (Dec. 11, 2018) (Butler). The State's other expert witness, Dr. Anthony Pratkanis, was not asked and did not testify concerning the customer understanding of the Comcast Guarantee as applied to multi-purpose service visits. Trial Tr. at 1375-1531 (Dec. 19, 2018) (Pratkanis).

49. The State of Guarantee, would have purpose service visits. Service Visits H 50. The State als charge customers for se cables, jumpers, and spl State claims that this ca covered by the Guarant 51. The State rel equipment" as "equipm voice-capable modems, remote controls, and an excluding equipment pu at 5 (emphasis added). 52. The RSA dis

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49. The State offered no evidence that a reasonable consumer, reading the Comcast Guarantee, would have had the net impression that that they would not be charged for multipurpose service visits.

Service Visits Related to the Replacement of Cables, Jumpers, and Splitters

50. The State also argues that Comcast failed to disclose to customers that it would charge customers for service visits where it was necessary to replace HDMI and coaxial cables, jumpers, and splitters. Trial Tr. at 3431-3433 (Jan. 30, 2019) (State Closing). The State claims that this cabling is, in certain cases, "Comcast equipment" that should have been covered by the Guarantee. Trial Tr. at 3431-3433 (Jan. 30, 2019) (State Closing).

51. The State relies on the definition set forth in the RSA, which defines "Xfinity equipment" as "equipment provided by Comcast such as gateways, routers, cable modems, voice-capable modems, wireless gateway/routers, CableCARDs, converters, digital adapters, remote controls, and any other equipment provided or leased to you by us or our agents, excluding equipment purchased by you from Comcast and Customer Equipment." DX-2700 at 5 (emphasis added).

52. The RSA distinguished "Inside Wiring" from "Xfinity equipment," and stated that the maintenance of "Inside Wiring," regardless of who provided or installed that wiring, was the responsibility of the customer. Trial Tr. at 2622:12-2623:16 (Jan. 15, 2019) (Daisey); DX-2700 at 8.

53. These cables, jumpers, and splitters—even if initially supplied by Comcast become the customer's property which the customer can continue to use even if the customer cancels its Comcast service. Trial Tr. at 2724:12-2725:22 (Jan. 15, 2019) (Daisey).

54. The State presented no evidence that customers understood that cables, jumpers, and splitters were Comcast equipment covered by the Comcast Guarantee. None of the Comcast customers called by the State as witnesses at trial testified that this was their understanding. Trial Tr. at 267-287 (Dec. 4, 2018) (Rusch); Trial Tr. at 287-310 (Dec. 4, 2018) (Mercer); Trial Tr. at 310-330 (Dec. 4, 2018) (Peters); Trial Tr. at 330-347 (Dec. 4,

2018) (Job); Trial Tr. at 348-366 (Dec. 4, 2018) (Polson); Trial Tr. at 381-426 (Dec. 5, 2018) (Burton); Trial Tr. at 450-491 (Dec. 5, 2018) (Albritton); Trial Tr. at 492-522 (Dec. 5, 2018) (Robertson); Trial Tr. at 559-609 (Dec. 6, 2018) (Lewis); Trial Tr. at 1157-1207 (Dec. 13, 2018) (Brodin); Trial Tr. at 1215-1254 (Dec. 13, 2018) (Smith); Trial Tr. at 1341-1366 (Dec. 18, 2018) (Hills); Trial Tr. at 1544-1596 (Jan. 7, 2019) (Decker).

55. The State's expert, Sarah Butler, performed a survey that did not purport to test customer comprehension of the Guarantee. Trial Tr. at 961:15-962:12 (Dec. 11, 2018) (Butler). The State's other expert witness, Dr. Anthony Pratkanis, was not asked and did not testify about customer understanding of the Comcast Guarantee as applied to the above-referenced cables, jumpers, and splitters. Trial Tr. at 1375-1531 (Dec. 19, 2018) (Pratkanis).

56. The State offered no evidence that a reasonable consumer, reading the Comcast Guarantee and the RSA, would have had the net impression that the Guarantee applied to the above-referenced cables, jumpers, and splitters.

57. Accordingly, any charge imposed on customers for the replacement of the abovereferenced cables, jumpers, and splitters would not have violated a reasonable customer's net impression of the Guarantee.

58. Even if customers did have the net impression that cables, jumpers and splitters were, when provided by Comcast, "Xfinity equipment" as defined in the RSA and thus were covered by the Guarantee, B.J. Daisey, the former Director of Technical Operations for Comcast's West Division, testified credibly that it was not uncommon for customers to purchase and install their own cables. Trial Tr. at 2724:12-19 (Jan. 15, 2019) (Daisey).

59. The State presented no evidence that any Comcast customer in Washington was charged for replacing cables, jumpers, or splitters provided to the customer by Comcast, as opposed to cables, jumpers, or splitters purchased by the customer. Accordingly, even if a reasonable customer would have had the net impression that the Comcast Guarantee applied to cables, jumpers, and splitters provided by Comcast, the State has not presented evidence that any customer was charged for a repair to a cable, jumper, or splitter provided by

Comcast, as opposed to a cable, jumper, or splitter that the customer separately purchased and installed.

#### Service Calls Involving Fix Codes U52 and T52

60. The State's final assertion is that Comcast may have improperly charged customers for non-chargeable work because several fix codes *could* be applied inconsistently with the Comcast Guarantee. Trial Tr. at 81-82 (Dec. 3, 2018) (State Opening Statement); Trial Tr. at 3433-3434 (Jan. 30, 2019) (State Closing); Third Amended Complaint ¶ 3.43-3.48.

61. At trial, the State presented evidence regarding only two such codes-U52 and T52. Comcast 30(b)(6) Tr. (Daisey) at 25:1-3, 25:8-14, 59:17-61:1, 61:20-62:17, 68:17-69:2, 69:9-24; 70:7-9, 70:12-15 (played at trial on Dec. 19, 2018); M. Johnson Tr. at 73:16-74:9 (played at trial on Jan. 7, 2019); Linthicum Tr. at 60:15-23 (played at trial on Dec. 18, 2018); Trial Tr. at 3219:19-3220:11 (Jan. 17, 2019) (Barrick).

62. From 2012 to 2015, Comcast allowed service technicians in Washington to enter code U52, which rendered chargeable an otherwise non-chargeable service visit. DX-2003 at 1. Comcast discontinued this code by June 2015. DX-2035 at 1.

63. From January 2012 to June 2015, Comcast technicians applied the U52 code 826 times in service visits for Washington customers. Trial Tr. at 2896:6-12, 2897:8-2898:3 (Jan. 16, 2019) (Deal). Not every application of this code resulted in a charge; out of the 826 times the U52 code was used, its application only resulted in a charge to the customer 442 times. Trial Tr. at 2896:6-12, 2897:8-2898:3 (Jan. 16, 2019) (Deal).

64. The State has not presented evidence regarding the application of the U52 fix code.

65. Comcast presented credible testimony that application of this code was limited to situations such as intentional vandalism by the customer or acts of nature. Trial Tr. at 2643:19-2644:5 (Jan. 15, 2019) (Daisey).

66. The State's expert, Dr. Anthony Pratkanis testified that even consumers who purchased Comcast's Service Protection Plan would expect to be charged for service visits involving intentional vandalism. Trial Tr. at 1503:7-1504:10 (Dec. 19, 2018) (Pratkanis).

67. The State offered no evidence that a reasonable consumer, reading the Comcast Guarantee, would have had the net impression that the Guarantee applied to service visits necessitated by intentional vandalism or acts of nature.

68. Accordingly, the State has failed to prove that the application of the U52 code resulted in a charge to a Washington customer contrary to a reasonable customer's net impression of the Guarantee.

69. The State also contends that Comcast failed to honor the Guarantee when customers were charged for service visits because the T52 fix code was entered. Trial Tr. at 3433-3434 (Jan. 30, 2019) (State Closing). That code applies to circumstances where Comcast would install an amplifier in a customer's home to improve the strength of their Comcast cable signal. Trial Tr. at 2649:7-2650:1 (Jan. 15, 2019) (Daisey); DX-2035 at 1. Comcast ceased charging for the T52 code in January 2015. DX-2026 at 2-4; Trial Tr. at 2650:2-2651:17 (Jan. 15, 2019) (Daisey); DX-2035 at 1.

70. During the period the T52 code was chargeable, it was used for unique customer situations, like when a customer needed extra signal beyond standard usage—for example, to support service to a mother-in-law suite or a customer trying to run a business in their basement. Trial Tr. at 2650:2-2651:17 (Jan. 15, 2019) (Daisey); Trial Tr. at 2719:2-21 (Jan. 15, 2019) (Daisey).

71. The State did not present evidence that customers were ever charged because of the application of the T52 code to a situation when installation of the amplifier was necessitated by a Comcast equipment or network issue. To the contrary, charges associated with the installation of a drop amplifier were waived—using the U51 code—whenever Comcast technicians determined that installation of the amplifier was necessitated by a Comcast equipment or network issue. Trial Tr. at 2650:8-2651:23 (Jan. 15, 2019) (Daisey).

Indeed, Comcast decided to make the T52 code non-chargeable both because of the frequency with which technicians were waiving charges and because of the introduction of new technology including Comcast's X1 operating system. Trial Tr. at 2650:8-2651:23 (Jan. 15, 2019) (Daisey).

72. Accordingly, the State has failed to prove that the application of the T52 code resulted in a charge to a Washington customer contrary to a reasonable customer's net impression of the Guarantee.

The At-Issue Statement in the Guarantee Was Immaterial to Customers

73. The State did not introduce evidence regarding when the Comcast Guarantee was available on Comcast's website. Likewise, the State offered no evidence that any Washington customer of Comcast's ever viewed the Comcast Guarantee on Comcast's website, or did so before purchasing Comcast products or services.

74. No customer who testified at trial testified that they were even aware of the Comcast Guarantee, much less that it was important to their decision to purchase Comcast's products or services. Trial Tr. at 267-287 (Dec. 4, 2018) (Rusch); Trial Tr. at 287-310 (Dec. 4, 2018) (Mercer); Trial Tr. at 310-330 (Dec. 4, 2018) (Peters); Trial Tr. at 330-347 (Dec. 4, 2018) (Job); Trial Tr. at 348-366 (Dec. 4, 2018) (Polson); Trial Tr. at 381-426 (Dec. 5, 2018) (Burton); Trial Tr. at 450-491 (Dec. 5, 2018) (Albritton); Trial Tr. at 492-522 (Dec. 5, 2018) (Robertson); Trial Tr. at 559-609 (Dec. 6, 2018) (Lewis); Trial Tr. at 1157-1207 (Dec. 13, 2018) (Brodin); Trial Tr. at 1215-1254 (Dec. 13, 2018) (Smith); Trial Tr. at 1341-1366 (Dec. 18, 2018) (Hills); Trial Tr. at 1544-1596 (Jan. 7, 2019) (Decker).

75. The Comcast Guarantee was distributed to customers in Welcome Kits after they had already purchased Comcast services. Trial Tr. at 2307:9-14 (Jan. 10, 2019) (Dhar).

76. The State's two experts did not testify that the Comcast Guarantee was material to Comcast customers' decisions to purchase Comcast services.

77. Dr. Ravi Dhar, a professor at the Yale School of Management with decades of marketing research experience involving hundreds of surveys, conducted two reliable

consumer surveys that evaluated the impact of the Comcast Guarantee on consumer purchasing. Trial Tr. at 2299:2-2301:4, 2311:6-15 (Jan. 10, 2019) (Dhar). Dr. Dhar credibly opined to a reasonable degree of scientific certainty that the at-issue statement in the Comcast Guarantee did not impact consumers' decisions to purchase Comcast services. Trial Tr. at 2311:9-2312:6, 2347:4-24 (Jan. 10, 2019) (Dhar).

78. Dr. Dhar's first survey asked recent Comcast subscribers to provide all the reasons why they had subscribed to Comcast services, and included numerous prompts to ensure that survey participants were comprehensive in their answers. Trial Tr. at 2312:7-2314:8, 2321:17-2325:6, 2328:21-2329:9 (Jan. 10, 2019) (Dhar). Not a single survey participant indicated that the Comcast Guarantee, including the statement that Comcast would not charge for service visits resulting from Comcast equipment or network problems, was a reason that they subscribed to Comcast. Trial Tr. at 2326:17-24 (Jan. 10, 2019) (Dhar).

79. Dr. Dhar's second survey used an experimental design in which survey participants were shown either (1) the actual Comcast Guarantee, or (2) a modified version of the Comcast Guarantee that corrected the at-issue language based on the State's allegations. Trial Tr. at 2337:5-2338:7 (Jan. 10, 2019) (Dhar). The results of Dr. Dhar's second survey showed that customers who viewed the modified Comcast Guarantee were not statistically more likely to subscribe to Comcast services. Accordingly, Dr. Dhar concluded that the Customer Guarantee, including the at-issue statement, did not have an impact on consumer purchasing decisions for Comcast services. Trial Tr. at 2342:19-2347:24 (Jan. 10, 2019) (Dhar). The Court credits Dr. Dhar's opinions and conclusions.

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### The Service Protection Plan: Scope/Coverage

80. Comcast's Service Protection Plan, or SPP, was an optional program available to Comcast customers for a monthly fee. DX-2713 at 1; PX-835 at 6. Because Comcast products and service are heavily used, but also may, in some cases, require a basic understanding of technology, subscribers to the SPP could contact Comcast and schedule

service visits from a trained technician, without worrying that they would be charged for that visit. Trial Tr. 2138:18-2139:15 (Jan. 9, 2019) (Abrams); Trial Tr. at 2773:10-2775:6 (Jan. 15, 2019) (Deal); Trial Tr. at 3343:8-3345:9 (Jan. 29, 2019) (Deal).

81. Some Washington SPP subscribers used and benefitted from their SPP subscriptions. The rate of service visits for SPP subscribers was more than double the rate of service visits for non-SPP subscribers. Trial Tr. at 2781:1-11 (Jan. 15, 2019) (Deal); Trial Tr. at 2246:16-2247:5 (Abrams).

82. From January 2011 to June 30, 2016, Comcast performed, without charge,
281,429 service visits for SPP subscribers. Absent their SPP subscriptions, these customers
would have been charged more than \$13.4 million for these service visits. DX-2989; Trial
Tr. at 2777:5-2778:11 (Jan. 15, 2019) (Deal).

83. SPP subscribers had, on average, higher levels of satisfaction with their Comcast service than non-SPP subscribers. Trial Tr. at 1858:2-1859:6 (Jan. 8, 2019) (Karinshak);
DX-2085.

84. The SPP was sold to customers by Comcast customer service representatives on the telephone primarily, in Comcast retail stores, and in internet chat sessions. PX-830; DX-2686 at 7; DX-2065 at 3; Trial Tr. at 1676:18-1677:3 (Jan. 7, 2019) (Karinshak). It was also sold by Comcast technicians during service visits and could be purchased on Comcast's website. DX-2686 at 7; DX-2065 at 3.

85. The scripts made no reference to the SPP covering repairs to customer-owned equipment or service calls to diagnose problems with customer-owned equipment. *See, e.g.*, PX-864 at 1-4. The scripts did include a section of "FAQs" that agents could access during a call that contained a link to the SPP Terms and Conditions, and those Terms and Conditions stated clearly and accurately that the SPP did not cover repairs to customer-owned equipment. PX-864 at 4; DX-2713 at 1; Trial Tr. at 216:10-217:12 (Dec. 4, 2018) (Hartsock).

86. When customers added new services to their accounts, Comcast sent those customers confirmation emails describing the changes made and listing for them the products and services to which they are subscribed. Trial Tr. at 1688:12-1689:15 (Jan. 7. 2019) (Karinshak); DX-2176. The SPP was included in such lists. Trial Tr. at 1688:12-1689:15 (Jan. 7. 2019) (Karinshak); DX-2176.

87. From 2007 to 2018, the Welcome Kit distributed to new Comcast subscribers in the West Division included a copy of the SPP Terms & Conditions. Trial Tr. at 2028:23-2029:17 (Jan. 9, 2019) (Miriello); DX-2902; DX-2712 at 25. Existing Comcast subscribers in the West Division who purchased the SPP were sent a copy of the SPP Terms & Conditions. Trial Tr. at 2042:13-2043:13 (Jan. 9, 2019) (Miriello); Trial Tr. at 2118:1-2119:8 (Jan. 9, 2019) (Abrams); Comcast 30(b)(6) Tr. (Dickey) at 39:6-7, 50:16-51:11 (played at trial on Dec. 18, 2018); C. Johnson Tr. at 94:4-7 (played at trial on Dec. 6, 2018).

88. Until 2013, the Terms & Conditions document was supposed to be mailed to existing Comcast customers who subscribed to the SPP. Comcast 30(b)(6) Tr. (Dickey) at 50:16-51:11 (played at trial on Dec. 18, 2018); Trial Tr. 2118:1-2119:25 (Jan. 9, 2019) (Abrams); Trial Tr. at 733:18-734:8 (Dec. 10, 2018) (Sumbillo). From 2013 until 2018, the Terms & Conditions document was emailed to existing Comcast customers who subscribed to the SPP. Comcast 30(b)(6) Tr. (Dickey) at 50:16-51:11 (played at trial on Dec. 18, 2018).

89. From 2013 to 2017, Comcast marketed the SPP on a dedicated webpage. DX-2100; DX-2947; Trial Tr. at 2461:10-2462:25 (Jan. 14, 2019) (Hauser). In relevant part, the SPP webpage stated that "Comcast offers a comprehensive Service Protection Plan (SPP), eliminating any concerns about being charged additional fees for service calls related to inside wiring. For a low monthly fee, our Service Protection Plan (SPP) will cover all chargeable service calls for your XFINITY services without additional service fees." PX-1211; DX-2100. The SPP webpage further stated that there would be no charge for "[s]ervice calls due to customer education or customer owned equipment connected to your XFINITY services." PX-1211; DX-2100.

90. The SPP webpage linked to the SPP Terms & Conditions. The link appeared twice on the page and was identified with bold font that was larger than the other text on the page. PX-1211; DX-2100; Trial Tr. at 233:1-234:25 (Dec. 4, 2018) (Hartsock).

91. Full details regarding the scope of the SPP's coverage, including any coverage exclusions, were included in the SPP Terms and Conditions. *See, e.g.*, DX-2713. The SPP Terms & Conditions clearly stated that the SPP covered service calls to diagnose a problem with customer-owned equipment but did not cover repairs to that equipment. DX-2713 at 1; Trial Tr. at 216:10-217:12 (Dec. 4, 2018) (Hartsock). The SPP Terms & Conditions also stated that the SPP "does not cover the repair of wire concealed within a wall (i.e., wire that is wall fished)." DX-2713 at 1-2; Trial Tr. at 250:21-251:10 (Dec. 4, 2018) (Hartsock).

### The SPP's Scope of Coverage

92. The State claims that Comcast omitted certain terms and conditions regarding the SPP during telephone calls with consumers and otherwise overstated the scope of the SPP's coverage, and that these omissions and misstatements induced customers to purchase the SPP. Trial Tr. at 3414:11-3415:24 (Jan. 30, 2019) (State Closing).

93. The State's expert, Dr. Pratkanis, testified that consumers should be provided with only the information that is relevant to them with respect to the product at issue. Trial Tr. at 1505:17-1506:8 (Dec. 19, 2018) (Pratkanis). This is because providing a customer with too much information has the potential to mislead the consumer. Trial Tr. at 1506:9-25, 1508:8-22 (Dec. 19, 2018) (Pratkanis). Moreover, Dr. Pratkanis explained that marketing communications should not include information about things that rarely occur. Trial Tr. at 1506:15-25 (Dec. 19, 2018) (Pratkanis).

94. As evidence of consumer comprehension of the SPP's scope of coverage, the State presented the survey conducted by its expert witness, Sarah Butler.<sup>4</sup> Trial Tr. at 909:17-22 (Dec. 11, 2018) (Butler).

95. Ms. Butler's "scope" survey was challenges vigorously at trial. Comcast argued that the witness failed to follow numerous generally accepted principles for survey methodology. Trial Tr. at 2507:21-2513:12, 2516:11-2518:6 (Jan. 14, 2019) (Hauser). Comcast emphasized that: Ms. Butler did not conduct a pretest for her survey, Trial Tr. at 980:8-981:23 (Dec. 12, 2018) (Butler); Trial Tr. at 2507:21-2508:5 (Jan. 14, 2019) (Hauser); the survey did not replicate marketplace conditions because Ms. Butler used a sales script for her audio recording stimulus that was not representative of how the SPP was described to potential subscribers-the script was targeted toward new Comcast customers, even though the majority of SPP subscribers are existing Comcast customers; and it was read verbatim even though numerous witnesses testified that the script was not followed verbatim by Comcast representatives, Trial Tr. at 981:24-984:4 (Dec. 12, 2018) (Butler); Ms. Butler tested one group of participants using a diagram she conceded was potentially inaccurate, yet still included results from those participants in certain of her conclusions, Trial Tr. at 915:4-10, 966:8-967:15 (Dec. 11, 2018) (Butler); 985:6-986:21 (Dec. 12, 2018) (Butler); Trial Tr. at 2494:6-2495:21 (Jan. 14, 2019) (Hauser); Ms. Butler did not approximate Washington demographics in her sample, which included nearly twice as many women as it did men. Trial Tr. at 2511:7-2513:12 (Jan. 14, 2019) (Hauser). Trial Tr. at 995:24-1003:13 (Dec. 12, 2018) (Butler); Trial Tr. at 2516:11-2518:6 (Jan. 14, 2019) (Hauser). These challenges decreased the weight to be accorded such testimony, not its acceptability.

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<sup>&</sup>lt;sup>4</sup> Three customer witnesses also testified to their understanding regarding the SPP's coverage— Susan Rusch, Trial Tr. at 267-287 (Dec. 4, 2018), Anita Job, Trial Tr. at 330-347 (Dec. 4, 2018), and Karen Hills, Trial Tr. at 1341-1366 (Dec. 18, 2018). Ms. Rusch was the only customer who testified that she thought the SPP covered the technique of wall fishing; as discussed below. Both Ms. Job and Ms. Hills testified that they thought the SPP covered service calls related to the wiring inside their home. Trial Tr. at 331:8-19 (Dec. 4, 2018) (Job); Trial Tr. at 1344:21-1345:7 (Dec. 18, 2018) (Hills).

96. Ms. Butler's primary takeaway from her survey—that consumers who were "misled" about the scope of the SPP's coverage were more likely to subscribe to the SPP. Trial Tr. at 973:9-21 (Dec. 11, 2018) (Butler); Trial Tr. at 2501:16-2502:15 (Jan. 14, 2019) (Hauser). One of the three questions in her "misled" construct did not provide participants with a response that accurately set forth the SPP's coverage of customer equipment issues (meaning respondents could not give a correct answer no matter what choice they selected); the other two questions related to the Comcast Guarantee's coverage (even though a copy of the Guarantee was not provided to respondents in the survey) and did not test understanding of the SPP. Trial Tr. at 969:2-972:25 (Dec. 11, 2018) (Butler); Trial Tr. at 2498:1-2499:13 (Jan. 14, 2019) (Hauser). Ms. Butler considered any respondent "misled" about the SPP if they answered any of these three questions (including the two questions that had nothing to do with the SPP) incorrectly. Trial Tr. at 2498:13-20, 2500:1-2501:6 (Jan. 14, 2019) (Hauser).

97. The Court found Ms. Butler's testimony most credible when assaying the SPP nomention and price, rather than scope/coverage issues.

#### The SPP's Coverage of Inside Wiring

98. As noted, Comcast represented to consumers that the SPP would cover the cost of service visits for issues relating to wiring inside their home ("inside wiring"). DX-2713; PX-1211. A reasonable customer would understand this to mean that the SPP would cover the cost of otherwise chargeable service visits related to inside wiring, including wires concealed behind walls. See, e.g., Trial Tr. at 1345:11-19 (Dec. 18, 2018) (Hills); Trial Tr. at 1498:23-1499:6 (Dec. 19, 2018) (Pratkanis).

99. At trial, the State argued that Comcast's marketing of the SPP was deceptive because the SPP did not cover the repair of concealed wiring. Trial Tr. at 77:19-78:4 (Dec. 3, 2018) (State Opening Statement). The evidence at trial did not support this argument. See infra ¶ 101. In its rebuttal closing argument, the State argued that Comcast's marketing of

the SPP was deceptive because Comcast did not affirmatively disclose at the point of sale that the SPP did not cover a particular technique for installing concealed wiring, known as "wall-fishing." Trial Tr. at 3731:22-3733:8 (Jan. 31, 2019) (State Rebuttal Closing).

100. The SPP did cover otherwise chargeable service visits where technicians performed repairs to inside wiring, including inside wiring concealed behind walls. Trial Tr. at 620:7-12 (Dec. 10, 2018) (Sumbillo); Trial Tr. at 2276:9-16 (Jan. 10, 2019) (Abrams); Trial Tr. at 2684:4-17 (Jan. 15, 2019) (Daisey); C. Johnson Tr. at 83:15-23 (played at trial on Dec. 6, 2018). As Mr. Daisey helpfully demonstrated in the courtroom at trial, there were a number of techniques besides wall-fishing that Comcast technicians could and did perform to repair wire concealed behind walls. Trial Tr. at 2669:20-2683:13 (Jan. 15, 2019) (Daisey); *see also* PX-840 at 5-11; M. Johnson Tr. at 87:5-89:12 (played at trial on Jan. 7, 2019); Trial Tr. at 2683:14-2684:3 (Jan. 15, 2019) (Daisey). All of these techniques were covered by the SPP. Trial Tr. at 2683:14-2684:3 (Jan. 15, 2019) (Daisey); PX-840 at 8.

101. Only one of the Comcast customers called by the State as a witness at trial (Susan Rusch) testified that she understood the SPP covered the specific technique of wall-fishing to repair issues with concealed wires. Ms. Rusch's testimony was the sole evidence presented by the State on this question. Ms. Rusch was familiar with the technique of wall fishing because of her professional experience as an architect. Trial Tr. at 277:23-278:12, 279:15-280:24 (Dec. 4, 2018) (Rusch). This testimony, while credible, is insufficient to establish that a reasonable consumer's net impression would be that the SPP covered the specific technique of wall-fishing in light of the weight of the evidence to the contrary.

102. While the State offered expert testimony from Dr. Anthony Pratkanis that customers would take away from Comcast marketing materials that the SPP covered the repair of all inside wiring including wiring concealed within walls, Trial Tr. at 1498:14-1499:6 (Dec. 19, 2018) (Pratkanis), Dr. Pratkanis was not asked and did not testify that consumers would understand the SPP to cover the specific technique of wall-fishing to repair issues with concealed wires.

103. The State did not establish that a reasonable consumer would have had the net impression that the SPP covered the specific technique of wall-fishing to repair issues with concealed wires.

104. The State introduced no evidence regarding the frequency with which wall-fishing would be required, if ever, to resolve an inside wiring issue to a SPP subscriber's satisfaction.

105. Comcast presented credible evidence that issues with the concealed portion of cable wiring are rare because wiring behind walls is protected by the walls in which it is concealed and therefore difficult to damage. Trial Tr. at 2678:10-18 (Jan. 15, 2019) (Daisey).

106. Mr. Deal offered unrebutted testimony that, in a sample of 1,830 SPP subscribers, not a single customer had had a fix code placed on their account related to or had been charged for wall-fishing. Trial Tr. at 2859:3-14 (Jan. 16, 2019) (Deal)

107. The State presented no evidence that any SPP subscriber was charged for a service visit to address concealed inside wiring. In contrast, Comcast presented unrebutted evidence that Comcast performed 65,919 service visits to SPP subscribers to repair issues related to inside wiring that were not charged to the customer. DX-2986; Trial Tr. at 2764:13-2765:24 (Jan. 15, 2019) (Deal). These service visits were to address inside wiring issues, including inside wiring concealed behind walls. Trial Tr. at 2684:20-2685:13 (Jan. 15, 2019) (Daisey); Trial Tr. at 2767:12-18 (Jan. 15, 2019) (Deal).

108. The State introduced no evidence of any SPP subscriber in Washington who was denied a repair to wiring concealed behind their walls.

109. There was indeed confusion among a number of employees at Comcast regarding the SPP's coverage of repairs to concealed wiring. PX-939 at 1; PX-912 at 1. However, employee confusion does not equal deception. More importantly, even if consumer confusion matched Comcast's employee confusion, it would have resulted in consumers believing that the SPP covered less than it actually did. As a result, consumers

would have been less likely to purchase the product than they would have been with an accurate understanding of the SPP's coverage.

#### The SPP's Coverage of Customer-Owned Equipment

110. Comcast rarely made representations to Washington customers regarding the SPP's coverage of customer-owned equipment issues. PX-864 at 1-3; Trial Tr. at 211:7-24 (Dec. 4, 2018) (Hartsock).

111. The State did not call witnesses at trial to testify that they understood the SPP covered repairs to customer-owned equipment.

112. The State offered no evidence that a reasonable consumer, reading the SPP website, would have had the net impression that the SPP covered repairs to customer-owned equipment. To the contrary, the SPP Terms & Conditions, linked prominently on the SPP website and distributed to SPP subscribers, made clear that the SPP did not cover repair to customer-owned equipment. DX-2100; DX-2713 at 1; Trial Tr. at 216:10-217:12, 233:1-234:25 (Dec. 4, 2018) (Hartsock).

113. Ms. Butler's review of a sample of SPP sales calls from July 1, 2014 through June 30, 2016 revealed that no more than 1.9% of sales calls contained any reference whatsoever to customer-owned equipment. Trial Tr. at 907:6-16 (Dec. 11, 2018) (Butler).

114. The SPP covered the cost of service visits to diagnose an issue with customer-owned equipment. In the relevant period, the SPP covered 60,300 chargeable service visits to SPP subscribers where the source of the customer's issue was the customer's own devices (e.g., iPhones, printers, televisions, computers). DX-2988; Trial Tr. at 2770:2-2771:15 (Jan. 15, 2019) (Deal).

115. The State has not presented evidence that a SPP subscriber was ever charged by Comcast for a customer-owned equipment issue, nor has it presented evidence that any SPP subscriber in Washington ever to pay a third-party for equipment repair or replacement.

Comcast's Marketing of the SPP as "Comprehensive"

116. The State argues that Comcast wrongly charged SPP subscribers for service visits despite marketing the SPP as covering either "all chargeable service visits,"
PX-1211, or offering "comprehensive" coverage for service visits. PX-864 at 1; Trial Tr. at 3410:16-3411:6 (Jan. 30, 2019) (State Closing).

117. From 2011 to 2016, Comcast conducted 281,429 otherwise-chargeable service visits for SPP subscribers in Washington that were within the scope of the SPP's coverage. Only 202 of those covered service calls were charged to customers. DX-2989; Trial Tr. at 2772:3-23 (Jan. 15, 2019) (Deal); Trial Tr. at 3337:9-23 (Jan. 29, 2019) (Deal). Thus, SPP subscribers were not charged for 99.93% of covered service visits. DX-2989; Trial Tr. at 3337:9-23 (Jan. 29, 2019) (Deal).

118. Comcast's expert witness, Bruce Deal, explained that these 202 service visits likely reflected statistical "noise" or data entry errors, were a product of his own conservative methodology for estimating service visit charges for SPP subscribers, and were not the result of any systematic practice of charging SPP subscribers for service visits when they should not have been charged. Trial Tr. at 3337:19-3338:17 (Jan. 29, 2019) (Deal).

119. The State also contends that Comcast's marketing of the SPP was deceptive because Comcast, consistent with the SPP's Terms and Conditions, charged 442 customers—some unknown number of whom may have been SPP subscribers—for service visits due to intentional vandalism or acts of nature (i.e., when the U52 code was applied). Trial Tr. at 2897:8-2898:1 (Jan. 16, 2019) (Deal). But the State's expert, Dr. Pratkanis, testified that a reasonable consumer would understand that the SPP would not cover service visits that were due to intentional vandalism, Trial Tr. at 1504:3-14 (Dec. 19, 2018) (Pratkanis), and opined (only in response to a question on cross-examination) that a consumer "might" have understood acts of nature to be covered depending on whether or not the customer perceived the SPP to be an insurance product. Trial Tr. at 1504:24-1505:8 (Dec. 19, 2018) (Pratkanis). The Court declines to credit Dr. Pratkanis' speculation on the latter point.

120. The State has not presented evidence that a reasonable consumer would have had the net impression that the SPP covered every single chargeable service call, without exception.

#### Any Deficiencies in Comcast's SPP Marketing Were Immaterial

121. Dr. John Hauser, a professor of marketing at the Massachusetts Institute of Technology with decades of experience conducting consumer surveys, credibly opined to a reasonable degree of scientific certainty that the disclosures the State contends should have been made regarding the SPP's scope of coverage would not have altered the likelihood that a customer would purchase the SPP. Trial Tr. at 2433:22-2441:8, 2486:16-24, 2596:9-22 (Jan. 14, 2019) (Hauser). Based on an empirical study, Dr. Hauser concluded that removal of the allegedly deceptive claims in SPP marketing communications (e.g., that the SPP is comprehensive) and more prominent display of the SPP's coverage limitations (e.g., that the SPP does not cover the repair of customer-owned equipment) does not have a material impact on consumers' likelihood of subscribing to the SPP. Trial Tr. at 2518:7-15, 2596:10-22 (Jan. 14, 2019) (Hauser).

122. In reaching his opinion, Dr. Hauser conducted a survey utilizing an experimental design in which he divided participants into two groups and showed one group a 2014 version of the SPP Webpage and Terms & Conditions and showed the other group a revised 2017 version of the SPP Webpage and Terms & Conditions that addressed the State's allegations regarding deceptive language and emphasized the SPP's exclusions. Trial Tr. at 2444:9-2445:18, 2464:7-2469:17 (Jan. 14, 2019) (Hauser). Dr. Hauser then asked participants in each group how likely they would be to subscribe to the SPP based on the materials they had reviewed. The survey results showed that there was no statistically significant difference between the two groups in likelihood of subscribing to the SPP. Trial Tr. at 2479:25-2485:8 (Jan. 14, 2019) (Hauser).

123. Dr. Hauser credibly opined that, when correctly interpreted, the data collected in the survey conducted by Sarah Butler similarly confirmed that more robust disclosures regarding the SPP's scope of coverage would not have altered the likelihood that a customer would purchase the SPP. Trial Tr. at 2507:7-14 (Jan. 14, 2019) (Hauser).

124. The Court credits Dr. Hauser's survey as reliable and persuasive.

125. Dr. Hauser's opinions regarding materiality find support in the record. Unrebutted evidence established that the "exceptions" to the SPP's coverage that the State would require to be disclosed during every SPP sale occurred rarely, if ever. *See, e.g.*, Trial Tr. at 2668:14-23, 2678:10-18 (Jan. 15, 2019) (Daisey). For example, Comcast's expert Mr. Deal testified that in a sample of 1,830 SPP subscribers, he did not identify a single subscriber who was charged for wall-fishing or any other type of inside-wiring related repair. Trial Tr. at 2859:3-23 (Jan. 16, 2019) (Deal).

126. These opinions did not undermine Ms. Butler's testimony re SPP nomention, or price.

IV. Subscribing Customers to the SPP without Fee Disclosures Claim

127. Comcast automatically charges customers a monthly fee for the SPP unless they contact Comcast and cancel. Comcast agents repeatedly failed to disclose the SPP's recurring monthly fees to Washington consumers.

128. Beginning April 25, 2013, Comcast ran a promotion that allowed agents to offer customers a free month of the SPP. The SPP was not automatically removed from the account following the promotion, and instead automatically "rolled to" its regular monthly rate after the first month (i.e. customers were billed at the regular monthly rate beginning in the second month). VRP p. 1853 (Karinshak testimony, Jan. 8, 2019); Ex. 1005 at COMCAST-WALIT-000070445. The free month promotion was marketed internally as a "NEW 1 Month FREE offer." Ex. 906; Ex. 979. The promotional pamphlet did not mention that the SPP would remain on the customer's account after the first month and roll to retail rates. When adding the free month promotion to a customer's account, the promotion was

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listed as "Description: SPP Free x1" and "Offer: Free SPP" in the order entry steps. *Id.* Comcast's Customer Care Sales Integrity Guidelines for West Division, which includes Washington State, required employees to disclose to customers what their monthly bill will be at the end of a promotion. Ex. 2129 at COMCAST-WALIT-000160676.

129. Ms. Butler's team coded the call recordings produced by Comcast to indicate whether any disclosures relating to the price of the SPP were made on each call. Exs. 2182, 1156.

130. Ms. Butler's analysis of the coding results determined that, in addition to the percentage of customer accounts for which the SPP was not mentioned at all, 23.6% of customer accounts with agent-match calls in the 2016 sample and 21.5% in both samples were not told the price of the SPP. Comcast agents told most of these customers that the SPP was "free" or that they would receive a "free month" of SPP, without disclosing that charges would be incurred after the first month. Other customers were not told anything at all about price.

131. Comcast's expert Mr. Deal identified 21 call recordings from the 3,129 agent-match customer calls that he testified were miscoded as lacking SPP fee disclosures.Of those 21 call recordings, 17 are from the 2016 sample and four are from the 2014-15 sample. Ex. 304.

132.Adjusting Ms. Butler's analysis of the coding results to account for these21 errors reduces the percentage of agent-match customers to whom the SPP was notmentioned to 22.4% for the 2016 sample and 20.4% in both samples.

133. The coding results for the 2014-15 sample and 2016 sample to be reliable and representative of the population as whole, and capable of extrapolation to the time periods April 1, 2015 through July 1, 2017, and July 1, 2014 through June 30, 2016. Applying the same Comcast data discussed above concerning number of SPP sales and subscriptions during the relevant time periods, Exs. 830, 2125, the extrapolation results of the call samples, adjusted to reflect the 21 coding errors, as follows:

Time Period	SPP Accounts (telephone)	SPP No Fee Disclosure (percent)	SPP No Fee Disclosure (accounts)
April 1, 2015 – June 30, 2016	54,995	22.4%	12,319
July 1, 2014 – March 31, 2015	31,085	20.4%	6,341
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134. Comcast has not produced data indicating the number of Washington customer accounts subscribed to the SPP between June 30, 2016 and July 1, 2017. Based on the data produced by Comcast for prior periods, and the testimony of Ms. Butler, the Court extrapolates the 2016 call sample coding results to SPP subscriptions to between June 30, 2016 and July 1, 2017.

135. Comcast agents also represented to Washington customers in online chats that the SPP would be "free" or "free for a month" without disclosing that the customers would incur recurring monthly charges after the first month. Ex. 687 at COMCAST-WALIT-000090416 ("By the way, we have a promo for Service Protection Plan for free for a month. This will ensure that no charges will be added to your bill for this visit. Do you want me to add this? It will automatically be removed after a month ... I have successfully added the free subscription for Service Protection Plan."); Ex. 713 at COMCAST-WALIT-000090617 ("By the way, I have great news! I was able to enroll the account to one month free Service Protection Plan, so no worries on being charged for the technician appointment."); Ex. 714 at COMCAST-WALIT-000090619 ("Here's what we can do. I will be able to enroll the account to one month free Service Protection Plan where you won't be charged for the technician visit."); Ex. 726 at COMCAST-WALIT-000090699 ("Here's what I can do. I will be able to enroll the account to one month free Service Protection Plan where you won't be charge [*sic*] for the technician visit.").

136. Comcast presented no evidence that it changed its policies or procedures for ensuring agents disclosed the SPP's recurring monthly charge to customers at any time between January 1, 2011 and July 1, 2017.

137. Products with recurring charges (also known as "negative option" plans) are a powerful sales mechanism for businesses and that industry standards require businesses to disclose monthly recurring charges for negative option sales. Dr. Pratkanis credibly opined that once a customer is enrolled in a service with recurring charges, several barriers can prevent the customer from cancelling the service even if it is not wanted. VRP pp. 1436-38 (Dec. 19, 2019).

## V. Subscribing Customers to the Service Protection Plan without Consent Claim 138. Despite Comcast's systemic guidelines and policies, the practice of

subscribing WA customers without meaningful consent was widespread. Multiple Washington Comcast subscribers testified that the SPP was added without their knowledge or consent. Examples of this testimony include the following:

a. Aloria Mercer was told by a Comcast telephone representative in 2012 or 2013 that the SPP was a required service on her parents' account. VRP p. 291 (Dec. 4, 2018). Upon later learning that the SPP was not mandatory, Ms. Mercer called and had it removed from her parents' account in 2017. Comcast did not issue any credit or refund for SPP charges. *Id.* at 295; Ex. 14.

b. The SPP was added to Stacey Peters' account without her consent or knowledge on October 19, 2015. VRP pp. 312-13 (Dec. 4, 2018); Ex. 129 ("[T]he Service Protection Plan was added to her account without her authorization on October 19, 2015.").

c. The SPP was added to Alexander Polson's Comcast account without his knowledge or consent in 2008, and remained on his account until 2016. VRP pp. 350-54 (Dec. 4, 2018).

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- d. The SPP was placed on separate Comcast accounts for Tyler Burton without his knowledge or consent, between April 12, 2008 and May 2, 2011 and between July 21, 2014 and February 2, 2018. VRP p. 385 (Dec. 5, 2018); Ex. 149. Comcast issued Mr. Burton a credit of four months' SPP subscription fees. Ex. 149.
  e. The SPP was added to the account of Jaeson Albritton, without his knowledge or consent, on February 8, 2015, and removed on December 22, 2017. VRP pp. 452-53 (Dec. 5, 2018); Ex. 74. Comcast issued Mr. Albritton a credit of four months'
- f. The SPP was added to the account of Elise Robertson, after she specifically refused it, on July 28, 2015. VRP pp. 495-96 (Dec. 5, 2018); Ex. 63. She called Comcast to inquire about the charge, and was told by a Comcast representative that it was a mandatory part of her service package. *Id.* After later learning that the SPP was not mandatory, Mr. Robertson cancelled the SPP on January 22, 2018. Ex. 63. Comcast issued a credit of 39 days' worth of SPP subscription fees to Ms. Robertson. VRP p. 507; Ex. 64.
  - The SPP was added to the account of Doug Brodin without his consent on August 15, 2011, and removed on December 26, 2017. VRP p. 1160 (Dec. 13, 2018); Ex. 42. Comcast issued Mr. Albritton a credit of four months' SPP subscription fees. Ex. 42.

#### **Frequency of SPP NonConsent**

SPP subscription fees. Ex. 74.

139. On May 17, 2017, the Court ordered Comcast to produce all call recordings "in which Defendants sold the SPP to Washington consumers" from a sufficient number of randomly selected days between June 2014 and February 2016 to yield a sample of 1,500 recordings. The Court's order further instructed Comcast to identify any call recordings it did not retain from this time period. Ex. 170 (Dkt. # 89).

140. On May 23, 2017, Comcast informed the State that it had not retained any call recordings from June 2014, or from October 2015 through February 28, 2016, and that it

had retained call recordings only for its billing and retention telephone agents from July 2014 through September 2015. Comcast further represented to the State that it had retained all call recordings for the period from February 29, 2016 through June 30, 2016. Ex. 171.

141. Comcast subsequently collected and produced calls from both the July 2014-September 2015 time period, for which it retained call recordings only for billing and retention agents (the "2014-15 sample"), and from the February 29, 2016 through June 30, 2016 time period, for which it retained all call recordings (the "2016 sample"). Ex. 172.

142. The methodology employed by Comcast to collect call recordings was as follows. Comcast randomly-selected 117 SPP subscription dates from within the 2014-15 sample period, and 59 additional SPP subscription dates from within the 2016 sample time period. Ex. 171; Ex. 172. For each randomly-selected date, Comcast collected all call recordings for each Washington customer account subscribed on that date that occurred within three days on either side of the subscription date. For example, Comcast collected all call recordings occurring between April 4 and April 10, 2016, for Washington customer accounts that were subscribed to the SPP on April 7, 2016. Ex. 172.

143. The State introduced the testimony of Sarah Butler, whom the Court finds is a qualified expert in statistical sampling and analysis. Ms. Butler testified that randomly selecting SPP subscription dates within the two time periods for which Comcast had retained call recordings was a reliable method for obtaining a statistically representative sample of the entire population of SPP subscriber telephone calls during those time periods. VRP pp. 817-21 (Dec. 11, 2018).

144. Employing the above collection methodology, Comcast produced 7,033 call recordings, constituting over 1,000 hours of calls. Id. at 825.

Ms. Butler hired two firms that specialize in survey research and data 145. coding to code the calls produced by Comcast. The coding firms received instruction from Ms. Butler and those assisting her and acting at her direction, and the coding was performed

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double-blind, meaning neither the coding firms nor the coders themselves were aware of the intended purpose of the project. *Id.* at 845.

146. The calls produced by Comcast were coded to indicate whether the SPP was mentioned on each call, whether certain disclosures relating to the price of the SPP were mentioned on each call, and whether certain disclosures concerning the scope of coverage provided by the SPP were mentioned on each call. Ex. 2182.

147. Because Comcast produced calls for all SPP customer accounts subscribed on the randomly-selected subscription dates, not just those accounts subscribed by telephone, the call recordings produced by Comcast included customers with no SPP sales calls in the samples. Accordingly, to ensure that the data for analysis were limited to those customers for whom there was an SPP sales call contained within the production, Ms. Butler crossreferenced metadata produced by Comcast for each of the calls, which identified the Comcast agent who took each call, with data produced by Comcast that identified the Comcast agent who subscribed each customer in the call recordings to the SPP. Ex. 199 (metadata example); Ex. 1118. By performing this additional step, Ms. Butler identified customer accounts in the call recordings produced by Comcast that had at least one call with the same agent who subscribed the account to the SPP (referred to as "agent-match" calls). VRP pp. 852-858. Ms. Butler's testimony on this issue was unrebutted.

148. The call recordings produced by Comcast contained 1,830 customer accounts with an agent-match call: 1,438 from the 2016 sample, and 392 from the 2014-15 sample. 3,129 calls were produced for the 1,830 customers with at least one agent-match call, and included in Ms. Butler's analysis. Ex. 1243. Ms. Butler credibly testified that the number of agent-matched calls was sufficiently large to provide a reliable estimate of the population from which the call samples were drawn. VRP pp. 858. (Dr. Ravi Dhar testified that a survey population of only 196 individuals can be large enough to reach statistically significant conclusions. VRP p. 2377 (Dhar testimony, Jan 10, 2019).)

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149. Ms. Butler's analysis of the coding results for customers with agent-match calls showed that 38.2% of SPP customer accounts in the 2016 sample, and 36.8% overall, received no mention of the SPP in any of the calls for those accounts:

	Customer	<u>SPP Not</u>	
	Accounts	Mentioned	Percent
2014-15 Sample	392	124	31.6%
2016 Sample	1438	549	38.2%
TOTAL	1830	673	36.8%
IUIAL	1630	075	50.870

Ex. 2182; VRP pp. 859-62 (Butler testimony, Dec. 11, 2018).

150. Comcast's expert Bruce Deal identified 44 call recordings from the 3,129 agent-match customer calls that he testified were incorrectly coded as no mention of the SPP. Of those 44 call recordings, 29 are from the 2016 call sample, and 15 are from the 2014-15 call sample. Ex. 304. Ms. Butler testified that she disagreed with nine of the recordings identified by Mr. Deal as miscoded as "SPP no mention." VRP p. 888, (Butler testimony, Dec. 11, 2018). Three additional call recordings not identified by Mr. Deal were played at trial which were miscoded as "SPP no mention."

151. Mr. Deal's report identified time stamps from each of the alleged miscoded calls in which the SPP was purportedly mentioned. Ex. 304. Excerpts from eight of the 47 alleged miscoded calls, at the time stamps identified by Mr. Deal, were played by the State at trial. Ex. 254 (COMCAST-WALIT-000023208); Ex. 280 (COMCAST-WALIT-000024178); Ex. 379 (COMCAST-WALIT-000021427); Ex. 258 (COMCAST-WALIT-000023371); Ex. 234 (COMCAST-WALIT-000021518); Ex. 439 (COMCAST-WALIT-000022433); Ex. 567 (COMCAST-WALIT-000025019); Ex. 531 (COMCAST-WALIT-000022433); Ex. 567 (COMCAST-WALIT-000025019); Ex. 531 (COMCAST-WALIT-00002500); EX. 531 (COMCAST-WALIT-00002500); EX. 531 (COMCAST-WALIT-0000

000024303). Two of these call recordings are from the 2014-15 call sample, and the remaining six are from the 2016 call sample. Exs. 255, 281, 380, 259, 235, 440, 568, 532 (corresponding metadata files). In all eight excerpts, either the SPP was not mentioned or the agent on the call otherwise failed to obtain affirmative consent from the customer to add the SPP, and in all eight, the agent did not accurately disclose the price of the SPP to the customer. VRP pp. 3055-70 (Deal testimony, Jan. 19, 2019).

152. Based upon the evidence introduced at trial, the Court finds that 39 call recordings were incorrectly coded as SPP not mentioned. Adjusting Ms. Butler's analysis of the coding results to account for these 39 errors reduces the percentage of agent-match customers to whom the SPP was not mentioned, as follows:

	Customer	SPP Not	
	Accounts	<u>Mentioned</u>	Percent
2014-15 Sample	392	111	28.3%
2016 Sample	1438	526	36.6%
TOTAL	1830	637	. 34.8%

153. Ms. Butler that she calculated the margin of error for extrapolating the results of her agent-match analysis to the entire population as plus or minus 2.2% at a 95% confidence interval. In other words, if an equivalently-sized sample of SPP sales calls was taken 100 times, at least 95 of those samples would result in a percentage of customers to whom the SPP was not mentioned within 2.2 percentage points of the results shown in the samples produced by Comcast. VRP pp. 866-67 (Dec. 11, 2018). Ms. Butler also testified that margins of error below 10% or 5% at a 95% confidence interval indicate that a sample provides a reliable, robust estimate of the true population value. *Id.* at 798-99.

154. The parties entered into a stipulation, admitted into evidence at trial, that the 2016 sample is representative of Comcast's SPP subscription practices applicable to Washington customers from April 1, 2015-July 1, 2017 to the same extent those recordings are representative of Comcast's SPP subscription practices from February 29, 2016-June 2016. Ex. 175.

155. Ms. Butler credibly testified that the 2016 sample is representative of the February 29, 2016-June 2016 time period from which it was drawn. VRP pp. 868-69, 871-72.

156. Applying the parties' stipulation, Ex. 175, the Court finds that the 2016 sample is representative of Comcast's SPP subscription practices applicable to Washington customers from April 1, 2015 through July 1, 2017, inclusive. The Court accordingly further finds that the coding results for the 2016 sample, adjusted to reflect the 39 miscoding errors discussed above, may be extrapolated to the entire population of SPP sales calls for the time period from

April 1, 2015 through July 1, 2017.

157. Data produced by Comcast indicates that 54,995 Washington customer accounts were subscribed to the SPP by telephone between April 1, 2015 and June 30, 2016. Ex. 830. Accordingly, the Court finds that the results of the 2016 sample are extrapolated to the April 1, 2015 through June 30, 2016 time period as follows:

Time Period	SPP Accounts (telephone)	SPP Not Mentioned (percent)	SPP Not Mentioned (accounts)
April 1, 2015 – June 30, 2016	54,995	36.6%	20,128

158. Comcast has not produced data indicating the number of Washington customer accounts subscribed to the SPP between June 30, 2016 and July 1, 2017. Based on the data Comcast has produced, Ms. Butler extrapolates the call sample results to subscriptions occurring between June 30, 2016 and July 1, 2017.

159. Ms. Butler also credibly testified that the 2014-15 sample and 2016 sample together provide a reliable estimate of the entire population of SPP telephone sales to Washington customer accounts between the beginning of the 2014 sample and the end of the 2016 sample. VRP pp. 872-73 (Dec. 11, 2018).

160. The Court accordingly finds that the coding results for the 2014-15 sample and 2016 sample, adjusted to reflect the 39 miscoding errors discussed above, may be extrapolated to the entire population of SPP telephone sales to Washington customer accounts between July 2014 and June 30, 2016, inclusive.

161. Comcast SPP subscription data indicates that 40,687 Washington customers were subscribed to the SPP between July 1, 2014 and March 31, 2015. Ex. 2125. As discussed above, data provided by Comcast indicates that approximately 76.4% of all Washington SPP subscribers were enrolled by telephone. Accordingly, the Court finds that 31,085 (approx. 76.4% of 40,867) is a reasonable approximation of the number of Washington customer accounts subscribed to the SPP by telephone between July 2014 and June 30, 2016, and extrapolates the results of the 2014-15 and 2016 samples to this time period as follows:

Time Period	SPP Accounts (telephone)	SPP Not Mentioned (percent)	SPP Not Mentioned (accounts)
July 1, 2014 – March 31, 2015	31,085	34.8%	10,818

162. The Court previously held that the call recording results may not be extrapolated prior to July 1, 2014.

163. Comcast's expert Mr. Deal testified that agent-match call recordings reviewed and coded by Ms. Butler and her team, and included in her analysis, were "incomplete," either because an agent-match call was transferred to another agent within Comcast, or because an agent-match call was dropped while in progress. Comcast introduced no evidence showing that the SPP was mentioned to any agent-match customer in a transferred or dropped call that was not produced by Comcast, and Mr. Deal acknowledged that he does not know whether the SPP was, in fact, mentioned to any agent-match customer in a transferred or dropped call. VRP p. 3073 (Deal testimony, Jan. 17, 2019). The State demonstrated at trial that transferred calls identified by Mr. Deal were, in fact, produced by Comcast, and included in the call review and analysis performed by Ms. Butler and her team. Ex. 487; Ex. 1241 at COMCAST-WALIT-000023353; Ex. 377; Ex. 1241 at COMCAST-WALIT-000021393. The State also demonstrated at trial that the dropped calls identified by Mr. Deal show no indication that the conversation between agent and customer continued after the point where the call was dropped. Ex. 244,

Ex. 461.

164. Mr. Deal also testified that Ms. Butler's analysis of agent-match call recordings reviewed and coded by Ms. Butler and her team was unreliable because (i) the SPP subscription date for particular customer accounts recorded in Comcast's system differed by up to three days from the dates of the agent-matched calls produced by Comcast, (ii) customer accounts included in the analysis previously had another SPP account with Comcast, and (iii) Comcast agents may have backdated SPP subscriptions. Comcast introduced no evidence showing that the SPP was mentioned to any agent-match customer in a non-produced call. The Court finds that Mr. Deal's testimony, as well as challenges to Ms. Butler's methodologies effected the weight to be accorded her testimony, but its import remains probative of the questions before the court and ultimately whether certain claims are more probably true than not so. The review, coding, and analysis of the call recordings performed by Ms. Butler and her team remain meaningful. Regarding differences between SPP subscription dates and the date of particular calls in which customers were subscribed, the call collection methodology, discussed above, of collecting all calls within a three-day window on either side of SPP subscription dates was proposed by Comcast, in response to the Court's order directing production of SPP sales calls. Exs. 170, 171, 172. Concerning customers with previous SPP accounts, the SPP is sold on an account, rather than customer,

level, meaning Comcast must obtain affirmative consent for each SPP account. VRP pp. 3097-98 (Deal testimony, Jan. 17, 2019). Concerning backdating, the State demonstrated at trial that in the backdating examples provided by Mr. Deal, the actual agent-matched sales call was produced by Comcast, and included in Ms. Butler's review and analysis, notwithstanding backdating of the SPP subscription date. Exs. 1272 & 1273; Exs. 1274 & 1275. Backdating SPP subscription dates was also against Comcast policy, and Comcast came forward with no evidence showing that it was a common occurrence. Ex. 2014 at COMCAST-WALIT-000003785 ("The SPP is not retroactive – the customers must subscribe to SPP when the trouble call is scheduled or with the technician at the home.").

165. Mr. Deal also testified, based upon the testimony of Ryan Kelly, Executive Director of Operational Effectiveness for Comcast, that Ms. Butler's analysis of agent-match call recordings reviewed and coded by Ms. Butler and her team was unreliable because (i) Comcast does not record some percentage of customer calls in the first instance, or calls are not retrievable after they are recorded, and (ii) Comcast did not formerly record outbound calls to customers made by inbound call center agents. VRP pp. 2063-64 (Kelly testimony, Jan. 9, 2019). Mr. Kelly's testimony conflicts with Comcast's representations during discovery in this matter that it had retained all call recordings from February 29, 2016 through June 2016. Ex. 171. In addition, the Court points out the testimony of former Comcast call agent Eric Padilla that inbound call center agents were not permitted to make outbound sales calls. VRP p. 1300 (Dec. 17, 2019).

166. Mr. Deal also testified that Washington customers who were subscribed to the SPP had more "truck rolls" (an internal Comcast term for service visits), on average, than Washington customers who were not subscribed to the SPP, and that the truck roll rate for agent-match customers in the call recordings to whom the SPP was not mentioned was more similar to that of SPP subscribers as a whole than to non-SPP subscribers. On the basis of those observations, Mr. Deal offered the opinion that there must be a coding or other unobserved error in the call analysis performed by Ms. Butler. Second, Mr. Deal performed

a correlation analysis and did not perform a causation analysis. This testimony was accepted for its circumstantial value. In addition, some customers are more predisposed to need help with service issues, and therefore more likely to both have truck rolls and be enrolled in the SPP. Id. at 2237, 47. Second, as discussed above, most Washington customers were subscribed by repair agents, who also schedule truck rolls, and numerous examples in evidence—including call recordings and internal Comcast documents—show that repair agents were subscribing customers to the SPP without their knowledge or consent during the same call in which a truck roll was scheduled. Ex. 1241 (COMCAST-WALIT-000020493, from 13:12 to 13:43); Ex. 234 (COMCAST-WALIT-000021518, from 3:15 to 3:40); Ex. 244 (COMCAST-WALIT-000022129, from 3:58 to 4:39); Ex. 296 (COMCAST-WALIT-000026790, from 21:18 to 21:55); Ex. 439 (COMCAST-WALIT-000022433, from 18:20 to 18:55); Ex. 567 (COMCAST-WALIT-000025019, from 4:33 to 5:12); COMCAST-WALIT-000021944 (contained within Ex. 1241, from 13:20 to 13:55); Ex. 760 (Comcast document stating agent "added the SPP [without disclosure] then discussed dates and times with customer [for scheduling truck roll]"); Ex. 767 (Comcast document stating agent "advised that he needs to get a tech out to the location, SPP is added to the account with no mention of it to the customer"); Ex. 780 (Comcast document stating agent told customer truck roll would be free "because he had already added SPP without authorization or disclosure at the beginning of the call"); Ex. 789 (Comcast document stating agent "[w]hile setting up the [truck roll] appointment ... says to the customer: 'you guys already have the service protection plan so there is no charge for us to come there" and then "proceeds to add it without disclosing any price or information to the customer.").

167. Comcast acknowledges that "slamming" of the SPP occurred but disputes the rates identified by Ms. Butler's analysis. Comcast, through Mr. Deal, presented a proposed alternate methodology to quantify the amount of SPP slamming for the period of January 2011 through June 30, 2016. Ex. 2993. The Court is not persuaded that this methodology wholly undercuts that of Ms. Butler. Most notably, Mr. Deal's analysis does not consider the call recording data produced by Comcast, or any other data related to the point of sale of the SPP to Comcast's customers, at which point the customer's knowledge and consent to the subscription is measured. VRP p. 2992 (Deal testimony, Jan. 16, 2019). Mr. Deal's analysis instead collates data subsequent to the SPP subscription, such as customer account credits and debits and historical account activity such as cancellations and service calls. *Id.* at 3008. Mr. Deal's analysis uses these data to infer customer knowledge and consent at the point of sale based on assumptions as to the cause of subsequent consumer behavior.

168. The Court finds that the coding methodology developed by Ms. Butler of coding for whether or not the SPP was mentioned at all on each call is a reliable and conservative means of determining whether or not Comcast agents obtained affirmative consent to add the SPP to customer accounts. Employing this methodology may favor Comcast, as any calls in which the SPP was mentioned, but consent was not obtained by the agent, will nevertheless be coded as "SPP Mentioned" and, therefore, as the agent having obtained consent.

169. Ms. Butler also and appropriately employed a margin of error that would account for meaningful imperfections in her analysis.

170. Accordingly, the Court finds that the following estimates are supported by reliable and representative evidence, and represent a minimum number of Washington Comcast customers subscribed without their consent during the indicated time periods:

Time Period	SPP Accounts (telephone)	SPP Not Mentioned (percent)	SPP Not Mentioned (accounts)
April 1, 2015 – June 30, 2016	54,995	36.6%	20,128
July 1, 2014 – March 31, 2015	31,085	34.8%	10,818
· · ·	•		30,946

171. Both parties introduced evidence at trial regarding customer satisfaction with Comcast's sales agents. VRP pp. 1751-1753, 1770-1780 (Karinshak testimony, Jan. 8, 2019); Ex. 1246-48, 1251. This evidence demonstrates Comcast was consistently one of the lower performers in its industry, its performance in the Seattle region lagged behind other Comcast regions, and it had a negative Net Promoter Score in Washington until 2018. Ex. 1246; VRP. 1779-80 (Karinshak testimony, Jan. 8, 2019).

172. The SPP was sold to Washington customers by both Comcast employees and employees of non-party, overseas vendors with whom Comcast contracted to provide call center services to Washington customers. Vendor-employed agents handle 60% of Comcast's call volume. Ex. 1251. Comcast presented testimony that Comcast had the same expectations of its non-party vendor representatives as its internal call center representatives. VRP p. 1756 (Karinshak testimony, Jan. 8, 2019). However, Comcast did not directly oversee or train these vendor call agents, and lacked authority to hire or terminate them. *Id.* at 1793, 1804-05; VRP pp. 1974, 1989-90, 2006-07 (Soehren testimony, Jan. 9, 2019).

173. Comcast's Regional Vice President for Technical Operations, Christopher Weeks, testified that both Comcast employees and non-party vendor employees identified themselves to customers as Comcast representatives. Weeks Dep., p. 72. Comcast admitted that it authorized non-party vendors to subscribe Washington consumers to the SPP, and that consumers who called Comcast customer service numbers could be routed to such non-party vendors. Ex. 845 (Responses to Requests for Admission 4, 5). Comcast further admitted that it received the revenue from SPP sales made by non-party vendor employees. *Id.* (Response to Request for Admission No. 9).

174. Comcast's West Division Customer Care Sales Integrity Guidelines instructed employees to "[a]lways secure a customer's consent or approval before adding or removing products on a customer's account." Ex. 2129. However, until July 1, 2017, Comcast agents were not required to obtain any affirmation of consent from customers to add the SPP other than a customer's oral assent. *See* Dickey Dep., pp. 38-40; Ex. 845, Response

to Request for Admission No. 17 (Admitted as to time period January 1, 2011 through June 30, 2016). Comcast presented no evidence that it changed its policies or procedures concerning obtaining affirmative consent from customers to add products or services at any time between January 1, 2011 and July 1, 2017.

175. The SPP was easy for Comcast agents to add to customer accounts, and internal Comcast documents noted that agents earned commissions and other financial benefits by adding the SPP without customers' consent. Ex. 734 (agent who added SPP without consent earned \$3.00 for each SPP sale completed); Ex. 738 (agent "added services on 43 accounts" which "impacts his monthly commissions"); Ex. 747 (agent who added without consent earned \$100 in commissions from SPP sales); Ex. 751 (agent added SPP without consent because he "felt pressured to make sales"); Ex. 758 (agent who added SPP without permission earned monthly SPP commissions of \$48, \$132, and \$90); Ex. 772 (adding SPP without consent benefits agent "financially as it increased his Revenue per Call and the amount points [*sic*] he earns"); Ex. 789 (adding SPP without consent "result[s] in adding a \$4.99 monthly recurring charge to the customer's account with [agent] earning commission on the sale").

176. Comcast call agents who took calls from Washington customers frequently received customer complaints of SPP "slamming", and made their supervisors aware of those complaints, but received no follow-up from their supervisors. *See* VRP pp. 1278-80 (Padilla testimony, Dec. 17, 2018); Darr Dep. pp. 124-127. In internal correspondence, one Comcast employee tracked complaints submitted to sixteen different supervisors, and only three of the sixteen supervisors reviewed the complaining customer's file. Ex. 770. Comcast supervisors' own performance metrics were also based on the performance metrics of their staff, and supervisors were in a position to benefit from slamming by call agents. *Id*.

177. Comcast Executive Vice President Tom Karinshak testified that Comcast used third-party vendors to do quality assurance monitoring of telephone calls between

Comcast agents and customers. VRP pp. 1697-99, 1840-42 (Jan. 7-8, 2019); Ex. 2163. Calls were monitored for compliance with Comcast's quality guidelines, rather than specifically to ensure that agents obtained consent to add products or services. *Id.* Comcast introduced no evidence of call monitoring results or reports concerning whether agents were adding products and services without consent. VRP pp. 1842 (Karinshak testimony, Jan. 8, 2019).

178. The Court accordingly finds that Comcast, as a general practice, did not sufficiently ensure that calls between its agents and customers where products and services were added were done only with customers' consent.

179. The total revenue that Comcast collected from Washington customers newly enrolled in the SPP by whatever means from July 1, 2014 through June 30, 2016 was \$3,196,227. PX-1100; DX-2165; DX-2569; DX-2723; DX-2724; DX-2725; DX-2726; DX-2727; DX-2728; DX-2729; DX-2730; DX-2731; DX-2732.

180. The total number of Washington customers who newly enrolled in the SPP by whatever means from July 1, 2014 through June 30, 2016 was 76,385. PX-1100; DX-2165; DX-2723; DX-2724; DX-2725; DX-2726; DX-2727; DX-2728; DX-2729; DX-2730; DX-2731; DX-2732.

181. Ms. Butler's analysis was limited to customers who enrolled in the SPP by telephone. Trial Tr. at 1090:11-25 (Dec. 12, 2018) (Butler); Trial Tr. at 2854:15-25 (Jan. 16, 2019) (Deal).

182. 76.3% of SPP enrollments occurred over the telephone. Trial Tr. at 2833:10-14 (Jan. 16, 2018) (Deal); DX-2992. While some of the remaining 23.7% of SPP enrollments occurred from unknown sources, the State presented no evidence that any of those remaining SPP enrollments occurred over the telephone. Trial Tr. at 1090:11-19 (Dec. 12, 2018) (Butler).

183. The total revenue that Comcast collected from Washington customers who enrolled in the SPP by telephone from July 1, 2014 through June 30, 2016 was \$2,438,721 (76.3% of \$3,196,227).

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184.The total number of Washington customers enrolled in the SPP bytelephone from July 1, 2014 through June 30, 2016 was 58,282 (76.3% of 76,385).

185. 34.4% (averaging Ms. Butler's estimates for the 2014-2016 period) of SPP enrollees in Washington between July 1, 2014 and June 30, 2016 were enrolled without consent. Trial Tr. at 888-890 (Dec. 11, 2018) (Butler); Trial Tr. at 3398:20-3400:5 (Jan. 30, 2019) (State Closing).

186. With 34.4% of SPP telephone enrollees in Washington between July 1, 2014, and June 30, 2016, were enrolled without consent, that means that, at most, 20,049 Washington customers were enrolled in the SPP without consent between July 1, 2014 and June 30, 2016 (34.4% of 58,282).

187. Mr. Deal analyzed SPP subscribers' account history to determine those most likely to have been enrolled in the SPP without their consent. Trial Tr. at 2877:13-2881:11 (Jan. 16, 2018) (Deal); Trial Tr. at 3180:12-3182:7 (Jan. 17, 2018) (Deal); DX-2994. He first identified 2,122 customers who cancelled their SPP subscription between 2011-2016 and received a large partial credit equating to 90 days or more of SPP fees (\$15), but did not receive a full refund. Trial Tr. at 2878:1-20 (Jan. 16, 2018) (Deal); Trial Tr. at 3180:12-3181:6 (Jan. 17, 2018) (Deal); DX-2994. These 2,122 customers were associated with \$113,522 in unrefunded SPP revenue. Trial Tr. at 2878:1-20 (Jan. 16, 2018) (Deal); Trial Tr. at 3180:12-3181:6 (Jan. 17, 2018) (Deal); DX-2994. Mr. Deal next identified 2,796 additional customers who cancelled their SPP subscription between 2011-2016 and received a full refund of greater than one month of SPP fees. Trial Tr. at 2879:3-2880:1 (Jan. 16, 2018) (Deal); Trial Tr. at 3181:6-14 (Jan. 17, 2018) (Deal); DX-2994. Finally, Mr. Deal applied the proportions from his first two categories (customers who cancelled and received a large refund, and customers who received a full refund) to all remaining customers who, as of 2016, had not yet cancelled their SPP subscriptions. Trial Tr. at 2880:2-12 (Jan. 16, 2018) (Deal); Trial Tr. at 3181:14-3182:7 (Jan. 17, 2018) (Deal); DX-2994. The Court finds Mr. Deal's analysis and conclusions helpful, but best suited to issues of restitution.

#### The State Offered No Evidence Regarding Post-June 2016 SPP Enrollments

188. The State offered no evidence concerning the number of customers enrolled in the SPP after June 30, 2016, or the amount of SPP revenue Comcast collected, if any, after June 30, 2016, from customers who were enrolled in the SPP after July 1, 2014.

189. Thus, even accepting the parties' stipulation and Ms. Butler's sample representative of the February 2016 to June 2016 time period, there is no evidentiary basis on which to determine the number of Washington customers enrolled in the SPP without consent after June 30, 2016, or the revenue, if any, collected after June 30, 2016, from customers who enrolled in the SPP after July 1, 2014.

### **CONCLUSIONS OF LAW**

I. Consumer Protection Act Standard The CPA prohibits companies from engaging in "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The purpose of the Act is to protect the public and foster fair and honest competition. RCW 19.86.920. The CPA is construed liberally to serve this purpose. *Short v. Demopolis*, 103 Wn.2d 52, 60-61, 691 P.2d 163 (1984). The Washington Attorney General may bring a CPA enforcement action in the name of the state for injunctive relief, restitution, civil penalties, and recovery of costs and attorneys' fees. RCW 19.86.080; RCW 19.86.140. The Washington CPA is liberally construed.

2. To prevail under the CPA, the State must prove "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 518, 398 P.3d 1271 (2017), *review denied*, 189 Wn.2d 1021, 404 P.3d 496 (2017). Unlike a private plaintiff, the State "is not required to prove causation or injury." *Id.* Because an unfair or deceptive practice "does not require a finding of an intent to deceive or defraud .... therefore good faith on the part of the seller is immaterial." *Wine v. Theodoratus*, 19 Wn. App. 700, 706, 577 P.2d 612 (1978); *see also State v. LA Investors, LLC*, 2 Wn. App. 2d 524, 538, 410 P.3d 1183 (2018), *review denied*, 190 Wn.2d 1023, 418 P.3d 796 (2018) ("The State is not required to prove causation, injury, intent to deceive or actual deception."). The standard of proof on a CPA claim is a preponderance of the evidence. *State Farm & Cas. Co. v. Huynh*, 92 Wn. App. 454, 470-71, 962 P.2d 854 (1998).

3. Either an unfair or deceptive act may be the basis for a CPA claim. *Klem v. Washington Mut. Bank,* 176 Wn.2d 771, 787, 295 P.3d 1179, 1187 (2013); RCW 19.86.020 ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.") Whether an act is unfair or deceptive is a question of law. *Panag v. Farmers Ins. Co, of Wash,* 166 Wn.2d 27, 47, 204 P.3d 885 (2009).

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4. An act is deceptive if "it had the capacity to deceive a substantial portion of the public." *Panag*, 166 Wn.2d at 47. "Thus, the CPA only requires the State to show capacity to deceive." *LA Investors*, 2 Wn. App. 2d at 538. "A communication can be accurate and truthful, yet still be deceptive if the net impression it conveys is deceptive." *Id.* at 540. "[A] practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed." *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 116, 22 P.3d 818 (2001).

5. In *Panag*, the Washington Supreme Court stated that, for purposes of a CPA claim, "deception exists if there is a representation, omission, or practice that is likely to mislead a reasonable consumer." *Panag*, 166 Wn.2d at 50. This "reasonable consumer" standard has been subsequently applied by the Washington Courts of Appeals. *See Mandatory Poster*, 199 Wn. App. at 518-19; *LA Investors*, 2 Wn. App. 2d at 540.

6. In *Panag*, the Washington Supreme Court also stated that, for purposes of a CPA claim, "[i]n evaluating the tendency of language to deceive, the [FTC] should look not to the most sophisticated readers but rather to the least," (quoting *Exposition Press, Inc. v. F.T.C.,* 295 F.2d 869 (2d Cir.1961)). *Id.; see also Peterson v. Kitsap Community Fed. Credit Union,* 171 Wn. App. 404, 426, 287 P.3d 27, 38 (2012) (same). Yet, *Panag* involved the interpretation of legal idiom such as "subrogation." Surely it is the context of any particular CPA case that will inform the relative standing if the parties. WA law on this score, consistently cites to the "reasonable" or "ordinary" customer. In deciding whether a practice or act is "unfair or deceptive" for purposes of the CPA, Washington courts look to federal court decisions concerning determinations made by the Federal Trade Commission (FTC) in administering the Federal Trade Commission Act (FTCA), ch. 311, 38 Stat. 717 (1914). *Panag*, 166 Wn. 2d at 47.

7. More recently, in *Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1268 (W.D. Wash. 2011), the court addressed the use of deceptive marketing practices to sign individuals up for subscription services, as follows:

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Not everyone would be fooled by this marketing technique. Some individuals would understand that obtaining something for nothing is a rare event ... But not everyone is so wary and/or detail-oriented, nor is the CPA designed to protect only those who need no protection. The capacity of a marketing technique to deceive is determined with reference to the least sophisticated consumers among us ... This is particularly important when the consumer has no reason to be looking for, and therefore is not expecting to find, a disclosure. It is not unreasonable for a consumer to assume that he can safely complete an uncomplicated internet transaction without fear of being swindled or saddled with unwanted goods and services if he reviews the order summary and clicks on the link or button that purportedly completes the purchase.

See also id. at 1266.

#### Materiality

8. An act or practice is deceptive if it "could be of material importance to a customer's decision to purchase the company's services." *Indoor Billboard/Washington, Inc., v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 78, 170 P.3d 10 (2007); *see also Panag*, 166 Wn.2d at 47 (notices mailed to consumers were deceptive because they "may induce people to remand payment under the mistaken belief they have a legal obligation to do so."). "Express product claims are presumed to be material." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1095-96 (9th Cir. 1994). Failing to disclose the "true price" of goods or services is also inherently material. *See Robinson*, 106 Wn. App. at 115-16; *see also F.T.C. v. The Crescent Publishing Group*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001) ("Information concerning prices or charges for goods or services is material").

#### **Unfair Act or Practice**

9. An act may be "unfair" without being "deceptive." *Klem*, 176 Wn.2d at 787. In *Klem*, the Washington Supreme Court declined to "explore in detail how to define unfair acts" for purposes of the CPA, noting that it "has allowed the definitions [of unfair and deceptive] to evolve through a gradual process of judicial inclusion and exclusion." *Id.* at 785, 788. The Court cited with approval the standard for unfairness applied in *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537 (1983), quoting *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n. 5, 92 S. Ct. 898, 905, n. 5, 31 L. Ed. 2d 170 (1972), as follows:

In determining whether something is unfair, the court may look to see

(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise...; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers.

*Id.* at 785-86.

10. The Court in *Klem* also noted that "[c]urrent federal law suggests a 'practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits." *Id.* at 787 (quoting 15 U.S.C. § 45(n) of the FTC Act).

11. Trade or commerce, under the CPA, "include[s] the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). The term "assets," in turn, is defined under the CPA to "include any property, tangible or intangible, real, personal, or mixed, and wherever situate, and any other thing of value." RCW 19.86.010(3).

12. The CPA also "incorporates a yardstick of reasonableness" that applies to both unfair or deceptive acts or practice. *Stephens v. OmniIns. Co.*, 138 Wn.App. 151 170 (2007).

## Public Interest Impact

13. An unfair or deceptive act must impact the public interest to constitute a CPA violation. RCW 19.86.920. In determining public interest impact, "[t]he factors to be considered will depend upon the context in which the alleged acts were committed." *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 177, 159 P.3d 10, 24 (2007), *aff'd sub nom. Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 204 P.3d 885 (2009). Where the acts complained of involve "essentially a consumer transaction," the following five factors are relevant:

(1) Were the alleged acts committed in the course of defendant's business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff? (5)

If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?

*Id.* (quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 790, 719 P.2d 531, 538 (1986)). "No one factor is dispositive, nor is it necessary that all be present." *Id.* 

14. "[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn,2d 396, 407, 759 P.2d 418, 423 (1988). Thus, acts affecting only one consumer may have a public interest impact if they are capable of repetition. *See id.* at 407 (finding public interest impact where other consumers, in addition to plaintiff, could be affected).

## Legal Standard

15. To prevail under the CPA, the State must prove, by a preponderance of the evidence,
"(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 518 (2017).

16. The CPA does not define "deceptive," but "the implicit understanding is that the actor misrepresented [or omitted] something of material importance." *Mandatory Poster Agency*, 199 Wn. App. at 519 (quoting *State v. Kaiser*, 161 Wn. App. 705, 719 (2011)). Only those omissions or misstatements with the capacity to mislead a substantial portion of the public are actionable. *See Mandatory Poster Agency*, 199 Wn. App. at 519. In making this inquiry, courts measure the "net impression" of the challenged act or practice on a "reasonable consumer." *State v. LA Inv'rs, LLC, 2* Wn. App. 2d 524, 540 (2018). The State has conceded that this requires proof that the communication at issue was sent to consumers. State's Opp. to Comcast's CR 41(b)(3) Mot. at 8.

17. An act is unfair within the meaning of the CPA "if it causes or it is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves," *Klem v. Wash. Mut. Bank*, 176 Wn. 2d 771, 787 (2013), or if it "offends public policy as established by statutes [or] the common law, or is unethical, oppressive, or unscrupulous, among other things." *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn. App. 476, 489-90 (2014) (quoting *Klem*, 176 Wn. 2d at 786). Courts interpreting the analogous Federal Trade Commission Act routinely hold that an injury is reasonably avoidable, and thus the challenged act or practice is not unfair, if consumers have sufficient information to make a "free and informed choice" to avoid the injury. *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012) (concerning Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)).
18. The CPA also "incorporate[s] a yardstick of reasonableness" that applies to both unfair or deceptive acts or practices. *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 170 (2007). This statutory defense excuses conduct that would otherwise constitute a

CPA violation if it is "reasonable in relation to the development and preservation of business or [is] not injurious to the public interest." *Id.* (quoting RCW 19.86.920).

### II. The State's Comcast Guarantee Claim

19. The State offered evidence that the Comcast Guarantee was communicated to Washington consumers in 2011, but not in any other years before 2014. See supra ¶
9.

20. The State asked Rebecca Hartsock, an investigator for the State, several questions about web pages she had located through use of the Way Back Machine (also sometimes referred to as the Internet Archive or Archive.org), a website that claims to provide historical versions of various web pages. Trial Tr. at 162:9-173:3 (Dec. 3, 2018) (Hartsock). The State, however, offered no testimony from any Way Back Machine employee authenticating that the screen shots upon which Ms. Hartsock

relied were true and accurate representations of the Way Back Machine's records or of what appeared on the internet on any given date.

21. There was no direct proof offered that a WA customer was aware of the Guarantee.

22. A reasonable consumer would not have had the net impression from the Comcast Guarantee that he or she would not be charged for multi-purpose service visits. See supra ¶¶ 47-49. Therefore, Comcast's charging customers for multi-purpose service visits did not render Comcast's marketing of the Guarantee unfair or deceptive.

23. A reasonable consumer would not have had the net impression from the Comcast Guarantee and RSA that cables, jumpers, and splitters were "Comcast equipment" and thus would be covered by the Comcast Guarantee. See supra ¶¶ 54-57. Therefore, Comcast's charging customers for the replacement of these cables did not render Comcast's marketing of the Comcast Guarantee unfair or deceptive under the CPA.

24. Even assuming that a reasonable consumer's net impression from the Comcast Guarantee and RSA is that cables, jumpers, and splitters were "Comcast equipment" and thus would be covered by the Comcast Guarantee when those items were provided by Comcast, the State has not shown that any Washington Comcast customer was charged for a repair to cables, jumpers, or splitters provided to the customer by Comcast. *See supra* ¶¶ 58-59. Therefore, the State has not carried its burden of proving that Comcast acted unfairly or deceptively by failing to honor the Guarantee with regard to cables, jumpers, and splitters.

25. The State also claims that Comcast charged customers contrary to the Comcast Guarantee because two specific fix codes were chargeable codes: U52, which for a period of time resulted in a service charge for service visits that ordinarily were not chargeable, and T52, the use of which for a period of a time resulted in a service charge for service visits that involved the installation of drop amplifiers. See supra ¶¶ 61-62, 69. The State presented no other evidence about Comcast's use of fix codes as

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it related to service visit charges and the Comcast Guarantee, and the Court accordingly grants judgment for Comcast with regard to any claims related to those other fix codes. *See supra* ¶ 61.

26. With regard to the U52 code, a reasonable consumer would not have had the net impression that the Comcast Guarantee covered service visits where the U52 code was applied, namely for service visits necessitated by intentional vandalism or acts of nature. See supra ¶¶ 66-67. The State has not proven that the U52 code was applied to a Washington consumer in any other circumstance. See supra ¶ 64. Therefore, Comcast's charging customers for service visits where the U52 code was applied did not render Comcast's marketing of the Comcast Guarantee unfair or deceptive under the CPA.

27. A reasonable consumer would not have had the net impression that the Comcast Guarantee applies to service visits that were charged to customers because of the application of the T52 code. See supra ¶¶ 71-72. The State presented no evidence that any customer was charged for an amplifier installation when that installation was necessitated by a Comcast equipment or network issue. See supra ¶ 71. Therefore, Comcast's charging customers for service visits where the T52 code was entered did not render Comcast's marketing of the Comcast Guarantee unfair or deceptive under the CPA.

28. The State's claims regarding the Comcast Guarantee also fail because the State has not shown that the alleged omissions were material. As noted, only material misrepresentations and omissions are actionable under the CPA. See Mandatory Poster Agency, 199 Wn. App. at 519. An omission or misrepresentation is material if it "could be of material importance to a customer's decision to purchase the company's services." Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc., 162 Wn. 2d 59, 78 (2007). The State has previously explained that this standard means that "a term is only 'material' if it 'involves information that is

important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." Pl.'s Cross-Mot. for Partial Summ. J., *State v. DIRECTV*, No. 09-2-44903-1 SEA, 2010 WL 2516491 (Wash. Super. Ct., King Cty. Apr. 23, 2010).
29. The State failed to meet its burden on materiality because it did not present sufficient evidence concerning the materiality of the alleged omissions to consumer decisions to subscribe to Comcast's services. Comcast presented testimony that the Guarantee was not provided to customers until after the customer decided to purchase Comcast's services. *See supra* ¶ 75. And even if a customer was aware of the Comcast Guarantee before subscribing to Comcast's services, Dr. Ravi Dhar testified credibly regarding two surveys that he conducted, which established that the Comcast Guarantee did not impact consumer purchasing decisions. *See supra* ¶ 77-79.

30. The State contends that Comcast's marketing of the Comcast Guarantee was an "express product claim," and therefore materiality should be presumed, citing federal case law. Trial Tr. at 3435:4-10 (Jan. 30, 2019) (State Closing). Assuming that the challenged statement in the Comcast Guarantee was an express product claim, under Washington law, "[a] presumption may be overcome by competent rebutting testimony from either interested or disinterested witnesses." *Matter of Davis Estate*, 23 Wn. App. 384, 386 (1979). Dr. Dhar has provided just such testimony here, and based on his testimony the Court holds that any presumption of materiality has been rebutted.

31. The State also argues that information concerning prices or charges for goods or services is *per se* material. Trial Tr. at 3435:11-19 (Jan. 30, 2019) (State Closing). Assuming that Washington courts would follow the limited precedent on this point from federal courts, this is not, as the State claims, a per se rule, but rather is itself a rebuttable presumption. *See FTC v. Crescent Pub. Grp, Inc.*, 129 F. Supp. 2d 311, 321 (S.D.N.Y. 2001). For the reasons noted above, *see supra* ¶¶ 28-202, Comcast has successfully rebutted this presumption.

- 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28
- 32. Comcast's marketing of the Guarantee was not unfair. As an initial matter, the State claimed that the practice was unfair solely because the Guarantee was deceptive, and the Court has held that the State has failed to carry its burden in this regard. *See supra* ¶ 19-27.

### **Comcast's Practices And Procedures Concerning Its Guarantee Were Reasonable**

33. Even if the Guarantee were unfair and/or deceptive, the Court holds that the challenged practices were "reasonable in relation to the development and preservation of business," Stephens, 138 Wn. App. at 170, and therefore do not violate the CPA. Comcast trained its employees about the Guarantee and instructed its employees to inform customers of even the possibility of a service visit charge. See supra ¶ 27-29. Comcast trained and retrained its technicians to apply fix codes only when those codes reflect work that directly resulted in the resolution of the customer's problem. See supra  $\P$  45. Comcast provided its technicians with a waiver code that would ensure that service visits where that code was applied would not result in a charge to the customer, encouraged technicians to use that code where appropriate, and placed no limitations on its use. See supra ¶ 12. Comcast reviewed its technicians' use of fix codes and assessed whether its chargeable fix codes should remain chargeable. See supra ¶ 71; Trial Tr. at 2606:13-15, 2615:20-2616:8 (Jan. 15, 2019) (Daisey). Where data or other factors suggested certain codes should no longer be chargeable. Comcast made them non-chargeable. See supra ¶ 71. And Comcast empowered its call center employees to credit back to customers service visit charges when warranted. See supra ¶ 13.

#### III. The State Has Not Proven Its SPP Scope Claims

34. Comcast's marketing of the SPP as it related to the SPP's coverage of inside wiring was not deceptive by a preponderance of evidence. Contrary to the State's allegations, the evidence presented at trial established that the SPP did cover service visit charges relating to the repair or replacement of inside wiring, including wires

concealed behind walls. See supra ¶ 100, 107. Thus, the net impression a reasonable consumer would take from Comcast's marketing of the SPP's inside wiring coverage was not deceptive.

- 35. To the extent the State claims that a reasonable consumer would have had the net impression from Comcast marketing that wall-fishing was covered by the SPP, the Court finds that a substantial portion of the public would not take away the net impression from Comcast's marketing of the SPP that the SPP covered the specific technique of wall-fishing. Therefore, Comcast's advertising of the SPP as it related to inside wiring was not unfair or deceptive.
- 36. A reasonable consumer would not have had the net impression from Comcast's SPP marketing that the SPP covered the repair or replacement of customer-owned equipment. See supra ¶ 112-115. Therefore, Comcast's advertising of the SPP did not create a deceptive net impression regarding the SPP's coverage of customerowned equipment.
- 37. A reasonable consumer would not have had the net impression from Comcast's SPP marketing that the SPP would cover service visits occasioned by a customer's intentional vandalism or acts of nature. See supra ¶ 66-67, 119. Therefore, Comcast's advertising of the SPP was not rendered unfair or deceptive as a result of this coverage exclusion.
- 38. It was not unfair or deceptive for Comcast to market the SPP as covering any or all chargeable service visits or providing "comprehensive" coverage. SPP subscribers were not charged for 99.93% of all service visits. See supra ¶ 117. This rate of coverage is consistent with the expectations of reasonable consumers in Washington when exposed to Comcast's marketing of the SPP. See supra ¶ 66-67, 119. Therefore, Comcast's marketing of the SPP was not unfair or deceptive when it advertised the SPP as covering any or all chargeable service calls or providing "comprehensive" coverage.

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# The State Has Not Shown That The Challenged Aspects Of Comcast's SPP Marketing Were Material

- 39. Both parties put forward expert surveys that sought to assess consumer perceptions of Comcast's SPP marketing. The survey conducted by Comcast's expert, Dr. John Hauser, was reliable, and credibly established that the challenged portions of Comcast's SPP marketing did not affect consumer likelihood of enrolling in the SPP. See supra ¶¶ 121-124.
- 40. Accordingly, Comcast's marketing of the SPP as it relates to inside wiring and to customer-owned equipment was not material to Washington consumers and therefore any omissions or misrepresentations were not unfair and/or deceptive. See supra ¶¶ 123-124; Indoor Billboard, 162 Wn. 2d at 78 (an omission is material only if it "could be of material importance to a customer's decision to purchase the company's services"); FTC v. Cyberspace.com LLC, 453 F.3d 1196, 1201 (9th Cir. 2006) (to be material, the omitted information must be "likely to affect [the consumer's] choice of, or conduct regarding, a product").
- 41. Apart from survey evidence, the State failed to prove that the wall-fishing exclusion was material to Washington customers. The State offered no evidence concerning the frequency with which wall-fishing would be needed to repair an issue with concealed wiring. *See supra* ¶ 104. In contrast, Comcast presented testimony from Mr. Daisey that issues with concealed wiring were rare to begin with, and in Ms. Butler's sample of 1,830 SPP subscribers not a single customer had had a fix code placed on their account related to or had been charged for wall fishing. *See supra* ¶¶ 105-106. Accordingly, the Court concludes that to the extent Comcast omitted the fact that the SPP did not cover wall-fishing from its SPP-related marketing, that omission was immaterial and therefore not a violation of the CPA.

# IV. Comcast Violated the CPA by Enrolling Consumers in the SPP without Disclosing the Plan's Recurring Charges.

42. The preponderance of the evidence establishes this claim as more probably true than not true. Enrolling customers in the SPP without disclosing recurring monthly fees has the capacity to deceive a substantial portion of the population and is an unfair or deceptive act or practice under the CPA. See *Indoor Billboard*, ("knowing failure to reveal something of material importance is deceptive"); *FTC v. AMG Capita; Mgmt*, *LLC*, 910 F.3d 417 (9<sup>th</sup> Circ. 2018)(inadequate disclosure of automated loan renewal deceptive).

43. One month "free" offers were automatically rolled to retail rate in month 2. Ex. 2087. Such would not be a reasonable consumers net impression.

44. In addition, each time Comcast charged an unsuspecting consumer for the SPP after failing to disclose the fees at the time of subscription it committed an additional unfair/deceptive act. Customers subscribed without fee disclosures would have no reason to scrutinize their bills for SPP charges and the law does not so burden the consumer.

45. In June 2013 Comcast decided not to send welcome letters or emails to WA subscribers after it was stated in an internal email that "if we welcome SPP Subs via email, we are essentially reminding them they have this plan and then they may want to cancel it.' Ex. 1018.

46. Auto-charging after the first month in this circumstance was "just not right." J. Darr.

47. This practice occurred in trade or commerce.

48. This practice impacted the public interest. The statistical extent of this practice was sufficiently demonstrated by witness Butler and other evidence. The evidence revealed that over 20% of WA SPP customer accounts subscribed via telephone were subscribed to the plan absent fee disclosures between July 2014 and June 2016. Pursuant the parties' stipulation, at least 12,319 accounts were subscribed absent

consent between April 2015 and June 2016, and 6,342 additional accounts were subscribed sans consent between July 1, 2014 and March 31, 2015. Numerous consumers were thus injured, or could have been, in the same manner, impacting the public interest.

49. Accordingly, Comcast violated the CPA each time it enrolled a WA consumer in the SPP without providing necessary fee disclosures and charging them for the SPP following enrollment.

### V. Comcast Violated the Consumer Protection Act by Enrolling Consumers in the Service Protection Plan without Consent

50. The State has established this claim by a preponderance of the evidence as more likely true than true. Enrolling customers in the SPP—a paid product for which Comcast charged a recurring, monthly fee—without obtaining affirmative consent has the capacity to deceive a substantial portion of the population and is a deceptive act or practice under the CPA. *See Indoor Billboard*, 162 Wn.2d at 75 ("Knowing failure to reveal something of material importance is 'deceptive' within the CPA."); *F.T.C. v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1000 (N.D. Cal. 2010), *aff'd*, 475 Fed. Appx. 106 (9th Cir. 2012) (placing unauthorized charges on telephone bills is deceptive under the FTCA).

51. Enrolling customers in the SPP without obtaining affirmative consent is also an unfair act or practice under the CPA. The Court questions whether the federal, three-part "substantial injury" test is appropriately applied to a CPA claim brought by the State, which does not need to prove injury to establish liability. Assuming without deciding that such test may be applied, the Court also finds that Comcast's conduct (i) caused or was likely to cause substantial injury to consumers, which (ii) was not reasonably avoidable by consumers themselves, and (iii) not outweighed by countervailing benefits to consumers.

52. Concerning substantial injury, federal courts "have repeatedly held that billing customers without permission causes injury for the purposes of asserting a claim under ... the FTC Act." *F.T.C. v. Amazon.com, Inc.*, 71 F. Supp. 3d 1158, 1164 (W.D. Wash. 2014) (collecting cases). "Substantial" injury is also shown where, as here, an act or practice does "small harm to a large number of people." *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010).

- 53. Concerning whether such injury was "reasonably avoidable," as discussed above, the CPA protects unsuspecting, as well as sophisticated, consumers. Washington Comcast customers who had the SPP added without their knowledge or consent had no reason to scrutinize their bills to detect unauthorized charges, and the law does not place that burden upon consumers. *See Inc21.com*, 745 F. Supp. 2d at 1004 ("This order declines to allow defendants to blame unsuspecting consumers for failing to detect and dispute unauthorized billing activity. As other courts have wisely concluded, the burden should not be placed on defrauded customers to avoid charges that were never authorized to begin with.").
- 54. Concerning whether such injury was outweighed by countervailing benefits, the evidence shows that numerous consumers were charged for a service they never requested, and that consumers who did detect unauthorized SPP charges, and complained, received less than full refunds. *See Inc21.com*, 745 F. Supp. 2d at 1004 ("[I]t cannot be said that defendants' 'customers' benefitted at all from services that they never agreed to purchase, didn't know were being provided to them, and never wanted in the first place,").
- 55. In addition to the unfair or deceptive act of subscribing consumers to the SPP without obtaining affirmative consent, each time Comcast charged a consumer for the SPP after failing to obtain consent, it committed an additional unfair or deceptive act or practice. *See Inc21.com*, 745 F. Supp. 2d at 1000 ("The placement of [unauthorized] charges on consumer telephone bills (and the inclusion of those charges in the 'total

amount due' shown on these bills) constituted an affirmative representation by defendants that the consumer had in fact authorized the purchase and owed payment to defendants."). As discussed above, the burden is not on consumers to discover and dispute unauthorized charges.

56. Comcast's unfair or deceptive acts of enrolling Washington consumers in the SPP without their consent, and charging for the SPP following unauthorized enrollment, occurred in trade or commerce.

57. The evidence, including the testimony of Ms. Butler sufficiently established the harm to a substantial portion of Washingtonians.

58. Comcast's unfair or deceptive acts of enrolling Washington consumers in the SPP without their consent, and charging for the SPP following unauthorized enrollment, affected the public interest. Call recordings produced by Comcast show that over onethird of Washington SPP customer accounts subscribed via telephone were subscribed to the plan without their consent between July 2014 and June 2016. Pursuant to the parties' stipulation and SPP subscription data produced by Comcast, at least 20,128 customer accounts were subscribed without consent between April 2015 and June 2016 alone (a time period during which Comcast made 71,944 new SPP sales to Washington customers) and 10,818 additional customer accounts were subscribed without consent between July 1, 2014 and March 31, 2015. See Mandatory Poster, 199 Wn. App. at 524 (finding mass mailing sent to over 79,000 consumers, generating 2,901 paid responses had capacity to deceive substantial portion of the public). Numerous consumers were injured in the same manner, *i.e.*, they were subscribed to the SPP, and charged for the SPP, without their consent, and Comcast's subscription practices for obtaining affirmative consent remained unchanged from 2011 to mid-2017. See Travis, 111 Wn.2d at 407 (finding public interest impact where "the sellers' practices, conducted in the course of their business, were longstanding and had not changed").

59. Accordingly, Comcast violated the CPA, RCW 19.86.020, each time it enrolled a Washington consumer in the SPP without their consent and each time it charged a Washington consumer for the SPP following enrollment without consent.

## VI. Penalties/Remedies

- 60. Comcast argues that an arbitration clause contained in the Agreement for Residential Services precludes any restitution to its customers. The State's authority to seek restitution, however, is not derivative of the rights of the individual customers, but is rather intended to benefit the general public. RCW 19.86.080. *State v. LG Elecs., Inc. 186 Wn.2d 1, 15* (2016). The clauses here, which exempts the State from its scope, do not bar the State's claims.
- 61. Because the Court finds that Comcast has not violated the CPA with regard to the State's Guarantee and Scope/Coverage claims, no civil penalty is of course appropriate. The Attorney General's claim and request for \$35,521,250 is denied.
- 62. The Court accepted the stipulation that the penalty period is Dec. 25, 2013 through July 1, 2017. Trial Tr. at 3386:11-14 (Jan. 29, 2019).
- 63. The Court previously ruled that call recordings results may not be extrapolated prior to July 2014.
- 64. The CPA provides that "every person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for *each violation*. RCW 19.86.140 (emphasis added).
- 65. The amount of civil penalties to impose for a violation of the CPA falls within a trial court's discretionary authority. *See State v. LA Inv'rs, LLC*, 2 Wn. App. 2d 524, 547 (2018). Although courts are not required to apply any one factor in assessing whether and to what extent civil penalties are warranted, Washington courts look to factors first identified in *United States v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 959 (3d Cir. 1981), including "whether defendants acted in good faith." *LA Inv'rs*, 2 Wn.

App. 2d at 546 (citing *Reader's Digest*, 662 F.2d at 967). The other factors include: "injury to the public," "defendant's ability to pay," "desire to eliminate any benefits derived by the defendants from the violation at issue," and "necessity of vindicating the authority of the law enforcement agency").

- 66. For the reasons stated above with respect to the reasonableness of Comcast's practices and procedures, *see supra* ¶¶ 33, Comcast's operations involved widespread telephone sales agents' recalcitrance and overreach, but also a nucleus of company good faith.
- 67. Comcast has a significant ability to pay. The Court has considered this valid factor leavened by the observation that just because one can pay does not mean it should pay, nor is business success automatically indicative of liability.
- 68. Ability to pay is further related however to the valid factor of deterrence since courts need to be mindful of imposing penalties so insufficient that potential CPA violators could regard them as an acceptable cost of doing business.
- 69. The Court is mindful of the per violation penalty imposed in a recent CPA case brought by the State, *LA Investors*. In that case, the defendant had sent over 250,000 mailers to Washington consumers that were intentionally designed to create the impression that the mailers came from a government agency and included a bill that consumers had to pay. *See LA Inv'rs*, 2 Wn. App. 2d at 534-35. Those mailers were actively developed and implemented by the company's owner. *See, e.g., id.* at 543 (owner manipulated consumers by designing mailer to include a deadline). The trial court there found that the defendant had acted in "bad faith," and that the defendant's CPA-violating acts were "not isolated instances of misjudgment, but rather, an intentional and deliberate practice." *Id.* at 535-36 (quoting trial court decision). That was conduct more egregious than in this case on a corporate mens rea, intentional level than what the State claims here; on the other hand, the power imbalance, technological and monopolistic when dealing with cable/internet needs, potentially

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rendered the cable/internet customer here more vulnerable. In this way, a reasonable customer *is* an unsophisticated customer. In *Ralph W*illiams, a case involving deceptive warranty and failure to disclose fees, the court imposed penalties of \$250—500.

- 70. While it could be said that the enrollment and deceptive charging abuses occurred in spite of Defendant's policies and guideline, etc., Comcast evidently did not do enough with regard to two CPA claims at bar.
- 71. Of the remaining claims, the State seeks penalties of \$37.1 million with respect to its SPP consent claim, and \$11.2 million with respect to its SPP recurring charge claim. Trial Tr. at 3485:18-3487:9 (Jan. 30, 2019) (State Closing).
- 72. The total number of SPP enrollments from January 1, 2014 to June 30, 2016 (the longest possible period for assessing a penalty) is 92,923. Trial Tr. at 2890:15-21 (Jan. 16, 2019) (Deal); DX-2996. Approximately 30,946 WA consumers were subscribed without consent in that time period.

73. The average duration of an SPP subscription was 33.3 months.

- 74. Beginning with the State's SPP recurring charges claim, Comcast enrolled 76,385 consumers in the SPP from July 2014 to June 2016 (the relevant period about which Ms. Butler opines), see supra ¶ 180, The Court finds that 18,660 customers were unduly charged recurring monthly fees. The Court adopts the State's conservative approach of presuming a 12-month average subscription period; but as to this claim the Court utilizes an 11 (post-initial) month period.
- 75. Accordingly, as to this claim, there were 205,260 violations. See *Ralph Williams* II,87 Wn.2d at 317.
- 76. The court has considered the respective suggested penalty amounts [State: \$50] and concludes that a \$15 penalty per violation is appropriate for a total of \$3,078,900.
- 77. With regard to the penalty for Comcast's SPP consent claim, the State argues that Comcast violated the CPA by enrolling improperly 34.4% of the 76,385 customers

Findings of Fact and Conclusions of Law

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1	(26,276 customers) who enrolled in the SPP during the relevant period. Only 58,282
2	customers were enrolled by telephone and limiting Ms. Butler's analysis to just these
3	customers would mean that 20,049 SPP subscribers were enrolled without consent.
4	See supra ¶ 185.
5	78. Applying the 12-month average subscription, the number of violations on this claim
6	is 240,588.
7	79. The court has considered the respective suggested penalties amount here [State; \$100;
8	Comcast: \$5] and concludes that a \$25 penalty per violation is appropriate for a total
9	of \$ 6,014.700.
10	Injunctive Relief Is Not Warranted
11	80. Neither party disputes that Comcast no longer engages in the challenged conduct.
12	Comcast no longer markets the SPP, and it has implemented new technologies and
13	processes that require active, affirmative consent from customers before they can be
14	enrolled in any new service, see supra $\P$ 39. This is what the Court would have
15	ordered.
16	81. Because "subsequent events ma[k]e it absolutely clear that the allegedly wrongful
17	behavior could not reasonably be expected to recur," see id. at 189, the State's request
18	for an injunction is denied.
19	Prejudgment Interest
20	82. "An award of prejudgment interest is appropriate where a party retains funds rightly
21	belonging to another party and thereby denies the party the use value of the money."
22	Arzola v. Name Intelligence, Inc., 188 Wn. App. 588, 595, 355 P.3d 286 (2015). "A
23	prevailing party is entitled to prejudgment interest, provided the damages are
24	liquidated." Id. Courts award prejudgment interest in analogous FTC cases. See e.g.,
25	F.T.C. v. AMG Servs., Inc., 2017 WL 1704411, *13 (D. Nev. 2017) (affirmed F.T.C.
26	v. AMG Capital Mgmt., LLC, 910 F.3d at 427-28); F.T.C. v. Ivy Capital, Inc., 616
27	Fed. Appx. 360, 361 (9th Cir. 2015) (unpublished). Here, the amounts Comcast
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charged customers for the SPP and for service call fees are readily ascertainable and liquidated. Comcast shall pay prejudgment interest on the restitution it provides to each consumer at a rate of 12% per annum. *See Public Utility Dist. No. 2 of Pacific County v. Comcast of Washington IV, Inc.*, 184 Wn. App. 24, 80-81, 336 P.3d 65 (2014).

#### Accounting

- 83. Within 60 days of entry of Judgment in this case, Comcast will deliver a written report to the State detailing the refunds made pursuant to this order, including the account number of each consumer; the amount refunded; the method of refund; the amount and calculation of any offset to the refund amount.
- 84. Comcast shall deposit all refund amounts owing to consumers it is unable to locate after making reasonable efforts and other refunds that are unclaimed after 180 days of issuance into a trust account. The trust account shall be used for *cy pres* relief at the discretion of the State. Comcast shall share the trust account information with the State.
- 85. The State's "All SPP Revenue" restitution request is rejected. The restitution amounts contemplated here are the actual improper charges, less prior refunds and service call expenses.

Fees

86. The Court declines to award attorneys fees and costs in this matter.

SO ORDERED this 06<sup>th</sup> day of June, 2019.

Hon. Timothy A. Bradshaw