

**IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
TWELTH DIVISION**

**NEW CINGULAR WIRELESS PCS LLC, AND
AT&T MOBILITY WIRELESS OPERATIONS
HOLDINGS INC. SUCCESSOR TO PINE
BLUFF CELLULAR, INC.**

PLAINTIFFS

V.

NO. 60CV-14-1722

**RICHARD A. WEISS, in his Official Capacity
DIRECTOR, ARKANSAS DEPARTMENT
OF FINANCE AND ADMINISTRATION**

DEFENDANT

ANSWER

Comes now the Defendant, Richard A. Weiss, in his official capacity as Director of the Arkansas Department of Finance & Administration, by and through his attorney, Joel DiPippa, and for his Answer to the Amended Complaint filed by the Plaintiffs, states as follows:

1. The Defendant denies the allegations contained in Paragraph 1 of the Plaintiffs' Amended Complaint. Pleading affirmatively, the Defendant avers that Plaintiffs have not complied with the provisions of Ark. Code Ann. § 26-18-101 through -1006 and are not entitled to judicial relief under the provisions of Ark. Code Ann. § 26-18-406.

2. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 2 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

3. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 3 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

4. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 4 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

5. With respect to Paragraph 5 of Plaintiffs' Complaint, the Defendant admits that Richard A. Weiss is the duly appointed and acting Director of the Arkansas Department of Finance & Administration. To the extent that Paragraph 5 of Plaintiffs' Amended Complaint avers Plaintiffs are entitled to a refund of allegedly overpaid taxes or to judicial relief, the Defendant denies such averments contained therein.

6. With respect to Paragraph 6 of Plaintiffs' Amended Complaint, the Defendant admits that the quotations of Ark. Code Ann. § 26-18-406 and Ark. Code Ann. § 26-18-507 are accurate reflections of Arkansas law. To the extent that the paragraph avers entitlement to the relief set forth or that venue is proper with this court, such averments are denied.

7. With respect to Paragraph 7, the Defendant admits that the Plaintiffs' Amended Complaint was filed within the requirements of Ark. Code Ann. § 26-18-507(e)(3)(B). Defendant affirmatively pleads, however, that Plaintiffs did not comply with the requirements of the Arkansas Tax Procedure Act, Ark. Code Ann. § 26-18-101 through -1006, and are not entitled to judicial relief.

8. With respect to Paragraph 8 of Plaintiffs' Amended Complaint, Defendant admits that no written notice of denial of refund based on Plaintiffs' November 9, 2010, request for refund has been issued. The Defendant denies that the class action litigation referenced by the Plaintiffs requires the Plaintiffs to file refund claims nationwide. *See Pls. Compl. Exhibit H - Global Class Action Settlement Agreement § 8.5* (providing for individual class members to file requests for refund with assistance from Plaintiffs in specified jurisdictions). The Defendant

is without sufficient knowledge or information necessary to determine the truth of the remaining factual averments and denies the averments contained therein as well as denying the legal conclusions contained therein.

9. The Defendant denies the legally conclusory statements contained in Paragraph 9 of the Plaintiffs' Amended Complaint. To the extent that any remaining averments of Paragraph 9 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

10. The Defendant denies the legally conclusory statements of Paragraph 10 of Plaintiffs' Amended Complaint that the Internet Tax Freedom Act ("ITFA") would bar application of sales tax or that Plaintiffs' would be within the moratorium provided in the ITFA. To the extent that any remaining averments of Paragraph 10 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

11. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 11 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

12. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 12 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

13. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 13 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

14. With respect to Paragraph 14 of Plaintiffs' Amended Complaint, the Defendant admits that Plaintiff New Cingular remitted \$18,215,729.01 in state and local sales tax for charges alleged to be Internet Access Services for the period of November 1, 2005 to September

31, 2010. Defendant denies the averment that the amount remitted was based entirely on customers who had reported a location in Arkansas as the place of primary use. To the extent that any remaining averments of Paragraph 14 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

15. Defendant generally admits the averments contained in Paragraph 15 of Plaintiffs' Amended Complaint. To the extent that Paragraph 15 contains legally conclusory statements regarding whether the claim for refund was a "duly executed refund claim," no response is required but Defendant denies such averments. Defendant also denies the averment that the charges for which the Plaintiffs' claim a refund are Internet Access Services though admits Plaintiffs designate the charges as "Internet Access Services." To the extent that any remaining averments of Paragraph 15 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

16. Defendant admits the averments contained in Paragraph 16 of Plaintiffs' Amended Complaint that Defendant received Plaintiffs' Claim for Refund and that Defendant acted to prevent additional periods of Plaintiffs' Claim for Refund from being barred by the limitations periods.

17. Defendant admits the averments contained in Paragraph 17 of Plaintiffs' Amended Complaint.

18. With respect to Paragraph 18 of Plaintiffs' Amended Complaint, the Defendant admits that Plaintiff Pine Bluff Cellular remitted \$539,983.33 in state and local sales tax for charges alleged to be Internet Access Services for the period of November 1, 2005 to September 31, 2010. Defendant denies the averment that the amount remitted was based entirely on customers who had reported a location in Arkansas as the place of primary use. To the extent that

any remaining averments of Paragraph 18 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

19. Defendant generally admits the averments contained in Paragraph 19 of Plaintiffs' Amended Complaint. To the extent that Paragraph 19 contains legally conclusory statements regarding whether the claim for refund was a "duly executed refund claim," no response is required but Defendant denies such averments. Defendant also denies the averment that the charges for which the Plaintiffs' claim a refund are Internet Access Services though admits Plaintiffs designate the charges as "Internet Access Services." To the extent that any remaining averments of Paragraph 19 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

20. Defendant admits the averments contained in Paragraph 20 of Plaintiffs' Amended Complaint.

21. Defendant admits the averments contained in Paragraph 21 of Plaintiffs' Amended Complaint.

22. Defendant denies the averments contained in Paragraph 22 of Plaintiffs' Amended Complaint.

23. Defendant denies the averments contained in Paragraph 23 of Plaintiffs' Amended Complaint.

24. Defendant denies the averments contained in Paragraph 24 of Plaintiffs' Amended Complaint.

25. Defendant admits the averments contained in Paragraph 25 of Plaintiffs' Amended Complaint. Defendant affirmatively pleads, however, that a federal district court lacks

jurisdiction to determine questions of collection and enforcement of state taxes pursuant to the Tax Injunction Act, 28 U.S.C. § 1341.

26. Defendant admits the averments contained in Paragraph 26 of Plaintiffs' Amended Complaint.

27. With respect to Paragraph 27 of Plaintiffs' Amended Complaint, Defendant admits that Plaintiffs have accurately quoted the "Settlement Agreement ¶ 8.8" but denies the legally conclusory statements regarding consent. To the extent that any remaining averments of Paragraph 27 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

28. Defendant denies the legally conclusory statements contained in Paragraph 28 of Plaintiffs' Amended Complaint. To the extent that any remaining averments of Paragraph 28 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

29. With respect to Paragraph 29 of Plaintiffs' Amended Complaint, Defendant admits that ¶ 8.10 of the Settlement Agreement, Exhibit H to Plaintiffs' Amended Complaint, specifies that Plaintiffs are to "seek to have the refund moneys paid directly to the Escrow Account," refunds received by the Plaintiff will be transferred to the Escrow Account, and that the funds placed into the separate escrow account will be segregated based on the state of origin. To the extent that any remaining averments of Paragraph 29 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

30. With respect to Paragraph 30 of Plaintiffs' Amended Complaint, Defendant admits that the "Plan of Distribution" includes a distribution of portions of the refunded amounts sought to the customers in the settlement class but denies that Paragraph 30 accurately describes the entire distribution of the refunded amounts sought. To the extent that any remaining

averments of Paragraph 30 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

31. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in Paragraph 31 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

32. With respect to Paragraph 32 of Plaintiffs' Amended Complaint, Defendant denies the legally conclusory statements contained therein. To the extent that Paragraph 32 includes language from Ark. Code Ann. § 26-52-301, the Defendant admits that Plaintiffs have accurately provided quotations from the Arkansas Code. To the extent that any remaining averments of Paragraph 32 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

33. With respect to Paragraph 33 of the Plaintiffs' Amended Complaint, the Defendant denies the legally conclusory statements contained therein. To the extent that Paragraph 33 includes language from Ark. Code Ann. § 26-52-315, the Defendant admits that Plaintiffs have accurately provided quotations from the Arkansas Code.¹ To the extent that any remaining averments of Paragraph 33 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

34. The Defendant admits the averments contained in Paragraph 34 of Plaintiffs' Amended Complaint.

¹ Paragraph 33 of Plaintiffs' Amended Complaint appears to contain a typographical error in citing to Ark. Code Ann. § 26-51-315(e)(19)(C)(vi). The quotation reflects Ark. Code Ann. § 26-52-315(e)(19)(C)(vi).

35. The Defendant is without knowledge or information sufficient to form a belief as to the truth and averments contained in Paragraph 35 of the Plaintiffs' Amended Complaint and therefore denies the averments contained therein.

36. Defendant admits that the citation to the Internet Tax Freedom Act is accurate in Paragraph 36 of Plaintiffs' Amended Complaint but is without knowledge or information sufficient to form a belief as to the factual averments with regard to Congressional intent and therefore denies the averments related therein. To the extent that any remaining averments of Paragraph 36 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

37. With respect to Paragraph 37 of the Plaintiffs' Amended Complaint, Defendant is without sufficient information or knowledge sufficient to form a belief as to whether Section 1101(a) of the ITFA is the "centerpiece" of the ITFA and therefore denies the averment contained therein. Defendant admits that Plaintiffs have accurately quotes the language of Section 1101(a) of the ITFA. To the extent that any remaining averments of Paragraph 37 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

38. With respect to Paragraph 38 of Plaintiffs' Amended Complaint, Defendant denies the legally conclusory statement alleging Arkansas is prohibited from imposing sales tax on Plaintiffs' Internet Access Services. Defendant admits the averments regarding the extension of the moratorium contained in Section 1101(a) and the accuracy of the language quoted regarding Section 1101(e)(3)(D). To the extent that any remaining averments of Paragraph 38 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

39. With respect to Paragraph 39 of Plaintiffs' Amended Complaint, Defendant admits that Arkansas taxpayers are entitled to receive refunds for overpaid taxes when the

requirements of the Arkansas Tax Procedure Act are met and admits that Plaintiffs accurately quoted Ark. Code Ann. § 26-18-507. To the extent that any averments in Paragraph 39 of Plaintiffs' Amended Complaint allege compliance with the Arkansas Tax Procedure Act, those averments are denied. To the extent that any remaining averments of Paragraph 39 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

40. With respect to Paragraph 40 of Plaintiffs' Amended Complaint, Defendant denies the legally conclusory allegations regarding whether consent garnered for the Federal Court settlement applies to the Arkansas Tax Procedure Act. Defendant admits that Arkansas Gross Receipts Tax Rule GR-81.1 addresses requests for refunds of overpaid taxes and that Plaintiffs have accurately quoted GR-81.1(C). To the extent that any remaining averments of Paragraph 40 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

41. With respect to Paragraph 41 of Plaintiffs' Amended Complaint, Defendant admits that Plaintiffs filed a Request for Refund on or about November 9, 2010. Defendant, however, denies that the request for refund contained sufficient information to be valid under Ark. Code Ann. § 26-18-507.

42. Defendant denies the averments contained in Paragraph 42 of the Plaintiffs' Amended Complaint. Defendant affirmatively pleads that Plaintiffs did not comply with the Arkansas Tax Procedure Act, Ark. Code Ann. § 26-18-101 through -1006, and that Plaintiffs are not entitled to judicial relief.

43. Defendant denies the legally conclusory statements contained in Paragraph 43 of Plaintiffs' Amended Complaint. To the extent that any remaining averments of Paragraph 43 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

44. Defendant denies the legally conclusory statements contained in Paragraph 44 of Plaintiffs' Amended Complaint. To the extent that any remaining averments of Paragraph 44 of Plaintiffs' Amended Complaint call for a response, Defendant denies such averments.

45. Defendant denies the allegations of Paragraph 45 of Plaintiffs' Amended Complaint.

46. Pleading affirmatively, the amount of tax remitted described in Paragraphs 14 and 18 does not accurately reflect the amount at issue as they include amounts outside of the statute of limitations for filing a request for refund under Ark. Code Ann. § 26-18-507. Amounts that were reported on returns filed prior to November 15, 2007, are barred by the statute of limitations and have been dismissed by this Court. *See Order, New Cingular Wireless PCS LLC v. Weiss*, 60CV-14-1722 (December 9, 2014).

47. Any allegations or averments contained in Plaintiffs' Amended Complaint not specifically admitted or responded to herein are hereby denied.

WHEREFORE, the Defendant, Richard A. Weiss, respectfully requests that the relief requested by the Plaintiffs be denied, that Plaintiffs' Amended Complaint be dismissed, and for all other equitable and proper relief to which the Defendant may be entitled.

RICHARD WEISS, DIRECTOR
ARKANSAS DEPARTMENT OF
FINANCE AND ADMINISTRATION



BY:

Joel DiPippa, Attorney, Ark. Bar #2003218
Attorney for Defendant Weiss
P. O. Box 1272, Room 2380
Little Rock, Arkansas 72203
Telephone: (501) 683-1534
Fax: (501) 682-7599

CERTIFICATE OF SERVICE

I, Joel DiPippa, do hereby certify that I have served a true and correct copy of the above and foregoing Defendant's Answer to Plaintiffs' Amended Complaint upon Plaintiffs herein by filing with the CM/ECF on January 5, 2015:

Michael O. Parker
Gary B. Rogers
Michael G. Smith
Dover Dixon Horne PLLC
425 West Capitol Avenue
Suite 3700
Little Rock, AR 72201



Joel DiPippa
Attorney for Defendant