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IV. STATEMENT OF THE CASE

John Smith and Joe Jones, (“Smith”), on behalf of themselves and a class of similarly situated persons, brought their claims for deceptive trade practices, fraud, misrepresentation, and breach of contract in the Dallas County Court at Law No. 3 by filing their Original Petition on December 15, 19xx. (C.R. 14.) Defendants The Phone Company and The Wireless Company (collectively “TPC”) removed this action to federal court on the basis of diversity jurisdiction and on the grounds that Smith’s claims gave rise to a federal question under the complete preemption doctrine. (C.R. 53.) This case was consolidated in federal court with a previously-filed federal action, and TPC moved to dismiss in both actions, asserting that Smith’s claims were defensively preempted under section 322 of the Federal Communications Act, 47 U.S.C. § 151 *et seq.* (C.R. 53.) Smith filed a motion to remand for lack of federal subject matter jurisdiction, arguing that there was no diversity jurisdiction and that the complete preemption doctrine did not apply.

The United States District Court for the Northern District of Texas granted Smith’s motion to remand and dismissed the previously-filed federal action due to a lack of subject matter jurisdiction. (C.R. 143.) The federal court rejected TPC’s argument that the Federal Communications Act completely preempted any regulation of wireless service providers. *Smith v. AT&T Corp.*, 122 F. Supp. 2d 703, 710 (N.D. Tex. 2000). Because the cases were either remanded or dismissed, the federal district court never addressed the issue of whether any or all of Smith’s claims were defensively preempted. *Smith*, 122 F. Supp. 2d at 706.

After remand, TPC filed its Motion for Summary Judgment on its affirmative defense of federal preemption on February 5, 2001. (C.R. 180.) Smith filed a cross-motion for partial summary judgment with respect to that affirmative defense. (C.R. 578.) The trial

court granted TPC's motion for summary judgment in its entirety and denied Smith's cross-motion. (C.R. 785.) Smith filed a timely notice of appeal (C.R. 4.)

V. ISSUES PRESENTED

1. Section 332(c)(3)(A) of the Federal Communications Act prohibits a state from erecting barriers to entry or regulating rates of a wireless carrier, while reserving to the states the ability to regulate other terms and conditions of wireless services. Smith's claims that TPC committed fraud, engaged in deceptive trade practices, and breached its contract with the putative class do not require the trial court to set, fix, or prescribe TPC's rates or regulate its entry into the market. Should the Court reverse the trial court's order granting TPC's motion for summary judgment and denying Smith's cross-motion on TPC's affirmative defense of federal preemption because Smith's claims are not preempted by section 332(c)(3)(A) as they do not require the trial court to regulate rates or market entry?

VI. STATEMENT OF FACTS

This is a class action brought on behalf of all persons residing in Texas who subscribe or who have subscribed to the digital wireless calling service offered by TPC from October 2, 19xx to the present. Smith alleges Texas state law claims for common law fraud and fraud in the inducement, negligent misrepresentation, deceptive trade practices, and breach of contract arising out of TPC's consumer-oriented conduct. In his First Amended Original Petition (the "Petition"), Smith alleges that TPC made misrepresentations and failed to disclose information regarding its digital wireless services, committed fraud and fraud in the inducement, and breached its contracts with the members of the putative class. (C.R. 144.)

TPC began providing digital wireless service in Texas in 19xx and began enticing additional customers for its services by offering its Super One Rate service plan beginning in 1998. (C.R. 150A-51.) The Super One Rate plan has been very successful, attracting thousands of new customers every month. (C.R. 154.) TPC encouraged its current wireless customers and new customers to switch to digital wireless service, although it knew, and did not disclose, that it could not provide the digital wireless service as advertised. (C.R. 151-55.) TPC was unable to provide the reliable, nationwide service that it advertised, but TPC did not disclose this fact to its current or new customers. (C.R. 151-55.) Smith alleges that TPC was aware of the level of service that its digital wireless network could provide but chose to tout a more reliable service through advertising and marketing, and that TPC proceeded to market its services deceptively. (C.R. 151-55.) Specifically, Smith alleges, *inter alia*, the following causes of action:

Common Law Fraud and Fraud in the Inducement:

TPC voluntarily made misrepresentations about the availability, operations, and quality of its service through marketing and advertising to potential customers; TPC did not disclose information within its knowledge regarding the true level of service that could be expected; TPC failed to disclose its inability to provide the service as advertised; TPC made fraudulent representations and induced members of the putative class into entering contracts. (C.R. 156-58.)

Negligent Misrepresentation:

TPC voluntarily made misrepresentations about the availability, operations, and quality of its service through marketing and advertising to potential customers. (C.R. 158.)

Deceptive Trade Practices:

TPC violated the Texas DTPA by passing off services as those of another, failing to provide services as agreed to; representing that services were of a certain quality when there were not; advertising with intent not to sell services as advertised; advertising services with intent not to supply a reasonable public demand; making deceptive representations about the availability of services; disseminating deceptive materials; breaching implied warranties; engaging in unconscionable acts. (C.R. 160-62.)

Breach of Contract:

TPC failed to provide the services promised under the contracts with the class members and failed to give proper credit for dropped calls or otherwise bill customers correctly. (C.R. 155-56.)

Smith is not asking the trial court to find that any of TPC's rates are unreasonable. Smith is not asking the trial court to enter an injunction preventing TPC from charging any specified rate in the future, forcing TPC to charge any particular rate in the future, forcing TPC to erect more cellular towers, forcing TPC to alter its infrastructure, or forcing TPC to change the way it provides service.

VII. SUMMARY OF THE ARGUMENT

At issue is whether Smith’s deceptive trade practices, tort, and contract claims against TPC require the trial court to regulate TPC’s rates in violation of section 332 of the Federal Communications Act (the “FCA”), which prohibits state regulation of a wireless-carrier’s rates. TPC argues that because the jury may take into consideration the price charged or the value of services provided when calculating damages, Texas courts are powerless to hear Smith’s claims. In its lengthy and well-reasoned *Wireless* decision, the Federal Communications Commission (“FCC”) sought to give guidance to state courts on this precise issue and concluded that because state law claims like Smith’s do not require a court to rule on the reasonableness of a wireless carrier’s rates, they do not involve a state court in the regulation of those rates.¹ The FCC expressly concluded that wireless carriers are not immune from the neutral application of state law and that damage awards on such claims are part of doing business in the unregulated free market. In the wake of the *Wireless* decision, other state appellate courts have found that claims like Smith’s are not preempted by section 332, and Texas courts are obligated to give deference to agency rulings, such as the FCC’s *Wireless* decision, that interpret an agency’s governing statute.

In the face of the FCC’s clear stand against preemption and the recent appellate decisions, TPC seizes on a single sentence near the end of the *Wireless* decision that acknowledges some state-law claims will be preempted if a court engages in a “regulatory type of analysis” where the court “purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.” *Wireless* at ¶ 39. TPC asks the Court to use

¹ *In re Wireless Consumers Alliance, Inc.*, 2000 WL 1140570, (FCC August 14, 2000)

this limited exception to swallow the general rule against preemption and render it immune from suit. The effect of TPC's argument is that it should enjoy immunity from the neutral application of Texas consumer protection, tort, and contract law as if its rates were regulated by the FCC when, in fact, TPC's rates are not subject to federal regulation.

TPC argued below that Smith's causes of action are actually disguised challenges to its rates. The FCC and recent decisions have rejected the assertion that non-disclosure and consumer-fraud claims like Smith's are disguised attacks on the reasonableness of the rate charged for services. *Wireless* at ¶ 26. Nevertheless, TPC asserts that by even considering the value of the service as provided in awarding damages, the trial court will by necessity be determining the reasonableness of TPC's rates and engaging in prohibited rate regulation. The FCC and other appellate courts have rejected this argument, concluding that by considering the price charged or placing a value on services provided as part of calculating damages, a trial court is not determining the reasonableness of rates. Indeed, the FCC has stated that because a carrier may be held liable for tort, deceptive practices, and contract damages whether or not its rates were reasonable, a state court is not required to determine the reasonableness of a rate to assess damages based on the difference between promise and performance. *Wireless* at ¶ 27.

Smith's claims will not require the trial court to regulate TPC's rates. Instead, Smith's claims for fraud and deceptive trade practices are based on TPC's false statements and concealment of material information – precisely the type of state-law claims the FCC and the post-*Wireless* appellate courts have held are not preempted by section 332. Similarly, Smith's claims will not involve the trial court in the regulation of TPC's entry into the market. TPC's preemption arguments were rejected by the FCC when TPC made them

in the *Wireless* proceeding. The same arguments were also rejected by other state appellate courts in the wake of the *Wireless* decision. This Court should follow the FCC's lead, reject TPC's affirmative defense of preemption, and reverse the trial court's order granting summary judgment and denying Smith's cross-motion for partial summary judgment.

VIII. ARGUMENT

A. Standard of Review.

The trial court erred in entering summary judgment in favor of TPC and denying Smith's cross-motion for summary judgment on TPC's affirmative defense of federal preemption. To be entitled to summary judgment, the movant must establish that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Calvilla v. Gonzalez*, 922 S.W.2d 928, 929 (Tex. 1996); *City of Houston v. Clear Creek Basin Auth.*, 598 S.W.2d 671, 678 (Tex. 1979). Questions of law, such as preemption and statutory interpretation, are proper matters for summary judgment. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999). When both parties move for summary judgment, and the trial court grants one motion but denies the other, the result is a final judgment, and the party that did not prevail may appeal on both the summary judgment granted against it and the motion the trial court denied. *Commissioners Ct. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). This Court reviews the propriety of a ruling on a motion for summary judgment de novo. *See Natividad v. Alexis, Inc.*, 875 S.W.2d 695, 699 (Tex.1994).

In reviewing the trial court's ruling on the preemptive effect of section 332 of FCA, this Court should give deference to the FCC's interpretation of the FCA. The United States Supreme Court requires courts to give deference to a federal administrative agency's interpretation of its governing statute. *Chevron USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 844 (1984) ("we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"); *Lopez v. Davis*, 121 S. Ct. 714, 722-23 (2001) (court must defer

where agency interpretation is reasonable). A Texas court should go even further and give “controlling weight” to a federal agency’s interpretation of its governing statute. *See Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 95 (Tex. App. – Fort Worth 2000, pet. denied).

POINT I THE COURT SHOULD REVERSE THE TRIAL COURT'S ORDER GRANTING TPC'S MOTION FOR SUMMARY JUDGMENT AND DENYING Smith'S CROSS-MOTION ON TPC'S AFFIRMATIVE DEFENSE OF FEDERAL PREEMPTION BECAUSE Smith'S CLAIMS ARE NOT PREEMPTED BY SECTION 332(C)(3)(A).

The trial court's order granting summary judgment and denying Smith's cross-motion should be reversed, and partial summary judgment should be entered overruling TPC's affirmative defense of preemption because consideration of the price charged or the value of services provided when calculating damages does not require the court to engage in rate regulation. Texas courts must apply a presumption against preemption of state law claims by federal law. Section 332 of the FCA only prohibits a state from regulating rates or market entry, while allowing state courts to adjudicate tort, consumer-fraud, and contract claims against wireless carriers. The FCC has concluded that because claims like Smith's do not require a court to determine the reasonableness of a carrier's rates, such claims are not preempted, and this Court is obligated to defer to the FCC's interpretation of its governing statute. Other state appellate courts have followed this interpretation and concluded that claims like Smith's do not require a court to regulate rates. Similarly, Smith's claims do not require the trial court to regulate TPC's entry into the market.

A. The Court Must Apply a Presumption Against Invoking the Preemption Doctrine.

Texas courts disfavor invocation of preemption, and there is a presumption that state law claims are not preempted by federal law. TPC's affirmative defense of preemption is based on the claim that 47 U.S.C. § 332(c)(3)(A) of the FCA preempts state law, including

a Texas court's ability to adjudicate Smith's claims.² In Texas, "preemption of state or local law by federal statute is disfavored in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained." *Legend Airlines, Inc. v. City of Fort Worth*, 23 S.W.3d 83, 93 (Tex. App. – Fort Worth 2000, pet. denied). Any preemption analysis "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981). Given the presumption against preemption and the limited scope of section 332's prohibition of state regulation, as a matter of law Smith's claims are not preempted, and the trial court erred in entering summary judgment on TPC's affirmative defense of preemption and denying Smith's cross-motion.

B. Section 332 Preserves a State's Ability to Regulate the Terms and Conditions of Wireless Service, Only Prohibiting State Regulation of Rates or Market Entry.

The FCA does not preempt a state's neutral enforcement of its consumer-protection ITPC or prevent a party from pursuing common-law remedies against a wireless carrier like TPC, as long as these actions do not require the court to regulate rates or entry into the

² The preemption doctrine is based on the Supremacy Clause of the federal Constitution. See *Crosby v. National Foreign Trade Council*, 147 L.Ed.2d 352, 361 (2000); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Congressional intent to preempt may be expressly stated or implied where federal law manifests an intent to "occupy the field" or state law conflicts with a federal law. *Crosby*, 147 L.Ed.2d at 361. This intent to preempt must be "clear and manifest," particularly in areas traditionally reserved to the states such as the exercise of state police powers, and this rule creates a presumption against preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). State police powers include consumer protection, such as protection against fraud, misrepresentation, and deceptive practices. *California v. ARC America Corp.*, 490 U.S. 93, 101 (1988). This Court must therefore apply the presumption against preemption in deciding whether Smith's Texas claims are preempted by section 332.

market. In 1993, Congress amended the FCA to deal with the rapidly growing wireless communications industry. Section 332 of the FCA was amended to provide that

no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services.

47 U.S.C. § 332(c)(3). This prohibition against state regulation of rates is part of the FCC's effort to deregulate wireless carriers, freeing them from the obligation imposed on other telephone-service providers to file their rates with the FCC. Wireless service providers such as TPC are specifically exempted from tariff filing requirements by the FCC. 47 C.F.R. § 20.15(a), (c) (1997); 47 C.F.R. § 20.3 (1997).

But section 332 does not grant wireless carriers complete immunity from all regulations or free them from the neutral application of state ITPC. In interpreting section 332, the FCC has stated that "Congress has explicitly permitted the regulation of 'the other terms and conditions of mobile service' by the states . . . [and there is no] general exemption for the [cellular] industry from the neutral application of state contractual or consumer fraud ITPC." *In re Southwestern Bell Mobile Sys., Inc.*, No. 99-356 at ¶ 10 (FCC Nov. 24, 1999); *see also Texas Office of Public Utilities Counsel v. F.C.C.*, 183 F.3d 393, 432 (5th Cir. 1999).³ Smith's claims do not require the trial court to regulate TPC's rates or construct

³ The legislative history also indicates that Congress intended to preserve the states' ability to regulate the wireless industry as long as rates and entry were not regulated. A Congressional House Report on the Omnibus Budget Reconciliation Act of 1993 states that "it is the intent of the Committee that the states still would be able to regulate the terms and conditions of these services. By 'terms and conditions,' the Committee intends to include such matters as customer billing information and practices and billing disputes and other consumer protections matters . . ." H.R. Rep. No. 103-111, 103rd Congress, 1st Sess. 211, 261, reprinted in 1993 U.S.C.A.A.N. 378, 588; *see Tenore v. AT&T Wireless Serv., Inc.*, 962 P.2d 104, 110-11 n. 65 (Wash. 1998), *cert. denied*, 525 U.S. 1171 (1999); *In re Southwestern Bell Mobile Sys., Inc.*, No. 99-356 at ¶ 7 (FCC Nov. 24, 1999).

barriers to TPC's entry into the market. They instead fall within the other terms and conditions that states are allowed to regulate, and Smith's claims are therefore not preempted.⁴

C. Smith's Consumer-Protection, Tort, and Contract Claims Are Not Preempted.

While TPC has asserted that Smith's claims for false advertising, deceptive trade practices, and breach of contract are preempted by the FCA, the FCC and recent appellate decisions establish that plaintiffs may pursue such claims against wireless carriers like TPC in state court. In August of 2000, the FCC issued the *Wireless* decision.⁵ In that decision, the FCC rejected TPC's contention that as a wireless carrier, it has a special status in the marketplace that shields it from state IPTC regulating normal commerce. While TPC asserted, based on case law developed under the filed-rate doctrine, that any claim relating to service necessarily required a state court to regulate rates, the FCC instead concluded that

⁴ This conclusion is also supported by the "savings clause" included in the FCA. Section 414 provides that nothing in the FCA "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. The inclusion of section 414 "clearly reflects Congress's determination that state law causes of action should not be subsumed by the Act, but remain as independent causes of action." *Sanderson, Thompson, Ratledge & Zimny v. AWACS, Inc.*, 958 F. Supp. 947, 958 (D. Del. 1997). In *Uniden America Corp. v. Trucking Associates*, 841 S.W.2d 522 (Tex. App. – Fort Worth 1992, no writ), the court, interpreting section 414, held that the provisions of the FCA governing interstate radio service did not preempt state law claims for fraud, breach of contract, and deceptive practices. *Uniden*, 841 S.W.2d at 525.

⁵ The FCC decision arose from the California case of *Spielholz v. Los Angeles Cellular Telephone Co.* The Wireless Consumers' Alliance, Inc. petitioned the FCC for a declaratory ruling on the issue of whether the plaintiff's claims for false advertising, unfair business practices, misrepresentation, and breach of contract were preempted. *Spielholz v. Superior Court*, 104 Cal.Rptr.2d 197, 200-01 (Cal. App. 2001). The California court stayed proceedings pending the FCC's ruling on the preemption issue. *Wireless* at ¶ 3. *Spielholz*, 104 Cal.Rptr.2d at 200-01.

the neutral application of state ITPC, including state consumer protection ITPC, did not involve state courts in prohibited rate regulation. Subsequent state appellate decisions have reached a similar conclusion that claims like Smith's are not preempted.

1. State Courts Do Have the Power to Award Monetary Relief Against Wireless Carriers for Violations of State Consumer Protection, Tort, and Contract ITPC.

In *Wireless*, the FCC confirmed that state courts may adjudicate state-law claims against wireless carriers for violations of consumer protection, tort, and contract ITPC. Given the varying interpretations of section 332 that courts across the country were making, the FCC sought to give guidance to state courts on the issue of whether section 332's language prohibiting rate regulation precluded state courts from considering consumer-protection, tort, and contract claims. *Wireless* at ¶ 3, 5.⁶ The *Wireless* decision arose out of a California case involving consumer claims similar to Smith's. *Wireless* at ¶ 3. TPC participated in the FCC proceedings. *See, e.g. Wireless* at ¶¶ 19, 28, 32, 33. In its decision, the FCC answered the following question:

whether the provisions of the Communications Act of 1934, as amended, serve to preempt state courts from awarding monetary relief against [wireless service providers] (a) for violating state consumer protection ITPC prohibiting false advertising and other fraudulent business practices, or (b) in the context of contractual disputes and tort actions adjudicated under state contract and tort ITPC.

⁶ Prior to the *Wireless* decision, courts appeared to reach inconsistent results as to the preemptive effect of section 332. *See, e.g. Bastien v. AT&T Wireless Servs., Inc.*, 205 F.3d 983 (7th Cir. 2000) (holding that claims were completely preempted); *Ball v. G.T.E. Mobilnet of California*, 96 Cal.Rptr.2d 801 (Cal. App. 2000) (false advertising claims preempted); *Tenore v. AT&T Wireless Servs., Inc.*, 962 P.2d 104 (Wash. 1998), *cert. denied*, 525 U.S. 1171 (1999) (false advertising claim not preempted)

Wireless at ¶ 1. The FCC completely rejected TPC’s preemption arguments, concluding that “section 332 does not generally preempt the award of monetary damages by state courts based on state consumer protection, tort, or contract claims.” *Wireless* at ¶¶ 2, 38.⁷

The FCC spurned all of TPC’s arguments that even where state-law claims did not directly challenge the reasonableness of a carrier’s rate, consumer protection, tort, and contract claims should be considered as disguised challenges to rates because in computing damages, a state court would necessarily be determining whether the price charged by the carrier was reasonable. The FCC concluded that non-disclosure and consumer fraud claims are not disguised attacks on the reasonableness of the rate charged for the service. *Wireless* at ¶ 26. Instead, the FCC made it clear that a wireless carrier may be subject to damages for a non-disclosure or false advertising if it fails to inform consumers of material terms, conditions, or limitations on the service it provides, and that an award of damages based on the difference between the service provided and the service promised does not require a state court to determine the reasonableness of a carrier’s rates. *Wireless* at ¶ 26. Indeed, state courts are free to consider the actual rate charged by the wireless carrier when computing damages because “a consideration of the price originally charged, for the purposes of determining the extent of the harm or injury involved, is not necessarily an inquiry into the reasonableness of the original price and therefore is permissible.” *Wireless* at ¶ 38. The FCC also stated the reasonableness of a rate is not implicated by a complaint questioning a

⁷ The FCC also rejected the assertion that state-law claims should be preempted because a claimant, in lieu or pursuing state-law remedies, could bring claims against a wireless carrier under Sections 207 and 208 of the FCA for unfair practices. Noting that wireless carriers were required to comply with these section, the FCC stated that “these alternate avenues of relief supplement rather than replace claims under state law, particularly those common law claims for fraudulent or tortious behavior.” *Wireless* at ¶ 35.

carrier's quality of service. *Wireless* at ¶ 25, n. 83 and 84. These principles reveal that Smith's claims do not require a Texas court to regulate TPC's rates or entry into the market and are therefore not preempted.

2. The California *Spielholz* Decision on the Precise Issue Before This Court Establishes That Smith's Claims Do Not Require a Texas Court to Regulate Rates.

In the first appellate court to issue an opinion after *Wireless*, the California Court of Appeal determined that state-law tort, consumer protection, and contract claims based on TPC's false representations regarding its services, claims that are almost identical to Smith's, were not preempted. In *Spielholz v. Superior Court of Los Angeles County*, 104 Cal.Rptr.2d 197 (Cal. App. 2001), the plaintiff filed a class-action suit against TPC for unfair business practices, false advertising, consumer-protection violations, misrepresentation, and breach of contract based on TPC's false claims that it offered a seamless calling area of uninterrupted service throughout Southern California. *Spielholz*, 104 Cal.Rptr.2d at 200.⁸ After staying its proceedings pending the FCC's ruling, the California Court of Appeal rejected TPC's claim that a state court, by making a monetary damages award that may involve a determination of the value of services provided, would necessarily be engaged in rate regulation.

After noting that the plain meaning of rate regulation referred to direct price controls, something the plaintiffs were not requesting, the court explicitly rejected the contention that a state court award of damages could be construed as prohibited rate regulation because it

⁸ The California Supreme Court denied TPC's Petition for Review in *Spielholz* on May 23, 2001.

might involve assessing the value of services provided as part of a damages calculation.

Spielholz, 104 Cal.Rptr.2d at 203. Specifically, the court stated that

Section 332(c)(3)(A) does not disclose a congressional intent to preempt state court monetary awards that may require a determination of the value of services provided but do not directly regulate rates. We presume if Congress had intended to preempt such state law remedies, it would have expressly so stated.

Spielholz, 104 Cal.Rptr.2d at 203. In reaching this conclusion, the court looked to the substance of the plaintiff's false advertising, fraud, misrepresentation, and contract claims and noted that any analysis involving the value of services was incidental to the substance of the claims, as was the effect of any damages award on rates. *Spielholz*, 104 Cal.Rptr.2d at 204-05. This result is entirely consistent with the FCC's determination that wireless companies, such as TPC, are subject to the neutral application of state tort and contract law.

3. The New York *Naevus* Decision Reaffirms That TPC May Be Held Liable for its Consumer-Oriented Conduct.

After the trial court in this case entered its summary-judgment order, a New York appellate court concluded that, consistent with the *Wireless* decision, claims for common law fraud and deceptive practices that, like Smith's, arose from TPC's deceptive marketing of its digital wireless service, were not preempted. In *Naevus International, Inc. v. AT&T Corp.*, 724 N.Y.S.2d 721 (App. 2001), the plaintiffs filed a complaint against TPC on behalf of a proposed class of subscribers to its Digital One Rate plan, alleging that subscribers experienced difficulties with the service that contradicted TPC's representations about the reliability of its service. *Naevus*, 724 N.Y.S.2d at 722. The *Naevus* plaintiffs pursued claims of common law fraud, deceptive practices, misrepresentations, breach of contract, breach of warranty, and unjust enrichment. *Id.* The court rejected TPC's preemption arguments, stating that "the claims for common-law fraud and [deceptive practices], for making false

statements and concealing material information, are precisely the types of State law claims that are not preempted.” *Naevus*, 724 N.Y.S.2d at 722, citing *Wireless* at ¶ 27. The court also stated that breach of contract claims based on TPC’s failure to credit subscribers for dropped calls, similar to contract claims made by Smith, were also not preempted. *Id.* The *Naevus* court inexplicably found that the plaintiffs’ breach of contract claims related to TPC’s failure to provide the promised level of service were preempted. *Naevus*, 724 N.Y.S.2d at 722.⁹ This ruling cannot be reconciled with the *Wireless* decision, where the FCC found that making an award in a breach of contract claim unrelated to rates did not involve the court in rate regulation. *Wireless* at ¶ 26. The *Naevus* court did recognize that claims based on misrepresentations and deceptive practices, like Smith’s, are not preempted by section 332.¹⁰

⁹ Smith’s contract claim is based in part on TPC’s failure to give proper credit for dropped calls or otherwise bill customers correctly, claims the *Naevus* court held were not preempted. (C.R. 155-56.) Smith’s contract claim is also based on TPC’s failure to provide the services promised under the contracts with the class members, claims the *Naevus* court, departing from the *Wireless* decision, determined were preempted. (C.R. 155-56.)

¹⁰ The only court to accept TPC’s position in the wake of *Wireless*, a New Jersey trial court, was forced to reject the *Wireless* decision to do so. *See Union Ink Co. v. AT&T Wireless Services, Inc.*, No. L-8974-99 (N.J. Super. Ct. Law Div. June 9, 2000). In concluding that plaintiffs’ tort and deceptive-practices claims were preempted, the New Jersey Judge deliberately disregarded the FCC’s interpretation of the FCA, noting that he “decline[d] to swallow whole the FCC determination.” (C.R. 452-53.) The New Jersey court could choose to ignore the FCC because New Jersey courts do not give deference to agency interpretations. *Mayflower Securities Co., Inc. v. Bureau of Securities*, 64 N.J. 85, 312 A.2d 497, 501 (1973).

4. Filed-Rate Doctrine Cases Cannot be Applied to Wireless Carriers.

This Court should reject TPC's attempts to rely on cases decided under the filed-rate doctrine as a basis for asserting that claims like Smith's are merely disguised attempts to regulate its rates. TPC has cited filed-rate-doctrine cases involving carriers whose rates are subject to governmental regulation in support of its assertion that while Smith does not directly challenge TPC's rates, his claims must be construed as rate regulation. (C.R. 203-04.) While this argument may make some sense for carriers whose rates are subject to regulation as a way of avoiding any challenge to the uniformity of regulatory authority, TPC is not such a carrier. Indeed, as the FCC has noted, there is a sharp distinction between telecommunications carriers whose rates are regulated by the FCC and wireless carriers like TPC whose rates are not regulated.

a. *Filed-Rate Analysis Is Inapplicable Because TPC's Rates Are Not Filed and Regulated.*

In the trial court, TPC relied on cases decided under the filed-rate doctrine, including *AT&T Corp. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), and *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983 (7th Cir. 2000), for the proposition that a challenge to quality of service requires a court to regulate rates because a court would of necessity be opining on the reasonableness of the rate in computing damages based on the difference between promise and performance. (C.R. 203-04.) In *Wireless*, the FCC rejected extending this filed-rate type of analysis to cases involving wireless carriers.

It is erroneous to apply filed-rate analysis, developed for carriers and entities subjected to a scheme of government regulation, to wireless carriers like TPC that have been freed from regulation of their rates. While section 332 does prohibit state regulation of rates,

it specifically allows states to regulate other terms and conditions of wireless service. According to the FCC, “the distinction between the two is not part of the logic or analysis of the filed rate doctrine,” and the broad scope of filed-rate analysis is simply inapplicable to wireless providers. *Wireless* at ¶ 19. In rejecting application of the filed-rate analysis, the FCC also pointed out that because filed rates are subject to regulatory review while wireless rates are governed by the competitive marketplace, the purposes of the filed-rate doctrine therefore “do not have the same relevance” in wireless cases. *Wireless* at ¶ 19.

b. *Under Nader, When There Are No Filed Rates, Non-Disclosure and Deceptive Practices Claims Do Not Require the Court to Regulate Rates.*

The FCC went so far as to conclude that where there is no filed rate, as is the case with wireless carriers like TPC, neither filed-rate cases nor their rationale should be applied. Repudiating TPC’s reliance on *Central Office*, the FCC instead cited *Nader v. Allegheny Airlines* 426 U.S. 290 (1976), in rebuffing TPC’s argument that any damages award against a wireless carrier “is necessarily equivalent to both retroactive and prospective rate regulation.” *Wireless* at ¶ 32. In *Nader*, the plaintiff was denied boarding or “bumped” from a reserved and confirmed seat because the airline overbooked its flights. *Nader*, 426 U.S. at 292-94. Plaintiff sued for fraudulent misrepresentation but did not contest the validity or reasonableness of the overbooking practice itself, only the failure to disclose the practice. *Id.* at 294-95. The Supreme Court distinguished filed-rate doctrine cases, noting that there was no “irreconcilable conflict between the statutory scheme and the persistence of common-law remedies” and that an award of damages could not conflict with an agency’s ratemaking power where there was no regulation of rates by the federal agency. *Nader*, 426 U.S. at 299. Because *Nader* did not involve a filed rate, adjudicating the claims would not place a court

in the position of second guessing an approved rate, and any “impact on rates that may result from the imposition of tort liability . . . would be merely incidental” and not itself constitute regulation of rates *Nader*, 426 U.S. at 300. Similarly, Smith is not challenging TPC’s practice of offering deficient services (essentially “overbooking” the wireless system),¹¹ only TPC’s misrepresentations regarding its practices, and under *Nader*, where no filed-rate is involved, a court does not become involved in regulation of rates.

c. *Bastien, a Case Decided Before Wireless, Incorrectly Relied on Filed-Rate Analysis.*

By rejecting the filed-rate doctrine and embracing *Nader*, the FCC transformed the legal landscape with respect to the preemption analysis. In particular, the FCC’s decision effectively eviscerated *Bastien*, the main case relied on by TPC below.¹² The *Bastien* decision, issued five months before the FCC’s *Wireless* decision, is of questionable authority because it is based on an incorrect premise – that TPC’s rates are subject to FCC approval and that the filed-rate doctrine therefore applies, a proposition directly rejected by the FCC. The *Bastien* court relied primarily on *Central Office*, a filed-rate case, because the *Bastien* court was apparently under the mistaken impression that the FCC had approved a tariff filed by TPC establishing rates for its wireless service. *Bastien*, 205 F.3d at 983, 984 (“AT&T Wireless, a subsidiary of AT&T, entered the market in the late 1990s, after receiving approval of its rates and infrastructure arrangements from the Federal Communications

¹¹ In *Shaw v. AT&T Wireless Services, Inc.*, 2001 WL 539650 (N.D. Tex. 2001), the plaintiff and the court characterized TPC’s practice of marketing its wireless service without disclosing the ratio of subscribers to available services as “overbooking.” *Shaw*, 2001 WL 539650 at *2.

¹² While the clear import of the *Wireless* decision is that *Bastien* was wrongly decided, the FCC did not say so outright, politely observing that the Seventh Circuit’s opinion merely stood for the proposition that state law claims may be preempted in certain situations and that the substance of the claims was most important. *Wireless* at ¶ 28.

Commission, as required by federal law.”) This is incorrect, as wireless rates are not subject to FCC approval. 47 C.F.R. § 20.15(a), (c) (1997); 47 C.F.R. § 20.3 (1997). Having been led astray by this mistaken assumption, the *Bastien* court proceeded to ignore *Nader*, where the court held that, in the absence of a filed rate, an award of damages by a court did not involve the court in rate regulation. *See Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 292-94 (1976). Accordingly, the *Bastien* court was wrong in concluding that if a claim involves a wireless carrier’s quality of service, by awarding damages a court will necessarily be regulating rates.¹³

C. By Awarding Damages to Smith, the Trial Court Will Not be Required to Engage in Prohibited Rate Regulation.

Despite a clear trend in the appellate courts, following *Wireless*, upholding state court-authority to adjudicate consumer-fraud, tort, and contract claims against wireless carriers, TPC continues to assert that Smith’s claims are preempted. The argument is based on a narrow exception to the general rule against preemption that recognizes a state court will run afoul of section 332 if it determines the reasonableness of a carrier’s rates or sets a prospective rate. TPC’s argument, that by calculating a damages award based on the difference between promise and performance a court must necessarily determine the reasonableness of a rate, is based on the premise that fraud and deceptive-practices claims are merely disguised challenges to rates, a premise specifically rejected by the FCC. In fact, the FCC has concluded that by considering the rate charged in calculating damages, a court

¹³ *Bastien* is also inapposite because it is a complete preemption case involving an issue of federal jurisdiction. *Bastien*, 205 F.3d at 990. The federal court in this case, in remanding to state court, and the federal court in the similar case of *Shaw v. AT&T Wireless Services, Inc.*, 2001 WL 539650 (N.D. Tex. 2001), refused to apply *Bastien* in their preemption analysis. *Smith v. AT&T Corp.*, 122 F. Supp. 2d 703, 710 n.6 (N.D. Tex. 2000); *Shaw*, 2001 WL 539650 at *7 n.6.

is not required to rule on the reasonableness of that rate. The FCC has also made it clear that by assessing the value of the service provided as part of a damages calculation, a court is not determining the reasonableness of the rate charged for that service. TPC's argument cannot be reconciled with the entire *Wireless* opinion or with the recent appellate decisions.

1. TPC's Argument is Based on a Narrow One-Sentence Exception to the General Rule Against Preemption of State-Law Claims Like Smith's.

In the first 38 paragraphs of the *Wireless* decision, the FCC soundly rejects all of TPC's filed-rate-based arguments for preemption of state-law consumer protection, tort, and contract claims. In asserting that Smith's claims are still preempted, TPC asks the Court to ignore these 38 paragraphs and focus entirely on one sentence in paragraph 39, the last substantive paragraph of the decision, as a basis for preemption. Paragraph 39 establishes a narrow exception to the general rule that state-law claims are not preempted, based on section 332's specific prohibition of state rate regulation. Having articulated at length the general rule that state law claims are not preempted, the FCC stated that

Of course, a court will overstep its authority under section 332 if, in determining damages, it does enter into a regulatory type of analysis that purports to determine the reasonableness of a prior rate or it sets a prospective charge for services.

Wireless at ¶ 39. TPC has based its entire preemption argument on this single sentence.

The parties extensively briefed the preemption issue before the trial court, focusing in large measure on TPC's repeated assertion that, under paragraph 39, any claim involving consideration of its quality of service required the court to regulate rates, an argument with its genesis in the filed-rate cases rejected by the FCC. *See, e.g., AT&T Corp. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) (claim for excessive rates can be couched as challenge to quality of service). In post-briefing letters requested by the court, counsel

for Smith noted that TPC made this precise quality-of-service argument to the FCC in the *Wireless* case, as demonstrated in TPC’s actual briefing before the FCC, and that the FCC rejected that argument. (C.R. 772-78.) Responding to this letter, TPC retreated from the quality-of-service argument, as it had to given the FCC’s position rejecting a filed-rate-based analysis. (C.R. 779.) TPC then crystallized its preemption argument, asserting that the issue was not quality of service but the “value of the services provided.” (C.R. 779.). Ignoring the actual language of the paragraph-39 exception that a court must enter into “a regulatory type of analysis” to be engaging in prohibited rate regulation, TPC asserted that a cause of action is preempted as impermissible rate regulation if, “in determining damages on such a claim, a court will be required to determine the reasonableness of the price charged or what rate should have been charged based on the level of service provided.” (C.R. 780.)

In essence, TPC argues that by assessing the difference between price and performance in computing damages, a court determines the reasonableness of the prior rate and thereby engages in rate regulation. This position, supposedly based on one sentence in paragraph 39 of the *Wireless* decision, cannot be reconciled with the other 38 paragraphs of that decision or the plain meaning of section 332.

2. Under *Wireless*, a State Court “Oversteps Its Authority” by Entering Into a “Regulatory Type of Analysis” When It Sets, Fixes, or Proscribes Rates.

The entire *Wireless* decision supports the conclusion that Smith’s consumer fraud, tort, and contract claims will not require the trial court to regulate rates. A wireless carrier like TPC is not immune from the neutral application of state consumer protection and contract law. *Wireless* at ¶ 8. The FCC has articulated what the paragraph 39 language

means, giving examples of what actions will involve a state court in a “regulatory type of analysis” of the rates charged:

If a plaintiff asks a state court to make an outright determination of whether a price charged for [wireless] service was unreasonable, the court would be preempted from doing so by section 332. Likewise, if a state court were to set a prospective price for [wireless] service, this action would also be preempted by section 332.

Wireless at ¶ 25. In essence, a state court is prohibited under paragraph 39 from setting, fixing, or prescribing wireless rates. *Wireless* at ¶ 38. In *Spielholz v. Superior Court*, 104 Cal.Rptr.2d 197 (Cal. App. 2001), the California Court of Appeal, having examined the *Wireless* opinion, gave other examples of state-court actions that would be prohibited, including “an injunction that prevents a wireless telephone service provider from charging specified rates,” adjudicating a claim that “directly challenges a rate as unreasonable,” or awarding damages “for the difference between a rate paid and what the court determines to be a reasonable rate . . .” *Spielholz*, 104 Cal.Rptr.2d at 204. *Spielholz* interpreted the FCC’s holding as preempting a judicial action “only if its principal purpose and direct effect are to control rates.” *Spielholz*, 104 Cal.Rptr.2d at 204. In sum, a court does not overstep its authority under section 332 by engaging in a “regulatory type of analysis” unless it engages in outright rate regulation or adjudicates a claim that has as its principal purpose and direct effect the regulation of rates. Smith’s claims, which do not challenge the reasonableness of TPC’s rates or ask the trial court to award damages based on any rate being unreasonable, do not involve the court in prohibited rate regulation.

3. Fraud and Deceptive Practices Claims Are Not Disguised Challenges to the Reasonableness of TPC's Rates.

Relying on filed-rate cases like *Central Office*, cases whose applicability has been rejected by the FCC and in recent appellate decisions, TPC has argued repeatedly that the substance of Smith's claims constitute a challenge to rates, however they are couched. (C.R. 780.) This argument is based on the premise that Smith's misrepresentation and deceptive-practices claims are disguised challenges to the reasonableness of its rates. The FCC's rejection of this premise is clear and unequivocal:

We reject arguments by [wireless] carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service.

Wireless at ¶ 27. The FCC went on to state that “a carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service,” clearly allowing for state-law claims based on misrepresentation, fraud, and deceptive practices involving the carrier's quality of service. *Id.* In *Shaw v. AT&T Wireless Services, Inc.*, 2001 WL 539650 (N.D. Tex. 2001), the federal court, in dicta, rejected TPC's attempt to characterize the plaintiff's claims referencing TPC's poor service as an attack on rates, noting that “instead, Plaintiff's Petition complains about AT&T's alleged failure to disclose material information (such as its practice of ‘overbooking’) and alleged misrepresentations about its wireless services.” *Shaw*, 2001 WL 539650 at *4. Indeed, the *Shaw* court, in dicta, noted that a plaintiff making claims similar to Smith's could potentially recover other damages unrelated to the price of the service, such as the cost of a cellular phone plaintiff purchased as part of a service plan, an activation fee, and any early termination fee. *Shaw*, 2001 WL 539650 at *6. The *Spielholz* court also

rejected this “disguise” argument, focusing on the substance and purpose of plaintiff’s claims and not TPC’s characterization of those claims. *Spielholz*, 104 Cal.Rptr.2d 203-04.

We conclude that a claim that does not directly challenge the rate but directly challenges some other activity, such as false advertising, and seeks a remedy to limit or control that activity or seeks damages arising from the activity is not an attempt to regulate rates and is not expressly preempted under section 332(c)(3)(A).

Spielholz, 104 Cal.Rptr.2d at 204. Simply because a court’s calculation of damages may possibly involve consideration of the rate charged does not mean such claims substantively require the trial court to regulate rates.

4. By Considering the Price Charged in Calculating Damages, a Court is Not Required to Rule on the Reasonableness of TPC’s Rates.

By considering the price actually charged by TPC in calculating damages, the trial court will not be engaging in rate regulation. The FCC categorically rejected TPC’s assertion that considering the price charged constituted rate regulation. “We also specifically disagree with those commenters who claim that any determination of monetary liability is equivalent to a finding that the service was inadequate for the price charged and therefore necessarily constitutes a finding that the rates originally charged were unreasonable.” *Wireless* at ¶25. Considering the price charged by a carrier is only prohibited “if a plaintiff asks a state court to make an outright determination of whether a price charged for [wireless] service was unreasonable” or if a court “were to set a prospective price” for wireless service. *Wireless* at ¶ 25.

The FCC described the precise situation presented in this case – claims that question whether a wireless carrier provided service as promised in its contract or misrepresented its

services in advertising – and stated that such claims do not constitute rate regulation merely because the court takes into account the price charged in computing damages:

A case may present a question of whether a [wireless] service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the [wireless] carrier’s advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court.

Wireless at ¶ 26. But by engaging in such a review, a state court, by considering the price charged, is *not* required to determine the reasonableness of that price to calculate damages.

In such a situation, a court need not rule on the reasonableness of the [wireless] carrier’s charges in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages. In our view, the court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there is a difference between promise and performance.

Wireless at ¶ 26. This statement by the FCC invalidates TPC’s premise that consideration of the price charged in calculating damages necessarily requires the court to determine the reasonableness of the rate and thereby engage in prohibited rate regulation. By calculating Smith’s damages, the trial court will not “overstep its authority” and “enter into a regulatory type of analysis” described in paragraph 39.

5. Considering the Value of the Services Provided by TPC is Not the Equivalent of Determining the Reasonableness of Prior Rates.

TPC is left with its assertion that determining “what rate should have been charge based on the level of service provided” is the same as determining “the reasonableness of a prior rate” and is therefore prohibited. (C.R. 779-80.) TPC offers no authority for the proposition that considering the value of services as provided in calculating damages requires the court to set, fix, or prescribe the reasonableness of the prior rate. The *Wireless*

decision itself rejects this premise. The FCC noted that the reasonableness of a rate has no bearing on whether a wireless carrier has breached its contract, made misrepresentations, or defrauded consumers, and that by adjudicating such claims, a court is not regulating rates:

a carrier that is charging a “reasonable rate” for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing. We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.

Wireless at ¶ 27. In other words, if a carrier provided a service that was actually worth the price charged but promised more than it delivered, the carrier could still be held liable for deceptive practices, fraud in the inducement, and breach of contract, and damages could be computed based on the expectation created by the false promise, all without questioning, evaluating, or determining the reasonableness of the rate charged. *See, e.g.*, Tex. Bus. & Comm. Code § 17.46(b)(7) (representing that services were of a particular standard, quality or grade when there were of another); Tex. Bus. & Comm. Code §§ 17.46(b)(9) (advertising services with intent not to sell them as advertised). TPC’s argument that assessing “what rate should have been charged based on the level of service provided” when calculating damages involves the court in prohibited rate regulation cannot be reconciled with paragraph 27 of the *Wireless* decision or state law.

The FCC unequivocally rejected TPC’s premise that by placing a value on the service provided as part of a damages calculation, a court is by necessity engaging in rate regulation. The *Spielholz* court also rejected this argument, holding that “monetary awards that may require a determination of the value of services provided but do not directly regulate rates”

are not preempted.” *Spielholz*, 104 Cal.Rptr.2d at 204. The trial court is free to consider the difference between promise and performance without engaging in prohibited rate regulation, and the trial court therefore erred in granting TPC’s motion for summary judgment and denying Smith’s cross-motion.

D. Smith’s Claims do not Require the Court to Regulate TPC’s Entry Into the Market.

The FCC and the post-*Wireless* appellate decisions have also rejected the argument that Smith’s claims require the trial court to regulate TPC’s entry into the market. Smith’s claims do not require the trial court to set, prescribe, or fix the conditions under which TPC was to begin offering its service in Texas. TPC’s theory, that any claim involving quality of service creates a barrier to entry, is unsupportable and should be rejected.

1. The Plain Meaning of Section 332 Establishes That Smith’s Claims do not Require the Trial Court to Regulate the Conditions Under Which TPC Could Enter the Market.

Under the plain meaning of the statute, TPC’s entry argument has no merit. The plain meaning of “entry” prohibits a state from creating any additional requirements to enter the market beyond those imposed by the FCC, such as licensing schemes or fees. This meaning is “clear and manifest” and should be controlling. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) A state-court damages award based on conduct occurring only after a carrier has entered the market would impose no such barrier to entry. TPC is already in the marketplace, and the neutral application of state consumer protection and contract law only imposes the same duties that state law requires of “any other business.” *Wireless* at ¶ 24.

2. By Asking the Trial Court to Consider TPC's Quality of Service, Smith is Not Requiring the Trial Court to Regulate Entry.

By adjudicating Smith's claims, the trial court will not be required to regulate TPC's entry into the marketplace. TPC has asserted that any examination of the quality of service necessarily involves creation of a barrier to entry. (C.R. 200-01.) This is no different than the argument TPC makes with respect to rates. The FCC in *Wireless* rejected this argument in the context of rates, and, by implication, has also rejected it with respect to entry into the marketplace. *Wireless* at ¶ 32-33. The *Naevus* court rejected this argument with respect to the plaintiffs' consumer-fraud and deceptive-practices claims, and the *Spielholz* court completely rejected this argument. *Naevus*, 724 N.Y.S.2d at 723; *Spielholz*, 14 Cal.Rptr.2d at 208. This Court should similarly reject TPC's argument.

Spielholz, *Naevus*, and *Wireless* all involved challenges to quality of service that are almost identical to Smith's. The claims at issue in those cases arose out of an inadequate wireless network. Under TPC's theory, the *Spielholz* and *Naevus* claims were preempted because the implied challenge to infrastructure must necessarily have involved the court in regulation of entry. Neither *Spielholz*, *Naevus*, nor the FCC reached such a conclusion.

Indeed, the FCC specifically linked the rates and service issues together, noting that "a carrier may charge whatever price it wishes *and provide the level of service it wishes*, as long as it does not misrepresent either the price or the quality of service." *Wireless* at ¶ 27. The *Spielholz* court was more direct, concluding that any discussion of inadequate infrastructure was incidental to the plaintiffs' claims and did not regulate entry. Specifically, the *Spielholz* court rejected TPC's argument that the plaintiffs' allegations that TPC misrepresented and failed to disclose the gaps in its network conflicted with the FCC's

requirements. *Spielholz*, 104 Cal.Rptr.2d at 208. In reaching this conclusion, the *Spielholz* court stated that “the complaint adequately alleges several tort causes of action based on false advertising, and the allegations that [TPC’s] infrastructure is inadequate *only support those causes of action*; they do not defeat them.” *Id.* (emphasis added). The *Naevus* court did not discuss the service issue beyond its effect on the contract-based claims, although such a result cannot be reconciled with the *Wireless* decision. *Naevus*, 724 N.Y.S.2d at 723. Here, Smith’s discussion of TPC’s service problems only supports the class claims that TPC misrepresented and failed to disclose the true state of its service.

Smith did not ask the trial court to order construction of any more towers or to change the manner in which it operates its service. As the FCC has stated, TPC is free to offer whatever level of service it chooses, subject to FCC approval, and that will not be changed by any judgment rendered by the trial court. *Wireless* at ¶ 27. TPC will simply be held responsible for failing “to inform consumers of other material terms, *conditions, or limitations* on the service it is providing.” *Id.* (emphasis added). Smith’s claims do not in any way require the trial court to erect any barriers to entry.

TPC incorrectly states that the FCC agrees with the holding in *Bastien* that “claims challenging quality of service bear directly on the areas reserved to the FCC.” (C.R. 201.) The *Wireless* decision says nothing of the kind. It says only that a state may not regulate “the modes and conditions under which [TPC] *may begin offering service.*” *Wireless* at ¶ 28 n.90 (emphasis added). This distinction is crucial – only the FCC may determine when a carrier may enter a market and begin offering services. Smith’s claims have nothing to do with the conditions under which TPC was permitted to begin offering its services. But once

a carrier has entered the market as approved by the FCC, that carrier is subject to consumer protection ITPC, and that has nothing to do with entry into the market.

CONCLUSION AND PRAYER

Plaintiffs pray that the Court reverse the trial court's order granting TPC's motion for summary judgment and denying Smith's cross-motion for summary judgment, render an order granting Smith's cross-motion for partial summary judgment, remand the case for further proceedings, and grant Smith such other and further relief as to which Smith may be justly entitled.

RESPECTFULLY SUBMITTED,

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