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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ON CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CHAD MINNICK, et al.,

Plaintiffs/Appellants,

v.

CLEARWIRE US, LLC and DOES 1 through 10,

Defendant/Appellee.

CLEARWIRE US, LLC'S ANSWER TO AMICUS CURIAE BRIEF OF THE NATIONAL CONSUMERS LEAGUE

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I. INTRODUCTION

The National Consumer League's ("NCL") brief makes a series of disjointed public policy arguments, invoking the virtues of encouraging competition among Internet service providers ("ISPs"), protecting poor and vulnerable consumers from improvident bargains, and preserving the rights of consumers to refuse to pay ISPs who fail to deliver what they promise. In the abstract, no one (including Clearwire) could disagree with the importance of these policies; ultimately, however, they do not support the outcome the NCL advocates.

In the first place, settled law controls this case. Since 1954, this Court has defined "alternative performance measures" to include contract clauses that provide "a ***real*** option," i.e., a choice between two alternatives "that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable." *Chandler v. Doran*, 44 Wn.2d 396, 401, 267 P.2d 907 (1954) (emphasis added). Clearwire's ETF satisfies this Court's test, and the Court should so advise the Ninth Circuit.

In any event, even if the Court decided to consider the NCL's idiosyncratic articulation of public policy, the result it seeks has no bearing on the policies it describes. Evaluating ETFs under the standards applicable to liquidated damages clauses, as the NCL proposes, will do ***nothing*** to enhance competition, protect the poor, or expand consumer rights. On the other hand, as Clearwire shows below, jeopardizing ETFs may have adverse effects on competition (by threatening smaller market participants, such as Clearwire), the poor (who could lose an economically advantageous option for escaping a term contract), and consumers (who would, if given a choice, obviously prefer a contract that gave the option to terminate for a fee as opposed to one that lacked that option).

II. ARGUMENT

A. Clearwire's ETF Meets the Test for an Alternative Performance Provision under Controlling Legal Principles, Which the NCL Ignores.

The NCL assumes Clearwire's ETFs ***cannot*** be alternative performance clauses simply because customers pay ETFs only upon contract termination. But the commentators and this Court have long agreed that an enforceable alternative performance provision ***can*** contemplate contract termination, as long as it provides a ***real*** option—meaning that at the contract's inception, the parties could have envisioned either alternative as the potentially desirable choice when the time came to render performance. Contrary to the NCL's contention, that test does not risk allowing unlawful penalties to survive legal scrutiny. And, where possible, courts should apply the test at the pleading stage rather than inviting years of litigation on facially enforceable contract provisions.

1. **Clearwire's ETF Satisfies the Test for an Alternative Performance Provision, Even Though a Customer Pays Only upon Early Termination.**

The NCL devotes one sentence to arguing plaintiffs' ETF does not function as an alternative performance provision, relying on the contention that an alternative performance measure ***must*** contemplate "a continuation of the relationship between the parties, rather than … its termination." Br. 3 (citing 24 WILLISTON ON CONTRACTS § 65:7 (4th ed. 2002)). But even Williston agrees an alternative performance provision ***can*** result in termination of the parties' relationship:

> [E]ven though one of the alternative performances is the payment of a fixed sum of money; that fact alone does ***not*** make the contract one for single performance with a liquidated damage provision for breach.

24 WILLISTON ON CONTRACTS § 65:7, at 263 (emphasis added). Corbin agrees. *See* 5 CORBIN ON CONTRACTS § 1079, at 455 n.46.

This Court likewise has recognized that a proper alternative performance provision may result in contract termination:

> If … the contract provides that the promisor shall have a choice or option between performances, or that on payment of a named sum his ***contract shall be null and void***, or that for a specified payment he may regain ***the legal privilege of not rendering the promised performance***, the contract may well be regarded as an alternative contract.

Chandler, 44 Wn.2d at 402 (emphasis added) (quoting 5 CORBIN ON CONTRACTS § 1213, at 883-84). *See also Bellevue Sch. Dist. v. Bentley*, 38 Wn. App. 152, 155-56, 684 P.2d 793 (1984) (right to terminate contract in exchange for lump-sum payment was alternative performance option).

Thus, the test for an alternative performance provision rests not on whether the parties' relationship continues (as the NCL argues) but on the nature of the performance required. If, on its face, the disputed clause "give[s] a ***real*** option (that is, that it was conceived possible that at the time fixed for performance, either alternative might prove the more desirable)," the clause passes muster as an alternative performance clause. *Chandler*, 44 Wn.2d at 401 (quoting 3 WILLISTON ON CONTRACTS (Rev. ed.) 2194, § 781)) (emphasis added). In that respect, the Court, quoting Williston, distinguishes an alternative performance provision from both "a contract contemplating a single definite performance with a ***penalty*** stated as an alternative," which the law does ***not*** enforce. The Court likewise distinguishes a true alternative performance clause from "a contract contemplating a single definite performance with a sum named as ***liquidated damages*** as an alternative," which the law enforces using the liquidated damages rubric. *Id.* (emphasis added).

Here, the Court can readily conclude—as did Judge Pechman—that Clearwire's contracts provide two options, either of which might "prove the more desirable" when the time for performance arrives. A customer entering into a term contract with Clearwire could envision that if she decided to move outside Clearwire's service area during the contract term, she might prefer to render performance through payment of a smaller ETF rather than pay a monthly charge for two years. Another customer might decide, after a year of satisfactory service, that he would prefer a new product or technology not available when he signed up for a two-year term. A third customer might find a better deal with a different provider that would make it economical to pay Clearwire a modest exit fee. Thus, ***any*** rational contracting party would prefer the flexibility of an ETF at the time of contracting (especially where, as here, the ETF requires a payment far less than the remaining obligation), over a contract with no early termination option. ***The NCL does not argue to the contrary.***

That being the case, Clearwire's ETF satisfies the prerequisites of an alternative performance provision—not because Clearwire would make it "immune from judicial scrutiny," as the NCL argues (Br. 2), but because it withstands scrutiny and satisfies this Court's fifty-year-old test.

2. This Court's Test for Alternative Performance Provisions Will Not Allow Penalties or Liquidated Damage Clauses to Escape Judicial Scrutiny.

For similar reasons, the NCL errs when it argues Clearwire's view of the law would allow businesses to recast ***any*** "liquidated damages clause or contractual penalty … as a provision for 'alternative performance.'" Br. 6. In fact, true penalties and liquidated damages provisions cannot meet *Chandler*'s alternative performance test. A "penalty" involves a prescribed payment that substantially exceeds the potential loss from a breach measured at the time of contracting. (In *Chandler*, this Court illustrated an unlawful penalty by quoting Williston's example of a contract requiring repayment of a note, with the "alternative" requiring conveyance of property worth "greatly in excess" of the note's value. 44 Wn.2d at 402.) And liquidated damages clauses come into play ***only*** upon a breach, when the agreed damages make "a reasonable forecast of the compensation necessary to make the seller whole should the buyer breach." *Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 894, 881 P.2d 1010 (1994). *See also Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 559, 730 P.2d 1340 (1987) (same); *Watson v. Ingram*, 70 Wn. App. 45, 53, 851 P.2d 761 (1993), *aff'd* 124 Wn.2d 845, 853, 881 P.2d 247 (1994) (liquidated damages evaluated "by reference to the prospective difficulty of estimating possible damages that would flow from a breach").

Clearwire's ETF fits neither paradigm. When plaintiffs signed their contracts, the ETF provided an alternative far cheaper to plaintiffs than full performance of their monthly obligation for two years; no one could plausibly call it a "penalty" from the perspective of parties entering into a term obligation. Nor could the ETF be liquidated damages: the contract allowed the customer to ***choose*** to terminate and pay the ETF, rather than making the ETF payable solely upon breach, and the ETF amounted to much less than a reasonable forecast of Clearwire's damages for breach.[1] But the ETF neatly fits *Chandler*'s definition of an alternative performance: "a ***real*** option" because "at the time fixed for performance, either alternative might prove the more desirable." 44 Wn.2d at 401.

The NCL's cases illustrate situations that could not fit *Chandler*'s definition of an alternative performance—and thus disprove its "chicken-little" argument that following *Chandler* would allow businesses to characterize true penalties as alternative performance clauses. In *Mitchell v. Ford Motor Credit Co.*, 702 F. Supp. 2d 1356, 1367 (M.D. Fla. 2010) (cited in Br. 10 n.14), a car lessee terminated her lease after making twenty-one of twenty-four monthly payments. The lessor then charged an

[1] The NCL declares, without citation, that the ETFs "appear to be wholly disproportionate in amount to any damage the provider suffers," claiming Clearwire has the right only to "direct/out of pocket costs or even opportunity costs" upon a subscriber's breach. Br. 5. But the law protects contract expectations by allowing ***expectation damages***. Thus, in *TMT Bear Creek Shopping Center, Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007), the Court of Appeals affirmed a landlord's right to payment for the present value of the remaining lease payments for the agreed term upon a tenant's breach because, among other reasons, the award placed the landlord in the "same economic position it would have occupied ***had the contract been fully performed***." 140 Wn. App. at 211 (citing *Rathke v. Roberts*, 33 Wn.2d 858, 865-66, 207 P.2d 716 (1949)) (emphasis added). Under *TMT*, if plaintiffs breach their term contracts, they must pay Clearwire the value of the agreed monthly payments for the balance of the term, less Clearwire's savings by reason of the breach. And here, the NCL concedes Clearwire does not avoid ***any*** material costs when customers fail to honor term contracts: "The 'product' sold – here, Internet access – is of a type that can be provided, ***at a minimal marginal cost***, to as many customers as can be induced to click 'agree.'" Br. 4 (emphasis added).

ETF exceeding the total remaining lease payments by more than $1,300—a scenario not presented here. *Id.* at 1368. The court held an ETF "greater than the amount owed had the lease gone to term ... is unreasonable." *Id.* Similarly, in *A.J. Lane & Co.*, 113 B.R. 821, 823 (Bankr. D. Mass. 1990) (cited in Br. 10 n.14), after a borrower sold collateral to repay the entire balance of principal and interest due under its loans, the bank charged a prepayment penalty of more than $96,000. Because the loan documents described the charge as a "penalty," and the bank treated plaintiff's sale of collateral as default, the court analyzed the penalty as a liquidated damages clause. *See id.* at 823, 827. Because the prime rate had risen, the court concluded the bank profited from the prepayment because it could re-lend the repaid loan amount at a higher rate, *id.* at 829, and the court declined to enforce the prepayment penalty as unreasonable. *Id.* at 830.

Both *Mitchell* and *Lane* involve classic penalties—neither "real options" nor reasonable damage forecasts—that could not meet the test for alternative performance set forth in *Chandler*. In contrast, Clearwire's ETFs satisfy Washington law. The NCL offers no reason for this Court to re-tool its existing test for alternative performance clauses.

3. The Court Should Reject the NCL's Ill-Considered Suggestion that the Court Change the Law to Facilitate More Fact-Intensive Review of ETFs.

The NCL proposes courts must analyze ***all*** ETFs under the more fact-intensive inquiry accorded liquidated damages, ***even if*** the court can resolve on the pleadings the threshold question whether the ETF offers consumers a reasonable alternative choice. Br. 19-20. But courts can and should evaluate this threshold question at the pleading stage; the saga of *In re Cellphone Fee Termination Cases*, 193 Cal. App. 4th 298, 330, 122 Cal. Rptr. 3d 726, 753 (2011), illustrates the inefficiencies of not doing so.

The plaintiffs filed *In re Cellphone* in 2003, attacking Sprint's ETFs. The trial court overruled demurrers (i.e., denied motions to dismiss) in 2006, and the jury handed down its verdict in 2008, five years after filing. By that time, the court had invalidated Sprint's ETFs as liquidated damages provisions (based on facts not present here, *see* Clearwire Br. 28-29), at least when Sprint applied the ETFs as a result of breach. But the court also found Sprint had the right to recover damages for its customers' early terminations, which breached their contracts. At trial, the jury answered special interrogatories, finding the class paid $73,775,975 in ETFs to Sprint—but that Sprint's damages from early terminations amounted $225,697,433, ***$150 million more than what Sprint collected.*** *In re Cellphone*, 122 Cal. Rptr. 3d at 734-35.

On post-trial motions, the trial court vacated the jury's verdict on Sprint's damages, based on the fact that the evidence could not support it. Sprint had offered evidence that the class owed $987 million, net of avoidable expenses, as a result of the class members' breaches—or $750 million ***more*** than what the jury awarded. *Id.* at 734-35. Plaintiff's evidence, on the other hand, suggested the amount owing net of avoidable costs came to only $17.6 million (based on the absurd assumption that early terminations allowed Sprint to avoid costs amounting to 98.6% of the expected revenue from terminated customers. *Id.* at 734. Because "[t]he damages found by the jury were the exact amount of ETFs charged to class members, but which were unpaid," *id.* at 735, the trial court concluded "[t]here is no way to read the jury's answer to question #3 [i.e., the amount owed to Sprint] that yields a result that is both reasonable and lawful." *Id.* at 736. The trial court ordered a new trial on Sprint's damages—but without suggesting the court would bar Sprint from showing, as it did before, that it suffered $987 million in damage because of class members' breaches. The Court of Appeal affirmed the trial court in its entirety, ***including*** its conclusion that Sprint had the right to contract damages resulting from plaintiffs' early terminations, measured by the amount of unpaid monthly payments for the agreed terms less avoided costs; it remanded solely for computation of damages. *Id.* at 753.[2]

In re Cellphone teaches that this Court should not lightly discard the parties' ETF agreement. If the ETFs meet the *Chandler* test, it should enforce them, as Judge Pechman did, rather than accepting the NCL's invitation to subject the ETFs to an unnecessary layer of further scrutiny. As *In re Cellphone* shows, the additional process advocated by the NCL imposes enormous costs on society, the courts, business, and even consumers—without putting a nickel in consumers' pockets. Because Clearwire's ETFs provide a "real option," which any rational consumer entering into a term contract would prefer to have, the Court should hold the ETFs satisfy Washington's test for alternative performance provisions.

B. The Court Should Reject NCL's Policy Arguments for Changing the Law of Alternative Performance Contracts, Which Would Provide None of the Benefits NCL Claims.

Unable to attack Clearwire's ETF based on existing law (the NCL cites four cases, all discussed above), the NCL embarks on a scattershot

[2] Plaintiffs misstate *In re Cellphone*, incorrectly saying the jury awarded damages "in an amount equal to the unpaid monthly fees"—in fact, the jury awarded a much ***lower*** number, matching the ETFs—and that the trial court found the jury "failed to take into account Sprint's 'avoidable costs,' and thus awarded Sprint ***more than*** its 'actual total economic damages.'" Reply Br. 22 (emphasis added). Plaintiffs therefore suggest the trial court will ***reduce*** the judgment on remand—when in fact, as the text makes clear, Sprint's award may ***increase*** substantially on re-trial. ***No court*** found the jury awarded Sprint "more than" its actual loss; plaintiffs' claim to the contrary amounts to pure wishful thinking.

discussion about communications and Internet policy. But even if one acknowledges the problems the NCL identifies—many of which the NCL should address to the Federal Communications Commission—invalidating Clearwire's ETF would not further their resolution.

1. Invalidating ETFs Will Have No Bearing on Whether Consumers Must Pay a Service Provider Who Fails to Deliver Promised Service.

The NCL devotes much of its brief to complaints about customer dissatisfaction over poor service, implying the Court must invalidate ETFs to avoid the inequity of imposing an ETF on customers to whom Clearwire failed to deliver reasonable service quality. *See* Br. 4, 13, & 16. But the NCL's argument amounts to a red herring. If this Court found Clearwire's ETFs were not alternative performance provisions, the parties would then have further proceedings to determine if the ETFs nevertheless amounted to valid liquidated damages provisions. And if, in the end, a court invalidated the ETFs, the result (as Judge Pechman held here) would simply be that "Plaintiffs would still have their payment obligations under the monthly fee provisions." *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179, 1187 (W.D. Wash. 2010). In other words, invalidating the ETF would excuse customers from paying the ETF—but would not excuse them from paying the monthly charge they ***expressly*** agreed to pay.

The law does, of course, provide recourse to parties who do not receive what they contracted for. When contracts require "performance by both parties, the party claiming nonperformance of the other must establish as a matter of fact that party's own performance." *Willener v. Sweeting*, 107 Wn.2d 388, 394 730 P.2d 45 (1986). Thus, if Clearwire breaches its agreement to provide service as promised, the law excuses Clearwire's customers from their performance obligations. ***But the validity (or invalidity) of an ETF has no bearing on this issue***: if the law excuses the customer from paying monthly charges for the agreed term, the law would equally excuse the customer from paying the ETF.[3]

2. Invalidating ETFs Will Not Enhance Competition, as the NCL Claims, but May Suppress Competition.

The NCL litters its brief with the misguided notion that, as a matter of public policy, consumers should be able to ignore their term contracts, terminate at will, and pay nothing more to Clearwire. *See*, *e.g.*, Br. 5, 10, & 12. But the NCL's position depends on ignoring the integrity of contracts. Further, even if this Court were inclined at one stroke to make consumer term contracts terminable at will (which could be done only by

[3] The NCL's related cry that "a provider will seek to immunize itself from (justified) customer dissatisfaction over poor service by imposing onerous liabilities on those who wish to sever their contractual relationship," Br. 4, makes no sense for the same reason. Further, this case does not involve "onerous liabilities," since the ETF provides a potentially advantageous option that any rational person would want to have available.

upending the foundations of modern contract law), as the NCL suggests it should, that would not remedy the ills identified in the NCL's brief.

Settled Washington law ***enforces*** term contracts as written —and the NCL (like plaintiffs) cites nothing to suggest the contrary. *See* Clearwire Br. 11-15 (citing *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 195-98, 209-11, 165 P.3d 1271 (2007) (enforcing landlord's right to contract damages for unpaid lease term); *Syrovy v. Alpine Resources, Inc.*, 122 Wn.2d 544, 546, 548, 550-51, 859 P.2d 51 (1993) (buyer under 2-year timber purchase agreement owed seller full outstanding balance under contract)). Thus, without the ETF alternative, Clearwire's customers would have ***one*** (and only one) choice: the legally-binding obligation to pay monthly service charges for the entire agreed one- or two-year term, resulting in a total payment obligation ranging from $720 to nearly $900. *See* ER 30-31 (¶¶ 5.18-5.20 (quoting terms of service)); *see* ER 62-65 (Exhibit A, ¶ 2); SER 119-20, 150-51, 174-75, 184, 193, 215 [Camacho Decl. ¶ 7, Ex. C ¶¶ 31, 8, Ex. B ¶¶ 31, 9, Ex. E ¶¶ 2, 10; Ex. F ¶¶ 2, 12, Ex. H ¶ 2].

The NCL therefore has it wrong when it argues ***the ETF*** prevents customers from abandoning their term contracts and changing ISPs on a whim. Instead, the term contract itself (like any other contract for a fixed period) binds the customer—just as it prevents Clearwire from changing the monthly price. The ETF functions as an escape valve—which the NCL should welcome—offering customers the choice to pay an exit fee instead of the remaining monthly charges for the agreed term, where the ETF presents an economically advantageous option.

In any event, the NCL gives this Court no reason to believe that honoring contracts, and particularly ETFs, has an anti-competitive effect on consumer choice of ISPs. Citing a 2011 FCC report, the NCL paints a picture of a wireless broadband industry "dominated by a few, massive companies, with the largest four commanding 90% of the market." Br. 8 (citing FCC, Report FCC 11-103, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services (June 27, 2011), at 27, *available at* http://wireless.fcc.gov/index.htm?job=cmrs_reports). The report identifies the largest four wireless broadband providers as Verizon Wireless, AT&T, Sprint Nextel, and T-Mobile. FCC 11-103, at 7.

But Clearwire does ***not*** fall within that group. Indeed, the FCC report shows Clearwire with just 1.5% of the market share of the top four. *Id.* at 34 (Table 3). The NCL's proffered data thus shows Clearwire to be an upstart, not one of a "few, massive companies" dominating the market. And an upstart cannot innovate and challenge market leaders within a legal framework where customers can exit term contracts and migrate to larger competitors at will—or, to put it another way, breach their contracts with impunity. Smaller companies need legal protection to maintain their most important assets, i.e., their customer contracts, and to protect them against well-heeled competitors who otherwise can use targeted marketing to entice their hard-earned customer base. The NCL gives this Court no reason to believe it can enhance competition in an already-concentrated market by threatening the integrity of smaller competitors' contracts.[4]

Further, term contracts with ETFs help consumers by locking in monthly rates and protecting them against price increases. The NCL, however, tells this Court the specter of rising prices is not "accurate," Br. 18, citing data suggesting that broadband ISP operating ***expenses*** declined in recent years. *Id.* (citing James Losey & Chiehyu Li, New America Foundation, Price of the Pipe: Comparing the Price of Broadband Service Around the Globe 1-2 (April 2010), *available at* http://newamerica.net/publications/policy/price_of_the_pipe). But the

[4] In many respects, consumer term contracts resemble small exclusive dealing arrangements, whose competitive benefits the courts have long recognized. As the United States Supreme Court explained: "Requirements contracts ... may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public. In the case of the buyer, they may assure supply, afford protection against rises in price, [and] enable long-term planning on the basis of known costs .... From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and – ***of particular advantage to a newcomer to the field*** to whom it is important to know what capital expenditures are justified – offer the possibility of a predictable market." *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949) (emphasis added).

passage NCL cites sheds no light on whether broadband ***pricing*** for consumer plans has decreased. And in fact, the same study the NCL cites says that "***prices*** for broadband in the U.S. are ***on the rise***" and that "[l]ack of competition is a major factor influencing the higher prices and slower speeds found in the U.S." Price of the Pipe at 1-2 (emphasis added). Term contracts insulate consumers against those rising prices.

Honoring commercial contracts has been a bedrock principle of American law since the founding of the Republic. The NCL has offered no reason for this Court to change course now.

3. Public Policy Favors Enforcing Form Contracts; Businesses Cannot Individually Bargain Terms with Every Customer.

The NCL implies that because Clearwire (like every other company doing business with large numbers of people) necessarily uses form contracts, the Court should allow customers to terminate contracts with Clearwire—and presumably every other business using form contracts—without regard to fundamental contract principles. *See* Br. 12.

The NCL cites no cases for this extraordinary proposition, and the law does not support it. A contract's adhesive nature does ***not*** render the contract unconscionable or void. *See Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 393, 858 P.2d 245 (1993) (contract's adhesive nature relevant, if at all, only as to procedural unconscionability) (citing *Blakely v. Hous. Auth.*, 8 Wn. App. 204, 213, 505 P.2d 151 (1973)). "[T]he times in which consumer contracts were anything other than adhesive are long past." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (citing *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004)). Indeed, if companies could secure enforceable contracts ***only*** by individually negotiating with each consumer, commerce would grind to a halt.

Regardless, the NCL's unspoken premise, i.e., that Clearwire's contract introduces an unfair term in the form of the ETF, makes no sense. With an ETF, a consumer has an option the contract would not otherwise provide, which could be advantageous in the right circumstances; without the ETF, the consumer has ***no option*** but to pay monthly charges for an agreed term. Neither the NCL nor plaintiffs have explained why ***anyone*** would prefer a contract lacking an ETF option. As a result, it makes no sense for the courts to intrude on the contracting process.

4. Consumers Have Options for Internet Service Other Than Term Contracts with ETFs.

The NCL argues customers have no choice but to sign contracts with Internet service providers for "lengthy terms" subjecting them to ETFs. Br. 9. The NCL reasons that consumers cannot determine service quality before being "trap[ped]" by the ETF. *Id.* 10. The NCL cites nothing to support these propositions, and the record shows the opposite.

Customers who wish to try Clearwire service without committing to a term contract have the option of selecting a month-to-month or prepaid plan—in each instance ***avoiding*** an ETF. SER 136 (¶ 3.6); SER 161 (¶ 3.b); SER 203 (¶ 2.b); SER 215 (¶ 2.b); SER 227 (¶ 2.b). Thus, customers have (and had) the opportunity to try Clearwire service without an ETF. Those customers who find the service satisfactory may lock in favorable pricing or discounted equipment by entering into term contracts. *See* Clearwire Br. 14-15; CTIA Br. 8-9. Those who dislike the service may instead opt to go elsewhere.[5]

5. Invalidating ETFs Solves Nothing for "Poorer and Otherwise Vulnerable Consumers."

The NCL complains Clearwire "ignore[s] entirely the burden that a large lump sum payment represents for consumers already at the financial breaking point – including those who have lost jobs or are on fixed incomes." Br. 13. But evaluating the ETF as a liquidated damages clause instead of as an alternative performance provision does nothing to

[5] Plaintiffs likewise take issue with the availability of the non-ETF option, arguing that most service agreements in the record do not refer to a "month-to-month" option. *See* Reply Br. 5-6. But plaintiffs and the NCL fail to mention that the service agreements that do not offer a month-to-month option instead offer a 90-day prepaid option—***which likewise does not involve an ETF.*** SER 136 (¶ 3.6); SER 161 (¶ 3.b); SER 203 (¶ 2.b); SER 215 (¶ 2.b); SER 227 (¶ 2.b). Thus, customers have options for prepaid plans that do ***not*** involve an ETF.

ameliorate the "burden" of the lump-sum ETF option, assuming one elects to pay the ETF over paying monthly charges for the agreed term.

Moreover, eliminating the ETF does not relieve ***any*** customers from their term contracts, no matter what their economic circumstances. Thus, without an ETF, cash-strapped customers would have only the option to make monthly payments for the agreed one- or two-year term—even if that option far exceeded the ETF amount. Customers in financially precarious circumstances would fare no better under the NCL's rule.

III. CONCLUSION

For these reasons, and for the reasons stated in its principal brief, Clearwire asks this Court to answer the certified question by ruling that Washington law treats the ETF at issue as an alternative performance provision, not as a liquidated damages clause.

RESPECTFULLY SUBMITTED this 28th day of October, 2011.

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