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No. 85810-1

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

On Appeal from the United States District Court
for the Western District of Washington at Seattle

No. 10-35228

CHAD MINNICK, *et. al.*,
Appellant,

vs.

CLEARWIRE US, LLC *et al.*,

Respondent.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

This case gives the Court the opportunity to establish the standards that will apply to early termination fees ("ETFs") charged pursuant to consumer contracts of adhesion, such as those that have become common in long-term subscription contracts imposed by Internet service and cellular phone service providers. Although lawsuits challenging the amount or terms of ETFs in such contracts have been brought in various jurisdictions in recent years, no appellate court of last resort has yet tackled this important issue. This Court's ruling, therefore, is likely to have far-reaching implications across the country.

In this action, Plaintiffs/Appellants Chad Minnick *et al.* (hereafter "Plaintiffs") allege that Defendant/Appellee Clearwire US LLC ("Clearwire") engages in false and misleading advertising relating to the reliability, speed and quality of its wireless Internet and telephone service, and then imposes ETFs on dissatisfied customers who seek to cancel prior to the expiration of Clearwire's one or two-year adhesion contracts ("Service Agreements"). Plaintiffs allege that the ETFs Clearwire unilaterally charges and collects are unlawful "penalties" under well-established law that applies to liquidated damages. Under that law, the ETFs are not enforceable if they are not a reasonable approximation of difficult-to-calculate damages and, in actuality, operate to force dissatisfied customers to continue incurring monthly charges despite receiving poor and, in some circumstances, no service.

For its part, Clearwire seeks to avoid this body of law entirely by arguing that the ETFs are not liquidated damages, but rather, are a form of "alternative performance" under its Service Agreements. Clearwire argues that a dissatisfied customer simply has a "choice" of how to "perform" under the Service Agreements: he or she can either continue to make monthly payments, or can pay the ETF. That "choice," according to Clearwire, means that the ETFs are not liquidated damages, and thus are exempt from the analysis that typically applies to liquidated damages.

The United States Court of Appeals for the Ninth Circuit concluded that Washington law, as it now stands, does not provide clear guidance on the dividing line between liquidated damages and "alternative performance," at least in the context of long-term subscription contracts. Accordingly, it certified that issue to this Court.

This Court should now hold that Clearwire's ETFs are subject to the same analysis typically applied to liquidated damages, and should reject Clearwire's "alternative performance" argument. The fundamental problem with Clearwire's position is that "choice" cannot be the correct dividing line between "liquidated damages" and "alternative performance." If it were, then any contract with a liquidated damages provision could be characterized as an "alternative performance" contract. The party could "choose" not to incur the liquidated damages by "choosing" to perform his or her other obligations under the contract. Indeed, because the element of "choice" is present in every contract, the same could be said for normal, unliquidated contract damages: a party to a contract is always faced with a "choice" between performing under the contract or paying damages for breach. Thus, a focus on consumer "choice" offers no manageable or logical way to distinguish between liquidated damages and "alternative performance."

A proper analysis should instead focus on two issues. First, the Court should examine the role that the stipulated sum of money (here, the ETF) plays in the contractual relationship. If the payment of the stipulated sum is one of two alternative ways for the customer to obtain full performance by the business (in this case, Clearwire's being required to provide service for the full term of the Service Agreement [one or two years] in exchange for the payment of the ETF), then it is an "alternative performance." But if (as is the case with Clearwire's ETFs) the stipulated sum only becomes payable upon the termination or breach of the contractual relationship by the customer, whereupon the business ceases to perform its obligations under the contract and the contractual relationship is ended, then the stipulated sum is liquidated damages.

Second, the Court should examine the remedies to which the business is entitled upon a termination or breach by the customer. When a contract contains a liquidated damages clause, the non-breaching party is entitled to the stipulated sum in the event of the other party's breach. But in a contract containing an alternative performance provision, the non-breaching party would only be entitled to the stipulated sum if it represented the *least expensive* alternative available to the breaching party. Here, the Service Agreement requires payment of the ETF even when that amount is *greater* than the sum that would be due if the Service Agreement was not cancelled (*i.e.*, the sum of the remaining monthly payments). Under bedrock remedies law, therefore, Clearwire would not actually be entitled to recover the ETFs in many cases if, as Clearwire argues, payment of the ETFs is merely a form of "alternative performance." Put otherwise, given how the ETFs actually work under the terms of the Service Agreement—and in particular the fact that the amount of the ETF is due upon termination or breach without regard to any other factors—they *must* be liquidated damages.

For these reasons, and as explained below, the Court should conclude that the ETFs at issue here are liquidated damages and therefore subject to analysis under that legal framework. Also, having been invited by the Ninth Circuit to make any ruling that is necessary or appropriate to disposing of this case, the Court should declare that under Washington law, regardless of whether the ETFs are classified as a liquidated damages clause or "alternative performance," and accepting the allegations of the Complaint (as it must given the procedural posture of this case), the ETFs operate as an impermissible penalty and, therefore, are unenforceable.

II. CERTIFIED QUESTION

Liquidated damages clauses entitle the non-breaching party to damages equal to a stipulated sum that has been agreed upon in advance—regardless of whether that sum is more or less than the cost of full performance—and also typically terminate the contractual relationship. Such clauses may be challenged as an unlawful penalty in appropriate cases. The ETFs at issue here require consumers who cancel their subscription agreements early to pay a fixed amount decided solely by Clearwire, whether or not the ETFs are higher than the consumers' cost of completing performance. The ETFs may be imposed by Clearwire for other breaches of the Service Agreement, and, although Clearwire collects the full ETFs, it does not offer any corresponding performance to the consumers. Rather, Clearwire only imposes and collects the ETFs after the contractual relationship has ended, and Clearwire has stopped providing service.

In contrast, a contract containing an alternative performance provision: (i) gives a party to a contract the option of choosing one form of performance over another, and his/her choosing either option compels the other party to *fully* perform its end of the bargain, and (ii) typically contemplates the preservation of the contractual relationship (until *both* parties have fully performed). Moreover, if an "alternative performance" contract is breached, the non-breaching party is only entitled to damages equal to the *least expensive* of the alternatives, viewed from the prospective of the breaching party.

Does Washington law treat the ETFs at issue in this case as liquidated damages, or as an "alternative performance" provision? Moreover, regardless of how characterized, does Washington law treat the ETFs at issue here as impermissible penalties based on the allegations in the Complaint?

III. STATEMENT OF THE CASE

A. Procedural History

Plaintiffs Chad Minnick, Linda Stephenson, Stephen Riemers, Donald Schultz, Corey Jelinksi, Victoria Bartley, Christopher Cuhel, Karen Grefsrud, Rita McVicker, Josh Keller, Glenn Reynolds, and Eva Girod are former or current customers of Clearwire, a provider of wireless Internet and telephone services. Plaintiffs allege that the ETF provisions of Clearwire's Service Agreements are unlawful and unenforceable, and that Clearwire falsely advertised its service as fast, reliable, and comparable to Internet and telephone service provided over land lines.

The original complaint was filed in the King County Superior Court on April 21, 2009. On May 27, 2009, the First Amended Complaint (the "Complaint") was filed, adding several additional plaintiffs. It alleged seven causes of action related to Clearwire's imposition of the ETFs, and false advertising. As particularly relevant to the issue before this Court, the Complaint alleged that the ETFs are unlawful "penalties," and thus that Clearwire has no legal right to impose the ETFs.

Clearwire removed the case to the United States District Court for the Western District of Washington on July 2, 2009, and moved for dismissal of all of Plaintiffs' claims on July 23, 2009 without any discovery having been conducted. In support of its motion, Clearwire contended that the ETFs are a form of "alternative performance" because customers have a "choice" of continuing with the Service Agreement or paying the ETFs. The district court agreed with Clearwire in a February 5, 2010 Order dismissing Plaintiffs' claims. That order held that the ETFs provided an "alternative method of performance" because Clearwire's customers "could elect to fulfill their contract in one of two ways: (1) they could pay for service for the full term of the contract with Clearwire or (2) pay the monthly fee for a shorter term plus the ETF." ER 6 (Order at 6). The district court characterized this scenario as "freedom of choice." *Id.*

Both Clearwire and the district court relied upon *Hutchison v. AT&T Internet Servs., Inc.*, No. CV07-3674, 2009 WL 1726344 (C.D. Cal. May 5, 2009), an earlier federal court case construing California law on the question of whether ETFs should be classified as liquidated damages clauses or alternative performance provisions and concluding that they should be classified as alternative performance provisions. Because *Hutchison* involved a question of state law, the district court was bound to follow controlling California authority on the subject. *Erie v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) (holding that federal court in diversity action is bound by a state court's interpretation of state law); *Webb v. Smart Doc. Solutions, LLC*, 499 F.3d 1078, 1082 (9th Cir. 2007). But because no appellate-level California state court had yet addressed the question presented to the federal court in *Hutchison,* the district court in *Hutchison's* role was to *predict* how California's highest court would rule on the issue. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004).

But, after the district court rendered its decision in reliance on *Hutchison* (and, indeed, after this case was briefed and argued before the Ninth Circuit), the California Court of Appeals, in *In re Cellphone Fee*

Termination Cases, 193 Cal. App. 4th 298, 122 Cal. Rptr. 3d 726 (2011), analyzed the same question examined by *Hutchison* and rejected its holding.[1] Had *In re Cellphone Fee Termination Cases* been decided prior to the dismissal of this case by the federal district court, the result would likely have been different, and this case would not have gone up on appeal to the Ninth Circuit. Thus, to some extent, the current procedural posture of this case is a quirk of timing.

In any event, after the district court's dismissal order, Plaintiffs filed a Notice of Appeal on March 8, 2010. The case was fully briefed in the Ninth Circuit, and oral argument was held on November 3, 2010. After oral argument Plaintiffs received information suggesting that Clearwire (as part of what it internally called project "Star Trek") intentionally manipulated its technical specifications so that customers who lived outside of its service area were unwittingly signed up for Clearwire's service by sales representatives.[2]

Relying on this information, on March 31, 2011 Plaintiffs filed a motion for indicative ruling in the district court under Fed. R. Civ. P. 62.1

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[1] Indeed, because the district court in *Hutchison* would have been bound to follow *In re Cellphone Fee Termination Cases*, had *In re Cellphone Fee Termination Cases* been decided earlier it is likely that *Hutchison* would have actually been a decision that was favorable to Plaintiffs.

[2] *See* 9th Cir. Docket No. 32, March 31, 2011 Declaration of Jonathan K. Tycko, (Docket No. 32, Case No. 2:09-cv-00912-MJP, United States District Court for the Western District of Washington).

that it would have authorized Plaintiffs to file an amended complaint asserting claims for fraud in violation of Washington's Consumer Protection Act had the case not been pending before the Ninth Circuit.[3] That motion is pending. On April 1, 2011, the Ninth Circuit certified the aforementioned question to this Court.

B. Alleged Pertinent Facts

When reviewing the dismissal of an action for failure to state a claim, a court must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Winn v. Arizona Christian School Tuition Org.*, 562 F.3d 1002, 1008 (9th Cir. 2009), rev'd on other grounds by *Arizona Christian School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2011); *see also Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.2d 1230 (2005) (holding that a 12(b)(6) motion should be granted "only if it appears beyond doubt that the plaintiff cannot prove any set of facts, consistent with the complaint, justifying recovery" and that "a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record"). Accordingly, for purposes of this appeal, the following facts must be accepted as true.

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[3] The document is entitled "Plaintiffs' Motion for an Indicative Ruling on Whether the Court Would Grant Leave for Plaintiffs to File a Second Amended Complaint Making New Allegations Arising out of Recently-Obtained Evidence of Intentional Fraud by Clearwire" (9th Cir. Docket No. 32, District Court Docket No. 31).

1. Plaintiffs and Others Subscribed to Clearwire's Service, Only to Discover That it Did Not Perform as Promised.

The gravamen of the Complaint is that Clearwire's representations that its users can "plug in [its] wireless modem and surf at broadband speeds anywhere in the Clearwire coverage area," that its Internet service is "better," in part, because it is "simple," "portable," "fast," and "reliable" and that its telephone services are of "superb quality" (see Excerpts of the Record, ("ER") 16 (Compl. ¶¶ 1.2-1.4), 25 (Compl. ¶ 5.2) and 26 (Compl. ¶ 5.6) are false and misleading. ER 24-29 (Compl. ¶¶ 5.1-5.14).

After signing up for Clearwire's services, every Plaintiff experienced service that was intolerably poor, with experiences ranging from slow connections to complete disruptions of service. For example, Plaintiffs Minnick, Stephensen, Reimers, Schultz, Jelinski, Cuhel, and McVicker all frequently experienced periods where their service would cease to work entirely. ER 34-43 (Compl. at ¶¶ 5.33, 5.38, 5.43, 5.51-5.52, 5.56, 5.65, 5.77). And every Plaintiff cancelled or informed Clearwire they intended to cancel their subscriptions only after giving Clearwire multiple opportunities to fix their poor service, with no success. ER 33-46 (Compl. at ¶¶ 5.34, 5.38, 5.43, 5.47, 5.51, 5.56, 5.61, 5.65, 5.72, 5.77-5.80, 5.83, 5.86, 5.91, 5.94-5.95). Others attempted to cancel after moving out of Clearwire's service area and also finding they did not get service in their new location. ER 35-36, 38, 41-43 (Compl. at ¶¶ 5.39, 5.44, 5.53, 5.69, 5.73, 5.77-5.78).

Plaintiffs were not the only ones to experience Clearwire's unreliable service. As alleged in the Complaint, on a website created and frequented by dissatisfied Clearwire customers, former and current subscribers describe their experiences, including:

> My service NEVER works. I have online classes that I was in danger of failing due to my internet service being so unreliable. 99% of the time while in the middle of an online test, my service would drop. Nothing like failing a test because you can't get online to take it. It got to the point that I had my old cable connection reinstalled so I could keep up with my classes.

ER 85 (Exhibit B to Complaint).

> My service goes down often. On contacting clearwire about it I was told that the [sic] their system showed that i am in [sic] coverage area so any early termination will cost between $180-220. This is [sic] clear rip off. Their product sucks.

ER 91 (Exhibit C to Complaint).

> I have clearwire but don't use it because they suck. We signed up for them in June 07. Used them for 29 days and they were great. the split second it turned midnight on the 30th day, the quality of service went to crap. it went from 1.5meg down to maybe 500k. my latency went from around 100 to about 10,000+. i would call their tech support and magically it would work great when I talked to their tech support. the second i got off the phone, it sucked again. at this point since it was the 30th day, we were locked into the 2 year contract. they would not let us out of it. I continued to call tech support about my issue and each time it worked great when I was on the phone with them and then went

> back to crap when I got off the phone. It's obvious they throttle the connection.

ER 97 (Exhibit D to Complaint).

2. Clearwire's "Click-Through" Service Agreement Authorizes it to Unilaterally Impose ETFs Whenever a Customer Terminates the Service Agreement Before the Term Expires and for Other Breaches of the Service Agreement.

Clearwire's Service Agreements are non-negotiable and are presented to subscribers for the first (and only) time on Clearwire's website, in "click-through" form. *See* ER 59-82 (Exhibit A to Complaint); ER 29 (Compl ¶¶ 5.15-16). The Service Agreements provide that Clearwire's customers must pay ETFs whenever they terminate the Service Agreement early—regardless of the reason—or otherwise breach the Service Agreement. ER 30 (Compl. ¶¶ 5.17-5.18). According to the Service Agreement, Clearwire has the right to impose the ETFs whenever Clearwire decides that a customer has breached the Service Agreement. *Id.*

The ETFs are described in several places in the Service Agreement. First, the ETFs make an appearance after Clearwire informs its customers of the "requirement that [they] commit to a minimum term of service." ER 61 (Exhibit A to Complaint). Then, the details of the penalties are described in more specificity depending on the service term the customer has selected. ER 62-64 (Exhibit A to Complaint). For consumers who entered into an agreement prior to March 1, 2007, the ETFs apply under the following circumstance:

> If your Internet Access Service was activated with a contract term prior to March 1, 2007 and you terminate that Service for any reason, including relocation outside a coverage area, or **that Service is terminated by Clearwire for any violation by you of the Agreement prior to the end of the Initial Term or any Renewal Term, as applicable, you will be liable for an early termination fee of $180.**

ER 63 (Exhibit A to Complaint) (emphasis added).

For customers who entered into a Service Agreement on or after March 1, 2007, the ETFs differ. ER 30 (Compl. ¶ 5.19). If the Service Agreement term is for 2 years, the early termination fee is $220.00, less $5.00 per month for each full month of service after the beginning of the initial contract or any renewal contract. *Id.* If the Service Agreement is for 1 year, the early termination fee is $220.00, less $10.00 per month for each full month of Service after the beginning of the initial contract or any renewal contract. *Id.* For consumers with a "Clear Account," the ETFs are $120.00, less $4.00 per month for each full month of Service after the beginning of the initial contract or any renewal contract. ER 31 (Compl. ¶

5.20). The vast majority of Clearwire's customers enter into one-or two-year Service Agreements. ER 32 (Compl. ¶ 5.22).[4]

3. Clearwire Imposes ETFs Even When Customers Cancel Because They Receive Unreliable Service or No Service at All.

The Complaint alleges that Clearwire regularly enforces these ETFs against its customers, and has enforced them against every Plaintiff—even though every Plaintiff initially wished to terminate service because it was unreliable, and because Clearwire failed to correct the service issues. ER 34-46 (Compl. ¶¶ 5.31-5.96).

Plaintiff Minnick alleges he first attempted to cancel after Clearwire failed to cure his intolerably poor service, which often would cease to work entirely. ER 34-35 (Compl. ¶¶ 5.33, 5.34). For months, Minnick had complained about his slow and sometimes nonexistent Internet services. ER 34 (Compl. ¶ 5.33). When he notified Clearwire

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[4] The Service Agreement contains a choice of law provision that provides for the application of either Washington or Delaware substantive law. Under Washington's "most significant relationship" test, a court must look at the place of contracting, negotiation, performance, and subject matter of the contract, and the domicile, residence, or place of incorporation of the parties. *McKee v. AT & T Corp.*, 164 Wn. 2d 372, 284-285, 191 P.3d 851-52 (2008). Applying this test, Washington has the "most significant relationship" to the parties and the subject matter of the Service Agreement. Clearwire's headquarters are in Washington, and it conducts its business out of Washington. Clearwire also offers service to Washington residents, and has entered into contracts with five of the named-Plaintiffs in Washington. In contrast, Delaware has little to no interest in the outcome of this action. Indeed, Clearwire has no connection to the state of Delaware other than the fact that Clearwire was incorporated under Delaware law—Clearwire does not even offer services there, and none of the named Plaintiffs reside in Delaware. Accordingly, as is at least implicit in the Ninth Circuit's certification order, Washington law governs the issue before this Court.

that he intended to cancel his services because of the long-term deficiencies, Clearwire charged a $200.00 early termination penalty. ER 34-35 (Compl. ¶ 5.34). Minnick refused to pay the fee and cancelled his subscription anyway. *Id.* His account was later transferred to a collection agency. ER 35 (Compl. ¶ 5.35).

Likewise, Plaintiff Reimers alleges that he frequently lost his connection soon after he signed up for Clearwire's service, but that Clearwire did not correct his service issues. ER 36 (Compl. ¶¶ 5.42-3). When he moved to another location still within Clearwire's claimed service area, the technical issues were exacerbated—and he had no Internet service at all. ER 36 (Compl. ¶ 5.44). Again, Reimers alleges that Clearwire's customer service department could not rectify the issue. ER 37 (Compl. ¶ 5.46). Finally, Reimers decided to cancel the service and subscribe to another company that provided reliable (and faster) service. ER 37 (Compl. ¶ 5.48). Clearwire refused to waive its ETF. Because Reimers did not want to pay the hefty fee, he remained subscribed to Clearwire's services and continued paying the monthly charge even though he was not receiving Internet services at all. *Id.*

Plaintiff Jelinski's service was also unreliable, slow, and in many instances failed to work entirely. ER 39 (Compl. ¶ 5.56). He tried to resolve the service issues with Clearwire, but the poor service persisted.

Id. Clearwire informed Jelinski that he would incur the ETF if he cancelled his services, so Jelinski turned his service off and cancelled his credit card to avoid incurring the ETF. ER 39 (Compl. ¶¶ 5.56-5.57). Later, a collection agency attempted to collect $500 from Appellant Jelinski. ER 39 (Compl. ¶ 5.58).

Plaintiff Schultz also wanted to cancel his agreement because it was unreliable and slow, and Clearwire's customer service department was unable to remedy the poor quality of his service. ER 38 (Compl. ¶¶ 5.51-5.52). Clearwire told Schultz it was imposing the ETF, so he chose to remain subscribed to the services for another month. ER 38 (Compl. ¶ 5.53). When Schultz later moved out of Clearwire's service area, he attempted to cancel his services again, and was again informed he would have to pay the ETF of $150.00. *Id.* Schultz ultimately paid the ETF. *Id.*

After Plaintiff Cuhel experienced significant disruptions in his Internet services, he contacted Clearwire, and Clearwire convinced him to upgrade the service to achieve higher Internet speeds of up to 1.5 Mbps. ER 40 (Compl. ¶5.65). But under the new plan, Cuhel only received speeds of approximately 600 Kbps. *Id.* Cuhel downgraded his service again, only to receive the same slow and unreliable service he had received before the false "upgrade." ER 41 (Compl. ¶ 5.66). Finally, Cuhel moved out of the area and attempted to cancel the service, but was told that he would be charged a $150.00 ETF—so Cuhel remained subscribed to Clearwire's services even though he was no longer receiving them. ER 41 (Compl. ¶ 5.69).

Plaintiff McVicker's service completely ceased to work in her home. ER 43 (Compl. ¶5.77). Although she wanted to cancel she was informed that she would incur the ETF, so she continued making the monthly payments without receiving service. *Id.* Clearwire then convinced McVicker to place her account into "hibernation" mode and wait for new technology that would enable her to use the service in another location. ER 43 (Compl. ¶ 5.78). But once she received the technology, it also proved unusable. ER 43 (Compl. ¶ 5.79). Thus, nearly two years later, thinking that her agreement would soon be terminated, McVicker again tried to cancel her services, and again was informed that she would be subject to a $135.00 ETF. ER 43 (Compl. ¶ 5.80). As a result, McVicker did not cancel her agreement. *Id.*

Finally, Plaintiffs Grefsrud, Reynolds, and Girold all attempted to cancel their service due to ongoing speed and reliability issues, and were hit with Clearwire's ETF. Gresfrud stayed in her contract for months, even though she was receiving poor service, to avoid paying the ETF, but eventually moved and cancelled her services. ER 42 (Compl. ¶¶ 5.72-74). She paid Clearwire $149.00. ER 42 (Compl. ¶ 5.74). Reynolds and

Girold also incurred and paid ETFs upon cancellation. ER 45-46 (Compl. ¶¶ 5.91, 5.96).

IV. ARGUMENT

A. Under Well-Established Standards Applicable To Liquidated Damages, Clearwire's ETFs Could Be Found To Be "Penalties," And Thus Held To Be Unenforceable.

Plaintiffs allege that the ETFs at issue here are unenforceable because they are liquidated damages that are impermissible penalties under the circumstances of this case. Under Washington law, a court must apply a two-part test to determine whether a liquidated damages clause is enforceable. "First, the amount fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach. Second, the harm must be such that it is incapable or very difficult of ascertainment." *Walter Implement, Inc. v. Focht*, 107 Wn.2d 553, 559, 561, 730 P.2d 1340, 1343-44 (1987); *Buchanan v. Kettner*, 97 Wn. App. 370, 374 (1999). If the clause fails either of these two parts, then it "must be considered as a 'penalty' rather than a stipulated 'liquidated damage.'" 107 Wn.2d at 561; RESTATEMENT (SECOND) OF CONTRACTS § 356(1).

The allegations of the Complaint, which must be taken as true, demonstrate that Clearwire's ETFs fail the test of lawfulness and enforceability. First, the Complaint alleges that the ETFs are not a "reasonable measure of the anticipated or actual damages suffered by

Clearwire." ER 32 (Compl. ¶ 5.24). This is especially true for those customers who wish to cancel the Service Agreement later in the contract term, at which point the ETFs are exceptionally larger than the amount of actual damage. Second, the Complaint alleges that the damages to Clearwire for early service termination are not impracticable or extremely difficult to compute. ER 33 (Compl. ¶ 5.25). Thus, Plaintiffs have alleged that Clearwire's ETFs fail the test of enforceability under Washington law. In addition to that two-part test, courts may look to other factors to determine whether a particular liquidated damages provision is an unlawful penalty. For example, the ETFs would be unenforceable if found to have the *in terrorem* effect of inducing performance rather than compensating loss, which is a hallmark of an unconscionable liquidated damages clause. *See S. L. Rowland Const. Co. v. Beall Pipe & Tank Corp.*, 14 Wn. App. 297, 312 P.2d 912 (1975) (*citing Brower Co. v. Garrison*, 2 Wn. App. 424, 433, 468 P.2d 469, 480 (1970), and *Management, Inc. v. Schassberger*, 39 Wn.2d 321, 326 P. 2d. 283 (1951)); *see also Western Camps, Inc. v. Riverway Ranch Ent.*, 70 Cal. App. 3d 714, 726-7, 138 Cal. Rptr. 918, 925 (1977) (there is no element of free rational choice when the "only purpose and effect of the formal alternative is to hold over [the obligor] the larger liability as a threat to induce prompt payment of the lesser sum") (citing *Garrett v. Coast and Southern Fed.*

Sav. and Loan Ass'n, 9 Cal.3d 731, 738, 108 Cal. Rptr. 845 (1973)). The Complaint explicitly alleges that Clearwire's ETFs had precisely this *in terrorem* effect on certain of the named Plaintiffs, who were compelled by the ETFs to continue to make payments to Clearwire even if they were receiving extremely poor service, or no service at all, from the company. ER 36-37, 41, 43-44 (Compl. ¶¶ 5.40, 5.48, 5.69, 5.80, 5.87). Indeed, the common sense understanding of ETFs is that they are intended to dissuade customers from cancelling their subscriptions and incurring the large and disproportionate ETF liability.

In addition, Clearwire's ETFs may be found to be unlawful penalties if they "[discourage] efficient breaches by raising the cost of a breach to the contract-breaker" and "give the non-breaching party an incentive to provoke a breach in order to make a profit…." *Spirit Locker, Inc. v. EVO Direct, LLC*, 696 F. Supp.2d 269, 306 (E.D.N.Y. 2010). This is precisely the scenario when a customer chooses to terminate at certain points during the contract term due to Clearwire's poor service. Clearwire is absolved from performance, and collects a sum of money that is far greater than that to which it would otherwise be entitled. Thus, Clearwire's ETFs, at least in theory, permit Clearwire to manipulate its performance under the Service Agreement to induce customers to incur the ETFs. Under these standards, the unenforceability of the ETFs is a fact-intensive question that can only be fully resolved after discovery and trial. Due to the early procedural posture of the case, Plaintiffs have not had the opportunity to conduct discovery relevant to these standards, and Clearwire has not proffered evidence of how it set the amounts of the ETFs, of how those amounts compare to the actual damages suffered by Clearwire when a customer terminates his or her service or fails to make his or her monthly payments, or of other potential relevant factors. What is clear, however, is that the Complaint sufficiently alleges that the ETFs are unlawful penalties, and thus that Clearwire could not obtain a contrary ruling by way of a motion to dismiss.

B. Clearwire's Position—That The ETFs Are Merely A Form Of "Alternative Performance"—Would, If Accepted By This Court, Insulate The ETFs From Any Analysis Under Those Well-Established Standards.

Clearwire recognizes that if its ETFs are classified as liquidated damages, then it will be forced to meet the standards discussed above, and risks having the ETFs classified as unlawful penalties. Seeking to avoid that analysis, Clearwire attempts to side-step it by claiming that the ETFs are actually a form of "alternative performance." Clearwire takes this position because, if the ETFs are classified as "alternative performance," then (at least according to Clearwire) they are enforceable even if they fail the two-part test applicable to liquidated damages, or even if they have an impermissible *in terrorem* effect. The federal district court accepted precisely that line of reasoning, holding that Plaintiffs' ETF-related claims failed because the ETFs were a form of alternative performance, and not liquidated damages.

C. The Court Should Reject Clearwire's Position, And Should Hold That The ETFs Are Liquidated Damages, And Not Merely A Form Of Alternative Performance.

1. The ETFs Are Liquidated Damages Because They Are Imposed On The Customer For Breach Or Termination Of The Service Agreement, And Because The Customer Has No Option To Pay The ETFs In Exchange For Continued Service From Clearwire.

No court has articulated a bright-line rule for distinguishing liquidated damages from alternative performance; however, the leading treatises on contract law, prior Washington cases, and recent decisions from other jurisdiction addressing ETFs in the context of long-term subscription agreements, all have focused on two factors. First, if a non-breaching party has the right, under the terms of the contract, to impose a stipulated sum of money on a breaching party, then this indicates that the stipulated sum is liquidated damages. Second, if payment of the stipulated sum of money is *not* a means by which one party can obtain performance by the other, then that sum is not a form of "alternative performance," but rather is liquidated damages. Both of those factors, when applied here, demonstrate that Clearwire's ETFs are indeed liquidated damages.

a. Where, As Here, A Fee Is Imposed By A Business Upon A Customer For Breaching Or Terminating A Contract, That Fee Constitutes Liquidated Damages.

As explained by one of the leading contract law treatises, the key to distinguishing between the *choices* offered by an alternative performance provision and the *breach* that triggers a liquidated damages clause is that an alternative performance provision contemplates a performance that continues the relationship between the parties, whereas a liquidated damages clause is an agreed-upon result that occurs when one of the parties *terminates* the contractual relationship:

> [O]ne of the principal characteristics of a stipulated damages provision is that it is agreed upon in advance by the parties as a remedy for breach. This characteristic provides the basis on which a liquidated damages provision is distinguishable from provisions for alternative performance of a contract, which are otherwise similar. In an alternative contract, either of two performances may be given by the promisor and received by the promisee as the agreed exchange for the return performance by the promisee. This may be so even 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 a breach. *In essence, the primary object of an alternative contract is performance, and it thus looks to a continuation of the relationship between the parties, rather than to its termination, whereas a liquidated damages provision provides for an agreed result to follow from nonperformance.*

24 WILLISTON ON CONTRACTS § 65:7 (4th ed. 2002) (emphasis added); *see also Wallace Real Estate Inv., Inc. v. Groves*, 124 Wn.2d 881, 894, 881 P.2d 1010, 1014 (1994) (liquidated damages are anticipated in advance by the parties to provide "just compensation" for "anticipated losses from breach").

This distinction between an "agreed upon result to follow from nonperformance" (liquidated damages), and a performance that "looks to a continuation of the relationship between the parties" (alternative performance"), was the key to the recent decision in *In re Cellphone Fee Termination Cases*, 193 Cal. App.4th 298, 122 Cal. Rptr.3d 726, which considered ETFs charged pursuant to Sprint's long-term subscription contracts. The court began its discussion of Sprint's "alternative performance" argument by drawing this exact distinction, noting that "'to constitute a liquidated damage clause the conduct triggering the payment must in some manner breach the contract,'" 193 Cal. App. 4th at 328, 122 Cal. Rptr.3d at 752 (quoting *Morris v. Redwood Empire Bancorp*, 128 Cal. App.4th 1305, 1315 (2005)), while "[a] contractual provision that merely provides an alternative performance of an obligation does not impose damages," and thus would not be considered a liquidated damages clause. *Id.*

Having set forth that distinction, the court then reasoned that it must be drawn by looking at the "true function and operation" of the contractual provision at issue. *Id.* In language directly pertinent to both the Sprint ETFs and the ETFs at issue here, the court stated that, "'when it is manifest that a contract expressed to be performed in the alternative is in fact a contract contemplating but a single, definite performance with an additional charge contingent on the breach of that performance, the provision cannot escape examination in light of pertinent rules relative to the liquidation of damages.'" *Id.* (quoting *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.*, 511 P.2d 1197 (Cal. 1973)).

As does Clearwire in this case, Sprint argued that the court should focus on "the choice the ETF provided customers at the outset of the contract." 193 Cal. App. 4th at 329, 122 Cal. Rptr.3d at 752-753. The court, however, easily rejected that argument, reasoning that "the service agreements provided from the inception of the contract that an ETF could be triggered involuntarily by Sprint, confirming that at the time of contracting the provision was not understood or intended as providing only for a 'rational choice' of the customer." *Id.*

Another recently-decided case, *Mau v. L.A. Fitness International, LLC*, 749 F. Supp. 2d 845 (N.D. Ill. 2010), similarly focused on the contractual role played by an ETF, and concluded that the ETF should be analyzed as liquidated damages. In *Mau*, a customer sued a health club individually and as a proposed class representative, claiming that the defendant, L.A. Fitness International ("Fitness"), wrongfully imposed an ETF contained in its standard long-term subscription contract. The contract was for a one year health club membership, and obligated the customer to pay monthly charges. The membership entitled Mau to attend fitness classes and work with a personal trainer. The contract included a so-called "Voluntary Termination" clause that provided that the customer could terminate the agreement before the end of its one-year term, but if so, s/he would have to pay a fee equal to 50% of the remaining balance. Approximately one month after signing up, Mau cancelled because he felt the defendant club had failed to adequately perform its obligations. The club then imposed the 50% fee. Mau sued to have the fee held an unenforceable penalty, and Fitness moved for summary judgment, arguing that the termination clause was a valid alternative performance provision.

The court denied Fitness' motion and instead held the clause to be an unenforceable penalty. In the course of its opinion, the court easily dispensed with the same arguments made by Clearwire in this action, and in so doing relied on the passage from WILLISTON ON CONTRACTS quoted above:

> Fundamentally an alternative-performance analysis is conducted in response to the suggestion of an "attempt to disguise a provision for a penalty that purports to make payment of the amount an alternative performance under the contract" (*Restatement (Second) of Contracts* § 356 cmt. c (1981)…. Courts should expect to find non-punitive forms of alternative performance clauses, as opposed to traditional liquidated damage clauses, where "the primary object of an alternative contract is performance, and it thus looks to a continuation of the relationship between the parties, rather than to its termination" (24 *Williston on Contracts* § 65:7 (Richard Lord, ed., 4th ed. 2010)).
>
> This exposition of the alternative-performance analysis makes clear that such an analysis is not really applicable here. First, by definition there was and is no expectation of a continuing relationship between Mau and Fitness—exactly the opposite is true. Mau simply wanted to end his contract with Fitness and presumably find another place to work out, if he chooses to continue to do so.

749 F. Supp. 2d at 848-849. The court also rejected an argument (similar to that advanced here by Clearwire) that a liquidated damages analysis was unnecessary because Mau's cancellation of the agreement was not strictly speaking a contractual breach, stating:

> Fitness … contends that because no breach of the contract took place, the Termination Clause cannot be considered a liquidated damages clause and therefore cannot qualify instead as an unenforceable penalty. Nonsense—clearly a contractual provision may be framed as something other than a liquidated damages clause and still be a penalty.

Id at 849, n. 8. Thus, the court recognized the ETF as a fee imposed upon the customer for breach of the agreement, and *not* as a means of obtaining a "continuing relationship" between the customer and Fitness.

In this crucial respect, the ETF provision in Clearwire's Service Agreement is indistinguishable from the ETF provisions at issue in *In re Cellphone Fee Termination Cases*, and *Mau*. A plain reading of the Service Agreement demonstrates that Clearwire has the right to unilaterally impose the ETFs whenever a customer breaches the Service Agreement, and that a customer who refuses to continue to make monthly payments (*i.e.*, a customer who "terminates" the contract) is considered to be in breach.

The Service Agreement is essentially a bilateral contract that contains an exchange of two promises: Clearwire promises to provide one or two years of service in exchange for the customer's promise to pay for that service on a monthly basis. Here, the Service Agreement makes clear that the company indeed considers a customer's cancellation of service to be a breach of the Service Agreement, and the imposition of the EFT to be a consequence of that breach. The Service Agreement states that the customer "will be liable" for an ETF if the customer breaches his or her obligations under the Service Agreement, or otherwise "terminates" the service:

> If . . . you terminate [the] Service for any reason, including relocation outside a coverage area, or [the] Service is terminated by Clearwire for any violation by you of the Agreement prior to the end of the Initial Term or any

> Renewal Term, as applicable, you will be liable for an early termination fee[.]

See ER 63 (Exhibit A to Complaint) (emphasis added).

Section 19 of the Service Agreement, (titled "Termination/Discontinuance of Service") also informs the customer that "your breach of this Agreement" will result in imposition of an ETF. ER 74 (Exhibit A to Complaint). In particular, that section provides as follows:

> Clearwire may suspend or discontinue providing the Service generally, or terminate your Service, in whole or in part, at any time in its sole discretion. If Clearwire discontinues providing the Service generally or terminates your Service for a reason **other than your breach of this Agreement**, you will be responsible only for charges accrued through the date of termination, including a pro-rated portion of the final month's charges, and you will not be charged the Early Termination Fee.

Id. (emphasis added).

Other provisions of the Service Agreement confirm this as well. Section 6 explains what Clearwire will do if a customer fails to pay his or her monthly charges in a timely fashion. ER.67 (Exhibit A to Complaint). That section provides that, under those circumstances, Clearwire "may terminate [the customer's] Service," and that the customer then becomes liable to Clearwire for "any outstanding fees." As the allegations of the Complaint make clear, Clearwire treats ETFs as among the "outstanding fees" that it may collect against a customer pursuant to Section 6 of the Service Agreement. ER 34-46 (Compl. ¶¶ 5.31 and 5.96). And Section 2 of the Service Agreement explicitly states that the customer "will be liable" for an ETF upon "any violation by [the customer] of the Agreement prior to the end of the Initial Term or any Renewal Term." ER 63 (Exhibit A to Complaint).

Thus, under the terms of the Service Agreement, a customer only becomes "liable" for the ETF if he or she "breaches" the Agreement or "terminates" the Agreement by failing to make monthly payments (something which, in turn, is itself treated as a breach of the Agreement). Under the Service Agreement, payment by a customer of an ETF is *not* a means to obtain a "continuation of the relationship between the parties." 24 WILLISTON ON CONTRACTS § 65:7 (4th ed. 2002). Rather, it is an "agreed result to follow from nonperformance." *Id.* Because the customer becomes liable for an ETF only *after* the contractual relationship has ended, in termination or breach, the ETF is liquidated damages.

b. Because A Customer Cannot Obtain Return Performance From Clearwire By Paying An ETF, Payment Of An ETF Is Not A Form Of "Alternative Performance" Under The Service Agreement.

Both courts of this state, and leading treatises, have noted that a true "alternative performance" contract is one in which one party has two alternative ways of performing, either of which obligates the other party to perform under the contract as well. Thus, for example, *Chandler v. Doran Co.*, 44 Wn.2d 396, 401, 267 P.2d 907, 910 (1954), defined an alternative performance contracts as:

> [O]ne in which a party promises to render some one of two or more alternative performances either one of which is mutually agreed upon as the bargained-for equivalent given in exchange for the return performance by the other party.

Id. (citing 5 CORBIN ON CONTRACTS, 379, § 1079).

Similarly, relying on *Chandler*, the court in *Bellevue Sch. Dist. No. 405 v. Bentley*, 38 Wn. App. 152, 684 P.2d 793 (1984), explained that "[a] contract is a true alternative contract when the parties have agreed that either of two or more alternative performances is to be given by the promisor as the agreed exchange for the promisee's performance." *Id.* at 155, 684 P.2d at 797 (citing 5 CORBIN ON CONTRACTS, § 1082 (rev. ed. 1964)); *see also* 24 WILLISTON ON CONTRACTS § 65:7 ("In an alternative contract, either of two performances may be given by the promisor and received by the promisee as the agreed exchange for the return performance by the promisee.").

Given this definition of "alternative performance," payment of an ETF clearly is *not* a form of alternative performance. If the ETFs at issue here were true alternative performance provisions, then on the day after the Service Agreement was entered into the consumer could *choose* to pay the ETF (approximately $200) and demand that Clearwire provide one or two years of service, depending on whether the Service Agreement was for one or two years. But here, the ETFs are never an "equivalent given in exchange for the return performance" of Clearwire. The Service Agreement provides no indication that the customer has an option of paying for (and receiving) Clearwire's service by paying *either* the monthly installments *or* the lump-sum ETF. To the contrary, customers promise to pay *only* monthly installments in exchange for Clearwire's Internet and telephone services for a specific term.

Thus, the Service Agreement does not provide customers with two "alternative" ways of "performing," and obtaining Clearwire's return performance. Rather, the Service Agreement makes clear that there is only one performance—monthly payments—that is "the agreed exchange for the promisee's performance." *Bentley,* 38 Wn. App. at 154-55, 684 P.2d at 797. Thus, contrary to being required to render full performance in exchange for the consumer's electing either of two options, Clearwire considers itself free of the obligation to render *any* service unless the customer pays each month for the full term of the Service Agreement. Under the plain terms of the Service Agreement, the ETF is a fee imposed by Clearwire upon the customer when the customer terminates or otherwise breaches the Agreement. Thus, for this additional reason, payment of the ETF cannot be considered a form of "alternative performance."

2. Clearwire's Position Cannot Be Squared With Well-Established Law Concerning Remedies For Breach Of Alternative Performance Contracts.

Clearwire's position that the ETFs are a form of alternative performance, if accepted by the Court, would lead to the paradox that, under bedrock principles of remedies, Clearwire would not actually be able to collect the ETFs in many cases. That paradox, in turn, further demonstrates that Clearwire's position is simply wrong: the ETFs are not "alternative performance," but rather are liquidated damages.

Leading commentators and case law from around the country have addressed the question of what remedy is available to a promisee when a promisor breaches an alternative performance contract. The well-established rule is that, when the promisor has not elected between the two alternatives, the promisee recovers only the damages flowing from the alternative "resulting in the smallest recovery." RESTATEMENT (FIRST) OF CONTRACTS § 344[5]; 5A CORBIN ON CONTRACTS § 1079 (2003); *accord,*

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[5] While the RESTATEMENT (FIRST) OF CONTRACTS contains a section entitled "Damages for an Alternative Contract", the SECOND RESTATEMENT omitted *any* discussion of the damages available for breach of an alternative contract—much as it omitted *any* discussion of the damages available for a host of other well-recognized remedies discussed in its first publication, such as "Damages for a Contract to Lend Money,"

DOBBS, D., HANDBOOK ON THE LAW OF REMEDIES § 12.5 at 825 (1973) ("when the contract is found to be an alternative contract, damages, in the absence of an election of the alternatives by the breaching party, are based on the alternative least expensive to him"); *see also Alpha Capital Mgmt. Inc. v. Retenbach,* 287 Mich. App. 589, 612, 792 N.W.2d 344 (Mich. App. Ct. 2010) (measure of damages in an alternative contract is "measured according to the least onerous alternative") (quoting *McBain v. Pratt*, 514 P.2d 823, 827 (Alaska 1973)); *Walker v. Hayes*, 100 N.H. 90, 91, 120 A.2d 140, 141 (1956) (same); *Branhill Realty Co. v. Montgomery Ward & Co.*, 60 F.2d 922, 923 (2d Cir. 1932) (same); *Franklin Sugar Refining Co. v. Egerton*, 288 F. 698, 704 (4th Cir. 1923) (when promisor failed to make a selection of alternatives and breached the contract, "measure of damages least onerous" was applied).

The *ratio dicendi* for this rule is that "the court may not place the promisee in a better position than had the contract been performed—it presumes that the promisor had bargained for the flexibility of the alternatives and, therefore, should be liable for no more than the least expensive alternative he could have chosen." *Energy Nuclear Gen. Co. v.*

"Damages For Breach of a Contract for the Benefit of a Third Person," and "Damages For Breach of a Construction Contract." But the SECOND RESTATEMENT contains no indication that one of its new provisions "replaced" the old alternative damages section, much as it did with many other provisions. Moreover, numerous decisions from around the country—many of which were decided after the SECOND RESTATEMENT was published—have adopted "cheaper election" rule.

U.S., 64 Fed. Cl. 336, 344 (2005) (quoting *Koby v. United States*, 53 Fed.Cl. 493, 501 (2002)). It is also "a recognition of the flexibility which had been bargained for by the party in breach" since the party "retained the possibility of performing one of two acceptable alternatives in order to discharge its contractual obligations to the other party." *Podlesnick v. Airborne Express, Inc.*, 627 F. Supp. 1113, 1116 (S.D. Ohio 1986); *cf. Hixon v. Hixon*, 26 Tenn. 33, 1846 WL 1474 (Tenn. 1846) (the measure of damages in an alternative contract where the alternative has not been selected should correspond to the alternative "in which it would have been most to the interest of the covenantor to have paid").

Here, if the ETFs truly were alternative performance provisions, then Clearwire would not be allowed to recover the ETF if the amount of the ETF was greater than the sum of the remaining monthly payments. Yet, the terms of the Service Agreement—and Clearwire's actual practice as alleged in the Complaint—make clear that Clearwire believes it has the right to collect the amount of the ETFs upon *any* termination or breach, regardless of whether that amount is greater than or less than the sum of the remaining monthly payments. In other words, Clearwire claims that the ETFs are "alternative performance" when they are challenged by a customer as unlawful penalties, but treats the ETFs as liquidated damages when Clearwire seeks to enforce them against a customer. The more honest of these two position is the latter: the ETFs *are* liquidated damages, and Clearwire *would* have the right to collect the full amount of the ETFs upon termination or breach, *unless* (as alleged in the Complaint) the ETFs are unlawful penalties.

D. In The Alternative, The Court Should Look Beyond The "Liquidated Damages" And "Alternative Performance" Labels, And Hold Simply That ETFs In Consumer Contracts Of Adhesion Are Subject To A "Penalties" Analysis Regardless Of Which Label Applies.

As the discussion above shows, the ETF at issue here is a liquidated damages clause and not an alternative performance provision. But, in addition to certifying the question discussed herein, the Ninth Circuit also made clear that this Court should make any ruling it believes necessary or appropriate to "dispose of this matter." *Minnick v. Clearwire US LLC*, 636 F.3d 534, 538 (9th Cir. 2011). The real issue for the Court, therefore, is whether the ETF imposes an impermissible penalty. In short the Court is confronted with the additional question of whether the classification between "liquidated damages" and "alternative performance" truly has any useful purpose or significance for consumer contracts of adhesion.

Indeed, more than 50 years ago, in *Chandler*, this Court recognized the overlap between the two provisions. *See Chandler*, 44 Wn.2d at 401, 267 P.2d 907 (noting that "a contract expressed to be in the alternative when examined in the light of the existing facts may prove to be (1) a contract contemplating a single definite performance with a penalty stated as an alternative, (2) a contract contemplating a single definite performance with a sum named as liquidated damages as an alternative, or (3) a contract by which either alternative may prove the more advantageous and is as open to the promisor as the other."). Later, in *Mau*, a federal district court also noted the overlap between the two provisions, and explained that the real issue—at least for consumer service agreements—is not how the contractual provisions were *labeled*, but how they *operated*. *See Mau,* 749 F. Supp.2d at 849-50.

Thus, the Court should follow its own advice from *Chandler*, where, quoting Williston, it stated that "[t]he fact that a promise is expressed in the alternative, however, may easily be given too much weight. As the question of liquidated damages or penalty is based on equitable principles, it cannot depend on the form of the transaction, but rather on its substance." *Chandler*, 44 Wn.2d at 401, 267 P.2d 907. Here, too, the question of penalty is based on equitable principles, and that question should not depend on the form of the transaction—or in this case, the label applied to the provision—but rather on its substance. As alleged in the Complaint, the ETF is drafted and operates as a penalty, in that it has no connection to CleaRwire's actual losses or the value of its avoided performance, it has the *in terrorem* effect of causing customers to retain CleaRwire's poor service just to avoid paying the ETF, and it discourages efficient breaches of contract in situations where the customer would be better served by cancelling the agreement and bringing his/her business to a different provider. It is these purposes and effects that are improper, and make the ETFs unlawful. Indeed, forcing consumers to remain parties to agreements where they receive poor or even no service due to ETFs hurts not only consumers, but the public at large, because companies such as Clearwire have no incentive to improve service or otherwise correct the deficiencies with the their products or services. The Court should therefore declare that, regardless of whether the ETFs are classified as liquidated damages or alternative performance, they are unenforceable if, as alleged in the Complaint, they operate as unlawful penalties.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court declare that the ETFs at issue here are liquated damages clauses and not alternative performance provisions. In the alternative, the Court should declare that, regardless of whether the ETFs are classified as a liquidated damages clause or an alternative performance provision, they are unenforceable if, as alleged in the Complaint, they operate as impermissible penalties. The Court should therefore recommend that the

Ninth Circuit reverse the district court's order granting Clearwire's motion to dismiss, and remand for further proceedings.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 16th day of May, 2011, a copy of this document was sent as stated below.

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SIGNED in Seattle, Washington this 16th day of May, 2011.

Dana Vizzare

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