

No. 85810-1

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,

Defendants/Appellees.

AMICUS CURIAE BRIEF OF CTIA – THE WIRELESS
ASSOCIATION® IN SUPPORT OF DEFENDANT/APPELLEE
CLEARWIRE US, LLC

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I. IDENTITY AND INTEREST OF AMICUS

CTIA is an international non-profit membership organization that has represented the wireless communications industry since 1984. Membership in the association includes wireless carriers and their suppliers, as well as providers and manufacturers of wireless data services and products. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate governmental agencies and the public about issues affecting the wireless industry.

CTIA strives to promote flexibility and choice for customers of wireless services providers. One mechanism that providers have utilized to broaden the range of options available for their subscribers is the inclusion of early termination fee (“ETF”) provisions in fixed-rate term contracts. ETF provisions are common in many different types of consumer contracts – not just those for wireless services – because they minimize risk for consumers who otherwise might be reluctant to enter into binding contracts for fixed terms. Term contracts containing ETFs are often more attractive to wireless consumers than monthly contracts without ETFs because they generally offer more choices, better prices for monthly services, and/or other benefits. ETFs also preserve flexibility by offering consumers a choice between continuing to make monthly payments for the duration of the contact term or terminating the contract before the term has expired at a reduced cost.

CTIA is concerned that the position advocated by Plaintiffs, if adopted, would have numerous unintended adverse consequences for consumers, business, and the courts. Many CTIA members do business with consumers pursuant to standardized contracts and terms of service that are governed by Washington law. Accordingly, CTIA has an interest in the development of Washington law in a manner that will preserve the availability of contracting alternatives for providers of communications services and their customers.

II. INTRODUCTION

The question certified to this Court is “Does Washington law treat the ETF at issue in this case as liquidated damages, or as an ‘alternative performance’ provision?” Certification Order at 4192. CTIA submits that ETFs are alternative performance provisions, not liquidated damages.

When provided with a choice between month-to-month plans and fixed-term contracts that include an ETF, a majority of consumers choose the latter. Term contracts that include an ETF are generally associated with increased flexibility and more benefits for consumers, including better rates, up-front discounts on devices and equipment, and a broader choice of features, plans and options.

As the Ninth Circuit recognized, “[t]he real question is whether the contract presents Clearwire’s subscribers with a ‘real option’ between paying monthly subscriber fees through the course of the contract, or terminating the contract and paying a one-time ETF.” *Id.* at 4191.

Because term contracts with an ETF component present subscribers with precisely that option, this Court should conclude that the ETF at issue is an alternative performance provision.

The facts of this case bear out the “real choice” presented by ETFs, given that each Plaintiff chose the option (continue to pay monthly service charges, or terminate and pay the ETF) that best suited his or her needs at the time the decision was made. The fact that different plaintiffs chose different options illustrates the reasonableness of the choice presented at the outset, *i.e.*, a contract structured to preserve plaintiffs’ future options, itself a benefit to consumers. The preservation of rational options, neither of which would subject the consumer to a claim for breach, defines an alternative performance contract. On these facts (where different plaintiffs chose different options), as a matter of law, it cannot be said that the relative value of the options at the time of contracting is “so disproportionate as to be unequal.” *Chandler v. Doran Co.*, 44 Wn.2d 396, 404, 267 P.2d 907, 912 (1954).

A ruling by this Court that wireless ETFs are liquidated damages, and not alternative performance contracts would have numerous adverse consequences for consumers, business, and the courts because it would limit consumer choice, subject service providers to *post-hoc* judgments regarding the amount of their ETFs, and embroil trial courts in judicial proceedings that more closely resemble ratemaking proceedings than contract disputes.

III. ARGUMENT

A. **Wireless Consumers Overwhelmingly Choose Term Contracts With an Early Termination Fee (ETF) Option over Other Alternatives Because of the Benefits ETFs Provide**

1. **Term Contracts with ETFs Are Prevalent in Consumer Contracts with Communications Service Providers**

As the Ninth Circuit recognized, early termination fees (ETFs) are a “common feature of service contracts between telecommunications companies and their subscribers.” Certification Order at 4192. ETFs are a component of the term contracts used by most if not all of the national wireless carriers.¹ Many providers of Internet phone service and subscription television services, including cable and satellite television service (*e.g.*, Dish Network and DirecTV), charge termination fees for early cancellation or termination.² Many providers of wireless broadband Internet service, like Clearwire, also include ETFs as part of the pricing structure for their term contracts.

ETFs are not unique to the communications and telecommunications industries. Providers of other types of services, including home burglar alarm services and fitness clubs, also commonly include ETFs in their contracts with customers. *See, e.g., Maddox v. ADT Sec. Servs.*, 2011 U.S. Dist LEXIS 1069, at *1 (N.D. Ill. Jan. 6, 2011)

¹ *See, e.g.*, Verizon Wireless Terms of Service, § 9.2, http://www.verizon.net/policies/vzcom/tos_popup.asp.

² *See, e.g.*, http://support.directv.com/app/answers/detail/a_id/940/~/early-cancellation-fee; *see also* <http://www.freedweiss.com/Dish-Network-Early-Termination-Fee.shtml> (attorney solicitation regarding class action challenging Dish Network’s early termination fee).

(enforcing three-year contract for security services that contained an early termination fee).³ Consumer contracts for auto leases, mortgages, and residential leases may also include fees for early termination.⁴

Wireless consumers in the United States are presented with a multitude of options and choices, and wireless carriers are continually modifying their business practices to accommodate the ever-changing tastes of American consumers. Features, options and pricing plans abound. Term contracts are the most popular option, but not all wireless plans require a term contract.⁵ The available plans include pre-paid options in which the customer pays up front and there is no ETF, post-paid plans in which the customer pays in arrears and has an ETF, and hybrid plans that are a combination of pre-paid and post-paid.

Wireless consumers can also choose from a wide variety of different contract options.⁶ There are simple contracts in which the

³ *See also, e.g.,* http://www.goldsgym.com/intranet/doclib/gym0690_root/docCancellation_Policies.pdf

⁴ *See, e.g.,* http://oregonstate.edu/uhs/halls_coops/contract_faq/ ; <http://housing.unl.edu/contracts/faq.shtml#a6> (university housing contracts).

⁵ When choosing their wireless service, customers may choose from a wide variety of providers and plans. Month-to-month alternatives without ETFs are readily available. For example, on Best Buy's website, the retailer splits its mobile broadband offerings into two groups: "plans" and "no contract" plans. *See* <http://www.bestbuy.com/site/Mobile-Cell-Phones/Mobile-Broadband/pcmcat184400050020.c?id=pcmcat184400050020>.

⁶ Internet service providers like Clearwire also offer their customers a wide variety of options when choosing a service plan. *See* Consumer Guide Excerpt, Clearwire Brings Flexible Price Plans to Broadband

customers pay for wireless service month-to-month using their own cell phone. There are term contracts in which the customers use their own cell phone, but commit to a fixed term contract and pay a monthly fee (often called the monthly recurring charge) for service and agree to pay an ETF in the event the customer chooses to terminate the contract early. There are also term contracts in which the device is part of the package, offering the phone for free or at a steeply discounted price.

Despite the prevalence of other alternatives, an overwhelming majority of U.S. wireless consumers elect traditional post-paid plans for a fixed term (usually one to two years) with an ETF component.⁷ The ETFs

Services, <http://www.muniwireless.com/2009/07/09/consumer-guide-excerpt-clearwire-brings-flexible-price-plans-to-broadband-services> (last visited Oct. 7, 2011) (praising “Clearwire’s long list of flexible options, which include choices of different levels of service speed as well as ‘bundling’ options that offer lower prices when consumers combine two services, such as a home service and a mobile service”); *see also id.* (noting that Clearwire had differentiated itself from some other service providers by offering the “the option to pay month-by-month, without any long-term contract or early termination fees”).

⁷ *See In re Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Fifteenth Report, ¶¶ 158, 166 (2011) [hereinafter “FCC Fifteenth Report”]. Although the number of pre-paid wireless subscribers as a percentage of all mobile wireless subscribers has increased in recent years, as of 2009, only 21 percent of U.S. mobile wireless subscribers were pre-paid customers. *See id.* ¶ 156. *See also* AT&T’s Response to FCC Inquiry Regarding ETFs (Feb. 23, 2010) (Consumers “overwhelmingly” elect postpaid plans with ETFs); Sprint Response to FCC Inquiry re ETFs at 1 (Feb. 23, 2010) (“[P]ostpaid term contracts with ETFs remain the *most popular choice* among Sprint subscribers because of their value proposition.”) (emphasis added). These materials are available at:

charged by many wireless carriers are, like Clearwire's,⁸ of the "declining" variety, meaning that the amount of the ETF decreases over time as the customer approaches the end of his or her contract term.

2. **Term Contracts with ETFs Provide Consumers with Choices, Flexibility, and Other Benefits**

ETFs maximize consumer choice. The ETF is a substitute contract performance, an alternative (and, usually, less expensive) way for a customer to fulfill his obligation under the contract. The ETF gives the customer the option to avoid all future monthly service payments on which the rate plan was originally based. ETFs also allow the customer to terminate the agreement, at any time during the service relationship, without breaching the contract. If the customer chooses to do so early in the contract term, then he or she benefits from the savings that result from avoiding the remaining payments for monthly service. If the customer chooses to terminate the agreement near the end of the term, the savings may not be as large, but neither is the ETF.⁹ Regardless, the decision of when to terminate the agreement is voluntary – the choice is always with the customer – and the calculation of the value of the decision (comparing

<http://www.fcc.gov/encyclopedia/early-termination-fees> (last visited Oct. 10, 2011).

⁸Certification Order at 4191 ("the ETF in most cases decreases by \$5 or \$10 in every month the customer remains subscribed").

⁹As illustrated in Appendix A to Clearwire's brief, in all but the last few months of the contract term, the ETF at issue here always presented the cheaper option. In addition, Clearwire notes that it "now structures its ETF so that it *always* presents a less costly option than a customer's remaining monthly payments." CW Brief at 20 n.4 (citing <http://www.clear.com/legal.etf>) (emphasis in original).

the benefits of termination with the value of the remaining monthly payments) is solely within the customer's discretion.

Term contracts with ETFs are often associated with reduced up-front costs and lower recurring monthly charges. Conversely, the monthly rates for month-to-month plans with no term commitment generally tend to be more expensive. Some term contracts with ETFs permit consumers to take advantage of discounted, or even waived, up-front costs such as equipment and/or installation costs.¹⁰ For example, a new HTC Inspire mobile phone retails at Best Buy for either \$79.99 with a new two-year contract, or \$599.99 with no contract.¹¹ Similarly, AT&T has a variety of options for customers seeking the popular iPhone, but the "no commitment" price is substantially higher than the price of the device when purchased in connection with a new two-year agreement.¹²

¹⁰ In many cases, the investment associated with a new customer is higher than the amount of the ETF. For example, John F. Murphy of DirecTV testified before the FCC that the satellite-TV service provider at that time waived roughly \$700 in upfront equipment costs [an antenna, receiver, and wiring] for customers who elected longer-term contracts, while customers who elected shorter-term agreements paid for that equipment out of pocket. John Eggerton, *Broadcasting & Cable*, "FCC Examines Early Termination Fees," June 12, 2008, *available at* <http://www.broadcastingcable.com/article/CA6569782.html>.

¹¹ <http://www.bestbuy.com/site/Mobile-Phones/Mobile-Phones-With-Plans/pcmcat209400050001.c?id=pcmcat209400050001>.

¹² See <http://www.wireless.att.com/learn/internet/iphone-faq.jsp> (\$199 for a 16 gigabyte iPhone 3GS with a 2-year contract versus a "no commitment" price of \$599).

Consumers who choose term contracts with ETFs may also benefit in the form of lower monthly prices¹³ and the ability to “lock in” a predictable monthly rate for a fixed period. The assurance that the customer will remain a customer for a fixed term enables service providers to offer the best possible monthly rate. Term plans that require a contract with an ETF also offer many more options to the subscriber, such as bigger “buckets” of minutes or lower per-minute usage charges, family plans, deeply discounted or even free handsets, free roaming, free long-distance, unlimited free calling to and from certain numbers, and additional services such as voice and data or voice, data, and video. Generally speaking, carriers can offer better deals and more options and flexibility to their post-paid customers because they have a commitment that those subscribers will remain on the network for the specified period of the contract.

Although ETFs generally do not fully compensate service providers for the loss that results when a customer terminates service without making all of the agreed payments, the ETFs do help mitigate risk, which is particularly important for new market entrants. The assured

¹³ For example, former FCC Commissioner Harold Furchtgott-Roth found that consumers typically pay less on a per-minute basis for wireless services with term contracts with ETFs than with plans without ETFs. *See* Federal Communications Commission, *In re CTIA Petition for Expedited Declaratory Ruling on Early Termination Fees*, Declaration of Harold W. Furchtgott-Roth, WT Docket No. 05-194, June 6, 2006, p.24; *see also id.* at 27 (“[O]n a per minute basis, rates for prepay plans tend to be substantially higher than rates for term contracts.”).

customer base and the predictable revenue stream associated with term contracts also allows carriers to manage and invest in their networks and improve the quality of their products and services, which ultimately inures to the benefit of consumers. In addition, ETFs allow carriers to reward customers for their loyalty and to share with those customers the savings associated with the commitment to a term contract.

3. Consumers Overwhelmingly Choose Fixed-Term Contracts with ETFs over Other Available Alternatives

Consumers have demonstrated by their behavior that they favor term contracts with an ETF over readily available alternatives without an ETF. Despite the prevalence of other options,¹⁴ including pre-paid and “no contract” plans, wireless consumers overwhelmingly choose term commitments with ETFs over other available alternatives.¹⁵ Most people choose long-term contracts with ETFs precisely because of the predictability, flexibility, and savings they offer. For these consumers, the choice is a reflection that term contracts with ETFs better served their economic interests than month-to-month or “no contract” offerings. Although “no commitment” options are increasingly widespread and appear to be growing in popularity, post-paid plans with ETFs continue to be the choice of most consumers.¹⁶

¹⁴ FCC Fifteenth Report ¶ 158 (noting that pre-paid service accounted for only 21.8 percent of mobile wireless subscribership in the U.S. in 2009). By their nature, prepaid service arrangements do not include ETFs.

¹⁵ *Id.* ¶ 166.

¹⁶ FCC Fifteenth Report ¶ 93 (referring to the “predominant postpaid handset subsidy model” in which “customers are required to sign a one- to

B. Clearwire’s ETF Is an Alternative Means of Performance

The defining characteristic of an alternative performance provision is the existence of a rational choice between alternatives at the time of contracting. 14 WILLISTON ON CONTRACTS § 42:10 (4TH ED. 2011) (“[I]f on a true interpretation, *it appears that it was intended to give 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 contract will be enforced according to its terms.*”) (emphasis added); *see also Chandler*, 44 Wn.2d at 401-02 (1954) (internal citations omitted); *Bellevue Sch. Dist. v. Bentley*, 38 Wn. App. 152, 155-56, 684 P.2d 793 (1984) (internal citations omitted). Where a contract for a specified period of time permits a party to terminate the agreement before its expiration in exchange for a lump-sum monetary payment, the payment is considered merely an alternative to performance, and not a penalty. *See Hutchinson v. AT&T Internet Servs.*, 2009 WL 1726344, at *1 (C.D. Cal. May 5, 2009), *aff’d sub. nom. Hutchinson v. Yahoo! Inc.*, 396 Fed. Appx. 331 (9th Cir. 2010) (holding Internet service provider’s ETF was alternative means of performance, not liquidated damages); *see also Schneider v. Verizon Internet Servs., Inc.*, 400 Fed. Appx. 136 (9th Cir. 2010) (same).

1. ETFs Provide Consumers with a “Real Option” to Terminate Their Contracts Before the End of the Term

ETFs permit consumers to contract for the option to decide, at some point in the future, whether they want to continue making payments

two-year service contract in exchange for purchasing a handset at a discount.”).

for services for the duration of the contract or whether they want to pay a lump sum to be free of their obligation to make recurring monthly payments for the full contract term. ETFs operate to the benefit of consumers who may not be able to predict their future preferences and needs when they are entering into a contract for services, but who still want to take advantage of the price-savings of a term contract.

The ETF therefore offers a “true option or alternative”: if a customer changes his or her mind and does not wish to continue using the service, the customer “retains the power to terminate” his or her agreement “through payment of a sum certain set forth in the contract.” *Blank v. Borden*, 11 Cal. 3d 963, 970, 524 P.2d 127, 131 (1974). The ETF “clearly reserve[s] to [the customer] the power to make a realistic and rational choice in the future with respect to the subject matter of the contract.” *Id.*

Washington courts have acknowledged that contracts permitting payment of a sum as an alternative means of performance can promote flexibility and choice for individuals who do not know what their future circumstances or preferences will be at the time of contracting. *See, e.g., Bentley*, 38 Wn. App. at 156 (observing that “[a]t the time of contracting the teacher may not know what circumstances will arise leading to a need or desire not to return to the former teaching position.”). A chief factor in resolving the question whether a “true option” exists is whether the promisor has free choice between performances:

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.

Bentley, 38 Wn. App. at 155-56 (emphasis added) (citing 5 CORBIN ON CONTRACTS, § 1213 (REV. ED. 1964) (CORBIN)); see also *Chandler*, 44 Wn. 2d at 402 (same).

2. Plaintiffs' Arguments to the Contrary Are Not Persuasive

Plaintiffs argue that Clearwire's ETF must be liquidated damages because an alternative performance provision "contemplates a performance that continues the relationship between the parties," and the ETF option, if elected, excuses Clearwire from any obligation to continue to provide service for the remainder of the contract term. Br. at 24-25. Plaintiffs are wrong. The right of a party to terminate an agreement by paying a sum certain in exchange for the release from future performance has long been recognized as an alternative method of performance in Washington as in other states. *Bentley*, 38 Wn. App. at 155-56 (citing *Corbin* for the proposition that an alternative contract may exist if "on payment of a named sum his contract shall be null and void, or . . . for a specified payment he may regain the legal privilege of not rendering the promised performance"); see also *Chandler*, 44 Wn. 2d at 402 (1954) (same); *Blank v. Borden*, 11 Cal. 3d 963 (1974); *Kuhlemeier v. Lack*, 50 Cal. App. 2d 802 (1942) (concluding provision allowing defendants to terminate residential apartment lease in exchange for security deposit was alternative method of performance); *Western Camps, Inc. v. Riverway*

Ranch Enters., 70 Cal. App. 3d 714, 727 (1974) (payment of \$60,000 to terminate sublease was alternative method of performance). In all of these cases, courts found lump sum payments to be alternative methods of performance, even though plaintiffs received no additional “benefit” beyond being released from future payments. A finding that Clearwire’s ETF constitutes an alternative method of performance is thus fully consistent with the case law of Washington and other jurisdictions.

Plaintiffs also argue that Clearwire’s ETF operates as a liquidated damages provision because Clearwire could conceivably impose an ETF on a customer for breaching the service agreement. (Br. at 29-30). Yet Plaintiffs’ attempt to draw an analogy to the claims at issue in the *Cellphone Fee Termination Cases*, 193 Cal. App. 4th 298, 122 Cal. Rptr. 3d 726 (2011) falls flat. Notably, in the *Cellphone Fee Termination Cases*, the California Court of Appeal had an opportunity to clearly disavow the outcome at the district court level in *Hutchinson*, but it did not. Instead, the Court viewed *Hutchinson* as distinguishable, stating that “[i]f these cases concerned a Sprint clause that stated customers could terminate term contracts early by paying a fee, then that fee might well be an alternative means of performance.” *Cellphone Fee Termination Cases*, 193 Cal. App. 4th at 329.

This case is more like *Hutchinson* than it is like the *Cellphone Fee Termination Cases*. None of the plaintiffs in this case alleges that Clearwire imposed an ETF on them for breaching the contract, and the only plaintiffs who paid an ETF did so because they chose to terminate

their contracts early. Although CTIA and its members believe that ETFs are valid and enforceable irrespective of which party terminates the agreement, the hypothetical question posed by Plaintiffs is simply not presented in this case. *See* Certification Order at 4192 (seeking the Court's views on the question whether the ETF "*at issue in this case*" constitutes alternative means of performance) (emphasis added). The question presented in this case is not whether the ETF *could have been imposed* for breach, but whether these plaintiffs had a real option between terminating the contract or fulfilling their contract obligations by continuing to make the remaining monthly payments. As explained in Clearwire's brief, all twelve plaintiffs were presented with this choice. (CW Brief at 8-9). Accordingly the Court should hold that Clearwire's ETF operates as an alternative means of performance.

C. A Broad Ruling Presumptively Invalidating ETFs Would Have Sweeping Negative Effects on Consumers, Industry, and the Courts

The rule of law advocated by Plaintiffs in this case would limit choice and flexibility in consumer contracts and would have other negative ramifications as discussed further below.

1. A Rule Rendering ETFs Presumptively Invalid Would Limit Consumer Choices, Thereby Harming Consumers

ETFs increase consumers' choices. As described above, post-paid options with ETFs offer a variety of options relating to handset costs, rate-per minute charges, and other wireless service options, and as a result, an overwhelming majority of wireless customers choose plans with term

commitments and ETFs over other available options. Because a rule eliminating ETFs by definition would reduce consumer choice (*i.e.*, by restricting consumers' ability to opt out of a term contract for a lower lump sum payment), a rule invalidating ETFs in consumer contracts would do more harm to consumers than good.

The test urged by Plaintiffs is flawed in other respects as well. First, it assumes – wrongly – that the marketplace for communications services is static. The reality is that service providers are changing their offerings all the time in response to consumer feedback, fluctuating costs, competitive pressure, and myriad other influences and factors. In the scenario posited by Plaintiffs, service providers could find themselves faced with a new class action each time they decided – for whatever reason – to change the amount or structure of the ETF.

This is not a workable business model. Communications service providers need predictability to be able to facilitate formulating economically viable offerings that are responsive to the ever-changing needs – and wants – of their customers. The factors that influence carriers' determinations in that regard, across a broad swath of the marketplace, are legion – and always in flux. In that context, service providers from widely varying industries would rarely be able to predict what ETFs would ultimately be found to meet the test for determining the validity of liquidated damages. As a result of this uncertainty, ETFs would disappear from the marketplace, even those ETFs, such as the one at issue here, that any rational consumer would want as an alternative to an

inflexible requirement to make recurring monthly payments for a fixed term. The risks and costs now offset by ETFs would then be shifted to consumers, in the form of higher monthly prices, fewer up-front discounts or equipment subsidies, or other ways. Preventing consumers from having the choice of a discounted phone or discounted service, or both, would eliminate popular (and lower-priced) options, and that outcome would disfavor consumers.

Plaintiffs suggest that the result urged by Clearwire would leave consumers who are unhappy with their service quality without a remedy, but the facts of this case do not bear out this concern. Consumers have legal remedies against service providers who make misrepresentations, breach contracts, or violate consumer protection statutes – issues that have nothing to do with the enforceability of ETFs.¹⁷

2. A Ruling that ETFs Are Liquidated Damages Could Have Unintended Negative Consequences, Including Encouraging Abuse of the Class Action Device

In addition to resulting in fewer choices for consumers, Plaintiffs' formulation would tax the resources of businesses and the courts without

¹⁷ The trial court in this case concluded that Plaintiffs had not stated a claim for fraud or nondisclosure, citing record evidence that Clearwire had disclosed that service quality "may vary depending on geography and modem placement." *Minnick v. Clearwire US, LLC*, 683 F. Supp. 2d 1179, 1188 (W.D. Wash. 2010). Similarly, the trial court dismissed Plaintiffs' claim for breach of contract due to their failure to comply with contractually prescribed procedures pertaining to complaints about service quality, performance, and interruption. Plaintiffs have appealed the dismissal of these claims to the Ninth Circuit, which has not yet addressed these issues, pending the outcome of this proceeding.

producing any net benefits for consumers. In an effort to downplay the significance of their challenge to ETFs, Plaintiffs argue that a ruling that Clearwire's ETF is not an alternative means of performance would simply require trial courts to evaluate the ETF under the framework applicable to "liquidated damages" under Washington law. But Plaintiffs appear blind to the implications of the rule of law they are advocating. Plaintiffs' formulation of the test under Washington law could not be applied without conducting exhaustive and fact-intensive examination of the carrier's ETF. See Pls. Reply at 21 (discussing how "expectation damages" should be calculated, including examination of the non-breaching party's avoided costs); see also *id.* at 23 (asserting that determining Clearwire's "expectation interest" "would require fact-finding with respect to Clearwire's 'avoidable costs' and whatever other factors might relate to its true economic damages"). Plaintiffs propose to conduct this examination on behalf of, "at a minimum, tens of thousands of individuals" who are "members of the putative class." ER 21 ¶ 4.3.

The *Cellphone Fee Termination Cases*, on which Plaintiffs rely heavily, provides an excellent real-life example of the difficulties that might be encountered by litigants and courts in applying Plaintiffs' suggested test – and the absence of any benefit to consumers. The Plaintiffs' case against Sprint has dragged on for more than 8 years. The parties engaged in exhaustive discovery and a lengthy trial on the merits. The pretrial proceedings and the (first) trial in the *Cellphone Fee Termination Cases* consumed copious resources, and the burdens

associated with Plaintiffs' pursuit of the class action against Sprint fell not only on the defendant, but also on the California court system. And the case is not over yet. As noted in the parties' briefs, the Court of Appeal affirmed in almost all respects but granted Plaintiffs' motion for a new trial on the issue of Sprint's damages for breach of contract. *Id.* at 330. Sprint filed a Petition for a Writ of Certiorari in the U.S. Supreme Court seeking review of the California court's ruling on the federal preemption issue. *See Sprint Spectrum, L.P. v. Ayyad, et al.*, No. 11-340 (U.S.), Petition for a Writ of Certiorari (Sept. 13, 2011).

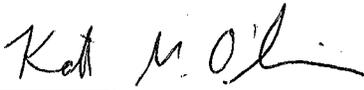
Perhaps most significant, despite the court's finding that Sprint's ETF was invalid under Section 1671 of California Civil Code, a jury concluded that *Sprint* suffered actual compensable damages of approximately \$225 million caused by plaintiffs' and class members early termination of their contracts. 193 Cal. App. 4th at 307, 122 Cal. Rptr. 3d at 734 (noting jury finding that the total amount of ETFs paid to Sprint was only approximately \$74 million). Plaintiffs note that a motion for a new trial was granted (Pls. Reply at 22), but only as to the amount of *Sprint's* damages. And the fact that the court will now have to repeat the damages phase all over again to determine Sprint's "avoided costs" (if any) does not assist Plaintiffs, for it still will leave the class owing damages to Sprint—probably in an amount exceeding the ETFs class members paid. Nothing suggests the *In re Cellphone Fee Termination Cases* class action against Sprint has benefited consumers.

IV. CONCLUSION

For the foregoing reasons, amicus respectfully requests that this Court 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 11th day of October, 2011.

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DECLARATION OF SERVICE

On October 11, 2011, I deposited in the U.S. mail a true and accurate copy of: AMICUS CURIAE BRIEF OF CTIA – THE WIRELESS ASSOCIATION® IN SUPPORT OF DEFENDANT/APPELLEE CLEARWIRE US, LLC in Supreme Court Case No. 85810-1 to the following:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 11, 2011, at Seattle, Washington.



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