

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION**

**MARCO ISLAND CABLE, INC., a
Florida corporation,**

Plaintiff

**COMCAST CABLEVISION OF THE
SOUTH, INC., a Colorado corporation,**

Defendants.

NO. 2:04-cv-26-FtM-29-DNF

**CORRECTED PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTIONS FOR A NEW TRIAL, FOR JUDGMENT
AS A MATTER OF LAW ON COUNT I, AND FOR REMITTITUR**

Plaintiff Marco Island Cable, Inc. (MIC) opposes the motions of Defendant Comcast of the South, Inc. (Comcast) for a new trial, for judgment as a matter of law on Count I, and for remittitur to reduce the jury's verdict in MIC's favor from \$3,268,392 to \$800,000. Comcast's lengthy motions and memoranda make dozens of points, some repeated many times in slightly different forms. Comcast's motions also seek to resurrect various arguments that the Court has already decided against Comcast – sometimes repeatedly. For the convenience of the Court, MIC will try to respond here, as briefly as possible, to the main points in all three of Comcast's motions.

At bottom, Comcast appears to be making three main arguments in its motions: (1) that the jury could not properly have found that Comcast violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA); (2) that the Court made numerous errors that prejudiced the jury against Comcast; and (3) that the jury could not properly have awarded MIC damages of \$3,268,392. None of these claims has merit.

OVERVIEW OF THE PROCEDURAL HISTORY AND TRIAL OF THIS CASE

MIC brought suit against Comcast in December 2003, primarily to stop it from engaging in conduct that MIC considered unfair, deceptive, and anticompetitive. These practices, MIC alleged, were threatening MIC's viability on Marco Island and were preventing it from expanding to the mainland of Collier County. In Count I of its Complaint, MIC alleged that Comcast's practices violated the FDUTPA. In Count II, MIC alleged that Comcast's practices violated Fla. Stat. § 718.1232. In Count III, MIC alleged that Comcast's actions violated the Florida Antitrust Act. MIC sought damages, injunctive and declaratory relief, costs, including attorneys fees, and other appropriate relief.

Before trial, the Court dismissed MIC's claims relating to its expansion to the mainland of Collier County, MIC's antitrust claims, and MIC's claims that Comcast was using litigation or threats of litigation to intimidate MIC's existing or potential customers.¹ In an order issued on July 3, 2006 (Doc. #365), the Court summarized the matters left to be tried as follows (with MIC's emphasis added):

Not all of the FDUPTA claims contained in Count I have been the subject of summary judgment. The Complaint alleges that it was a violation of the FDUPTA for defendant to compensate developers for entering into the exclusive contracts. (Doc. #1, ¶¶ 22, 26). *These "door fees" are independent from the issue of exclusivity in and of itself, and is properly the subject of Count I to the extent it relates to conduct on Marco Island.* Additionally, there were letters relating to ownership of internal wiring which did not contain reference to litigation, and therefore would not be immune under (the *Noerr-Pennington* doctrine) but which might constitute a violation of FDUPTA. (E.g., Doc. #S-6, Exhibits J, L). *Ownership, removal, and threats of removal of inside wiring in MDUs on Marco Island (other than when coupled with a threatened or actual lawsuit) may be a proper basis for the FDUPTA claim in Count I.*

¹ MIC does not agree with the Court's decisions on these issues.

The trial began on July 11 and ended July 21, 2006. With the consent of both parties, the Court presented the jury a verdict form posing two questions. The two questions and the jury's answers were as follows:

1. Do you find that Plaintiff Marco Island Cable, Inc. has established by a preponderance of the evidence that Defendant Comcast of the South, Inc. violate the Florida Deceptive and Unfair Trade Practices Act? Answer: Yes.
2. What amount do you find will fairly and adequately compensate Marco Island Cable, Inc. for the actual damages directly caused by the conduct of Comcast of the South, Inc.? Answer: \$3,268,392.00.

During the trial, both MIC and Comcast presented evidence that MIC's business grew dramatically from its inception in 1993 until Comcast came into the market in 2001. MIC also presented substantial evidence, which Comcast did not attempt to rebut, that MIC's success was attributable to its significantly lower rates for comparable or better products than Comcast's predecessors offered, to MIC's superior customer service, to its good reputation throughout the community, and to the preference of Marco Islanders to deal with local businesses. (Gaston, Tr. 175-76; Adamski, Tr. 412-13; Folk, Tr. 1158-60, 1165-68) As the undisputed evidence also showed, another important reason for MIC's success was that a court decision prohibited Comcast's predecessors – and Comcast, as the succeeding party – from attempting to use control of internal wiring as a weapon against MIC. (Folk, Tr. 1291-92)

Shortly after entering the market, Comcast determined that, to curtail MIC's growth, Comcast had to deny MIC access to inside wiring in multiple dwelling units (MDUs).² (Folk,

² There are generally three kinds of wiring at MDUs: (1) "distribution wiring," which brings a cable operator's signals from outside the MDU to lock boxes in one or more meter rooms or closets; (2) "home run wiring," which extends from the lock box to a "demarcation point" at or about twelve inches outside of where the cable wire enters the subscriber's dwelling unit, or, where the wire is physically inaccessible at such point, the closest practicable point that does not require access to the individual subscriber's dwelling unit; and (3) "home wiring," which runs from the demarcation point into the subscriber's dwelling unit. "Home run wiring" and "home wiring" are collectively referred to as "inside wiring."

Tr. 1166-70) As a part of this strategy, Comcast decided early on to “send a message” to developers, MDU owners and managers, and others, that Comcast was going to play hardball when it came to allowing competitors to obtain access to inside wiring in MDUs. (Folk, Tr. 1173-74) Comcast knew that its message would spread quickly throughout Marco Island because the real estate community on the island was a small and tightly-knit group, which regularly exchanged information about such matters through organizations such as the Condominium Association Managers of Marco Island. (Folk, Tr. 1174-75; Delgado, Tr. 628-29)

For a small company like MIC, litigating all of the facts surrounding Comcast’s conduct at each of the approximately 50 properties at issue was a practical impossibility. Doing so would have been prohibitively burdensome, time-consuming, and expensive. As a result, MIC did the only thing that it could do – provide the jury several representative examples of Comcast’s business practices on Marco Island. Comcast was hardly in a position to object, as MIC’s examples merely reflected the image that Comcast itself wanted to project to the real estate community on Marco Island. Time and space permit us to discuss only two such examples here.

Comcast’s first major opportunity to take a stand on Marco Island occurred when an MDU known as the Charter Club decided in May 2002 that it would not renew Comcast’s cable service agreement and would instead move its business to MIC. To bully the Charter Club into reversing this decision – and to show the rest of the real estate community on Marco Island what lay in store for MDUs that sought to buck Comcast – Comcast took the following steps:

First, on May 31, 2002, Comcast wrote a letter threatening to remove “its” home run wiring if the Charter Club canceled its bulk cable service agreement. Plaintiff’s Exhibit (“PX”) 34. As the supposed source of its right to remove the wiring, Comcast quoted a passage from an agreement between the Charter Club and one of Comcast’s predecessors. In doing so, however, Comcast studiously omitted a key phrase that undercut its claim. At trial, Terese Delgado,

Comcast's regional manager for commercial accounts, whose responsibilities included advising district offices on compliance with Comcast's ethical standards, acknowledged that omitting material language from a letter such as this would be unethical, unfair, and deceptive. (Delgado, Tr. 681-682). Later in the trial, Barbara Hagen, the Comcast executive who signed the letter, admitted under intense cross examination that the quoted passage could not be understood without reference to the omitted language. (Hagen, Tr. 1688-89) Her only explanation for the omission was that Comcast may have wanted to keep the letter on a single page. (*Id.*, Tr. 1651) As the jury could plainly see, however, there was more than enough blank space available on the page for Comcast to have included the omitted language. (*Id.*, Tr. 1687-88) Thus, the jury could easily have found that Comcast's omission was unfair, deceptive, unethical, and contrary to the FDUTPA.

Second, in the same letter, Comcast claimed that residents of the Charter Club who elected to terminate Comcast's service would have to pay Comcast \$0.65 a foot to purchase the home wiring in their units. The source of this obligation, Comcast insisted in the letter, was the Federal Communications Commission's inside wiring rules, 47 C.F.R. § 801 et. seq. As Ms. Delgado conceded at trial, however, Comcast knew that the FCC's rules did NOT apply in this situation; Comcast just invoked the rules "as a courtesy to this property." (Delgado, Tr. 639-40).

Furthermore, under the FCC's rules, "the cost which may be charged by the cable operator is the replacement cost per foot of the wire, nothing else." Jury Instructions (Doc. #415 at 10.)³ As Comcast's own wiring expert testified at trial, the replacement cost of the wire was \$0.07 a foot, not \$0.65 a foot. (Vaspasiano, Tr. 1815).

³ In its order limiting a cable operator's recovery to "only the value of the wire itself on a per foot replacement cost basis," the FCC explained that "from the point of view of the subscriber, ... the cost of the internal wiring has already been paid, in whole or in part, through the initial installation charge." *In the Matter of Implementation of the Cable*

Again, the jury could readily have found that Comcast violated the FDUTPA, first by knowingly invoking inapplicable FCC rules to give its actions a false aura of authoritativeness, and then again by pretending that the rules allowed Comcast to demand payment for home wiring at rates nearly 10 times the rates the FCC rules permitted it to charge. The jury could also have reasonably inferred that Comcast demanded such a high price, not to profit from selling the wiring, but to discourage residents from buying it so as to make it available to MIC.

Third, on July 3, 2002, without any prior notice, Comcast sent a crew to the Charter Club, ostensibly for the purpose of removing the home run wiring. Comcast did this even though it knew that it could not carry out the removal without having previously gotten the consent of the residents. Indeed, in one of the most memorable moments of the trial, Comcast's expert on wiring testified that "if you started to try pulling on the home run wiring without permission of the homeowner, it would be like the Three Stooges pulling on a wire and the TVs and everything else in the room would come toward the jack." (Vaspasiano, Tr. 1813) The only plausible explanation for Comcast's action is that its real intent was to intimidate the residents at the Charter Club into abandoning their decision to do business with MIC – and to send the message to other MDUs on Marco Island that Comcast might well do the same to them if they chose to do business with MIC. Yet again, the jury could easily have found that Comcast's deceptive and intimidating behavior violated the FDUTPA.

Fourth, on July 29, 2002, Comcast wrote another letter to the Charter Club. PX 36. This time, Comcast offered to sell the home run wiring for \$300 per unit and the home wiring for \$195 per unit, for a total of \$495 per unit. Again, Comcast invoked the FCC rules to give its actions the pretense of authenticity, and once again, it grossly overstated the charges that the FCC rules allowed it to impose. To appreciate the absurdity of Comcast's demand, one need

Television Consumer Protection and Competition Act of 1992 Cable Home Wiring, 8 FCC Rcd 1435; 1993 FCC LEXIS 553, ¶ 18 (1993).

only do a simple calculation – at the FCC rate of \$0.07 cents a foot, the \$195 that Comcast demanded would have purchased 2786 feet of cable – more than nine football fields in length – *for each and every unit* in the Charter Club. Furthermore, as both MIC’s and Comcast’s wiring experts testified, the longest run of cable to and within any unit at the Charter Club would have been about 250 feet, including a maximum of about 50 within the units. (Hilliard, Tr. 1071; Vaspasiano, Tr. 1815) If the whole 250 feet were classified as home wiring, the most that Comcast could have charged was \$17.50. If only the 50 feet within each unit were classified as home wiring, then Comcast could have charged no more than \$3.50 for it. Either way, Comcast’s charge of \$195 per unit was vastly overstated. Here, too, the jury could justifiably have found Comcast’s actions illegal under the FDUTPA.

The second example involved three related MDUs – one of which was on the mainland of Collier County – Hammock Bay – and two of which were on Marco Island – the Belize and the Veracruz.

On August 1, 2003, Nikki Mello, a Comcast account executive, wrote an email to her boss, Steven Kovacheff, head of Comcast’s Naples office. PX 215. In the email Ms. Mello stated,

Here is the Hammock Bay Agreement modified at your request to state that Comcast has the ‘exclusive right’ to use the Owner’s internal wiring. You’ll notice, redlined, that I had to remove some other language that again referred to our non-exclusive right. Once you get the okays from Comcast if you want to call Stephen [Pierce, attorney for the developer of the three properties] together to see if he is okay with this change for Veracruz and Belize we can do it together. Thanx.

Mr. Kovacheff quickly sought concurrence from Comcast’s regional office. *Id.* In an email to Ms. Delgado, which is quoted in full below with emphasis added, Mr. Kovacheff flatly admitted that the intent of the new language was to *thwart competition from MIC*:

Terese, Here is the Hammock Bay agreement with a couple of changes. ***If we include language that gives us the exclusive right to utilize the system during***

the term of the agreement then I believe that we are safe from Marco Island Cable. So we don't have to start from scratch we could use this template for the two Marco Island properties. We can add this to our Monday stuff, we are meeting at 9 at a team and 10 is our conference call.

Ms. Delgado's responded promptly and emphatically: "That sounds like a plan." *Id.*

On August 19, 2003, Ms. Mello sent another email to Mr. Kovacheff and Ms. Delgado, advising them that she had just received signed copies of the Veracruz and Belize agreements. PX 212. Given the importance to Comcast of the exclusive-right-to-use provisions in these agreements, Ms. Mello was thrilled that the developer's attorneys had not proposed any changes: "What's really good is that they either did not catch or did not care that we asked to be granted the right to use their internal wiring for the term of the 20-year non-exclusive agreement!" *Id.*

Shortly after receiving Ms. Mello's email, Ms. Delgado responded with delight at the "Great news." With the exclusive right to use the inside wiring at Veracruz and Belize now in hand, Ms. Delgado observed, "Let's scratch these two off our list of "At Risk" projects we were working on." Still, Ms. Delgado warned that Ms. Mello should act quickly to prevent MIC from obtaining access to the internal wiring. "If we inadvertently let (MIC's Bill Gaston) to slip in and start using the wiring it will be very difficult to get him out without a major court battle." *Id.*

In her response, Ms. Mello assured Ms. Delgado that she would indeed act quickly. Ms. Mello then added,

I think as long as its fair (Marco fair) we won't have to go lower than what we want to for 2004 (unlike some of the win backs we're trying to get) because we have a brand new contract to show them that gives us exclusive wiring usage. Thanx.

On its face, this statement plainly reflects Ms. Mello's understanding that Comcast's new exclusive agreements to use inside wiring would enable Comcast to avoid having to lower its prices to meet competition in 2004.

Yet again, the jury could reasonably have viewed this evidence as proof of unfair and deceptive conduct by Comcast, undertaken in violation of the FDUTPA, with express intent to choke off competition from MIC.

At the conclusion of the trial, with these and many other examples of Comcast's misconduct before it, and with both percipient and expert testimony about the damages that Comcast had caused MIC, the jury took less than two hours of deliberation to reach its verdict – that Comcast violated the FDUTPA and caused MIC actual damages of \$3,268,392.

Following the trial, the parties briefed MIC's request in Count II of its Complaint for a declaratory judgment that Comcast's exclusive arrangements violate Fla. Stat. § 718.1232. On March 8, 2007, the Court ruled that MIC had no standing under Section 718.1232 to challenge Comcast's exclusive arrangements and that, in any event, most of MIC's contentions lacked merit (Doc. #433).

DISCUSSION

For the reasons set forth below, the Court acted well within its authority and discretion in upholding the jury verdict in *toto* in its final judgment entered on March 9, 2007 (Doc. #443). The Court should therefore reject Comcast's motions.

I. THERE IS NO MERIT TO COMCAST'S CLAIM THAT THE JURY HAD NO BASIS FOR FINDING THAT THE COMCAST VIOLATED THE FDUTPA

Comcast's first attack is on the legal underpinnings for the jury's determination that Comcast violated the FDUTPA. In its Motion for Judgment, Comcast contends that MIC's FDUTPA claim must fail at the threshold because MIC has not tied the objectionable conduct about which it complains to a violation of a statute or a FTC pronouncement. Motion for Judgment at 4-5. Comcast also claims that MIC's claims under the FDUTPA are deficient because Comcast's alleged misconduct is expressly allowed by federal law and is thus exempt from the FDUTPA. *Id.* at 7-8, citing Fla. Stat. § 201.212(1). Neither claim is correct.