

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION**

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

**Plaintiff,**

v.

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

**Defendant.**

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

**PLAINTIFF'S CLOSING ARGUMENT ON COUNT II**

In Count II of its Complaint, Plaintiff Marco Island Cable ("MIC") sought a declaratory judgment that Comcast of the South, Inc. ("Comcast") has violated Fla. Stats. § 542.18 and § 718.1232 by entering into exclusive contracts that prevent developers, associations, or residents of multiple dwelling units ("MDUs") from choosing MIC as a cable provider. Given the Court's dismissal of MIC's antitrust claims under Section 542.18, MIC will focus here on Section 718.1232 and will show that the exclusive contracts discussed below do indeed violate the statute. The Court should therefore grant MIC the declaratory judgment that it seeks; permanently enjoin Comcast from entering into or enforcing the offending provisions; order Comcast to provide prompt written notice to all developers, associations, and residents who may be affected by such provisions; and file a report documenting Comcast's compliance with the notice requirement.<sup>1</sup>

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<sup>1</sup> MIC continues to believe that the Court's prior rulings against MIC were incorrect. Nothing contained in, or omitted from, this memorandum should be deemed as a waiver of MIC's right to appeal these rulings.

### **Background**

In its Opinion and Order of July 3, 2006 (Doc. # 365) (“Summary Judgment Order”), the Court ruled against MIC on a number of issues but found that MIC had a right to a jury trial under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), Fla. Stat. § 501.201 *et seq.*, with regard to Comcast’s practices involving “door fees,” ownership of wiring, removal of wiring, and threats of removal of wiring. Summary Judgment Order at 23. The Court also ruled that MIC had raised genuine issues of material fact as to whether Comcast’s exclusive contracts violate Section 718.1232. *Id.* at 24.

At the conclusion of the trial, the jury found that Comcast had violated the FDUTPA, causing MIC money damages of \$3,267,392. The Court did not ask the jury to render a verdict or provide advisory findings concerning Count II. Rather, in anticipation of ruling on Count II itself, the Court gave the parties fifteen days to file written closing arguments as that count.

In this memorandum, MIC focuses on five kinds of exclusive arrangements that violate Section 718.1232 -- (1) provisions that expressly give Comcast the exclusive right to provide cable service at a condominium; (2) provisions that require all residents to pay Comcast for basic cable service, whether or not they want service from Comcast; (3) provisions that give Comcast exclusive use of, or access to, the inside wiring necessary to provide cable service; (4) provisions that give Comcast the right to leave “its” facilities on the premises for up to six months after its right to provide cable service has ended; and (5) provisions that give Comcast’s an exclusive “right of entry” extending beyond the termination of Comcast’s right to provide service.

Comcast does not – and cannot -- deny that it routinely includes such provisions in its agreements. Instead, Comcast claims that MIC lacks standing to challenge these provisions and that the provisions do not, in fact, prevent MIC from providing cable service to anyone. MIC

will show that Section 718.1232 does give MIC standing and that the record amply demonstrates the unlawful and anticompetitive effects of these provisions.

## ARGUMENT

### I. SECTION 718.1232 PROHIBITS COMCAST FROM ENTERING INTO OR ENFORCING EXCLUSIVE ARRANGEMENTS THAT EXPLICITLY OR EFFECTIVELY PRECLUDE RESIDENTS IN CONDOMINIUMS FROM CHOOSING MIC AS THEIR CABLE SERVICE PROVIDER

#### A. The Statute

Fla. Stat. § 718.1232 reads in full as follows:

No resident of any condominium dwelling unit, whether tenant or owner, shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.

On its face, Section 718.1232 not only gives residents of condominiums a statutory right to choose among available franchised or licensed cable service providers, but it also gives franchised or licensed providers an enforceable right to serve any resident who wants its service. Furthermore, Section 718.1232 does not merely proscribe explicit denials of access, but it broadly covers arrangements that have the practical effect of preventing residents and qualified cable service providers from doing business with each other.

Our research has disclosed only two Florida cases interpreting Section 718.1232. First, in *Dynamic Cablevision of Florida, Inc. v. Biltmore II Condominium Ass'n*, 498 So.2d 632 (Fla. 3<sup>rd</sup> DCA 1986), a cable operator and two condominium unit owners challenged a condominium association's refusal to allow installation of cable wiring on the building's exterior walls. According to the plaintiffs, such refusal violated Section 718.1232 because requiring unit owners

to pay the significantly higher cost of internal wiring would effectively raise their rates for cable service to levels higher than single-family homes in the surrounding area would normally pay. The trial court ruled in the association's favor, finding that it had acted reasonably in rejecting external wiring as "unsightly."

On appeal, the Third Circuit affirmed, holding that the trial court "appropriately ruled that the Association's decision to reject exterior installation because it was unsightly was based on reasonable grounds," 498 So.2d at 634, citing several Florida cases. The Third Circuit also found that no violation of Section 718.1232 had occurred, as "the Association approved a wiring plan for interior installation whereby all residents of [the condominium] would have access to [the plaintiff cable company's] services." *Id.* at 635.

*Dynamic Cablevision* apparently did not involve a condominium resident's right to select among competing cable service providers. Rather, the case appears to have been nothing more than a dispute about which method of wiring the single cable operator involved was to employ. As such, the case turned on a portion of Section 718.1232 that is not relevant here – the clause that prohibits conditioning a resident's receipt of cable service on the payment of charges greater than the charges that residents in single-family homes in the area would normally pay.

*Dynamic Cablevision* does, however, confirm that internal wiring is considerably more expensive than external wiring, that external wiring can be "unsightly," and that associations "reasonably" can – and do – reject external wiring for this reason. In these respects, *Dynamic Cablevision* reinforces MIC's position and evidence on these matters and undermines Comcast's position that Section 718.1232 requires MIC to post-wire MDUs, either internally or externally.

The second Florida case interpreting Section 718.1242 is highly relevant here and is directly on point on the key issue posed by Count II of the Complaint. In *Comcast Cablevision*

*of West Florida v. Cozumel Condominium Ass'n*, Case No. 01-3598-CA (Collier Cty. 20<sup>th</sup> Cir., 2001), Comcast sued the Association for allegedly terminating Comcast's cable service prematurely and for permitting MIC to use the internal wiring in the condominium to provide competitive cable service. The Association moved to dismiss, arguing that Comcast's exclusive contract violated Section 718.1232. After thorough briefing and oral argument, the court ruled that "the exclusivity provision in the contract attached to the first amended complaint violates Section 718.1232, Florida Statutes." Order Dismissing Plaintiff's Complaint, December 12, 2002 (Attachment A, filed previously in this case as Doc. # 257-4). Comcast did not appeal this decision but entered into a settlement, leaving the court's ruling on the books.

Outside of Florida, as MIC has previously suggested to the Court, Comcast's affiliate in New Jersey has recently provided a useful analysis of how exclusive agreements of the kind that Comcast routinely employs on Marco Island should be viewed under a statute that is strikingly similar to Section 718.1232.<sup>2</sup> In that case, Comcast claimed to be the victim, rather than the perpetrator, of the adverse effects of an exclusive 100% take-or-pay bulk service agreement. Relying heavily on *Princeton Cablevision, Inc. v. Union Valley Corp.*, 195 N.J. Super. 257 (Ch.

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<sup>2</sup> N.J. Stat. Ann. § 48:5A-49a provides that "No owner of any dwelling or his agent shall forbid or prevent any tenant of such dwelling from receiving cable television service, nor demand or accept payment in any form as a condition of permitting the installation of such service in the dwelling or portion thereof occupied by such tenant as his place of residence, nor shall discriminate in rental charges or otherwise against any such tenant receiving cable television service; provided, however, that such owner or his agent may require that the installation of cable television facilities conforms to all reasonable conditions necessary to protect the safety, functioning, appearance and value of the premises and the convenience, safety and well-being of other tenants; and further provided, that a cable television company installing any such facilities for the benefit of a tenant in any dwelling shall agree to indemnify the owner thereof for any damage caused by the installation, operation or removal of such facilities and for any liability which may arise out of such installation, operation or removal."

Div. 1983), Comcast argued that the agreement was unlawful because it “effectively forces all [residents] to take service from [Comcast’s competitor].”<sup>3</sup> Comcast then continued:

The [100 percent exclusive take-or-pay bulk service agreement] violates the [New Jersey] Cable Act’s clear injunction against barring access to a franchised cable operator, as the mandatory “fee” is the functional equivalent of a prohibition on the use of Comcast’s services. *See Princeton Cablevision, supra*, 195 N.J. Super. at 273.

As the court in *Princeton Cablevision* found,

Although it is possible for a Concordia resident to pay for two competing cable services, it is unreasonable to suppose that any but the strongest willed of them will do so. *The monthly charge levied by the homeowner’s association is the functional equivalent of a prohibition on the use of plaintiff’s services.*<sup>4</sup>

Notably, contrary to its position here, Comcast did not suggest that only a resident has standing to sue under a law such as N.J. Stat. Ann. § 48:5A-49a. Rather, in seeking to enforce the New Jersey statute itself, Comcast took advantage of *Princeton Cablevision*’s forceful finding that the statute gives cable operators, as well as residents, a right to sue to protect their own interests under the statute:

There should be no question of the standing of plaintiff to seek a declaration as to the validity of such a contract. It certainly has an interest in the matter. If the contract is valid, it makes it virtually impossible to compete with a cable system that residents have to pay for whether they use it or not. If it is invalid, there is no one but plaintiff to seek a judicial declaration to that effect.

*Princeton Cablevision*, 195 N.J. Super. at 273, 478 A.2d at 1242. The same should apply here.<sup>5</sup>

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<sup>3</sup> Memorandum of Law in Support of Plaintiff’s Application By Way of an Order to Show Cause With Temporary and Preliminary Injunctive Relief, *Comcast of Central New Jersey v. The Ponds Condominium Ass’n*, at 2, filed December 24, 2004 (Attachment B).

<sup>4</sup> *Id.* at 8-9 (emphasis in original).

<sup>5</sup> The New Jersey court ultimately denied Comcast’s motion for a preliminary injunction, without explaining its decision. (Attachment C). There may well have been facts in the New Jersey case that distinguish it from this one, but that is immaterial for present purposes. Here, MIC relies here only on the reasoning in Comcast’s memorandum of law, as applied to the evidence of record in this case.

Lacking support for its interpretation of Section 718.1232 under the case law of Florida or elsewhere, Comcast may urge the Court to defer to a Federal Communications Commission (“FCC”) interpretation of Section 718.1232 that supposedly supports Comcast’s position. For example, in its Motion in Limine No. 5 (Doc. # 318), Comcast noted that the FCC had included Section 718.1232 in a list of state “mandatory access laws” and had stated that such laws “provide franchised cable operators with a legal right to install and maintain cable wiring in MDU buildings, even over MDU owners’ objections,” Comcast’s Motion at 2, quoting *In re Telecommunications Servs. Inside Wiring*, 18 F.C.C.R. 1342, 18 FCC Rcd. 1342 (Jan. 29, 2003) (“*FCC Inside Wiring Order of 2003*”), at ¶ 35 n.82 (citing Fla. Stat. § 718.1232).

Comcast’s discussion of the FCC’s inside wiring order was incomplete, inaccurate, and misleading. For one thing, contrary to Comcast’s suggestion, the FCC did not purport to offer a studied interpretation of Section 718.1232. To the contrary, the FCC referred to state access statutes only in broad general terms, expressly disavowed any intention of interpreting particular state statutes, and pointedly stated that it was leaving to the appropriate state courts the task of making definitive interpretations of their own statutes. In fact, the FCC reaffirmed its long-standing presumption that state laws do *not* give an incumbent cable operator an enforceable right to remain on the premises against an MDU owner’s will unless and until a state court finds otherwise. Specifically, in declining to reconsider its prior Report and Order on this issue, the FCC stated:

The Commission made no finding or determination in the Report and Order regarding which particular state statutes foreclose application of our home run wiring rules. Instead, the Commission adopted a presumption that the home run wiring disposition procedures will apply in each state "unless and until the incumbent obtains a court ruling or an injunction enjoining its displacement."

*FCC Inside Wiring Order of 2003* at ¶ 40.

In any event, even if Section 718.1232 could be read to give Comcast the right to remain in an MDU against the will of an MDU owner if a resident wants to receive service from Comcast, Section 718.1232 clearly cannot be read to allow Comcast to leave its facilities in place to impede a resident from obtaining service from a competing provider. Reading Section 718.1232 that way would completely undermine the pro-competitive purposes of the statute, by enabling incumbents to thwart residents and competitive cable service providers from choosing to do business with each other.<sup>6</sup>

Finally, Comcast may also contend, as it did in its Motion in Limine No. 5, that MIC agreed in the Joint Pretrial Statement that the FCC's home wiring rules do not prohibit Comcast's practices. Comcast's Motion in Limine No. 5 at 3. To be sure, MIC agreed with the abstract statement that the FCC's rules do not apply where a cable operator has a legally enforceable right to remain on the premises. The question here, however, is a different one – i.e., does Section 718.1232 give Comcast a right to remain on the premises against the will of *both* MDU owners *and* residents that want to obtain cable service from a qualified competitive service provider? The answer to that question is plainly “No,” and MIC has never agreed to anything to the contrary.

#### **B. Application of Section 718.1232 to Comcast's Exclusive Contracts**

As indicated, Comcast routinely includes in its contracts five kinds of exclusivity provisions that MIC believes to be unlawful under Section 718.1232. In this section, MIC

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<sup>6</sup> The FCC has itself observed that “The cable commenters are troubled by the Commission's notation in footnote 100 of the Inside Wiring Further Notice that where a mandatory access statute is triggered by a tenant requesting service, the incumbent provider may not have the right to maintain its facilities on the premises if no tenant is currently requesting service.” *In the Matter of Telecommunications Services Inside Wiring...* 13 FCC Rcd. 3659, 1997 WL 644031, ¶ 71 (rel. October 17, 1997). To our knowledge, the FCC has never receded from this position.

describes these five types of provisions, provides examples from among the contracts admitted into the record at trial, and responds to Comcast's probable arguments in support of them.<sup>7</sup>

**1. Provisions that explicitly give Comcast the exclusive right to provide cable service at an MDU**

As the Court recognized in the Summary Judgment Order, a contract that explicitly gives Comcast an exclusive right to provide cable service at an MDU would violate Section 718.1232.

As an example of such a provision, the Court quoted from a letter attached to MIC's complaint:

[A]t least one letter from Comcast asserted a "right to service the property exclusively on an individual basis until 2010 should [the MDU] decide not to continue being billed on a bulk basis." (Doc. #S-6, Exhibit J). Thus, there are material issues of disputed facts which preclude summary judgment. The motion will therefore be denied as to Count II.

Summary Judgment Order at 24.

The following are examples of provisions that explicitly give Comcast the exclusive right to provide cable service:

WHEREAS, the Company and Owner desire to enter into a Bulk Bill Addendum pursuant to which *the Company will provide broadband communications services to the Premises, including, but not limited to, cable television service, on an exclusive basis*; and

WHEREAS, *in exchange for such exclusive rights*, the Company will pay Owner a one time fee as set forth herein.

1) As consideration for Owner entering into a five (5) year MDU Broadband Services Agreement (the "Agreement") with the Company, *granting the Company, among other things, the exclusive right to provide cable television service to the Premises*, the Company agrees to pay Owner a one time fee of

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<sup>7</sup> MIC has many more examples of such contracts and would gladly furnish them to the Court, should the Court wish to see them, together with a spreadsheet that identifies the offending provisions in each such contract. MIC does not have a complete set of the potentially relevant contracts, however, as Comcast has refused to provide any of the missing contracts after the trial. MIC would file the contracts marked "business secret" under seal, as Comcast has also refused to withdraw or justify its remaining "business secret" designations.

\$1,693.89 (the “One Time Compensation) payable within sixty (60) days of the receipt by the Company of a fully executed Agreement)

Vintage Bay, Compensation Agreement (MIC-005544) (Plaintiff Exhibit 122) (emphasis added).

Delivery of Services. The Association has the authority to grant and does hereby grant to the Company during the term hereof the exclusive right and license to construct, install, operate and maintain multi-channel video distribution facilities on the Premises (whether by cable, satellite, microwave or otherwise) and to deliver the Services to the Premises, unless otherwise required by applicable law.

Stevens Landing, Installation and Services Agreement, ¶ 4 (MIC-006048) (Plaintiff Exhibit 143)<sup>8</sup>

The provision from the Vintage Bay agreement quoted above is not only an example of an exclusive cable service agreement that contravenes Section 718.1232, but it also provides an example of a “door fee” paid to the Vintage Bay Condominium Association to achieve this unlawful end. In the Stevens Landing and Vantage Point agreements,<sup>9</sup> Comcast’s use of the clause “unless otherwise provided by law” can not have had any purpose other than to disguise the illegality of the exclusivity language that precedes it, which Comcast knows to be contrary Section 718.1232. In addition to advancing the purposes of Section 718.1232, the declaratory ruling that MIC seeks would remove Comcast’s ability to indulge in such deceptive and misleading practices with affected parties.

## **2. Exclusive 100% take-or-pay bulk service contracts**

As the evidence presented at trial confirmed, both MIC and Comcast extensively use exclusive bulk service contracts, but there is a fundamental difference between MIC’s and Comcast’s contracts. In MIC’s case, residents of MDUs are entitled to opt out, and MIC charges

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<sup>8</sup> Vantage Point, Bulk Installation and Services Agreement ¶ 4 (MIC-005689) (Defendant Exhibit 202), uses term “Owner” rather than the term “Association” but is otherwise identical.

only for cable service that residents actually receive. Gaston, Tr. 197-98, Delgado, Tr. 738-39. In contrast, Comcast demands that associations pay Comcast's bulk rate multiplied by the total number of units at an MDU, regardless of whether a particular unit may actually want or receive service from Comcast. Delgado, Tr. 738. A typical Comcast exclusive 100% take-or-pay provision reads as follows:

The Company agrees to provide Total Basic Service consisting of "Basic I," "Basic II," and "Basic III" tiers of service to five pre-existing CATV cable outlets in 117 units. ... The Owner shall pay the Company a monthly per unit service fee for Total Basic Service equal to \$15.80 per unit for a total monthly billing of \$1,848.60, plus all applicable taxes and fees.

Crescent Beach, Exhibit "A" Bulk Bill Addendum, ¶ 1 (MIC-008150) (Plaintiff Exhibit 73).

Throughout this case, Comcast has never denied that its exclusive 100% take-or-pay agreements require associations to pay for services that individual residents do not receive and/or may not want. Nor has Comcast denied that such agreements can provide an overwhelming disincentive to residents that may prefer to take services from a competitor -- as Comcast itself insisted in New Jersey. Instead, Comcast has repeatedly offered two main arguments in support of these arrangements -- (1) that the allocation of costs between an association and its residents is solely between them and has nothing to do with Comcast;<sup>10</sup> and (2) that nothing but MIC's own greed prevents it from post-wiring MDUs itself to reach any residents who may want its services. Comcast has also often given its catch-all response to MIC's claims of harm -- that nothing but

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<sup>9</sup> The Stevens Landing Agreement was signed in March 2002 and the Vantage Point Agreement was signed in April 2004.

<sup>10</sup> See, e.g., Defendant's Memorandum in Support of its Renewed Dispositive Motion for Judgment as a Matter of Law on All Claims, at 7 (Doc. # 412).

its own stinginess prevents MIC from reaching any resident it wants by post-wiring MDU's either internally or externally.<sup>11</sup>

As to Comcast's first argument, Terese Delgado, Comcast's designated representative for the trial as well as its most knowledgeable executive with respect to most of the issues involved in this case, admitted when pressed under oath that Comcast assumes that associations will allocate the bulk service fees that it pays to Comcast among all individual unit owners, including those that do not take/want Comcast's services. Specifically, after counsel for MIC asked Ms. Delgado to assume that Comcast charged a condominium association a 100% take-or-pay bulk services fee of \$11 per unit, the following exchange occurred:

Q. All right. The association is already paying you \$11 for every unit in the condominium. That's correct? That's my assumption, okay? I'm assuming this –

A. If it's on a bulk contract, the association would be paying Comcast to deliver service to all the units, that's correct.

Q. Okay. And would you assume that the association would charge the customer's account \$11? Would that be your assumption?

A. *My assumption would be that, that they would somehow assess the residents for the -- for that.*

Q. Okay. And if a customer was in a condominium where your assumption was correct, that the association was assessing the customers \$11 each, each unit owner \$11 each, would the customer now have to pay whatever Mr. Gaston's prices were for comparable service plus your \$11?

A. If the customer is being assessed, *which I believe that's probably how that is handled*, and that customer made the option and elected to have the other service provider, then that customer would be making the decision that they indeed want to do that. So yes, that would be the case.

Tr. 742-43 (emphasis added).

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<sup>11</sup> See, e.g., Defendant's Memorandum in Support of Its Motion For Reconsideration of the Order Denying, in Part, Defendant's Dispositive Claim for Summary Judgment on All Claims, at 11-12 (Doc. #377-1).

In short, given Ms. Delgado's admissions, there can be rational basis for distinguishing the operation of the exclusive 100% take-or-pay agreements that Comcast typically uses on Marco Island from that of the agreement in New Jersey that Comcast characterized as the "functional equivalent of a prohibition." In both cases, a resident would essentially have to pay substantially more for basic service in order to do business with a competitor. If Comcast was right that the agreement in New Jersey violated that state's access statute, then by Comcast's own rationale, Comcast's agreements on Marco Island violate Section 718.1232.

Comcast's second argument is equally without merit. To be sure, two Comcast employees and a Comcast expert claimed that post-wiring, particularly external wiring, is easy, inexpensive, and aesthetically "okay." Delgado, Tr. 679-81.<sup>12</sup> Yet, despite Comcast's professed eagerness to compete vigorously with MIC on Marco Island, Comcast has itself never installed, or even considered installing, a secondary system of wiring anywhere on Marco Island, either internally or externally. Delgado, Tr. 1124-26. Comcast's position is also undercut by *Dynamic Cablevision*, in which the courts found that it was reasonable for an association to reject external wiring as "unsightly."

In contrast, MIC's witnesses testified that post-wiring, whether internal or external, would be expensive, disruptive, unsightly, "monstrous," "insane," "ugly," "wouldn't look right," detrimental to property values, and unacceptable to the typical MDU association on Marco Island. Gaston, Tr. 322-25; Boggs, Tr. 509-10, 522-23; Draper, Tr. 560-61; Hilliard, Tr. 1077-86. These witnesses all had relevant first-hand experience on Marco Island, and, MIC believes, they were all highly credible.

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<sup>12</sup> The transcript of the testimony of Andy Vaspaciano and James Cuddihy is not yet available.

Furthermore, Chrisann Folk, Comcast's former commercial development manager for Marco Island, testified that she, Ms. Delgado, and Barbara Hagen, head of the Naples System, discussed the fact that, if Comcast removed the home run wiring from the Charter Club, "it would be difficult for a second system to be installed if the old system was removed." Folk, Tr. 1186. That was so, she explained, "because of the age of the wiring, the likelihood of it of being brittle was very good and that if we, as a company, was to remove it, there was a good chance that it could break within the internal piping and would clog the pipes and would not allow another provider to put cable services through those pipes." *Id.*

Last, it is also clear that the jury did not accept Comcast's position or testimony regarding post-wiring. Having been instructed that MIC was required to take all reasonable steps to mitigate its damages, the jury could not possibly have awarded MIC \$3.3 million in damages if it believed that post-wiring was a reasonable, feasible, and appropriate alternative for MIC.<sup>13</sup>

In summary, there is no merit to either of Comcast's arguments in defense of its 100% take-or-pay agreements. The Court should therefore find that these agreements violate Section 718.1232.

**3. Provisions that preclude MIC or another competitor from using inside wiring that Comcast does not own**

Section 718.1232 can be read to require an incumbent to make wiring that it installed and clearly owns available to a qualifying competing cable operator, presumably for fair compensation, if that is what it takes to enable a resident to choose to take service from the competing provider. At the very least, Section 718.1232 should be read to invalidate agreements that deny competing cable operators access to wiring that the developer or association installed

and that the incumbent does not own. Yet, as the following examples illustrate, Comcast has entered into such contracts:

... At no time during or after the term hereof shall the Owner or any third party have the right to use the System or any portion thereof for any purpose, *except upon expiration or termination of this Agreement, the Owner shall have the right to use those portions of the System installed by the Owner.*

Monterey, Bulk Installation and Service Agreement, ¶ 2 (MIC-00666) (Defendant's Exhibit 196)

(emphasis added).

... At no time during or after the term hereof shall the Owner or any third party have the right to use the System or any portion thereof for any purposes, *except upon the expiration or termination of this Agreement, the Owner shall have the right to use those portions of the System installed by the Owner* and if the Company fails to remove that portion of the System installed by them within six (6) months of the termination of this Agreement, it shall be considered abandoned and useable by the Owner or a third party.

Southern Breeze, Broadband Services Agreement, ¶ 2 (MIC-006113) (Defendant Exhibit 200)

(emphasis added).

... At no time during or after the term hereof shall the Owner or any third party have the right to use the System or any portion thereof for any purposes, *except upon the expiration or termination of this Agreement, the Owner shall have the right to use those portions of the System installed by the Owner.*

Sunset Cove, Broadband Services Agreement, ¶ 2 (MIC-015256) (Plaintiff Exhibit 63)

(emphasis added).

As the Court knows, MIC believes that Comcast cannot lawfully claim ownership of *any* cable home run wiring or home wiring in Collier County as it has stipulated that it did not pay personal property taxes on such wiring during the last five years. But even assuming that Comcast does indeed own at least some of this wiring, the provisions quoted above make clear

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<sup>13</sup> Comcast makes its post-wiring argument pervasively, not just in defense of its take-or-pay agreements. MIC's response here is intended to apply as well in all contexts in which Comcast makes its post-wiring argument.

that Comcast has often entered into exclusive agreements that deny Comcast's competitors access to wiring that Comcast, itself, acknowledges that it did not install and does not own. Such provisions are unquestionably beyond the pale of Section 718.1232.

**4. Provisions that allow Comcast to leave "its" facilities in place for up to six months after its contract to serve an MDU has expired**

Comcast's contracts have a standard provision that, with minor variations, gives Comcast the right to leave its facilities at an MDU for up to six months after its right to serve the MDU has expired. Such a provision is present "in the great majority" of Comcast's contracts. Folk, Tr. 1289. Two examples follow:

REMOVAL OF SYSTEM. Upon termination of the Agreement for any reason, the Company shall have a period of six (6) months in which it shall be entitled but not required to remove the System.

Monterrey, Bulk Installation and Service Agreement, ¶ 7 (MIC-006667) (Defendant Exhibit 196).

Removal of System. Upon termination of the Agreement for any reason, the Company shall have a period of six (6) months in which it shall be entitled but not required to remove the System, including the cable home wiring and cable home run wiring.

Stevens Landing, Installation and Services Agreement, ¶ 12 (MIC-006050) (Plaintiff Exhibit 143).

In her testimony at trial, Chrisann Folk discussed at length her negotiations on behalf of Comcast with William Klug, the manager of the Crescent Beach condominium. According to Ms. Folk, Mr. Klug "unusually astute." Folk, Tr. 1288. In a letter to Comcast concerning the Comcast's standard 6-month removal provision, Mr. Klug observed,

As I explained from Crescent Beach's perspective, the problem as communicated to me by our building manager is we cannot install a parallel redundant system in the building while the Comcast system is still in place. Obviously, if Comcast were to take the full six months to pull its system as presently proposed, it would

take over 90 days to install a new system. The building would potentially be without cable service for a period of up to nine months in the event the building should elect to use another cable service provider.

Plaintiff's Exhibit 280, read into the record, Tr. 1207. Ms. Folk went on to testify that she concurred with Mr. Klug on this point, and that, in the case of Crescent Beach, Comcast ultimately agreed to replace its standard 6-month provision with language that limited Comcast's window of time to remove its facilities to the much shorter period allowed by the FCC's inside wiring rules. Folk, Tr. 1207, 1210.<sup>14</sup> Ms. Folk also testified that someone less astute as Mr. Klug would probably not appreciate the potential problems that this provision could cause at the end of contract term. Folk, Tr. 1290.

Given the ubiquity of Comcast's 6-month provision, its great potential for undermining the rights that Section 718.1232 bestows upon residents of condominiums and competitive cable service providers, and the inability of all but "unusually astute" representatives of associations to understand how Comcast can use it coerce renewal of its service agreements, the Court should declare that provision is unlawful and unenforceable under Section 718.1232.

##### **5. Provisions giving Comcast an exclusive "right of entry" that extends beyond its term of service**

Another device that Comcast typically uses to choke off competition in violation of Section 718.1232 is its use exclusive right-of-entry ("ROE") agreements that extend beyond the term of Comcast's service agreements. According to Ms. Delgado, such agreements exist at "a lot of properties." Delgado, Tr. 798. In fact, she conceded at trial that "You could have, *very often*, a 20 year right of entry agreement with a five year bulk addendum or a two year bulk addendum or a three year bulk addendum." *Id.* (emphasis added). For example, at Stevens

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<sup>14</sup> The timetables in the FCC's rules, 47 C.F.R. § 76.801 *et seq.*, ensure that there are no service interruptions when a new cable service provider replaces an incumbent.

Landing, the ROE provision in Comcast's Installation and Services Agreement, ¶ 8 (MIC-006049) (Plaintiff Exhibit 143) provides that "This Agreement shall remain in force for an initial term of twenty years," whereas the provision specifying the term of the bulk service agreement in Comcast's Exhibit "B" Bulk Bill Addendum, ¶ 2 (MIC-006052) (Plaintiff Exhibit 143) states that "This Addendum shall remain in force for an initial term of five years from the effective date."

In comments at the bottom of a "New Contract Cover Sheet" for the Tampico condominium (MIC-013426) (Plaintiff Exhibit 95), Comcast bluntly explained how an exclusive ROE agreement that extended beyond the term of Comcast's service agreement would prevent a condominium from transferring its business to a competitor:

This is a renewal bulk Agreement based on the new Marco rate card. The ROE Agreement that goes along with this is for a term of 6 years so this Agreement will expire one year before the ROE. The property will either have to renew their bulk agreement or go IB [individually billed] for one year if they decide to leave us for any reason in 2007.

In other words, in this comment, Comcast fully recognized the anticompetitive effects of the extended exclusive ROE agreement – i.e., the condominium and its residents would have no choice but to renew Comcast's bulk agreement or pay much higher individually billed rates. Again, this is completely contrary to the letter and spirit of Section 718.1232.

## **II. CONCLUSION**

For all of the foregoing reasons, MIC submits that the Court should grant the declaratory judgment that MIC seeks and permanently enjoin Comcast from entering into or enforcing exclusive arrangements of the kind discussed above. Because only Comcast can identify all of the developers, associations, and residents whom its unlawful practices may affect or have affected, the Court should require Comcast to determine, and give appropriate written notice to,

each such person, in clear and readily understandable language. Finally, to ensure that Comcast complies fully with the Court's order, the Court should also require Comcast to file a report detailing the steps that it has taken to achieve such compliance.

Respectfully submitted,

A handwritten signature in black ink that reads "Jim Baller" with a long horizontal flourish extending to the right.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I electronically filed a version of the foregoing with clerk of Court using the CM/ECF system which will send a notice of electronic filing to the following: Jaime A. Bianchi, jbianchi@whitecase.com; Noah A. Brumfield; nbrumfield@whitecase.com; Sean Stokes, sstokes@baller.com; Karen Larson, karenlarson@marcocable.com and William Keith, wkeith@ckblaw.com, this 7th day of August, 2006.



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Counsel to Marco Island Cable