

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**Appeal No. 07-12886-FF**

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

Plaintiff/Appellee,

vs.

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

Defendant/Appellant.

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On Appeal from the United States District Court for the  
Middle District of Florida  
Honorable Judge John Steele

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**MARCO ISLAND CABLE'S RESPONSE BRIEF**

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Counsel for Marco Island Cable, Inc. (“MIC”), relying in part on Comcast Cablevision of the Southwest, Inc. (“Comcast”)’s corporate disclosure statement hereby certifies that the following is a complete list of persons and entities having an interest in the outcome of this case:

**The District Court**

Judge John E. Steele

Magistrate Judge Douglas N. Frazier

**For the Plaintiff/Appellee**

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Comcast Holdings Corporation

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A handwritten signature in cursive script that reads "James Baller". The signature is written in black ink and ends with a long horizontal flourish that extends to the right.

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James Baller

## **STATEMENT REGARDING ORAL ARGUMENT**

Marco Island Cable, Inc. (“MIC”) agrees with Comcast that oral argument would be useful in this case. MIC also agrees with Comcast’s rationale in support of oral argument.

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## PRELIMINARY STATEMENT

MIC has decided not to proceed with its cross-appeal. MIC's reasons for this decision are as follows.

MIC's cross-appeal raised issues of two kinds: (1) issues stemming from the District Court's determination that, because MIC had not obtained a cable franchise covering the mainland of Collier County, Florida ("the Mainland") before filing its suit, MIC could proceed only on its claims regarding Marco Island, and not its claims regarding the Mainland; and (2) issues stemming from the District Court's dismissal of Count II of MIC's Complaint, in which MIC alleged that Comcast's exclusive arrangements at multiple dwelling units ("MDUs") violate Fla. Stat. § 718.1232, which gives residents of condominiums a right to be serviced by any available franchised cable operator.

With regard to the Mainland, this Court held in *Cable Holdings of Georgia v. Home Video, Inc.*, 825 F.2d 1559 (11<sup>th</sup> Cir. 1987), that a cable operator's preparedness to compete in a new territory is an *issue of fact*, and the cable operator's failure to obtain a cable franchise for the new territory before filing suit is just one consideration that the jury can take into account, along with all other facts relevant to preparedness. MIC repeatedly tried to persuade the District Court below to follow *Cable Holdings*, but the Court insisted that MIC was barred, as a

matter of law, from pursuing any claims relating to the Mainland because it had not acquired a franchise for that area.

While MIC still believes that it is correct, it has come to realize that, even if it prevailed on the Mainland issue before this Court, its victory would be a pyrrhic one because MIC does not have the resources to proceed with discovery and another trial on that issue. Indeed, that is why MIC reluctantly agreed to accept a remittitur from the \$3,267,393 that the jury had awarded to MIC to a modest \$800,000.

As to Count II, recent actions by the Federal Communications Commission (“FCC”) have significantly reduced MIC’s need for a declaratory judgment or injunctive relief. On November 13, 2007, the FCC issued an order prohibiting cable operators from entering into new exclusive arrangements at MDUs and from enforcing existing ones.<sup>1</sup> The FCC took this action pursuant to Section 628(b) of the Communications Act, 47 U.S.C. § (b), which prohibits cable operators from engaging in “unfair practices that have the purpose or effect of hindering significantly or preventing their competitors from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”

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<sup>1</sup> *In the Matter of Exclusive Service Contracts For Provision of Video Services In Multiple Dwelling Units and Other Real Estate Developments*, 2007 WL 3353544 (F.C.C.) (Attachment A hereto).

In its order, the FCC took a two-step approach – (1) it issued an immediate ban on exclusive arrangements that expressly restrict competition, and (2) it initiated a further rulemaking to address, within six months, exclusive arrangements that do not expressly restrict competition but have the practical effect of doing so. *Id.* at 65. If the FCC applies in the new rulemaking the same pro-competitive rationale as it applied in its MDU Order, the issues that MIC raised in Count II are likely to be moot by the time that this Court issues its decision.

In view of the circumstances summarized above, MIC has decided to spare the parties and the Court the time, burden, and cost of addressing the issues that MIC’s cross-appeal would have raised. MIC will instead focus on responding to Comcast’s appeal.

### **COUNTERSTATEMENT OF THE ISSUES**

MIC submits that Comcast’s Statement of the Issues mischaracterizes the issues that its appeal poses for the Court’s review. MIC offers the following alternative:

Whether the District Court correctly denied Comcast’s motion for judgment as a matter of law on Count I, in which MIC alleged that Comcast violated the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”), where the trial record contains substantial evidence of deceptive and unfair trade practices by

Comcast causing injury to MIC, and where the District Court's evidentiary rulings were well within its discretion.

## **COUNTERSTATEMENT OF THE CASE**

### **1. Nature of the Case**

Comcast's statement is laden with errors, omissions of important facts, and unsupportable inferences. Comcast tries to portray this case as a routine dispute between two cable operators in which Comcast has done nothing other than to engage in standard industry practices that the FCC has expressly endorsed on numerous occasions. Comcast's Brief at 59. Comcast would have the Court believe that MIC built a sizable business on Marco Island by undercutting the prices and misappropriating the inside wiring of Comcast's weak predecessors. Comcast's Brief at 1-2. Comcast also suggests that MIC brought this suit because Comcast won back the Monterrey condominium and fended off the loss of two other MDUs by competing vigorously on price and defending its legitimate ownership rights in the wiring at MDUs on Marco Island. Comcast's Brief, at 1-2.

In fact, this is a suit about the broad range of unfair and deceptive practices that Comcast has used to keep MIC from expanding to the Mainland of Collier County and to undermine its business on Marco Island. Comcast's actions are particularly reprehensible because they involve deceiving and intimidating residents of MDUs whose average age, Comcast acknowledges, is between 70 and

80 years. D.E. 422, Tr. 732:10-16. In the 9-day trial below, MIC presented the jury such a wealth of compelling evidence of wrongdoing by Comcast, that the jury took less than three hours to rule in MIC's favor and to award MIC monetary damages of \$3,268,392.

As Comcast correctly notes, ownership and control of inside wiring in MDUs on Marco Island is among the key issues in the case. Throughout its Initial Brief, Comcast has tried to persuade this Court that it was Comcast and its predecessors that installed and own the wiring, and not the MDU associations or individual unit owners. For example, in the introduction to its Statement of the Case, Comcast contends that inside wiring was "installed and owned by the incumbent cable operator" – Comcast and its predecessors. Comcast's Brief at 1-2. At one point in its Statement of Facts, Comcast states that "[t]o provide cable services to an MDU, a cable company installs wiring in the street, from the street to the building and through each floor, and to the individual units." *Id.* at 7. Later in its Statement of Facts, Comcast claims that "[m]ost of Marco Island's MDUs were wired and initially served by Comcast's predecessors" and "Comcast installed wiring in other Marco Island MDUs itself." Comcast even goes so far as to misrepresent the District Court's designations of the issues for trial as including the following: "whether it was improper to assert ownership rights to inside cable wiring that the cable operator had installed." Comcast's Brief at 3.

As, the record in this case overwhelmingly demonstrates the inside wiring at issue was installed and owned by MDU developers and owners. To be sure, Comcast offered some evidence to the contrary, but the jury was not persuaded. After all, Comcast essentially admitted that it had acted deceptively, unfairly, and unethically in dealing with an MDU through which it sought to “send a message” to other MDUs of what might happen to them if they sought to do business with MIC. D.E. 422 Tr. 681 – 682, D.E. 427Tr. 1173:20 – 25.

The jury probably also found Comcast’s credibility diminished by its admission that it had never paid personal property taxes on the inside wiring at issue in this case, even though the record contained unchallenged expert testimony that Florida law requires cable operators to pay personal property taxes on such wiring. D.E.427 Tr. 1297: 10 – 17, DE 233-1, PX 4. Comcast’s only explanation was that no tax authority had ever told Comcast that it owed these taxes. *Id.*

Another key issue in this case is whether Comcast is immunized from potential FDUTPA liability by Fla. Stat. § 501.212(1), which exempts any “act or practice required or specifically permitted by federal or state law.” According to Comcast, “there is nothing in Comcast’s contracts with Marco Island MDUs that is not specifically permitted by the FCC rules.” Comcast’s Brief at 59. Comcast is plainly wrong. In fact, in the recent FCC MDU Order, the FCC flatly rejected Comcast’s contention. To the contrary, the FCC stated that all it had done in the

past was to delay a decision as to whether to ban these practices because it did not have an adequate record. While holding back, the FCC had also made clear to Comcast and other incumbent cable companies that the FCC might well ban exclusive arrangements when it had a more complete record. *FCC 2007 MDU Order*, ¶¶ 36, 59. The FCC then added,

...we do not believe that any [incumbent cable operator] has a legitimate investment-backed expectation in profits obtained through anticompetitive behavior such as that found to exist in this Order. *Cf. Otter Tail Power Co. v. United States*, 410 U.S. 366, 380 (1973) (antitrust law proscribing monopolies “assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency,” and a monopolist may not “substitute for competition anticompetitive uses of its dominant power”); *Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) (“A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.”). *To the extent that Comcast and Time-Warner argue otherwise, we reject their arguments.* See Comcast Comments at 33-35; Time-Warner Comments at 11-13.

*FCC 2007 MDU Exclusivity Order*, at ¶ 58, n.182 (emphasis added).

Comcast and MIC differ on many issues, but they agree on one thing – in reviewing the legality of Comcast’s practices at MDUs, the Court should defer to the FCC, the expert federal agency on the matters at issue in this case. Comcast’s Brief at 58-59, citing *Credit Suisse Secs. (USA) LLC v. Billing*, 127 S.Ct. 2383, 2392 (2007). MIC submits that the Court should embrace the FCC’s determination that exclusive arrangements are unfair and contrary the pro-

competitive purposes of the federal communications laws, and hence also to FDUTPA.

To be sure, the FCC has not yet applied the rationale of its new MDU Order to all of the practices that MIC presented to the jury. At the very least, however, the order has undermined Comcast's argument that its actions are exempt from FDUTPA. It follows that the jury, on the copious record in this case, was free to find Comcast's actions violated FDUTPA.

Last, there is no merit to any of Comcast's arguments on damages. Comcast has misinterpreted the scope of FDUTPA's damages provisions, and it has failed to show that record is devoid of evidence of actual damages of at least the \$800,000 at issue in this appeal. Indeed, before the District Court, Comcast itself insisted that the jury's damage award should be reduced by \$2,468,392 to \$800,000, "which is the largest amount supported by evidence at trial that conforms to the Court's damages instructions to the jury." D.E. 436 at 1. Furthermore, Comcast's claim that it was "surprised" by the testimony of MIC's damages expert is absurd. Comcast deposed that expert twice on the theories underlying his testimony, and Comcast's own expert on damages, Dr. Mikkelsen, testified that he was fully prepared to refute MIC's expert's testimony. He then tried to do so, but failed to carry it off. As with Comcast's evidence on liability, the jury was unimpressed by Comcast's showing.

In its post-trial briefs below, Comcast made virtually the same arguments on damages as it is making here. The District Court found these unpersuasive and rejected them. D.E. 471, 5-7; 478, 2-3. MIC submits that this Court should do so as well.

## **2. Course of the Proceedings and Dispositions Below**

Comcast opens its discussion of the course of the proceedings and dispositions below with a self-serving and misleading overview of this case. MIC objects to this overview, for the reasons set forth in the previous section. Comcast then provides, in Sections A and C through G, a relatively straightforward summary of filings and the District Court's rulings below. MIC does not object to these sections.

MIC does, however, object to Section B, particularly the second paragraph. That is where Comcast misrepresents the Court's designation of the issues for trial, as MIC noted above. MIC submits that the best evidence of what the District Court actually said is the order itself, D.E. 365 at 24, which is quoted below:

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.

## **STATEMENT OF FACTS**

### **1. MIC's Business from 1993-2003**

#### **a. MIC's Early Steps and Business Model**

In 1993, the Gulfview Condominium on Marco Island, dissatisfied with the prices and services that it was receiving from the incumbent cable company, invited William Gaston to install a Satellite Master Antenna Television (SMATV) system and to provide the Gulfview alternative cable service. D.E.420 Tr. 153:22-157:5. At the time, Comcast's predecessor, Colony Communications, was the only cable service provider on Marco Island. D.E. 420 Tr. 150:19-151:7.

Mr. Gaston met the Gulfview's needs, and from this first step, he went on to develop a substantial cable business on Marco Island. DX 560. The keys to MIC's success were: (1) lower prices than the incumbent for video programming (2) an excellent reputation for highly responsive customer service, (3) innovative offerings, MIC was one of the first cable companies in the United States to offer digital service and the first on Marco Island (by two years) to offer high speed Internet access, (4) aggressive marketing and (5) the fact that many MDUs preferred dealing with a responsive local business to dealing with a large, remote corporation. D.E.420, Tr. 175:20-177:1, 220:6-222:8, D.E. 421, Tr. 412:7-413:5

**b. Inside Wiring**

MDUs of the kind that MIC serves typically have three kinds of inside wiring -- “distribution wiring,” “home run wiring,” and “home wiring.” “Distribution wiring,” which is always owned by the cable operator, runs from outside the MDU to a lock box in a utility room or closet in the MDU. D.E. 420, Tr. 146:2-148:6 The outside end of the distribution wiring attaches to the cable operator’s cables that run back to the cable operator’s “headend,” at which it collects, processes, and disseminates video content throughout its system.

“Home run” wiring starts at the lock box and heads in the direction of the individual units. It runs through concrete slabs, floors, walls, risers, and ceilings to a “demarcation point,” where it becomes “home wiring.” The home wiring extends from the demarcation point to the televisions or other customer premises equipment in the individual units.

For MDUs, the demarcation point is located “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 thereto that does not require access to the individual subscriber's dwelling unit.” 47 C.F.R. § 76.5(mm)(2). A wire is “physically inaccessible” if obtaining access to it would require “significant modification of, or significant damage to, preexisting structural elements, and would add significantly to the physical difficulty and/or cost of

accessing the subscriber's home wiring.” 47 C.F.R. § 76.5(mm)(4). According to the FCC, a wire is “physically inaccessible” if it is behind brick, cinderblock, or sheetrock.<sup>2</sup>

Inside wiring can be installed in an MDU before or after it is completed. “Pre-wiring” refers to the practice of installing wiring during initial construction, before the walls, floors, and ceilings are closed. D.E. 429, Tr. 1729:12-1732:1. Pre-wiring is relatively simple and inexpensive. “Post-wiring” can mean several things, but for the purposes of trial, the parties have used the term to mean installing a second set of wiring within or outside an MDU. MIC’s witnesses testified that post-wiring, whether internal or external, would be expensive, disruptive, unsightly, “monstrous,” “insane,” “ugly,” detrimental to property values, and unacceptable to the typical MDU association on Marco Island. See, e.g., D.E.420 Tr. 322:18-325:8; D.E. 421, Tr. 509:1-10; Tr. 522:4-523:16; D.E. 421, Tr. 560:2-561:13; D.E. 423, Tr. 1077:2-1086:7. These witnesses all had relevant first-hand experience on Marco Island. D.E.420, Tr. 238:8-239:6; 269:18-270:2; D.E. 421, Tr. 501:21-504:8 Tr. 536:19-539:13; D.E. 423, Tr. 1059:10-1062:15; Tr. 1086:17-1087:15. In short, MIC’s evidence showed that post-wiring is not a feasible option for a competitor on Marco Island. While

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<sup>2</sup> *In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment*, ¶ 33 n.105 and ¶ 56, 22 FCC Rcd. 10640, 2007 WL 1670907 (F.C.C.).

Comcast introduced some contrary evidence, *see, e.g.*, D.E. 422 Tr. 679:3-681:6, Comcast also acknowledged that, despite its strong desire to compete with MIC at the many MDUs that MIC serves, Comcast has never itself post-wired a building on Marco Island. D.E. 427, Tr. 1124:14-1126:9. In the end, the jury found MIC's evidence persuasive and rejected Comcast's.<sup>3</sup>

The record also belies Comcast's contention that MIC's business model requires it to misappropriate the "cable company's" inside wiring. Comcast's Brief at 1-2, 9. In fact, the record shows that in *every* case in which MIC served an MDU on Marco Island before Comcast acquired the incumbent cable operator in 2001, MIC always obtained the permission of the owners of the home run wiring and the home wiring – the governing body of the MDU or the individual unit owners. *See, e.g.*, D.E. 420, Tr. 320:9-322:2. With such permission in hand, MIC then ran its own distribution wiring to the lock box, disconnected the incumbent's distribution wiring, and used the MDU's or the unit owners' home run and home wiring to serve the individual units.

The record contains only a small number of cases in which the incumbent cable operator claimed ownership of home run wiring or home wiring before Comcast entered the market. D.E.420, Tr. 168:11-169:25. In one of these cases,

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<sup>3</sup> In awarding MIC \$3.3 million in damages, the jury implicitly rejected Comcast's argument that post-wiring was a reasonable method of mitigating damages.

the MDU yielded to the cable operator's claims, so MIC did not go forward with serving the MDU. *Id.* In another case, MIC litigated the issue and prevailed. D.E. 427, Tr. 1291:15-1292:20.

According to the trial testimony of Chrisann Folk, a former executive of Comcast's predecessor, MediaOne, who became an executive of Comcast when Comcast acquired MediaOne in 2001, MediaOne believed that it could not lawfully wield exclusive control of inside wiring as a competitive weapon against MIC, and it did not attempt to do so. *Id.* During the four years between 1997 and 2001 that MediaOne was the incumbent cable operator on Marco Island, the number of MDUs that MIC served skyrocketed from 19 to 92. DX 560.

## **2. Comcast's Enters the Market on Marco Island and Introduces a Broad Range of Anticompetitive Practices**

In 2001, Comcast acquired MediaOne's franchise, assets, and customers on Marco Island and the Mainland of Collier County. As Ms. Folk's testimony confirmed, shortly after entering the market, Comcast determined that, to curtail MIC's rapid growth, Comcast had to prevent MIC from obtaining access to inside wiring. D.E. 427, Tr. 1166:21-1175:11. 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. *Id.*, Tr. 1172:14-74:24. Comcast knew that its message would spread quickly throughout Marco Island

because the MDU community on Marco Island was a small and tightly-knit group, which regularly exchanged detailed information through organizations such as the Condominium Association Managers of Marco Island (CAMMI). D.E. 427, Tr. 1173:20-1175:10. In fact, Comcast encouraged its executives to participate in CAMMI. *Id.* Tr. 1175:2-10.

In the limited number of pages available, MIC cannot do justice to all of the evidence of Comcast's unfair and deceptive trade practices that MIC presented at trial. We therefore discuss two examples in detail and then briefly mention some of Comcast's other practices.

Comcast's first major opportunity to "send a message" to the MDUs of Marco Island occurred in May 2002, when an MDU known as the Charter Club decided not to renew Comcast's cable service agreement and to 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 wanted to do business with MIC, 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. PX 34. As the supposed source of its right to remove the wiring, Comcast purported to quote a passage from an agreement between the Charter Club and one of Comcast's predecessors. In doing so, however, Comcast deceptively omitted key

operative language 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. D.E. 422, Tr. 681:21-682:8. 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 considering the omitted language. D.E. 429, Tr. 1688:15-1689:16. Her only explanation for the omission was that Comcast wanted to keep the letter on a single page. *Id.*, Tr. 1651:10-23. As the jury could plainly see, however, there was plenty of blank space available for Comcast to have included the omitted language. *Id.*, Tr. 1687:2-1688:2.

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. In support of this claim, Comcast invoked the FCC's inside wiring rules, 47 C.F.R. § 76.811. As Ms. Delgado testified, however, Comcast did not believe that the FCC's rules applied

to this situation; Comcast just invoked the rules “as a courtesy to this property.”  
D.E. 422, Tr. 639:8-640:18.<sup>4</sup>

According to Ms. Delgado, the FCC’s rules did not apply to the Charter Club because the agreement between Comcast’s predecessor and the Charter Club trumped the FCC’s rules. *Id.* Comcast may also have had another reason for claiming that the rules did not apply – they expressly preclude a cable operator from seeking benefits of the kind that Comcast was asserting at the Charter Club when the operator treats cable home wiring as owned by unit owners for property tax purposes. 47 C.F.R. § 76.801 (“The provisions [of this subpart] do not apply where the cable home wiring belongs to the subscriber, such as where the operator ... has been treating the wiring as belonging to the subscriber for tax purposes ....”).

More specifically, in a stipulation with MIC, Comcast acknowledged that it had not paid personal property taxes on the home run or home wiring at any MDU in Collier County for the years 2001-2005. Comcast did, however, pay personal property taxes on its distribution wiring at these MDUs. PX 4; D.E. 422, Tr. 704:2-706:22. When confronted with unchallenged expert testimony that Florida law requires cable operators to pay personal property taxes on the home run and

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<sup>4</sup> The record shows that Comcast also extended the same “courtesy” to several other properties. See, e.g., D.E.420, Tr. 194:2-196:25; PX 39; D.E. 420, Tr. 207:3-210:4; PX 233.

home wiring they own, D.E. 427, Tr. 1297:2-1298:10, Comcast's only response was that no tax authority had ever told Comcast that it owed such taxes, D.E. 429, Tr. 1682:8-18; see also D.E. 422, Tr. 705:4-11.

In its letter of May 31, to the Charter Club, Comcast did not stop at invoking rules that it believed to be inapplicable. It went on to compound this deception by misrepresenting what the rules said. Under 47 C.F.R. §§ 76.802(a)(3) and 76.804(a)(4), a cable operator can charge only "the replacement cost per foot of the wiring on the subscriber's side of the demarcation point multiplied by the length in feet of such wiring."<sup>5</sup> As Comcast's wiring expert testified at trial, the replacement cost of the wire at issue was \$0.07 a foot. D.E. 429, Tr. 1815:13-20. By demanding \$0.65 a foot for the home wiring at the Charter Club, Comcast was in effect telling the Charter Club that the FCC rules gave Comcast the right to demand nearly 10 times the amount that the rules actually permitted.

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 carrying out such a removal would have been impossible without the prior consent of the residents. Indeed, in one of the

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<sup>5</sup> In 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 Television Consumer Protection and Competition Act of 1992 Cable Home Wiring*, 8 FCC Rcd 1435, ¶ 18 (1993).

more 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." D.E. 429, Tr. 1812:20-1813:13. As it happens, when the Charter Club refused to allow the crew to touch the wiring, they left the property. D.E. 427.

It is not clear whether sending the crew was just a ploy to intimidate the residents and other MDUs on Marco Island, or whether the executives actually wanted the crew to be as destructive as possible. It might well have been the latter, as Ms. Folk testified that Ms. Delgado and Ms Hagen had discussed the fact that the wiring was probably brittle from age and that attempting to remove it might cause it to break in its conduits, rendering them unusable by anyone else. D.E. 427, Tr. 1179:5-1187:7. Whatever Comcast's motive may have been, the jury could well have found that sending the crew was not just an unfair business practice, but a reprehensible one.

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

demand. To appreciate the absurdity of Comcast's demand, one need only do a simple calculation – at the FCC's authorized rate of \$0.07 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 feet within the units. D.E. 423, Tr. 1071:9-1075:5; D.E. 429, Tr. 1815:1-18. 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. *Id.* Either way, Comcast's charge of \$195 per unit was vastly overstated.

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

On August 1, 2003, Nikki Mello, a Comcast account executive, wrote an email to her supervisor, 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 approval 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." Ms. Delgado warned Ms. Mello to act quickly to prevent MIC from obtaining access to the internal wiring. "If we inadvertently let him [MIC's Bill Gaston] 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 and intent that Comcast's new exclusive agreements would be used to keep Comcast's prices above competitive market levels in 2004.

In addition to these two examples, Comcast also brought many other kinds of unfair and deceptive agreements and practices to Marco Island. These included agreements that explicitly barred MDUs from doing business with Comcast's competitors, PX 122, 143; agreements that allowed Comcast to leave its facilities in place for up to six months after its right to serve an MDU ended, thereby threatening MDUs with service gaps of up to nine months if they did not renew

their service agreements with Comcast, D.E. 427, Tr. 1287:19-1290:7; DX 196, PX 280; agreements reciting that Comcast had installed inside wiring when in fact it had not, PX 63, DX 196, 200; agreements giving Comcast the exclusive right of access to a facility for up to a year beyond Comcast's service agreement, which, Comcast admitted, effectively forced MDUs to renew their service agreements or pay much higher rates for services on an individually-billed basis, D.E. 422, Tr. 798: 1-800:7, PX 143. PX 95; and 100 percent exclusive take-or-pay agreements, D.E. 421, Tr. 196:7-199:10, D.E. 422, Tr. 738-739, 742-43, PX 73.

### **3. MIC's Decision to File This Action**

Why did MIC pursue legal action? MIC saw the pattern of unfair, deceptive, and intimidating behavior that Comcast had introduced on Marco Island, and had seen agreements and received other information about Comcast's practices on the Mainland indicating that Comcast was engaging in similar practices there. D.E. 233-1, ¶¶ 47-63. On Marco Island, Comcast's anticompetitive practices were clearly working. For example, based on past experience, and the fact that Comcast was serving about 40-43 MDUs on Marco Island in 2003, DX 560, MIC could reasonably predict 8-10 MDUs would come up for renewal in 2003 and that most of these MDUs would request bids from MIC – if for no other reason than to give Comcast an incentive to make better renewal proposals. Yet, as Mr. Gaston testified, by the end of 2003, the requests for proposals that MIC received had

dwindled to zero. D.E. 427, Tr. 1303. Without a definitive judicial declaration of its rights, MIC was concerned that the same thing was likely to happen on the Mainland. D.E. 233-1, ¶¶ 46-50.

Second, MIC was also gravely concerned about Comcast's failure to comply with a court ruling holding that Comcast's exclusive agreements were illegal. 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 exclusive cable service agreement 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 Fla. Statute § 718.1232, which gives residents of condominiums the right to be served by any franchised cable operator of their choice. 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." D.E. 257-4. Comcast did not appeal this decision but entered into a settlement with the Cozumel. Even though the settlement left the court's ruling on the books, Comcast paid no attention to it at other properties. D.E. 233, ¶ 50.

In short, MIC believed that, without a judicial determination put an end to Comcast's unfair, deceptive, and anticompetitive behavior, MIC's expansion was likely to fail. D.E. 233, ¶ 48.

### **STANDARDS OF REVIEW**

In Section 3 of its Initial Brief, entitled "Standards of Review", at 23-24, Comcast provides an incomplete and misleading summary of the standards of review that apply to this matter. At other points in its brief, Comcast provides more complete, but still not entirely satisfactory statements as to the applicable standards of review. MIC therefore urges the Court to use the following summaries:

#### **1. Motions for Judgment as a Matter of Law**

We review the district court's ruling on a motion for judgment as a matter of law *de novo*, considering the evidence and the reasonable inferences drawn from it in the light most favorable to the nonmoving party. *Judgment as a matter of law is appropriate only if the evidence is so overwhelmingly in favor of the moving party that a reasonable jury could not arrive at a contrary verdict.*

*Middlebrooks v. Hillcrest Foods, Inc.*, 256 F.3d 1241, 1246 (11<sup>th</sup> Cir. 2001)

(quotation marks and citations omitted; emphasis added).

#### **2. Jury Instructions**

We review claims pertaining to jury instructions to determine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled. If jury instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instruction. *We*

*will reverse the trial court because of an erroneous instruction only if we are left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.*

*Johnson v. Barnes & Noble Booksellers, Inc.*, 437 F.3d 1112, 1115 (11<sup>th</sup> Cir. 2006) (quotation marks and citations omitted; emphasis added).

### **3. Expert Witnesses**

A district court's decision regarding the admissibility of expert testimony is reviewed for an abuse of discretion, and *we defer to the district court's ruling unless it is “manifestly erroneous.”*

*U.S. v. Douglas*, 489 F.3d 1117, 1124 (11<sup>th</sup> Cir. 2007) (emphasis added).

### **4. Issues of Law**

MIC agrees with Comcast statement that *de novo* review is appropriate for questions of law presented by motions for judgment as a matter of law.

## **SUMMARY OF ARGUMENT**

Comcast seeks reversal of the District Court’s denial of Comcast’s Motion for Judgment as a Matter of Law on Count I. In that Count, MIC had alleged that Comcast, in violation of the FDUTPA, engaged in a broad range of deceptive and unfair trade practices to impair MIC’s cable and broadband business on Marco Island, Florida, and to prevent MIC from expanding to the mainland of Collier County, Florida. The jury found in favor of MIC and awarded it money damages in the amount of \$3,268,392. The Court remitted that amount to \$800,000.

Comcast maintains that the District Court erred in denying Comcast's Motion for Judgment because (1) MIC did not present any evidence that Comcast's alleged violations of the FDUTPA proximately caused MIC's alleged injury, (2) MIC did not present competent evidence of damages, and (3) MIC did not present sufficient evidence to show that Comcast had violated the FDUTPA.

MIC submits that the District Court committed no reversible errors. MIC presented vast amounts of evidence of Comcast's violations of the FDUTPA, as well as extensive lay and expert testimony showing Comcast's misconduct caused MIC to lose profits and to suffer a decline of business value, in amounts exceeding \$800,000.

Comcast contends that FDUTPA does not permit recovery of damages for lost profits or loss of business value, but the relevant authorities cited below hold that such damages are available where, as here, they are the direct and foreseeable result of Comcast's misconduct.

Comcast also contends that it could not have violated FDUTPA because the Act exempts activities that have been specifically approved by other federal or state laws, and the Federal Communications Commission has approved all of the practices of which MIC complains. In fact, the Commission has recently issued an order finding some of Comcast's activities unlawful, and it has expressly denied that it ever approved any of the practices at issue here.

Comcast further contends that the District Court should have excluded MIC's evidence of damages because MIC did not make it available to Comcast until just before or during the trial, to Comcast's great prejudice. The District Court considered these claims on several occasions and correctly rejected them.

### **ARGUMENT**

#### **THE DISTRICT COURT CORRECTLY REJECTED COMCAST'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON COUNT I**

This is a very simple and straightforward case, but one would never know it from reading Comcast's brief. Among other things, Comcast's arguments follow no logical sequence, mischaracterize numerous issues, distort the evidence that MIC offered in support of those issues, misapprehend the District Court's instructions and the jury's findings, confound the role of the FCC's rules in this case and misstate what the rules say, and misconstrue both the liability and damages issues that FDUTPA poses.

First, MIC will show that Comcast is plainly wrong in arguing that it has done nothing that the jury could have found to be unlawful under FDUTPA. To the contrary, MIC will show that Comcast violated FDUTPA in numerous ways. With regard to damages, MIC will first show that Comcast is incorrect in arguing that FDUTPA does not contemplate awards of money damages for lost profits or lost business value in cases such as this one. MIC will then show that the evidence

of damages that it offered to the jury was sufficient to sustain the District Court’s award of damages to MIC in the amount of \$800,000.

**I. The Record Amply Supports the Jury’s Finding that Comcast Violated the FDUTPA**

**A. Applicable Substantive Standards**

In Fla. Stat. § 501.204(1), the FDUTPA provides that “Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” Section 501.204(2) states that “(2) It is the intent of the Legislature that, in construing subsection (1), due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) as of July 1, 2001.”

Section 501.202 expresses the Legislature’s intent that the Act be “construed liberally” to effectuate its broad consumer protection and fair competition goals. In the same vein, Section 501.203(3) defines the term “Violation of this part” as including a violation of “(c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.”

The FDUTPA “is designed to protect not only the rights of litigants, but also the rights of the consuming public at large.” *Florida Office of Attorney General v.*

*Wyndham Int'l, Inc.*, 869 So.2d 592, 598 (Fla. 1<sup>st</sup> DCA 2004), quoting *Davis v. Powertel, Inc.*, 776 So.2d 971, 975 (Fla. 1st DCA 2000). Consequently,

When addressing a deceptive or unfair trade practice claim, the issue is not whether the plaintiff actually relied on the alleged practice, but whether the practice was likely to deceive a consumer acting reasonably in the same circumstances. A deceptive or unfair trade practice constitutes a somewhat unique tortious act because, although it is similar to a claim of fraud, it is different in that, unlike fraud, a party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.

*Florida Office of Attorney General*, 869 So.2d at 598, citing *Davis v. Powertel*, 776 So.2d at 973-74.

### **1. “Deceptive acts or practices”**

In *Zlotnik v. Premier Sales Group, Inc.*, 481 F.3d 1281, 1289 (11<sup>th</sup> Cir. 2007), this Court noted that “deception” for the purposes of the FDUTPA is defined as follows:

The FDUTPA declares that “unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful. Fla. Stat. Ann. § 501.204(1). Pursuant to § 501.211, any person who has suffered losses as a result of a violation may commence a private action to recover actual damages, attorney's fees, and costs. Fla. Stat. Ann. § 501.211(2). The Florida Supreme Court has noted that “deception occurs if there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.” *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So.2d 773, 777 (Fla.2003) (quotation marks and citation omitted). This standard requires a showing of “probable, not possible, deception” that is “likely to cause injury to a reasonable relying consumer.” *Millennium Commc'ns & Fulfillment, Inc. v. Office of the Att'y Gen.*, 761 So.2d 1256, 1263 (Fla.Dist.Ct.App.2000).

Under the Federal Trade Commission Act, the courts have held that, to establish that an act or practice is deceptive, a plaintiff must show “that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material.” *F.T.C. v. Peoples Credit First, LLC*, 2007 WL 2071712 (C.A.11 (Fla.), *citing* *FTC v. Tashman*, 318 F.3d, 1273, 1277 (11th Cir.2003). “The deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably.” *F.T.C. v. Verity Int’l, Ltd.*, 448 F.3d 48, 63 (2d Cir. 2006, *quoting* *F.T.C. v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7<sup>th</sup> Cir. 1988).

## **2. “Unfair trade practices”**

The Supreme Court of Florida has broadly defined the term “unfair practice” for the purposes of FDUTPA as “one that offends established public policy and one that is “immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *PNR, Inc. v. Beacon Property Management, Inc.*, 842 So.2d 773, 777 (Fla. 2003) (internal quotation marks and citations omitted). Furthermore, through Fla. Stat. § 501.203(3)(c), a cable operator that engages in “unfair acts and practices” as defined in Section 628(b) of the Communications Act, 47 U.S.C.

§ 548, also violates FDUTPA. In its recent MDU Order, the FCC interpreted that Section 628(b) as follows:

[W]e find that cable operators' use of exclusivity clauses in contracts for the provision of video services to MDUs constitutes an unfair method of competition or an unfair act or practice proscribed by Section 628(b). ... That provision specifically prohibits cable operators from engaging in unfair methods of competition or unfair acts or practices ... Exclusivity clauses prevent new entrant MVPDs from competing with entrenched incumbent providers on the basis of service offerings, including programming, and on price. Foreclosing competition in the MDU market in this way is unfair because it deprives consumers residing in MDUs of the opportunity to choose a MVPD provider.

*FCC MDU Order (2007)*, at ¶ 27

#### **B. Comcast Engaged in “Deceptive” and “Unfair” Trade Practices**

MIC provided the jury copious evidence of practices by Comcast that met the definitions of “deceptive” and “unfair” trade practices set forth in the previous section. Such practices included:

- Omitting key contract language from correspondence with a MDU
- Falsely claiming to own home run wiring and home wiring that Comcast knew that it did not own, as evidenced in part by Comcast’s treatment of such wiring as owned by others for tax purposes
- Invoking the FCC’s inside wiring rules in situations in which Comcast did not believe they applied, to intimidate MDUs and their 70-80 year old residents into refraining from doing business with MIC
- Misrepresenting what the inside wiring rules say, in a manner calculated to advance Comcast’s interests at the expense of MDUs and MIC

- Sending a crew to an MDU to remove inside wiring, without prior warning, with the specific intent that news of this hostile act would intimidate other MDUs into refraining from doing business with MIC
- Routinely using exclusive service agreements of the kind that the FCC has recently declared to be unfair, anticompetitive, and unlawful
- Entering into agreements giving Comcast the exclusive right to use inside wiring, for the express purpose of keeping Comcast “safe from Marco Island Cable” and enabling Comcast to charge prices above competitive levels
- Employing numerous other means to thwart competition from MIC, including exclusive 100 percent take-or-pay service agreements, exclusive right-of-entry agreements, agreements falsely asserting that Comcast installed wiring that it did not in fact install, etc.

To prevail on its motion for judgment as a matter of law, Comcast must show that “the evidence is so overwhelmingly in favor of the moving party that a reasonable jury could not arrive at a contrary verdict.” *Middlebrooks*, 256 F.3d at 1246. Comcast has come nowhere near to meeting that burden.

### **C. Comcast’s Other Defenses to Liability Under the FDUTPA Are Without Merit**

Near the end of its Initial Brief, Comcast offers a buffet of petit arguments to ward off liability under FDUTPA. None of these arguments has merit.

First, Comcast contends that MIC failed to provide any evidence of door fees, and that the FCC has specifically approved such arrangements. Brief at 50. In fact, MIC did introduce evidence of door fees, *see, e.g.*, D.E. 233-1, ¶ 45, and Ms. Delgado acknowledged that Comcast has paid them, D.E. 422-Tr. 809:10-

812:5. Furthermore, MIC has shown that Comcast's claim that the FCC approved door fees is simply wrong. D.E. 466-2 at 11. As it happens, however, the door fee issue now is essentially moot. Door fees were primarily a problem on the Mainland, and the Mainland is no longer involved in this case.

Next, Comcast raises two issues regarding wiring. One is that MIC did not claim damages at MDUs for which it introduced inside wiring evidence. The second is that MIC lacks standing to sue on Comcast's misrepresentations to third parties about ownership of wiring. *Id.* at 50-51.

MIC will address Comcast's argument about damages in part II, along with Comcast's other contentions about damages. Comcast's standing argument is based entirely on the District Court's ruling that MIC lacked standing under Section 718.1232 to challenge Comcast's exclusive arrangements at condominiums. D.E. 433 at 11. The Court's ruling focused on the specific language of Section 718.1232, which bears no resemblance to the substantially broader language of FDUTPA. Unlike Section 718.1232, Fla. Stat. § 501.211(2), as amended in 2001, affords "persons" a right to sue for competitive injuries. Courts interpreting that language have expressly held that an entity can sue a competitor under FDUTPA for injuries suffered as a result of the competitor's misrepresentations to third parties. *See, e.g., Advanced Protection Technologies v. Square D*, 390 F.2d 1155, 1165 (M.D. Fla. 2005).

Third, building on its erroneous premise that MIC could not sue Comcast for its misrepresentations to MDUs, Comcast asserts that the District Court committed reversible error by referring to misrepresentations in a superfluous jury instruction, and confusing the jury. Brief at 52-53. This argument cannot survive the correction of Comcast's false premise.

Fourth, Comcast suggests that it has never removed any wiring, so it cannot have caused any harm from doing so. *Id.* at 53. Comcast need not actually remove wiring to cause injury. Just a serious threat of removal, combined with other anticompetitive Comcast actions, is likely to deter some MDUs from switching from Comcast to MIC. That is particularly true of the 70-80 year olds who live in most of the MDUs on Marco Island.

Fifth, Comcast claims that the Court undermined its own rulings under the Noerr-Pennington doctrine by allowing MIC to show the jury various Comcast letters with threats of litigation redacted. *Id.* at 54. If Comcast had its way, MIC would not have been able to use any Comcast letters at trial, as it is difficult to conceive of a letter from Comcast to an MDU in which Comcast did not somehow assert rights of some kind. Indeed, Comcast acknowledges that if the District Court had excluded all of the documents that Comcast found objectionable, MIC's case would have collapsed. *Id.* at 55.

As it happens, the District Court struck a very sensible compromise – it gave counsel for Comcast the opportunity to redact the portions of any letters that contained material to which Comcast objected, and the District Court allowed MIC to use information it needed in the remainder of these letters. That was well within the District Court’s discretion.

Sixth, Comcast argues the District Court erred in admitting evidence about the FCC inside wiring rules, that the District Court allowed an unqualified individual to testify as an expert on the wiring rules, that the Court’s jury instructions were incorrect in several respects, and that the Court effectively told the jurors that Comcast could not own inside wiring because it had not paid property taxes on it. Comcast is wrong on every point.

Comcast appears to be confused about the role of the FCC’s rules in this case. MIC does not claim that the rules apply; to the contrary, MIC claims that the rules do NOT apply, and that it was unfair and deceptive of Comcast to invoke and then misrepresent them to the detriment of MDUs and MIC. There is no way that MIC could have proven these assertions without referring to the rules on the record. With regard to MIC’s expert, Garth Ashpaugh, Comcast has apparently overlooked the District Court’s determination that “Ashpaugh is qualified to testify concerning the FCC’s cable inside wiring rules.” D.E. 357. In any event, Comcast

has not even made a proper objection, as it does not claim, much less show, that the District Court abused its discretion in admitting Mr. Ashpaugh's testimony.

Comcast's assertion that the Court gave the jury erroneous instructions is also incorrect and insufficient. According to Comcast, the District Court erred by referring to 47 C.F.R. § 76.802 and 47 C.F.R. § 76.804 in its jury instructions, because neither is applicable here. This is a puzzling argument because the Court never said that these rules were applicable. Rather, it is Comcast itself that claimed to MDUs that the rules were applicable, even though it knew that to be untrue, and then it misrepresented what the rules said. All the District Court did was to instruct the jury on how these rules would have worked if they did apply – which is what Comcast is really concerned with.

Furthermore, the Court did not tell the jury that Comcast could not own inside wiring because it did not pay taxes on it. The Court did no more than paraphrase the rule. Nor does the rule itself say that Comcast could not own wiring. The Rule just says that if Comcast treated wiring as owned by the unit owners for tax purposes, Comcast could not invoke the protections that the rules provide cable operators. So, once again, the District Court did not commit any error. Even if it had, the error would have been harmless because both parties insisted throughout the trial that the rules did not apply.

Last, with rich irony, Comcast contends that this Court should defer to the FCC, the expert agency concerning the matters at issue in this case. MIC agrees. In particular, MIC submits that the Court should embrace the FCC's findings in its new MDU Order that (1) Comcast's exclusive arrangements that explicitly bar competition are unfair and unlawful, (2) other arrangements that the FCC has not barred – e.g., arrangements that are not explicitly exclusionary but may have that effect as a practical matter may also be unfair and unlawful (as the jury found in this case), and (3) the FCC has never “specifically approved” the practices that Comcast seeks to sweep into the exemption from FDUTPA liability.

In summary, MIC amply proved that Comcast violated FDUTPA, and nothing in Comcast's brief undermines that conclusion.

## **II. COMCAST HAS FAILED TO SHOW THAT THE DISTRICT COURT ERRED IN AWARDING MIC DAMAGES OF \$800,000**

Comcast contends that the District Court committed reversible error in awarding damages of \$800,000 to MIC. According to Comcast, FDUTPA does not allow damages of the kind that the Court awarded to MIC, and MIC's evidence on damages was also deficient in a number of other respects. Comcast also contends that MIC sandbagged it by introducing new evidence just before and during the trial. Comcast made the same arguments below, and the District Court found them all without merit.

In part A below, MIC will show that FDUTPA does permit damages of the kind that MIC received. In part B, MIC will show that its evidence was more than sufficient to sustain the Court's award.

First, however, MIC believes it important to put the damages issues into context.

MIC is a small company with limited resources. After a period of impressive growth between 1997 and 2001, MIC's growth flattened in 2002-03, after Comcast came into market and introduced a broad range of unfair, deceptive, and intimidating practices. MIC had hoped that a court decision in 2002 holding that Comcast's exclusive contracts violated Fla. Stat. § 718.1232 would turn matters around, but Comcast just ignored the decision at other properties. By the end of 2003, Comcast's tactics were clearly succeeding. Given MIC's good reputation, attractive prices and services, and outstanding customer service, it should have been getting 8-10 requests for proposals a year. By the end of 2003, however, requests for proposals had dwindled to zero. As a result, MIC concluded that it had no reasonable option but to file this action at the end of 2003.

For the next three years, MIC endured protracted and costly litigation, including massive discovery and numerous motions. As it prepared for trial in the summer of 2006, MIC faced a dilemma – with some 40-50 properties likely to have been affected by Comcast's anticompetitive practices, MIC knew that it could

not litigate the details of more than a handful of these properties, nor would the court have allowed MIC to do so.

In short, as a practical matter, there was only one thing that MIC could do – focus on presenting representative examples of practices that Comcast was commonly using at MDUs that could reasonably be extrapolated to the rest of the properties at issue. In particular, MIC decided to concentrate on properties, such as the Charter Club, that had received widespread attention on Marco Island because Comcast itself wanted other MDUs to view them as representative of Comcast’s methods of doing business. In these circumstances MIC argued that what the jury saw Comcast doing at these properties, could reasonably be applied to what Comcast was doing elsewhere.

That is how the trial proceeded. Through nine action-packed days, MIC called a litany of MDU managers, MDU residents, construction contractors, and others to testify. Most had had first-hand experience with Comcast’s acts of deception and intimidation and were able to communicate effectively to the jury how it felt to be in Comcast’s cross-hairs. These witnesses were not as vulnerable to deception and intimidation as the 70-80 year olds who occupied most of the MDUs on Marco Island and the Mainland. Rather, they were particularly astute, experienced, and articulate. In other words, they had the characteristics that would enable them to do just what FDUTPA seeks to do – expose and remedy anti-

consumer and anti-competitive behavior, particularly on the large scale that Comcast was engaging in such practices.

At the end of the trial, MIC offered two witnesses on the impact of Comcast's practices on MIC. First, MIC presented the testimony of its president, Bill Gaston, who claimed no expertise in the arcana of economics or high finance, but had an intimate understanding of his business and what Comcast had done to it after entering the market. Mr. Gaston presented a simple spreadsheet that conservatively estimated MIC's lost profits at seven representative properties – totaling \$297,000 – and he testified that, although he could not be sure of the exact dollar impact, he was sure that Comcast's practices were having similar effects at the 33-36 other properties that MIC was not serving on Marco Island.

MIC's second damages witness, Chris Pedersen, a highly qualified expert in business appraisal. After studying MIC's situation in intimate detail, including analyzing volumes of financial information, performing numerous interviews, and visiting Marco Island and the Mainland to get a first-hand feeling for the business, Pedersen used well-established analytical tools, used widely by professional business appraisers, to determine the injury that Comcast caused MIC to suffer. He arrived at two figures -- one an estimate of MIC's lost past profits, totaling \$336,000, and the other an estimate of the loss of the value of MIC's business, totaling \$800,000. These were complementary rather than alternative measures of

damages, as lost profits focused on the past, and lost market value focused of MIC as of December 31, 2005.

Following the trial, the jury used its own method of valuing MIC's damages and awarded it \$3,268,392. Comcast thereupon filed post-trial motions requesting a new trial on damages or a remittitur reducing the damages to \$800,000, conceding that this was "the largest amount supported by evidence admitted at trial that conforms to the Court's damages instructions to the jury." DE 436, 1.

MIC opposed Comcast's post-trial motions, offering the District Court various theories about how the jury could have justified an even higher damage award. D.E. 457. MIC noted that consistent with Mr. Gaston's testimony, if MIC had been able to serve certain MDUs from which it had been excluded, MIC could also have provided service to a substantial portion of the single-family homes that its lines would have passed on their way to the MDUs.

The District Court rejected MIC's estimates that included sales to single-family homes and granted Comcast's motion for a new trial, finding that the record at most supported damages of \$800,000. Although MIC strongly disagreed with this ruling, it could not afford a new trial, so it reluctantly accepted remittitur to \$800,000. This was a bitter pill for MIC to swallow, as MIC was certain that its damages were far greater than \$3,268,392 just on Marco Island, and Pedersen had also estimated damages exceeding \$5 million for the Mainland.

In summary, MIC's approach to establishing its damages was the only practical one available to it, and it yielded reasonable and reliable results. As shown below, MIC's results were well within the law.

**A. The FDUTPA Allows Damages for Lost Profits and Lost Business Value**

**1. Applicable Substantive Standard**

Fla. Stat. § 501.211(2) provides that

(2) In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in § 501.2105. ...

**2. Analysis**

Comcast attacks the Court's instructions to the jury on the proper calculation of damages. The Court instructed the jury that,

Only actual damages may be awarded under the Florida Deceptive and Unfair Trade Practices Act. Actual damages are calculated by determining the difference in the market value of Market Island Cable, Inc. after the deceptive or unfair acts and the market value of Marco Island Cable, Inc. in the condition that it would have been in but for the unlawful acts.

D.E. 430, Tr. 2089. Comcast maintains that this instruction was improper because

FDUPTA only allows recovery of “actual damages.” Fla. Stat. § 501.211(2). In FDUPTA consumer actions, actual damages are “the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.”

Comcast’s Brief at 35, quoting *General Motors Acceptance Corp., v. Ronald Lasser*, 718 So. 2d 276 (Fla. App. 1998) (emphasis provided by Comcast).

Comcast maintains that it was error for the Court to substitute the phrase “market value of Market Island Cable, Inc.” for “market value of the product or service.”

As Comcast itself recognizes, the standard quoted from *General Motors* is the applicable standard for consumer actions under FDUPTA. None of the cases that Comcast cites involved claims of unfair and deceptive trade practices by competitors. Indeed, all but one of the cases that Comcast cites predate the 2001 amendment to FDUPTA allowing for suits and damages in actions between competitors. Thus, these cases do not control damages issues in this case.

Nor has Comcast presented any relevant case law or treatise to support its contention that damages in post-2001 FDUPTA cases between competitors cannot be based on lost business value or lost customers. Indeed, in making similar arguments to the District Court, Comcast candidly conceded that “the standard for a competitor claim under FDUPTA is relatively undeveloped.”<sup>6</sup> D.E. 437 at 6.

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<sup>6</sup> Comcast’s concession is, if anything, considerably understated. As David J. Federbush has observed, cases construing actual damages under FDUPTA

MIC submits that the District Court correctly ruled during its conference to finalize jury instructions on July 21, 2006, that consumer cases decided before the Florida legislature expanded FDUTPA in 2001 to give commercial entities the right to sue for damages are not authoritative on the kinds of damages that commercial entities can recover under FDUTPA. Specifically, responding to Comcast's suggestion that lost profits are not an item of injury under FDUTPA, the Court responded, "That might be – might have been the law with regard to consumers, but this isn't a consumer case." D.E. 430, Tr. 1990.

At least two post-2001 cases have addressed the issue of lost profits or lost business value in suits between competitors under FUDTPA. Both support MIC's position here. The first case is *Sun Protection Factory, Inc. v. Tender Corp.*, 2005 WL 2484710 \*14 (M.D.Fla.) where the Court found:

**\*14** Under [Section 501.211\(2\)](#), Sun Protection must demonstrate that it "suffered a loss" as a result of a "violation of this part" in order to recover actual damages. *See* [FLA. STAT. § 501.211\(2\)](#). The record reflects a genuine issue of material fact as to each of these elements because the trademark infringement constitutes a "violation of this part," and *the lost business and lost profits constitute a loss* despite the fact that the specific dollar value of the loss has not yet been demonstrated. (emphasis added) (page 11)

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are inconsistent and ill-considered at best. *Damages Under the FDUTPA*, by David J. Federbush, Florida Bar Journal, Vol. LXXVIII, No. 5.

Clearly, the first prong of the damage calculation offered by Mr. Gaston and Pedersen addressed this “lost profits” calculation.

The second case is *Hanson Hams, Inc. v. HBH Franchise Co., LLC.*, 2004 WL 5470401 (S.D.Fla.) where the Court found:

In addition, Plaintiff's argument that its franchise is “valueless” is predicated on an unwarranted leap in logic: because it has been unable to sell its franchise *thus far*, it cannot sell it *at all*. (emphasis in original) (page10)

Again, in the *Hanson Hams* case the Court specifically recognized that loss of “market value” was appropriate under FUDTPA. The \$800,000 of damage testified to by Pedersen was a loss in “market value” of MIC.

In attacking the District Court’s jury instructions, Comcast also argues that lost profits or the diminution in MIC’s value are a measure of “consequential damages” and that “actual damages” under FDUPTA do not include consequential damages. This argument suffers from a fundamental flaw. In depicting all claims for lost profits as claims for consequential damages that are *per se* unrecoverable under FDUPTA, Comcast has painted with too wide a brush.

In making this argument, Comcast has read out of context this Court’s statement in *Nyquist v. Randall*, 819 F.2d 1014 (11th Cir. 1987), that lost profits are the “quintessential example” of consequential damages. A careful examination of *Nyquist* reveals that the intent of the Court’s ruling was far more limited than Comcast would have it.

The decision involved an interpretation of what damages are due under the Florida Uniform Commercial Code for a breach in the sale of goods (the sale of cattle in that case). The Court's discussion of consequential damages appeared in the following passage:

"Lost profits" are typically considered to be "consequential damages." R. White & J. Summers, *Handbook of the Uniform Commercial Code*, § 10-4 at 391 (2d ed. 1984). Cases applying Florida law seem to have assumed this to be the case, without discussing the issue. See *National Papaya v. Domain Industries, Inc.*, 592 F.2d 813 (5th Cir. 1979); *Council Bros., Inc. v. Ray Burner Co.*, 473 F.2d 400 (5th Cir. 1973); *Miles v. Kavanaugh*, 350 So. 2d 1090 (Fla.App.3d Dist. 1977). In fact, lost profits may indeed be the quintessential example of "consequential damages." See *Hadley v. Baxendale*, 156 Eng.Rep. 145 (Exch. 1854). In that case, which is generally regarded as the foundation of the modern law of consequential damages, the court denied recovery for lost profits occasioned [\*1018] when a mill was forced to shut down by the delay in delivering an essential part for it. *In denying recovery, the court stated that the loss "would not have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances. . . ." Id. at 151.*

*Nyquist*, 1017-1018 (*emphasis added*).

In the Court's citation to *Hadley v. Baxendale*, and its explanation of the rationale of that decision, lies the key to why lost profits or lost business value are not recoverable in consumer cases and may also not be recoverable in certain commercial cases under FDUTPA, but clearly *are* recoverable in cases such as this one. That key issue is foreseeability.

In consumer cases and certain kinds of commercial cases, lost profits or lost business value are collateral to the transaction at issue. For example, if a manufacturer sells a tire on the claim that it is puncture proof and the purchaser gets a flat tire that causes it to lose a day of profits, the lost profits are unforeseeable and collateral to the loss in value of the tire itself. Thus, under the FDUTPA, the purchaser could recover only the value of the tire.

In this case, however, MIC's lost profits and diminished value are the direct and foreseeable effects of Comcast's deceptive and unfair practices. These losses are not "consequential" or collateral, but are the "actual damages" to MIC that Comcast's unlawful actions have proximately caused MIC to suffer. It is therefore entirely appropriate for FDUTPA to provide for the recovery of such losses. Indeed, if FDUTPA did not provide for the recovery of such losses, it would in most cases leave injured competitors without an effective remedy to obtain compensation for their injuries. That, would frustrate the pro-consumer and pro-competitive goals of FDUTPA.

There is also another reason for construing FDUTPA as providing for the recovery of lost profits or lost business value in commercial cases in which these effects are the direct and foreseeable objectives of the defendant's actions. The reason is that FDUTPA says nothing to the contrary, and Section 501.202 requires

courts to construe the term “actual damages” liberally in furtherance of the broad remedial goals of the Act.

Florida law generally presumes that, in the absence of express statutory language to the contrary, common law compensatory damages are available as part of statutory damages schemes and that lost profits are a common element of damages in commercial cases. For example, in *McLeod v. Continental Insurance Co.*, 591 So. 2d 621 (Fla. 1992) the Florida Supreme Court held in a decision interpreting the Florida Insurance Code, Fla. Stat. § 624.155, that a party seeking damages is entitled to damages which are the “natural, proximate, probable or direct consequence of the act.”

In *Hanna*, this Court stated that the "fundamental principle of the law of damages is that the person injured by breach of contract or by wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of the defendant's act which [gave] rise to the action." *Id.* See also *Fisher v. City of Miami*, 172 So. 2d 455, 457 (Fla. 1965 )("the primary basis for an award of damages is *compensation* [and] the objective is to make the injured party whole"); *Douglass Fertilizers & Chemical, Inc. v. McClung Landscaping, Inc.*, 459 So. 2d 335, 336 (Fla. 5th DCA 1984) (the plaintiff is entitled to damages which are the "natural, proximate, probable or direct consequence of the act").

*McLeod*, at 624-625.

In *McLeod* the court recognized that the legislature has the right to modify the common law definition of damages, but there must be evidence of a legislative intent to do so. *Id.*, 591 So. 2d at 625; see also *Thornber v. City of Fort Walton*

*Beach*, 568 So. 2d 914, 918 (Fla. 1990) (statutes do not change the common law except as they clearly and plainly specify, and when there is such a change the common law is displaced no more than is necessary); *accord*, *State v. Ashley*, 701 So. 2d 338, 431 (Fla. 1997).

Similarly, in *Nebula Glass International, Inc., v. Reichhold, Inc.*, 454 3d 1203, 1213 (11<sup>th</sup> Cir. 2006), this Court cited several landmark Florida cases in confirming that lost profits, though challenging to prove, are a bedrock feature of Florida's remedial law:

It is settled under Florida law that lost profit damages, like all damages, cannot be speculative and must be proved with reasonable certainty. *See, e.g., W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348, 1350-51 (Fla.1989); *Twyman v. Roell*, 123 Fla. 2, 166 So. 215, 218 (1936). And since proving lost profits invariably includes some element of prediction about how the market would have behaved but for the defendant's tortious act or breach, Florida courts have often noted that proving lost profits damages is difficult, but by no means impossible.

If the legislature had intended to exclude consequential or other elements of common law damages for competitors, it could easily have modified the phrase "actual damages" or written the exemption to clearly say so.

Moreover, unlike consumer actions in which consequential losses would be highly speculative, it is entirely reasonable and appropriate that the measure of actual damages in suits between competitors include diminished value in the company or lost profits, as a direct consequence of the unlawful practices. This is

evidenced by the fact that lost profits are routinely available as part of the damages available to businesses under Florida common law.

**B. Comcast Has Failed To Show That MIC's Evidence Was Insufficient to Support the Court's Award of Damages**

In addition to arguing that lost profits and lost business value are not available under FDUTPA, Comcast also maintains that MIC's evidence of such damages was insufficient to support the verdict as a matter of law. More particularly, Comcast contends that MIC failed to introduce evidence of proximate cause, that MIC's evidence was inadmissible and so speculative that no reasonable jury could have awarded damages, and that MIC sandbagged Comcast by surprising it with new evidence of damages just before or during trial. None of these claims is correct.

**1. MIC Introduced Abundant Evidence of Proximate Cause**

According to Comcast, MIC was required to prove, on a property-by-property basis, for each of the more than 40 MDUs at issue in this case, that Comcast's alleged violations of FDUPTA proximately caused the damages that MIC claims. As noted above, however, it would have been prohibitively burdensome, time-consuming, and expensive for a small company like MIC to have done that. As a result, MIC did the only thing that it could reasonably 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 worked so hard to convey to the MDU community across Marco Island. Comcast wanted to “send a message” to the other MDUs on Marco Island, and from MIC’s perspective, that message had clearly gotten through. That MIC was no longer getting ANY requests for proposals by the end of 2003 was compelling evidence of this.

Contrary to Comcast’s suggestion, Florida law does not require that damages in commercial settings be established on a customer-by-customer or property-by-property basis. To the contrary, as this Court held in *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524 (11<sup>th</sup> Cir. 1988),

Florida law clearly provides that inability to give the precise amount of damages does not preclude recovery when substantial damages were suffered. Tyler's testimony, based upon Electro's financial records, customer accounts, net profit margin, and sales projections, satisfies the dictates of Florida law and supports the award as it relates to commercial purchasers. \*\*\* Accordingly, we will not disturb the jury's award for lost profits.

*Id.* at 1528 (citations omitted); *see also W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350-51 (Fla. 1989).

In the landmark case of *Twyman v. Roell*, 123 Fla. 2, 166 So. 215, 218 (Fla. 1936), the Supreme Court of Florida observed that, since proving lost profits invariably includes some element of prediction about how the market would have behaved but for the defendant's tortious act or breach, Florida courts have often

noted that proving lost profits damages is difficult, but by no means impossible.

The Court went on to hold:

The rule is well settled that if there is a yardstick or measure of damages by which prospective profits may be determined... Uncertainty of the amount or difficulty of proving the amount of damage with certainty *will not be permitted to prevent recovery on such contracts*. If it is clear that substantial damages have been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether.

*Twyman*, 123 Fla. at 7 (emphasis added).

As this Court has held, “it will be enough if the evidence show[s] the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The proof may be indirect and it may include estimates based on assumptions, so long as the assumptions rest on adequate data.” *G.M. Brod & Co., Inc. v. U.S. Home Corp.*, 759 F.2d 1526, 1539 (11<sup>th</sup> Cir. 1985).

Similarly, in *F.A. Conner v. Atlas Aircraft Corp.*, 310 So.2d 352 (3<sup>rd</sup> DCA 1975), the court held that the natural, proximate, and direct result of the wrong can include the lost profits of a business where the loss and the amount can be established with reasonable certainty as in the instant case. The *Conner* court, citing *Twyman* found that the relevant standard of certainty is not, as exacting as Comcast suggests, but simply requires that the court consider whether the “mind of a prudent impartial person be satisfied with the damages.” *Id.* at 354. The *Conner* court held that the inability to give exact or precise amount of damages did not

preclude recovery, so long as there is a reasonable basis in the evidence for the amount awarded. “If the proximate estimates of witnesses leads to a satisfying conclusion damages may be awarded.” *Id.* 354.

MIC’s damages witnesses, Mr. Gaston and Pedersen, presented the jury sufficiently detailed information to support the verdict. Mr. Gaston derived his information from his extensive day-to-day knowledge of the cable market on Marco Island. As a representative example of his losses, he testified that Comcast’s tactics prevented MIC from expanding on the eastern part of the Island, costing it the ability to compete for 27 units, at a loss of \$237,000, as well as the ability to expand to single family homes. D.E. 428, Tr. 1378, 1388, 1394.

Pedersen has qualified as an expert business appraiser in over a hundred proceedings. D.E. 428, Tr. 1502-1505. He conducted a thorough investigation into Marco Cable’s business practices and financial data consistent with his practices as an appraiser. D.E. 428, Tr. 1509:5-1514.

Comcast’s expert witness, Dr. Mikkelsen tried to discredit Pedersen’s testimony. In closing argument, counsel for Comcast, did the same, raising many of the same criticisms that Comcast offers in its Initial Brief. D.E. 430, Tr. 2069-76. The jury simply did not believe them, as was the jury’s right to do. Nor did the District Court agree with Comcast when it raised the same arguments in its

post-trial briefs. D.E. 436, 437, 438 and 471. MIC submits that this Court should now close the door on these objections.

Comcast's professions of surprise and prejudice are utterly without merit. On the eve of trial, Comcast raised some of the same points as it is now making, and after considering MIC's response, the District Court found no prejudice to Comcast. At trial, Dr. Mikkelsen testified that he had read Pedersen's reports, exhibits, depositions, and trial transcript; that he was familiar with Petersen's theories and assumptions; and was fully prepared to address them in his testimony. Thus, when Comcast complained about surprise in its post-trial briefs, the District Court found Comcast's complaint unpersuasive. As the Court knows, the District Court has broad authority over evidentiary matters at trial, including evidentiary matters involving expert witnesses, and in the absence of abuse of discretion, its decisions must be upheld.

There was no surprise in the testimony of either Gaston or Pedersen necessitating exclusion. The standard of appellate review for a district court's decision allowing an expert to testify is limited to an abuse of discretion. *US v Frazier* 387 F.3d 1244, 1260 (11th Cir. 2004). An appellate court cannot award a new trial on the basis of an evidentiary ruling unless such substantial prejudice tantamount to manifest *error* is established. *Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.*, 37 F3d 1460, 1465 (11<sup>th</sup> Cir. 1994).

To overrule the District Court, this Court must find that there was a manifest error, amounting to substantial prejudice, in allowing Pedersen to testify.

Under Section 703 of the Federal Rules of Evidence, an expert may testify to evidence disclosed at trial. Comcast itself opened the door to the \$800,000 testimony by cross examining Gaston on *his* lack of knowledge of terms such as payback analysis, and “Earnings Before Interest, Depreciation, Taxes and Amortization” (“EBIDTA”). D.E. 420, Tr. 346:5-351:16;352:3-355:12. The apparent purpose of these questions was to suggest to the jury that it could not trust Gaston’s damage testimony. Whereupon, MIC’s counsel called upon MIC’s business valuation expert, Pedersen, to rebut this inquiry and to discuss MIC’s financial health using the same terms and documents that Comcast’s counsel had introduced in its inquiry of Gaston, including Comcast’s summary of MIC’s financials. DX 561. 565. 66.

Using Comcast’s own charts, Pedersen demonstrated MIC’s growth and attributed it to MIC’s efficient business model notwithstanding competition from other providers. D.E. 428, Tr. 1514:24-1523:18; 1535:20-1537:25. Pedersen was asked whether he had heard Mr. Gaston’s testimony, specifically his cross examination, about his company’s EBIDTA. Pedersen indicated that he had and proceeded to explain the significance of EBIDTA as a means of normalizing valuation comparisons between companies. D.E. 428, Tr. 1540:18-1542:5.

Consistent with prior statements, Pedersen testified as to capitalization rates and risks associated with the business prior to Comcast's practices. He then testified as to the risk that investors would attach to a business as the result of Comcast's conduct. D.E. 428, Tr. 1545:1-22. At the time of the trial Comcast was not only aware of this line of testimony, but had already tried and failed to exclude it as part of a motion to Exclude Pedersen. D.E. 244, 270.

Pedersen testified that applying the capitalization rate of 11% to the EBIDTA of \$400,000 the value of the business after Comcast's actions, in terms of increased risk, was \$800,000. D.E. 428, Tr. 1540:14-1545:22. He distinguished the loss in value damages from those damages MIC sustained as the result of its inability to expand. He estimated the value of those damages at \$336,000, representing the total loss in income after expenses as of the date of value. D.E. 428, Tr. 1547:8-1553:5. When questioned as to why there were two numbers he responded: "Well there's two elements, one is damages to the existing business and the other is the damage to the business as the result of its inability to expand." D.E. 428, Tr. 1553:6-22.

Comcast's expert testifying in rebuttal, attacked the basis of Pedersen's testimony on both numbers. D.E. 429, Tr. 1908:10-1911:23, 1911:25-1922:15. In doing so, Mikkelsen concurred that there were losses under the methodology utilized but suggested that the number of lost subscribers were lower. He declined

to specify number other than to say that it was around \$40,000. D.E. 429, Tr. 1907:16- 1911:19. As to the \$800,000, Mikkelsen agreed with Pedersen's explanations on capitalization rates, but disagreed as to the actual number. He testified that if a different capitalization rate was used, the \$800,000 number would be reduced. D.E. 429, Tr. 1917:21-1919:10.

Given the substantial give and take on these issues by Comcast's counsel and its own financial expert, MIC submits that the District Court committed no error whatsoever in finding that Comcast was not prejudiced by the testimony of Messrs. Gaston and Pedersen. The District Court did not abuse its discretion.

### **CONCLUSION**

For all of the foregoing reasons, MIC submits that the Court should affirm the judgment of the District Court.

Respectfully submitted,



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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 13,999 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and the Local Rules of this Court.

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately based typeface using Microsoft Word, 14-point Times New Roman.



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James Baller

## CERTIFICATE OF SERVICE

I hereby certify that an original and six copies of the foregoing Brief for Marco Island Cable, were sent via overnight delivery by Federal Express to the Eleventh Circuit Court of Appeals this 15th day of December 2007, in addition an electronic copy of this Brief was uploaded on the 15<sup>th</sup> day to the Court's web site at [www.ca11.uscourts.gov](http://www.ca11.uscourts.gov). I further certify that on the 15<sup>th</sup> of December 2007, a true and correct copy of the foregoing Brief was sent via overnight delivery by Federal Express to:

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