UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

IN RE: CENTURYLINK SALES PRACTICES AND SECURITIES LITIGATION	File No. 17-MD-2795 (MJD/KMM)
	Minneapolis, Minnesota
	July 6, 2018
	9:00 to 9:59 a.m.
	DIGITAL RECORDING

BEFORE THE HONORABLE KATHERINE M. MENENDEZ

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(TELEPHONE CONFERENCE)

TRANSCRIBER:

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P R O C E E D I N G S

TELEPHONE CONFERENCE

(9:00 a.m.)

THE COURT: We have Mr. Gudmundson, who I think is going to take the lead on behalf of the plaintiffs. We also have Mike Blatchley from Oregon. Anyone else here on behalf of the plaintiffs today?

MR. RIDDLE: Yes. Good morning, Your Honor. This is Bryce Riddle with Zimmerman Reed.

THE COURT: Okay, What is your last name, sir?

MR. RIDDLE: Riddle, R-I-D-D-L-E.

THE COURT: Okay, great. Thank you. Welcome. Anyone else with the plaintiff's today? Okay.

And who is here on behalf of the defendant today? Defendants, and I'm assuming we might have counsel on behalf of the intervening parties that probably overlap but just go ahead and starting telling me who is here on that side.

MR. MCNAB: That is all correct. And good morning, Your Honor. Bill McNab from Winthrop & Weinstine on behalf of the intervenors.

THE COURT: Good morning. Who else do we have?

MR. LOBEL: Good morning, Your Honor. Douglas Lobel on behalf of CenturyLink, Inc., and the intervenors.

THE COURT: Welcome.

MR. VOGEL: And Davide Vogel also on behalf of the

defendant and the intervenors.

THE COURT: Okay, for the plaintiffs, are you expecting anybody else that's necessary for the call today?

MR. GUDMUNDSON: Your Honor, not if they are not already. I don't anticipate anybody else.

THE COURT: Okay. And how about for the defendants? Are we expecting anybody else who is essential today?

MR. LOBEL: No, we are not, Your Honor.

THE COURT: The purpose of the call just to make a tidy record, although it's obvious to everyone on the phone, that a couple of discovery issues were raised through the Court's informal dispute resolution process. We adopted this approach to discovery disputes in this matter in large part for their speed because we are on an expedited schedule for discovery related to three pending motions.

I have received and reviewed all three letters. I have some questions. I also welcome any kind of addition to the letters that either side would like to make but assume that I have read them and kind of paid attention closely to what's going on.

Let's start with the plaintiffs, Mr. Gudmundson, what would you like me to keep in mind or anything you need to add or clarify?

MR. GUDMUNDSON: Thank you, Your Honor. I'll

start with I think the fact that -- I think that all of us should be somewhat proud that we've only got a very small handful of disputes.

THE COURT: Yep, I was going to express my appreciation for that, and I think that's a good thing so.

MR. GUDMUNDSON: Yeah. And, obviously, these final three are the ones that are quite important to the plaintiffs and obviously to the defense and proposed intervenors as well.

I'll start with RPD's 19 and 20 because they sort of dovetail with one another. These address the extent to which arbitrations are actually initiated by consumers and engaged in by CenturyLink and vice versa. I know the extent to which CenturyLink pursues actions against its customers in court rather than an arbitration. It's really an important issue.

The Fit Bit case has gotten a lot of publicity lately, but it underscores a really important point that's an undercurrent of all the law in this area, and that's all the law that sort of talks about the Federal Arbitration Act and why courts think it should be favored and why it should be enforced. If arbitration is not a viable alternative, it undermines all of that. It's sort of a false tribunal concept. And what the Fit Bit case sort of highlighted and what we think may be going on here is that it's all well and

good to cite to the FAA and all of the case law surrounding it, but if the company refuses to engage in arbitration or tries to avoid it, you're really asking a court to send the plaintiffs nowhere.

And when a judge decides that arbitration is appropriate, presumably that judge is relying on the case law that says arbitration is a proper forum for the disputes to be resolved. If it's not a proper forum, the judge should know that, and we think that it should be known here.

There's a low amount in controversy. In many cases, the arbitration fee on either side is more than what the amount of controversy is, and so we think it's important to know whether these arbitrations are engaged by CenturyLink and the people who are trying to enforce the arbitration.

I think that one thing that the Court should bear in mind is that as currently drafted, these requests are seeking all documents. And, you know, this obviously was an important issue that the defendant and the proposed intervenors or primarily the defendant didn't want to produce documents in this area, and so we were sort of at an impasse quite early on and never got to negotiating that.

I want you to hear, and I want everybody to hear that we are willing to take far less than all documents and we are also not interested in the substance of the cases

other than to know that they were about cell phone billing practices. We're not trying to get a peek under the hood. We're not trying to get class wide discovery that we know is not on the table.

What we're really only interested in is the number of arbitrations initiated, who filed, who initiated the arbitrations, whether it was customers or CenturyLink, Inc., or somebody that CenturyLink, Inc. controlled, whether it was about sales or overbilling like this case is about, and this disposition, not necessarily who won but, again, we're not trying get a peek under the hood. But whether it was actually arbitrated or whether it was, for example, CenturyLink Inc. refused to remit its portion of the arbitration fee, and it just went away without ever being arbitrated. And so that is sort of really where we are, and that's really the same for RP number 20.

I think it's well received by me, the argument that I saw for the first time in their five page letter brief that we could just search Pacer for this. That's a good point, and we will do that. I also see here that they've written now that they don't believe there's any responsive documents, but also that there may be a number of small claim court actions that are not publicly accessible.

We're not trying to do make work here. We can look on Pacer, but if there's non publicly accessible court

initiations by CenturyLink, Inc., we think that that's discoverable for all of these reasons. That particular RP number 20 really goes to mutuality concepts. Are they requiring something of customers that they don't engage in themselves. And while I'm not entirely dispositive, it's certainly a factor under number of decisions, and we think it's both easily provided and highly relevant.

THE COURT: Okay. Why don't we stick with these two before we pivot to 54, just to kind of keep things clean. Mr. McNab or whichever of your team is going to take the lead.

MR. MCNAB: I think Mr. Lobel will be taking the argument this morning, Your Honor.

THE COURT: Okay, great. Mr. Lobel?

MR. LOBEL: And, Your Honor, I'm going to hand the ball off to Mr. Vogel.

MR. MCNAB: Sorry, Your Honor.

THE COURT: All right. Does Mr. Vogel know this? All right, Mr. Vogel.

MR. LOBEL: He just learned it, yes, Your Honor.

THE COURT: Okay. Let's hear it.

MR. VOGEL: Good morning, Your Honor. I'll start by noting that on both 19 and 20, they haven't cited you any authority that this kind of discovery is proper for these questions. I think it's pretty clear it's completely

inappropriate.

On the first issue of arbitration, the law is super well settled by three Supreme Court cases that arbitration is favored and should be enforced as a matter of federal policy. So they're trying to find a loophole around the law by creating really a factual argument, and the factual argument is predicated on two things:

First, that the company hasn't done enough arbitration in the past based on whatever number -- if we were to respond with all of this information he is seeking, they would then tell the Court whether that's enough in their mind. And if they decide it's not a big enough number, they're going to make some argument that it's not an option because we haven't done it enough in the past.

And, Your Honor, I think that there's nowhere in the Supreme Court cases about arbitration is there even an inkling that this is a factor. And, obviously, it creates a tremendous amount of satellite litigation because instead of talking about what's in the consumer's contract, we're now going to be talking about, well, how come there isn't as much arbitration in the past as the plaintiffs claim they would like to have seen?

And you almost have to get down to individual disputes about why they did or didn't get arbitrated and really we're trying to -- we're going to end up having to

prove some negative in the next three months of the customer disputes that don't go to arbitration, why didn't they get arbitrated? Did the customers decide they got enough of a refund from the company and the credit process? Did they go to small claims court instead?

I mean of course you create this incredible amount of side litigation that has nothing to do with whether these 38 consumers clicked to accept the contract that were presented to them on the computer screens. And there is no case that authorizes this.

The only case they're citing you is this Fit Bit case where the Fit Bit defendant violated the court order and, you know, they clearly, you know, should be taken to task for that, but we're not under any court orders to arbitrate. And so that leads me to the second fallacy with this request about arbitration.

It's predicting our future behavior. It's predicting we're going to ignore the Court order. There's, you know, the Court can take that for what it is. We think the case law is pretty well settled. The court should not assume a party will violate a court order, but we can fix this too.

We have considered all along that they're opposing the operating companies intervening, so we have always considered one option is the operating companies can always

consider arbitration under these contract clauses. We felt the Court would feel that if we did that, that would infringe on the Court's authority to decide whether they should be arbitrated. We didn't think that would be well received by Judge Davis, so we have not --

THE COURT: Mr. Vogel, can I ask a question or point out a concern that I have? I think that you're perhaps artificially cabining their argument a bit to say that it's based on the future prediction that the defendants will violate a Court Order in this case for arbitration as to these 37 or 38 plaintiffs. I think that, obviously, there's no way in the world you would do that because all eyes are -- not to suggest that you ever would anyway. I'm not casting aspersions or anything like that, but all eyes are on you and that wouldn't go well.

I think that the argument is more nuanced, and it is that in general if this arbitration clause is illusory, then it means that while conduct might conform to arbitration in this case where there is so much enormous attention placed on these 37, that aside from that, these arbitration clauses are simply a paper remedy and not an actual remedy.

So I'm not -- I'm not saying -- I'm not predicting that means I agree that number 19 or number 20 are necessary, but I think it's artificially narrowing their

argument to say that it's about a prediction that you're going to violate court-ordered arbitration. I'm kind of agogue that Fit Bit would do that, but I don't think that that is the heart of this argument.

MR. VOGEL: Well, I appreciate that, Your Honor. And the heart of the argument, the heart of the issue in front of Judge Davis is whether to enforce these contractual arbitration provisions and class action waivers. And all the case law I've seen on that looks at the language of the contract and decides whether they're enforceable. I've never seen a case that goes into whether they've been arbitrated or employed in arbitration by prior disputes.

And a couple of points to keep in mind there. The first one is how is it held against us if customers don't initiate arbitration? That should be a customer's choice whether to do it or not. If the contract says they're supposed to but they choose to take a credit from the company instead of initiating an arbitration, I don't think the lack of arbitration with consumer initiated arbitration should be held against us in deciding whether this contract is enforceable.

And I think the second point to make is if you look at these contracts, they do tell consumers, and this is very consumer friendly, the consumers mandatory arbitration except for I think this is pure monetary disputes that

consumers are allowed to go to small claims court and that's in these contract provisions and they do that, and there are small claim processes. I don't know in each state if they're publicly available or not but those processes do exist.

So whatever the number of arbitrations is, I would imagine the plaintiffs will find it's not high enough, and we're going to be litigating all sorts of side issues about why isn't the number different than what it is? None of which goes to whether the contract language is written is binding on these plaintiffs. Obviously, the consumer plaintiffs don't know about any past arbitrations. That's, in fact, why they're asking.

So why is, you know, one of these plaintiffs that they see their contract and they read it and they click to accept it and let's say they understood it, they read it, they agree with it, why is it totally not binding because of a past practice with other consumers whether or not things were arbitrated or put in small claims court or resolved informally?

THE COURT: Let me ask a purely hypothetical question and kind of going to the very heart of number 19. Let's hypothesize that there was a demonstrable pattern of a particular defendant mocking arbitration invitations at low dollar values because or mocking is too judgmental a word,

but taking efforts with their substantially greater resources to avoid arbitration because the low dollar makes the enterprise not worthwhile. Are you suggesting that simply because a court that we don't have precedent for that argument, that if there was a case where a District Court judge was asked not to enforce an arbitration agreement because it is essentially illusory and because X defendants always tells the arbitrator, hey, this isn't worth it, we're not going to pay our filing fee, that that wouldn't be relevant to the enforceability of the arbitration clause? I mean that seems like you're going farther than you need to go.

MR. VOGEL: Well, I think also their discovery requests go farther than they need to go.

THE COURT: Oh, absolutely, yeah, I'm actually asking you to think about that hypothetical for a minute, is that your position?

MR. VOGEL: Well, I think so, and here's why, Your Honor. I think we all go back to law school and contract law. The contract is first determined by the plain language, and if the Court can determine its enforceability on plain language, the Court is done, end of story.

THE COURT: Right.

MR. VOGEL: And in past practice for other contracts, they're always the plain language.

THE COURT: Well, you really don't think that courts would have that concern? I mean, you're absolutely right, the Supreme Court has repeatedly recently as has the Eighth Circuit expressed an affection for enforcing arbitration clauses. I understand that this landscape substantially favors arbitration. I just think it goes too far to suggest that because each arbitration clause is enforced on its own, if the reality were so dismissive of the contractual requirement in general, that a court would not be appropriate in considering that.

I'm assuming CenturyLink doesn't engage in that practice that, you know, it's sort of suggested that the Fit Bit folks did at least once, but I don't know that we need to imagine that this could ever be relevant.

MR. VOGEL: Well, I'll first confirm my understanding is that the company does not engage in these practices, that there would be no instance of the company refusing to pay a filing fee if a consumer wanted an arbitration. But I think what you're describing is not really a question of contract enforceability. It really sounds like some kind of an improper corporate behavior, like a claim, or a consumer fraud claim or some kind of, you know, unjust unfair practice. It sounds like a substantive claim you're describing, not a defense to a contract enforceability issue.

THE COURT: Interesting.

MR. VOGEL: But, again, I think this is all -- this is the (inaudible). We have a very short amount of time. We have a tremendous amount of work, and the judge is going to have a lot of things to decide, and this issue they're trying to skirt the policy and arbitration is really a lot of satellite litigation that does not involve their customers, their plaintiffs at all. It's some murky past practice, which is really very hypothetical.

THE COURT: Okay. Mr. Gudmundson, anything you want to say with respect to 19 and 20?

MR. GUDMUNDSON: Just that I think that the Court, your questions were sort of directed at what I would have rebutted with, and that is this is not about accusing CenturyLink that they're going to violate a Court Order in the future. Really we're looking at it in the context of if this is enforced, what happens outside of this litigation? If this is a false tribunal, then it's really a bridge to nowhere.

And also I think that Mr. Vogel is being a bit overly general with respect to claiming that every arbitration clause they they're trying to enforce here also allows customers to go to small claims court. I don't have it all sitting in front of me, but that's my understanding that that's not the case. But I'll leave it at that and

then move on to 54, unless the Court has any sort of questions.

THE COURT: Okay. I have a couple of more questions for Mr. Vogel. Mr. Vogel, let me ask you this: If I were to order you to disclose cases in which the defendant or the intervenors had refused to participate in arbitration, how burdensome would that request be?

MR. VOGEL: Well, just to clarify also, that would be I would imagine arbitration for residential or small businesses. The company does have, you know, major enterprise customers that would also arbitration, but that wouldn't seem to be relevant.

THE COURT: No, and we could even narrow it to billing disputes, but I'm not sure that's even necessary because I suspect that almost all of your residential and small business arbitration is related to billing disputes so. How burdensome would that be? Because I share your observation about how vastly far afield we can get with this litigation and about the reality that if consumers are choosing not to arbitrate for whatever their reason is or choosing to accept credits against their bill or erasing, you know, on demand purchases or something else in satisfaction of their frustration instead of invoking an arbitration clause, that doesn't demonstrate shenanigans on the part of the defendants.

So if we were to narrow it to instances like those implicated by the Fit Bit decision and the hypothetical, I'm assuming that that would not be particularly burdensome, but I'm going to give you the opportunity to tell me otherwise.

MR. VOGEL: Well, our objection was never a burden objection. It was a philosophical objection to what they were seeking. I also believe the answer to that question is going to be a null set, and I would obviously we try to prove it's a null set, I need to run it down completely with the company, but I believe that's something we could run down in a week or so.

THE COURT: Okay. And, Mr. Gudmundson, since I'm at least considering red lining your request in 19, tell me what's wrong with my narrowing?

MR. GUDMUNDSON: I, You know, for the purposes of where we sit today, I think that your proposal would be fine by us.

THE COURT: Okay. All right. As to number 20, before we pivot to 54, let me understand what more you are looking for than what you already have, if I could?

The defendants have clarified a null set as to a subset of the request, which is specifically that there are no lawsuits by the defendant or the intervenors that take, you know, the Court path instead of the arbitration path as to residential and small business customers regarding sales

or billing disputes. We also have the reality that you can find litigation engagement by CenturyLink probably by doing some Pacer searches. What more are you still seeking than what you have right now?

MR. GUDMUNDSON: Perhaps nothing, but it was a little confusing in reading their letter that if they did call it a null set, but they also said that there are maybe small claims activities and that's what we would be interested in is non publicly accessible cases. We can find everything else that's publicly accessible, but if there's non publicly accessible cases.

Now, it may be that it's a null set because they hire collection companies to sue these people, which is what they do regularly in court by the way. But on publicly accessible things would be what we're after.

THE COURT: Okay. Mr. Vogel, what are your thoughts about the collection company challenge?

MR. VOGEL: Well, that's a different issue. I haven't even focused on the collection company issue. Those would be third party suits. Given the time frame we're under --

THE COURT: Right, I hear you. What he's trying to suggest is, you know, and I'm certainly sensitive to all of these issues, but I think that there is at least a hypothetical concern that it's fine for the defendant and

the intervening company to say, oh, we never sue anyone. We simply invoke arbitration. If what they in reality do is assign the lawsuit to a third party and have them do it all the time. That's not what this request seems to include or contemplate. Do you have anything you want to add on that?

MR. VOGEL: Well, a couple things, yes, I've never thought about that issue and never read this as getting to third party collection issues, which are on a whole different federal set of laws, of course.

The other issue is the question is these are company initiated legal proceedings. Small claims is technically a legal proceeding. Now, we did say there is no, I was very specific in the letter, that we've said there's a null set of filings in the course of general jurisdiction, which is meant to exclude small claims which is discussed in the letter. Those do happen all the time. I don't know how many times the company itself files those.

As you know, Your Honor, in small claims courts, at least in most small claims courts, the company and counsel are not allowed to appear. So these are handled by company staff. I don't know if there's even a central depository of small claims issues or if it's an office-by-office or state-by-state sort of thing, And they're in business in 37 states so.

THE COURT: Can I ask a question about the small

claims provision? And I apologize that I don't have this at my fingertips. But in one of these agreements where there is an arbitration clause that is how many of the agreements at issue here in this case, let's just take in this case, have mutual arbitration versus one sided?

MR. VOGEL: I think they're all mutual. They'll read, you know, all of our disputes shall be arbitrated. There are carve outs for, in some of them, there are carve outs for small claims where it's just about a monetary payment issue.

THE COURT: And actually that was my second question. So mutual arbitration with small claims carve outs, and are small claims carve outs mutual always or are they one sided?

MR. VOGEL: I have to say, Your Honor, I've looked at a few weeks ago. I don't know the answer. Well, clearly, the consumer is permitted always to file in small claims. Whether the companies also, I'm not sure. It's protection for the consumer because the consumer might prefer going to small claims than arbitrating.

THE COURT: Yeah, okay.

MR. GUDMUNDSON: And, Your Honor, if I may jump in. This is Brian Gudmundson. That is not my understanding. I've seen some of these and like Mr. Vogel, I don't have them sitting in front of me. Perhaps, we can

do a separate submission if the Court thinks it would be useful. But my memory of seeing clauses that say we both have to go to arbitration, but CenturyLink gets to go to court if you owe us money. Those are the ones that I remember, and I don't want to misspeak, but I think if it's dispositive in the Court's mind, we may need a separate submission.

THE COURT: No, no, it's not dispositive in my mind. I'm just asking. And when you say, "go to court," do you mean small claims court? Do you mean courts of general jurisdiction? What do you mean by court?

MR. GUDMUNDSON: That I don't recall, but I recall I thought it was courts of general jurisdiction, perhaps in small claims court, but I remember having this discussion with somebody about that clause so.

THE COURT: Okay. So presumably this is all going to get fleshed out for Judge Davis who is the one that needs to really grapple with it.

Okay, why don't we go ahead to number 54?

MR. GUDMUNDSON: Okay. Your Honor, 54 is kind of a bit more nuanced yet. And this seeks information about piercing the corporate veil and the capitalization of the subsidiaries. When we started negotiating this, Mr. Vogel, I believe it was, made a very logical point, which was you're saying all subsidiaries here but we have so many, and

there are so many that are irrelevant here. And I'm thinking to myself, you know, I don't want the catering company that's a subsidiary. They don't have anything to do with this. So we try to find a way to narrow this and get exactly what we want that would be important for the Court's consideration in the briefing.

So we ask for the proposed intervenors because that's who the defendant keeps saying they want to be the defendants. But then we said, well, there's these other, you know, we have asked since day one who is responsible for creating, implementing, enforcing the centralized sales and billing practices at issue here?

We were initially told by the defendant you sued the wrong person. We said, okay, well, who created, implemented, and enforced the sales and billing practices? To this date, we have never gotten that information. Presumably, it's going to be coming out in discovery in the depositions that we're doing, but we've never been told who that was. Instead we've got a list of 10 proposed intervenors who they say "provided services."

Well, that's not our question because our complaint is very clear, and it goes not to necessarily who provided services, but who created, implemented and enforced the sales and billing practices at issue and are responsible for the misrepresentation and omission and breaches at

issue?

We don't want to wait until the end of discovery to get that information. We want to make good use of our discovery time that we have so we don't have to come back and say, well, gee whiz, we were sand bagged or something like that, and now we have to figure all of this out.

THE COURT: Have you submitted an interrogatory asking that question?

MR. GUDMUNDSON: Well, we've asked for documents, and we've gotten deposition topics on it. But, you know, interrogatories to me to my mind usually especially in a short time period, it's not a way to get at it in a quick manner.

THE COURT: Okay.

MR. GUDMUNDSON: You know, you've heard a lot, perhaps about the whole naming of CenturyLink, Inc. in your original complaint, and we were totally open minded about that process, and we did an investigation and we concluded that Inc. was the one responsible. And they said, well, it's not. We said, well, who did all this? And that's all we want to know because we asked the right questions and find out who the corporate veil is going to be pierced as to.

So we've gotten the submission from them July 2nd, and it says no, no, no, this is about piercing the corporate

veil between CenturyLink, Inc., and the proposed intervenors, and this is all they get (inaudible).

THE COURT: Yeah, I haven't read your papers to embrace that the proposed intervenors are the only people for whom the corporate veil could be pierced. And just to add an additional wrinkle, it seems like if we're talking about contacts with the forum with respect to personal jurisdiction, we also have a concern about if there is another alter ego type actor having contacts with the forum, it seems that that would be relevant.

But let me ask you this, what you really want despite the vast broadness of request number 54 is that you really want information about the capitalization of whatever subsidiary designed, implemented, and I forget what your other verb was, the billing and sales practices.

MR. GUDMUNDSON: That's correct. And if you see footnote one in our submission, that's what we narrowed it to.

THE COURT: Okay. And presumably the defendants have provided substantial information about the capitalization of the proposed intervenors?

MR. GUDMUNDSON: Well, we've gotten a new document production. I've looked at the indexes and what we've received so far. I'm not quite sure it's been in there yet, but we just received another production last evening, and it

may be in there. They said they're going to produce it, and we've had a good faith exchange so far. They say it's in there. I believe it to be in there.

THE COURT: Okay. Let me hear the perspective of the defendants on this point with the particular focus on the narrowed requests because I agree wholeheartedly with the concerns that you raised about the vastness of the request itself, but let's focus on the more narrow request about capitalization as to the proposed intervenors, which it sounds like you have provided substantial information on that front. And capitalization of whatever entity or subsidiary is responsible for the three verbs of the billing policies.

MR. VOGEL: Thank you, Your Honor. So, yes, the financial, the 10 operating companies that are intervening, seeking to intervene have been produced is my understanding. And they're going to be getting the 30(b)(6) testimony on those documents.

And this is where I would footnote the discussion Mr. Lobel had with you or Mr. McNab when we were in front of you. The company has -- this is a general approach to this. There's been no allegation of under capitalization. None. They're asking us to prove a negative. We pointed out they got the wrong defendant, and they're like, well, give us all the financials. There's no allegation that you're going to

find anything in it. There's not a single document that they're going to capitalize. It's just like you keep feeding the plaintiffs because they're grasping at straws here.

So this is an initial point here that this is a very attenuated, keep digging more holes to see what you can find approach to discovery. The issue whether is Inc., whether you can pierce the veil between -- well, let me step back, Your Honor.

There's never been any dispute nor have they attempted any dispute that the operating companies are the ones that provided service. These are phone companies. These are Internet companies. These are the companies that have the wires that go into the homes that provide the phone calls, that provide the television signals, that provide the Internet signals. So the ten intervenors are the contracting parties who have the service of giving to the plaintiffs.

The plaintiffs have shifted their target now. They're now talking about, well, who developed these enterprise wide policies?

THE COURT: Mr. Vogel, I'm not sure I credit that that is a shift. I understand that you all have been seeking to keep the focus on the intervenors throughout the stage of the litigation. But in all candor, the very heart

of their complaint has to do with these billing practices and billing policies, and they have been looking all along for which entity is the appropriate entity that adopted those.

And just to be slightly argumentative, I'm not sure if a judge can be argumentative, but I'm about to, this is also the very essence of the difference between the position that the defendant took at the MDL panel about how there is a centralized, uniform cohesive plan and the position that's being taken now about how there are decentralized ten separate operating systems.

And I understand that you all have a theory of the case by which those two things are a hundred percent true. But I also understand that the plaintiffs have a theory of the case by which there is someone responsible for uniform top down billing and sales practices, and they are trying to figure out who that is and get the information as to that entity.

So I'm not sure it's quite fair to say that this is a shift, that this is a digging a new hole, that this is a new effort, that this is somehow a moving target for the defendants to satisfy their discovery requests. I maybe naively think that this has been the heart of their discovery effort all along.

MR. VOGEL: So, Your Honor, let me address a

couple of different points here. But let me start first and foremost with the suggestion that we've been inconsistent in our papers because I absolutely just completely, you know, comparing apples to oranges.

There is common management, not involving Inc. Inc. is not involved in this, and they're never going to find that proof. But the common management of sales, advertising, those sorts of things are done by some of the intervenors and by some other entities which are affiliates, some other subsidiaries. That's what's common, that's what we told the panel when we're talking about sales and billing policies, that's what's common.

Our position is with the lack of commonality doesn't get to the sales and billing practices. It goes to each individual consumer's claims. One consumer is claiming he got billed at the wrong time of the month. Another one claimed his Internet speed was too slow. Another one claims he got a fee he didn't authorize. That's what's not consistent between these claims.

So you're comparing, so when they are trying to compare our papers, they're doing a disservice by ignoring the context of what we're saying is consistent or not consistent between the cases.

THE COURT: So have you all revealed which entities that are subsidiaries that are part of the common

management that has designed, implemented and adopted the sales and billing practices? Have you disclosed that information to the plaintiffs?

MR. VOGEL: You know, they have not asked us to do that, and he said that they did, but they haven't. They served no interrogatory on that. They have served interrogatory on another issue, but they have never served an interrogatory on that question.

They have not yet taken a deposition. We had a deposition scheduled last Friday. It got postponed due to unfortunate circumstances by the plaintiff's counsel, so we offered it today. We would actually be in Monroe today doing that deposition. They chose not to take it, so they already know the answer to that question having taken that deposition.

They got deponents next week who mentioned the company name. So when we went and informally we offered to name the companies they should be suing. They never came back and said, well, name the companies who did these common policies. They never asked us that. So that historical revision is why the plaintiffs think that we've been refusing to answer the question. We never had the question put to us. And we will --

THE COURT: It feels mutually frustrating all around that what seems to me to be quite literally the

million dollar question, the million dollars referring to the expense of the litigation perhaps at this stage rather than anything else, but hasn't been asked clearly or answered clearly, and I'm kind of mystified and astonished, but frankly my astonishment is mutual, and I think comes in part from my relative recent status in the intricacies of civil litigation where things like this confound me and in my former practice I think we would have just asked.

But, okay, I hear your point. So let's focus on the idea that there are entities out there that are largely or significantly responsible for creating and adopting and implementing the billing and sales practices that are being complained about that include to an extent the intervenors, that also include other entities that you have not yet been properly asked to name and, therefore, haven't named. Why not provide the capitalization information as to those entities? You know who those entities are. It can't be very many. What's the problem with -- help me understand what your position is as to those discreet entities? Because the cat is going to be out of the bag next week even if it's not out of the bag today, so what is the problem with providing that information?

MR. VOGEL: So I have two or three problems, Your Honor. The first one is legally what are their claims against these entities from whom they didn't make purchases?

Their claims that have to be against the companies they had contracts with from whom they bought the services and that's the operating company. There's no privity with these other parties. If some other company, and the key word he used in his verbs is implemented.

If there's some other company that sets an enterprise wide policy and then it gets effectuated -- just put it this way, let's say there's management at this other affiliate that sets up enterprise wide billing policy. And let's say the plaintiffs don't like that policy, they can't run into court the next day. They've got to make a purchase and that policy has got to be implemented in the purchase. And there's going to be damage, actual right damage as a result of that policy harming a consumer. Well, the damage of that transaction is with the operating company.

So they're now, they are -- and I do think it's shifting because you never hear about this in the consolidated complaint, but whether they've almost thought about it or not, they're moving the target because now instead of trying to sue the company they had the transaction with, they're trying to sue other companies for some, you know, companywide policy but they don't have standing to challenge that until they actually have a transaction and that's going to be with the operating companies.

And so that's my first problem that they're chasing companies that they're not, they can never have a claim against because they have no standing to sue those companies for their developing policies. That's one issue.

Another issue we've got is that it doesn't -- it's not going to pierce the veil with Inc. What you're going to be doing is trying to -- what they're trying to do is say the operating companies, some of them have some of their, you know, decision making made by other sister affiliates, and they're basically trying to blend all these affiliates into one big entity and from their papers even suggest that. What they're really trying to do is pierce the veil between sister affiliates, and the law is pretty clear that's not the purpose of piercing. The purpose of veil piercing is to look at whether the parent and the subsidiary are to be treated the same, and so they're discovery is going in sideways, not up and down.

THE COURT: Well, but just to nudge back a little, it seems like you are the ones that are continually trying to suggest the 10 intervenors is the appropriate parties and say, therefore, the piercing of the veil is limited to the 10 defendants that we want to have sued.

I think what the plaintiffs are trying to do more broadly is to suggest that someone is responsible for a uniform, and they argue deceptive set of sales and billing

practices. They don't agree that it is the 10 people you would like or the 10 entities you would like it to be. They believe it is Inc. or a closely affiliated alter ego or, you know, I apologize but I don't have the corporate terminology down, but a closely affiliated entity with Inc., and they are not embracing your thought that the only questions before Judge Davis in a couple of months are as between the 10 and the one.

MR. VOGEL: I understand they're not embracing it, but the problem is that they're trying to create a claim that doesn't exist. They don't have standing to challenge the policy that was generated, just because they don't like the policy. They must have a company that -- the company must have damaged them. The defendant must have caused them damage.

That's a fundamental Article III standing requirement. The policy was developed by an affiliate or by a third company, maybe it was just a policy the company pulled off the Internet. They don't have standing to challenge the developer of some independent party. They've got to have a transaction. They've got to have damage.

THE COURT: Let me ask it like this. Let's say we had a much cleaner situation where the plaintiffs have sued the operating company and the company that created policy because every time they tried to get at the policy, the

operating company would say, oh, yeah, that's just how we all do it. That's how it was designed. And so they have sued both the operating company that sent in the bill and the company that told the operating company how to send them the bill. You're suggesting there wouldn't by standing for that?

MR. VOGEL: I think there would be a serious problem for standing for that, and I'll give you a real world example. The Minnesota State Attorney General, as you're probably aware, filed a civil lawsuit against CenturyLink in the fall based on billing and sales issues. They named three companies who are the ones who do the transactions with consumers in Minnesota. They did not name the company that developed some of these policies because they don't need to, because the law is going to, if a company does a policy that's wrongful, and it causes harm, it's liable for the harm. I don't think that company can say, well, I'm just following the orders of my corporate superiors. That's not going to be a defense to a breach of contract claim or a consumer fraud claim, that they caused the harm, and it's a wrongful policy whether they developed it or whether it's just following orders. It's liable, and I don't think there is any standing for the third party because there's no privity. There's just no contractual privity, and there's no harm caused by that other entity.

It's just a policy.

So let me also go further, Your Honor, because there's a little more to this also. I think we have asked the Court starting with Judge Davis that we followed the rules here. When they said they wanted discovery on their operating company, Judge Davis expressly said that's got to be by Rule 45 subpoena to the operating companies, and they've done that. Well, they're not doing that with these other entities now.

What they've done here is they've served the discovery on the corporate parent and define the word you, Y-O-U, so broadly as to include all subsidiaries. They're not trying to take discovery indirectly on these other affiliates, not by the Rule 45 subpoena, but by Rule 34 on the parent. We feel that end runs what the judge ordered which was affiliate should be subject to Rule 45 subpoena, so they can all protect their independent rights.

THE COURT: Yes, you keep reminding me about that issue. That is something I wanted to ask Mr. Gudmundson about.

MR. GUDMUNDSON: Yeah, I'm happy to answer that. I offered the Rule 45. It was not a (inaudible) report. He asked how we should do it, and I said, listen, I don't think they're parties. I'm happy to do a Rule 45. So Mr. Vogel has not stated the record correctly. I have much more to

say, but I'll leave it at that unless you have other questions.

THE COURT: I do. So tell me as to the question of these entities, why not wait until next week, get the information about who designed and implemented or adopted and disseminated whatever verbs we want to use, these sales and billing practices and serve a Rule 45 subpoena on that entity next week?

MR. GUDMUNDSON: Well, I think we're running out of time for new subpoenas and response dates and everything like that. You know, Mr. Vogel is also just flat out misrepresenting history. We have asked this information from day one and not been given it.

I'm just going to look at the, there's certain categories and certain topics that embrace this specific issue, and I just want to see what the timing of those is. I don't want to be difficult. We've had a pretty good ability to try to work through our disputes. If we can wait and get an agreement to have this stuff turned around quickly next week as opposed to -- I just don't understand why -- it's July 13th, I guess that is, the topics will be testified about.

THE COURT: Okay. Okay, I think I'm ready to rule on these three issues. Let me just say that I do appreciate both the substantial amount of discovery that has already

been provided by the defendants. I'm really mindful both the defendants and the proposed intervenors, I'm mindful that substantial discovery has been provided, and I'm also really appreciative that despite the high stakes of this litigation and the zealous advocacy on both sides that you have been able to overwhelmingly find common ground in discovery requests and not have to raise issues with the court. So I appreciate both of those realities.

With respect to number 19, let me get it pulled up on my screen, I am going to require both the defendants and the intervening companies to provide a very discreet subset of this information, which is any instances in which the defendant or the intervenors refused to participate in arbitration when it was requested by a consumer.

I'm not narrowing that all the way to because the filing fee was too big in comparison to the extent of the dispute. I'm saying any instance in which an intervenor sought arbitration and either the defendant or the operating companies refused. Any questions about that order?

COUNSEL (collective response): No, Your Honor.

THE COURT: With respect to number 20, I am going to require the defendant and the operating companies to provide information that I believe is frankly a null set, which is information about -- let me get the exact language -- residential and small -- oh, and let me, I'm sorry, let

me back track and make clear. I think what's already been clear from our conversation that that is as to residential and small business customers, not as to other types of entities with whom other the defendant or the intervenors have business relationships. It's to residential and small business customers.

As to number 20, I am going to require the defendant and the proposed intervenors to clarify, to make sure to confirm that there are no lawsuits in courts of general jurisdiction initiated by any of the defendants regarding sales and billing disputes. So if that slightly more fulsome review by the defendants or if it's already been done, demonstrates that that remains a null set, that is a null set.

As to 19 and 20, I agree with the concerns of the defendant that these could easily create enormous amounts of production and discovery, but also possible fighting about production and discovery. It doesn't get to the heart of what's at issue, which is basically whether these arbitration agreements exist only on paper but aren't honored by the defendant or the intervenors. And so my ruling as to 19 and 20 is designed to get at that specific question. Any questions about my ruling on 20 or 19?

MR. GUDMUNDSON: One question, Your Honor, this is Brian Gudmundson speaking, on number 20, when you say

defendants plural, do you mean the --

THE COURT: I'm sorry, I keep misspeaking. I mean the defendant and the operating company.

MR. GUDMUNDSON: Understood.

THE COURT: The proposed intervenors. I know I keep slipping into defendants because it does feel like we have a lot of entities, and I know according to the defendants the intervenors are likely soon to be defendants themselves but that's what I mean. Other than that, any other need for clarification?

MR. VOGEL: No, Your Honor, this is Mr. Vogel.

THE COURT: Okay, thank you. As to number 54, let me just tell you that having appeared in front of Judge Davis for my entire career, he is a man of obviously he's very decisive. He's super intelligent. He also doesn't suffer petty battles with enormous patience. And I think it is time for this question to be answered and for the defendants to advise the plaintiffs as to who designed, implemented, adopted, disseminated, trained about, whatever you want to call it, the sales and billing practices that are at the heart of this lawsuit.

I'm not going to say that they haven't been asked for or they have been asked for properly. I sense some possibility of game playing on both side, but I don't even mean that disparagingly because that's exactly what civil

litigation is designed to encourage in discovery practice. But I think that the time has passed for not knowing the answer to that question. And so I leave it to you to decide how to provide that information, Mr. Vogel, to the plaintiffs and then the plaintiffs can choose how to try to get, if necessary, additional information regarding things like capitalization.

I'm not entirely sure that capitalization is the argument that the plaintiffs actually want to focus on with respect to the entities, the collective management group that helped design this plan, but that's up to them. They can't even serve that Rule 45 subpoena or ask the right document requests or do anything else until they know who the entity or entities are.

So I'm going to give everyone time to figure out how to communicate this information, but it isn't productive to just wait until they ask the right question next week then say the right answer and then further narrow the time they have to get the information they actually need to litigate the motions that are pending before Judge Davis.

So, Mr. Vogel, what format would you like to provide this information in and how soon can you do it?

MR. VOGEL: I expect to be in an e-mail probably all that's necessary, and I need to confer with my client about doing this. I mean it could be done by Monday, I

would think.

THE COURT: Okay. I think that would be great. If there are objection or concerns, I will try to get an order out quickly. I can just foreshadow for you though that since this is kind of the heart of this stage of the battle, I think it's important to get this information shared, so we can get this discovery done and get this in a format so that Judge Davis can rule on the actual merits of these three motions, which is what our whole goal has been, and I know you all are working really hard to make that happen.

So I am going to not require information at this stage about capitalization of the as yet unnamed entities. We can talk about that once they're named. I'm assuming that if there is a good argument about capitalization of discreetly identified entities, the defendants aren't going to oppose providing that information, I'm going to assume that the plaintiffs are going to try to really narrowly tailor requests from here on out, so that we don't start with the broad and get down to the basics, but we start with the actual essential information. But if either of the assumptions are misplaced, then I look forward to hearing from everybody again.

Anything else we need to talk about today or any clarification about I'm ruling with respect to number 54?

COUNSEL (collective response): No, Your Honor.

THE COURT: All right. Well, I appreciate everybody's time today. I appreciate the thoroughness and brevity which aren't two things that normally go hand in hand so well, including by myself, in the letters that each side provided me to prepare for the call, and please get in touch again. We'll endeavor to get you on my calendar as soon as practicable at every turn if necessary.

The reason I, incidentally, the reason I'm making the order at this time with respect to number 54, which I know is not actually giving the plaintiffs what they asked for but giving them something else, is because I don't want to have a situation where we're into the depositions next week, and we have a question of whether this entity or that person is the right person to answer the question or whether it's raised in the exact magic way to get at this information. We're going to skip all that, we're going to get this information out there so those depositions can be productive.

Okay. Thank you everyone. Call me if you need me and I hope everyone has a good week end.

COUNSEL (collective response): Thank you, Your Honor.

(End of proceedings.)

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REPORTER'S CERTIFICATE

I, Maria V. Weinbeck, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Maria V. Weinbeck*

Maria V. Weinbeck, RMR-FCRR