UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In re: CenturyLink Sales Practices and Securities Litigation	)	File No. 17-MD-2795 (MJD/KMM)
	)	Minneapolis, Minnesota
	)	June 7, 2019
	)	8:03 a.m.
Benjamin Craig, et al., Plaintiffs, vs. CenturyLink, Inc., et al., Defendants.	)	File No. 18-CV-296 (MJD/KMM)
	)	Minneapolis, Minnesota
	)	June 7, 2019
	)	8:03 a.m.

BEFORE THE HONORABLE MICHAEL J. DAVIS
UNITED STATES DISTRICT COURT JUDGE

(MOTIONS HEARING)

Proceedings reported by shorthand reporter; transcript produced by computer.

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P R O C E E D I N G S

IN OPEN COURT

THE COURT: Let's call the first matter, please.

COURTROOM DEPUTY: In re: CenturyLink Sales Practices and Securities Litigation, Civil Case No. 17-MD-2795; and Benjamin Craig, et al. vs. CenturyLink, et al., Civil Case No. 18-CV-296.

Counsel, please state your appearances for the record.

MR. GUDMUNDSON: Good morning, Your Honor. Brian Gudmundson for the plaintiffs.

THE COURT: Good morning.

MS. REGAN: Good morning, Your Honor. Anne Regan on behalf of the plaintiffs.

THE COURT: Good morning.

MS. WANG: Good morning, Your Honor. Ling Wang on behalf of the plaintiffs.

THE COURT: Welcome.

MR. DUBANEVICH: Good morning, Your Honor. Keith Dubanevich for the plaintiffs in the securities case.

THE COURT: Good morning.

MR. BLATCHLEY: Good morning, Your Honor. Michael Blatchley from Bernstein, Litowitz, Berger & Grossmann for the lead plaintiff in the securities action.

THE COURT: Good morning.

MR. MATHAI: Good morning, Your Honor. Michael Mathai from Bernstein, Litowitz, Berger & Grossmann for lead plaintiff in the securities action.

THE COURT: Good morning.

MR. FISHBEIN: Good morning, Your Honor. Gregg Fishbein, Lockridge, Grindal & Nauen, on behalf of plaintiffs in the securities case.

THE COURT: Good to see you.

MR. FISHBEIN: Good to see you.

MR. MUELLER: Good morning, Your Honor. Keil Mueller with Stoll Berne on behalf of the plaintiffs in the securities action.

THE COURT: Good morning.

MR. McNAB: Good morning, Judge Davis. Bill McNab, Winthrop & Weinstine, on behalf of the CenturyLink defendant.

THE COURT: It's always good to see you.

MR. McNAB: Thank you, Your Honor.

MR. LOBEL: Good morning, Your Honor. Douglas Lobel on behalf of CenturyLink.

THE COURT: Good morning.

MS. LIGHTDALE: Good morning, Your Honor. Sarah Lightdale from Cooley on behalf of the defendants in the securities case.

THE COURT: Good morning.

MR. GIBBS: Good morning, Your Honor. Patrick Gibbs, also from Cooley, on behalf of the defendants in the securities case.

THE COURT: Good morning.

MS. INGLIS: Good morning, Your Honor. Georgina Inglis on behalf of the defendant in the securities case.

THE COURT: All right. I believe we have -- who is on the line so we can make a record of that? Is anyone on the telephone line? Please note your appearance.

MR. ROBINOVITCH: Hart Robinovitch from Zimmerman Reed for plaintiffs in the consumer case.

THE COURT: Good morning.

MR. GUTKIN: Good morning, Your Honor. Jeff Gutkin from the Cooley firm for defendant.

THE COURT: Good morning.

MR. VOGEL: Good morning, Your Honor. David Vogel from Cooley's Reston office on behalf of CenturyLink.

THE COURT: Good morning.

All right. Those of you that are on the telephone line, I would ask you to mute your phones so I don't have to hear your dog or music playing in the background. Come on, people can laugh. It's 8:00 in the morning.

(Laughter)

THE COURT: Let's proceed. Do I have an update of what's going on?

MR. GUDMUNDSON: Yes, Your Honor. Good morning.

THE COURT: Good morning.

MR. GUDMUNDSON: Brian Gudmundson again on behalf of plaintiffs. I'm here with an update for Your Honor on the status in the consumer cases.

The parties on May 20th mediated the case in front of Judge Layn Phillips. We entered into a term sheet four days later and have settled the case tentatively.

The structure of the settlement is a closed nonreversionary fund, which is going to be comprised of a monetary fund of $15.5 million. There will be $3 million for claims administration. There will be more provisions related to claims administration, which I'm happy to discuss. We will also be negotiating injunctive nationwide relief.

One of the important things that the parties are going to be doing, and we have a request for Your Honor related to this, is conducting some confirmatory discovery, which we believe will take some time. And to that end the parties would like to request that the Court enter a stay of our proceeding so that we can conclude negotiations in preparation of a settlement agreement and present this settlement, tentative settlement, to the Court for preliminary approval as soon as possible.

Right now we anticipate that that process will

take until approximately mid August, early September, although it may be sooner. We are working very hard to try to get things done. If it takes a little longer, it's because the efforts are -- not because the efforts are not being pursued strong, but because there's just a lot of work to do.

Really that's all I have for you, Your Honor. We're pleased to provide updates in the interim if the Court desires to know what's going on --

THE COURT: I do.

MR. GUDMUNDSON: -- as these weeks and months proceed. So we would be happy to establish status conferences or simply check in with Your Honor and schedule according to your wishes.

THE COURT: I think it would be best that you just every 30 or 45 days send me an update signed by both parties so I know that everyone is agreeing to what's being said.

MR. GUDMUNDSON: Sure. Would a letter ECF'd and submitted to your chambers be sufficient?

THE COURT: Yeah, I believe that -- I think that's best, so everyone knows what's going on --

MR. GUDMUNDSON: Sure.

THE COURT: -- instead of having it just sent to my chambers.

MR. GUDMUNDSON: Unless the Court has any

questions, I really have nothing further, Your Honor.

THE COURT: All right. Thank you.

MR. GUDMUNDSON: Thank you.

THE COURT: Any response? Good seeing you again.

MR. LOBEL: Good seeing you, Your Honor. Very pleased to be here today. I agree with --

THE COURT: It's warm.

MR. LOBEL: It is warm. I've been here when it's cold and I've been here when it's warm.

Your Honor, I agree with everything that Mr. Gudmundson said. We are pleased that we were able to reach a tentative settlement. We think this is a very reasonable compromise for the class in light of the strong arguments that we believe we had with respect to the motion to compel arbitration with respect to class certification issues. We think it's a fair and reasonable outcome for the class, and we also think it has great benefits for judicial economy given the likely duration of this matter no matter what happened on the pending motions.

So we are committed to working hard to efficiently complete the confirmatory discovery. We will document the settlement and we will set up an orderly and efficient claims process, and we give you our word that we're committed to do that.

THE COURT: I know that you are. I respect both

sides and what you've done. It's amazing. I didn't expect it. When I received notice that there was a settlement, I was happy to see that.

MR. LOBEL: Thank you.

THE COURT: Not because of court efficiency, but I think from a business perspective, I thought it was best.

MR. LOBEL: Thank you very much.

THE COURT: All right. Let's call the next matter.

COURTROOM DEPUTY: I called them both.

THE COURT: Oh, you called them both. Let's proceed.

MR. GIBBS: Good morning again, Your Honor. Patrick Gibbs from Cooley on behalf of CenturyLink and the individual defendants in the securities case.

THE COURT: Good morning.

MR. GIBBS: Your Honor, we have some slides that we're prepared to display electronically, but I also have hard copies if the Court would like me to hand up some copies.

THE COURT: Please. Would you, please.

MR. GIBBS: Certainly. How many copies would the Court like?

THE COURT: I need three: one for myself, one for my court reporter, and one for my law clerk.

MR. GIBBS: May I approach, Your Honor?

THE COURT: You may.

MR. GIBBS: Thank you.

(Documents handed to the Court)

MR. DUBANEVICH: Your Honor, if I can interrupt? Just from a housekeeping perspective --

THE COURT: Turn the microphone on.

MR. DUBANEVICH: Good morning, Your Honor. I would like to interrupt just for housekeeping purposes. It's 8:10 a.m. and we understood that you had a hard stop at 9:00. If that's not correct, I just kind of wanted to figure out what our timing was this morning.

THE COURT: It's a hard stop at 9:00. Unfortunately I have to be at -- well, we'll see how it goes. It's a hard stop at 9:00. It's my 50-year college reunion. I don't know why, but they want me to be there. They want to honor me at every event possible, and we've been getting e-mails and calls from the president of the college and so that's what we are putting up with and so -- but this is more important to me than being there on time and so we'll try for the 9:00 hard stop and if we need to go past that, we'll just have to go past that.

MR. DUBANEVICH: Thank you, Your Honor.

MR. GIBBS: Thank you, Your Honor. I'm mindful that we are fairly short of time. Before launching into a

long presentation, I wanted to first ask if there's any particular part of our motion that the Court is particularly interested in discussing with us or if you have any questions that you would like me to address.

THE COURT: I need you to focus on the area that you think is most important and usually that's the weakest part of your argument.

MR. GIBBS: That's fine, Your Honor. Thank you.

THE COURT: You know that's where the opposing side is going to go, so let's deal with those issues.

MR. GIBBS: That's fine, Your Honor. Thank you. I would like to begin with a reminder of the plaintiffs' theory of the case and what that implies for their pleading burden.

As the Court knows, this whole series of cases really begins with a set of consumer class actions that the Court was just discussing with some of my colleagues and the question is how do the plaintiffs try to turn a set of consumer class actions into a securities class action.

It's obviously not securities fraud for the company to have been sued in some consumer class actions. Consumer class actions get filed routinely across the country and it doesn't by itself amount to securities fraud.

And so what the plaintiffs in the securities case have done to try to convert these consumer class actions

into the basis for a securities class action is to lay out an incredibly aggressive theory of the case.

And the theory is not only was there some amount of improper billing at CenturyLink, but, in fact, the alleged improper billing was, in effect, the business strategy. This is how they ran the company. This is where the revenue came from.

So, in other words, the plaintiffs' theory of the case is that for over four years CenturyLink systematically, routinely across the entire company intentionally overbilled millions of customers by hundreds of millions of dollars to such an extent that it materially inflated the revenues of a company whose quarterly revenues during that period routinely exceeded $4 billion every quarter, consumer revenues hovering around a billion and a half dollars every single quarter.

So the implication of that theory is that this alleged overbilling scheme would have to be absolutely massive, would have to be absolutely routine across the entire company and, most importantly for securities fraud purposes, the senior executives of the company, the people speaking to the market would have to know that it was going on, would have to know that it was going on to such an extent that it was materially inflating the company's revenues.

That's the burden they've taken on with the theory of the case they have laid out, and we would respectfully submit the complaint currently before the Court does not come close to carrying the burden they bear.

Before getting into the particular allegations, I want to start with just the question of whether this is even a plausible theory as it's laid out in the complaint. Obviously the Court needs to draw reasonable inferences in the plaintiffs' favor, but a complaint also has to meet some threshold level of plausibility, as we've learned from the Supreme Court.

And in this case the theory is, as I said, for four and a half years CenturyLink systematically and routinely overbilled millions of people by hundreds of millions of dollars. Those overbillings would have been reflected in bills that were sent to customers. This is not something that could be plausibly hidden from people for very long because people get bills and they pay their bills.

According to plaintiffs, CenturyLink has been caught in this scheme in a very public way. That's how they claim the so-called truth has come out. And yet the world we see reflected in the complaint looks nothing like the world we would see if a company had been caught overbilling millions of people by hundreds of millions of dollars over four and a half years and been very publicly caught.

Let's start with the fact that according to plaintiffs' theory of the case, CenturyLink's historical revenues were materially inflated by fraud and that's been publicly disclosed.

Not only, though, has there been no restatement of those previously publicly-reported revenues, but, in fact, CenturyLink's independent audit firm has continued to issue clean audit opinions for financial statements that include the very revenue numbers that the plaintiffs claim were materially inflated.

And the company has been caught and yet nobody has done anything about it. There are no other indicia in the complaint of the kind of public fallout that one would expect to see if an overbilling scheme of this magnitude had come to light.

So just as a starting point, the scheme itself is implausible to begin with. The complaint does not describe a set of circumstances one would expect to see if that scheme really had occurred and really had come to light, which is necessary for there to be a securities fraud claim. And so just as a starting point, we think the theory laid out in the complaint is implausible.

So the question is whether they have alleged sufficient facts to support a reasonable inference in their favor that this scheme existed, that this scheme materially

inflated the company's revenues over this period, and whether the complaint alleges particularized facts sufficient to support a strong inference of scienter, which is that the senior executives, the people speaking to the market actually knew this scheme was going on and actually knew it was happening on such a massive scale that it was materially inflating the company's revenues.

Now, as we've said in the briefing, given that there's been no public admission or public finding or confirmation that this supposed scheme even existed, the plaintiffs try to make out their case through 20 former employees that they claim they interviewed and they purport to report in their complaint what these people told them.

The facts attributed, the statements attributed to these 20 former employees do not come close to establishing, A, that there was such a massive, company-wide, systematic overbilling scheme or, B, that any of the senior executives, that any of the individual defendants or any of the speakers knew that this scheme existed and was materially inflating the company's revenues.

I've got slide 5 from our presentation up in front of the Court. First of all, the 20 former employees are a tiny fraction of the overall employee base of this very large company.

Seventeen of them do not purport to have spoken to

a single one of the individual defendants. As we've cited case law out of the Eighth Circuit and elsewhere, that alone means those former employees, 17 of them, have nothing to say about the defendants' state of mind. They add nothing to the scienter question that I personally think is the clearest weakness in the complaint.

Twelve of these former employees worked in very low-level sales and customer service positions, usually only in one location, for their tenure at the company. Those people have nothing to say about any kind of company-wide or systematic scheme. They could have observed at most things happening in a single call center.

Eight of the former employees actually affirmatively describe a set of policies and practices that were in place for resolving customer complaints and billing issues at CenturyLink.

This is important because I think it's crucial for the Court to have in mind the kinds of billing issues that the plaintiffs are routinely alluding to are a fact of life in a customer-facing business of this scale.

This is a company, as I said, that's serving millions of customers all around the United States. They're doing business by telephone with individual consumers on a massive scale. They have millions of customer interactions every year. It is inevitable that there will be some

routine level of billing mistakes, billing complaints, billing inquiries and the like.

The fact that the company has a structure that is set up to address and resolve those types of billing issues makes crystal clear that at least up to some level billing complaints, billing disputes, issues like this are routine. They are not indicative in and of themselves of a massive company-wide scheme to inflate revenue by intentionally overbilling customers.

Five of these former employees worked at CenturyLink for less than a year during the alleged class period.

Only two of these former employees purport to describe some level of company-wide customer billing issues or complaints. And this is one of the only areas where the complaint purports to provide any type of quantitative information about customer complaints. Those allegations, though, routinely slip in both cramming, which is what the plaintiffs claim happened here, and, quote, other billing issues, which are not described or explained in any way.

But in any event, to the extent those former employees are describing some level of customer complaints across the company, the numbers they're giving amount to a tiny fraction of the company's customers during the period in question. There's nothing about that number of

complaints alone described by those former employees that would suggest a massive company-wide scheme to intentionally inflate revenues through billing fraud.

And then, finally, oddly for a case that is premised primarily on an alleged overstatement of revenue through billing fraud, we only have one former employee who even worked in the finance department. This was a low-level finance department employee who only -- who has nothing to say about some company-wide scheme to cram or inflate revenue through billing fraud.

So the sum of all this is we don't have a single former employee who purports to estimate the financial impact of cramming on CenturyLink's revenues. We don't have a single former employee who is telling the Court that any individual defendant or any other senior CenturyLink executive encouraged, condoned, or directed people to charge customers for things they hadn't ordered. None of them purports to have gone to any of the defendants and informed them that there was some massive, widespread, systematic cramming of customers.

Without any allegations like that, you simply cannot get to a finding of particularized allegations supporting a strong inference of scienter at the least. We also don't think you can get to any reasonable inference that this scheme existed in the first place, but without

some link between whatever was happening on the ground in the call centers and the senior executives, there simply cannot be a finding of scienter here.

I want to focus quickly on the three former employees who allegedly spoke to the defendants. One of them, Former Employee 15, describes really nothing other than a disagreement with senior management about the marketing strategy. This former employee didn't like the fact that the base price for products was set low and then there were fees associated with those prices. This has nothing to do with charging customers for products and services they didn't order. It's a disagreement about how the products should be priced and brought to market. It's irrelevant to the plaintiffs' claim.

Former Employee 19 --

THE COURT: Well, 15, it's a little bit more than that. It's not just a simple disagreement about the business strategy. FE-15 alleges that Defendant Puckett, Defendant Bailey, and Victory created a strategy to mislead the customers.

MR. GIBBS: With all due respect, Your Honor, I'm not sure I would agree that the strategy that Former Employee 15 is describing is a strategy to mislead the customer. What that former employee describes is we're going to price the base product at a certain level, but

there will also be fees associated with it. Whether that misleads the customer depends on how it's described to the customer. This person has nothing to say about that.

This person's personal discomfort with that approach to the business doesn't amount to the company intentionally misleading its customers, much less on a massive scale sufficient to inflate revenues.

THE COURT: We'll hear from the plaintiff, but I think I can read correctly and I think FE-15 warned that the strategy would mislead customers and Puckett, Bailey, and Victory pushed forward with the strategy anyway, knowing that it would likely lead to cramming.

MR. GIBBS: I understand, Your Honor --

THE COURT: That's being alleged and so let's be careful how we characterize what these witnesses are saying.

MR. GIBBS: Fair enough, Your Honor, although I don't think I would agree with the knowing that this would mislead the customers. FE-15 thought it would mislead the customers. I don't know how FE-15 can conclude that Puckett, Bailey, and Victory agreed that it would mislead the customers. That seems to be something that one could have a different view on.

But in any event, it's also a different type of conduct than what I understand the complaint to be describing as cramming, which is charging customers for

products and services they didn't order. That seems to me to be a different issue, are they correctly disclosing all aspects of the pricing for a given product or a service.

Former Employee 19 purports to have had discussions with Post and Puckett about how to resolve customer complaints, but is one of the employees I mentioned before who confirms that there were policies and procedures in place to resolve them.

I don't think anything in the allegations about Former Employee 19 supports the inference that there was a widespread, company-wide, systematic scheme to inflate revenues by charging customers for things they didn't order.

And then finally we have Former Employee 5, who has alleged to have spoken to Defendant Bailey. Plaintiffs have laid out a fairly detailed set of allegations about an interaction between these two at the Breakers Hotel in Palm Beach, followed by an e-mail that the complaint purports to describe in some detail.

The problem is, having described that e-mail in such detail in their complaint, it is now incorporated by reference into their complaint. We've submitted it to the Court as Exhibit 26 to my declaration.

The e-mail makes quite clear that their interaction had nothing to do with cramming or overbilling customers at all. It is flatly inconsistent with the

plaintiffs' allegation. And under basic federal court pleading law, where there is a conflict between the allegations in the complaint and a document properly incorporated by reference, the document controls.

Now, some of the other specific allegations I want to touch on briefly.

We don't think they come close to establishing either the alleged scheme or scienter on the part of any of the individual defendants or any of CenturyLink's other senior executives.

There's a series of allegations about something that's characterized as an internal CenturyLink audit. That allegation is lifted entirely out of a discovery letter briefing in a separate case brought by the Minnesota Attorney General. We have laid out in the briefs the reasons why that doesn't meet the pleading standard.

In their opposition plaintiffs have massively mischaracterized their own allegation about this Minnesota Attorney General assertion. Having said in their complaint there was one internal CenturyLink audit showing that there was potential overbilling of three and a half million customers, in the opposition they say there are multiple audits which show hundreds of dollars of overbilling per customer, none of which is actually in the complaint. And I would respectfully urge the Court to please focus on the

complaint, not the way the complaint is characterized in the opposition brief.

In any event, the Court does not have before it any information about what this purported internal audit is, who created it, how they created it, whether it's in any way reliable. But even taken at face value, the fact that 3.5 million customers were, quote, potentially overbilled doesn't get you to there was a massive, company-wide, systematic scheme to inflate revenues by overbilling customers.

Plaintiffs have also focused on this story of how the company allegedly tried to change its sales practices and to adopt something plaintiffs call a behavioral coaching model. They claim that having adopted this model, they saw sales plummet and immediately reversed course and went back to the old way of doing things, after which revenues bounced back up. The problem is this set of allegations also is flatly inconsistent with judicially-noticeable facts.

Now, I think, again, if the Court focuses not on how the plaintiffs characterize that allegation, but on the allegations themselves, it's a conglomeration of things attributed to a handful of confidential witnesses or former employees, none of whom actually tells the story that plaintiffs lay out either in their complaint or in the opposition. They sort of cobbled together statements from a

handful of people to put this story together.

But more importantly, in all objective respects, the story is clearly untrue. They claim that in the fourth quarter of 2014 the company saw some drastic reduction in consumer revenues by virtue of having changed its sales model and that the revenues rebounded later in 2015.

We have shown the Court, from the company's publicly-reported revenue numbers, there was no drastic decline in consumer revenues in the fourth quarter of 2014. Those revenues actually went up slightly in that period from the period before. Nor was there a dramatic increase later in 2015 after the company allegedly abandoned this behavioral coaching model.

So the story doesn't add up. It is inconsistent with judicially-noticeable facts. It does not support the plaintiffs' claim.

It is also inconsistent with the facts in the sense that the story purports to say that Former Employee 5 had his conversation with Mr. Bailey in the spring of 2014 and immediately after that Mr. Bailey was promoted into a role that led to the creation of this new behavioral coaching model.

The problem is judicially-noticeable documents confirm that Mr. Bailey was not appointed to that position until sometime in 2015, not in 2014. And, as I said, the

revenue -- the changes in the reported consumer revenue don't match up with the story they're telling.

Now, plaintiffs have strained, really strained to try to argue that this case is just like the *Wells Fargo* case, and we have briefed this issue extensively. I won't dwell on it here except to note a couple of very important factors.

In *Wells Fargo* it was effectively conceded, it had been found in a consent decree by a federal regulator that Wells Fargo employees had created over one and a half million fake deposit accounts and over a half of million fake credit card accounts for customers. The fact that that conduct had occurred was not meaningfully in dispute in the *Wells Fargo* cases.

The issue that Judge Tigar was grappling with, over a series of motions to dismiss, was to what extent have the plaintiffs alleged facts showing that Wells Fargo's board knew about these things during the class period. That's what the majority of those opinions is devoted to.

We do not have anything like that federal regulator finding here. We don't have an admission or a finding that there was overbilling or intentional overbilling happening on some kind of massive scale. So that's a key distinction.

Setting that distinction aside, in finding

scienter in the *Wells Fargo* cases, Judge Tigar walked through what he called a battery of particularized factual allegations that he believed supported an inference that the board knew of and did nothing about illegal activity. We do not have anything like that battery of particularized factual allegations here.

And given the shortness of time, I won't sit here and read the slides to the Court, but we've laid out here all of the different factual allegations, the red flags that Judge Tigar noted.

THE COURT: Didn't he note that the imposition of strict sales quotas and close tracking by a company established scienter?

MR. GIBBS: He did not note that that by itself established scienter, not at all. In fact, Judge Tigar noted repeatedly that his finding of scienter was not based on any individual allegation like that, but was based on the totality of the allegations, which is why we've tried to lay out as many of them here as we could. I agree that one of the things the judge looked at in that case was the existence of sales quotas.

THE COURT: Let's spend some time on this.

MR. GIBBS: Sure.

THE COURT: Go ahead.

MR. GIBBS: Okay. Let me go back, then. So these

are some of the objective factors I alluded to before.

By the time Judge Tigar was considering the motions to dismiss in the *Wells Fargo* cases, there had been a public disclosure, not meaningfully disputed by the company, that their employees had created over 2 million fake accounts. This had, by definition, inflated this cross-sell metric that Wells Fargo had repeatedly reported along with its financial results, talking about the number of different Wells Fargo accounts that they were selling into each household. By the time Judge Tigar was considering those motions, regulatory bodies had leveled fines against Wells Fargo of over $185 million.

And, again, as I said, Judge Tigar's decision was based on this aggregation of red flags that he found alleged in the complaints there. Now, as I said, the plaintiffs are trying very hard in this case to try to echo some of those red flags in *Wells Fargo*, but I believe Judge Tigar's opinions are quite clear that the finding of scienter is not based on any individual one of those red flags by itself, but rather on the combination of all of them.

We don't have anything like the combination of red flags here that Judge Tigar was considering in the *Wells Fargo* cases. For one thing, one of the primary red flags that Judge Tigar alludes to repeatedly in his opinions is the fact that Wells Fargo's CEO at the time testified before

Congress and admitted that Wells Fargo's directors and officers had known about the fraud for many years before it came to light and before it ended. That was a key red flag for him. There is nothing like that alleged in this case.

Judge Tigar alluded to a former Wells Fargo banker who had sent multiple letters directly to the board detailing the very specific allegation of unauthorized customer accounts that were completely ignored by the board and that this person persisted a number of times over a period of time.

There were at least ten different legal actions filed against the company during the class period repeating this very specific allegation of unauthorized customer accounts. The L.A. City Attorney was one of the lawsuits that was filed. There was at least one whistleblower complaint that led to the Department of Labor making a finding of reasonable cause to believe that this type of activity had occurred. Now, I expect plaintiffs will say here we have lots of lawsuits too and so that's similar.

There's a really, really important distinction. Judge Tigar -- and Judge Tigar specifically says this in his opinion. He was not citing the lawsuits as evidence that the conduct had occurred. What he was doing with the lawsuits was saying the fact that these lawsuits are getting filed over and over and over and over again and making the

very same specific factual allegation is part of what put the board on notice that this was happening.

The lawsuits here, all of the consumer lawsuits that were filed, they were filed after the so-called truth came to light. Nobody can seriously claim that the consumer class actions filed here, after the first of the alleged corrective disclosures, somehow put CenturyLink's senior executives or directors on notice of this supposed massive scheme to inflate revenues. It's a key distinction.

The only reason Judge Tigar is looking at the lawsuits in *Wells Fargo* is because they were happening during the class period before the fake account scheme was publicly disclosed, and he was saying the filing of those lawsuits with this very specific allegation is one of the things that put the board on notice that this was happening at the company. That's not true here.

I would note too, by the way, there's a very important distinction between *Wells Fargo* and the allegations in this case. There's no circumstance in which bankers opening up a credit card or deposit account for a customer without the customer's knowledge is excusable, right? It is inherently fraudulent. It is inherently criminal. It is not the type of conduct that would be the subject of a routine billing dispute where someone might not have understood the charges they were going to see on their

bill. That's a very, very different type of conduct.

Judge Tigar also noted -- and, again, this is during the class period. This is not part of the revelation of the fraud. This is something happening during the class period that Judge Tigar felt put the defendants on notice of what was happening at Wells Fargo. It was a *Los Angeles Times* article based on interviews with 28 former and seven current employees and internal bank documents and records. There is not anything analogous to that here during the class period.

Now, plaintiffs might say their complaint refers to reports from former employees and that sort of thing, but, again, nobody is claiming that the amended complaint here somehow put senior executives at CenturyLink on notice that this was happening during the class period. It's a fundamental difference and the attempt to analogize to that fails.

Judge Tigar cited several significant regulatory interventions, including OCC supervisory letters that the board didn't respond to at all, took no action to respond to.

There were over 5,300 employees terminated, again, during the class period, 5,300 terminated during the class period for this conduct and yet the conduct continued over and over and over and over again.

There were also allegations describing not just the fact that senior executives and directors at Wells Fargo received reports about sales issues, but reports that documented increases in reports. So there were at least some allegations about the content of the reports, which is a key distinction between *Wells Fargo* and this case.

Here we have some generic allegations saying that some of the senior executives received reports about billing complaints or billing disputes or sales issues. None of them describes the content of the reports in a way that would suggest that those reports put CenturyLink's executives on notice of a massive company-wide scheme happening on such a scale that it was materially inflating the company's revenues.

Unlike opening fake customer accounts, which is by no means routine or normal, it is inherently a red flag that something is going on wrong in the business, the fact that you have customer complaints about bills, that you have disputes about bills, that is, at least at some level, a normal part of a consumer-facing business like this.

And so the fact that Post and other executives got reports that there were -- showing that there were customer complaints is not a red flag. It does not put them on notice of this kind of massive scheme to inflate revenues through billing fraud.

THE COURT: Well, they just didn't get complaints on the billing. That's insulting to me. The reason why they got the complaints were because of what? You tell me. Because people were being billed for things that they did not receive.

MR. GIBBS: You're alluding to the former employee allegations about the reports that went to senior executives?

THE COURT: Yes.

MR. GIBBS: Yes.

THE COURT: You just said they got reports of billing disputes. Please. An executive is not going to get a report on billing errors. They're going to be important errors and that there are going to be allegations of misconduct.

MR. GIBBS: With all due respect, Your Honor, I don't know what's in the reports that are being described in the complaint because they're not described with very much specificity.

I will note that the allegations that purport to describe reports going to senior executives routinely say the reports involve complaints about cramming and other billing issues. I don't know what that means.

I think it's clear from their allegations that reports and complaints about cramming do come up in the

business. That is true. I don't think that's in dispute. Again, there's a huge gap --

THE COURT: Are you saying your executives wouldn't know what cramming meant?

MR. GIBBS: No, not at all, Your Honor. I'm saying when I look at the complaint and they describe reports talking about complaints about cramming and other billing issues, I have no way of knowing how much of the -- how many instances of cramming they're reporting and what are the other billing issues. There's a wide range of things that could be categorized as other billing issues. I don't know what they're talking about. We don't know what those reports said.

I don't think that -- a senior executive receiving a report that says there are customers who claim they were crammed, there are customers who claim they were charged for something they didn't order by itself does not put someone on notice that this is happening intentionally, that this is happening in such a widespread and systematic way that it is actually inflating the revenues of a company whose quarterly revenues routinely exceed $4 billion, whose consumer revenues routinely exceed one and a half billion dollars every three months.

So the question is not were the executives aware that customers sometimes complained about cramming. That is

alleged in the complaint. The complaint does allege there were reports sent up to senior management that indicated there were reports of cramming.

There's a huge gap between that fact and saying the senior executives of the company knew that cramming was happening systematically across the entire company on such a scale that it actually materially inflated the company's $4 billion a quarter in revenue. It's just too wide of a gap.

There's no reasonable inference to be made, much less a strong inference, which is required for scienter, from the mere allegation that senior executives were aware that allegations of cramming had been made. Plaintiffs' own former employee witnesses say that not all complaints from customers were confirmed. Some of them were confirmed. Some of them were not confirmed.

So, again, the fact that senior executives were made aware of allegations of cramming, it's not a red flag and it certainly doesn't show that these people were aware of this massive scheme to inflate revenues through fraud. You're reacting to my red flag comment.

THE COURT: Well, if you're a senior executive, you have people underneath you and if something gets to the senior executive's desk, I think that indicates some kind of flag, whether or not it's red, pink, or bright red, because

there's -- the senior executive has other people taking a look at what's happening with the business and is not going to be bothered with just a routine complaint from a consumer.

MR. GIBBS: Well, I don't want to quibble over what "flag" means, so let me move away from that language.

THE COURT: Isn't that true? Just tell me the pyramid that's in a company, in your company. A senior executive just is not going to receive a complaint from a customer that's paying $150 a month on a bill.

MR. GIBBS: Probably not, but I guess --

THE COURT: Probably not?

MR. GIBBS: Yeah, probably not. I don't know. It depends on the escalation procedures. It depends on what we mean by "senior executive." Did the CEO get individual complaints? Maybe directly. I don't know. But we don't know from the complaint either.

THE COURT: Well, you know what a senior executive is because you're using the term.

MR. GIBBS: Fair enough. So let's talk about the individual defendants. Do I think the individual defendants might have been made aware of individual --

THE COURT: Well, no. Use my hypothetical.

MR. GIBBS: So I don't disagree with Your Honor's notion that something has to have some level of importance

to get up to the most senior executives in the company. I don't disagree with that.

THE COURT: Okay. And the higher it goes, the more serious it is?

MR. GIBBS: Probably true.

THE COURT: And that would be a signal that it might be a red flag?

MR. GIBBS: It might be.

THE COURT: Okay.

MR. GIBBS: It might be.

THE COURT: All right.

MR. GIBBS: It might not be. The senior --

THE COURT: More than likely it would be?

MR. GIBBS: I don't know that I would agree with that, Your Honor.

THE COURT: Okay.

MR. GIBBS: It's entirely plausible to me that senior executives might receive regular reports that tell them here's what our level of customer complaints are this month, we've received X number of customer complaints. They might get those reports.

The fact that they get reports isn't necessarily indicative of a problem. It certainly indicates that the information they are receiving is information they think they need to have to do their job. But not everything

that's reported to a senior executive --

THE COURT: But they would have to know what is in the complaints. Just because you get a number, let's say you get X number of complaints, the senior executive is not going to sit there and say, oh, okay, that number is not high enough for me to be concerned about it. They're going to be what is the complaint, what is the problem, what is the problem that's causing it to get to my desk.

Why are you doing this to me, like I -- I was chief judge of this court and I can tell you that what landed on my desk became a red flag and so -- I guess I was a senior executive, right?

And even as a judge, something my staff gives me and it lands on my desk, that's going to be a red flag that an attorney has done something or a *pro se* litigant has done something. That means I have to take a look at it. It's not something, oh, it's a piece of paper and I say shred it.

MR. GIBBS: I'm not suggesting it's a piece of paper and you shred it, Your Honor. What I'm pointing out is the law requires particularized --

THE COURT: I understand the law, but don't say that a senior executive is going to get a piece of paper and it may not indicate a red flag, because it's serious when it gets to a senior executive. And don't tell me that you don't know what a senior executive is.

MR. GIBBS: I will say neither of those things, Your Honor.

THE COURT: All right. Let's move on.

MR. GIBBS: My only point is --

THE COURT: Let's move on. I understand what your point is.

MR. GIBBS: Thank you, Your Honor. I'm mindful of time.

THE COURT: I threw you off, so let's move on to the other issues that you want to talk about.

MR. GIBBS: We've cited some cases from the Eighth Circuit. We think those cases stand for the proposition that if you are going to claim revenues or some other metric like that were misstated, you have to give at least some indication of the scale or at least allege sufficient facts, again, to support a reasonable inference that the thing was happening on such a scale that it materially impacted revenues. We don't think they've done that here.

I want to touch briefly on another category of statements which have to do with the company's strategies, their code of conduct, their expectations for behavior. We've cited the Court to cases recognizing those kinds of statements are not tantamount to a guaranty that nobody ever violates the code of conduct. The fact that some number of employees sometimes violated the code of conduct does not

translate the code of conduct itself into a materially false statement.

I'll touch on a few other categories of allegations the plaintiffs use to try to establish scienter. Actually, I want to set that aside for now, Your Honor. I want to focus on a slightly bigger picture approach.

For scienter the Court needs to be apprised of specific allegations going to each individual defendant's state of mind, and I don't see how the Court can read this complaint and have confidence that any specific individual defendant was put on notice of facts suggesting that cramming was happening on such a large massive scale that it was materially inflating the company's revenues or that it was happening so routinely that it rendered the company's aspirational statements and code of conduct to be materially false or misleading.

And I would simply urge the Court to please carefully review the allegations as to each of the individual defendants rather than the more impressionistic high-level arguments that the plaintiffs make about senior executives.

Your Honor, I want to just note before I sit down -- we've made the point similar to this -- there are a couple of individual defendants, Puckett and Douglas, who are only alleged to have made very specific and limited

statements that the plaintiffs seek to hold them liable for. All of the statements made by all of the other defendants, I would be remiss if I didn't point out that Puckett and Douglas are slightly differently situated and the Court needs to consider individuals on an individual basis.

But with that, unless the Court has questions, I would like to reserve the rest of my time.

THE COURT: Thank you very much.

Counsel.

MR. DUBANEVICH: Good morning, Your Honor.

THE COURT: Good morning.

MR. DUBANEVICH: To remind the Court, my name is Keith Dubanevich and I am here on behalf of the plaintiffs in the securities case.

We have a very limited number of handouts which I will circulate, but let me step back for a second and say that these cases, the customer cases and the security cases, are really a simple set of cases. They're not complex at all.

CenturyLink told its customers that they could get TV for 49.95 and instead they billed them 149.95 and they forced them to take Internet services. That's illegal, it's cramming, and it's fraud. And they did that millions of times, not once, not twice, not a hundred, not a thousand, but millions of times.

Similarly, they told investors, just like the State of Oregon, that they would never place or record an order for a product that was not authorized by the customer, so Oregon, just like every other investor in the country, can think, okay, I've got a company that is going to comply with the law, they are going to tell me what they're doing, and I'm entitled to rely upon it.

But what do we know that they did? They placed millions of unauthorized orders for products that nobody wanted. And it gets worse. When people called and said I don't want Internet, they were charged an early cancelation fee. When people called and said you're billing me 149.99 a month and you said it was going to be 49, they said, oh, we never offer anything for $49 a month. And, Your Honor, if this was isolated, we wouldn't be here.

So what we have is a company that recognized that cramming and selling services to customers that didn't want those services, that resulted in substantial revenue to the company. And that practice of cramming and misbilling people was well-known and widespread throughout the company. It was not isolated to Arizona. It was not isolated to Minnesota. It was across the company.

Now, unfortunately for investors, we didn't know that. We bought under the belief that this was a company that was going to comply with the law, that was going to

comply with what they said in their SEC statements and what they told investors, but that's not what happened.

In June of 2017 *Bloomberg News* reported that when a whistleblower, a former employee, had complained to the management that we were selling stuff to people that didn't want it, she got fired. And the *Bloomberg News* reporters are saying this is just like Wells Fargo and the next trading day CenturyLink's stock went down. And then not surprisingly, customers recognized, geez, if this whistleblower is correct, maybe this is a systematic problem.

THE COURT: I have read your papers. I understand all that.

MR. DUBANEVICH: So let me turn to --

THE COURT: Let's get to what the defendant has argued. Scienter is very important here and we spent some on that and I want you to spend some time on that.

MR. DUBANEVICH: I would. And if I can, Your Honor, let's set up the law for a second. We are here on a motion to dismiss, not a motion for summary judgment. When I saw their 34 exhibits, I swear it must have been a summary judgment motion, but it's not. Your Honor knows --

THE COURT: I understand. That's just a practice that we've evolved to for the last 25 years. Everything turns into a summary judgment.

MR. DUBANEVICH: However, this Court has actually said in the *Retek* case in 2005 and the Ninth Circuit Court of Appeals has recognized that in these securities cases it has become rampant and it is unfair and it should not be tolerated. The court in the Ninth Circuit case of *Khoja*, which was cert denied last month by the U.S. Supreme Court, the court in the Ninth Circuit said this is unfair, it is unacceptable, and it should not be tolerated.

So I just want to point out that we're not here on a summary judgment motion. Their exhibits are incomplete. They refer to SEC filings, but they're only excerpts. Their code of conduct that they attach is dated January of 2018. Well, that's clearly not applicable in 2013, '14, and '15. So I don't think Your Honor should look at their exhibits at all.

So let's go directly to the points they raised in their reply, and the first is that there is no evidence that this was a widespread problem and they wrap that around their complaints about Former Executive -- Former Employee Number 5 and they seek to introduce an e-mail between one person and a senior vice president, Mr. Bailey. As Your Honor is well aware, this is not the time for you to assess anybody's credibility, Mr. Bailey's, Former Employee 5, or anybody else's.

But if you take a look at the *Signet Jewelers*

case, a case that we cited to Your Honor in January in our letter to the Court, the court there rejected the defendant's arguments that, geez, a former employee's statements that were reported in the complaint should not be considered because they didn't know what they were doing, they weren't probative. The court said that's not appropriate at a motion to dismiss stage.

So what we have, however, are allegations that talk specifically about each of the former employees. And Former Employee 5, we specified his job title, a consumer and business sales manager. We identified his job location, Boise, Idaho. We identified the job responsibilities. He was an inbound sales manager who sold Internet and cable services. We identified the duration of his employment. There is simply no basis to disregard our allegations about FE-5 or any other former employee.

We provided Your Honor a chart that identifies these former employees and that chart shows that these people are located all over the company. They're not located just in Arizona or just in Minnesota. They're located in all of the regions where the company does business and they're from the company's headquarters in Louisiana.

So if you take a look at the standard that this Court described in *St. Jude Medical Securities Litigation*,

it's clear that we have met that standard and Your Honor should consider the former employees.

And going back to that e-mail that counsel referred to and that they attached, we did not incorporate it by reference at all in our complaint. Indeed, it's not been properly authenticated. It was printed by a Mr. Steven Young and we have no idea who he is.

But even if Your Honor considers that exhibit, the e-mail confirms that an Eric Adams met with Senior Vice President Bailey in 2014, senior vice president, and he met with another person and they discussed customer service issues. And that's the e-mail that they submit.

Now, frankly, that's very similar to paragraph 109 of our complaint in which we say that FE-5 alerted both his manager, Northwest Region Vice President Brian Stading, and Senior Vice President Bailey at this Circle of Excellence event that the problems were constant and rampant, cramming and misquoting problems. And in that discussion this former employee said that in response Mr. Bailey, senior vice president, acknowledged the cramming issues and told Stading, another executive, and FE-5 we've got to do something about it.

Now, these allegations in our complaint are very similar to the allegations in the *Galestan vs. OneMain* case, a case that we cited in January in our letter to Your Honor.

There the plaintiffs relied upon former employees and the defendant claimed that the allegations didn't show any specific conversation with the executive, just what the defendant is arguing here.

The court in that case rejected it and the reason is, just as in this case, the defendants participated in numerous meetings and conferences and they received a monthly e-mail that disclosed the problems in that case. In addition, just as we allege here, the defendants there had access to reports that detailed the company's problems, in that case productivity. And the court in that case said that's more than sufficient to show that the executives knew what was going on.

In their reply CenturyLink takes great issue with our citation to the Minnesota Attorney General's letter brief in which they describe an audit, an internal audit at CenturyLink that shows that CenturyLink overbilled three and a half customers. That makes up more than half of their broadband customers. That's a significant amount of customers.

Now, our allegations are not based solely on the Minnesota AG's allegations, not even close. We've interviewed at least --

THE COURT: Three and a half million?

MR. DUBANEVICH: Three and a half million, Your

Honor.

THE COURT: You said three and a half.

MR. DUBANEVICH: Very short people apparently. Three and a half million. Thank you.

We've interviewed at least 20 former employees. We've obtained extensive materials through public records requests. And our investigation is very similar to the investigation in the *Pension Trust Fund vs. DeVry* case that we cited to Your Honor, and that's a Northern District of Illinois case in which the court said confidential or former employee statements are sufficient to establish that the defendants knew what was going on at the company.

So let's talk a little bit about what our former employees said. Former Employee 3 said the sales quotas were unreasonable and did not reflect what employees who were dealing honestly with its customers could expect to sell. We pled that the executives at the company established those quotas.

Former Executive -- Former Employees 5, 7, 9, 11, and 13 said that CenturyLink routinely represented to customers that they would be charged one price for a particular service, but it would, in fact, charge a different price.

We've established that FE-5 said every time I went to a training, the facilitators were straight up about

telling new hires just tell them the total price. Don't tell them anything about options. Don't tell them anything about fees.

Numerous of these former employees, 4, 7, 11, 13, 14, 15, said CenturyLink routinely added services to customer's accounts without authorization. This isn't an isolated problem, Your Honor.

One person, who spent over 14 years at CenturyLink, said during every sales training they did, the trainers would instruct representatives that they could quote a single price for Internet service without disclosing underlying fees. Employees knew that was wrong.

But according to FE-11, cramming was rampant. It was happening all the time and every day. 13 says it was widespread throughout the company.

For example, if you look at 18, that person worked as one of three managers of the Regulatory Services Division. It was responsible for handling complaints from the SEC, from State Attorneys General, the Better Business Bureau, and executive complaints. Executive complaints are complaints that go straight to the C-suite office that then go down to Former Employee 18's group and they investigate that. And of the cramming complaints that that group reviewed, about half did, in fact, happen exactly the way the customer said it.

FE-19 also confirmed that Defendant Post, Defendant Puckett, and Defendant Victory were sent and reviewed monthly reports concerning cramming reports that CenturyLink received, and those reports had a specific category for cramming complaints and FE-19 said this was very common and widespread.

But that's not all, Your Honor. We researched what the Arizona Attorney General alleged and we obtained all of the publicly-available information about that case. And the Arizona Attorney General alleged -- guess what? -- CenturyLink billed customers at rates higher than those it represented during sales calls, they billed customers early termination fees when the customer canceled the service after getting a bill that reflected a price they didn't want to pay, that CenturyLink billed customers for periods of service before the services were connected. That's what the Arizona Attorney General said.

But wait. There's more. We allege that the Minnesota Attorney General found that CenturyLink charged over 12,000 Minnesotans more than was promised. And in another case, another state found that 175,000 customers in that state alone were overbilled.

But we did not rely upon just what we read in the Minnesota AG's case. We conferred with the Minnesota --

THE COURT: Before we move on, it has nothing to

do with this, but I didn't understand why the Arizona Attorney General only -- they settled for $170,000, right?

MR. DUBANEVICH: 175 -- in another case. We're not sure it happened in Arizona, but we know Arizona brought their case. We have Minnesota that brought their case. And a separate state apparently investigated and found 175,000 problems.

THE COURT: You submitted so much paper. But there was one settlement for 170 --

MR. DUBANEVICH: Yes. That was Arizona.

THE COURT: That was Arizona. Just my own interest, any reason why such a low amount?

MR. DUBANEVICH: No, Your Honor. I can tell you from my experience as a former deputy in the Oregon Department of Justice, but that would be outside the record. But suffice it to say that CenturyLink did enter into an assurance of voluntary compliance, which included injunctive relief that the company and its officers were obligated to comply with.

THE COURT: Okay. Go ahead. I'm sorry to bother you with that.

MR. DUBANEVICH: We didn't -- no problem, Your Honor, and I appreciate questions. It makes it a lot more enjoyable for me as well.

We didn't rely just upon what we read in the

Minnesota AG's filing. We actually conferred with the Minnesota AG's office to confirm that they indeed conducted their own investigation and had a good-faith basis to make the allegations they did.

Now, CenturyLink has complained, geez, we didn't cite to or say anything about the audit other than what was reported by the Minnesota AG. And that's correct. We would love to see the audit, Your Honor, but CenturyLink is taking great lengths to not disclose it to anybody. But when we get into discovery, we're confident that that audit will indeed confirm exactly what the Minnesota Attorney General's Office described as showing.

Now, CenturyLink has complained that, gee whiz, we shouldn't be allowed to rely upon or cite to allegations in other lawsuits. Let me do a little bit of a pause to address some of the cases that they mentioned.

One is *Maine vs. Countrywide*. In that case the court found that the allegations were parroted almost word for word from another lawsuit. We have not done that. And the court found that plaintiff's counsel did not speak to any of the sources on which the allegations were made, did not examine any of the underlying documents, did not contact the attorneys in the other cases whose allegations were parroted.

That is not at all the situation here. We clearly

have conferred with the Minnesota AG's office. We have collected voluminous documents. We have interviewed at least 20 former employees. We have conducted exhaustive investigation.

So let me turn to the defendants' argument that this behavioral coaching idea just simply doesn't make any sense.

So let's set this up. CenturyLink is getting thousands upon thousands of complaints every month. They've got an internal audit that shows they've got a cramming problem. The executives are getting monthly reports, if not more frequent, that shows that they have cramming problems.

How do they know that? Because they are having such a high turnover and at exit interviews the employees are saying these quotas are impossible for us to meet and they're admitting that the only way they can meet those quotas is by cramming.

So the company recognizes it has a problem, that it is inconsistent with its code of conduct to be doing that. So instead they change to what's called behavioral coaching. FE-17, a director of human resources who reported to Executive Vice President Kathy Flynn, said what we did is we changed to a behavioral coaching model in which employees were judged on the quality of their services, not on sales metrics. We also pled that Defendant Post, one of the

senior executives in the company, recognized Flynn for her work on the project.

We quoted and referred to FE-20, who said that, yes, indeed they switched to a behavioral coaching model. And she said we were having so much discipline and so many investigations and we were hearing in the exit interviews that it was because of the sales quotas, so CenturyLink had to stop enforcing it.

So what happened? So they converted to a model that's behavioral, which is to advise customers of the true price of the product they want and sell them only the product that the customer wants.

And what happens? Revenues went down. Well, how do we know that? Well, according to FE-1, she said as soon as the behavioral model was adopted, sales fell off very quickly. FE-8 says I remember results dropping drastically when people were no longer being managed to a number.

Not surprisingly, when sales dropped in June of 2015, Defendant Puckett left the company to spend more time with her family. Now, CenturyLink --

THE COURT: But the amount -- the percentage amount didn't drop that much.

MR. DUBANEVICH: Your Honor, the problem is that CenturyLink changed the way they reported their data during the class period and the filings that they have submitted,

Your Honor, are incomplete. They are merely excerpts. So that evidence is not in front of you.

We believe that when an investigation takes place, we will show that it was sufficient enough that the company changed course and decided to abandon the behavioral coaching model and go back to the cramming methodology that they had used for many years. Defendant Puckett was fired, we believe, because of that.

And so CenturyLink might not like these allegations, they might even disagree with them, but at this stage of the case, Your Honor, these are the allegations the Court must presume are true.

So let's turn to the *Wells Fargo* case. We've provided --

THE COURT: The reason I brought that up is because you're alleging that an article in the *Wall Street Journal* -- what was it, a 4.5 percent drop? This was a very low percent drop.

MR. DUBANEVICH: It was enough that it got the company's attention so that they had to change course. But what they didn't do is tell the investors why there was a drop. They didn't tell the investors that it was because they abandoned cramming because they had problems and they converted to a behavioral coaching model. And they didn't tell investors that, geez, that behavioral coaching model

resulted in decreased revenue, so we're going to go back to cramming. They didn't tell investors that. If they had, we might not be here. But they didn't tell investors that.

So let me turn to the *Wells Fargo* case for a second. In *Wells Fargo* -- as Your Honor can see from our handouts, on the left what we did is we took defendants' description of the *Wells Fargo* case and on the right we simply showed Your Honor what our allegations are and, not surprisingly, they are very similar to *Wells Fargo* with one big difference. The conduct here was more widespread, it was more significant, and it took place over a longer period of time.

We clearly talk about the company executives in both companies imposing very strict sales quotas. We talk about a theory of bundling products and selling products to customers that don't want those products. That's pretty similar to what they did in *Wells Fargo*.

So let me move off *Wells Fargo* and get to scienter. We don't have to prove at this stage anything. All we have to do is make a reasonable inference, a strong inference, but that does not license the Court to resolve disputed facts at this stage. We just need to plead enough information that there is a reasonable inference.

One of the cases we cited uses a baseball analogy, which is a tie goes to the runner. If we have pled facts

which give a reasonable inference, they might have a similar story, but if both of those stories are reasonable, the tie goes to the runner and you must deny their motion. So let me suggest that Your Honor look at both the *DeVry* and the *Signet Jewelers* case. Those are the cases that talk about the tie goes to the runner.

The inference of scienter need not be irrefutable, Your Honor, or even the most plausible of competing inferences. As long as it is as least as compelling as any opposing inference, the complaint adequately alleges scienter.

So what have we pled? We pled that the executives established the sales quotas. We pled that company systems kept track of whether people met their sales quotas and whether cramming was occurring. We have pled that those reports went to the senior executives.

We have pled that at least on a number of occasions there were actual conversations with executives about cramming. Indeed, we pled that Defendant Post complained about the number of complaints he was saying -- seeing about cramming. That's specific and that is clear knowledge that they had a problem.

We have clearly established that Defendant Bailey had a conversation about cramming, and he acknowledged the existence of that.

We've established through FE-8 that there are these reports, a dashboard system that provided up-to-the-minute data on sales and revenue.

We've established through FE-15 that that person discussed the pricing problems with Puckett, Bailey, and Victory.

We've said that FE-16 said that there were problems that were recorded in something -- a system called Q-Finity. Any team leader, director, or vice president had access to that system and they would compile a report every month and send that report to team leaders, directors, VPs, and regional VPs.

FE-18 said CenturyLink's senior leadership, Post, Puckett, Victory, and Olsen, got reports on the number and types and categories of complaints from the FCC, from state agencies, the Better Business Bureau, and direct customer escalations. These are reports that went directly to the top of the company.

So what did they actually tell investors? Did they tell investors that they were generating revenue from all the cramming and misrepresentations? No, not at all, Your Honor.

What they said is they will never place or record an order for our products and services for a customer without that customer's authorization. They said our focus,

on the first day of the class period, is meeting the needs of our customers. They repeated that over and over in every report throughout the class period.

They not only said it's important what's to the benefit of the customer, but they said it is not important what we think is best. That's what Defendant Post told analysts. Well, that's completely inconsistent with their behavior of cramming and selling stuff to people that don't want it, and that occurred consistently throughout the class period.

So let me turn to their code of conduct. Defendants have taken issue with, gee whiz, you can't hold somebody responsible to a code of conduct and they cite, for example, a couple of cases that were very aspirational. Geez, we try to do the best thing. We try to comply with the law. There was a recent Second Circuit case where the --

THE COURT: Let's not spend time on this.

MR. DUBANEVICH: Excuse me?

THE COURT: Don't spend time on --

MR. DUBANEVICH: I will not.

THE COURT: It's not aspirational.

MR. DUBANEVICH: Okay. So let me then finish with whether there was any impact on the stock because of their misrepresentations. Let me circle back on this issue and

let's set the tone for the law.

As this court said in March of 2005 in the *Retek* order, in the Eighth Circuit the causation requirement for damages is not very stringent. Plaintiffs only need to show some causal nexus between defendant's improper conduct and plaintiff's losses.

This court said in *In re Buca* that plaintiff need not prove loss causation with particularity. Rather, a short and plain statement in accordance with FRCP 8(a)(2) is sufficient. Your Honor, that's consistent with the *St. Jude* case and with *Dura*.

And what we have clearly established and Your Honor can see in our chart is that when the facts started coming out, first with the news report of the whistleblower being sued -- I'm sorry, being fired and then when consumers started filing cases and made their allegations more public and then when the Minnesota Attorney General filed her complaint at that time, that's when the market realized what was going on at CenturyLink and on each of those occasions the stock fell precipitously. That is all we need to allege. When we get into discovery, we will be able to show it without any doubt.

But, Your Honor, I believe that our complaint adequately pleads a cause of action under the applicable law and the defendants' motion should be denied.

Do you have any questions?

THE COURT: Thank you very much.

MR. DUBANEVICH: Thank you, Your Honor.

THE COURT: Counsel.

MR. GIBBS: Thank you, Your Honor. I would like to circle back to scienter, if I may. I'm glad counsel agrees with me that it is not just a reasonable inference, but a strong inference that's required and for that purpose.

THE COURT: And I agree with you too.

MR. GIBBS: Thank you, Your Honor.

(Laughter)

MR. GIBBS: I'm not surprised by that. I'm highly confident in that position.

Your Honor, I'm not here to defend or minimize cramming and I'm not trying to suggest that a report of cramming going to a senior executive is not a serious thing. If I left that impression, I want to apologize because that's not our position.

THE COURT: Thank you. That's the impression I got.

MR. GIBBS: All I'm trying to point out is to support a strong inference of scienter, given the theory of the case here, the information going to Mr. Post and the other senior executives would need to be described in enough detail that the Court can reach a strong inference that this

information put them on notice not just that cramming was occurring, again, not to minimize that, but to distinguish between some amount of cramming happening and cramming happening so systematically on such a massive scale that it results in a material overstatement of the company's revenue. To support that inference you would have to have far more detail than you have in the complaint before you.

I think that the Court can reasonably infer from the facts alleged in this complaint that information and reports went to Mr. Post and other senior executives indicating that there were reports of cramming happening.

And, again, not to minimize that, but there is a wide gulf between senior executives knowing that there are instances of some employees violating company policy on the one hand versus it's happening on such a massive scale that it's actually inflating their $4 billion a quarter in quarterly revenue. I think it's just a bridge too far given the very high pleading burden imposed by the PSLRA. Unless the Court has any further questions on that, I'll move on.

I want to touch briefly on *Wells Fargo*. I actually think plaintiffs' handout on that is actually quite telling. What they've highlighted and analogized to this case are three sentences where we simply describe the plaintiffs' theory of the case in *Wells Fargo*.

And I have no doubt that the plaintiffs' theory of

the case here is intentionally modeled on the theory of the case in *Wells Fargo*. That doesn't mean that the allegations here across the board are so similar that Judge Tigar's decisions in *Wells Fargo* should control or even be persuasive here.

What they haven't highlighted, what they haven't tried to meaningfully analogize to the facts alleged in their complaint are the ones I was talking about covering two slides, about all the things that Judge Tigar characterized as red flags. They don't even discuss it here. They don't highlight the sentences where we call out some of those red flags in the brief. They have nothing to say about all of the particular -- the battery of particularized factual allegations that I discussed with Your Honor at some length, and that's the difference. You don't get to *Wells Fargo* controls this case just by saying we've articulated a theory that's very much like their theory in that case.

THE COURT: Well, plaintiffs are going to have to come back up and deal with Tigar's holding and the analysis of his opinion. And then I'll give you a chance to respond.

MR. GIBBS: Thank you, Your Honor.

I want to touch briefly on the Minnesota AG discussion and the assertions in that discovery letter. I have to say counsel's presentation to you just now is the

very first time I've ever heard any mention of plaintiffs' counsel talking to the Minnesota AG's Office about the assertions in that letter. It's not in the complaint. It's not in the briefing. It is not a basis for the Court to accept that allegation if it's otherwise not inclined to.

The story about behavioral coaching and the alleged decline in revenue, counsel focused on statements attributed to a couple of former employees about sales dropping dramatically. Now, we've pointed the Court to the publicly-reported revenue numbers, which presumably is what the defendants would have been responding to, right? The concern is they want to be able to report favorable financial results.

We've pointed Your Honor to the specific financial reports that were actually reported in that time period. Their response is to quote a couple of former employees who worked in human resources who say sales dropped dramatically.

I don't know how one could possibly ignore the publicly-reported revenue numbers and conclude, based on the word of a couple of people in HR, that sales dropped dramatically and that was the impetus for changing this policy. I don't think that supports a reasonable inference, much less a strong inference, of scienter.

Your Honor, may I consult briefly with my team and

see if we have anything else we want to say?

THE COURT: You may.

MR. GIBBS: Thank you, Your Honor.

(Mr. Gibbs and Ms. Lightdale confer)

MR. GIBBS: Your Honor, with that, I'll yield and be ready to respond to whatever counsel has to say about *Wells Fargo*.

THE COURT: Did you want to talk about the termination of the whistleblowers at all?

MR. GIBBS: I would be happy to, Your Honor.

THE COURT: Please.

MR. GIBBS: So I'm not sure which allegation the Court is focused on. I'm happy to talk about any of them. I think --

THE COURT: FE-11 and FE-7 and FE-9.

MR. GIBBS: Let me get to those allegations. I guess what I would say about them is I'm personally a little skeptical of them, but I understand the procedural posture requires the Court to accept factual allegations as true and so I'm not going to quibble with them at that level.

I guess what I would say, though, is whatever is going on with those individual employees, again, we're talking about fairly low-level sales folks in individual call centers. I don't think that has anything to do with what the senior-most executives in the company knew about.

THE COURT: What about the executive resignations?

MR. GIBBS: I think the executive resignations, we've pointed out in the briefing, based on some of the public disclosures around those resignations, that the plaintiffs' allegations are in certain respects just not correct.

But I think more importantly than that, the suggestion that Puckett was fired because of this thing around behavioral coaching and what happened to revenues, it's sheer speculation. It's just made up. There's no one in the complaint who says I know why Puckett was fired and it has something to do with revenue or behavioral coaching or changes in the sales model. It is sheer speculation.

I mean, they have a four-and-a-half-year class period. Some executives left during that four and a half years. There's nothing suspicious or nefarious about that. Given the sheer length of their class period and all of the events they describe in their class period, it's inevitable that those departures could be related in time to various events in their complaint. I mean, the complaint is describing conduct happening over a four-and-a-half-year period.

There's no specific factual allegations to support even a reasonable inference that any of those departures are in any way related to the allegations the plaintiffs are

making here. It's not enough for them to say some executives left and to speculate that that departure has something to do with these sales issues or anything else. The record is simply bare on that. It's nothing but speculation.

THE COURT: Do you want to check with your colleagues?

MR. GIBBS: I think I should, Your Honor. Thank you.

(Mr. Gibbs and Ms. Lightdale confer)

MR. GIBBS: Your Honor, I won't belabor the point, but I want to refer Your Honor to slide 23 in our presentation, which is the one that touches on the executive resignations and lays out the reasons why we think their allegations are not consistent with the publicly-disclosed and judicially-noticeable facts about those resignations, but I don't think we need to belabor it here.

THE COURT: Thank you.

Counsel, before you get started, why don't we take a stretch break so my court reporter can have a few minutes.

(Pause)

THE COURT: All right. You may be seated.

MR. DUBANEVICH: Thank you, Your Honor.

THE COURT: There's no rush anymore. I've missed my meetings.

MR. DUBANEVICH: I apologize.

THE COURT: I mean I missed the ceremony.

MR. DUBANEVICH: I'm getting close to my 50th as well and I'm not sure I want to go either.

THE COURT: I will be there this afternoon, but this morning I won't be.

MR. DUBANEVICH: I want to directly address Your Honor's questions about the *Wells Fargo* case. And not surprisingly, we think it is remarkably similar. In that case Judge Tigar went out of his way to describe the high-pressure sales tactics and quotas that the senior management put in place for the company. If you look at the defendants' slides, slide 13, we talked about cross-selling and here they were bundling.

What we know is that in the *Wells Fargo* case there were one and a half million fake deposit accounts over -- and over 500,000 fake credit card accounts. In our case we have between a third and a half of their customers being falsely billed or crammed. Similar, if not greater, volume of problems here.

They say that, gee whiz, you know, they haven't been held responsible yet. Well, that's why we're here, Your Honor. And they have apparently agreed to injunctive relief with the customer plaintiffs.

In terms of whether the companies knew, well, the

Wells Fargo executive admitted under oath that they had known about it for many years. Well, that was testimony that came long after the case was filed. It wasn't testimony or a public statement during the class period.

And here we have both Mr. Bailey admitting that he was aware of cramming and we have evidence that monthly reports went directly to Mr. Post and to other senior executives notifying them of the changes in revenue, which of course they track closely, and when they would have complaints about cramming.

It would be foolish to say that a senior executive at a public company does not take complaints to the FCC seriously. And when they get to his level, you must take them very seriously, and he was getting those reports at least on a monthly basis.

We know that Ms. Heiser told Mr. Post in 2016, by posting a message on some sort of internal company blog or e-mail, that there was cramming going on and this wasn't okay. So it's clear that the executives at CenturyLink knew about the cramming and they condoned it because it led to greater revenues.

Judge Tigar's description in his opinion indicates that the defendants knew or deliberately disregarded their cross-selling metrics when they reported to the public. And that's exactly what we have here. The company disregarded

and ignored the data that they had about cramming and misrepresentations to sell more services to their customers, and they ignored that when they reported to the investing public. So Judge Tigar found indeed that there were material misrepresentations and that the executives had scienter.

And in our view, given that the consumer segment made up over 30 percent of CenturyLink's revenues, it is certainly fair for Your Honor to presume that a company executive is going to be very particularly interested in what is happening with a core business function.

And in this case 30 percent or more of their revenue is coming from the consumer division. Clearly an executive should be paying attention to where that money is coming from and how they're earning it.

Unless Your Honor has any further questions, I would be happy to sit down.

THE COURT: Well, hold on for a second.

(Pause)

THE COURT: My understanding of the argument this morning in dealing with *Wells Fargo* by the defendant is that there were a number of elements within Tigar's opinion that would not apply to the plaintiffs' case and I would like you to address that issue.

MR. DUBANEVICH: Sure. Going back to their

slides, on page 14 they say there are not a number of red flags in this case.

In point 1, as they mentioned, they talk about Wells Fargo's CEO's testimony before Congress shows that he knew about it. What we have is evidence that Mr. Bailey was specifically told there's a problem with cramming and he acknowledged it. And what we have is monthly reports that are going to the senior executives that fully and unequivocally disclose the extensive cramming and sales misrepresentations that were taking place. So that's points 1 and 2.

THE COURT: Okay.

MR. DUBANEVICH: Point 3, the legal actions that were taken. Well, what we know is that Ms. Heiser was fired for being a whistleblower and disclosing the problems of cramming. What we know is that Arizona brought a lawsuit against CenturyLink. What we know is that there were customer complaints in the millions and customer lawsuits. So, Your Honor, I think we've satisfied point number 3.

Point number 4, the *Los Angeles Times* interviews. We've interviewed at least 20 former employees. And as our chart indicates, these are former employees from all over the company in all regions, including the corporate office.

Point number 5, they talk about significant regulatory interventions and OCC supervisory letters. Your

Honor, what we know here is that CenturyLink did internal audits, that they closely tracked complaints that were sent to the Federal Communications Commission, that they closely tracked complaints that went to state regulatory boards. We know for a fact that they were paying attention to Attorney General investigations. So I think we've more than adequately satisfied point 5.

Point number 6, more than 5,300 Wells Fargo employees were terminated. We don't know how many employees were terminated at CenturyLink, but we do know that they were fired and we do know that they had an extraordinary problem retaining employees, who said repeatedly I can't meet the sales metrics. And a lot of people said the only way I can do it is by selling false information to the customers and they couldn't do that, so they quit. I think we more than adequately fit number 6.

And then number 7, Wells Fargo received regular internal investigation reports. As I've said, Your Honor, we've already cited at least two different kind of reports that went to the C-suite that talked about both their sales revenue, but also the reports of cramming.

So, Your Honor, I think we clearly fit into the *Wells Fargo* --

THE COURT: Thank you very much for making sure it was clear to me.

MR. DUBANEVICH: Thank you, Your Honor.

THE COURT: Anything else, Counsel?

MR. GIBBS: Yes, Your Honor. If I may, I would just like to respond to those specific points.

So as to point 1, the testimony from the CEO of Wells Fargo in front of congressional committees. Counsel first said that testimony took place in 2016, which is late or it may be even after the class period. That's a red herring. The testimony concerned what the board and management knew back in 2012 and '13 and '14 and '15, right during the class period. So the question of when he testified is irrelevant. The issue is what was he saying about the senior executives' and board's knowledge during the class period.

And I would encourage the Court to please read Judge Tigar's decision. He references that testimony repeatedly. It is a very important part of his analysis. It is not present here.

The attempt to analogize the CEO's admission before Congress that his executive team and the board knew of illegal conduct for years is not remotely comparable to the Bailey allegation even if you accept it at face value. We think that the e-mail that we have put in front of the Court is properly before the Court and completely undermines that allegation, but even on its face it's not remotely

comparable.

Counsel said -- I'm sorry. I tried to get the words down, so I think this is accurate, but I don't have a transcript. But I heard counsel say that they had identified reports that, quote, fully disclosed the extent of the cramming that went to senior executives. That's not true. That's not a fair characterization of what's in the complaint.

The complaint says that reports about cramming and other billing complaints went to executives. That's not the same as saying there's a report that disclosed -- fully disclosed the total extent of the cramming, much less that the reports showed cramming is happening on such a massive scale that it could possibly have inflated their $4 billion a quarter in revenue.

Also I heard counsel say we know that Heiser was fired in retaliation. We don't know that. Those are allegations in a lawsuit that was settled very quickly after it was filed. It's one lawsuit.

I will say that in discussing the lawsuits at issue in *Wells Fargo*, Judge Tigar was very careful to say that the plaintiffs in that case were not citing the lawsuits to support the allegation that the unauthorized account creation had occurred. They were not citing them as evidence that the allegations in the complaint were true.

They were citing them to say the sheer volume of complaints filed throughout the five-year class period, making the very same, very specific allegation that customers were opening unauthorized accounts, was one of many things that would put the board on notice during that period that this conduct was occurring.

A single employee working out of her home office in Arizona filing a wrongful discharge or retaliatory discharge claim, which, by the way, is at the very end of the class period here -- it's part of what plaintiffs claim brought the truth to light -- is not remotely comparable to the cascade of lawsuits that Judge Tigar cited as having put the Wells Fargo board on notice that something was going on.

On the *Los Angeles Times* article, again, it's a timing point. Counsel's reference to the employees they interviewed and the facts alleged in the amended complaint is a red herring. The reason why Judge Tigar cited the *Los Angeles Times* article was not because it established the truth that unauthorized accounts were being created. He cited it because it was published right in the heart of the class period and put the directors on notice that Wells Fargo employees were creating unauthorized accounts.

The amended complaint here that reflects all of the plaintiffs' work and all of the former employee interviews was not filed until like a year after the class

period ends. Their complaint can't be analogized to a newspaper article that comes out during the class period and put the directors on notice of what was happening during the class period. So the analogy there is simply false.

Counsel referenced internal audits. This again gets to my point. It's not enough to talk about reports, documents, audits. They have to have some indication of what's actually in them. Other than the allegation that's lifted from the briefing in the Minnesota Attorney General Office lawsuit, there's no allegation about what these reports showed that would support an inference that the reports put people on notice that this is happening on a massive scale.

Counsel talked about exit interviews of employees. I'd just go back to what I said about the alleged retaliatory termination. There's no connection between individual employee exit interviews and the senior executives who have been named as individual defendants here.

I just want to close by emphasizing a point about Judge Tigar's decision. I'm citing language at page 13 of the *Shaev*, S-h-a-e-v, *vs. Baker* case. It's 2017 WL 1735573. Judge Tigar wrote, quote, While any of these red flags might appear relatively insignificant to a large company like Wells Fargo when viewed in isolation, when viewed

collectively they support an inference that a majority of the director defendants consciously disregarded their fiduciary duties despite knowledge regarding widespread illegal account-creation activities and therefore there is a substantial likelihood of director oversight liability.

Now, the language that the judge is using there is because in that part of the opinion he's analyzing a breach of fiduciary duty claim. He later cites back to that discussion when he makes a finding as to scienter as part of the securities fraud claim. But that's the basis of his finding.

And the point I wanted to emphasize here is it's not enough to pluck one or two or three of the things out of *Wells Fargo* and say we sort of ring a faint bell that's kind of like this thing in *Wells Fargo*. Wells Fargo's result turned on all of those things considered collectively. So unless we have all of those things here, you can't reach the same result based solely on what Judge Tigar did in the *Wells Fargo* cases.

Thank you, Your Honor.

THE COURT: Thank you.

Anything further? If not, we'll adjourn for this morning. I will take this matter under advisement and get my order out as quickly as possible. Enjoy the weekend. Thank you.

(Court adjourned at 9:53 a.m.)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: *s/ Lori A. Simpson*

Lori A. Simpson, RMR-CRR