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* * *

1 MS. REGAN: Good afternoon, Your Honor. Anne
2 Regan from Hellmuth & Johnson on behalf of the consumer
3 plaintiffs.

4 THE COURT: Welcome, Ms. Regan.

5 MS. REGAN: Thank you.

6 MR. GUDUMNDSON: Good afternoon, Your Honor.
7 Brian Gudmundson of Zimmerman Reed on behalf of plaintiffs.

8 THE COURT: Excellent. Welcome.

9 MR. RIDDLE: Good afternoon, Your Honor. Bryce
10 Riddle of Zimmerman Reed, also here on behalf of consumer
11 plaintiffs.

12 THE COURT: Okay. And is anyone going to be
13 joining the three of you?

14 MR. GUDMUNDSON: No, Your Honor.

15 THE COURT: Okay. Good. And who do you think is
16 going to take the lead, or are you dividing and conquering?

17 MS. REGAN: We are dividing and conquering, Your
18 Honor.

19 THE COURT: Okay. And you said Regan; is that
20 right?

21 MS. REGAN: That's correct, Your Honor.

22 THE COURT: Okay. Thank you.

23 And on behalf of the defendants today. And you
24 are all wearing two hats; is that right?

25 MR. McNAB: Yes, Your Honor.

1 THE COURT: Okay.

2 MR. McNAB: I believe we are all wearing two hats.
3 Bill McNab, Winthrop & Weinstine, on behalf of both the
4 defendant and the intervenors.

5 THE COURT: Okay.

6 MR. McNAB: Thank you.

7 THE COURT: Thank you.

8 MR. LOBEL: Good afternoon, Your Honor. Douglas
9 Lobel on behalf of the defendant and the proposed
10 intervenors.

11 THE COURT: Great.

12 MR. VOGEL: Good afternoon, Your Honor. David
13 Vogel employed on behalf of the defendant and intervenors.

14 THE COURT: Okay. Excellent.

15 So this is more briefing than I have received in a
16 long time with respect to a discovery dispute. I do
17 understand why at least the defendants felt like it was
18 important enough to the questions moving forward that it was
19 appropriate to have the more-formal motion to compel, rather
20 than the less-formal method, but we are here in an expedited
21 kind of procedural posture.

22 I am going to, if possible, rule from the bench
23 today to give you all immediate guidance on what's going to
24 happen moving forward. If not possible, then we will
25 endeavor to get an order out as quickly as possible to guide

1 your next steps, because I know there's not a lot of time in
2 this calendar before there's going to be substantive
3 decisions made by Judge Davis.

4 So it is the plaintiffs' motion. Ms. Regan, why
5 don't you go ahead and go first. And I should just -- oh,
6 sorry. I misspoke. Mr. Gudmundson.

7 MR. GUDMUNDSON: Yes, Your Honor.

8 THE COURT: Did I pronounce that correctly?

9 MR. GUDMUNDSON: You did.

10 THE COURT: Okay. Great. Welcome.

11 MR. GUDMUNDSON: Thank you.

12 We thought -- I will be handling the motion to
13 compel first, request for production of documents, and Ms.
14 Regan will be handling the intervenor subpoenas. We thought
15 it was a logical progression for me to go first.

16 THE COURT: Great. Okay. I have to just warn you
17 that I ask a lot of questions, so I'm going to jump right
18 in.

19 You spend a lot of time convincing me that there's
20 either been a waiver or that the work product doctrine
21 doesn't apply. I think the bigger challenge you have is
22 that Judge Davis made pretty clear that we're not moving
23 forward with class-wide discovery, that the discovery needs
24 to be narrowly tailored to the issues that are pending
25 before him in the three motions. Help me understand why 9.7

1 million documents and an extensive audit report on merits is
2 necessary at this stage.

3 MR. GUDMUNDSON: Well, Your Honor, to come right
4 out of the gate on the stay order, I think we said in our
5 papers it is our view that it was not necessarily -- this
6 discovery is not necessarily encompassed by that. That is a
7 decision squarely for Judge Davis. If --

8 THE COURT: I think he kind of kicked that one to
9 me, right?

10 MR. GUDMUNDSON: Okay. If that's the case, then
11 that's -- however, as luck would have it, the opening part
12 of my outline is why are we here.

13 THE COURT: Okay. Good. Jump right into that.

14 MR. GUDMUNDSON: You know, there's three motions
15 pending. One is a motion to intervene on behalf of ten
16 companies from around the nation. The other is a motion to
17 dismiss on jurisdictional grounds and some other grounds,
18 and the third is a motion to compel arbitration. All three
19 motions are squarely dependent on one concept in case theory
20 being put forward by the defendant and that is that
21 CenturyLink, Inc., is not a proper defendant, that it sells
22 nothing, that it has no policies or procedures regarding
23 sales or otherwise, has no employees, that it has done
24 nothing with respect to these plaintiffs under the --

25 THE COURT: I understand -- I understand our

1 landscape. I understand those big questions that Judge
2 Davis is going to have to answer. I understand how the two
3 parties see this in really different ways. What I don't
4 understand is how the right approach in the error of
5 proportionality is to give us everything because there might
6 be something in there that's relevant to piercing the
7 corporate veil or representing things unclearly to
8 consumers, the consumer confusion analysis that we've talked
9 about or jurisdictional contacts. I understand how those
10 things are important today. I don't understand how either
11 the O'Melveny report or the 9.7 million documents are
12 likely, more likely than not proportional to answering those
13 questions.

14 MR. GUDMUNDSON: Okay. Well, I think that, first
15 of all, I was in court in front of Judge Davis and I believe
16 I stated that we don't need or want the 9.7 million
17 documents.

18 THE COURT: Okay.

19 MR. GUDMUNDSON: We would not be able to review
20 them in sufficient time to get briefing out in the next few
21 weeks.

22 We don't know what all they have. We have seen
23 some additional explanation of what they have. And perhaps
24 it's a discussion that we have even today about what they
25 have and what's appropriate, because certain things are

1 protected, no doubt, certain things are not protected, no
2 doubt.

3 I think that the core concepts here is important,
4 the fact that they are pointing to a bunch of decentralized
5 companies that we have never heard of before this
6 intervention motion are to blame, instead of CenturyLink,
7 and why it's important for these three motions and why it's
8 important, in particular, for the O'Melveny & Myers report.

9 Let's start with the press release on the
10 O'Melveny & Myers report, which directly contradicts
11 virtually every word they said in their briefing. It
12 starts, and this is --

13 THE COURT: Yeah, I understand. I understand. I
14 get, I get why you think that the press release suggests
15 that CenturyLink, Inc., took steps, did reviews, was
16 exonerated. That's what they have said. Why does that mean
17 you get the report? Why are representations that they have
18 made in the media or, frankly, conversations they have had
19 with an outside counsel that they have retained to do an
20 audit relevant to proving either piercing the corporate veil
21 or consumer confusion?

22 MR. GUDMUNDSON: Okay. So we are not seeking it
23 right now at all for the merits of it, not to prove they're
24 exonerated or anything else. We are focused on one word,
25 "The Company." They define "The Company" as CenturyLink,

1 Inc., in their press release. Okay? And they go on to say
2 that the investigation was about, quote, "the company's
3 policies, procedures and practices relating to consumer
4 sales, service and billing," end quote. That directly
5 contradicts virtually every word of their intervention
6 motion and their motion to dismiss on jurisdictional
7 grounds. But there is more. They've snuck a little Easter
8 egg into their briefing, which proves why this is
9 appropriate for production immediately.

10 In their brief and on -- and in paragraph 12 of
11 the Olson declaration, which is at Docket 166, they change
12 the words. In the second full sentence of paragraph 12 it
13 says, "The press release made clear that the investigation
14 was undertaken in direct response to allegations that the
15 Company and certain subsidiaries engaged in sales-related
16 misconduct." Those certain subsidiaries appear nowhere in
17 the press release. And so what was once crystal-clear in
18 their press release --

19 THE COURT: How long is the press release?

20 MR. GUDMUNDSON: The press release is -- well, I
21 don't know how to quite describe it. It's a page. I have
22 it here.

23 THE COURT: So it can't be that a company's press
24 release summarizing in shorthand a greater document somehow
25 constitutes the landscape that Judge Davis is, even part of

1 the landscape, that Judge Davis is likely to consider. He's
2 going to look at all kinds of things related to piercing the
3 corporate veil, but not necessarily what CenturyLink says in
4 a press release, right?

5 MR. GUDMUNDSON: Well, I hope that's the case.

6 THE COURT: Help me understand, even if the press
7 release is relevant to your jurisdictional argument or your
8 intervenor response, how the underlying arguably
9 attorney-client privileged audit report, and we can talk
10 about that in a minute, how that is relevant.

11 MR. GUDMUNDSON: Well, again, we don't know what
12 they have. It could be a summary report. It could be a --
13 any number of things. We haven't seen it. You know,
14 there's arguments about attorney-client privilege and about
15 work product doctrine. We have not seen a log. We have not
16 seen what they are. We have no idea to what extent we can
17 challenge them or whether they are attorney-client privilege
18 or work product as they claim, but one thing we do know is
19 that they went through with more than mere findings in this
20 press release in attempt to exonerate themselves publicly.

21 And their own case law -- they said a bunch of
22 cases that look at it in factual circumstances and say what
23 amount of information did they get out there, does this
24 amount to a waiver. And their big case that they like is
25 *Dayco*, D-a-y-c-o, and what that one says is, well, we're not

1 going to find a waiver here because they merely talked about
2 some findings, but didn't summarize any evidence. Well,
3 let's look back at the press release.

4 THE COURT: Tell me, give me your best case that
5 has found a similar press release to constitute waiver.

6 MR. GUDMUNDSON: Well, I think that it's not --
7 respectfully speaking, I think it's the wrong way to look at
8 it, Your Honor.

9 THE COURT: Okay. But before you tell me that
10 it's the wrong lens, give me the best case to have found
11 waiver of an internal audit like this based on a press
12 release.

13 MR. GUDMUNDSON: I would not be able to cite one.
14 We have got *United Shore*, the Sixth Circuit. That they
15 decided to put into a press release into some other form,
16 I'm not sure is dispositive or important. They have gotten
17 it out to the public for a reason and it is cited in court
18 for a reason.

19 THE COURT: Well, there's a fair amount of case
20 law that they have decided -- or that they have cited and
21 that I have looked at that stands for the proposition that
22 sort of a high-level press release, and it can only be
23 described as high level if it's a page summarizing an
24 investigation that reviewed 9.7 million documents, right, so
25 that a high-level press release isn't the same sort of thing

1 that constitutes a waiver as using an audit as a shield in
2 litigation and then refusing to turn it over. So that's why
3 I think that you're right that press release itself isn't
4 necessarily the magic, but I feel like you have got a bit of
5 a burden with the case law here finding that press releases
6 of similar internal investigations actually don't constitute
7 a waiver.

8 MR. GUDMUNDSON: Well, I think -- I think it's
9 waived under *Dayco*.

10 THE COURT: Okay.

11 MR. GUDMUNDSON: *Dayco* says if you summarize the
12 evidence, then it's waived. And here we have that.
13 Exhibit 3 to the Lobel declaration, the press release. In
14 the middle of the page it says, "The Special Committee's key
15 findings:" The first bullet point says, "The investigation
16 did not reveal evidence to conclude that any member of the
17 company's management team engaged in fraud or wrongdoing."
18 It summarizes the evidence. The second sentence, the
19 sentence immediately thereafter, "Company management did not
20 condone or encourage cramming, and the evidence did not show
21 that cramming was common at the company." So "at the
22 company." Who was "the company" here? Who was "the
23 company"? That's why we are here. It's not about the
24 merits of whether they are exonerated at the end of the day
25 or what -- it is about who "the company" is, because here

1 they say it is CenturyLink, Inc., but in their papers they
2 say it's CenturyLink, Inc., and certain subsidiaries.

3 THE COURT: So instead of seeking the O'Melveny
4 report and its conclusions about the billing practices,
5 which is clearly merits, why don't you seek documents that
6 tend to show one way or another that it's the company as
7 opposed to the subsidiaries? I mean, that's one of the
8 points that they make, is that just because included within
9 this universe might be things that support your
10 jurisdictional argument doesn't mean that the whole universe
11 is discoverable. In fact, that's pretty obvious.

12 MR. GUDMUNDSON: Because this is likely
13 dispositive and this is the best source and this is the best
14 evidence. This is an investigation into the exact
15 allegations of the type that are asserted in the
16 consolidated class action of --

17 THE COURT: Of the merits, though, not of the
18 veil, not of the representations, not of the corporate
19 structure. I mean, we don't even know if there is a single
20 question put to O'Melveny & Myers about the corporate
21 structure or who answers to whom. We don't have any reason
22 to know that the smoking gun that might be in there isn't a
23 merits smoking gun, but might have nothing to do with the
24 questions that Judge Davis has to decide as an initial
25 matter.

1 MR. GUDMUNDSON: Well, I think that the core
2 question, going back to it again, I don't mean to repeat
3 myself, is, Who did it, Who did it. Before the Judicial
4 Panel on Multidistrict Litigation they testified; they put
5 papers in that said all of the sales and billing policies
6 and procedures are centralized. And here before this
7 court --

8 THE COURT: And they are going to have to answer
9 for that screaming contradiction to Judge Davis, right, but
10 that doesn't mean that this report, which doesn't -- it
11 would be different if it was O'Melveny's investigation into
12 the corporate structure of Inc. and their subsidiaries, but
13 this is O'Melveny's investigation into the validity of
14 consumer complaints about the business practices, which I'm
15 having a hard time understanding. Just because contained in
16 this document might be things that you could harvest to make
17 your jurisdictional argument doesn't make it proportional.
18 I am having a hard time seeing why this discovery is needed
19 at this stage.

20 MR. GUDMUNDSON: Well, I mean, if it's six
21 documents that show, it is hardly a proportionality
22 analysis, I would submit, but, again, they are not taking
23 the position it's the company anymore. They are trying to
24 divorce themselves from this document. They are now saying
25 it's a company and certain subsidiaries. This is a sworn

1 declaration in this litigation by Steven Olson. If we take
2 his deposition, if we question him on this, on this
3 statement, or would he claim attorney-client privilege and
4 work product doctrine?

5 THE COURT: He -- I think we are conflating two
6 ideas, right? You could, you could probably take his
7 deposition; and as long as he doesn't have to read the
8 O'Melveny report to answer your questions, that doesn't
9 necessarily mean it's privileged, right? I mean, O'Melveny
10 -- that's what I am trying to get at. You love that it
11 collates together a whole lot of information that could be
12 really helpful to you, and I get that. I get why you want
13 this so badly. But included in that pile might be five
14 sentences that you could use to support the jurisdictional
15 argument. Why not just ask for those documents directly as
16 part of the discovery that Judge Davis is permitting at this
17 stage?

18 MR. GUDMUNDSON: And we have. We included all, we
19 included all of the document requests related to the
20 O'Melveny & Myers report in our subpoenas. And the answer
21 was the same, that you don't get it, you don't, you know --

22 THE COURT: No, no. I am talking about the
23 underlying facts that you would use. O'Melveny wasn't
24 asked, at least as far as we can tell, O'Melveny wasn't
25 asked to understand the corporate structure, right? They

1 were asked to understand whether there was fraud in the
2 billing practices and all of the things that are kind of
3 merits-based. Why do you keep asking for the O'Melveny
4 report instead of documents that tend to show that the
5 corporate structure is pierceable or a sham or
6 insufficiently separate or the things that you could use for
7 the motions at this stage?

8 MR. GUDMUNDSON: Well, we certainly have asked for
9 that, Your Honor.

10 THE COURT: Okay.

11 MR. GUDMUNDSON: And I am sure that we will be
12 before you again on this issue. But the bottom line is that
13 this was all about CenturyLink, Inc., here and this is
14 exactly the question that we are trying to resolve.

15 Now, we could go try to sift through in the next
16 few weeks millions and millions of documents, the way that
17 O'Melveny and Myers did, and come to the conclusion that
18 CenturyLink, Inc., was responsible for the policies,
19 procedures and practices that were the subject of these
20 complaints, but I'm not sure we'd ever be able to do it or
21 that we would even see the documents that O'Melveny &
22 Myers -- that ultimately came to O'Melveny & Myers or
23 whether they would be withheld on some privilege or other
24 grounds.

25 It's the same -- I don't want to beat a dead

1 horse, certainly, but look at the motion to arbitrate,
2 motion to compel arbitration. One of the central questions
3 in that case is who agreed with who and when about what and
4 what do those contracts say. Well, we've got a whole slew
5 of contracts with no signatures on them at all. We have
6 contracts of every description you could possibly imagine.
7 Which ones are enforceable? Is there a contract for
8 CenturyLink, Inc., or is it just an agreement over the
9 phone? We need to figure out when they talk about the
10 company's policies, procedures and practices relating to
11 consumer sales, service and billing, we need to find out
12 what that means. We could take it on its face, we could, if
13 they hadn't just put in a sworn declaration that says "the
14 company" does not now mean that, but it means the company
15 and certain subsidiaries. Who are they?

16 THE COURT: Let me ask a couple of questions about
17 what I'd have to find in order to order -- you are seeking
18 the O'Melveny report and all the documents on which it was
19 based? I mean, you have suggested you are willing to narrow
20 that, but that's what you asked for, right?

21 MR. GUDMUNDSON: Certainly. You know, we've put
22 the request for production forward, received blanket
23 objections, no discussion, and I know why. We have heard
24 from Mr. Lobel in no uncertain terms his feelings and
25 remarks on the matter. We never did meet and confer about a

1 lesser subset because there's nothing to talk about.

2 Nothing would be produced.

3 THE COURT: But that's what you've asked for?

4 MR. GUDMUNDSON: It's what we asked for, because
5 that, you know, that would be our best day, although I did
6 say 9.6 million documents, we don't have it, we don't want
7 it, we can't, you know, it's --

8 THE COURT: So as you stand here today, what do
9 you want?

10 MR. GUDMUNDSON: We want the findings and the
11 conclusions, whether that's in report form or whether that's
12 in some summary form or something else. We want all of the
13 facts that are not opinion, that are just the facts about
14 who they looked into, which entities were involved, who the
15 personnel were that were involved, what their titles were,
16 who they worked for. And if, you know, if we were going to
17 meet and confer and they gave me a list of what they had, I
18 could probably --

19 COURT REPORTER: Would you slow down and repeat
20 what you said?

21 MR. GUDMUNDSON: I am sorry.

22 For these three briefs, it's who is the company
23 and who was involved in this investigation.

24 THE COURT: What if I were to tailor the order to
25 just address findings that related to the who, but not

1 conclusions about representations or murky billing practices
2 or -- and the inability to answer consumer questions, but
3 just findings related to the who? That would be
4 proportional to the motions and comply with Judge Davis'
5 order, right?

6 MR. GUDMUNDSON: I think that that would be
7 acceptable, Your Honor. I mean, that's why we are here,
8 right?

9 THE COURT: So what would I have to find to do
10 that? I would have to find that it was either not
11 privileged or the privilege had been waived and that it was
12 not work product or that if it is work product you cannot
13 get it from another source. Am I understanding correctly
14 the landscape to go?

15 MR. GUDMUNDSON: Generally, although I think that
16 where you need to start, sort of, what is protected and what
17 is privileged and mere facts are not. Okay? We have got
18 the *Upjohn* case, which talks about questionnaires and how
19 they are drafted and even witness summaries. You know, we
20 would sure like those. *Upjohn* is going to be the first word
21 out of their mouth, and I am sure it is going to be the
22 first case that Your Honor reads. I don't know what else
23 they have. Maybe it's an interrogatory response. Maybe
24 it's directing them to do that. I don't know. But the
25 facts are not -- cannot be privileged. There is facts that

1 nothing passes through them that creates a -- that endows
2 them with --

3 THE COURT: Well, case law actually really
4 suggests that the very, the very act of collecting the
5 documents and providing them to your lawyer is covered by at
6 least work product, because it reveals, if not privileged,
7 because it reveals something about their internal thought
8 processes, right? So the facts maybe aren't privileged, so
9 you can ask for documents, but the facts provided to
10 O'Melveny & Myers and the response that they gave, that's
11 where privilege and work product come in.

12 MR. GUDMUNDSON: Well, in a way, I suppose. But
13 if it were fashioned in the form of a discovery response
14 that was sufficient to show, that would be the response to
15 every sufficient to show request for production. If we
16 change these to sufficient to show or if Your Honor's order
17 did that, they certainly couldn't come back and say, well,
18 we figured this was sufficient to show, that's our work
19 product, because that's what it took to figure out whether
20 it was sufficient to show these things, and so we can't turn
21 it over.

22 THE COURT: I'm sorry. I don't understand what
23 you mean by "sufficient to show."

24 MR. GUDMUNDSON: Okay. So -- and we have actually
25 discussed this with the defendant on a couple of occasions

1 in different discussions on meet and confers. You can say
2 give me all documents related to the scope of the O'Melveny
3 & Myers investigation, which we don't know what the volume
4 is and we have never heard any substantiation, any number
5 what that is, but they may say, well, that's overly
6 burdensome, not much time. How about we do sufficient to
7 show, which would just show that? Sure. We do those all
8 the time. We all the time serve discovery requests and say
9 produce documents sufficient to show the entities who were
10 involved in responding to the O'Melveny & Myers
11 investigation. That's an inartfully-stated request. It
12 could be stated better, I am sure, but that --

13 THE COURT: But that isn't the request that you
14 have made.

15 MR. GUDMUNDSON: No, no. We have requested all
16 documents.

17 THE COURT: All documents provided to O'Melveny &
18 Myers and the report itself.

19 MR. GUDMUNDSON: Well, yes, with the caveat,
20 again, that in court I stated, you know, we don't want 9.6
21 million documents.

22 THE COURT: Right.

23 MR. GUDMUNDSON: There is a lesser subset.
24 There's a core of documents. There is something lesser out
25 there. We are in no position to know what it is or what

1 form this is in.

2 THE COURT: Help me understand. Do you agree with
3 the defendant's position that it's a 12(b)(6) standard that
4 determines the intervenor motion?

5 MR. GUDMUNDSON: That one, I believe, Ms. Regan
6 will be able to field. If we're ready to switch, I'm
7 certainly --

8 THE COURT: No, no, no. That's okay. I thought
9 that might be something in your bailiwick, because it kind
10 of has to do with the scope of discovery that's permitted by
11 Judge Davis.

12 Help me understand. Your opening salvo was that
13 Judge Davis didn't -- help me understand what your position
14 is about what Judge Davis meant when he issued the stay
15 order.

16 MR. GUDMUNDSON: When -- well, first of all, the
17 stay order did not reference the first RPDs. And,
18 timing-wise, when we requested to serve the first RPDs, the
19 motion to compel arbitration, motion to stay, motion to
20 dismiss, these motions were being discussed. It was in
21 front -- it was in front of the court. So we could not
22 devine from the order whether or not he intended to say, no,
23 I didn't want you to serve those or, no, I no longer want
24 you to follow through on those, but whether they are
25 included in what I am doing. We are also not going to rule

1 against ourselves.

2 THE COURT: Do you think it might be grandfathered
3 in?

4 MR. GUDMUNDSON: We think it might be
5 grandfathered in.

6 THE COURT: Okay. And those are presumably some
7 of the requests for productions that preceded this
8 presumably go to class-wide discovery, right?

9 MR. GUDMUNDSON: I would think so.

10 THE COURT: Okay.

11 MR. GUDMUNDSON: Well, Your Honor, I think they
12 certainly would go to class-wide discovery, but I also think
13 they also go to individual plaintiff's claims because they
14 have fraud claims which have signer elements, have all sorts
15 of elements. To say that the company's centralized strategy
16 for sales and billing practices and procedures is not
17 relevant or is somehow class-wide and not relevant to
18 anything we are looking at here, I think defies credibility.
19 Now, that's what they think, but that's not my call to make.
20 We are going to have to have that information to prove it.
21 They have stated to the judicial panel that it's all
22 centralized. Centralized where? Now they say it is ten
23 different companies, and actually they say it's dozens of
24 companies from around the country who do this. Is it
25 centralized? Well, at the JPML it is centralized. In their

1 press release it is centralized.

2 THE COURT: Right. I think this all gets to the
3 merits of what Judge Davis has decided, though. What I am
4 trying to figure out is -- it seems very clear to me from
5 everything I've read that Judge Davis wants there to be
6 discovery, that he wants there to be some discovery related
7 to the motions that are pending before him, that he does not
8 want there to be class-wide discovery, the kind of thing
9 that if arbitration is denied you will want to serve, that
10 he, whether grandfathered or not, that is not his intention.
11 He wants there to be a balance between some discovery to
12 enable you to defend against the three motions that, like
13 you said, are kind of the case, but not to enable you to get
14 discovery beyond those three things at this stage. And so I
15 think that the fact that something was -- you know, I kind
16 of have a Mission Impossible idea in my head of the garage
17 door closing and Tom Cruise sliding under in just the right
18 moment. And the fact that those discovery requests made it
19 under before the door was shut doesn't change that I -- I
20 mean, your swiftness doesn't get you class-wide discovery,
21 is what I think I am saying.

22 MR. GUDMUNDSON: It's more than that. It was a
23 colloquy between Judge Davis and I when he said yes, please
24 go ahead and serve the discovery.

25 THE COURT: And then he saw the clarity of the

1 strength of the defendant's arguments around arbitration,
2 which you are not conceding, and that he gets to decide and
3 then he issued the stay order. So I don't think that even
4 if it is true that he thought one thing at first and then
5 became persuaded -- I was in that first conversation about
6 discovery, I heard what he said, and he said go ahead and
7 get started, but as things developed he clearly cabined that
8 with the stay order.

9 MR. GUDMUNDSON: Well, I don't think it was as
10 clear to us, Your Honor, because of that.

11 THE COURT: Okay.

12 MR. GUDMUNDSON: And this whole discussion of this
13 is much lengthier than I even anticipated, because our
14 simple response is if it's included we don't get it.

15 THE COURT: Okay.

16 MR. GUDMUNDSON: And then we have to get it some
17 other way. We have to see what -- see what is covered by
18 the three pending motions.

19 THE COURT: Okay.

20 MR. GUDMUNDSON: We are fine with whatever it is.
21 We just don't want to rule against ourselves and say okay --

22 THE COURT: Right. Don't stop asking for things
23 we could get just because we're worried that we can't ask
24 for it.

25 MR. GUDMUNDSON: Right.

1 THE COURT: Okay.

2 MR. GUDMUNDSON: And so it's a very -- it's a
3 pretty quick resolution on that one, in my opinion.

4 THE COURT: Do you think you have made an -- one
5 of the arguments that the defendants make is that you're
6 stuck with just consumer confusion and that you haven't made
7 adequate allegations in the complaint about things that
8 would go toward piercing the corporate veil. What do you
9 think about that?

10 MR. GUDMUNDSON: Well, I think that if you looked
11 at our --

12 THE COURT: Or alter ego. I am sorry.

13 MR. GUDMUNDSON: I think if you looked at our
14 jurisdictional allegations you would find what you are
15 looking for.

16 THE COURT: Okay. I think so too.

17 Okay. Thank you.

18 I actually would like to hear first from defense
19 counsel about the O'Melveny and the state investigations and
20 then turn to the intervenor issues, if that's okay.

21 So Mr. Gudmundson makes a good argument about a
22 seeming series of vacillations in the defendant's position
23 between the press release, the position taken at the JPML
24 and the position now taken in this litigation. Why isn't it
25 relevant who commissioned the O'Melveny report, what they

1 asked for or what entities they represented were relevant,
2 who they claimed did the billing, for these questions that
3 are now before Judge Davis?

4 MR. LOBEL: Your Honor, I'm prepared to address
5 the privileged work product issues and the classified
6 issues, but to answer that question directly the -- getting
7 at that question through the O'Melveny information, which we
8 believe is a textbook privileged investigation protected by
9 work product, is so indirect, it's so third or fourth level
10 to get at that information. I think Your Honor was
11 exactly -- had exactly the right approach to it, which is if
12 they want to understand, but -- who is in charge, who sets
13 policies, who controls whom, who the subsidiaries report to
14 or, you know, who sets sales policies, they can do that
15 directly. They have in fact done that. They have
16 propounded 62 document requests that you will be hearing
17 about in a few weeks because they are completely excessive,
18 but they attempt to get at that issue.

19 So why would you ask for an outside counsel's law
20 firm, retained by a special committee of the board of
21 directors, to do a privileged work product investigation to
22 get at the issue of who controls the company when you can
23 take that discovery directly? They might as well ask who
24 paid the electric bill for the subsidiary when it came in.
25 Did it -- there's thousands of inquiries they could make

1 that are appropriate. This is so indirect and so rife with
2 danger.

3 THE COURT: Let me ask a couple of questions
4 related to that.

5 MR. LOBEL: Yes, Your Honor.

6 THE COURT: Is the -- are the representations made
7 by CenturyLink, Inc., to the public, to regulators about
8 centralized billing practices relevant to the alter ego
9 arguments? I mean, there's a point to be made that you
10 can't have your cake and eat it too, the classic legal
11 adage, and so therefore you can't simultaneously say that
12 you are all together for one purpose and a bunch of
13 subsidiaries for another purpose. Is there some relevance
14 to what representations are made to O'Melveny or made to the
15 state regulators or made to the press about the O'Melveny
16 conclusions, not even related to merits, but related to who
17 is driving the car?

18 MR. LOBEL: Your Honor, again, there is relevance
19 to every representation a company makes and how it fits into
20 the picture, but in this instance I think we have to really
21 understand what's happening here. And if I can just step
22 back for a minute. This material has been sought since
23 December.

24 THE COURT: I know.

25 MR. LOBEL: It is clearly about class. It is

1 clearly about merits. It's pretext to say it's about
2 support of the motions. And so to pluck out a sentence out
3 of a one-and-a-half-page press release and say, aha, now I
4 need to get a privileged investigation, work product
5 protected, 1980 *Upjohn* case, is so excessive and so
6 unnecessary, they can just pursue the discovery that they
7 sought.

8 Now, let me answer your question a different way.
9 Mr. McNab will be addressing the alter ego issues, but it's
10 of course relevant. They haven't made a showing to entitle
11 themselves to that discovery. If you look at their
12 complaint, and you can look in the first couple of pages of
13 their complaint, the only factor relative to alter ego that
14 they ever mention is customer confusion. They do not
15 mention commingling of funds; they do not mention
16 undercapitalization; they do not mention merging of
17 corporate entities; they never use the word "alter ego";
18 they never use the words "piercing the corporate veil."
19 They have essentially taken this opening that Judge Davis
20 has presented and they are trying to drive a truck through
21 it to get at all this information that they are not entitled
22 to under the case law. And even if they were entitled to
23 alter ego discovery, it would only be on the issue of
24 customer confusion. It wouldn't be on all these other
25 myriad of -- there's about a 15-factor test, as I think we

1 all know. They have mentioned -- I wouldn't even concede
2 one of them because customer confusion, we cited the case,
3 is not a basis to pierce the corporate veil. But even if
4 the court were to be generous and allow that, that would be
5 the only issue that they could explore, is customer
6 confusion, not the representations made in a press release
7 by O'Melveny, not to actually intrude on what is a sovereign
8 right of a corporation to investigate allegations, to bring
9 outside counsel to provide legal advice to the board and
10 special committee.

11 THE COURT: So I think they go a little further
12 than you give them credit for in their complaint. I think
13 they point to things that they attribute to CenturyLink,
14 Inc., that it has policies, procedures and practices
15 relating to consumer sales, service and billing, that it
16 has -- this is in paragraph 17 of their complaint -- that
17 when new subsidiaries are added they are going to operate
18 under the corporate name and to assure customers that they
19 are dealing with a large company. I recognize you don't
20 agree on the merits that this is veil piercing, but my
21 question here isn't who wins the merits. It's who gets
22 discovery.

23 MR. LOBEL: Yes. Your Honor, it's not that I
24 don't agree on the merits. I don't agree that that is an
25 adequate allegation of piercing. There is a trade name.

1 It's CenturyLink. We can show you today tariff pages in
2 which tariffs are filed with state and federal regulators of
3 these subsidiaries d/b/a CenturyLink. That is the company's
4 trade name. You will see it on the stadium. You will see
5 it on the truck. You will see it on the tariffs. You will
6 see it on virtually everything the company does. Like AT&T,
7 like other big companies, they operate under a trade name.
8 That -- all they have alleged is the use of that trade name
9 confused the customers and made them think that they were
10 doing business with a parent holding company that has a
11 handful of employees that offers no services and provides no
12 consumer services whatsoever. And so really they've -- they
13 haven't made an adequate showing.

14 THE COURT: What's your best authority for the
15 idea that the multifaceted alter ego showing has to be
16 included in the complaint?

17 MR. LOBEL: I don't have that at hand, Your Honor,
18 because we had divided up the arguments between O'Melveny --
19 the 1 through 5 and the other subpoenas.

20 THE COURT: Because if anything it seems --

21 MR. LOBEL: But we did cite a case on that, I
22 believe.

23 THE COURT: It seems to me like part of the issue
24 is that they don't believe they need to allege it because
25 they believe CenturyLink, Inc., is the proper defendant; it

1 is you alleging that it is not the proper defendant who is
2 putting at issue the alter ego. So I wonder if under that
3 circumstance the law supports the idea that the complaint
4 itself has to iterate the test in order to justify
5 discovery.

6 MR. LOBEL: Your Honor, I don't think so, because
7 the problem is fundamentally they have sued the wrong party.
8 We tried to get them to sue the right party. The evidence
9 is undisputed. CenturyLink, Inc., does not have a presence
10 in Minnesota. It does not have customer -- employees that
11 provide customer services, does not do any of the things we
12 talked about. They need to establish the alter ego theory
13 in order to have CenturyLink, Inc., held responsible for the
14 acts of the subsidiaries.

15 THE COURT: I understand that. Do they need to
16 allege it in the complaint --

17 MR. LOBEL: Yes, they do, Your Honor.

18 THE COURT: -- to get discovery?

19 MR. LOBEL: Yes, they do, Your Honor. The law
20 says that, as we all know, alter ego discovery is enormously
21 burdensome, enormously intrusive, and the case was very
22 protective of corporations.

23 THE COURT: I understand. I totally get your
24 point.

25 MR. LOBEL: Okay.

1 THE COURT: What I am trying to get at is show me
2 the authority for the idea that if alter ego is brought up
3 by the defendants that the landscape for determining the
4 discovery question in order to decide jurisdiction, which we
5 all know some discovery is often allowed given the analysis
6 of proportionality, that that is based entirely on what's in
7 the complaint as opposed to the issues that have been
8 raised, say, by the defendant in the motion to dismiss for
9 jurisdictional grounds.

10 MR. LOBEL: Well, Your Honor, to be clear, we
11 didn't bring up the alter ego theory. We identified what
12 they were arguing in their briefs.

13 If you look at their discovery questions, they are
14 asking about commingling of funds, undercapitalization of
15 corporations, merging of officers and directors with
16 multiple roles. They have done everything to allege alter
17 ego other than use the term. And so the case law that we
18 cited says when a party is seeking discovery to establish an
19 alter ego relationship or to pierce the veil, they must make
20 an adequate showing to entitle themselves to that extremely
21 onerous discovery.

22 I don't know if my colleague has located it, but I
23 know we cited a case to that effect. Your Honor, Steinbeck
24 -- *Steinbuch v. Cutler*, 518 F.3d 580, at 588, 589.

25 THE COURT: Where is that?

1 MR. LOBEL: That's Eighth Circuit 2008.

2 THE COURT: Eighth Circuit 2008.

3 MR. LOBEL: And if I can read the portion of the
4 brief, Your Honor.

5 THE COURT: Yep.

6 MR. LOBEL: "Under the Eighth Circuit standard,
7 the court should permit discovery on personal jurisdiction
8 only if plaintiffs provide documentary evidence supporting
9 their jurisdictional theory. Where a plaintiff offers mere
10 speculations or conclusory allegations, a court should
11 refuse to allow jurisdictional discovery."

12 THE COURT: Okay. That doesn't get to the fact
13 that those allegations have to be in the complaint. What I
14 am getting at is if I am just looking at the question --

15 You are supposed to put a Post-It on it.

16 MR. LOBEL: I am sorry, Your Honor.

17 THE COURT: No. That's all right. That's fine.
18 I can read the case for myself. You don't have to quote it
19 to me.

20 MR. LOBEL: Well, let me find it, Your Honor,
21 because I do recall spending much time with this brief and I
22 know that that case is in here.

23 THE COURT: Okay.

24 MR. LOBEL: Okay. So discovery is necessarily
25 limited to the matters specifically pled in the complaint.

1 Well, we all know that. Plaintiffs are limited in discovery
2 to those -- well, I mean, these are general propositions,
3 Your Honor, but let me just, because I am caught a little
4 off guard, let me just direct you to page 20 --

5 THE COURT: Okay.

6 MR. LOBEL: -- where we begin discussing the alter
7 ego relationship is not alleged in the facts and how the
8 discovery would be limited on that.

9 THE COURT: And I guess what I am kind of
10 grappling with is that although it might not be alleged
11 explicitly with the many criteria in the complaint, they
12 certainly alleged it all over the place, including quoting
13 your representations to the JPML. So if my question is
14 just, Has there been a showing of alter ego possibility
15 sufficient to justify more discovery, that is a question
16 that veers in favor of the plaintiffs. If the question is,
17 Does -- Do those allegations that satisfy classic alter ego
18 analysis, the kind of analysis Judge Davis is going to have
19 to do, do those have to be set forth specifically in the
20 complaint in order to justify discovery, that's a harder
21 question. And so I was looking for the best authority for
22 the fact that in making this discovery decision I base it on
23 what is set forth in the complaint as opposed to what is set
24 forth in the briefing. And you have shared with me that
25 *Steinbuch* is your best case, and I will read it closely.

1 MR. LOBEL: Well, Your Honor, let me just say,
2 again, Mr. McNab will address it.

3 THE COURT: Okay.

4 MR. LOBEL: I just want to say I was here to
5 address the O'Melveny.

6 THE COURT: Okay.

7 MR. LOBEL: But I am familiar with these
8 arguments. But let me just say that, I mean, we all
9 understand that the complaint frames the discovery and, no,
10 they can't keep morphing their argument, not having
11 allegations in the complaint and then throwing it into a
12 brief to entitle themselves to this very onerous, intrusive
13 discovery.

14 THE COURT: Although they are going to say that
15 you guys are the morphers, right, because they are going to
16 point to the position taken before the JPML and talk about
17 the evolution of that position, which was after the
18 complaint was filed, right, to now. So, I mean, I think
19 everyone wears a morphing hat at this point.

20 MR. LOBEL: Well, Your Honor, there's actually, I
21 mean, if you want to get into that, there is actually zero
22 inconsistency there because -- and I was involved in all of
23 these statements, so I can tell you what I intended and what
24 I said.

25 What I said to the JPML was that there are

1 centralized sales and billing practices that are -- that
2 govern the family of companies. And on that basis, the JPML
3 centralized all the cases before Judge Davis.

4 What I said to Judge Davis in the initial status
5 conference was there are no common billing issues here,
6 meaning if you look at the allegations of the 15 individual
7 lawsuits, one of them talked about my auto pay was taken too
8 early in the month, one of them talked about I was given --

9 THE COURT: I understand that.

10 MR. LOBEL: -- a promotion and I didn't receive
11 it. What I was saying is there is not a commonality of
12 sales practices that is reflected in the complaints. That's
13 different than saying the family of companies has a common
14 sales and billing practice. Of course, it does. It's got
15 80 subsidiaries as a result of regulatory requirements by
16 different state PUCs and different regulators. They don't
17 all sit around every week and make their own sales and
18 marketing and billing practices. There are service
19 companies that are at the subsidiary level below
20 CenturyLink, Inc., but above the individual operating
21 subsidiaries that uniformly set these practices for the subs
22 below them.

23 THE COURT: At the instruction of CenturyLink,
24 Inc.?

25 MR. LOBEL: No, Your Honor. There -- at some

1 level as a parent there is presumably some involvement, but
2 these are called service companies. They have names, like
3 CenturyTel Service Company.

4 THE COURT: But I think we are getting a little
5 bit far afield, because I think that the reality is that my
6 decision is not who wins the veil-piercing argument.

7 MR. LOBEL: Yes.

8 THE COURT: My decision is what's a reasonable
9 scope of discovery related to it. And I am -- I have a
10 couple more questions related to the O'Melveny report and
11 then I want to move on to the intervenor stuff, because I
12 see that I've talked way too much.

13 MR. LOBEL: Yes, Your Honor.

14 THE COURT: Is there any case law that you are
15 aware of that has found a press release, a one-page, even
16 fine-print press release, to constitute waiver of privilege
17 of an internal audit like this?

18 MR. LOBEL: No, Your Honor. There's not a single
19 case that exists that we could find that finds waiver based
20 on the issuance of a press release.

21 *Dayco* is exactly on point. *Dayco* is a corporate
22 internal investigation which a special committee hired
23 outside counsel, had outside counsel conduct a privileged
24 work product investigation, and at the end of that, just
25 like CenturyLink, announced its high-level findings and on

1 that basis it was alleged to -- there was alleged to have
2 been a waiver. What the court found is no, because that
3 press release, which, by the way, was the exact same length
4 as CenturyLink's, did not summarize evidence, did not go
5 into detail. There was a waiver to the limited extent of
6 the findings that were published, but not beyond that.

7 And so the notion that you can get a broad-based
8 waiver of everything involved in an investigation because of
9 a one-and-a-half-page press release just doesn't hold muster
10 and it is completely inconsistent with the entire body of
11 *Upjohn*-related and its progenies. So, no, they don't have a
12 case that ever finds that. There are multiple cases that
13 find in this instance there is no waiver.

14 Now, I will say there are cases that say when you
15 use it affirmatively in the litigation, sword and shield,
16 that's a waiver. We have not, affirmatively, not done that.
17 We have disavowed the use of this. We will not use it.
18 That's not a concern that plaintiffs have. So they have no
19 cases that support this.

20 THE COURT: Okay. Is there anything different
21 about the communications with the state attorneys general?

22 MR. LOBEL: No, Your Honor. Those are, those are
23 clearly class-wide, clearly merits. They are what's known
24 as cloned discovery. Courts cloned, c-l-o-n-e-d, is how the
25 case is termed. It is greatly disfavored for the very

1 reason that it is like putting -- it is like wanting to
2 catch your dinner and putting a net across the Atlantic
3 Ocean. That's effectively what you are sweeping in,
4 everything. There's no indication what the focus of those
5 state investigations were. There is no indication that
6 there was anything relevant to this case. There is clearly
7 an indication that you would get lots of things not
8 relevant. And what the court's actually saying in a fairly
9 harsh way, Your Honor, is do your work. It's -- you can't
10 make it that easy. You can't say --

11 THE COURT: Right. You can't just ask for what
12 was provided in a different unrelated --

13 MR. LOBEL: Yeah. Give me what that guy did. You
14 can't say that.

15 THE COURT: Okay.

16 MR. LOBEL: So it's very greatly disfavored. And
17 for all the reasons, it should be denied here.

18 THE COURT: Okay. Thank you.

19 MR. LOBEL: Thank you, Your Honor.

20 THE COURT: Okay. Ms. Regan, let's turn to the
21 intervenor, the specific discovery.

22 MS. REGAN: Thank you, Your Honor.

23 So to answer your first question with respect to
24 the standard applied to the motion to intervene, the
25 Rule 12(b)(6) standard, that is only true where you can

1 actually presume the truth. Now, when you have declarations
2 in this litigation that contradict each other, you can't
3 presume the truth and so --

4 THE COURT: What's your best authority for the
5 idea that when there's some reason to doubt the veracity of
6 the documents that are normally considered that you go
7 beyond?

8 MS. REGAN: So that is *Stadin versus Union*
9 *Electric Company*, 309 F.2d 912. The jump cite is 917.
10 That's the Eighth Circuit 1962. The Eighth Circuit has
11 held, "Our quoted language, however, does not mean that, for
12 the purposes described, all statements in pleadings of this
13 kind are to be accepted as true irrespective of their nature
14 or content." It has to be well pleaded.

15 When you have contradictory declarations as we
16 have had in this case, the Guy Miller declaration that is in
17 front of the JPML, where Mr. Miller testified in that
18 declaration at all times relevant to these lawsuits the
19 consumer sales and billing channels at CenturyLink have all
20 reported to common management and have been subject to
21 common sales and billing policies and practices that apply
22 across all consumer channels, and then, on the other hand,
23 we have the intervenor saying it's us, not them, whoever
24 that common management is, we don't know. We just don't
25 know because we don't have the organization charts. We

1 don't have the business cards. We don't have the other
2 indicia of that organizational structure.

3 So important to the resolution of the motion to
4 intervene, Your Honor, is the fact that seven of the ten
5 affiliates who are seeking to intervene are not named in any
6 contract that CenturyLink has put in the record. That's
7 both in the Seshagiri affidavit that is attached to the
8 motion to intervene, as well as in the motion to arbitrate.
9 They have only put in contracts that name Qwest Corp., Qwest
10 Broadband Services, CenturyTel Broadband Services. So
11 Embarq Florida, Embarq Missouri, Carolina Telephone and
12 Telegraph, Central Telephone Company, CenturyTel of Idaho,
13 CenturyTel of Larson-Readfield, who is our favorite
14 subsidiary of the day, CenturyTel of Washington, not named
15 in the contracts.

16 THE COURT: Okay.

17 MS. REGAN: So we don't know why they are here.

18 THE COURT: Let's focus on some of the specific
19 discovery requests.

20 MS. REGAN: I would be glad to.

21 THE COURT: Let me tell you that I need less
22 persuading on the business cards and the organizational
23 charts. I am curious about the intellectual property.

24 MS. REGAN: Certainly. So for the purposes of the
25 jurisdictional analysis, which is a different standard, of

1 course, you can resolve factual disputes and look beyond the
2 pleadings for the purposes of a Rule 12(b)(2) motion, and
3 I'll speak a little bit more on that later. I also have a
4 couple additional cites that what we have with respect to --
5 in the brief itself.

6 The intellectual property is relevant to be able
7 to establish CenturyLink, Inc.'s contacts in each of the
8 jurisdictions with respect to the intervenors. To the
9 extent that there are agreements that -- let's just say
10 CenturyTel of Washington, like I said, it's a slightly
11 bigger entity, entered into with CenturyLink, Inc. That
12 will help us establish contacts for the purposes of
13 Washington state itself, because the analysis that Judge
14 Davis is going to apply with respect to personal
15 jurisdiction -- we don't know exactly how he's going to
16 approach it, but they are arguing that if we were in our
17 respective home jurisdictions, whether that's Wisconsin,
18 Iowa, Washington, Utah, wherever the cases have been filed,
19 CenturyLink is arguing -- we don't agree, but CenturyLink is
20 arguing that there is no personal jurisdiction over
21 CenturyLink, Inc., in those jurisdictions.

22 THE COURT: So tell me how a relationship with one
23 of those subsidiaries to use the intellectual property
24 constitutes contact.

25 MS. REGAN: Sure. So one of the factors in the

1 multifactor analysis does go to whether there are shared
2 assets, logos, trademarks and things like that.

3 THE COURT: It seems like this is one that you all
4 have an abundance of information on shared -- I mean, you
5 have got concessions all over the place, not to make you
6 pinky swear to a concession, but concessions all over the
7 place that they are using and holding themselves out to be
8 CenturyLink, that they are using the same logo, that they
9 have the same trucks. Why does getting into the legal
10 relationship protecting the intellectual property, why is
11 that proportional to what you need to show?

12 MS. REGAN: Well, I don't know that it would be
13 disproportionate. I mean, I don't know how many agreements
14 there are out there. But certainly there have been cases
15 that have found and some of them are in the Western District
16 of Pennsylvania, some of them are in Pennsylvania, in
17 general, the chocolate antitrust litigation, did look at the
18 fact that there were anti -- there were licensing,
19 trademark, intellectual property agreements between the
20 various subsidiaries. At the end of the day it didn't sway
21 the court in its analysis, but it permitted jurisdictional
22 discovery. So the *Enterprise Rent-a-Car* case that
23 defendants have cited in their opposition to the motion to
24 compel, as well as in their motion to dismiss for lack of
25 personal jurisdiction, cites to this line of cases that at

1 least allows jurisdictional discovery with respect to
2 intellectual property agreements.

3 THE COURT: Okay. Let me understand why do you
4 need the lease.

5 MS. REGAN: Yeah. So certainly we did not
6 anticipate that that would be such -- that would be objected
7 to on the proportionality grounds. Again, we don't know how
8 many offices there are that CenturyLink has. Qwest Corp. is
9 what was brought up. But I found a photo of CenturyTel of
10 Larsen-Readfield, and it's a low squat, white brick building
11 where there are no windows. And so I can't imagine that
12 that would be disproportionate or hard to or not
13 discoverable or not discoverable for the purposes of
14 ascertaining whether CenturyLink, Inc., or a different
15 management subsidiary actually controls that building.

16 THE COURT: Do you have any reason to think that
17 CenturyLink, Inc., controls any buildings?

18 MS. REGAN: No, but that's why we are --

19 THE COURT: I mean that they, that they -- they
20 have repeatedly said they do nothing, they have no
21 employees, they don't sign agreements, they don't sign
22 leases. I am not sure that it's proportional to make them
23 dig up, what is it, 14,000 leases over an eight-year period
24 that might include multiple leases for each facility to
25 show. Do we have any reason to think that they are on these

1 leases?

2 MS. REGAN: No, I don't know, Your Honor. I don't
3 have a reason not to think that, and I don't have a reason
4 to think that. We just haven't seen them. But I can tell
5 you, if I may approach --

6 THE COURT: Have you thought about trying to get
7 at the answer to that question through a different
8 mechanism, like an interrogatory saying is CenturyLink,
9 Inc., on any of the leases of buildings owned by the
10 subsidiaries?

11 MS. REGAN: Well, certainly, if we are allowed to
12 ask that in deposition, that would be a quick way to do it.

13 So what I've brought forward to the court, and I
14 gave it to opposing counsel as well, to go to the notion
15 that CenturyLink, Inc., does not sign anything, it doesn't
16 do anything, it enters into multiple agreements with public
17 utilities commissions throughout the country, and this is an
18 example of one with the Minnesota Public Utilities
19 Commission dated from 2011, just as the Qwest and
20 CenturyTel, CenturyLink mergers were in their completion,
21 and on the back page there is a signature from CenturyLink,
22 Inc. So of course CenturyLink, Inc., enters into agreements
23 by and on behalf of its subsidiaries and with its
24 subsidiaries. And to the extent that there are other
25 agreements like that, we believe that we're entitled to know

1 that.

2 THE COURT: Okay. You say that you might ask this
3 in a deposition. Are there going to be depositions? What's
4 the landscape look like for other discovery?

5 MS. REGAN: So we have also served deposition
6 subpoenas, Rule 45 subpoenas to the intervenors, as well as
7 the document requests. We're in the process of narrowing
8 the scope of some of the topics, but I think we will be able
9 to reach agreement on most. And certainly what the court
10 has to say today will guide some of the meet-and-confer
11 discussions with respect to that.

12 THE COURT: Okay. Great. Let me -- is this a
13 question for Mr. Gudmundson? It might be. I would like to
14 hear your thoughts about the idea -- and if it is for him, I
15 will wait -- your thoughts about the idea that is it true
16 that alter ego analysis has to be pled in the complaint in
17 order to be at issue.

18 MS. REGAN: No. I do have an answer to that.

19 THE COURT: Great.

20 MS. REGAN: But the alter ego issue is something
21 that CenturyLink has injected into the lawsuit through its
22 motion to dismiss. It is something that we are entitled to
23 defend because that is their defense, that is their
24 affirmative defense. But Your Honor was correct. When we
25 very carefully went through and made our allegations with

1 respect to the complaint, it's CenturyLink, Inc., we
2 believe, who is responsible for this. Whether we have to do
3 an alter ego analysis with respect to the jurisdiction issue
4 is different than the liability issue.

5 THE COURT: And it's only raised by their motion?

6 MS. REGAN: Exactly.

7 THE COURT: Which is why you think that the lack
8 of specific alter ego allegations in the complaint shouldn't
9 eliminate the need for -- or the opportunity to get
10 discovery?

11 MS. REGAN: That's -- you are right.

12 THE COURT: Okay. Give me a second. Why the
13 judgments?

14 MS. REGAN: Against CenturyLink, Inc., and the
15 employees?

16 THE COURT: Yes.

17 MS. REGAN: So with respect to the prong of the
18 intervention test, CenturyLink, Inc., is saying it is not
19 adequate to protect the interests of any of the subsidiaries
20 that it's seeking to have intervene in this case, and that
21 certainly would go to that. If CenturyLink, Inc., has been
22 on a judgment, responsible for payment of a judgment for any
23 of the subsidiaries, employees, that would be relevant to
24 that analysis.

25 THE COURT: Okay. One second. Okay. I think

1 that's it for now. Thank you.

2 MS. REGAN: Thank you, Your Honor.

3 THE COURT: Yes, at long last.

4 MR. McNAB: Thank you, Your Honor. Again, Bill
5 McNab with Winthrop & Weinstine. I'm going to try to move
6 quickly and speak slowly.

7 THE COURT: Okay.

8 MR. McNAB: I don't know that I will be
9 successful, but I recognize the hour is late.

10 THE COURT: No, I can't imagine, but let's hear
11 it.

12 MR. McNAB: With respect to the question about
13 cases holding that veil piercing needs to be alleged in the
14 complaint in order to become discoverable under these
15 circumstances, there are four cases cited in our complaint.
16 I am not prepared to tell you which one is our best case. I
17 would just refer the court. They all specifically deal with
18 a party failing to include corporate veil piercing or alter
19 ego allegations in actually the second amended complaint in
20 the first instance here and was not allowed to conduct
21 discovery on it in this matter.

22 Now, I understand Your Honor has asked a different
23 question later and that is, well, whose fault is it that we
24 are even talking about veil piercing and alter ego. Well --

25 THE COURT: "Fault" is a strong word, but I think

1 Ms. Regan's argument is that it's different when a failure
2 to establish alter ego is not -- it's not the plaintiffs
3 trying in the first instance to establish the alter ego. It
4 is the defendants raising the failure to establish the alter
5 ego that postdates the complaint.

6 MR. McNAB: I appreciate the subtle difference and
7 more charitable way of describing it, but the bottom line is
8 they sued the wrong folks.

9 And we understand where we are and we understand
10 what motions are on file before Judge Davis, and we
11 understand that he has issued an order that goes to
12 intervention, goes to personal jurisdiction, including some
13 element of a theory of veil piercing and that it also goes
14 to the arbitrability issue. We understand that.

15 So if I can back up, Your Honor, and take us back
16 to where Your Honor began today and that is, and I thought
17 that your introductory comment was very well taken, the
18 decisions that are made today will be important not for 8 or
19 10 disputed topics in these subpoenas alone. As Your Honor
20 has heard, there are 61 or 2 outstanding document requests
21 to the parent. There are 23, I think it is, pending
22 subpoena deposition topics. There are other subpoena topics
23 that we haven't even met and conferred -- or I am sorry --
24 other deposition topics that we haven't even met and
25 conferred about yet.

1 In their brief and to some extent in Mr.
2 Gudmundson's argument we hear a lot about the Rule 26
3 standard and relevance.

4 THE COURT: Show me a case that stands for the
5 proposition that you get the protection of Rule 45 when you
6 are aggressively litigating to get into a case.

7 MR. McNAB: Show me the case that says when you
8 are aggressively trying to keep someone out and can only --

9 THE COURT: Okay. So both sides suffer from a wee
10 bit of hypocrisy here.

11 MR. McNAB: But my, but my point wasn't going to
12 be that point, which you fairly drew from our brief. My
13 point was going to be something else.

14 THE COURT: Okay.

15 MR. McNAB: Rule 26, the hallmark of
16 discoverability, is relevance, and relevance can be very
17 broad, it can be very attenuated, but that's not where we
18 are today. The standard here is reasonable discovery
19 specifically directed at the motions.

20 THE COURT: Okay.

21 MR. McNAB: Not anything that might be marginally
22 or tangentially relevant, which would otherwise possibly be
23 discoverable under Rule 26(b) (1).

24 THE COURT: I understand that the line that Judge
25 Davis has drawn is no, we're not in a full discovery realm,

1 we are not in class-wide discovery realm, we are in a realm
2 where discovery is permitted on these motions, and it is my
3 job to draw those lines.

4 MR. McNAB: Well, there's actually another line
5 that His Honor has passed on to you to draw, because there's
6 absolutely a black-and-white -- we differ on where it is,
7 but you are absolutely right -- there is an absolute
8 black-and-white no class-wide, no merits, and then there is
9 something about intervention and personal jurisdiction and
10 arbitrability, but even that isn't unlimited because Judge
11 Davis didn't say discovery about. He said reasonable
12 discovery specifically directed at. That is something less
13 than just somehow relevant to.

14 THE COURT: Okay. Let's get into specifics.

15 MR. McNAB: Well, and if I may, Your Honor, this
16 is really important, if I can have just another moment
17 before we get into the specific requests, because I think I
18 need to make a couple of points that are important. This is
19 why we wanted the formal hearing, because these are the
20 points we need the court to have in mind as it makes
21 decisions over the course of this summer on all of these
22 issues and that whatever reasonable discovery is on these
23 three motions should be guided and instructed by the law,
24 the relevant law. It should be guided and informed by the
25 factual circumstances that we know to exist. It should be

1 guided and informed by the allegations that are or are not
2 in the complaint. Now, I can skip that section because that
3 had to do with the lack of alter ego, but we think that does
4 inform what is and isn't reasonable. And finally, and maybe
5 most importantly, it has to be informed by all of the things
6 we are already agreeing without reservation to produce,
7 things that we think are probably beyond what the law
8 requires, we think probably beyond what Judge Davis even
9 ordered, but we think that keeping that in mind informs the
10 decision of whether another request is or is not in fact
11 reasonable. And I will give you an example of that.

12 THE COURT: Okay. Let's turn to specifics. I
13 want to focus on the business cards. Tell me why the
14 business cards, which seems squarely to fall within the idea
15 of reflecting corporate structure and affiliation, is
16 disproportionate or not relevant. I'm not sure what your
17 argument is to the business cards, but -- and just to help
18 hone in on where we are in terms of the numbers, it's
19 numbers 4 and 5.

20 MR. McNAB: And, Your Honor, this helps make the
21 point that I just tried to make and that is we have already
22 agreed to request, to identify officers and directors and
23 will be producing documents that show corporate
24 relationships, corporate affiliations.

25 THE COURT: Yep. My question is why are the -- I

1 understand. I have heard you make your speech. I get the
2 idea you are giving a lot of stuff you wish you weren't
3 giving. I will keep that close to my heart as I issue this
4 ruling. I am asking you to make a particular showing about
5 why the business cards are either burdensome or irrelevant.

6 MR. McNAB: That's --

7 THE COURT: Not just --

8 MR. McNAB: I am going there.

9 THE COURT: Okay.

10 MR. McNAB: But it has to be in light of other
11 things we are producing, again, that better answer the
12 question, I think. And, you know, again, we're going to
13 show that each intervenor does use the trade name
14 CenturyLink and how each intervenor is, you know, fully
15 capitalized, pays it own way. Running around the company
16 collecting business cards, and this is a lot of different
17 running around, that will all say CenturyLink because the
18 intervenors all use that trade name, it is burdensome,
19 duplicative and it is not useful.

20 THE COURT: I don't think they are asking for all
21 the 14,000 employees' business cards. They are asking for
22 management's business cards, right?

23 MR. McNAB: They are asking for two different
24 categories of people, management people from all of the
25 intervenors and then people that either have been or might

1 be offering declarations in the case. That's what 4 and 5
2 are about. So they run through all different categories of
3 employees for each of the intervenors.

4 THE COURT: Okay. And your argument is just that
5 getting business cards is, it's -- it duplicates information
6 that you are providing in other contexts and it is a
7 disproportionate hassle to show something that you are
8 basically conceding anyway, which is that it is going to
9 have CenturyLink logo and it is going to show their title
10 which you are giving in other forms.

11 MR. McNAB: Right. Yeah. Exactly, Your Honor.

12 THE COURT: Okay. How about the organizational
13 charts?

14 MR. McNAB: Much the same, Your Honor. We are
15 going to be producing documents that will show how each
16 intervenor markets, serves and bills its customers. And
17 there may be subcontractors. There may be service
18 companies, as Mr. Lobel discussed. We will be identifying
19 them as well. So those documents are going to far better
20 serve than archaic structures that may or may not exist and
21 may or may not be current and may or may not be informative
22 of anything, because what we are agreeing to produce is
23 documents sufficient to show how these businesses are
24 organized and how they operate.

25 THE COURT: But it feels like by choosing one set

1 of documents to prove your point, which is the billing
2 structure and everything else, and not disclosing
3 organizational charts that might be dated, might be archaic,
4 but might also show a much greater relationship between the
5 subsidiaries and CenturyLink, Inc., that you are getting to
6 kind of, through discovery, tailor their ability to disagree
7 with you about what the organizational chart shows in terms
8 of alter ego.

9 MR. McNAB: Well, that assumes sort of a bad
10 purpose, but in fact, Your Honor, and I regret that I really
11 haven't made the speech yet that I hoped to make, but I
12 understand it's late, but, Your Honor, that assumes then
13 that anything they ask for is fair game because they ask
14 for --

15 THE COURT: That's not fair. That's not fair. If
16 you guys have organizational charts that show relationships
17 between CenturyLink, Inc., and subsidiaries, that's not the
18 same thing as anything they ask for.

19 MR. McNAB: But nor is that what they asked for.

20 THE COURT: Okay. Let's -- help me understand
21 then how that is not what they asked for, because if it's a
22 matter of being more burdensome than that, that would be
23 helpful to me to understand.

24 MR. McNAB: Well, the request doesn't say anything
25 about the relationship between the subsidiary and

1 CenturyLink, Inc. And, in fact, I suspect that if there
2 were any organizational charts, they are not going to
3 reflect that anyway.

4 THE COURT: What do you think they are going to
5 reflect?

6 MR. McNAB: They are going to reflect the
7 organization of the subsidiary that is trying to intervene
8 in the case.

9 THE COURT: Okay. Let me find where this request
10 is. I just had it and I lost it.

11 MS. REGAN: It's Request No. 10, Your Honor.

12 THE COURT: It's 10. Okay.

13 Your organizational chart, the "you" being the
14 subsidiary, including any changes made during the relevant
15 time period. And what you are saying is that this won't
16 show the relationship to CenturyLink, Inc. It will just
17 show the organization of the subsidiary. Okay.

18 MR. McNAB: Yes, Your Honor.

19 THE COURT: Tell me about the intellectual
20 property.

21 MR. McNAB: I think you were absolutely right,
22 Your Honor, bearing in mind, and this goes back to the point
23 I keep making, we have agreed, not only have we averred to
24 the court in both pleadings and memorandum, but also in open
25 court, they do all use the trade name. And we have agreed

1 to No. 28, and No. 28 asks us for documents reflecting all
2 of the use of the trade name. So who owns the trade name is
3 not particularly meaningful.

4 THE COURT: Okay.

5 MR. McNAB: And we think this is much ado about
6 nothing. So that really takes care of 14, 26, 27 and 29,
7 but we think that by agreeing to 28 that's what they really
8 need, that's what's reasonable under the circumstance.

9 THE COURT: That's a horrible noise.

10 MR. GUDMUNDSON: It just materialized here. We
11 didn't --

12 THE COURT: Hang on one second. I think I might
13 have a button I can push.

14 THE CLERK: There we go.

15 MR. GUDMUNDSON: That was the button.

16 THE COURT: Thank you.

17 Okay. Tell me about -- help me understand the
18 burdensomeness or not of the request related to the offices,
19 without laughing.

20 MR. McNAB: Sorry, Your Honor. I apologize. This
21 is serious stuff.

22 It is as set forth in our brief. It is burdensome
23 because there are thousands of offices across the country,
24 and it's, again, not meaningful. It doesn't matter what the
25 lease says, where the building is.

1 THE COURT: Well, arguably, it matters what the
2 lease says, right? If the lease says CenturyLink, Inc.,
3 leases this building for, you know, subsidiary X, that is
4 something that they are going to emphasize in talking about
5 who is the proper defendant.

6 MR. McNAB: But I'm not sure how somebody owning a
7 building and leasing it to someone else, if that were the
8 case, and it's --

9 THE COURT: We don't know.

10 MR. McNAB: -- me now offering evidence, but
11 that's not the case here, but even if it were, I'm not quite
12 sure why it would matter if a parent happened to own a piece
13 of property and leased it to a subsidiary. What -- what's
14 wrong with that?

15 THE COURT: I'm not saying anything is wrong with
16 it. I'm saying it might be a fact that they point to in an
17 effort to establish that you are the proper defendant or
18 that you have adequate contacts with the forum, right? I
19 mean that CenturyLink, Inc. -- we have got a lot of
20 different questions being established here, but it certainly
21 has relevance to who is where doing business, right?

22 MR. McNAB: I suppose if the parent owned property
23 around the country. But we have got affidavits and
24 declarations in already that say the only property that the
25 company really owns is the stock in its subsidiaries.

1 THE COURT: Where is its office?

2 MR. McNAB: CenturyLink, Inc.?

3 THE COURT: Mm-hmm.

4 MR. McNAB: Monroe, Louisiana.

5 THE COURT: So would you agree that answering
6 questions at a deposition about whether you lease any, own
7 and lease any of the buildings to the subsidiaries would be
8 a more tailored way to get at this information?

9 MR. McNAB: Yes, I would agree that it's more
10 tailored. I am not promising there won't be any objections
11 when and if that were to come up, but --

12 THE COURT: What would your objection to that be?

13 MR. McNAB: I don't know, Your Honor. I'm just
14 saying I, you know, I certainly agree with the premise that
15 that's less intrusive than give us a picture of every
16 building that all of you have, whoever you may be,
17 intervenor, parent, someone else who, you know, some third
18 party leases it to one of the intervenors, I don't know,
19 whatever. That just seems so far afield.

20 THE COURT: Okay. Help me understand your
21 perspective about any judgments that might hold CenturyLink,
22 Inc., responsible for or co-responsible for court-ordered
23 payments.

24 MR. McNAB: We think that we are, you know, we're
25 providing financial information sufficient to show that each

1 intervenor is adequately capitalized and each intervenor
2 pays its own way, all of its way. And so this could also be
3 please produce any evidence that the parent has ever
4 purchased your Post-It notes, staples and pens.

5 THE COURT: But it's not.

6 MR. McNAB: But it's the same thing, Your Honor.

7 THE COURT: Well, I understand that the reasoning
8 could be the same. This is much more narrowly tailored.
9 And one of the things I am trying to do is draw a line
10 related to proportionality. Whether we use the lens that
11 Judge Davis iterated or the standard language in the rule, I
12 think either way we all know that he wants there to be some
13 discovery on these issues, but not without limit. So they
14 are not asking for whether CenturyLink, Inc., ever bought a
15 Post-It. They are asking for whether there are court
16 judgments against CenturyLink, Inc., for cases that were
17 brought against the subsidiaries. And I am trying to
18 understand why that is either or not relevant or
19 disproportionate.

20 MR. McNAB: And my answer is it's not reasonable.

21 THE COURT: It's not reasonable. Why?

22 MR. McNAB: Because it's not the right way -- we
23 are already going to produce reams of financial information
24 that demonstrate that each of these intervenors stands on
25 its own financially. And that's really the point of looking

1 for this judgment, right, is that, oh, well, somebody else
2 is paying your bills. That's a sign of alter ego.

3 THE COURT: Okay.

4 MR. McNAB: Your Honor, I think it's important
5 again just to say that we have, without resistance, agreed
6 to produce documents regarding corporate formation,
7 corporate formalities, documents identifying officers and
8 directors, documents identifying corporate relationships,
9 shared resources and financial accounting for each
10 intervenor, documents reflecting each intervenor's use of
11 the trade name and documents reflecting each intervenor's
12 contacts with the plaintiffs, contracts, billing services,
13 repair records and all these sorts of things.

14 Now, when we had our first phone conference with
15 Your Honor, you added some color to what you thought Judge
16 Davis' order meant. It says reasonable. You said you think
17 he expects, and specifically you expect, meaningful. We've
18 produced 51,000 pages of very meaningful material today. We
19 have agreed to continue to produce on a weekly basis, on a
20 rolling basis all of these categories of documents with a
21 targeted substantial completion date of the third week of
22 this month. So it's not like we're kicking and screaming
23 and saying we're not going to produce. It's that we are
24 trying to do what's reasonable. We are trying to put in
25 front of the intervenors and ultimately the court the stuff

1 that goes to the three motions. That's the field in which
2 we are trying to employ.

3 THE COURT: And so far 51,000 pages?

4 MR. McNAB: Just today. And I will tell you -- in
5 fact, if I may, Your Honor, I will kind of show you very
6 quickly. Don't let the weight of this concern you. I am
7 not going to keep anyone here through dinner. These are
8 examples of the kinds of information that we have put in
9 front of and will continue to put in front of the
10 plaintiffs.

11 Now, at the last hearing Mr. Gudmundson
12 specifically said to Judge Davis that the kind of
13 information they're looking for, the kind of discovery they
14 are looking for is to determine whether or not these
15 companies, these entities are real.

16 So we have got four examples here. The popular
17 CenturyTel of Larsen-Readfield is the smallest, and Qwest is
18 the largest. The others in between run that gamut. But
19 what you see, very quickly, in Tab 1 is that
20 Larsen-Readfield is certified by the Wisconsin Public
21 Utilities Commission. What you see at Tab 2 is that
22 Larsen-Readfield is 109 years old. It has been in existence
23 continuously since 1909 and providing these kinds of
24 services. What you see in Exhibit 4 is from Mr. Lobel's
25 declaration. It demonstrates that CenturyTel of

1 Larsen-Readfield, that no one apparently has ever heard of
2 before, is identified in the bill that this particular
3 plaintiff received every month. We see in Tab 4 a tariff,
4 which is a publicly-filed PUC document, that sets forth the
5 billing and other aspects for CenturyTel of Larsen-Readfield
6 and it clearly indicates doing business as CenturyLink.

7 So Mr. Gudmundson announced in court at the last
8 hearing or the one before, well, I've never heard of this
9 company. Well, you know what, if you are not from Larsen or
10 Readfield, that's not really surprising; but if you are from
11 Larsen or Readfield, you almost certainly have because it's
12 the only landline phone game in town and it's probably been
13 the only landline phone game in town for over a hundred
14 years. The point of this, and I won't go through each and
15 every one of these, but you are going to see similar
16 documents for Embarq of Missouri and that that was founded
17 in 1929. This is similar --

18 THE COURT: Okay. I'll take a look at these.

19 MR. McNAB: And I'm not arguing the merits, but
20 what I am saying, Your Honor, is that when we think about
21 what is reasonable, these are the kinds of documents of
22 which the court can take judicial notice. These are
23 government documents. These came from these agencies and
24 regulators. Okay? This isn't company propaganda. This is
25 the specific -- four of these specific intervenors being

1 recognized over and over again by the SEC, the FCC --

2 THE COURT: I recognize your point. I recognize
3 your point.

4 One of the goals of discovery, though, is to make
5 sure that it isn't just a unilateral provision by one party
6 of the documents that support their position in an effort to
7 avoid the other party from discovering the documents that
8 don't. And as slick and well-tabbed as this is, I still
9 have concerns about where the line is to be drawn. And the
10 simple fact that you have provided lots of information,
11 while essential and appreciated and ordered by Judge Davis,
12 doesn't obviate your need to comply with discovery requests
13 that are meaningful and reasonable, as Judge Davis set out,
14 that might not support your case. And so the line I am
15 trying to draw is to make sure that the plaintiffs have a
16 chance to try to prove their case too, not simply accepting
17 your unilateral good faith disclosure, things that support
18 your case, and that's what I am trying to get at.

19 I'm going to ask you to be seated, sir. I want to
20 hear from Mr. Gudmundson just a little bit more, and then I
21 might have a couple more questions for you guys.

22 MR. GUDMUNDSON: Your Honor, if I may, do you have
23 questions right away?

24 THE COURT: Go ahead, but keep it quick. We are
25 late.

1 MR. GUDMUNDSON: Mr. McNab just described pretty
2 clearly what this is all about and what it's all been about
3 from the beginning as it regards who did what.

4 They did ask us to amend the complaint early, and
5 they did give us the names of dozens of people that they
6 said should be defendants, but our response to that and our
7 response to the court as to why that was insufficient is
8 because we said, Who talked to our clients, Who is
9 responsible for this, Who did this, and the answer we kept
10 getting back was a very technical one. These are the
11 operating companies; these are the service providers.
12 That's not our question. The question we seek to answer, we
13 need discovery on -- it's not that it's a real company.
14 Anybody can make a real company. It could be a company for
15 150 years.

16 THE COURT: Well, it's more than that. These are
17 not companies that CenturyLink, Inc., hatched. They are
18 companies that preexisted and developed later relationships
19 to CenturyLink, Inc. There's a difference.

20 MR. GUDMUNDSON: But are they responsible for the
21 business policies that led to the things that happened as
22 alleged in our complaint?

23 THE COURT: Is that enough, though? If
24 CenturyLink, Inc., conditioned subsidiary relationships on
25 agreeing to certain policies, is that enough to create alter

1 ego liability?

2 MR. GUDMUNDSON: Well, there's a lot going on with
3 alter ego liability and, you know, using names across --
4 well, there's multiple elements that have not been briefed
5 yet and that will be briefed.

6 Well, I've just been handed a --

7 THE COURT: Smoking gun.

8 MR. GUDMUNDSON: -- a yellow envelope, and I'm
9 just going to read it into the record.

10 MS. REGAN: Sure.

11 MR. GUDMUNDSON: It's the *Epps* case, 327 F.3d 642,
12 and that's the Eighth Circuit 2003.

13 THE COURT: What was the page cite?

14 MR. GUDMUNDSON: It's 642. And the jump cite
15 would be 648-49.

16 THE COURT: Thanks.

17 MR. GUDMUNDSON: And here, it's even in red bold
18 here, it says, quote, "Notably, another wrinkle is added
19 when the defendant is a nonresident parent corporation. In
20 that situation, personal jurisdiction can be based on the
21 activities of the nonresident corporation's in-state
22 subsidiary, but only if the parent so controlled and
23 dominated the affairs of the subsidiary that the latter's
24 corporate existence was disregarded so as to cause the
25 residential corporation to act as the nonresidential

1 corporate defendant's alter ego," end quote.

2 When our clients and the class reps and class
3 members contact somebody for service, they do not look up
4 Larsen-Readfield in the phone book.

5 THE COURT: Yeah, but an individual human
6 consumer's misunderstanding of the elaborate corporate
7 culture is not the standard by which we decide alter ego at
8 all, otherwise there would be no parent subsidiaries. I
9 mean, the defendant's briefs are full of cases affirming the
10 validity and the non-pierceability of really similar
11 structures where you have a, you know, parent corporation --
12 I'm not quite sure I understand what they do, but a whole
13 bunch of subsidiary corporations, and courts have held all
14 over the place that simply because the average citizen
15 doesn't get that corporate structure doesn't pierce the
16 veil. Right?

17 MR. GUDMUNDSON: There was nobody else to sue
18 here. I can tell you that very plainly. Our clients, these
19 class reps and class members, all these thousands of people
20 who are complaining, didn't know anybody else that they
21 dealt with.

22 When you take your money to the -- and this is an
23 actual example. It's a real corny example, but I use it a
24 lot in these types of situations, and it happened to me. I
25 took my shirt to the dry cleaner. When I went to pick it

1 up, it wasn't there. And I said, well, I need the shirt or
2 I need something here. And they handed me a business card
3 of the company they gave it to to clean and said you need to
4 call them. And I said no, I gave my money to you and you
5 agreed to clean it and you need to get my shirt back, and
6 they did, but the point is -- it's a corny one, but I think
7 it's sort of easily understood.

8 THE COURT: But that easily understood to me in
9 the dry cleaner example doesn't necessarily -- is not
10 coextensive with the analysis the court's going to do about
11 alter ego. I mean, it's a nice, folksy image, and I totally
12 get it. In fact, that's why you have so many frustrated
13 alleged consumers here. But that doesn't necessarily mean
14 that you are going to prevail on your jurisdictional
15 argument or prevail on the intervenors' argument or prevail
16 on the arbitrability argument, right?

17 MR. GUDMUNDSON: Well, I think that all --

18 THE COURT: I mean, it's not just consumer
19 confusion. That's one small factor. There's a lot of other
20 things.

21 MR. GUDMUNDSON: Oh, certainly. Certainly. And
22 that will all be briefed. I mean, that is in the process of
23 being briefed right now. I am merely trying to frame the
24 issues such that it is not whether this company is real or
25 not, but all of the other things that Ms. Regan talked

1 about, all the other inquiries into how they do business and
2 all the other things. It's not merely, Is this real. And
3 so when I hear my words quoted back to me to say that the
4 only inquiry here is whether these are actually registered
5 corporations like CenturyLink, Inc., in the State of
6 Minnesota, you can look up on the secretary of state's
7 website, it is, but there is more to it and a lot of it has
8 to do with things that we are seeking that we've already
9 discussed.

10 THE COURT: Let me ask you one more question about
11 the organizational charts. How does the organizational
12 chart of the subsidiaries that presumably doesn't have a big
13 line at the top that says CenturyLink, Inc., how does that
14 help you?

15 MR. GUDMUNDSON: Well, I think that it shows a
16 number of key employees who overlap or has the potential to.

17 THE COURT: But you are asking for that
18 information separately, right? You are asking for that
19 information in -- I apologize; I had these so tidily
20 organized when I came out here -- No. 6, whether each
21 operating company's officers or management serves on the
22 board or management of any other affiliates.

23 MR. GUDMUNDSON: Well, it's similar, but not quite
24 the same.

25 THE COURT: Okay.

1 MR. GUDMUNDSON: Seeing how they lay out -- first
2 of all, these things are kept just like in a file at every
3 corporate company, so I don't understand how they are
4 burdensome. But how they lay out in relation to each other
5 and, you know, if -- if CenturyTel of Larsen-Readfield is a
6 one-page organizational chart with three people on it,
7 that's going to tell us something. If the Qwest Corporation
8 is different, that tells us something. If all of the people
9 in the -- if the same sales director works for all five,
10 that tells us something.

11 The other request seeks something similar, but it
12 doesn't give us that sense of where things are laid out and
13 how -- how it's structured, whether for the purpose of
14 taking depositions and who these people report to, where
15 things might be aligned, where information might be, what
16 they're responsible for, what departments they have. Does
17 Larsen-Readfield even have a sales department or a billing
18 department? It sort of goes to more of that, whereas the
19 latter it's just more of the whether they have similar
20 officers and directors, which is another piercing the
21 corporate veil element.

22 THE COURT: Okay. Thank you.

23 MR. GUDMUNDSON: Thank you, Your Honor.

24 THE COURT: Okay. I'm going to probably,
25 ill-advisedly, rule from the bench, but I'm going to follow

1 it up with an order.

2 I may, as I get part way through, decide there's a
3 couple things I need to think about, in which case I won't
4 issue rulings on those particular questions.

5 I am not going to order the disclosure of the
6 O'Melveny & Myers report, any part of the report or any of
7 the documents that were provided, the perhaps 9.7 million
8 documents that were provided to the auditors. I think it is
9 covered by privilege. I think it is classic *Upjohn*. I also
10 think it is radically disproportionate to the needs of the
11 case at this stage. I think that it would be like getting,
12 you know, some enormous set of findings in hopes that there
13 is some discussion that could be helpful to the plaintiffs,
14 which is definitely not the standard we're dealing with; but
15 even if that were the standard we were dealing with, we
16 would have huge issues of privilege.

17 I find that the case law does not support a
18 finding that a one-page, high-level press release
19 constitutes a waiver of privilege in a case like this. And
20 I'm not even going to delve into the work product doctrine
21 issues because I think it is unnecessary. That document and
22 that request is denied, and the motion to compel with
23 respect to that is denied.

24 The same thing applies to the documents related to
25 the attorney generals' investigations for reasons set forth

1 in the briefing and for similar reasons. The simple fact
2 that these were provided to investigators investigating
3 similar billing problems doesn't mean that they're relevant
4 or proportional or reasonable to the issues that are
5 currently pending with respect to the three motions. So
6 those are both denied in toto.

7 I am going to order the disclosure of -- let me
8 think of how to organize this. I am mindful of Mr. McNab's
9 admonition that I should not just view what's being asked
10 for, but what's already been given, and that informs my
11 thinking here, but doesn't obviate the need of the
12 defendants to provide some of this information.

13 At this point I am not going to grant the motion
14 to compel as to the objected portion of No. 1, Request No.
15 1, requiring disclosure of all of the office locations,
16 telephone numbers, the identity of the entity that owns or
17 leases each office location, the identity of any other
18 subsidiary that uses the office location and the photos of
19 the office location and signage. At this point, given what
20 I think is a reasonable showing of how enormous that request
21 could be, that is -- I am going to use the term
22 disproportionate, although I know we are arguably not in
23 proportionate land, but I have been so well trained, it is
24 disproportionate to the questions before the court.

25 I am not suggesting that more narrowly-tailored

1 questions related to whether CenturyLink, Inc., leases
2 property to any of its subsidiaries are off limits. And if
3 there is a more narrowly-tailored way to get at that
4 information, I am not prejudging that dispute. Whether that
5 comes up as a question in the deposition or an
6 interrogatory, that seems more relevant, although I am not
7 ruling against you for a motion that hasn't yet been pled,
8 but as this is articulated it is too broad and
9 disproportionate.

10 With respect to No. 6, I am going to grant the
11 motion to compel. I am paraphrasing here, and I apologize,
12 but it is asking for whether any of each operating company's
13 officers or management serves on the boards or management of
14 any other affiliates. I find that that is precisely
15 tailored to the sort of questions that Judge Davis is going
16 to have to answer. I don't find that it is unduly
17 burdensome, and it should be disclosed.

18 With respect to the business cards of employees --
19 I am going to look at this exact request. Give me just a
20 moment. I am going to grant the motion to compel with
21 respect to Request No. 4. I am not going to grant the
22 motion to compel with respect to Request No. 5.

23 The discreet list for each subsidiary's
24 top-ranking officers, top-ranking marketing employee,
25 top-ranking billing employee, top-ranking sales employee,

1 top-ranking installation or service employee and top-ranking
2 customer service employee is narrowly tailored and directly
3 related to the issues that are going to be decided by Judge
4 Davis. And, frankly, given that careful itemization of
5 whose cards are necessary, I don't think it's going to
6 impose a significant burden. That adds up to less than a
7 dozen, but I don't understand and am not finding relevance
8 of the business cards of everyone that's filing any papers
9 or might file papers in the future. So I am granting as to
10 4; I am denying as to 5.

11 As to No. 10, I am going to grant organizational
12 charts to the extent they are in the possession of the
13 subsidiaries. I am not requiring the subsidiaries to
14 generate organizational charts that don't exist, but if they
15 do exist, then they have to be disclosed for the time period
16 in question. If there are showings about that time period
17 being unduly burdensome, I know that we didn't get to this
18 part of the conversation, I encourage meeting and
19 conferring. The simple fact that those allegations haven't
20 been addressed yet doesn't mean they are not appropriate for
21 discussion, but it does seem like the relevant time period
22 is narrowly tailored in some ways. So I am going to assume
23 you can work that out.

24 I am denying the request as to No. 14, 26, 27 and
25 29, which are the intellectual property questions. It is a

1 blunt instrument indeed to delve into who owns, controls,
2 licenses, possesses, how, what IP covers, the intellectual
3 property at issue here, when what you are trying to
4 establish is that everyone is sharing the same logo and
5 trademark and holding themselves out in the same way, which
6 I think is going to be amply established in other ways and
7 has been virtually conceded. So 14, 26, 27 and 29 are --
8 the motion to compel as to those is denied.

9 Mr. Gudmundson or Ms. Regan, have I missed any
10 items in dispute? Hang on one second.

11 Oh, judgments. Thank you. Let me pull that up.

12 Can someone remind me which number that
13 judgments --

14 MS. REGAN: No. 30, Your Honor.

15 MR. McNAB: No. 30, Your Honor.

16 THE COURT: Can everyone simultaneously and in
17 unison remind me?

18 Okay. I am also going to deny this request as
19 disproportionate to the needs of the case. I do think that
20 this is something that, like, could be explored somewhat in
21 another format, but part of the reason I have hesitation
22 about this is that the simple fact that there is an order or
23 a judgment that names CenturyLink, Inc., doesn't mean that
24 there's been a meaningful finding as to their involvement in
25 the case and it could be a -- not a central issue that was

1 explored at all. And so barring any showing that these are
2 really relevant to some sort of finding of indemnification
3 or vicarious liability, this will be denied at this point.

4 With that correction, am I missing any, Ms. Regan?

5 MS. REGAN: No, Your Honor. I think that's it.

6 THE COURT: Okay. Am I missing any from the
7 perspective of the defendants?

8 MR. McNAB: I don't believe so, Your Honor. Thank
9 you.

10 THE COURT: Okay. Let's talk for a minute about
11 moving forward.

12 I am trying to help administer Judge Davis' line.
13 It's a little unusual, because usually when I decide
14 discovery disputes I am also the person who has set the
15 schedule, who has had the conversations with the parties
16 about what discovery will or won't be allowed, often who has
17 decided a stay motion and the effect that that has on
18 discovery. Here, that's not true, but I think I have a very
19 good sense. In fact, I know that I have a good sense of
20 what his expectations were. And so I am trying to both use
21 my own judgment and give voice to the line that he is trying
22 to draw. He wants there to be discovery on these issues.
23 He does not want them to be decided with the plaintiffs'
24 hands completely tied in their ability to try to defend
25 these three motions. At the same time he doesn't want the

1 discovery on these important issues to become the Trojan
2 Horse for class-wide discovery that is otherwise not
3 permitted. That understanding that I have, and each of you
4 can be modestly disgruntled with it, if you'd like, is going
5 to inform additional disputes that come up.

6 I hear you predicting that I am going to spend my
7 summer sorting through these things with you, and I really
8 hope that that's not true, not because I have anything I
9 would rather do, actually I do, and not because it's not my
10 job, but because I expect you all to try to administer this
11 line to the best of your ability and to really limit coming
12 to the court for things that are truly on the wrong side of
13 that line.

14 I hope this conversation today has kind of
15 foreshadowed that I am going to probably move, more or less,
16 down the middle. Everybody is going to be somewhat unhappy.

17 I think today you guys might be a little more
18 unhappy.

19 But, nonetheless, I think I have made very clear
20 that I don't believe that simply the landscape that the
21 defendants are trying to establish of what they believe the
22 ultimate merits will be, that isn't what's going to
23 determine the jurisdictional discovery, the intervenor
24 discovery. We need -- we need you to have an opportunity to
25 prove your case. But at the same time we've already had

1 51,000 pages disclosed, although this does make me wonder
2 whether each tab counts as a page. Okay.

3 MR. McNAB: No, Your Honor.

4 THE COURT: Because this is a lot of tabs and this
5 is just one little packet.

6 So I want it to, as much as possible, be a spirit
7 of cooperation. I know this is sort of no-holds-barred
8 litigation, and I totally get that these three motions are
9 kind of the life of the case. So I am not making light of
10 the seriousness of these issues to the parties, but I do
11 want to encourage you where possible to try to draw these
12 lines on your own.

13 One last thing is that Mr. Gudmundson was really
14 candid about a few places where you didn't attempt to meet
15 and confer. You didn't attempt to narrow down the
16 9.7 million documents because it was a flat yes or a flat
17 no. In the O'Melveny documents that makes sense; it was a
18 flat yes or a flat no. But in other respects I expect you
19 to try to narrow, where possible, before you bring those
20 disputes to me. Don't just kind of leave it at the highest
21 level, get my guidance and try to narrow. Do your best to
22 try to narrow. We are on a really tight time frame.

23 I am also going to suggest that to the extent you
24 would like me to be able to give swift guidance, I can't
25 read another 120 pages. I have more cases than you all can

1 count. We're enormously busy. I want to give this a great
2 deal of attention, but I need some circumspection in terms
3 of how much information you provide about each one of these
4 disputes moving forward.

5 To that end, I think informal discovery disputes
6 would be great. I have heard the speech now. I understand
7 the backdrop. I understand how important this is to you
8 all. I understand how convinced you are you are going to
9 win on the merits of the jurisdictional claim, and I
10 understand how convinced you are that you are not. So let's
11 move forward, assuming that I have got and internalized all
12 of those things, and let me try to help you with discovery
13 disputes informally wherever possible, because it can be a
14 lot faster. It can also be less expensive, but I don't know
15 that that's a huge concern right now.

16 MR. GUDMUNDSON: Your Honor, may I address that?

17 THE COURT: Please.

18 MR. GUDMUNDSON: I would like to address that
19 because I think it's a really important point. And we asked
20 for informal briefing.

21 THE COURT: I know you did.

22 MR. GUDMUNDSON: We also filed one brief and got
23 21,000 pages in return.

24 THE COURT: I know you did.

25 MR. GUDMUNDSON: So I'm not certain that, you

1 know, our efforts are effective in getting the briefing down
2 and getting the issues narrowed for Your Honor's swift
3 presentation. I am used to a much more streamlined process
4 in this district --

5 THE COURT: Okay.

6 MR. GUDMUNDSON: -- whereupon we would call Your
7 Honor and you would tell us how you want to hear it. If you
8 want to hear five minutes of argument followed by two-,
9 three-page letter briefs, that would be fine by us, but I
10 think that the parties could do well to get some guidance
11 from Your Honor as to how you prefer to have that done.

12 Thank you, Your Honor.

13 THE COURT: Yeah. Okay. I appreciate that.

14 I really prefer to use my informal approach, and
15 I'd prefer to have letters from the parties. And you can
16 save a lot of the stock law, right, because assume that I
17 know it. Give me the cases that really matter. Point me to
18 the stuff that's right on point. I don't need the binders
19 and the tabs. I need the attachment of what is essential.
20 A document request? Attach it. That's great. But I
21 generally don't need enormous numbers of affidavits and
22 things like that.

23 I am not, though, scolding the defendants for
24 wanting to bring this through the formal process. You all
25 haven't -- well, you have met me, but you all haven't

1 litigated in front of me in this case. We haven't talked
2 together about what the heck I think Judge Davis meant and
3 about what's gone before in this MDL, but I do think he's
4 made really clear that you all are going to bring your
5 discovery disputes over the course of the summer to me, and
6 I would really love to try to get that on a more efficient
7 track.

8 I can impose page limits. I think that probably
9 makes sense. I think a 10-page letter is generally enough,
10 but I also recognize there might be times where it's not and
11 I am open to hearing that as well. But what I don't need to
12 be is just buried in words, because more words isn't
13 necessarily going to mean a ruling in your favor.

14 Does that give enough guidance?

15 MR. GUDMUNDSON: Yes, Your Honor. Thank you very
16 much.

17 THE COURT: Okay. How about you guys? Do you
18 have any questions?

19 MR. LOBEL: May I be heard for a moment, Your
20 Honor?

21 THE COURT: Yes, of course, sir.

22 MR. LOBEL: Your Honor, thank you for that
23 guidance, and we will be absolutely mindful of your
24 requests, and we will work in the most professional and
25 cooperative way that we absolutely can. We understand we

1 need to do that.

2 That said, I would like the court to understand
3 what we have in front of us, because it's massive at this
4 point. And I just want the court to understand we have got,
5 for an expedited discovery process that's limited on three
6 motions that needs to be completed in the next six weeks, we
7 have got 23 deposition topics, 430 intervenor document
8 requests that have now been narrowed by Your Honor today, 61
9 requests to CenturyLink, Inc., five deposition subpoenas to
10 deponents, a 30(b)(6) deposition. All -- it doesn't sound
11 like expedited discovery, and it's going to require a lot of
12 cooperation between the parties to get it to a reasonable
13 position where we can physically get this done. So I just
14 wanted the court to understand that because I fear that we
15 will have to come back to you and seek limits on this,
16 because there's only so much time and ability to do that
17 kind of work. Many of these requests -- by the way, you are
18 talking about ten different companies all over the country.
19 We have got people working around the clock to try to pull
20 this information. We have started making productions. It
21 is a massive undertaking and I --

22 THE COURT: How come your subsidiaries don't each
23 have separate counsel?

24 MR. LOBEL: Separate counsel generally or in this
25 matter?

1 THE COURT: In this matter.

2 MR. LOBEL: Well, Your Honor --

3 THE COURT: I mean, I guess that's a hard question
4 to ask, but --

5 MR. McNAB: I don't think you should answer that.
6 I think that might be privileged.

7 THE COURT: Yeah, I bet it is privileged,
8 actually. Thank you.

9 But I do note that you do have a ton of work on
10 your plate, and I am really mindful of that, and I am not
11 looking to make that more, nor am I looking to make that
12 excessive, but at the same time your point is that these are
13 independent subsidiaries that each have independent
14 relationships and independent decision-making and yet you
15 all are choosing, understandably perhaps, to consolidate
16 their representation, but that's a choice you have made.

17 MR. LOBEL: Well, Your Honor, let's talk corporate
18 law for a moment. They are owned by the parent. That's
19 what -- you asked earlier, What does the parent do. The
20 parent owns companies and issues stock to the public.
21 That's basically the role of the parent. These are, these
22 are entities that are owned by the parent, and the parent
23 has a legal department, and the legal department provides
24 services, and there is financial transactions that are
25 incurred. So it's not that we don't have enough resources.

1 I mean, we can bring in more people and we will bring in
2 more people to reach the -- to comply, but it's enormously
3 expensive, massively complicated to do this.

4 And I guess the point I am making is the initial
5 salvo by the plaintiffs was not reasonable, not targeted,
6 not limited to this limited process that we're undergoing.
7 Now, hopefully, with the court's guidance today, both
8 parties will try to be more appreciative of what's needed to
9 be done. I have to say I'm concerned because of what we
10 have got in front of us, but these numbers are not a
11 streamlined process that I think the court envisioned. And
12 I do think the Trojan Horse concept is very applicable here.
13 I think that's what's happening. So hopefully with the
14 guidance the court has given today we will find some peace
15 with this, but I am concerned.

16 THE COURT: I share your concern. I am not sure
17 what to do with our collective concerns.

18 MR. LOBEL: I am not sure either, Your Honor.

19 THE COURT: I share your concern. You know, the
20 burden is going to be on the plaintiffs to rule against
21 themselves, right, like --

22 You said you didn't want to do it, and I get that.
23 You don't want to foreclose yourself from asking for
24 anything that you would like to have, but, like, you can't
25 come to me for every ruling against yourselves. You have to

1 now take the guidance Judge Davis gave, the guidance I gave,
2 the scope of the motions and rule against yourselves.

3 But you guys do too. Just because you don't want
4 to give something up -- and I am not suggesting this has
5 been the test, but just because you think we've provided all
6 these things that support our position, we shouldn't also
7 have to provide these other things, you have to rule against
8 yourselves too.

9 But I know that cliché. I sound like a Hallmark
10 card of discovery, like we are still going to have to slug
11 through the hard work, and I get that. And there might be
12 times that the informal approach doesn't work; there might
13 be times it works perfectly, but you need more than ten
14 pages. We might be talking every week, but about discreet
15 issues. I'd rather sort of front-load this, if possible,
16 but that might not be possible.

17 What is our deadline? When do you have to get
18 this done?

19 MR. LOBEL: Their brief is due July 26th.

20 THE COURT: Holy smokes.

21 MR. LOBEL: Yes.

22 THE COURT: Okay. So I have a feeling we will be
23 talking again soon. I'll tell my assistant to get you on
24 the calendar as quickly as possible, with the understanding
25 that you will have to write something. If sometimes we're

1 going to write less and talk more, that's fine. We can also
2 do these telephonically. That works really well. When I'm
3 not sitting up here, I can work the phone, and that might be
4 a good way to go as well. So I want to try to do what I can
5 to help you get this done.

6 MR. LOBEL: And, Your Honor, with now that we have
7 laid the foundation and we have been able to brief these
8 issues to you, we are completely open to doing this
9 expeditiously, telephonically, whatever informal way under
10 the right circumstances. There may be other times we need
11 to come in and see you, like we did today.

12 THE COURT: Okay. I appreciate that.

13 MR. LOBEL: But we appreciate it. Thank you.

14 THE COURT: Anything else you guys need to share?

15 MR. GUDMUNDSON: No, Your Honor.

16 MS. REGAN: No, Your Honor.

17 THE COURT: Oh, it's come to with the other side
18 having the last word. I was always terrible at that, so --
19 okay.

20 Sir, are you still on the phone?

21 MR. BLATCHLEY: I am, Your Honor.

22 THE COURT: Are you doing something really fun
23 while you listen to us, like catching up on your emails?

24 MR. BLATCHLEY: No. Thank you.

25 THE COURT: All right. Well, I'm going to hang up

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on you now. Thank you for participating, and we are going off the record.

(Court adjourned at 5:53 p.m., 06-04-2018.)

* * *

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

Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR