UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

IN RE: CENTURYLINK SALES PRACTICES AND SECURITIES LITIGATION This Document Relates to: 17-2832, 17-4613, 17-4614, 17-4615, 17-4616, 17-4617, 17-4618, 17-4619, 17-4622, 17-4943, 17-4944, 17-4945, 17-4947, 17-5001, 17-5046, 18-1573, 18-1572, 18-1565, 18-1562	**MDL No. 17-2795 (MJD/KMM)** **PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT AND PROVISIONAL CLASS CERTIFICATION**

INTRODUCTION

Plaintiffs move for preliminary approval of a class action settlement and provisional class certification after reaching an agreement with CenturyLink, Inc. and the Operating Companies[1] (collectively, "CenturyLink" or "Defendant"). Plaintiffs initially brought claims against CenturyLink in June and July of 2017, resulting in the formation of an MDL before this Court on October 10, 2017. Plaintiffs, in their Consolidated Class Action Complaint ("CCAC"), contended that CenturyLink utilized centralized sales and billing policies, procedures, and systems that led it to knowingly overbill customers for its services. Among other things, Plaintiffs alleged CenturyLink: (1) promised a discount or promotion that was never applied, (2) charged more for services than it advertised or otherwise promised, (3) charged for services it did not provide, (4) charged for services customers did not request, (5) charged undisclosed or higher-than-agreed upon fees, (6)

[1] All defined terms shall have the meaning ascribed to them in the Settlement Agreement and Release ("SAR") (attached as Ex. A to the Declaration of Brian C. Gudmundson in Supp. of Mot. for Prelim. Approval of Class Action Settlement ("Gudmundson Decl.")).

charged improper termination fees, and (7) put customers into collections as a result of unpaid overcharges.

Litigation of the case has proven to be complex. Pending before the Court are CenturyLink's motion to compel arbitration and enforce class-action waivers and its motion to dismiss. Additionally, CenturyLink's Operating Companies, the companies CenturyLink asserts contracted with and provided services to customers, also moved to intervene for the purpose of staying discovery and enforcing purported arbitration and class action waiver provisions. Plaintiffs pursued significant discovery concerning the validity of the arbitration and class action waiver clauses, the identity of the appropriate defendants, and the centralization of CenturyLink's billing practices, including its relationship with and control over the Operating Companies and certain service companies that manage companywide sales, billing, and customer disputes. Defendant also propounded significant discovery on the Named Plaintiffs. All motions have been fully briefed, including supplemental briefing, and are pending before the Court.

While those motions were pending, the Parties entered into mediation overseen by the Hon. Layn R. Phillips (Ret.), former Judge on the United States District Court for the Western District of Oklahoma and the mediator of numerous high-profile settlements, including the Wells Fargo deceptive billing litigation. After several days of extensive negotiations, the Parties entered into a term sheet outlining the fundamental terms that gave way to the ultimate Settlement Agreement.

To verify the scope of potential Class-wide damages, Plaintiffs pursued months of confirmatory discovery, including serving interrogatories and requests for admission,

conducting a Fed. R. Civ. P. 30(b)(6) deposition, and observing the deposition of CenturyLink's expert, David Hall, which was conducted by the Office of the Minnesota Attorney General. The confirmatory discovery supports the fairness of the Settlement and Plaintiffs now move for its preliminary approval.

The Settlement is a substantial benefit to Plaintiffs and the proposed Settlement Class. The Settlement is designed to provide monetary and non-monetary relief to current and former CenturyLink customers who, from January 1, 2014 to the date of preliminary approval ("Class Period"), overpaid CenturyLink in a variety of ways. To that end, the Settlement provides $18.5 million in Settlement funds, $15.5 million of which will, in part, be used to pay Settlement Class Members who submit either: (1) a Flat Payment Claim that provides a set payment starting at $30 and adjusted by a Pro Rata Multiplier and requires no separate supporting documentation beyond completing the sworn Claim Form; and (2) a Supported Document Claim, which allows Claimants to pursue the full amount of their overpayment multiplied by both a Litigation Risk Factor of 40% (i.e., 40% of damages are recoverable) and the Pro Rata Multiplier by describing and demonstrating their overpayment through supporting evidence. The Settlement Agreement provides that CenturyLink will pay up to an additional $3 million for notice and claims administration plus one half of any administration costs up to the next $1 million.

In addition, CenturyLink will implement changes to its business practices in all states where it does business to address the core allegations in Plaintiffs' CCAC. These business practice requirements are designed to prevent instances of future systematic

overbilling and misleading sales practices and include prohibitions on false statements and omissions during sales.

The proposed Settlement satisfies and exceeds the preliminary approval criteria that a settlement be "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). As such, Plaintiffs now move the Court to take the initial steps in the settlement approval process by: (1) granting preliminary approval of the proposed Settlement; (2) provisionally certifying the proposed Settlement Class; (3) appointing the Settlement Class Representatives and the undersigned attorneys as Settlement Class Counsel; (4) approving the proposed Class notification procedures and forms of notice; and (5) scheduling the final Fairness Hearing and related deadlines.

BACKGROUND

I. Plaintiffs' Allegations

Plaintiffs are thirty-three (33) current or former CenturyLink customers who brought claims against CenturyLink alleging systematic sales and billing practices that resulted in customers being charged amounts higher than promised during the sales process and imposing a variety of improper charges and fees. ¶ 5.[2]

In the CCAC, Plaintiffs alleged that CenturyLink purposefully created a sales system designed to quote prices it would not honor. ¶¶ 71-72, 74, 77. According to the CCAC, CenturyLink relied on a labyrinth of customer databases that lacked sufficient capacity to track quoted prices, a sales methodology designed to encourage hyper-aggressive sales tactics, including promising undeliverable prices in order to secure

[2] Use of "¶" refers to the CCAC, Feb. 15, 2018 (ECF No. 38).

customers, and a myriad of exceptions, conditions, exclusions, and hidden fees undisclosed to customers. ¶¶ 68, 70, 81-84, 87, 92-95, 99-100, 108. Those tactics led to meaningless quoted costs of services and customers being billed for services at a higher rate than what CenturyLink had quoted. ¶¶ 80, 83, 88, 100. As a result, Plaintiffs' asserted CenturyLink increased its customer base but many of its customers were charged and paid more than the amount they were promised. ¶¶ 80, 83. When customers called to validly cancel their services due to their overpayments, CenturyLink often charged them early termination fees. ¶¶ 84, 102, 116.

II. Procedural Posture and Discovery

In July 2017, CenturyLink moved to create a multidistrict litigation ("MDL") pursuant to 28 U.S.C. § 1407 to consolidate numerous actions filed against it concerning its billing practices. On October 10, 2017, the Judicial Panel on Multidistrict Litigation created an MDL and consolidated all pending and future actions in this Court. Transfer Order, Oct. 10, 2017 (ECF No. 1).

On February 15, 2018, thirty-eight Plaintiffs (five of whom were later voluntarily dismissed without prejudice) filed the CCAC, bringing eight claims against CenturyLink for: (1) violating 47 U.S.C. §§ 201, *et seq.* and 47 C.F.R. § 64.2401, the Truth in Billing requirements, (2) Breach of Contract, (3) Breach of Duty of Good Faith and Fair Dealing, (4) Violation of State Consumer Protection Statutes in Colorado, Minnesota, Florida, Washington, Oregon, Missouri, New Mexico, Iowa, Nevada and Idaho, (5) Violations of the Louisiana Unfair Trade Practices and Consumer Protection Law, (6) Negligent Misrepresentation, (7) Fraudulent Inducement, and (8) Unjust Enrichment. ¶¶ 422-544.

The claims were asserted on behalf of a nationwide class of CenturyLink customers, and several sub-classes comprised of CenturyLink customers in certain states. ¶ 416.

On April 2, 2018, ten entities, which CenturyLink termed the "Operating Companies,"[3] filed a Motion to Intervene for the Limited Purpose of Moving to Compel Arbitration and Enforce Class-Action Waivers and to Join in Defendant CenturyLink Inc.'s Motion for Temporary Stay of Discovery ("Motion to Intervene"). Mot. to Intervene, Apr. 2, 2018 (ECF No. 80). CenturyLink, Inc. and the Operating Companies asserted CenturyLink, Inc. was not the proper defendant in this action and that the Operating Companies, who supposedly contracted with the Plaintiffs and provided their services, were the proper defendants. *See* Mem. In Supp. of Mot. to Intervene, Apr. 2, 2018 (ECF No. 82). The Operating Companies sought to intervene to enforce certain arbitration and class-action waiver provisions that CenturyLink argued governed Plaintiffs' service agreements. *Id.*

On April 28, 2018, CenturyLink moved to Compel Arbitration and Enforce Class-Action Waivers ("Mot. to Compel Arb."). (ECF No. 122). CenturyLink asserted that all Named Plaintiffs agreed to arbitrate claims against CenturyLink and the Operating Companies and waived their rights to bring a class action. Mem. in Supp. of Mot. to Compel Arb. 7-8 (ECF No. 124). CenturyLink claimed that 37 of the 38 Named Plaintiffs assented to the arbitration and class action waiver provisions multiple times,

[3] These Operating Companies were: Qwest Corporation; Embarq Florida, Inc.; Embarq Missouri, Inc.; Carolina Telephone and Telegraph Company LLC; Central Telephone Company; CenturyTel of Idaho, Inc.; CenturyTel of Larsen-Readfield, LLC; CenturyTel of Washington, Inc.; CenturyTel Broadband Services, LLC; and Qwest Broadband Services, Inc.

including by: (1) "clicking" to accept contract terms when installing internet services; (2) "clicking" to accept contract terms in order to use online payment features; (3) receiving mail and email confirmation of the terms; (4) "clicking" to accept contract terms prior to activating television services; (5) "clicking" to accept contract terms prior to completing an online purchase; and, (6) continuing services after a 2017 contract amendment. *Id.* at 2-3, 7-8.

On April 28, 2018, CenturyLink also filed an Alternative Motion to Dismiss under Rules 12(b)(2) and 12(b)(6) ("Mot. to Dismiss"). (ECF No. 132). CenturyLink asserted because CenturyLink, Inc. was merely a holding company that had no interaction with the Plaintiffs, the Court had no personal jurisdiction over it. Mem in Supp. of Mot. to Dismiss 10-22 (ECF No. 134). CenturyLink also argued Plaintiffs' federal Truth in Billing claim should be dismissed because the harms supposedly did not fall within the proscriptions of the law. *Id.* at 23-24.

On May 8, 2018, the Court permitted Plaintiffs to conduct reasonable discovery related to CenturyLink's Motion to Compel Arbitration and Motion to Dismiss as to CenturyLink's assertion that it was not the proper defendant. (ECF No. 145). The Court stayed all other discovery. *Id.*

The Parties proceeded through extensive discovery on these issues. Plaintiffs responded to 730 written discovery requests and CenturyLink deposed 25 Plaintiffs. Plaintiffs served CenturyLink with requests for production of documents and interrogatories and reviewed tens of thousands of pages of documents. Plaintiffs took

seven depositions of CenturyLink, including both Rule 30(b)(1) and 30(b)(6) depositions. The Parties also briefed and argued several discovery disputes.

On August 23, 2018, after completing discovery related to CenturyLink's motions, Plaintiffs filed their memoranda in oppositions to the Motion to Intervene (ECF No. 216), Motion to Compel Arbitration (ECF No. 253), and Motion to Dismiss (ECF No. 229).

In their oppositions to the Motion to Intervene and the Motion to Dismiss, Plaintiffs contended that CenturyLink, Inc. was the appropriate Defendant because it controlled and centralized the billing practices, policies, and systems for all of the Operating Companies through the use of Affiliated Interests Services Agreements ("AISAs"). *See* Opp. to Mot. to Intervene 8-9 (ECF No. 216). Plaintiffs asserted CenturyLink used a three-tiered system where: (1) CenturyLink, Inc.'s directors and officers oversaw the Service Companies, (2) the Service Companies fulfilled all functions related to management, sales, billing, customer service, and collections on behalf of the Operating Companies, and (3) the Operating Companies contracted with and provided customers with access to CenturyLink's networks. Opp. to Mot. to Dismiss 6-11 (ECF No. 229). CenturyLink, Inc. owned 100% of the Operating Companies and was the sole member of each of the Service Companies. *Id.* at 12. Plaintiffs asserted this system enabled CenturyLink to retain control over all aspects of the CenturyLink enterprise while attempting to insulate itself from liability. *Id.* at 6. Therefore, Plaintiffs asserted, CenturyLink, Inc. was the proper defendant.

Plaintiffs also opposed CenturyLink's Motion to Compel Arbitration. *See* Mem. In Opp. to Mot. to Compel Arb. (ECF No. 253). Among other things, Plaintiffs argued

the discovery showed CenturyLink's asserted arbitration provisions were invalid for a number of reasons, including but not limited to: (1) they were never presented to certain Plaintiffs at all; (2) they were presented after an agreement was reached, were hidden, or otherwise inconspicuous in violation of law; and (3) they contained conflicting directives, including requiring disputes be brought "in court" while simultaneously requiring arbitration. *Id.* at 11-14, 20-23, 46-48, 50-62. Plaintiffs asserted these infirmities undermined fundamentally all the arbitration provisions CenturyLink asserted applied to Plaintiffs.

On November 21, 2018, the Operating Companies filed a Reply to Plaintiffs' Opposition to their Motion to Intervene (ECF No. 296), and CenturyLink, Inc. filed Replies to Plaintiffs' Opposition to its Motions to Dismiss (ECF No. 305) and to Compel Arbitration (ECF No. 295). The Parties submitted additional briefing on the Motion to Intervene, with Plaintiffs filing a Sur-Reply on January 18, 2019 (ECF No. 360) and the Operating Companies filing a response on March 22, 2019 (ECF No. 396). All three motions are still pending before this Court.

III. Settlement Negotiations and Confirmatory Discovery

Following the extensive discovery and briefing on Defendant's initial motions, the Parties agreed to mediate. They met on May 20, 2019 before the Hon. Layn R. Phillips in New York City. Prior to mediation, the Parties drafted extensive mediation statements summarizing Plaintiffs' claims, CenturyLink's defenses, the procedural posture of the case, information about similar cases against CenturyLink, the Heiser Complaint, and certain analyses of CenturyLink's billing systems. Both Parties set forth proposed

settlement terms and described the scope of the damages. Additionally, the Parties provided all briefing on CenturyLink's pending motions. *See* Declaration of Layn R. Phillips ("Phillips Decl.") ¶ 6 (submitted contemporaneous).

Despite extensive, arms-length negotiations, the Parties did not come to an agreement during mediation but continued to negotiate in consultation with Hon. Phillips' office. *Id.* at 7. On May 24, 2019, the Parties agreed to the terms of a potential settlement and signed an initial term sheet. *Id.* Acceptance of the terms of the agreement was made contingent upon confirmatory discovery that would test CenturyLink's representations and warranties given during the mediation process and the signing of a final, master Settlement Agreement. *Id.* at 7-8.

Plaintiffs pursued extensive and iterative confirmatory discovery of CenturyLink, focused largely on the scope of class damages. Plaintiffs served a total of 39 interrogatories, eight requests for admission, and took CenturyLink's Rule 30(b)(6) deposition. CenturyLink responded to all requests. *See* Gudmundson Decl. ¶ 7. Additionally, on October 3, 2019, Plaintiffs' counsel observed the deposition of CenturyLink's expert, David Hall, which was conducted by the Office of the Minnesota Attorney General. *Id*.

IV. The Proposed Settlement Agreement

A. The Proposed Settlement Class

The Settlement seeks certification of the following Settlement Class, which covers a proposed Class Period of January 1, 2014 through the date of Preliminary Approval:

> All persons or entities in the United States who are identified by CenturyLink as a residential or small business customer and who, during the Class Period, had an account for local or long distance telephone, internet, or television services within one or more of the Operating Companies.

See SAR § 1.39. Excluded from the class are the Court, the officers and directors of CenturyLink, Inc. or any of the Operating Companies, and persons who timely and validly request exclusion from the Settlement Class. *Id.* According to data provided by CenturyLink, the Settlement Class will include approximately 17.2 million individuals, made up of 6.6 million current customers and 10.6 million former customers. Gudmundson Decl. ¶ 8(a)-(b).

B. The Settlement's Benefits

Under the Settlement, CenturyLink will pay $15.5 million to create a non-revisionary, capped Primary Fund, plus $3 million to pay for a Notice and Settlement Administration Fund; and, if those costs exceed $3 million, CenturyLink will pay half of any additional costs for the next million. SAR §§ 1.25, 1.30, 2.2.1. After deducting the costs of proposed Service Payments to Settlement Class Representatives[4] and the Fee, Cost, and Expense Award, the remaining Net Primary Fund will be distributed by an experienced Settlement Administrator, Rust Consulting Co., to Settlement Class Members making valid Claims pursuant to a Distribution Plan. *See id.* at § 3; *see also*

[4] The Settlement permits the Class Representatives to apply to the Court for an award of Service Payment not to exceed two thousand five hundred dollars ($2,500.00) per Class Representative. *Id.* at § 7.1. Such an award is eminently appropriate here, where the proposed Settlement Class Representatives undertook substantial effort to respond to discovery, provide personal documents, be deposed, and assist in the prosecution of the action.

Decl. of Tiffaney A. Janowicz in Supp. of Mot. for Prelim. Approval of Class Action Settlement ("Janowicz Decl.") ¶¶ 2-5 (submitted contemporaneously).

The Settlement provides compensation to Settlement Class Members who assert they paid CenturyLink for unauthorized, undisclosed, or otherwise improper charges, and who were not previously compensated for their overpayment, including for the following reasons: (1) promised one rate during the sales process but paid a higher rate; (2) paid for services or equipment not ordered; (3) paid for nonexistent or duplicate accounts; (4) paid for services ordered but never delivered or not delivered as promised; (5) paid for services that were previously and appropriately cancelled; (6) paid for equipment that was previously returned; (7) paid for an unwarranted early termination fee; (8) incurred costs resulting from an account being improperly sent to collections. SAR, at Ex. 7.

Settlement Class Members may seek a portion of the Net Settlement Fund by submitting either: (1) a Flat Payment Claim or (2) a Supported Document Claim. *Id.* at §§ 3.2.1, 3.2.2. Regardless of the type of Claim submitted, all Claimants must timely submit a Claim Form to the Settlement Administrator. *Id.* at §§ 1.6, 5.2, Ex. 7 (the Claim Form is attached as Ex. 7 to the Settlement). The Claim Form requires all Claimants to provide (a) their name and basic contact information, including current address, email, and phone number, (b) their Claimant Identification Number as indicated on the Claimant's notice, (c) their CenturyLink account number, (d) the types of services received from CenturyLink, (e) the state in which services were received, (f) the timeframe during which the Claimant received services, and (g) preferred manner of payment. *Id.* at Ex. 7.

For the Flat Payment Claim, the Claimant need not provide any documentation supporting the fact or amount of the overpayment beyond the information required in the Claim Form. *Id.* Instead, the Claimant must indicate on the Claim Form that they were injured by selecting the type of overcharge they assert, including whether they: (1) were promised one rate during the sales process but paid a higher rate; (2) paid for services or equipment not ordered; (3) paid for nonexistent or duplicate accounts; (4) paid for services ordered but never delivered or not delivered as promised; (5) paid for services that were previously and appropriately cancelled; (6) paid for equipment that was previously returned; (7) paid for an unwarranted early termination fee; (8) incurred costs resulting from an account being improperly sent to collections. *Id.* The Claimant must also confirm under penalty of perjury that the statements provided are truthful and that neither the Claimant, nor anyone on his or her behalf, previously accepted reimbursement or other compensation for the overcharges asserted. *Id.*

For a Supported Document Claim, the Claimant must submit a completed Claim Form and provide a narrative of their injury and documents evidencing the amount the Claimant overpaid to CenturyLink. *Id.* Accepted supporting documents include chat transcripts, correspondences, or other communications with CenturyLink, contemporaneous notes, and copies of billing statements or payment receipts. *Id.*

The Settlement Administrator will review all submitted Claims for completeness, validity, accuracy, and timeliness, and will implement reasonable measures designed to prevent fraudulent claims. *Id.* at § 5.1-5.4. Any Claim determined by the Settlement

Administrator to be timely and valid will receive a payment from the Net Settlement Fund. *Id.* at § 5.2, 3.2.1, 3.2.3.

A Flat Payment Claim will result in an award of $30 multiplied by the Pro Rata Multiplier,[5] which may increase or decrease the award. *Id.* at § 3.2.1, 3.3.2. A successful Supported Document Claim will permit the Claimant to receive the amount of his or her overpayment multiplied by a Litigation Risk Factor of 40% and by the Pro Rata Multiplier.[6] *Id.* at § 3.2.2, 3.3.3. In no case will a valid Supported Document Claim result in less than the amount awarded through a Flat Payment Claim. *Id.* at § 3.2.3.

In addition to monetary relief, the Settlement requires CenturyLink to certify its compliance for three years with several business practices in all states where it does business. *Id.* at § 2.1. These business practice requirements are designed to prevent instances of future systematic, intentional overbilling and misleading sales practices, and include prohibitions on false statements and omissions during sales. *Id.*

Finally, in consideration of the monetary and non-monetary relief, the Settlement Class requires a release of claims. *Id.* at § 2.3.

[5] The Settlement Administrator will calculate the Pro Rata Multiplier by dividing the Net Primary Fund by the total amount claimed – the sum of the all valid and timely Supported Document Claims multiplied by the Litigation Risk Factor and all Flat Payment Claims. *Id.* at § 3.3.1.

[6] Special, consequential, or lost profit damages may not be recovered via a Supported Document Claim, and recurring monthly overcharges may be claimed for up to six months of overpayments. *Id.*

C. Class Notification Procedures

The Settlement Agreement provides for direct and indirect notice to proposed Settlement Class Members. *Id.* at § 4; Decl. of Shannon R. Wheatman, Ph.D. on Adequacy of Notices and Proposed Notice Program ("Wheatman Decl.") ¶¶ 15-25 (submitted contemporaneously). The Settlement Agreement proposes two methods of notice for current CenturyLink customers: (1) Bill Notice and (2) CenturyLink's Website. SAR §§ 4.3.1., 4.3.2, 4.3.3. For Settlement Class Members who receive their billing statements from CenturyLink by U.S. Mail, CenturyLink will issue the Bill Notice in billing statements mailed to Settlement Class Members. *Id.* at § 4.3.1. For those who receive their billing statements electronically, CenturyLink will include a link to the Bill Notice in the email sent to Settlement Class Members that lets them know their billing statement is ready to be viewed. *Id.* at § 4.3.2. Additionally, CenturyLink's website will include a link to the Bill Notice. *Id.* at § 4.3.3.

For Settlement Class Members who are former CenturyLink customers, the Settlement Agreement requires either Email Notice or Postcard Notice. *Id.* at § 4.4. The Settlement Administrator will send an Email Notice to those for whom CenturyLink possesses an email address and to those for whom an email address was identified through the email appends process. *Id.* at §§ 4.4.1, 4.4.2. Former customer Settlement Class Members who do not receive an Email Notice or for whom the Settlement Administrator receives a notification that the Email Notice was undeliverable will receive a Postcard Notice sent to the U.S. postal address provided by CenturyLink, subject to any corrected addresses identified through the National Change of Address Database. *Id.* at §

4.4.3. In addition to direct notice, the Settlement Administrator will issue a Publication Notice, under which ads will appear for four weeks using the Google Display Network, which reaches millions of websites, news pages, blogs, and Google sites, and creating "keyword searches" that display ads when users search specific keywords in common search engines. Wheatman Decl. ¶ 20.

All of the notices will include information about the reason for the notice, the subject matter of the litigation, the criteria to be a Settlement Class Member, the relief provided by the Settlement, rights to object or opt out of the Settlement, and deadlines for all actions. SAR § 4.5; Wheatman Decl. ¶¶ 27-28. In addition, the Long-Form Notice, posted on the Settlement Website, will provide additional information on the legal rights and options available to the Settlement Class, including how to submit a claim, how to opt out, how to object, the date, location, and time of the Fairness Hearing, how to contact Settlement Class Counsel, and attorney's fees, costs, and expenses and Service Payments. SAR § 1.24, Ex. 2.

D. Attorneys' Fees, Costs, and Expenses

Settlement Class Counsel may make a reasonable request for fees up to 33 1/3 percent of the total value of the Settlement Funds plus reasonable costs and expenses to the Court and CenturyLink reserves the right to respond as it deems appropriate. *Id.* at §§ 1.15, 2.2.4. Any attorneys' fees, costs and expenses awarded by the Court shall be paid by the Settlement Administrator from the Primary Fund. *Id.* at § 2.2.4. The finality or effectiveness of the Settlement will not be dependent on the Court awarding Plaintiffs' Counsel any particular amount on their petition. *Id.*

ARGUMENT

I. The Court Should Preliminarily Approve the Settlement

Parties seeking to settle a class action must seek approval from the Court. Fed. R. Civ. P. 23(e). Rule 23(e) requires that the Court consider whether to preliminarily approve a settlement, whether the class should be certified for settlement purposes, and whether the proposed notice appropriately notifies class members. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1399 (D. Minn. 1993); *Sullivan v. DB Inv., Inc*., 667 F.3d 273, 296 (3d Cir. 2011) (*en banc*). After preliminary approval, the Court must decide whether to grant final approval after class members have had sufficient notice and opportunity to review the settlement. Fed. R. Civ. P. 23(e); *see also, e.g., Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975).

Courts attach "[a]n initial presumption of fairness . . . to a class settlement reached in arm's-length negotiations between experienced and capable counsel after meaningful discovery." *Grier v. Chase Manhattan Auto Fin. Co*., No. 99-CV-0180, 2000 WL 175126, at *5 (E.D. Pa. Feb. 16, 2000); *see also White*, 822 F. Supp. at 1416. Indeed, the law strongly favors resolving litigation through settlement, particularly in the class action context. *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1148 (8th Cir. 1999) (holding that "strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." (internal citations removed)); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716088, at *6 (D. Minn. Feb. 27, 2013) ("The policy in federal court favoring the voluntary resolution of litigation through settlement is particularly strong in the class action context." (citing

White, 822 F. Supp. at 1416)); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995) (citing cases).

In addition to the "initial presumption of fairness," courts also consider four factors in evaluating whether a proposed settlement is fair, reasonable, and adequate: (1) the merits of plaintiffs' case weighed against the settlement terms; (2) the defendant's financial condition; (3) the complexity and expense of further litigation; and (4) the amount of opposition to the settlement. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932-33 (8th Cir. 2005) (citing *Grunin*, 513 F.2d at 124); *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988); *Dryer v. Nat'l Football League*, No. 09-CV-2182 (PAM/AJB), 2013 WL 5888231, at *2 (D. Minn. 2013). At the preliminary approval stage, "the fair, reasonable and adequate standard is lowered, with emphasis only on whether the settlement is within the range of possible approval due to an absence of any glaring substantive or procedural deficiencies." *Martin v. Cargill, Inc.* 295 F.R.D. 380, 383 (D. Minn. 2013) (citation omitted).

The Court is afforded broad discretion in evaluating those factors because it is "exposed to the litigants, and their strategies, positions and proofs" and "is aware of the expense and possible legal bars to success." *Van Horn*, 840 F.2d at 606-607 (citing *Grunin*, 513 F.2d at 123). Additionally, the "Court is entitled to rely on the judgment of experienced counsel in its evaluation of the merits of a class action settlement." *In re Employee Benefit Plans Sec. Litig.*, No. 92-CV-0708, 1993 WL 330595, *5 (D. Minn. June 2, 1993); *see also Welsch v. Gardenbring*, 667 F. Supp. 1284, 1295 (D. Minn. 1987) (affording "great weight" to opinions of experienced counsel). Here, the Settlement is

presumed valid and the relevant factors weigh in favor of preliminary approval of the Settlement.

A. The Proposed Settlement Agreement is Presumptively Valid

The Settlement is afforded an initial presumption of fairness because the Parties, represented by experienced counsel, have engaged in extensive negotiations with an experienced mediator at an appropriate stage in the litigation where the Parties understand the strengths and weaknesses of the case. *See, e.g., In re Employee Benefit Plans*, 1993 WL 330595, at *5 (noting that "intensive and contentious negotiations likely result in meritorious settlements . . . ."); *Zurn Pex*, 2013 WL 716088, at *6 (observing that "[s]ettlement agreements are presumptively valid, particularly where a settlement has been negotiated at arm's length, discovery is sufficient, [and] the settlement proponents are experienced in similar matters . . . ." (internal citations omitted)).

Here, the Parties have had sufficient opportunity to test and refine their legal theories through investigation, research, discovery, and vigorous motion practice. Plaintiffs set forth above the extensive discovery and motion practice the Parties undertook with respect to CenturyLink's three initial motions, including two dispositive, fact-based motions. This discovery and these efforts, in conjunction with substantial confirmatory discovery, allowed Plaintiffs to glean important insight into the procedural and substantive merits of their claims and class allegations.

The means by which the Parties arrived at this Settlement is also reflective of the contested nature of the litigation and Plaintiffs' efforts to test Defendant's material representations. The Parties negotiated extensively in consultation with Hon. Layn R.

Philips, a deeply experienced judge and mediator, before entering into an agreement. *See* Phillips Decl. ¶¶ 1-5; *see also Khoday v. Symantec Corp.*, No. 11-CV-0180-JRT, 2016 WL 1637039, at *5 (D. Minn. Apr. 5, 2016) (noting a "settlement . . . is presumptively valid" when "supervised by an independent mediator . . . ."); *Zurn Pex*, 2013 WL 716088, at *6. Thereafter, the Parties engaged in months of confirmatory discovery to test and confirm the assumptions and representations that led to the Settlement. The rigorous negotiations, arm's length agreement, and extensive confirmatory discovery support the presumptive fairness of the Settlement.

B. The Settlement is Fair and Reasonable when Weighed Against the Strengths and Weaknesses of the Claims

The first and "most important factor in determining whether a settlement is fair, reasonable, and adequate is a balancing of the strength of the plaintiff's case against the terms of the settlement." *Van Horn*, 840 F.2d at 607; *see also Dryer*, 2013 WL 5888231, at *4; *Petrovic*, 200 F.3d at 1150. In considering this factor, courts are "not to reach any conclusions as to the merits . . . nor . . . substitute [their] opinion for that of plaintiffs' counsel or the class members." *In re Employee Benefit Plans Sec. Litig*., 1993 WL 330595, at *4; *see also Alexander v. Nat'l Football League*, No. 04-CV-0123, 1977 WL 1497, at *12-13 (D. Minn. Aug. 1, 1997) (stating that "the court does not have the responsibility of trying the case or ruling on the merits of the matters resolved by agreement . . . . [because] 'the very purpose of compromise is to avoid the delay and expense of such a trial.'" (quoting *Grunin*, 513 F.2d at 124)).

i. The Strength of Plaintiffs' Case

Plaintiffs believe in their allegations that CenturyLink implemented centralized, deceptive sales and billing practices that harmed Plaintiffs and the Class, and that CenturyLink is liable under a number of statutory and common law theories. However, Plaintiffs' claims face substantial procedural and substantive challenges.

CenturyLink's pending Motion to Compel Arbitration and Enforce Class Action Waivers, if granted, would be deleterious to Plaintiffs' efforts to efficiently pursue redress on a broad basis, if at all. The class action mechanism affords Plaintiffs, whose individual damages may be small, an opportunity to collectively seek a remedy against CenturyLink. *See Silver Buckle Mines, Inc. v. United States*, 132 Fed. Cl. 77, 103 (Fed. Cl. 2017) (noting that where "recovery is likely to be small . . . absent a class action . . . claimants would likely not seek legal redress . . . ."); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Should Plaintiffs overcome CenturyLink's Motion to Compel Arbitration, CenturyLink has also moved to dismiss Plaintiffs' claims, which could pose substantial procedural and substantive roadblocks if granted.

Beyond the hurdles of CenturyLink's initial motions, Plaintiffs would be required to succeed on a motion for class certification. And even if successful, Plaintiffs would still have to prove their liability case in chief that CenturyLink engaged in a systematic, fraudulent sales and billing process, that this process violated various laws, and that those violations caused damages suffered by Plaintiffs and the Class. Thus, while Plaintiffs believe their case is strong, they face early and substantial challenges with the potential to recover less, or nothing, in the future.

ii. The Terms of the Settlement

The Settlement is designed to provide monetary benefits to all Settlement Class Members damaged by CenturyLink's alleged improper sales and billing practices who have not already been compensated by CenturyLink. To that end, the Settlement creates $18.5 million in settlement funds, of which $3 million will be provided to a Notice and Administration Fund, and $15.5 million to a Primary Fund that will fund Settlement Class Members' timely and valid claims, Settlement Class Representative Service Payments, and the Fees, Costs, and Expense Award. SAR §§ 1.25, 1.30, 2.2.1-2.2.5

Settlement Class Members may choose one of two Claim types. First, Settlement Class Members may make a Flat Payment Claim for $30 (multiplied by a Pro Rata Multiplier), which does not require the Claimant to submit any documentation beyond the Claim Form. *Id.* at §§ 1.19, 3.2.1. The Claim Form will require Claimants to provide their personal details, including account number, services, and timeframe of service, indicate the type of improper billing or sales practice he or she experienced, and attest that he or she has not already been compensated. *Id.* at Ex. 7. Alternatively, Settlement Class Members may choose to submit a Supported Document Claim by additionally providing a narrative and documentation to support a Claim for compensation above the Flat Payment Claim amount. *Id.* at §§ 1.45, 3.2.2. Supported Document Claimants will receive 40% of the amount of their documented overpayments (also multiplied by the Pro Rata Multiplier). *Id.* at § 3.3.3. These two Claim types provide all damaged Settlement Class Members an opportunity to receive compensation.

In assessing the benefits of the Settlement against the risks of continued litigation, the Court must "estimate[e] the range of possible outcomes and ascrib[e] a probability to each point on the range . . . ." *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 285 (7th Cir. 2002). Courts typically compare the actual settlement value to the "best possible recovery" plaintiffs could receive through pursuit of litigation in light of the risks of continued litigation. *See In re Ins. Brokerage Antitrust Litig.*, 282 F.R.D. 92, 105 (D.N.J. 2012). Here, assuming the maximum class-wide damages and that all of CenturyLink's 17.2 million customers were injured, the maximum possible recovery, is approximately $1.2 billion. However, this is not an accurate analysis because confirmatory discovery showed that far less than 100% of the Class suffered unreimbursed damages.

CenturyLink has asserted that the exact number of the Settlement Class who were overcharged and uncompensated is unknown because such a determination would require an analysis of each customers' individual records, which CenturyLink could not perform without a time-intensive analysis of each Settlement Class Members' individual account data. *See* Gudmundson Decl. ¶ 8(c)-(d). However, CenturyLink's confirmatory discovery showed it provided an average of $68 to resolve escalated and unresolved complaints over the Class Period. *Id.* at ¶ 8(i). Thus, at best, if *all* 17.2 million Settlement Class Members were overcharged by the average reimbursement amount of $68 and none were compensated by CenturyLink, the total recoverable damages should Plaintiffs win their case would be approximately $1.2 billion.

Even if that damages assessment were accurate (which it is not), the $18.5 million Settlement would still be in the range of reasonableness sufficient to grant preliminary

approval. *See Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 584 (N.D. Ill. 2011) (reasoning that "simply because the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate or unfair. In fact, there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of potential recovery."); *see also In re Airline Ticket Com'n Antitrust Litig.*, 953 F. Supp. 280 (D. Minn. 1997) ("A settlement sum is, in virtually every case, less than the claimed loss. A settlement is, necessarily, a compromise between plaintiffs, who did not win their case, and defendants, who did not lose theirs."). However, confirmatory discovery shows that far less than 100% of the Class were injured by CenturyLink's improper billing and sales practices and that CenturyLink has already compensated a significant number of overbilled customers.

Plaintiffs took extensive confirmatory discovery on the size and scope of class-wide damages, including: the number and nature of complaints CenturyLink received over the Class Period; CenturyLink's methods of and organizations responsible for resolving customer complaints; its processes for identifying and addressing escalated and unresolved complaints, including those of overbilling; its efforts to reimburse customers for identified instances of overbilling; the total value of adjustments made to resolve customer complaints; and, CenturyLink's ability to track and identify the number of overbilling complaints it received. Among other things, confirmatory discovery revealed:

1. CenturyLink has not performed any Classwide assessment or audit identifying the number of overbilled customers or the amount overcharged;

2. CenturyLink issued tens of millions of dollars' worth of adjustments annually over the Class Period to resolve customer complaints of all types, including complaints of overbilling;

3. CenturyLink has reimbursed, or is in the process of reimbursing, all of its customers who were overbilled due to identified systematic errors;

4. The number of complaints related to overbilling represents a small portion of the overall complaints made to CenturyLink;

5. CenturyLink's Customer Advocacy Group ("CAG"), which addresses and investigates escalated and unresolved complaints, received complaints from less than 1% of CenturyLink's customers during the Class Period, and less than half of those complaints related to overbilling; and,

6. The CAG provided less than $2.5 million in adjustments to fully resolve those few escalated and unresolved complaints raised over the Class Period.

See Gudmundson Decl. ¶ 8. CenturyLink's prior reimbursements to customers who made complaints and the few complaints that were ultimately escalated indicate that far fewer than 100% of the Class were injured and remain uncompensated for CenturyLink's improper sales and billing practices.

The Settlement is reasonably calculated to reimburse those Settlement Class Members with outstanding damages and is within "the range of possible outcomes" as required to be fair, reasonable, and adequate. *See Reynolds*, 288 F.3d at 285. Both Claim types available in the Settlement provide significant benefits to the Settlement Class: the Flat Payment Claim allows injured Settlement Class Members to receive a Claim through simple submission of a Claim Form; and, the Supported Document Claim allows Settlement Class Members to receive individualized compensation based on their individual, demonstrable damages. Both Claim types, are similarly discounted: the $30 Flat Payment Claim is approximately 40% of the value of $68, the average amount

CenturyLink reimbursed to remedy escalated and unresolved complaints during the Class Period; the Supported Document Claim is multiplied by a 40% Litigation Risk Factor; and, both are multiplied by the Pro Rata Multiplier.

Therefore, the value of the Settlement is fair, reasonable, and adequate in light of the confirmatory discovery and the strength of Plaintiffs' case. The Court should preliminarily approve the Settlement.

C. The Defendant's Financial Condition

The second fairness factor considers the defendant's ability to pay. *See Petrovic*, 200 F.3d at 1152 (citing *Grunin*, 513 F.2d at 124). In this case, CenturyLink has agreed to both a cash settlement and non-monetary relief. CenturyLink is fully capable of paying the Settlement Fund and therefore, this factor supports the fairness of the Settlement.

D. The Complexity and Expense of Further Litigation

The third fairness factor requires the Court to evaluate whether the expense and complexity of further litigation weighs in favor of approving the Settlement. *In re Wireless Tel.*, 396 F.3d at 932-33. In applying this factor, courts have approved settlements where "[t]here is no doubt that further litigation in this matter would be both complex and extraordinarily expensive"; "[t]he class certification process would undoubtedly be hard-fought and would also require a detailed analysis of the claims of the class members"; "Plaintiffs' claims themselves are complex"; and damages determinations would be "exceedingly time-consuming and complex." *Dryer*, 2013 WL 5888231, at *3.

Already in this action, before any ruling on CenturyLink's initial motions to compel arbitration and to dismiss, the Parties have pursued significant discovery and motion practice. Specifically, Plaintiffs took extensive, months-long discovery and fully briefed three potentially deleterious, if not dispositive, motions, in addition to briefing and arguing several discovery disputes. Should the case continue, massive amounts of additional discovery and expert analysis on the issues of liability, causation, and damages would be necessary to prepare for class certification followed by summary judgment and trial if the case made it that far. In fact, CenturyLink described its own internal investigation (which the Court deemed privileged and undiscoverable) as having gathered 9.7 million documents and 42 terabytes of information.[7] Continued litigation would doubtlessly require tremendous resources.

The complexity of the case and the substantial discovery necessary to continue to litigate this case supports approval of the fair and reasonable Settlement Agreement proposed here.

E. The Amount of Opposition to the Settlement

The final fairness factor considers the amount of opposition to the Settlement. *In re Wireless Tel.*, 396 F.3d at 932-33. This factor is best addressed at the Final Approval Hearing when the Settlement Class has had an opportunity to object or raise concerns to the Settlement.

[7] News Release, *CenturyLink announces conclusion of Special Committee investigation*, CenturyLink.com (Dec. 7, 2017), http://news.centurylink.com/2017-12-07-CenturyLink-announces-conclusion-of-Special-Committee-investigation

II. Certification of the Settlement Class Is Warranted Under Rule 23

Federal courts have long regarded consumer claims as particularly appropriate for class resolution. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Indeed, the "policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Id.* (quoting *Mace*, 109 F.3d at 344).

In considering whether to certify a Settlement Class, courts must look to Rule 23 of the Federal Rules of Civil Procedure. *See Amchem*, 521 U.S. at 620-21. Rule 23(a) creates four threshold requirements applicable to all class actions: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. Fed. R. Civ. P. 23(a)(1)-(4); *see also id*. at 613. Additionally, the proposed class must meet one of the requirements of Rule 23(b). *Amchem*, 521 U.S. at 613. Where, as here, a damages class is proposed, plaintiffs must show "the questions of law or fact common to the class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). These requirements are generally referred to as "predominance" and "superiority."

A. The Settlement Class Meets the Requirements of Rule 23(a)

Rule 23(a) provides four prerequisites that any proposed class must meet. These prerequisites are: (1) the class is so numerous that joinder of all members is impracticable ("numerosity"), (2) there are questions of law or fact common to the class ("commonality"), (3) the claims or defenses of the representative parties are typical of the

claims or defense of the class ("typicality"), and (4) the representative parties will fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a)(1)-(4). The proposed Settlement Class meets all four Rule 23(a) requirements.

i. Numerosity

Under Rule 23(a)(1), the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Where "the total number of class settlement members is . . . in the thousands[,]" numerosity is "easily satisfied." *Klug v. Watts Regulator Co.*, No. 15-CV-0061, 2016 WL 7156478, at *4 (D. Neb. Dec. 7, 2016). Encompassed within numerosity is a requirement that class members be identifiable by objective means.

Here, the Settlement Class is both so numerous that joinder is impracticable, and the Settlement Class Members are easily identified using CenturyLink's records. The Settlement Class consists of approximately 17.2 million current and former CenturyLink customers, "easily satisf[ying]" the requirements for numerosity. *Id.* Moreover, all Settlement Class Members are identifiable using CenturyLink service records, which retain the service address among other information for all current and former customers. *See also Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 127-28 (S.D.N.Y. 2011) (holding defendants' business records may be used to ascertain class members). Numerosity is met here.

ii. Commonality

Under Rule 23(a)(2), the Settlement Class must share common questions of law or fact. The commonality requirement is not demanding. *Klug*, 2016 WL 7156478, at *4. Not "every question of law or fact . . . [must be] common to every member of the class." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982). Rather, commonality is achieved whenever "the question of law linking the class members is substantially related to the resolution of the litigation even though individuals are not identically situated." *Id.* at 561; *see also Klug*, 2017 WL 7156478, at *4; *DeBoer v. Mellon Mortg. Co*., 64 F.3d 1171, 1174 (8th Cir. 1995). When examining commonality, "a court looks to 'the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation.'" *Khoday v. Symantec Corp.*, No. 11-cv-0180, 2014 WL 1281600, at *15 (D. Minn. Mar. 13, 2014) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (emphasis in original)).

Here, the Settlement Class shares numerous common questions of law and fact, and the answers to those common questions will have Classwide effect. To start, all Settlement Class Members are or were CenturyLink customers, and each paid CenturyLink for some combination of internet, television, and local or long-distance phone services. The Plaintiffs, on behalf of the Settlement Class, commonly asserted CenturyLink implemented deceptive companywide sales and billing practices that led to the systematic overcharging of customers. CCAC ¶¶ 5, 68, 70, 81-84, 87, 92-95, 99-100, 108. Where such a "common nucleus of operative facts" exists, commonality is met. *In*

re Zurn Pex Plumbing Prods. Liab. Litig., 2012 WL 5055810, at *4 (D. Minn. Oct. 18, 2012) (citing *U.S. Fid. & Guar. Co. v. Lord*, 585 F.2d 860, 872 (8th Cir. 1978)).

While "one common question of law and fact that could generate class wide answers" is sufficient for commonality, numerous additional common issues exist here. *See Khoday*, 2014 WL 12816000, at *15 (finding that the common question of whether defendants' misled consumers is, on its own, sufficient to meet commonality). Additional common questions include but are not limited to:

1. Whether CenturyLink implemented centralized sales and billing practices;

2. Whether CenturyLink's sales and billing practices resulted in overcharging customers for the services they received;

3. Whether CenturyLink knowingly continued to use policies, procedures, and systems that resulted in customers overpaying for the services they received;

4. Whether CenturyLink owed Plaintiffs a duty of good faith and fair dealing;

5. Whether CenturyLink's allegedly centralized, deceptive sales and billing practices caused any damages asserted by the Class; and,

6. Whether CenturyLink was unjustly enriched as a result of its purported deceptive sales practices.

Even if some individualized damages issues remain, the existence of a single common question is sufficient, and here Plaintiffs share many legal and factual commonalities. Commonality is therefore met.

iii. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The Eighth

Circuit defines typicality as requiring "a demonstration that there are other members of the class who have the same or similar grievances as the plaintiff." *Chaffin v. Rheem Mfg. Co.*, 904 F.2d 1269 (8th Cir. 1990) (internal quotations removed); *Khoday*, 2014 WL 1281600, at *16 (same). "The burden to establish typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Briles*, 2016 WL 4094866, at *3. The "differences in the claimed damages or availability of certain defenses do not defeat typicality, so long as the class claims are generally based on the same legal or remedial theory." *Id; see also Cortez v. Nebraska Beef, Inc.*, 266 F.R.D. 275, 290 (D. Neb. 2010).

The Settlement Class Representatives are typical of the Settlement Class because their claims result from a similar course of conduct, namely, CenturyLink's alleged centralized, deceptive sales and billing practices. *See Khoday*, 2014 WL 1281600, at *16 (typicality satisfied where "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."). Plaintiffs assert confirmatory discovery has confirmed that CenturyLink utilizes such centralized sales, billing, and customer service platforms.

Moreover, the Class Representatives and Settlement Class Members have a common legal theory. Each asserts CenturyLink engaged in sales and billing practices that caused customers to pay more than agreed to pay. Plaintiffs claim those practices violated various state laws, including by, among other things, breaching CenturyLink's contracts with Plaintiffs, its duty of good faith and fair dealing, and violating several state

deceptive trade practices acts, and violated the federal Truth in Billing requirements. CCAC ¶¶ 422-544.

The fact that some circumstances may be specific to each Settlement Class Member, including the specific service, the promised price, the amount billed, and the amount overpaid, does not defeat typicality. *See Briles*, 2016 WL 4094866, at *3 ("[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory (citing *Beck v. Maximus, Inc.*, 547 F.3d 291, 296 (3rd Cir. 2006)). Although the Settlement Class Representatives and members of the Settlement Class have unique circumstances, the alleged wrongdoing is uniform throughout the Class and therefore, "arises from the same event or practice . . . ." *Briles*, 2016 WL 4094866, at *3. Typicality is satisfied.

iv. Adequacy

Rule 23(a) requires that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The "adequacy" requirement evaluates whether (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interest of the class through qualified counsel. *Briles*, 2016 WL 4094866, at *4 (citing *Cortez*, 266 F.R.D. at 291); *Paxton*, 688 F.2d at 562-63. "Challenges to adequacy are not relevant unless they bear on the existence of conflicts among class members or plaintiffs' ability to vigorously prosecute their case." *Khoday*, 2014 WL 1281600, at *17 (quoting *Jonson v. Harley-Davidson Motor Co. Grp., LLC*, 285 F.R.D. 573, 578 (E.D. Ca. 2012)).

First, the Settlement Class Representatives' interests are aligned with those of the Settlement Class. All are or were CenturyLink customers during the Class Period, when they assert CenturyLink utilized central sales and billing policies, procedures, and systems that led it to knowingly overbill customers for services. CCAC ¶¶ 5, 68, 70, 81-84, 87, 92-95, 99-100, 108. The Settlement Class Representatives and Settlement Class Members also have an additional interest in preventing such sales practices from continuing or re-appearing in the future. Although not all Settlement Class Representatives or Settlement Class Members are current CenturyLink customers, many still have the option to choose CenturyLink for services in the future and some have no option other than CenturyLink for internet, television, or local or long-distance phone services. Preventing further billing improprieties allows the Settlement Class to accurately compare CenturyLink's costs of services with competitors.

Second, the Settlement Class Representatives vigorously prosecuted the interests of the Settlement Class through qualified counsel, including counsel with decades of experience in bringing consumer class actions. Through their counsel, the Settlement Class Representatives obtained a Settlement that provides relief for injuries due to unreimbursed overcharges, regardless of which specific type of sales or billing impropriety caused it.

Although Settlement Class Members have the option of submitting either Flat Payment Claim or Supported Document Claim that provide differing payouts, that does not create a conflict within the Settlement Class. *See Marshall*, 787 F.3d at 513 (approving a settlement with no payouts for individual Class Members); *In re Ins.*

Brokerage, 579 F.3d at 272 (noting that different claim values are "simply a reflection of the extent of the injury that certain class members incurred and does not clearly suggest that the class members had antagonistic interest."); *See In re Phenylpropanolamine (PPA) Prods. Liab. Litig*., 227 F.R.D. 553, 562 (W.D. Wash. 2004) ("[D]isparate treatment of claims is obviously necessary if claims are to be valued and a settlement is to occur. Placing a lower value on claims that would have been barred by a defense . . . is hardly evidence of a conflict.").

A fundamental conflict of interest exists only where "by maximizing their own interest, the putative representatives would necessarily undercut the interests of another portion of the class." *In re Nat'l Football League Players Concussion Injury Litig.*, 307 F.R.D. 351, 376 (E.D. Pa. 2015), *aff'd* 821 F.3d 410 (3d Cir. 2016). Here, the Settlement treats all members of the Settlement Class identically by affording *any* Settlement Class Member who suffered an unreimbursed injury an opportunity to submit a Claim for a monetary award. That some members of the Settlement Class may have suffered greater injury and may pursue a greater award through a Supported Document Claim does not create a conflict. *See id.* at 378-79 ("Adequacy of representation of a class is not compromised simply because there may be differences in the condition or treatment of class members. Varied relief among class members with differing claims is not unusual.") (internal citations removed)). Adequacy is satisfied.

B. The Settlement Class Meets the Requirements of Rule 23(b).

"The requirements of 'predominance of common issues' and 'superiority' are stated in Rule 23(b)(3) in the conjunctive; both must be present for an action to be maintained under that provision." *Klug*, 2016 WL 7156478, at *5.

i. Predominance

A (b)(3) settlement class must show that common questions "predominate over any questions affecting only individual [class] members." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 459 (2013). "At the core of Rule 23(b)(3)'s predominance requirement is the issue of whether the defendant's liability to all plaintiffs may be established with common evidence . . . . If the same evidence will suffice for each member to make a *prima facie* showing, then it becomes a common question." *Sandusky Wellness Ctr.*, 821 F.3d at 998 (quoting *Avritt v. Reliastar Life Ins. Co*., 615 F.3d 1023, 1029 (8th Cir. 2010)). "It is not necessary to illustrate that all questions of fact or law are common" but rather that the common questions "constitute a significant part of the individual cases." *Briles*, 2016 WL 4094866, at *4.

Here, common issues predominate over individual issues because each Settlement Class Member would rely on common factual evidence to establish CenturyLink's liability. Each of the Settlement Class claims centers on CenturyLink's conduct, namely, a common scheme that CenturyLink allegedly implemented to cause customers to overpay for services. CCAC ¶¶ 68, 70, 81-84, 87, 92-95, 99-100, 108. Proving this common scheme is central to establishing CenturyLink's liability to each member of the Settlement Class. *See, e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent*

Actions, 148 F.3d 283, 314 (3d Cir. 1998) (upholding predominance determination where plaintiffs "alleg[ed] that Prudential engaged in a common course of conduct by which it defrauded class members" because "where many purchasers have been defrauded over time by similar misrepresentations, or by a common scheme . . . [plaintiffs] have a common interest in determining whether the defendant's course of conduct is actionable.").

While the Settlement itself cannot create predominance, its existence is also relevant to class certification and the manageability of the case. *See Amchem*, 521 U.S. at 619-20 ("Settlement is relevant to class certification . . . ."); *In re Amer. Int'l Group, Inc. Sec. Litig*., 689 F.3d 229, 240 (2d Cir. 2012) (noting "the predominance inquiry will sometimes be easier to satisfy in the settlement context . . . .").

Generally, the fact that individual damages differ amongst the Settlement Class does not preclude class certification. *See* Fed R. Civ. P. 23 advisory committee notes ("a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."); *Day v. Celadon Trucking Services*, 827 F.3d 817, 833 (8th Cir. 2016) (certifying class despite the need to perform "individualized inquiries for determining the rate of compensation for each employee."). This is especially true, where, as here issues concerning "defendants' liability predominates over any individual issues involving plaintiffs." *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2012 WL 92498, at *11 (E.D. La. Jan 10, 2012).

However, the Settlement also resolves those potentially individual issues of damages and causation. The Flat Payment Claim resolves causation issues because Claimants need not prove the amount or cause of their overpayment. Rather the Claimant need only select the type of overcharge they assert to have paid and attest they have not been compensated for it. *See, e.g.*, *In re Nat'l Football League Players Concussion Injury Litig.*, 301 F.R.D. 191, 197 (E.D. Pa. 2014) ("The Settlement does not require Settlement Class Members to prove that . . . [their] cognitive injuries were caused by NFL-related concussion or sub-concussive head injuries."). Additionally, the Supported Document Claim allows Claimants to pursue more by providing documents to substantiate the specifics of their asserted overcharges. The Settlement, therefore, resolves otherwise individualized causation and damages through the availability of two different Claim types. Predominance is satisfied.

ii. Superiority

Rule 23(b) requires that a "class action [be] superior to other available methods for fairly and efficiently adjudicating the controversy." This case presents the "quintessential class action" because it "involves thousands of plaintiffs who were subjected to the same . . . wrongdoing and whose recovery is likely to be small" and "absent a class action . . . claimants would likely not seek legal redress." *Silver Buckle Mines, Inc. v. United States*, 132 Fed. Cl. 77, 103 (Fed. Cl. 2017).

Where a "large number of potential plaintiffs" share common claims, "certifying the class will allow a more efficient adjudication of the controversy than individual adjudications would." *Roberts v. Source for Pub. Data*, No. 08-CV-04167-NKL, 2009

WL 3837502, at *7 (W.D. Mo. Nov. 17, 2009). In considering superiority, federal courts have long regarded consumer claims as particularly appropriate for class resolution. *See Amchem*, 521 U.S. at 625; *In re Mex. Money Transfer Litig.*, 267 F.3d 743, 747 (7th Cir. 2001) ("Many opinions . . . give consumer fraud as an example of a claim for which class treatment is appropriate.").

Here, the Settlement Class contains millions of current and former CenturyLink customers, thousands of whom suffered financial injuries due to CenturyLink's alleged wrongful billing practices. For most of the Settlement Class, the financial injury incurred is insufficient to warrant individual action against CenturyLink. *See* Gudmundson Decl. ¶ 8(i) (stating CenturyLink provided on average $68 to remedy escalated and unresolved complaints over the Class Period). The class action mechanism affords the Settlement Class an opportunity for recovery through the fair terms of the Settlement. Thus, the circumstances here present the "quintessential class action," and adjudication through a class action is superior both because without a class action, the Settlement Class may have no other realistic relief, and also because should the Settlement Class adjudicate their cases individually, the courts would be flooded with thousands of individual claims. Superiority is met here.

Because the Settlement satisfies Rule 23's requirements, the Court should conditionally certify the Settlement Class.

III. The Court Should Approve the Class Notification Procedures and Schedule a Fairness Hearing

Upon preliminary approval and certification of a settlement class, Rule 23 requires the Court to "direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified with reasonable effort." Rule 23(c)(2)(B). Notice will be adequate if it is "reasonably calculated, under all circumstances to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Petrovic v. Amoco Oil Co*., 200 F.3d at 1153 (quoting *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950)). The class notification procedures here satisfy any due process requirement.

A. The Class Notification Procedures Are Designed to Directly Reach a High Percentage of the Settlement Class

The class notification procedures here directly target a high percentage of the Settlement Class and appropriately "appraise the interested parties of the pendency of the action . . . ." *Petrovic*, 200 F.3d at 1153. CenturyLink's records permit the Settlement Administrator to identify substantially all members of the Settlement Class and provide information sufficient to contact them through direct electronic or United States mail. Wheatman Decl. ¶¶ 16-22. The Settlement Agreement requires notice to be provided by several methods, including by issuing direct, individual notice to current and former CenturyLink customers who are part of the Settlement Class. SAR § 4.

Settlement Class Members who are current CenturyLink customers will receive notice through either a paper or electronic Bill Notice, depending on how they receive

their bill from CenturyLink. *Id*. at § 4.3. Settlement Class Members who are former CenturyLink customers will receive either an Email Notice or a Postcard Notice. *Id*. at § 4.4. The Email Notice will be sent to all former customers during the Class Period for whom CenturyLink already possesses an email address on file or for whom the Settlement Administrator obtains an email address by using U.S. postal address information with an email append process. *Id*. For Settlement Class Members who did not receive an Email Notice because either no email record was identified or the identified email address resulted in an undeliverable email, the Settlement Administrator will send a Postcard Notice via U.S. Mail. *Id*.

Finally, in addition to the notice types designed to target current and former CenturyLink customers, the Settlement Administrator will also issue a Publication Notice whereby ads describing the Settlement will appear using the Google Display Network, which reaches millions of websites, news pages, blogs, and Google sites, and when users type in certain keywords in common search engines. Wheatman Decl. ¶ 20.

B. The Notices Provide All Appropriate Information to the Settlement Class

The Bill Notice, Email Notice, Postcard Notice, and Publication Notice provide appropriate information about the Settlement and Settlement Class Members' rights as required by Rule 23. All notices included in the Settlement will provide information about the litigation, the Settlement Agreement, the criteria to qualify as a Settlement Class Member, and the benefits of the Settlement Agreement, including information about the Flat Payment Claim and the Supported Document Claim, when those claims

must be submitted, and who is eligible to submit such a claim. *See* SAR, Ex. 2-5; Wheatman Decl. ¶¶ 26-29. All the notices will also explain the Settlement Class Members' options to opt-out or object to the Settlement and includes the requirements and deadlines for doing so. SAR, Ex. 2-5.

Additionally, the notices direct Settlement Class Members to the Settlement Website for more information, which will contain the Long-Form Notice and Claim Form. *Id*. at Ex. 1. The Long-Form Notice will also include information about the Attorneys' Fees and Settlement Class Representative benefits. *Id.*

Together, the Class notification procedures provide the Settlement Class with the essential information about the Settlement and all information required by Rule 23 to inform the Class Members of their rights and deadlines to act. Wheatman Decl. ¶¶ 26-30; *see also Carpenters & Joiners Welfare Fund, Universal Care Inc. v. SmithKline Beecham Corp*, No. 04-CV-3500 MJD/SRN, 2008 WL 4435734, at *2 (D. Minn. Sept. 30, 2008) (approving notification procedures where notice was provided directly to substantially all class members in addition a published notice).

C. The Court Should Set Settlement Deadlines and Schedule a Fairness Hearing

Plaintiffs also request that the Court set a final approval hearing date, dates for mailing or emailing the Bill Notices, Email Notices, and Postcard Notices and publication of the Publication Notice, and deadlines for objecting to the Settlement Agreement and filing papers in support of the Settlement. Settlement Class Representatives propose the

following schedule, which the Parties believe will provide ample time and opportunity for Settlement Class Members to file Claim Forms, request exclusion or object:

Action	Timing	Citation
Last day for CenturyLink to provide the Settlement Administrator the Class List	21 days after entry of this Order	SAR ¶ 4.1
Last day for the Settlement Administrator to publish the Settlement Website and begin operating a toll-free telephone line, and email address and P.O. Box to accept inquiries from Settlement Class Members	45 days after entry of this Order	SAR ¶ 4.2
Last day for the Settlement Administrator to begin Publication Notice	45 days after entry of this Order	SAR ¶ 4.5
Settlement Administrator provides Email Notice to Settlement Class Members that are former CenturyLink customers	45 days after entry of this Order	SAR ¶ 4.4.2
Settlement Administrator provides Postcard Notice to Settlement Class Members that are former CenturyLink customers	45 days after entry of this Order	SAR ¶ 4.4.3
CenturyLink starts providing Bill Notice to Settlement Class Members that are current CenturyLink customers	First billing cycle that starts more than 45 days after entry of this Order	SAR ¶¶ 4.3.1 & 4.3.2
CenturyLink completes providing Bill Notice to Settlement Class Members that are current CenturyLink customers	No later than 106 days after entry of this Order	SAR ¶ 1.26
Last day for Settlement Class Counsel to file motion in support of Fees, Cost and Expense Award	130 days after entry of this Order	SAR ¶ 7.2.1
Last day for Settlement Class Members to file Claim Forms, object, or request exclusion from the class	151 calendar days after the entry of this Order	SAR ¶ 1.38
Last day for Settlement Administrator and CenturyLink to provide Settlement Class Counsel declarations regarding proof of notice	14 days before Final Approval Hearing	SAR ¶ 7.2.2

Last day for Settlement Class Counsel to file brief in support of Final Approval	14 days before Final Approval Hearing	Preliminary Approval Order ¶ 16

According to this schedule, Settlement Class Members will begin receiving notice 21 days after the Preliminary Approval order and all notices will be issued within 106 days of Preliminary Approval. Settlement Class Members will have at least 45 days from the time the last notices are issued to respond by filing a claim, opting out, or submitting an objection. Courts have endorsed this time frame as fair and sufficient. *Zurn Pex*, 2012 WL 5055810, at *10 (approving response deadline 45 days).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court: (1) granting preliminary approval of the proposed Settlement; (2) provisionally certifying the proposed Settlement Class; (3) appointing the Settlement Class Representatives and the undersigned attorneys as Settlement Class Counsel; (4) approving the proposed Class notification procedures and forms of notice; and (5) scheduling the final Fairness Hearing and related deadlines.

Dated: October 16, 2019

Respectfully submitted,

s/ Brian C. Gudmundson

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